

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - James G. Watt

Office of Hearing and Appeals - - - Donald R. Tindal, Director

Office of the Solicitor - - - William H. Coldiron, Solicitor

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

EDITED BY

BETTY H. PERRY

RACHAEL CUBBAGE



VOLUME 90

JANUARY-DECEMBER 1983

U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON: 1984

For sale by the Superintendent of Documents, U.S. Government Printing Office

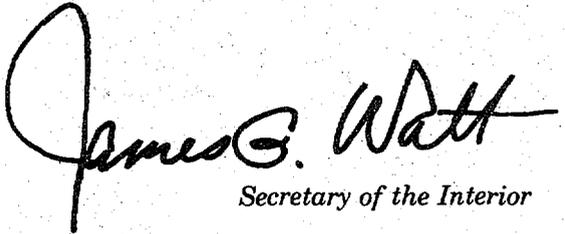
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1983, to December 31, 1983. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable James G. Watt served as Secretary of the Interior during the period covered by this volume; Mr. J. J. Simmons III served as Under Secretary; Messrs. G. Ray Arnett, Garrey E. Carruthers, Daniel Miller, Pedro A. Sanjuan, Kenneth L. Smith, J. Robinson West served as Assistant Secretaries of the Interior; Mr. William H. Coldiron served as Solicitor. Messrs. John N. Stafford and Donald R. Tindal served as Directors, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "90 I.D."



James G. Watt
Secretary of the Interior

CONTENTS

	Page
Preface	II
Table of Decisions Reported.....	V
Table of Opinions Reported.....	IX
Table of Suits for Judicial Review of Published Departmental Decisions.....	XI
Cumulative Index To Suits for Judicial Review of Departmental Decisions	XVII
Table of Cases Cited	XLIX
Table of Overruled and Modified Cases.....	LIX
Decisions and Opinions of the Interior Department.....	1

TABLE OF DECISIONS REPORTED

	Page		Page
Acting Ass't Secretary for Indian Affairs; Ute Mountain Ute Tribe <i>v.</i> , 11 IBIA 168, 90 I.D. 169 (Apr. 19, 1983).....	169	Ass't Secretary for Indian Affairs; Pueblo of Laguna <i>v.</i> , 12 IBIA 80, 90 I.D. 521 (Dec. 7, 1983)	521
Acting Deputy Ass't Secretary—Indian Affairs (Operations); Seattle Indian Center <i>v.</i> , 12 IBIA 67, 90 I.D. 515 (Dec. 5, 1983).....	515	Attorney's Fees Request of DNA—People's Legal Services, Inc., <i>In re</i> , 11 IBIA 285, 90 I.D. 389 (Sept. 9, 1983).....	389
Acting Deputy Ass't Secretary—Indian Affairs (Operations); Transwestern Pipeline Co. <i>v.</i> , 12 IBIA 49, 90 I.D. 474 (Oct. 28, 1983).....	474	Barnes, Joseph A., <i>et al.</i> , 78 IBLA 46, 90 I.D. 550 (Dec. 13, 1983)	550
Acting Deputy Ass't Secretary—Indian Affairs (Operations); White Sands Forest Products, Inc. <i>v.</i> , 11 IBIA 299, 90 I.D. 396 (Sept. 12, 1983).....	396	Barton, Wilbur <i>v.</i> Area Director, Navajo Area Office, Bureau of Indian Affairs, 12 IBIA 110, 90 I.D. 536 (Dec. 9, 1983).....	536
Acting Deputy Ass't Secretary—Indian Affairs (Operations) (On Reconsideration); United Indians of All Tribes Foundation <i>v.</i> , 11 IBIA 276, 90 I.D. 376 (Aug. 15, 1983).....	376	B & B Contractors, Appeal of, IBCA 1646-1-83, 90 I.D. 226 (May 13, 1983).....	226
Acting Deputy Director, Office of Indian Education Programs; Zarr, Diane <i>v.</i> , 11 IBIA 174, 90 I.D. 172 (Apr. 21, 1983).....	172	Begay, Henry W. <i>v.</i> Area Director, Navajo Area Office, Bureau of Indian Affairs, 12 IBIA 119, 90 I.D. 539 (Dec. 9, 1983).....	539
Antunovich, George, John E. Curran, 76 IBLA 301, 90 I.D. 464 (Oct. 19, 1983).....	464	Blankenship, Sam, 5 IBSMA 32, 90 I.D. 174 (Apr. 26, 1983).....	174
Application for Costs (Central Colorado Contractors, Inc.), IBCA 1672-4-83, 90 I.D. 379 (Aug. 17, 1983).....	379	Brentwood, Inc., 76 IBLA 73, 90 I.D. 421 (Sept. 21, 1983).....	421
Ass't Area Director (Economic Development), Portland Area Office, Bureau of Indian Affairs; Walch Logging Co., Inc., Dant & Russell, Inc. <i>v.</i> , 11 IBIA 85, 90 I.D. 88 (Mar. 18, 1983).....	88	Carroll, Richard F. (On Reconsideration), 76 IBLA 151, 90 I.D. 432 (Sept. 27, 1983).....	432
Ass't Secretary for Indian Affairs; Melsheimer, Juanita <i>v.</i> , 11 IBIA 155, 90 I.D. 165 (Apr. 14, 1983).....	165	Casey, Powell A., Appeal of, IBCA 1638-11-82, 90 I.D. 230 (May 23, 1983).....	230
		Central Colorado Contractors, Inc., Appeal of, IBCA 1203-8-78, 90 I.D. 109 (Mar. 25, 1983).....	109
		Cheyenne & Arapaho Tribes of Western Oklahoma <i>v.</i> Deputy Ass't Secretary—Indian Affairs (Operations), Reading & Bates Petroleum Co. & Woods Petroleum Corp., 11 IBIA 54, 90 I.D. 61 (Feb. 10, 1983)	61
		Confederated Tribes of the Chehalis Reservation, Appeal of, IBCA 1640-12-82, 90 I.D. 228 (May 20, 1983).....	228

Page		Page
49	Consolidation Coal Co., 5 IBSMA 6, 90 I.D. 49 (Feb. 2, 1983)	54
543	Cook Inlet Region, 77 IBLA 383, 90 I.D. 543 (Dec. 9, 1983)	352
329	Deputy Ass't Secretary—Indian Affairs (Operations); Idaho Mining Corp. v., 11 IBIA 249, 90 I.D. 329 (July 29, 1983).....	54
283	Deputy Ass't Secretary—Indian Affairs (Operations); Native Americans for Community Action v., 11 IBIA 214, 90 I.D. 283 (July 1, 1983) ..	470
243	Deputy Ass't Secretary—Indian Affairs (Operations); Racquet Drive Estates, Inc. v., 11 IBIA 184, 90 I.D. 243 (May 24, 1983).....	445
61	Deputy Ass't Secretary—Indian Affairs (Operations), Reading & Bates Petroleum Co. & Woods Petroleum Corp.; Cheyenne & Arapaho Tribes of Western Oklahoma v., 11 IBIA 54, 90 I.D. 61 (Feb. 10, 1983)	322
41	Dodd, Frazier & Co., Appeal of, IBCA 1591-6-82 & 1605-7-82, 90 I.D. 41 (Jan. 28, 1983)	491
289	Doyon, Ltd., 74 IBLA 139, 90 I.D. 289 (July 6, 1983).....	491
366	Estes, Charley O., d.b.a. Phoenix Reforestation Co., Appeal of, IBCA 1198-7-78, 90 I.D. 366 (Aug. 11, 1983).....	189
262	Feezor, J. Gary; U.S. v., 74 IBLA 56, 90 I.D. 262 (June 29, 1983).....	165
84	Fortune Oil Co., 71 IBLA 153, 90 I.D. 84 (Mar. 9, 1983).....	382
297	Highland Reforestation, Inc., Appeal of, IBCA 1563-3-82, 90 I.D. 297 (July 8, 1983).....	382
329	Idaho Mining Corp. v. Deputy Ass't Secretary—Indian Affairs (Operations), 11 IBIA 249, 90 I.D. 329 (July 29, 1983).....	181
308	Industrial Machine & Welding, Inc., Appeal of, IBCA 1322-12-79, 90 I.D. 308 (July 11, 1983).....	181
389	<i>In re</i> Attorney's Fees Request of DNA—People's Legal Services, Inc., 11 IBIA 285, 90 I.D. 389 (Sept. 9, 1983).....	283
189	<i>In re</i> Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (Apr. 28, 1983).....	494
	<i>In re</i> Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (Aug. 5, 1983).....	494
	Johnson, Ronald W., 5 IBSMA 19, 90 I.D. 54 (Feb. 4, 1983).....	352
	Kaiser Steel Corp., 76 IBLA 387, 90 I.D. 470 (Oct. 27, 1983).....	54
	Kenney, Stephen J., Appeal of, IBCA 1438-3-81, 90 I.D. 455 (Sept. 30, 1983).....	470
	L. A. Melka Marine Construction & Diving Co., Inc., Appeal of, IBCA 1511-9-81, 90 I.D. 322 (July 28, 1983).....	445
	IBCA 1511-9-81, 90 I.D. 491 (Nov. 25, 1983).....	445
	Lick Gulch Timber Sale, <i>In re</i> , 72 IBLA 261, 90 I.D. 189 (Apr. 28, 1983).....	322
	Melsheimer, Juanita v. Ass't Secretary for Indian Affairs, 11 IBIA 155, 90 I.D. 165 (Apr. 14, 1983).....	491
	Mosch Mining Co., 75 IBLA 153, 90 I.D. 382 (Aug. 18, 1983).....	165
	Mud Fork Coal Corp., 5 IBSMA 44, 90 I.D. 181 (Apr. 28, 1983).....	382
	Native Americans for Community Action v. Deputy Ass't Secretary—Indian Affairs (Operations), 11 IBIA 214, 90 I.D. 283 (July 1, 1983) ..	181
	Nicholson Construction Co., Appeal of, IBCA 1711-8-83, 90 I.D. 494 (Nov. 30, 1983).....	283
	Office of Surface Mining Reclamation & Enforcement; River Processing, Inc. v., 76 IBLA 129, 90 I.D. 425 (Sept. 16, 1983).....	494
	Ogden, Roger K., 77 IBLA 4, 90 I.D. 481 (Oct. 31, 1983).....	425
	Pacific Coast Molybdenum Co., <i>In re</i> , 75 IBLA 16, 90 I.D. 352 (Aug. 5, 1983).....	481
	Pathfinder Mines Corp., 70 IBLA 264, 90 I.D. 10 (Jan. 26, 1983)	352
	Price, Glenn W.; Winegeart, Jessie v., 74 IBLA 373, 90 I.D. 338 (July 29, 1983).....	10
	Pueblo of Laguna v. Ass't Secretary for Indian Affairs, 12 IBIA 80, 90 I.D. 521 (Dec. 7, 1983)	338

TABLE OF DECISIONS REPORTED

Page		Page	
<p>Racquet Drive Estates, Inc. v. Deputy Ass't Secretary—Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (May 24, 1983).....</p> <p>Raimonde Drilling Corp., Appeal of, IBCA 1359-5-80, 90 I.D. 69 (Feb. 14, 1983).....</p> <p>River Processing, Inc. v. Office of Surface Mining Reclamation & Enforcement, 76 IBLA 129, 90 I.D. 425 (Sept. 26, 1983).....</p> <p>Roger J. Au & Son, Inc., IBCA 1303-9-79, 90 I.D. 401 (Sept. 14, 1983).....</p> <p>Satellite Energy Corp., 77 IBLA 167, 90 I.D. 487 (Nov. 17, 1983).....</p> <p>Seattle Indian Center v. Acting Deputy Ass't Secretary—Indian Affairs (Operations), 12 IBIA 67, 90 I.D. 515 (Dec. 5, 1983).....</p> <p>St. Clair, Donald, <i>et al.</i>, 77 IBLA 283, 90 I.D. 496 (Nov. 30, 1983).....</p> <p>Thorn Construction Co., Inc., Appeal of, IBCA 1254-3-79, 90 I.D. 21 (Jan. 27, 1983).....</p> <p>Tickel, Charles R., 73 IBLA 360, 90 I.D. 258 (June 15, 1983).....</p> <p>Transwestern Pipeline Co. v. Acting Deputy Ass't Secretary—Indian Affairs (Operations), 12 IBIA 49, 90 I.D. 474 (Oct. 28, 1983).....</p>	<p>243</p> <p>69</p> <p>425</p> <p>401</p> <p>487</p> <p>515</p> <p>496</p> <p>21</p> <p>258</p> <p>474</p>	<p>United Indians of All Tribes Foundation v. Acting Deputy Ass't Secretary—Indian Affairs (Operations) (On Reconsideration), 11 IBIA 276, 90 I.D. 376 (Aug. 15, 1983).....</p> <p>U.S. v. Feezor, J. Gary, 74 IBLA 56, 90 I.D. 262 (June 29, 1983).....</p> <p>Ute Mountain Ute Tribe v. Acting Ass't Secretary—Indian Affairs, 11 IBIA 168, 90 I.D. 169 (Apr. 19, 1983).</p> <p>Virginia Fuels, Inc., 5 IBSMA 1, 90 I.D. 1 (Jan. 19, 1983).....</p> <p>Wakon Redbird & Associates, Appeal of, IBCA 1682-6-83, 90 I.D. 441 (Sept. 30, 1983).....</p> <p>Walch Logging Co., Inc., Dant & Russell, Inc. v. Ass't Area Director (Economic Development), Portland Area Office, Bureau of Indian Affairs, 11 IBIA 85, 90 I.D. 88 (Mar. 18, 1983).....</p> <p>Wall, Irvin, 70 IBLA 183, 90 I.D. 3 (Jan. 20, 1983).....</p> <p>White Sands Forest Products, Inc. v. Acting Deputy Ass't Secretary—Indian Affairs (Operations), 11 IBIA 299, 90 I.D. 396 (Sept. 12, 1983).....</p> <p>Winegeart, Jessie L. v. Glenn W. Price, 74 IBLA 373, 90 I.D. 338 (July 29, 1983).....</p> <p>Zarr, Diane v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (Apr. 21, 1983).....</p>	<p>376</p> <p>262</p> <p>169</p> <p>1</p> <p>441</p> <p>88</p> <p>3</p> <p>396</p> <p>338</p> <p>172</p>

TABLE OF OPINIONS REPORTED¹

	Page		Page
Calder, Leo (On Reconsideration); Orem Development Co., A-26604, 90 I.D. 223 (Apr. 25, 1983)	223	Federal Water Pollution Control Act—Sec. 404 Compliance for Projects Funded in Part by State & Local Entities, M-36915 (Supp. I), 90 I.D. 255 (June 2, 1983)	255
Effect of the Federal Land Policy & Management Act on the Right-of- way Application for the Middle Fork of the Powder River Reser- voir, M-36900 (Supp. I), 90 I.D. 345 (June 27, 1983)	345	Orem Development Co. v. Calder, Leo (On Reconsideration), A-26604, 90 I.D. 223 (Apr. 25, 1983)	223
		Purposes of Executive Order of Apr. 17, 1926, Establishing Public Water Reserve No. 107, M-36914 (Supp. II), 90 I.D. 81 (Feb. 16, 1983)	81

¹ Solicitor's Opinions are printed as received from that office.

TABLE OF SUITS FOR JUDICIAL REVIEW OF PUBLISHED DEPARTMENTAL DECISIONS

Page	Page		
Adams, Alonzo A., <i>et al. v. Witmer et al.</i>	XL	Boyle, Alice A. & Carrie H. v. Morton.....	XLI
Adams, Scott Q. v. Watt & Sundquist.....	XVII	Bradford Mining Corp., Successor of J. R. Osborne v. Andrus.....	XLV
Adler Construction Co. v. U.S.....	XVII	Brown, Melvin A. v. Udall.....	XX
Akers, Dolly Cusker v. Dept. of the Interior.....	XVII	Brown, Penelope Chase, <i>et al. v. Udall.</i>	XXXIX
Alaska, State of v. Alaska Native Claims Appeal Board <i>et al.</i>	XXIV	Brubaker, R. W., <i>et al. v. Morton</i>	XLI
Alaska, State of v. Lestenkof <i>et al.</i>	XVIII	Buch, R. C. v. Udall.....	XX
Alaska, State of v. 13.90 Acres of Land.....	XVIII	Bunkowski, Henrietta & Andrew Julius v. Applegate, L. Paul, District Manager, BLM, Thomas S. Kleppe, Secretary of the Interior, <i>et al.</i>	XLI
Aleutian/Pribilof Islands Ass'n v. Powers <i>et al.</i>	XVIII	Bunn, Thomas M. v. Udall.....	XXXV
Allied Contractors, Inc. v. U.S.....	XVIII	Burkybile, Doris Whiz v. Smith, Alvis, Sr., as Guardian Ad Litem for Zelma, Vernon, Kenneth, Mona & Joseph Smith, Minors, <i>et al.</i>	XLVII
American Coal Co. v. Dept. of the Interior.....	XVIII	Burn Construction Co., Inc. v. U.S.....	XX
Atlantic Richfield Co. v. Hickel	XXXVII	California Co., The v. Udall.....	XX
Atlantic Richfield Co. & Pasco, Inc. v. Morton <i>et al.</i>	XIX, XXXI	California Oil Co. v. Sec.....	XXXVII
Atwood <i>et al. v. Udall.</i>	XXXVIII	Cameron Parish Police Jury v. Udall <i>et al.</i>	XX
Baciarelli, Elverna Yevonne Clairmont v. Morton.....	XXII	Canterbury Coal Co. v. Kleppe	XXI
Baker, Phil v. Dept. of the Interior.....	XIX	Capital Fuels, Inc. v. Andrus.....	XXI
Barash, Max v. McKay.....	XIX	Carson Construction Co. v. U.S.....	XXI
Barnard-Curtiss Co. v. U.S.....	XIX	Clarkson, Stephen H. v. U.S.....	XXI
Barrows, Esther, as an Individual & as Executrix of the Last Will of E. A. Barrows, Deceased v. Hickel	XLI	COAC, Inc. v. U.S.....	XXI
Bender, Jack J. v. Watt <i>et al.</i>	XIX	Cohen, Hannah & Abram v. U.S.....	XXI
Bennett, William, Paul F. Goad & United Mine Workers v. Kleppe	XX	Colson, Barney, R., <i>et al. v. Udall</i>	XXII
Bergesen, Sam v. U.S.....	XIX	Confederated Tribes & Bands of the Yakima Indian Nation v. Kleppe, Thomas, & Philip Brendale.....	XLVI
Billmeyer, John, etc. v. U.S.....	XXVIII	Confederated Tribes & Bands of the Yakima Indian Nation v. Kleppe, Thomas, & Erwin Ray.....	XXV
Bishop Coal Co. v. Kleppe.....	XXXVI	Consolidated Gas Supply Corp. v. Udall <i>et al.</i>	XX, XXVII, XXX
Black Fox Mining & Development Corp. v. Andrus <i>et al.</i>	XX	Consolidation Coal Co. v. Andrus.....	XXII
Block, J. L. v. Morton.....	XLI	Continental Oil Co. v. Udall <i>et al.</i>	XXII
Booth, Lloyd W. v. Hickel	XLI		
Bowen v. Chemi-Cote Perlite.....	XXI		
Bowman, James Houston v. Udall.....	XXXVI		

	Page		Page
Converse, Ford M. v. Udall.....	XLI	Geosearch Inc. & McGregor v. Watt <i>et al.</i>	XXVII
Cosmo Construction Co. <i>et al.</i> v. U.S.....	XXII	Gerttula, Nelson A. v. Udall	XXVI
Council of the Southern Mountains, Inc. v. Watt.....	XXII	Goodwin, James C. v. Andrus, Dale R., State Dir., BLM, <i>et al.</i>	XXVI
Coy, Mildred, <i>et al.</i> v. Watt <i>et al.</i>	XXIII	Grigg, Golden T., <i>et al.</i> v. U.S. & Morton.....	XLII
Cuccia, Louise & Shell Oil Co. v. Udall.....	XXXI	Griggs, William H. v. Solan.....	XXVII
Daniel, Larry, <i>et al.</i> v. Andrus.....	XXIII	Gucker, George L. v. Udall.....	XXXIII
Danks, Edward S., <i>et al.</i> v. Fields, Harrison, <i>et al.</i>	XXV	Guthrie Electrical Construction Co. v. U.S.....	XXVI
Darling, Bernard E. v. Udall	XXX	Hansen, Raymond J. v. Seaton.....	XXV
Dean Trucking Co., Inc. v. Andrus.....	XXIII	Hansen, Raymond J., <i>et al.</i> v. Udall....	XXVI
Debord, Mary, <i>et al.</i> v. Watt <i>et al.</i>	XXIII	Haskins, Richard P., for himself & as Admin. of Estate of B. H. Haskins (Deceased) v. Udall	XLII
Denison, Marie W. v. Udall.....	XLII	Haskins, Richard P. v. Watt	XLII
Dredge Co. v. Husite Co.....	XXIII	Hat Ranch, Inc. v. Kleppe <i>et al.</i>	XXVI
Dredge Corp., The v. Penny.....	XXIII	Hayes, Joe v. Seaton.....	XXXVIII
Drummond Coal Co. v. Andrus <i>et al.</i>	XXIII	Henault Mining Co. v. Tysk <i>et al.</i>	XLII
Duesing, Bert F. v. Udall.....	XXXVIII	Henrikson, Charles H., <i>et al.</i> v. Udall <i>et al.</i>	XLII
Eastover Mining Co. v. Andrus <i>et</i> <i>al.</i>	XXIV	Higgins, Jesse, <i>et al.</i> v. Andrus	XXVII
Equity Oil Co. v. Udall.....	XL	Hill, Houston Bus v. Morton.....	XXXV
Enevoldsen, H. J. v. Andrus <i>et al.</i>	XXIV	Hill, Houston Bus & Thurman S. Hurst v. Morton.....	XXXV
Eskra, Constance Jean Hollen v. Morton <i>et al.</i>	XLVI	Hinton, S. Jack, <i>et al.</i> v. Udall.....	XXXVI
Evans, David H. v. Morton.....	XXIV	Holland Livestock Ranch <i>et al.</i> v. U.S., Andrus, <i>et al.</i>	XX
Farrelly, John J. & the Fifty-One Oil Co. v. McKay.....	XXIV	Holland Livestock Ranch <i>et al.</i> v. U.S., Watt, <i>et al.</i>	XXVII
Foote Mineral Co. v. Andrus <i>et al.</i>	XXV	Holt, Kenneth, etc. v. U.S.....	XXVII
Foote Mineral Co. v. U.S.....	XXV	Homer, City of v. Curtis McVee <i>et</i> <i>al.</i>	XXI
Foster, Everett, <i>et al.</i> v. Seaton	XLII	Hoover & Bracken Energies, Inc. v. DOI, Watt, <i>et al.</i>	XXVII
Foster, Gladys H., Executrix of the Estate of T. Jack Foster v. Udall, Stewart L., Boyd L. Rasmussen.....	XXV	Hope Natural Gas Co. v. Udall	XXVII, XXX
Foster, Katherine S. & Brook H. Duncan II v. Udall.....	XIX	Huff, Thomas J. v. Asenap <i>et al.</i>	XLVIII
Freeman, Autrice Copeland v. Udall.....	XIX	Huff, Thomas J. v. Udall	XLVIII
Gabbs Exploration Co. v. Udall	XXV, XL	Hugg, Harlan H., <i>et al.</i> v. Udall.....	XL
Garcia, Barbara v. Andrus <i>et al.</i>	XXXIV	Humboldt Placer Mining Co. & Del De Rosier v. Sec. of the Interior	XLIII
Garigan, Philip T. v. Udall.....	XXXI	Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. Morton.....	XLIII
Garthofner, Stanley v. Udall.....	XXV	Independent Quick Silver Co., an Oregon Corp. v. Udall	XLIII
Geikaunmah, Juanita Mammedaty & Imogene Geikaunmah Carter v. Morton.....	XXV	International Union of United Mine Workers of America v. Hathaway....	XLVIII
General Excavating Co. v. U.S.....	XXV		

Page	Page
International Union of United Mine Workers of America v. Morton.....XXIV	McClarty, Kenneth v. Udall <i>et al.</i>XLIII
Island Creek Coal Co., Rebel Coal Co. v. Andrus <i>et al.</i>XXVIII	McGahan, Kenneth v. Udall.....XXX
Iverson, C. J. v. Frizzell, Kent, Acting Secretary & Dorothy D. Rupe.....XXVIII	McIntosh, Samuel W. v. Udall.....XXXII
J. A. Terteling & Sons, Inc. v. U.S.....XXVIII	McIntyre, Carmel J. v. Andrus <i>et al.</i>XXX
J. D. Armstrong, Inc. v. U.S.....XXVIII	McKenna, Elgin A. (Mrs.), as Executrix of the Estate of Patrick A. McKenna, Deceased v. Udall.....XXX
Johnson, Leroy V. & Roy H., Marlene Johnson Exendine & Ruth Johnson Jones v. Kleppe.....XXII	McKenna, Elgin A. (Mrs.), Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Hickel <i>et al.</i>XXX
Johnson, Menzel G. v. Morton <i>et al.</i>XXIX	McKenna, Patrick A. v. Davis.....XXIII
June Oil & Gas, Inc. & Cook Oil & Gas, Inc. v. Andrus <i>et al.</i>XXIX	McKinnon, A. G. v. U.S.....XXX
Kaiser Steel Corp. v. Office of Surface Mining & Enforcement.....XXIX	McMaster, Raymond C. v. U.S. Dept. of the Interior, Secretary of the Interior & BIA.....XXXI
Kalerak, Andrew J., Jr., <i>et al.</i> v. Udall.....XVIII	McNeil, Wade v. Leonard <i>et al.</i>XXXI
Krueger, Max L. v. Seaton.....XXIX	McNeil, Wade v. Seaton.....XXXI
Laden, George C., Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, Heirs of George H. Wedekind, Deceased v. Morton <i>et al.</i>XXXVII	McNeil, Wade v. Udall.....XXXI
Lamp, Benson J. v. Andrus <i>et al.</i>XXIV	Maher, Charles & L. Franklin Mader v. Morton.....XLIII
Lance, Richard Dean v. Udall <i>et al.</i>XLIII	Marathon Oil Co. v. Morton <i>et al.</i>XIX, XXXI
La Rue, W. Dalton, Sr. v. Udall.....XXIX	Megna, Salvatore, Guardian, etc. v. Seaton.....XXXI
L. B. Samford, Inc. v. U.S.....XXX	Melluzzo, Frank & Wanita v. Andrus.....XLIV
Lewis, Gary Carson, etc., <i>et al.</i> v. General Services Admin. <i>et al.</i>XXXII	Melluzzo, Frank & Wanita v. Morton.....XLIV
Lewis, Ruth Pinto, Individually & as the Administratrix of the Estate of Ignacio Pinto v. Kleppe, Thomas S., Secretary of the Interior, & U.S.....XXX	Melluzzo, Frank & Wanita v. U.S. & Watt.....XLIV
Liss, Merwin E. v. Seaton.....XXII	Meva Corp. v. U.S.....XXXI
Lutey, Bess May, <i>et al.</i> v. Dept. of Agriculture, BLM, <i>et al.</i>XXX	Miller, Duncan v. Udall, 69 I.D. 14 (1962).....XXXIV
Lutzenhiser, Earl M. & Leo J. Kottas v. Udall <i>et al.</i>XXIX	Miller, Duncan v. Udall, 70 I.D. 1 (1963).....XXXI
McCall, William A., Sr., The Dredge Corp. & Olaf H. Nelson v. Boyles, John F., <i>et al.</i>XLIII	Miller, Duncan v. Udall, (A-30546, A-30566 & 73 I.D. 211 (1966)).....XXXII
McCall, William A., Sr. & the Estate of Olaf Henry Nelson, Deceased v. Boyles, John S., District Manager, Bureau of Land Management, <i>et al.</i>XLIII	Mineral Ventures, Ltd. v. Secretary of the Interior.....XLIV
	Morgan, Henry S. v. Udall.....XXXII
	Morris, G. Patrick, Joan E. Roth, Elise L. Neeley, <i>et al.</i> v. U.S. & Morton.....XLIV
	Morrison-Knudsen Co. v. U.S.....XXXII
	Mountain Enterprises Coal Co. v. Secretary of the Interior.....XXXII
	Mullins, Howard v. Andrus.....XXXIV
	Munsey, Glenn v. Andrus.....XXXII
	Napier, Barnette T., <i>et al.</i> v. Sec.....XXXIX
	Native Village of Tyonek v. Bennett.....XXXIII

	Page		Page
Navajo Tribe of Indians <i>v.</i> Morton <i>et al.</i>	XXXII	Rhyneer, George S., <i>et al. v.</i> Andrus <i>et al.</i>	XVIII
Neuhoff, Edward D. & E. L. Cord <i>v.</i> Morton.....	XXII	Richards, Theodore A. & Judith Miller <i>v.</i> Secretary of the Interior & Seldovia Native Ass'n, Inc.....	XVIII
New Jersey Zinc Corp., The, a Del. Corp. <i>v.</i> Udall.....	XLIV	Richfield Oil Corp. <i>v.</i> Seaton.....	XXXV
New York State Natural Gas Corp. <i>v.</i> Udall.....	XX	Ringstad, Mark B., <i>et al. v.</i> U.S., Secretary of the Interior & The Arctic Slope Regional Corp.....	XXI
O'Callaghan, Lloyd, Sr., Individually & as Executor of the Estate of Ross O'Callaghan <i>v.</i> Morton <i>et al.</i>	XLIV	Robedeaux, Oneta Lamb, <i>et al. v.</i> Morton.....	XXXV
Oelschlaeger, Richard L. <i>v.</i> Udall.....	XXXII	Roberts Brothers Coal Co. <i>v.</i> Andrus <i>et al.</i>	XXXV
Oil Resources, Inc. <i>v.</i> Andrus.....	XXXIII	Roberts, Kenneth, <i>et al. v.</i> Morton <i>et al.</i>	XLVI
Oil Shale Corp., The, <i>et al. v.</i> Sec.....	XXXIX	Robinson, Rene, by & through her Guardian Ad Litem, Nancy Clifford <i>v.</i> Andrus, Cecil, Gretchen Robinson & Trixi Lynn Robinson Harris.....	XXXVI
Oil Shale Corp., The, <i>et al. v.</i> Udall.....	XL	Rocky Mountain Oil & Gas Ass'n <i>v.</i> Andrus <i>et al.</i>	XXVIII
Old Ben Coal Corp. <i>v.</i> Interior Board of Mine Operations Appeals <i>et al.</i>	XXXIII	Rosebud Coal Sales Co. <i>v.</i> Andrus <i>et al.</i>	XXXVI
Osborne, J. R., Individually & on behalf of R. R. Borders, <i>et al. v.</i> Morton <i>et al.</i>	XLV	Rowe, Richard W. & Daniel Gaudiane <i>v.</i> Hathaway.....	XXXVI
Ounalashka Corp., for & on behalf of its Shareholders <i>v.</i> Kleppe <i>et al.</i>	XXXIII	Runnells, John S. <i>v.</i> Andrus <i>et al.</i>	XXXIII
Pagedas, Anthony, <i>et al. v.</i> Watt <i>et al.</i>	XXVII	Safarik, Louise <i>v.</i> Udall.....	XXV
Pan American Petroleum Corp. <i>v.</i> Udall.....	XXVI	Sam, Christine & Nancy Judge <i>v.</i> Kleppe.....	XXIX
Parks, Jack W. <i>v.</i> Kleppe.....	XXXIII	Savage, John W. <i>v.</i> Udall.....	XL
Paul Jarvis, Inc. <i>v.</i> U.S.....	XXXIV	Schulein, Robert <i>v.</i> Udall.....	XXVI
Pease, Louise A. (Mrs.) <i>v.</i> Udall.....	XXXIII	Scott, Clara Ramsey <i>v.</i> U.S. <i>et al.</i>	XXXIV
Peter Kiewit Sons' Co. <i>v.</i> U.S.....	XXXIV	Seal & Co., Inc. <i>v.</i> U.S.....	XXXVI
Peters, Curtis D. <i>v.</i> U.S. & Morton.....	XXXIV	Sessions, Inc. <i>v.</i> Morton <i>et al.</i>	XXXVI
Pittsburgh Pacific Co. <i>v.</i> U.S., Andrus, <i>et al.</i>	XLV	Shaw, William T., Jr., <i>et al. v.</i> Morton <i>et al.</i>	XLVII
Pocahontas Fuel Co. <i>v.</i> Andrus.....	XXXIV	Shell Oil Co. <i>v.</i> Udall.....	XXI, XXXVI
Port Blakely Mill Co. <i>v.</i> U.S.....	XXXIV	Shell Oil Co. & D. A. Shale, Inc. <i>v.</i> Morton.....	XLVI
Pressentin, E. V., Fred J. Martin, Administrator of H. A. Martin Estate <i>v.</i> Udall & Stoddard.....	XLV	Shell Oil Co. <i>et al. v.</i> Udall <i>et al.</i>	XLVIII
Price, Robert <i>v.</i> Morton <i>et al.</i>	XXIII	Shoup, Leo E. <i>v.</i> Udall.....	XLI
Ray D. Bolander Co. <i>v.</i> U.S.....	XXXV	Sinclair Oil & Gas Co. <i>v.</i> Udall <i>et al.</i>	XXXVII
Reed, George, Sr. <i>v.</i> Morton <i>et al.</i>	XXXV	Sink, Charles T. <i>v.</i> Kleppe & MESA.....	XXXVII
Reed, Wallace, <i>et al. v.</i> Dept. of the Interior <i>et al.</i>	XXVIII	Smith, Reid <i>v.</i> Udall <i>et c.</i>	XLI
Reeves, Alvin B., <i>et al. v.</i> Morton & The City of Phoenix.....	XXXV	Snyder, Ruth, Administratrix of the Estate of C. F. Snyder, Deceased <i>et al. v.</i> Udall.....	XLV
Reliable Coal Corp. <i>v.</i> Morton <i>et al.</i>	XXXIV		
Republic Steel Corp. <i>v.</i> Interior Board of Mine Operations Appeals.....	XXXV		

	Page		Page
South Dakota, State of <i>v.</i> Andrus <i>et al</i>	XLV	United Mine Workers of America <i>v.</i> Andrus (No. 77-1840).....	XXXIII
Southern Pacific Co. <i>v.</i> Hickel.....	XXXVII	United Mine Workers of America (Local Union No. 1993) <i>v.</i> Andrus.....	XL
Southern Pacific Co. <i>et al.</i> <i>v.</i> Morton <i>et al</i>	XLV	United Mine Workers of America <i>v.</i> Interior Board of Mine Operations Appeals.....	XXIV
Southwest Welding <i>v.</i> U.S.....	XXXVII	United Mine Workers of America <i>v.</i> Kleppe (No. 76-1208).....	XXI
Southwestern Petroleum Corp. <i>v.</i> Udall.....	XXVI, XXXVII	United Mine Workers of America <i>v.</i> Kleppe (No. 76-1377).....	XL
Standard Oil Co. of Calif. <i>v.</i> Hickel <i>et al</i>	XXXVII	United Mine Workers of America <i>v.</i> Kleppe (No. 76-1980).....	XXIII
Standard Oil Co. of Calif. <i>v.</i> Morton <i>et al</i>	XXXVII	United Mine Workers of America <i>v.</i> U.S. Interior Board of Mine Operations Appeals.....	XXXIII
Steele, J. A., <i>et al.</i> <i>v.</i> Kleppe, Thomas S., in his capacity as Secretary of the Interior & the U.S.....	XIX	United Mine Workers of America (Dist. 6) <i>et al.</i> <i>v.</i> U.S. Dept. of Interior Board of Mine Operations Appeals.....	XXVI
Stevens, Clarence T. & Mary D. <i>v.</i> Hickel	XLV	U.S. <i>v.</i> Adams, Alonzo.....	XL
Stewart Capital Corp. <i>et al.</i> <i>v.</i> Andrus.....	XXIII	U.S. <i>v.</i> Brubaker-Mann, Inc. <i>et al</i>	XLI
Still, Edwin, <i>et al.</i> <i>v.</i> U.S.....	XXVI	U.S. <i>v.</i> Haskins	XLII
Superior Oil Co. <i>v.</i> Bennett	XXXIII	U.S. <i>v.</i> Hood Corp. <i>et al</i>	XXVIII
Superior Oil Co. <i>et al.</i> , The <i>v.</i> Udall.....	XXXIX	U.S. <i>v.</i> Michener, Raymond T., <i>et al.</i>	XXVIII
Swanson, Elmer H. <i>v.</i> Morton.....	XLV	U.S. <i>v.</i> Nogueira, Edison R., <i>et al.</i>	XLIII
Swanson, Elmer H. & Livingston Silver, Inc. <i>v.</i> Andrus.....	XLV	U.S. & Rogers C. B. Morton <i>v.</i> Wharton, Minnie E., <i>et al</i>	XLVII
Tanacross, Inc. <i>v.</i> Watt <i>et al</i>	XXXVIII	Vaughey, E. A. <i>v.</i> Seaton	XLVI
Tallman, James K., <i>et al.</i> <i>v.</i> Udall	XXXVII	Verrue, Alfred N. <i>v.</i> U.S. <i>et al</i>	XLVI
Texaco, Inc., a Corp. <i>v.</i> Secretary of the Interior	XXXVIII	Virginia Iron, Coal & Coke Co. <i>v.</i> Andrus.....	XLVI
Texas Construction Co. <i>v.</i> U.S	XXXVIII	Wackerli, Burt & Lueva G., <i>et al.</i> <i>v.</i> Udall <i>et al</i>	XLVII
Thom Properties Inc. d/b/a Toke Cleaners & Launderers <i>v.</i> U.S., Dept. of Interior, BIA.....	XXXVIII	Wallis, Floyd A. <i>v.</i> Udall.....	XXVIII
Thoroughfare Coal Co. <i>v.</i> Watt.....	XXXVIII	Ward, Alfred, Irene Ward Wise & Elizabeth Collins <i>v.</i> Frizzell, Kent, Acting Secretary, <i>et al</i>	XLVII
Thor-Westcliffe Development, Inc. <i>v.</i> Udall.....	XXXVIII	Weardco Construction Corp. <i>v.</i> U.S.....	XLVII
Thor-Westcliffe Development, Inc. <i>v.</i> Udall <i>et al</i>	XXXVIII	West Virginia Highlands Conservancy <i>v.</i> Watt <i>et al</i>	XLVII
Tollage Creek Elkhorn Mining Co. <i>v.</i> Andrus	XXXIX	Western Nuclear, Inc. <i>v.</i> Andrus, Cecil & U.S.....	XLVII
Tooisgah, Jonathan Morris & Velma <i>v.</i> Kleppe	XXXIX	White, Vernon O. & Ina C. <i>v.</i> Udall	XLVI
Umpleby, Joesph B., <i>et al.</i> <i>v.</i> Udall	XL	White Winter Coal, Inc. <i>v.</i> Dept. of the Interior	XLVII
Union Oil Co. of Calif <i>v.</i> Udall	XXXIX, XL	Williams, Leo <i>v.</i> Watt <i>et al</i>	XLVIII
Union Oil Co. of Calif., a Corp. <i>v.</i> Udall	XL	Wilson Farms Coal Co. <i>v.</i> Andrus.....	XLVIII
United Mine Workers of America <i>v.</i> Andrus (No. 77-1090).....	XXIV		
United Mine Workers of America <i>v.</i> Andrus (No. 77-1839).....	XVIII		

	Page		Page
Wisnak, Inc., an Alaska Corp. v. Kleppe, Thomas S., Secretary of the Interior & U.S.....	XLVIII	Yavapai-Prescott Indian Tribe v. Andrus <i>et al.</i>	XXIX
WJM Mining & Development Co. <i>et</i> <i>al.</i> v. Morton.....	XLIV	Zapata Coal Corp. v. Andrus.....	XLVIII
Wyoming, State of, Albert E. King, Comm'r of Public Lands v. Andrus.....	XLVIII	Zeigler Coal Co. v. Frizzell, Kent, Acting Secretary.....	XLVIII
Wyoming, State of, & Gulf Oil Corp. v. Udall etc.....	XL	Zwang, Darrell & Elodymae v. Andrus.....	XLVI
		Zweifel, Merle I., <i>et al.</i> v. U.S.....	XLVI

CUMULATIVE INDEX TO SUITS FOR JUDICIAL REVIEW OF DEPARTMENTAL DECISIONS PUBLISHED IN INTERIOR DECISIONS

The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given, if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

Scott Q. Adams, 60 IBLA 288, 88 I.D. 1110 (1981)

Scott Q. Adams v. James Watt & Richard Sundquist, Civil No. 82-35-BLG, D. Mont. Suit pending.

Adler Construction Co. (On Reconsideration), 67 I.D. 21 (1960)

Adler Construction Co. v. U.S., Cong. 10-60. Dismissed, 423 F.2d 1362 (1970); *rehearing denied*, July 15, 1970; *cert. denied*, 400 U.S. 993 (1970); *rehearing denied*, 401 U.S. 949 (1971).

Adler Construction Co. v. U.S., Cong. 5-70. Trial Commr's report accepting & approving the stipulated agreement filed Sept. 11, 1972.

Estate of John J. Akers, 1 IBIA 8, 77 I.D. 268 (1970)

Dolly Cusker Akers v. The Dept. of the Interior, Civil No. 907, D. Mont. Judgment for defendant, Sept. 17, 1971; order staying execution of judgment for 30 days issued Oct. 15, 1971; appeal dismissed for lack of prosecution, May 3, 1972; appeal reinstated, June 29, 1972; *aff'd*, 499 F.2d 44 (9th Cir. 1974).

State of Alaska v. Juneau Area Acting Director, Bureau of Indian Affairs, & Arctic John Etalook, 9 IBIA 126, 88 I.D. 1020 (1981)

State of Alaska v. 13.90 Acres of Land, James Watt, et al., Civil No. F81-40, D. Alaska. Suit pending.

State of Alaska v. Jacob Lestenkof, Area Director, BIA, & James Watt, et al., Civil No. F81-49, D. Alaska. Suit pending.

State of Alaska, Andrew Kalerak, Jr., 73 I.D. 1 (1966)

Andrew J. Kalerak, Jr., et al. v. Stewart L. Udall, Civil No. A-35-66, D. Alaska. Judgment for plaintiff, Oct. 20, 1966; *rev'd*, 396 F.2d 746 (9th Cir. 1968); *cert. denied*, 393 U.S. 1118 (1969).

Appeals of the State of Alaska & Seldovia Native Ass'n, Inc., 2 ANCAB 1, 84 I.D. 349 (1977)

Theodore A. Richards & Judith Miller v. The Secretary of the Interior & Seldovia Native Ass'n, Inc., Civil No. A78-170-CIV, D. Alaska. Suit pending.

George S. Rhyneer, Walter M. Johnson, David Vanderbrink, Vivian MacInnes, Bruce McAllister & Alan V. Hanson v. Cecil Andrus, Secretary of the Interior, Seldovia Native Ass'n, Inc., Cook Inlet Region, Inc., Robert Leresche, Comm'r of Natural Resources of the State of Alaska, Civil No. A78-240 CIV, D. Alaska. Suit pending.

Aleutian/Pribilof Islands Ass'n v. Acting Deputy Ass't Secretary—Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982)

Aleutian/Pribilof Islands Ass'n v. Gene R. Powers, Chief, Division of Support Services, Juneau Area Office, BIA, et al., Civil No. A82-163 CIV, D. Alaska. Suit pending.

Allied Contractors, Inc., 68 I.D. 145 (1961)

Allied Contractors, Inc. v. U.S., Ct. Cl. No. 163-63. Stipulation of settlement filed Mar. 3, 1967; compromised.

American Coal Co., 84 I.D. 394 (1977)

American Coal Co. v. Department of the Interior, No. 77-1604, U.S. Ct. of Appeals, 10th Cir. Dismissed on motion of Petitioner, Nov. 23, 1977.

Armco Steel Corp., 84 I.D. 454 (1977)

United Mine Workers of America v. Cecil D. Andrus, No. 77-1839, U.S. Ct. of Appeals, D.C. Cir. Suit pending.

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 74-180, D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. Rogers C. B. Morton, Secretary of the Interior, Vincent E. McKelvey, Dir. of Geological Survey, & C. J. Curtis, Area O&G Supervisor, Geological Survey, Civil No. C74-181, D. Wyo.

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

Leslie N. Baker et al., A-28454 (Oct. 26, 1960); *Autrice C. Copeland (On Reconsideration)*, 69 I.D. 1 (1962)

Autrice Copeland Freeman v. Stewart L. Udall, Civil No. 1578, D. Ariz. Judgment for defendant, Sept. 3, 1963 (opinion); *aff'd*, 336 F.2d 706 (9th Cir. 1964); no petition.

Phil Baker, 84 I.D. 877 (1977)

Phil Baker v. Department of the Interior, No. 77-1973, U.S. Ct. of Appeals, D.C. Cir. *Aff'd in part & rev'd in part*, Nov. 29, 1978.

Max Barash, The Texas Co., 63 I.D. 51 (1956)

Max Barash v. Douglas McKay, Civil No. 939-56. Judgment for defendant, June 13, 1957; *rev'd & remanded*, 256 F.2d 714 (1958); judgment for plaintiff, Dec. 18, 1958. Supplemental decision, 66 I.D. 11 (1959); no petition.

Barnard-Curtiss Co., 64 I.D. 312 (1957); 65 I.D. 49 (1958)

Barnard-Curtiss Co. v. U.S., Ct. Cl. No. 491-59. Judgment for plaintiff, 301 F.2d 909 (1962).

Eugenia Bate, 69 I.D. 230 (1962)

Katherine S. Foster & Brook H. Duncan II v. Stewart L. Udall, Civil No. 5258, D.N.M. Judgment for defendant, Jan. 8, 1964; *rev'd*, 335 F.2d 828 (10th Cir. 1964); no petition.

Robert L. Beery et al., 25 IBLA 287, 83 I.D. 249 (1976)

J. A. Steele et al. v. Thomas S. Kleppe in his capacity as Secretary of the Interior, & U.S., Civil No. C76-1840, N.D. Cal. *Aff'd*, June 27, 1978; no appeal.

Jack J. Bender, 54 IBLA 375, 88 I.D. 550 (1981)

Jack J. Bender v. James G. Watt, Secretary of the Interior, et al., Civil No. CIV-81-0682JB, D.N.M. Suit pending.

Sam Bergesen, 62 I.D. 295 (1955); *Reconsideration denied*, IBCA-11 (Dec. 19, 1955)

Sam Bergesen v. U.S., Civil No. 2044 D. Wash. Complaint dismissed, Mar. 11, 1958; no appeal.

Bishop Coal Co., 82 I.D. 553 (1975)

William Bennett, Paul F. Goad & United Mine Workers v. Thomas S. Kleppe, Secretary of the Interior, No. 75-2158, U.S. Ct. of Appeals, D.C. Cir. Suit pending.

Black Fox Mining & Development Corp., 2 IBSMA 110, 87 I.D. 207 (1980)

Black Fox Mining & Development Corp. v. Cecil Andrus, Secretary of the Interior, et al., Civil No. 80-913 K, W.D. Pa. Judgment for plaintiff, Jan. 21, 1981; no appeal.

BLM-A-045569, 70 I.D. 231 (1963)

New York State Natural Gas Corp. v. Stewart L. Udall, Civil No. 2109-63.

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.

Melvin A. Brown, 69 I.D. 131 (1962)

Melvin A. Brown v. Stewart L. Udall, Civil No. 3352-62. Judgment for defendant, Sept. 17, 1963; *rev'd*, 335 F.2d 706 (1964); no petition.

R. C. Buch, 75 I.D. 140 (1968)

R. C. Buch v. Stewart L. Udall, Civil No. 68-1358-PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); *rev'd*, 449 F.2d 600 (9th Cir. 1971); judgment for defendant, Mar. 10, 1972.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272, 86 I.D. 133 (1979)

Holland Livestock Ranch, a Co-Partnership composed of Bright-Holland Co., Mari-mont-Holland Co. & Nemmeroff-Holland Co. and John J. Casey v. U.S., Cecil Andrus, Secretary of the Interior, Edward Roland, Cal. State Director, BLM, & Edward Haste, Nev. State Director, BLM, et al., Civil No. R-79-78-HEC, D. Nev. Judgment for defendant, Aug. 7, 1979; *aff'd*, 655 F.2d 1002 (9th Cir. 1981).

Burn Construction Co., Inc., IBCA 1042-9-74, 85 I.D. 353 (1978)

Burn Construction Co., Inc. v. U.S., Ct. Cl No. 474-79C. Judgment for defendant, Dec. 30, 1981.

The California Co., 66 I.D. 54 (1959)

The California Co. v. Stewart L. Udall, Civil No. 980-59. Judgment for defendant, 187 F. Supp. 445 (1960); *aff'd*, 296 F.2d 384 (1961).

In the Matter of Cameron Parish, Louisiana, Cameron Parish Police Jury & Cameron Parish School Board, June 3, 1968, appealed by Secretary, July 5, 1968, 75 I.D. 289 (1968)

Cameron Parish Police Jury v. Stewart L. Udall et al., Civil No. 14,206, W.D. La. Judgment for plaintiff, 302 F. Supp. 689 (1969); order vacating prior order issued Nov. 5, 1969.

James W. Cannon et al., 84 I.D. 176 (1977)

Mark B. Ringstad, William I. Waugaman, William N. Allen III, Nils Braastad, Elmer Price, Dan Ramras, & Kenneth L. Rankin v. U.S., Secretary of the Interior, & The Arctic Slope Regional Corp., Civil No. A78-32-Civ, D. Alaska. Suit pending.

Canterbury Coal Co., 83 I.D. 325 (1976)

Canterbury Coal Co. v. Thomas S. Kleppe, No. 76-2323, U.S. Ct. of Appeals, 3d Cir. *Aff'd per curiam*, June 15, 1977.

Capital Fuels, Inc., 2 IBSMA 261, 87 I.D. 430 (1980)

Capital Fuels, Inc. v. Cecil D. Andrus, Secretary of the Interior, Walter N. Heine, Dir. Office of Surface Mining Reclamation & Enforcement, Civil No. 80-2438, S.D. W. Va. Suit pending.

Carbon Fuel Co., 83 I.D. 39 (1976)

United Mine Workers of America v. Thomas S. Kleppe, No. 76-1208, U.S. Ct. of Appeals, D.C. Cir; *rev'd & remanded*, 581 F.2d 891 (1978); *cert. denied*, Oct. 30, 1978.

Carson Construction Co., 62 I.D. 422 (1955)

Carson Construction Co. v. U.S., Ct. Cl. No. 487-59. Judgment for plaintiff, Dec. 14, 1961; no appeal.

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

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

Chemi-Cote Perlite Corp. v. Arthur C. W. Bowen, 72 I.D. 403 (1965)

Bowen v. Chemi-Cote Perlite, No. 2 CA-Civ. 248, Ariz. Ct. App. Decision against Dept. by the lower court *aff'd*, 423 P.2d 104 (1967); *rev'd*, 432 P.2d 435 (1967).

City of Homer, 6 ANCAB 203, 88 I.D. 1047 (1981)

City of Homer v. Curtis McVee, State Director of the Bureau of Land Management, et al., Civil No. A82-043 CIV, D. Alaska. Suit pending.

Stephen H. Clarkson, 72 I.D. 138 (1965)

Stephen H. Clarkson v. U.S., Cong. Ref. 5-68. Trial Commr's report adverse to U.S. issued Dec. 16, 1970; Chief Commr's report concurring with the Trial Commr's report issued Apr. 13, 1971. P.L. 92-108 enacted accepting the Chief Commr's report.

Appeal of COAC, INC., 81 I.D. 700 (1974)

COAC, Inc. v. U.S., Ct. Cl. No. 395-75. Suit pending.

Mrs. Hannah Cohen, 70 I.D. 188 (1963)

Hannah and Abram Cohen v. U.S., Civil No. 3158, D.R.I. Compromised.

Barney R. Colson, 70 I.D. 409 (1963)

Barney R. Colson et al. v. Stewart L. Udall, Civil No. 63-26-Civ.-Oc, M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); *aff'd*, 428 F.2d 1046 (5th Cir. 1970); *cert. denied*, 401 U.S. 911 (1971).

Columbian Carbon Co., Merwin E. Liss, 63 I.D. 166 (1956)

Merwin E. Liss v. Fred A. Seaton, Civil No. 3233-56. Judgment for defendant, Jan. 9, 1958; appeal dismissed for want of prosecution, Sept. 18, 1958, D.C. Cir. No. 14,647.

Appeal by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in the Matter of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, 77 I.D. 116 (1970)

Elverna Yevonne Clairmont Baciarelli v. Rogers C. B. Morton, Civil No. C-70-2200 SC, D. Cal. Judgment for defendant, Aug. 27, 1971; *aff'd*, 481 F.2d 610 (9th Cir. 1973); no petition.

Consolidation Coal Co., 1 IBSMA 273, 86 I.D. 523 (1979); 2 IBSMA 21, 87 I.D. 59 (1980)

Consolidation Coal Co. v. Cecil D. Andrus, Secretary of the Interior, Civil No. 803037, S.D. Ill. Judgment for defendant, Feb. 8, 1982.

Appeal of Continental Oil Co., 68 I.D. 337 (1961)

Continental Oil Co. v. Stewart L. Udall et al., Civil No. 366-62. Judgment for defendant, Apr. 29, 1966; *aff'd*, Feb. 10, 1967; *cert. denied*, 389 U.S. 839 (1967).

Estate of Hubert Franklin Cook, 5 IBIA 42, 83 I.D. 75 (1976)

Leroy V. & Roy H. Johnson, Marlene Johnson Exendine & Ruth Johnson Jones v. Thomas S. Kleppe, Secretary of the Interior, Civil No. CIV-76-0362-E, W.D. Okla. Suit pending.

Autrice C. Copeland, 69 I.D. 1 (1962)

See *Leslie N. Baker et al.*

E. L. Cord, Donald E. Wheeler, Edward D. Neuhoff, 80 I.D. 301 (1973)

Edward D. Neuhoff & E. L. Cord v. Rogers C. B. Morton, Secretary of the Interior, Civil No. R-2921, D. Nev. Dismissed, Sept. 12, 1975 (opinion); *aff'd*, July 17, 1978; no petition.

Appeal of Cosmo Construction Co., 73 I.D. 229 (1966)

Cosmo Construction Co. et al. v. U.S., Ct. Cl. No. 119-68. Ct. opinion setting case for trial on the merits issued, Mar. 19, 1971.

Council of the Southern Mountains, Inc. v. Office of Surface Mining Reclamation & Enforcement, 3 IBSMA 44, 88 I.D. 394 (1981)

Council of the Southern Mountains, Inc. v. James G. Watt, Civil No. 81-1022. Suit pending.

Cowin & Co., 83 I.D. 409 (1976)

United Mine Workers of America v. Thomas S. Kleppe, No. 76-1980, U.S. Ct. of Appeals, D.C. Cir. Suit pending.

Estate of Glenn F. Coy, Resource Service Co., 52 IBLA 182, 88 I.D. 236 (1981)

Mildred D. Coy et al. v. James G. Watt, Secretary of the Interior, et al., Civil No. 81-0984. Suit pending.

Estate of Jonah Crosby (Deceased Wisconsin Winnebago Unallotted), 81 I.D. 279 (1974)

Robert Price v. Rogers C. B. Morton, Individ. & in his official capacity as secretary of the Interior & his successor in office, et al., Civil No. 74-0-189, D. Neb. Remanded to the Secretary for further administrative action, Dec. 16, 1975.

Daniel Brothers Coal Co., 2 IBSMA 45, 87 I.D. 138 (1980)

Larry Daniel et al. v. Cecil D. Andrus et al., Civil No. 80-49, E.D. Ky. Suit pending.

Dean Trucking Co., Inc., 1 IBSMA 229, 86 I.D. 437 (1979)

Dean Trucking Co., Inc. v. Cecil D. Andrus, Civil No. 80-006-B, W.D. Va. Suit pending.

John C. deArmas, Jr., P. A. McKenna, 63 I.D. 82 (1956)

Patrick A. McKenna v. Clarence A. Davis, Civil No. 2125-56. Judgment for defendant, June 20, 1957; *aff'd*, 259 F.2d 780 (1958); *cert. denied*, 358 U.S. 835 (1958).

H. R. Delasco, 39 IBLA 194, 84 I.D. 192 (1979); *Blanche V. White*, 40 IBLA 152, 85 I.D. 408 (1979)

Stewart Capital Corp. et al. v. Cecil D. Andrus, Secretary of the Interior, Civil No. C79-123, D. Wyo. *Aff'd in part, rev'd in part*, Apr. 24, 1980; appeal withdrawn.

Dinco Coal Sales, Inc., 4 IBSMA 35, 89 I.D. 113 (1982)

Mary Debord et al. v. James G. Watt, Secretary of the Interior & Dinco Coal Sales, Inc., Civil No. 82-99, D. Ky. Suit pending.

The Dredge Corp., 64 I.D. 368 (1957); 65 I.D. 336 (1958)

The Dredge Corp. v. J. Russell Penny, Civil No. 475, D. Nev. Judgment for defendant, Sept. 9, 1964; *aff'd*, 362 F.2d 889 (9th Cir. 1966); no petition. See also *Dredge Co. v. Husite Co.*, 369 P.2d 676 (1962); *cert. denied*, 371 U.S. 821 (1962).

Drummond Coal Co., 2 IBSMA 96, 87 I.D. 196 (1980)

Drummond Coal Co. v. Cecil D. Andrus et al., Civil No. C-V-80-M-0829, N.D. Ala. Judgment for plaintiff, Apr. 20, 1981.

Eastern Associated Coal Corp., 82 I.D. 22 (1975)

International Union of United Mine Workers of America v. Rogers C. B. Morton, Secretary of the Interior, No. 75-1107, U.S. Ct. of Appeals, D.C. Cir. Dismissed by stipulation, Oct. 29, 1975.

Eastern Associated Coal Corp., 82 I.D. 311 (1975)

United Mine Workers of America v. Interior Board of Mine Operations Appeals, No. 75-1727, U.S. Ct. of Appeals, D.C. Cir. Petition for Review withdrawn, July 28, 1975.

Eastern Associated Coal Corp., 5 IBMA 185, 82 I.D. 506 (1975); *On Reconsideration*, 7 IBMA 14, 83 I.D. 425 (1976); *Aff'd en banc*, 7 IBMA 133, 83 I.D. 695 (1976), 7 IBMA 152 (1976)

United Mine Workers of America v. Cecil D. Andrus, No. 77-1090, U.S. Ct. of Appeals, D.C. Cir. Voluntary dismissal, Apr. 4, 1977.

Eastover Mining Co., 2 IBSMA 5, 87 I.D. 9 (1980)

Eastover Mining Co. v. Cecil D. Andrus et al., Civil No. 80-17, E.D. Ky. Suit pending.

Appeal of Eklutna, Inc., 1 ANCAB 165, 83 I.D. 500 (1976)

State of Alaska v. Alaska Native Claims Appeal Board et al., Civil No. A76-236, D. Alaska. Suit pending.

H. J. Enevoldsen, 44 IBLA 70, 86 I.D. 643 (1979)

H. J. Enevoldsen v. Cecil D. Andrus, Secretary of the Interior, Glenna M. Lane, Chief, O&G Section, Wyo. State Office, BLM & Shackelford Reeder, Civil No. C80-0047, D. Wyo. Suit pending.

David H. Evans v. Ralph C. Little, A-31044 (Apr. 10, 1970); 1 IBLA 269, 78 I.D. 47 (1971)

David H. Evans v. Rogers C. B. Morton, Civil No. 1-71-41, D. Idaho. Order granting motion of Ralph C. Little for leave to intervene as a party defendant issued June 5, 1972. Judgment for defendants, July 27, 1973; *aff'd*, Mar. 12, 1975; no petition.

John J. Farrelly et al., 62 I.D. 1 (1955)

John J. Farrelly & The Fifty-One Oil Co. v. Douglas McKay, Civil No. 3037-55. Judgment for plaintiff, Oct. 11, 1955; no appeal.

Milton D. Feinberg, Benson J. Lamp, 37 IBLA 39, 85 I.D. 380 (1978); *On Reconsideration*, 40 IBLA 222, 86 I.D. 234 (1979)

Benson J. Lamp v. Cecil Andrus, Secretary of the Interior, James L. Burski, Douglas E. Henriques & Edward W. Stuebing, Administrative Judges, IBLA, Civil No. 79-1804. Dismissed as to defendant Feinberg. Mar. 17, 1981.

Foote Mineral Co., 34 IBLA 285, 85 I.D. 171 (1978)

Foote Mineral Co. v. Cecil D. Andrus, Individ. & as Secretary of the Interior, H. William Menard, Individ. & as Director, Geological Survey, & Murray T. Smith, Individ. & as Area Mining Supervisor, Geological Survey, Civil No. LV-78-141 RDF, D. Nev. Dismissed without prejudice, Nov. 15, 1979. No appeal.

Foote Mineral Co. v. U.S., Ct. Cl. No. 12-78. Suit pending.

Administrative Appeal of Fort Berthold Land & Livestock Ass'n v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 8 IBIA 90, 87 I.D. 201 (1980)

Edward S. Danks, John Fredericks, Maurice Danks, et al. v. Harrison Fields, Acting Supt. of Fort Berthold Indian Reservation, et al., Civil No. A4-80-39, D.N.D. Suit pending.

T. Jack Foster, 75 I.D. 81 (1968)

Gladys H. Foster, executrix of the estate of T. Jack Foster v. Stewart L. Udall, Boyd L. Rasmussen, Civil No. 7611, D.N.M. Judgment for plaintiff, June 2, 1969; no appeal.

Franco Western Oil Co. et al., 65 I.D. 316, 427 (1958)

Raymond J. Hansen v. Fred A. Seaton, Civil No. 2810-59. Judgment for plaintiff, Aug. 2, 1960 (opinion); no appeal.

See Safarik v. Udall, 304 F.2d 944 (1962); cert. denied, 371 U.S. 901 (1962).

Gabbs Exploration Co., 67 I.D. 160 (1960)

*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. denied*, 375 U.S. 822 (1963).*

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

Confederated Tribes & Bands of the Yakima Indian Nation v. Thomas 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. 4194-60. 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 (1976); 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 I.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. Compromise offer accepted & 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. denied*, 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.

Hat Ranch, Inc., 27 IBLA 340, 83 I.D. 542 (1976)

Hat Ranch, Inc. v. Thomas Kleppe et al., Civil No. 76-668M, D.N.M. Remanded to the Interior Board of Land Appeals, June 2, 1978; appeal dismissed for lack of jurisdiction, Oct. 18, 1978.

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, U.S. Ct. of Appeals, D.C. Cir. Dismissed for lack of jurisdiction, June 20, 1977.

Holland Livestock Ranch & John J. Casey, 52 IBLA 326, 88 I.D. 275 (1981)

Holland Livestock Ranch et al. v. U.S., James Watt, Secretary of the Interior, et al., Civil No. CIV-R-81-68-BRY, D. Nev. Suit pending.

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.

Home Petroleum Corp et al., 54 IBLA 194, 88 I.D. 479 (1981)

Anthony C. Pagedas, Calvin J. Gillespie, Peter G. Sarantos, Thomas C. Pagedas, Donald J. Albrecht, & Fred L. Engle, d/b/a Resource Service Center v. James G. Watt, Secretary of the Interior, Glenna M. Lane, Chief, O&G Sec. Wyo. State Office, BLM, Civil No. C81-206, D. Wyo. Suit pending.

Geosearch Inc. & M. T. McGregor v. James G. Watt et al., Civil No. C81-208, D. Wyo. Suit pending.

Hoover & Bracken Energies, Inc., 52 IBLA 27, 88 I.D. 7 (1981)

Hoover & Bracken Energies, Inc. v. DOI, James Watt, Secretary, Doyle G. Frederich, Acting Dir. U.S. Geological Survey & Theodore Krenzke, Dep. Comm'r, BIA, Civil No. CIV-81-461T, W.D. Okla. Judgment for plaintiff Nov. 18, 1981.

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; *rev'd*, 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 Sec. 603 of the Federal Land Policy & Management Act of 1976—Bureau of Land Management (BLM) Wilderness Study, 86 I.D. 89 (1979)

Rocky Mountain Oil & Gas Ass'n v. Cecil D. Andrus, Secretary of the Interior & Leo Krulitz, Solicitor of the Interior, Civil No. C78-265, D. Wyo. Judgment for plaintiff, Nov. 17, 1980; appeal filed, Jan. 5, 1981.

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.

Island Creek Coal Co., 1 IBSMA 316, 86 I.D. 724 (1979)

Island Creek Coal Co., Rebel Coal Co. v. Cecil D. Andrus et al., Civil No. 80-3137, S.W. W. Va. Suit pending.

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-74-158, RDF, D. Nev. Judgment for defendant, Oct. 18, 1977; *aff'd*, Sept. 18, 1980. No petition.

June Oil & Gas, Inc., Cook Oil & Gas, Inc., 41 IBLA 394, 86 I.D. 374 (1979)

June Oil & Gas, Inc. & Cook Oil & Gas, Inc. v. Cecil D. Andrus, Secretary of the Interior, et al., Civil No. 79-1334, D. Colo. Judgment for defendant, Jan. 20, 1981; appeal filed Feb. 11, 1981.

Kaiser Steel Corp. (Petitioner) v. Office of Surface Mining Reclamation & Enforcement (Respondent), 1 IBSMA 184 (1979); *Kaiser Steel Corp.*, 2 IBSMA 158, 87 I.D. 324 (1980)

Kaiser Steel Corp. v. Office of Surface Mining & Enforcement, Civil No. 80-656-M, D.N.M. Suit pending.

Estate of San Pierre Kilkaken (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 Kleppe, Secretary of the Interior, Civil No. C-76-14, E.D. Wash. Dismissed with prejudice.

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

Marlin D. Kuykendall v. Phoenix Area Director & Yavapai-Prescott Tribe, 8 IBIA 76, 87 I.D. 189 (1980)

Yavapai-Prescott Indian Tribe v. Cecil D. Andrus, Secretary of the Interior, et al., Civil No. CIV-80-464 PCT-CLH, D. Ariz. Suit pending.

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. denied*, 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, Individ. & as the Adm'x 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. Alaska. 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.

Appeal of Carmel J. McIntyre, 4 ANCAB 24, 86 I.D. 663 (1979)

Carmel J. McIntyre v. Cecil D. Andrus, Secretary of the Interior, Frank Gregg, Dir., BLM, Curtis V. McVee, Alaska State Dir., BLM, Alaska Native Claims Appeal Board, Eklutna, Inc. & Cook Inlet Region, Inc., Civil No A79-391 CIV, D. Alaska. Suit pending.

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 & 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. Or. 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. denied*, 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 decision 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 & Shell 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-30546 (Aug. 10, 1966); A-30566 (Aug. 11, 1966); & 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. Klunter 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. denied*, 371 U.S. 941 (1962).

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

Morrison-Knudsen Co. v. U.S., Ct. Cl. No. 239-61. Remanded to Trial Comm'r, 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.

Mountain Enterprises Coal Co., 3 IBSMA 338, 88 I.D. 861 (1981)

Mountain Enterprises Coal Co. v. Secretary of the Interior, Civil No. 81-0325-B, W.D. Va. Suit pending.

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, U.S. 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. C308-73, 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. 4181-60. 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. denied*, 392 U.S. 909 (1968).

Oil & 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. Alaska. Withdrawn Apr. 18, 1963.

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

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

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alaska. 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. Alaska. 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 Co., 81 I.D. 428; 81 I.D. 436; 81 I.D. 440 (1974)

Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals et al., Nos. 74-1654, 74-1655, 74-1656, U.S. Ct. of Appeals for the 7th Cir. Board's decision *aff'd*, 523 F.2d 25 (7th Cir. 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, U.S. Ct. of Appeals, D.C. Cir. *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, U.S. 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 Kleppe, Secretary of the Interior & his successors & predecessors in office, et al., Civil No. A76-241 CIV, D. Alaska. Suit pending.

D. E. Pack, 30 IBLA 166, 84 I.D. 192 (1977); On Reconsideration, 38 IBLA 23, 85 I.D. 408 (1978)

John S. Runnells v. Cecil Andrus, Secretary of the Interior, et al., Civil No. C-77-0268, D. Utah. *Rev'd & remanded* to Bureau of Land Management for issuance of the leases, Feb. 19, 1980; no appeal.

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

Jack W. Parks v. Thomas S. Kleppe, No. 76-2052, U.S. 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 denied, 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.

Earl W. Platt, 43 IBLA 41, 86 I.D. 458 (1979)

Barbara Garcia v. Cecil Andrus, Secretary of the Interior, Earl W. & Buena Platt, Civil No. CIV-80-382 PCT, D. Ariz. Suit pending.

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

Howard Mullins v. Cecil D. Andrus, No. 77-1087, U.S. Ct. of Appeals, D.C. Cir. *Rev'd & remanded*, Dec. 31, 1980.

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

Pocahontas Fuel Co., Div. of Consolidation Coal Co. v. Cecil D. Andrus, No. 77-2239, U.S. Court 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 decision, Dec. 3, 1969; interim decision, 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, U.S. Ct. 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, U.S. 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 decision, *vacated & remanded*, Oct. 2, 1975; judgment for plaintiff, Dec. 1, 1975.

Roberts Brothers Coal Co., 2 IBSMA 284, 87 I.D. 439 (1980)

Roberts Brothers Coal Co. v. Cecil D. Andrus et al., Civil No. 80-016900 (G), W.D. Ky. Suit pending.

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. Bohl, Chief, Land & Mining, Bureau of Land Management, Wyo., Civil No. C78-261, D. Wyo. Judgment for plaintiff, Oct. 17, 1979. No appeal.

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. 75-115. 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, U.S. Court 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, U.S. Ct. of Appeals, 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. Alaska. 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).

Appeal of Tanacross, Inc., 4 ANCAB 173, 87 I.D. 123 (1980)

Tanacross, Inc. v. James G. Watt et al., Civil No. A82-005 CIV, D. Alaska. Suit pending.

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).

Thoroughfare Coal Co., 3 IBSMA 72, 88 I.D. 406 (1981)

Thoroughfare Coal Co. v. James G. Watt, Secretary of the Interior, Civil No. C81-0068, W.D. Ky. Suit pending.

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.

See also:

Thor-Westcliffe Development, Inc. v. Stewart L. Udall et al., Civil No. 2406-61. Judgment for defendant, Mar. 22, 1962; *aff'd*, 314 F.2d 257 (1963); *cert denied*, 373 U.S. 951 (1963).

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

Bert F. Duesing v. Stewart L. Udall, Civil No. 290-62. Judgment for defendant, July 17, 1962 (oral opinion); *aff'd*, 350 F.2d 748 (1965); *cert denied*, 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.

Tollage Creek Elkhorn Mining Co., 2 IBSMA 341, 87 I.D. 570 (1980)

Tollage Creek Elkhorn Mining Co. v. Cecil D. Andrus, Civil No. 80-230, E.D. Ky. Suit pending.

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. Dismissed 418 F. Supp. 913 (1976). No appeal.

TOSCO v. Secretary of the Interior

See *Union Oil Co.*, 71 I.D. 169 (1964)

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, 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 Oil Co. of California et al., 71 I.D. 169 (1964); 72 I.D. 313 (1965); *U.S. v. Bohme*, 48 IBLA 267, 87 I.D. 248; 51 IBLA 97, 87 I.D. 535 (1980)

Penelope Chase Brown et al. v. Stewart Udall, Civil No. 9202, D. Colo.

Barnette T. Napier et al. v. Secretary of the Interior, Civil No. 8691, D. Colo.

The Oil Shale Corp. et al. v. Secretary of the Interior, Civil No. 8680, D. Colo.

Joseph B. Umpleby et al. v. Stewart L. Udall, Civil No. 8685, D. Colo.

FOR ABOVE CASES: 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.

Equity Oil Co. v. Stewart L. Udall, Civil No. 9462, D. Colo.

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 9464, D. Colo.

Harlan H. Hugg et al. v. Stewart L. Udall, Civil No. 9252, D. Colo.

John W. Savage v. Stewart L. Udall, Civil No. 9458, D. Colo.

The Oil Shale Corp. et al. v. Stewart L. Udall, Civil No. 9465, D. Colo.

Union Oil Co. of California, a Corp. v. Stewart L. Udall, Civil No. 9461, D. Colo.

FOR ABOVE CASES: Order to Close Files & Stay Proceedings, Mar. 25, 1967.

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 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).

United Mine Workers of America v. Inland Steel Co., 83 I.D. 87 (1966)

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

United Mine Workers of America, Local Union No. 1993 v. Consolidation Coal Co., 84 I.D. 254 (1977)

Local Union No. 1993, United Mine Workers of America v. Cecil D. Andrus, No. 77-1582, U.S. Ct. of Appeals, D.C. Cir. Suit pending.

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 Berri-man 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 Individ. & 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. Alaska. 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.

U.S. v. Brubaker-Mann, Inc., 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, Civil No. 74-742-JWC, C.D. Cal. Stipulated agreement dated Jan. 30, 1975, & accepted by the defendants on Feb. 3, 1975; final judgment entered May 7, 1975.

U.S. v. Henrietta & Andrew Julius Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972)

Henrietta & Andrew Julius Bunkowski v. L. Paul Applegate, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of the Interior, et al., Civil No. R-76-182-BRT, D. Nev. Dismissed with prejudice, Nov. 27, 1978.

U.S. v. Ford M. Converse, 72 I.D. 141 (1965)

Ford M. Converse v. Stewart Udall, Civil No. 65-581, D. Or. Judgment for defendant, 262 F. Supp. 583 (1966); *aff'd*, 399 F.2d 616 (9th Cir. 1968); *cert. denied*, 393 U.S. 1025 (1969).

U.S. v. Alvis F. Denison et al., 71 I.D. 144 (1964); 76 I.D. 233 (1969)

Marie W. Denison, Individually & as Executrix of the Estate of Alvis F. Denison (Deceased) v. Stewart L. Udall, Civil No. 963, D. Ariz. Remanded, 248 F. Supp. 942 (1965).

Leo E. Shoup v. Stewart L. Udall, Civil No. 5822-Phx., D. Ariz. Judgment for defendant, Jan. 31, 1972.

Reid Smith v. Stewart L. Udall, etc., Civil No. 1053, D. Ariz. Judgment for defendant, Jan. 31, 1972. *aff'd*, Feb. 1, 1974; *cert. denied*, Oct. 15, 1974.

U.S. v. Everett Foster et al., 65 I.D. 1 (1958)

Everett Foster et al. v. Fred A. Seaton, Civil No. 344-58. Judgment for defendants, Dec. 5, 1958 (opinion); *aff'd*, 271 F.2d 836 (1959); no petition.

U.S. v. Golden Grigg et al., 19 IBLA 379, 82 I.D. 123 (1975)

Golden T. Grigg, LeFawn Grigg, Fred Baines, Otis H. Williams, Kathryn Williams, Lovell Taylor, William A. Anderson, Saragene Smith, Thomas M. Anderson, Bonnie Anderson, Charles L. Taylor, Darlene Baines, Luann & Paul E. Hogg v. U.S., Rogers C. B. Morton, Secretary of the Interior, Civil No. 1-75-75, D. Idaho. Judgment for defendant, Nov. 6, 1979; appeal filed, Jan. 3, 1980.

U.S. v. Richard P. Haskins, A-30737 (Dec. 19, 1966); 3 IBLA 77 (1971); 59 IBLA 1, 88 I.D. 925 (1981)

Richard P. Haskins for Himself & as Adm. of the Estate of Bartholomew H. Haskins (Deceased) v. Udall, Civil No. 67-1815-CC, C.D. Cal. Judgment for defendant, Apr. 15, 1968; remanded to Director, Bureau of Land Management for an exercise of discretion, Oct. 3, 1969.

U.S. v. Richard P. Haskins, Civil No. 72-246 JWC, C.D. Cal. Judgment for plaintiff, May 18, 1972 (opinion); *rehearing denied*, June 28, 1972; *aff'd & remanded for further proceedings*, 505 F.2d 246 (9th Cir. 1974).

Richard P. Haskins v. James Watt, Civil No. 82-2112 CBM (JRX), C.D. Cal. Suit pending.

U.S. v. Henault Mining Co., 73 I.D. 184 (1966)

Henault Mining Co. v. Harold Tysk et al., Civil No. 634, D. Mont. Judgment for plaintiff, 271 F. Supp. 474 (1967); *rev'd & remanded for further proceedings*, 419 F.2d 766 (9th Cir. 1969); *cert. denied*, 398 U.S. 950 (1970); judgment for defendant, Oct. 6, 1970.

U.S. v. Charles H. Henrikson et al., 70 I.D. 212 (1963)

Charles H. Henrikson et al. v. Stewart L. Udall et al., Civil No. 41749, N.D. Cal. Judgment for defendant, 229 F. Supp. 510 (1964); *aff'd*, 350 F.2d 949 (9th Cir. 1965); *cert. denied*, 384 U.S. 940 (1966).

U.S. v. Humboldt Placer Mining Co., & Del De Rosier, 8 IBLA 407, 79 I.D. 709 (1972)

Humboldt Placer Mining Co., & Del De Rosier v. Secretary of the Interior, Civil No. S-2755, E.D. Cal. Dismissed with prejudice, June 12, 1974; *aff'd*, 549 F.2d 622 (9th Cir. 1977); petition for cert. filed, June 25, 1977.

U.S. v. Ideal Cement Co., 5 IBLA 235, 79 I.D. 117 (1972)

Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. Rogers C. B. Morton, Civil No. J-12-72, D. Alaska. Judgment for defendant, Feb. 25, 1974; motion to vacate judgment denied, May 6, 1974; *aff'd*, 542 F.2d 1364 (9th Cir. 1976).

U.S. v. Independent Quick Silver Co., 72 I.D. 367 (1965)

Independent Quick Silver Co., an Oregon Corp. v. Stewart L. Udall, Civil No. 65-590, D. Or. 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 Ass'n (Intervenor), 2 IBLA 64, 78 I.D. 71 (1971).

William A. McCall, Sr., The Dredge Corp. & Olaf H. Nelson v. John F. Boyles et al., Civil No. 74-68(RDF), D. Nev. Judgment for defendant, June 15, 1976; petition for reconsideration denied, Aug. 17, 1977; *aff'd*, July 10, 1980; rehearing *en banc* denied, Oct. 17, 1980; *cert. denied*, Mar. 23, 1981.

U.S. v. William A. McCall, Sr., Estate of Olaf Henry Nelson (Deceased), 7 IBLA 21, 79 I.D. 457 (1972)

William A. McCall, Sr. & the Estate of Olaf Henry Nelson (Deceased) v. John S. Boyles, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of the Interior, et al., Civil No. LV-76-155 RDF, D. Nev. Judgment for defendant, Nov. 4, 1977; *aff'd*, 628 F.2d 1185 (9th Cir. 1980); *cert. denied*, Mar. 23, 1981.

U.S. v. Kenneth McClarty, 71 I.D. 331 (1964); 76 I.D. 193 (1969)

Kenneth McClarty v. Stewart L. Udall et al. Civil No. 116, E.D. Wash. Judgment for defendant, May 26, 1966; *rev'd & remanded*, 408 F.2d 907 (9th Cir. 1969); remanded to the Secretary, May 7, 1969; *vacated & remanded* to Bureau of Land Management, Aug. 13, 1969.

U.S. v. Charles Maher et al., 5 IBLA 209, 79 I.D. 109 (1972)

Charles Maher & L. Franklin Mader v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 1-72-153, D. Idaho. Dismissed without prejudice, Apr. 3, 1973.

U.S. v. Mary A. Matthey, 67 I.D. 63 (1960)

U.S. v. Edison R. Nogueira et al., Civil No. 65-220-PH, C.D. Cal. Judgment for defendant, Nov. 16, 1966; *rev'd & remanded*, 403 F.2d 816 (1968); no petition.

U.S. v. Frank & Wanita Melluzzo, 76 I.D. 160 (1969); 32 IBLA 46 (1977)

Frank & Wanita Melluzzo v. Rogers C. B. Morton, Civil No. CIV 73-308 PHX CAM, D. Ariz. Judgment for defendant, June 19, 1974; *aff'd in part & rev'd & remanded in part*, 534 F.2d 860 (9th Cir. 1976); no petition.

Frank & Wanita Melluzzo v. Cecil Andrus, Secretary of the Interior, Civil No. CIV 79-282 PHX CAM, D. Ariz. Judgment for defendant, May 20, 1980

U.S. v. Frank & Wanita Melluzzo, et al., 76 I.D. 181 (1969); reconsideration, 1 IBLA 37, 77 I.D. 172 (1970).

WJM Mining & Development Co. et al. v. Rogers C. B. Morton, Civil No. 70-679, D. Ariz. Judgment for defendant, Dec. 8, 1971; dismissed, Feb. 4, 1974.

U.S. v. Frank & Wanita Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978)

Frank & Wanita Melluzzo v. U.S., James Watt, Secretary of the Interior, Civil No. 81-607 PHX CAM, D. Ariz. Suit pending.

U.S. v. Mineral Ventures, Ltd., 80 I.D. 792 (1973)

Mineral Ventures, Ltd. v. The Secretary of the Interior, Civil No. 74-201, D. Or. Judgment for defendant, July 10, 1975; *vacated & remanded*, May 3, 1977; modified amended judgment, Sept. 9, 1977.

U.S. v. G. Patrick Morris et al., 82 I.D. 146 (1975)

G. Patrick Morris, Joan E. Roth, Elise L. Neeley, Lyle D. Roth, Vera M. Baltzor (formerly Vera M. Noble), Charlene S. & George R. Baltzor, Juanita M. & Nellie Mae Morris, Milo & Peggy M. Axelsen, & Farm Development Corp. v. U.S. & Rogers C. B. Morton, Secretary of the Interior, Civil No. 1-75-74, D. Idaho. *Aff'd in part, rev'd in part*, Dec. 20, 1976; *rev'd*, 593 F.2d 851 (9th Cir. 1978). Dismissed with prejudice, June 23, 1980; motion to vacate denied Oct. 9, 1980; appeal filed Dec. 3, 1980.

U.S. v. New Jersey Zinc Co., 74 I.D. 191 (1967)

The New Jersey Zinc Corp., a Del. Corp. v. Stewart L. Udall, Civil No. 67-C-404, D. Colo. Dismissed with prejudice, Jan. 5, 1970.

U.S. v. Lloyd O'Callaghan, Sr., et al., 79 I.D. 689 (1972); *U.S. v. Lloyd O'Callaghan, Sr.*, Contest No. R-04845 (July 7, 1975), 29 IBLA 333 (1977)

Lloyd O'Callaghan, Sr., Individ. & as Executor of the Estate of Ross O'Callaghan v. Rogers Morton et al., Civil No. 73-129-S, S.D. Cal. *Aff'd in part & remanded*, May 14, 1974. Judgment for defendant, May 16, 1978, *aff'd*, May 8, 1980.

U.S. v. J. R. Osborne et al., 77 I.D. 83 (1970); 28 IBLA 13 (1976), *reconsideration denied* by order dated Jan. 4, 1977

J. R. Osborne, Individ. & on behalf of R. R. Borders et al. v. Rogers C. B. Morton et al., Civil No. 1564, D. Nev. Judgment for defendant, Mar. 1, 1972; remanded to Dist. Ct. with directions to reassess Secretary's conclusion, Feb. 22, 1974; remanded to the Dept. with orders to reexamine the issues, Dec. 3, 1974.

Bradford Mining Corp., Successor of J. R. Osborne, agent for various persons v. Cecil D. Andrus, Secretary of the Interior, Civil No. LV-77-218, RDF, D. Nev. Suit pending.

U.S. v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977)

Pittsburgh Pacific Co. v. U.S., Dept. of the Interior, Cecil Andrus, Joseph W. Goss, Anne Poindexter Lewis, Martin Ritvo, State of South Dakota, Dept. of Environmental Protection & Allen Lockner, Civil No. CIV 77-5055, W.D.S.D. Dismissed by plaintiff, Dec. 8, 1980; no appeal.

State of South Dakota v. Cecil D. Andrus, Secretary of the Interior, et al., Civil No. CIV 77-5058, W.D.S.D. Judgment for defendant, Dec. 26, 1978; *aff'd*, Feb. 12, 1980; *cert. denied*, Sept. 4, 1980.

U.S. v. E. V. Pressentin & Devisees of the H. S. Martin Estate, 71 I.D. 447 (1964)

E. V. Pressentin, Fred J. Martin, Adm. of H. A. Martin Estate v. Stewart L. Udall & Charles Stoddard, Civil No. 1194-65. Judgment for defendant, Mar. 19, 1969; no appeal.

U.S. v. Ollie Mae Shearman et al., 73 I.D. 386 (1966)

See Idaho Desert Land Entries—Indian Hill Group

U.S. v. C. F. Snyder et al., 72 I.D. 223 (1965)

Ruth Snyder, Adm'x of the Estate of C. F. Snyder (Deceased) et al. v. Stewart L. Udall, Civil No. 66-C-131, D. Colo. Judgment for plaintiff, 267 F. Supp. 110 (1967); *rev'd*, 405 F.2d 1179 (10th Cir. 1968); *cert. denied*, 396 U.S. 819 (1969).

U.S. v. Southern Pacific Co., 77 I.D. 41 (1970)

Southern Pacific Co. et al., v. Rogers C. B. Morton et al., Civil No. S-2155, E. D. Cal. Judgment for defendant, Nov. 20, 1974.

U.S. v. Clarence T. & Mary D. Stevens, 77 I.D. 97 (1970)

Clarence T. & Mary D. Stevens v. Walter J. Hickel, Civil No. 1-70-94, D. Idaho. Judgment for defendant, June 4, 1971.

U.S. v. Elmer H. Swanson, 81 I.D. 14 (1974); 34 IBLA 25 (1978)

Elmer H. Swanson v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 4-74-10, D. Idaho. Dismissed without prejudice, Dec. 23, 1975 (opinion).

Elmer H. Swanson & Livingston Silver, Inc. v. Cecil D. Andrus, Secretary of the Interior, Civil No. CIV-78-4045, D. Idaho. Suit pending.

U.S. v. Alfred N. Verrue, 75 I.D. 300 (1968)

Alfred N. Verrue v. U.S. et al., Civil No. 6898 Phx., D. Ariz. *Rev'd & remanded*, Dec. 29, 1970; *aff'd*, 457 F.2d 1202 (9th Cir. 1971); no petition.

U.S. v. Vernon O. & Ina C. White, 72 I.D. 552 (1965)

Vernon O. & Ina C. White v. Stewart L. Udall, Civil No. 1-65-122, D. Idaho. Judgment for defendant, Jan. 6, 1967; *aff'd*, 404 F.2d 334 (9th Cir. 1968); no petition.

U.S. v. Frank W. Winegar et al., 81 I.D. 370 (1974)

Shell Oil Co. & D. A. Shale, Inc. v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 74-F-739, D. Colo. Judgment for plaintiff, Jan. 17, 1977; *aff'd*, Jan. 25, 1979.

U.S. v. Elodymae Zwang, U.S. v. Darrell Zwang, 26 IBLA 41, 83 I.D. 280 (1976)

Darrell & Elodyame Zwang v. Cecil Andrus, Secretary of the Interior, Civil No. 77-1431 R, D. Cal. Judgment for plaintiff, Aug. 20, 1979.

U.S. v. Merle I. Zweifel et al., 80 I.D. 323 (1973)

Merle I. Zweifel et al. v. U.S., Civil No. C-5276, D. Colo. Dismissed without prejudice, Oct. 31, 1973.

Kenneth Roberts et al. v. Rogers C. B. Morton & The Interior Board of Land Appeals, Civil No. C-5308, D. Colo. Dismissed with prejudice, 389 F. Supp. 87 (1975); *aff'd*, 549 F.2d 158 (10th Cir. 1977).

E. A. Vaughey, 63 I.D. 85 (1956)

E. A. Vaughey v. Fred A. Seaton, Civil No. 1744-56. Dismissed by stipulation, Apr. 18, 1957; no appeal.

Estate of Cecelia Smith Vergote (Borger), Morris A. (K.) Charles & Caroline J. Charles (Brendale), 5 IBIA 96, 83 I.D. 209 (1976)

Confederated Tribes & Bands of the Yakima Indian Nation v. Thomas Kleppe, Secretary of the Interior & Phillip Brendale, Civil No. C-76-199, E.D. Wash. Suit pending.

Estate of Florence Bluesky Vessell (Unallotted Lac Courte Oreilles Chippewa of Wisconsin) 1 IBIA 312, 79 I.D. 615 (1972)

Constance Jean Hollen Eskra v. Rogers C. B. Morton et al., Civil No. 72-C-428, D. Wis. Dismissed, 380 F. Supp. 205 (1974); *rev'd*, Sept. 29, 1975; no petition.

Virginia Iron, Coal & Coke Co., 2 IBSMA 165, 87 I.D. 327 (1980)

Virginia Iron, Coal & Coke Co. v. Cecil D. Andrus, Secretary of the Interior, Civil No. 80-0245-B, W.D. Va. Suit pending.

***Burt A. Wackerli et al.*, 73 I.D. 280 (1966)**

Burt & Lueva G. Wackerli, et al. v. Stewart L. Udall et al., Civil No. 1-66-92, D. Idaho. Amended complaint filed, Mar. 17, 1971; judgment for plaintiff, Feb. 28, 1975.

***Estate of Milward Wallace Ward*, 82 I.D. 341 (1975)**

Alfred Ward, Irene Ward Wise, & Elizabeth Collins v. Kent Frizzell, Acting Secretary of the Interior, et al., Civil No. C75-175, D. Wyo. Dismissed, Jan. 1, 1976.

***Weardco Construction Corp.*, 64 I.D. 376 (1957)**

Weardco Construction Corp. v. U.S., Civil No. 278-59-PH, S.D. Cal. Judgment for plaintiff, Oct. 26, 1959; satisfaction of judgment entered, Feb. 9, 1960.

***Estate of Mary Ursula Rock Wellknown*, 1 IBIA 83, 78 I.D. 179 (1971)**

William T. Shaw, Jr., et al. v. Rogers C. B. Morton et al., Civil No. 974, D. Mont. Dismissed, July 6, 1973 (opinion); no appeal.

***West Virginia Highlands Conservancy (The)*, 3 IBSMA 154, 88 I.D. 570 (1981)**

West Virginia Highlands Conservancy v. James Watt et al., Civil No. 81-0037-C(H), N.D. W. Va. Suit pending.

***Western Nuclear, Inc.*, 35 IBLA 146, 85 I.D. 129 (1978)**

Western Nuclear, Inc., a Del. Corp., authorized & doing business in the State of Wyo. v. Cecil Andrus, Secretary of the Interior, & U.S., Civil No. C78-129, D. Wyo. Judgment for defendant, 475 F. Supp. 654 (D. Wyo. 1979); appeal filed, Nov. 28, 1979.

***Minnie E. Wharton, John W. Wharton, Ruth Wharton James, Carroll Wharton, Iris Wharton Bartyl, Marvin Wharton, Thomas Wharton, Betty Wharton Zink, Faye Wharton Pamperien & Samuel Wharton*, 4 IBLA 287, 79 I.D. 6 (1972)**

U.S. & Rogers C. B. Morton, Secretary of the Interior v. Minnie E. & John W. Wharton, Ruth Wharton James, Carroll Wharton, Iris Wharton Bartyl, Marvin Wharton, Thomas Wharton, Betty Wharton Zink, Faye Wharton Pamperien & Samuel Wharton, Civil No. 70-106, D. Or. Judgment for defendant, Feb. 26, 1973; reconsideration denied, June 4, 1973; rev'd & remanded, 514 F.2d 406 (9th Cir. 1975); no petition.

***White Winter Coal, Inc.*, 1 IBSMA 305, 86 I.D. 675 (1979)**

White Winter Coal, Inc., v. Dept. of the Interior, Civil No. 3-80-3. Suit pending.

***Estate of Hiemstennie (Maggie) Whiz Abbott*, 2 IBIA 53, 80 I.D. 617 (1973); 4 IBIA 12, 82 I.D. 169 (1975); reconsideration denied, 4 IBIA 79 (1975)**

Doris Whiz Burkybile v. Alvis Smith, Sr. as Guardian Ad Litem for Zelma, Vernon, Kenneth, Mona & Joseph Smith, Minors, et al., Civil No. C-75-190, E.D. Wash. Judgment for defendant, Jan. 21, 1977; no appeal.

Estate of Joseph Willessi, 8 IBIA 295, 88 I.D. 561 (1981)

Leo Williams v. James Watt, Secretary of the Interior, et al., Civil No. C81-700, W.D. Wash. Suit pending.

Wilson Farms Coal Co., 2 IBSMA 118, 87 I.D. 245 (1980)

Wilson Farms Coal Co. v. Cecil D. Andrus, Secretary of the Interior, Civil No. 80150, E.D. Ky. Suit pending.

Frank Winegar, Shell Oil Co. & D. A. Shale, Inc., 74 I.D. 161 (1967)

Shell Oil Co. et al. v. Udall et al., Civil No. 67-C-321, D. Colo. Judgment for plaintiff, Sept. 18, 1967; no appeal.

Appeal of Wisenak, Inc., 1 AN CAB 157, 83 I.D. 496 (1976)

Wisenak, Inc., an Alaska Corp. v. Thomas S. Kleppe, Individ. & as Secretary of the Interior & the U.S., Civil No. F76-38 Civ., D. Alaska. Remanded to Department for further proceedings, July 9, 1979.

Estate of Wook-Kah-Nah, Comanche Allottee No. 1927, 65 I.D. 436 (1958)

Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah (Deceased), Comanche Enrolled Restricted Indian No. 1927 v. Jane Asenap, Wilfred Tabbytite, J. R. Graves, Examiner of Inheritance, Bureau of Indian Affairs, Dept. of the Interior & Earl R. Wiseman, District Dir. of Internal Revenue, Civil No. 8281, W.D. Okla. Dismissed as to the Examiner of Inheritance; plaintiff dismissed suit without prejudice as to the other defendants.

Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah v. Stewart L. Udall, Civil No. 2595-60. Judgment for defendant, June 5, 1962; remanded, 312 F.2d 358 (1962).

State of Wyoming, 27 IBLA 137, 83 I.D. 364 (1976)

State of Wyoming, Albert E. King, Comm'r of Public Lands v. Cecil D. Andrus, Secretary of the Interior, Civil No. C77-034K, D. Wyo. Judgment for defendant, Sept. 8, 1977; *aff'd*, July 18, 1979.

Zapata Coal Corp., 2 IBSMA 9, 87 I.D. 11 (1980)

Zapata Coal Corp. v. Cecil D. Andrus, Civil No. 80-2058, S.W. W. VA. Suit pending.

Zeigler Coal Co., 81 I.D. 729 (1974)

International Union of United Mine Workers of America v. Stanley K. Hathaway, Secretary of the Interior, No. 75-1003, U.S. Ct. of Appeals, D.C. Cir. *Rev'd & remanded* to the Board for further proceedings, 532 F.2d 1403 (1976).

Zeigler Coal Co., 82 I.D. 36 (1975)

Zeigler Coal Co. v. Kent Frizzell, Acting Secretary of the Interior, No. 75-1139, U.S. Ct. of Appeals, D.C. Cir. Judgment for defendant, 536 F.2d 398 (1976).

TABLE OF CASES CITED

	Page		Page
A&J Construction Co., IBCA 1142-2-77 (Dec. 28, 1978), 85 I.D. 468, 79-1 BCA par. 13,621.....	145, 398	Andrus v. Shell Oil Co., 446 U.S. 657 (1980).....	18, 226
Alabama v. Schmidt, 232 U.S. 168 (1914).....	468	Antonovich, George, 76 IBLA 301, 90 I.D. 464 (1983).....	555
Alaska v. Kleppe, 9 E.R.C. 1497 (D.D.C. 1976).....	347	Apache Mining Co., 1 IBSMA 14, 85 I.D. 395 (1978).....	507
Alaska Miners v. Andrus, 662 F.2d 77 (9th Cir. 1981); <i>accord</i> , United States Steel Corp., 7 ANCAB 106, 89 I.D. 293 (1982).....	293	Applicability of Mining Laws to Revested Oregon & California & Reconveyed Coos Bay Grant Lands, 57 I.D. 365 (1941).....	554
Alaska, State of, 73 I.D. 1 (1966); <i>aff'd sub nom. Udall v. Kalerak</i> , 396 F.2d 746 (9th Cir. 1968), <i>cert. denied</i> , 393 U.S.1118 (1969).....	547	Arata, Mary I., 4 IBLA 201, 78 I.D. 397 (1971).....	436
Alaska, State of, Dept. of Transportation & Public Facilities (On Reconsideration), 7 ANCAB 188, 89 I.D. 346 (1982).....	293	Argosy Ltd. v. Hennigan, 404 F.2d 14 (5th Cir. 1968).....	423
Alaska, State of, & Seldovia Native Ass'n, 2 ANCAB 1, 84 I.D. 349 (1977).....	293	Ass't Attorney General's Opinion, "Authority to Withdraw Lands Within a Forest Reserve," 35 L.D. 262 (1906).....	13
Aleutian/Pribilof Islands Ass'n, Inc. v. Acting Deputy Ass't Secretary—Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982).....	334	A. S. Wikstrom, Inc., IBCA 466-11-64 (Mar. 23, 1965), 65-1 BCA par. 4725.	442
Allen, Matthew v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982).....	98, 171, 392, 529	Atlas Can Corp., ASBCA No. 3381 (June 6, 1960), 60-1 BCA par. 2651..	305
Almasy, Theodore J., 69 IBLA 160, 89 I.D. 619 (1982).....	292	Aywon Wire & Metal Corp., ASBCA No. 4966 (Sept. 27, 1963), 1963 BCA par. 3912.....	305
Amdata Systems, Inc., ASBCA No. 27211 (Nov. 11, 1982), 83-1 BCA par. 16,197.....	229	Bache Halsey Stuart, Inc. v. French, 425 F. Supp. 1231 (D.D.C. 1977).....	251
American Airlines, Inc. v. CAB, 565 F.2d 939 (9th Cir. 1966).....	257	Baifield Industries, Division of A-T-O, Inc., ASBCA Nos. 13,418, 13,555, 17,241, 77-1 BCA par. 12,308.....	370
American Ligurian Co., IBCA 492-4-65 (Jan. 21, 1966), 73 I.D. 15, 66-1 BCA par. 5,326.....	157	Ballard E. Spencer Trust, Inc. v. Morton, 18 IBLA 25 (1974); <i>aff'd</i> , 544 F.2d 1067 (10th Cir. 1976).....	437
American Smelting & Refining Co. v. County of Knox, 60 Ill.2d 133, 324 N.E.2d 398 (1974).....	59	Barden v. Northern Pacific Railroad, 154 U.S. 288 (1894).....	554
		Bartley, Gobel, 4 IBSMA 219, 89 I.D. 628 (1982).....	186
		Bennett v. Baxley, 2 L.D. 151 (1884)....	342
		Bennett v. U.S., 178 Ct. Cl. 61 (1967)...	27
		Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill. 1982).....	392
		Bishop v. Norell, 88 Ariz. 148, 353 P.2d 1022 (1960).....	436

	Page		Page
Blackburn v. City of Paducah, 441 S.W.2d 395 (Ky. 1969).....	436	Cheyenne-Arapaho Tribes of Western Oklahoma v. Deputy Ass't Secretary—Indian Affairs (Operations), 11 IBIA 54, 90 I.D. 61 (1983).....	103, 481
Boesche v. Udall, 373 U.S.472 (1963) ...	248	C.I.C. Construction Co., Inc., IBCA 1190-4-78 (Sept. 25, 1979), 86 I.D. 475, 79-2 BCA par. 14,057.....	34, 370
Boyajian v. U.S., 423 F.2d 1231 (Ct. Cl. 1970).....	104	Cincinnati Electronics Corp., ASBCA No. 23742 (Oct. 19, 1979), 79-2 BCA par. 14,145.....	443
Branch Banking & Trust Co. v. U.S., 120 Ct. Cl. 72 (1951).....	240	City of New York v. U.S. Environmental Protection Agency, 543 F. Supp. 1084 (S.D.N.Y. 1981).....	349
Brookfield Construction Co., Inc. v. U.S., 661 F.2d 159 (Ct. Cl. 1981).....	394, 421	COAC, Inc., IBCA 1004-9-73 (Dec. 6, 1974), 74-2 BCA par. 10,982, <i>On Motion for Reconsideration</i> (Feb. 19, 1975), 81 I.D. 700, 75-1 BCA par. 11,104.....	35
Brown v. Udall, 335 F.2d 706 (D.C. Cir. 1964).....	8	Coastal Cargo Co. v. U.S., 173 Ct. Cl. 259, 351 F.2d 1004 (1965).....	307
Brown v. U.S., 113 U.S. 568, 5 Sup. Ct. 648 (1885).....	365	Coastal States Energy Co., 70 IBLA 386 (1983), <i>appeal filed</i> , Coastal States Energy Co. v. Watt, No. 83-0730J (C.D. Utah filed, June 3, 1983).....	472
Brown, Charlotte E., 70 I.D. 491 (1963).....	108	Colorado Coal & Iron Co. v. U.S., 123 U.S. 307 (1887).....	469
Brown, Melvin A., 69 I.D. 131 (1962) ...	8	Combs v. Comm'r, 4 IBIA 27, 82 I.D. 184 (1975).....	528
Brown & Root, Inc. v. U.S., 126 Ct. Cl. 684 (1953).....	368	Commodity Futures Trading Comm'n v. Rosenthal & Co., 537 F. Supp. 1094 (N.D. Ill. 1982).....	394
Burfenning v. Chicago & c. Ry., 163 U.S. 321 (1896).....	468	545 F. Supp. 1017 (N.D. Ill. 1982).....	394
Burgett Investment, Inc., AGBCA No. 81-108-1 (Jan. 27, 1981), 81-1 BCA par. 14,913.....	45	Conn v. U.S., 68 F. Supp. 966 (Ct. Cl. 1946).....	378
Burke v. Southern Pacific R.R., 234 U.S. 669 (1914).....	467, 555	Connovichnah v. Acting Anadarko Area Director, 9 IBIA 179, 89 I.D. 71 (1982).....	174
Cameron v. U.S., 252 U.S. 450 (1920)....	14, 356	Consolidation Coal Co., 4 IBSMA 227, 89 I.D. 632 (1982).....	188
Carbon Fuel Co., 3 IBSMA 207, 88 I.D. 660 (1981).....	506	Constantino v. U.S., 536 F. Supp. 60 (E.D.Pa. 1982).....	394
Capt. Joe's Surplus Stores, ASBCA No. 26315 (Nov. 30, 1981), 82-1 BCA par. 15,523.....	227	Continental Chemical Corp., GSBICA No. 4483 (June 18, 1976), 76-2 BCA par. 11,948.....	32
Cataract Gold Mining Co., 43 L.D. 248 (1914).....	362	Conway v. Watt, 717 F.2d 512 (10th Cir. 1983).....	490
Central Colorado Contractors, Inc., IBCA 1203-8-78 (Mar. 25, 1983), 90 I.D. 109, 83-1 BCA par. 16,405.....	380	Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976).....	248
Central Pacific R.R. v. Valentine, 11 L.D. 238 (1890).....	554	Cooper v. Roberts, 59 U.S. (18 How.) 173 (18—).....	469
Centre Manufacturing Co. v. U.S., 183 Ct. Cl. 115 (1968).....	240		
Challinor, Jim, AGBCA No. 75-133 (June 12, 1978), 78-2 BCA par. 13,278.....	142		
Chantilly Construction Corp., ASBCA No. 24138 (Dec. 12, 1980), 81-1 BCA par. 14,863.....	73		
Charles T. Parker Construction Co., IBCA 335 (Jan. 29, 1964), 71 I.D. 6, 1964 BCA par. 4,017.....	31		

TABLE OF CASES CITED

LI

Page		Page
	Cosmic Construction Co., ASBCA No. 26537 (Dec. 30, 1981), 82-1 BCA par. 15,541, <i>aff'd</i> , (Appeal No. 23-82), 697 F.2d 1389 (Fed. Cir. 1983).....	227
	VACAB No. 1504 (Mar. 18, 1982), 82-1 BCA par. 15,696.....	443
	Cosmic Construction Co. v. U.S., 697 F.2d 1389 (Fed. Cir. 1982).....	495
	Cowell v. Lammers, 21 F. 200 (1884)....	467
	Daniel Brothers Coal Co., 2 IBSMA 45, 87 I.D. 138 (1980).....	178
	Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).....	336
	Davis v. Weibbold, 139 U.S. 507 (1891)	467
	De Haven v. Gott, 18 L.D. 144 (1894)...	342
	De Mauro Construction Corp., ASBCA No. 17029 (Apr. 28, 1977), 77-1 BCA par. 12,511.....	409
	Dean Prosser & Crew, IBCA 1471-6-81 (Aug. 28, 1981), 88 I.D. 809, 81-2 BCA par. 15,294.....	242
	D & D Mining Co., 4 IBSMA 113, 89 I.D. 409 (1982).....	53
	Diamond Coal & Coke Co., v. U.S., 233 U.S. 236 (1914).....	468
	Doe v. Waterloo Mining Co., 70 F. 455 (9th Cir. 1895).....	364
	Douglas & Other Lodes, 34 L.D. 556 (1906).....	384
	Drexler Construction Co., ASBCA No. 9776 (Feb. 17, 1966), 66-1 BCA par. 5,389.....	34
	Duluth & Iron Range Railroad Co. v. Roy, 173 U.S. 587 (1899).....	469
	East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911), <i>on rehearing</i> , 41 L.D. 255 (1912).....	272
	Eastover Mining Co., 2 IBSMA 70, 87 I.D. 172 (1980).....	507
	Eder Electric Co. v. U.S., 205 F. Supp. 305 (1962).....	155
	Ehrhardt v. Hogaboom, 115 U.S. 67 (1885).....	469
	E. H. White & Co., Appeal of, IBCA 1216-9-78 (July 19, 1982), 82-2 BCA par. 15,920.....	47
	El-Tronics, Inc., ASBCA No. 5457 (Feb. 28, 1961), 61-1 BCA par. 2,961.	443
	Emeco Industries, Inc. v. U.S., 202 Ct. Cl. 1006 (1973).....	241
	Emily Lode, 6 L.D. 220 (1887).....	384
	Facilities Construction Co., AGBCA No. 79-161-1 (Sept. 18, 1980), 80-2 BCA par. 14,678.....	45
	Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).....	341, 444
	Fehlhaber Corp. v. U.S., 138 Ct. Cl. 571 (1957).....	407
	Fidelity Construction Co., Inc., DOT CAB Nos. 1113, 1123 (Dec. 10, 1980), 80-2 BCA par. 14,819.....	305
	Fidelity Construction Co. v. U.S., 700 F.2d 1379 (Fed. Cir. 1983).....	381, 493
	Filippo v. Secretary of Health & Human Services, — F. Supp. —, 51 U.S.L.W. 2705 (E.D.N.Y. May 4, 1983).....	393
	Florida Builders, Inc., ASBCA No. 8728 (Sept. 30, 1963), BCA par. 3,886.....	26
	Fort Berthold Land & Livestock Ass'n v. Aberdeen Area Director, 8 IBIA 230, 88 I.D. 315 (1981).....	96, 528
	Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).....	355
	Foster Construction C.A. v. U.S., 193 Ct. Cl. 587 (1970).....	407
	Foster Mining & Engineering Co., 7 IBLA 299, 79 I.D. 599 (1972).....	466
	Frank Briscoe Co., Inc., Appeal of, GSBCA No. 2591 (Sept. 11, 1968) 68-2 BCA par. 7,239.....	27
	Freeman Electric Construction Co., DOT CAB Nos. 74-23A, 74-23B (Dec. 6, 1976), 77-1 BCA par. 12,258.	35
	Futuronics, Inc., DOT CAB No. 67-15 (June 17, 1968), 68-2 BCA par. 7,079.....	32
	General Casualty Co. v. U.S., 130 Ct. Cl. 520 (1955).....	315
	Germania Iron Co. v. U.S., 165 U.S. 379 (1897).....	468
	Gibbs, Edwin G., 68 I.D. 325 (1961).....	9
	Gibbs, Lauren W., 67 I.D. 350 (1960)....	108
	Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708 (9th Cir. 1980).....	250
	Goldberg v. Kelly, 397, U.S. 254 (1970)	285
	Grafton Coal Co., 3 IBSMA 175, 88 I.D. 613 (1981).....	429
	Graybar Electric Co., IBCA 773-4-69 (Feb. 12, 1970), 70-1 BCA par. 8,121.	372

	Page		Page
Gunnell v. Nello L. Teer Co., 205 Va. 28, 135 S.E.2d 104 (1964)	399	International Tel. & Tel. Corp. v. Gen. Tel. Electronics Corp., 518 F.2d 913 (D.C. Cir. 1975).....	257
Hadley v. Baxendale, 156 Eng. Rep. 145 (1845).....	105	Jackson v. Anadarko Area Director, 4 IBIA 39, 82 I.D. 191 (1975)	97
Hahn v. U.S., 107 U.S. 402, 2 Sup. Ct. 494 (1882).....	365	J. A. LaPorte, Inc., IBCA 1014-12-73 (Sept. 29, 1975), 82 I.D. 459, 75-2 BCA par. 11,486)	141
Halvorson-Lents (A Joint Venture), IBCA 1059-2-75 (Mar. 3, 1977), 77-1 BCA par. 12,382	375	James Hamilton Construction Co., IBCA 493-5-65 (July 18, 1968), 75 I.D. 207, 68-2 BCA par. 7,127	141
Harper, David W., 74 I.D. 141 (1967) ...	547	James River Flood Control Ass'n v. Watt, 553 F. Supp. 1284 (D.S.D. 1982).....	216
Harry Claterbos Co., Appeal of, 10 IBCA 216, 84 I.D. 969 (1977)	62	Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912)	272
Hartley, Earl C., 65 I.D. 12 (1958)	108	Jewell Smokeless Coal Corp., 4 IBSMA 51, 89 I.D. 313 (1982).....	186
Hartley, Esdras K., 54 IBLA 38, 88 I.D. 437 (1981).....	20	J. F. Shea Co., Inc., IBCA No. 1191-4-78 (Mar. 30, 1982), 89 I.D. 153, 82-1 BCA par. 15,705.....	407
Heath v. Wallace, 138 U.S. 573 (1891).....	468	Johnson v. Cowan, 59 Pa. 275 (1868)....	399
Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969).....	270	Johnson, Ronald W., 3 IBSMA 118, 88 I.D. 495 (1981).....	55
H. M. Byars Construction Co., IBCA 1098-2-76 (June 7, 1977), 84 I.D. 260, 77-2, BCA par. 12,568	139	Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117 (S.D. Cal. 1948); <i>vacated on other grounds</i> , 89 F. Supp. 962 (S.D. Cal. 1950); <i>rev'd</i> , 188 F.2d 569 (9th Cir. 1951); <i>cert. denied</i> , 342 U.S. 820 (1951)	436
Holly Corp., ASBCA No. 24975 (Sept. 2, 1980), 80-2 BCA par. 14,675	45	Joseph Fusco Construction Co., GSBGA No. 5717 (Dec. 10, 1980), 81-1 BCA par. 14,837.....	78
Hoofnagle v. Anderson, 20 U.S. (7 Wheat.) 248 (1822).....	469	Joseph Pickard's Sons Co. v. U.S., 22 CCF par. 80,210, 209 Ct. Cl. 643 (1976).....	370
Houston Ready Cut House Co. v. U.S., 119 Ct. Cl. 120, 96 F. Supp. 629 (1951).....	26	Kammerman, Celia R., 66 I.D. 255 (1959).....	439
Howell, Corinne Mae v. U.S., 9 IBIA 70, 88 I.D. 822 (1981)	287	Keating v. Federal Aviation Admin., 610 F.2d 611 (9th Cir. 1979).....	349
H. R. Henderson & Co., ASBCA No. 5146 (Sept. 28, 1961), 61-2 BCA par. 3,166.....	143	Kenai Oil & Gas, Inc. v. Dept. of the Interior, 671 F.2d 383 (10th Cir. 1982).....	63
Human Advancement, Inc., HUDBCA 77-215-C15 (June 30, 1981), 81-2 BCA par. 15,317	315	Kent, DOT CAB No. 67-35 (Mar. 28, 1969), 69-1 BCA par. 7,590	138
Humble v. McMurtrie, 2 L.D. 161 (1884).....	342	Kent, d.b.a. Dorald Engineering Co., DOT CAB No. 67-35 (Mar. 28, 1969), 69-1 BCA par. 7,590	32
H. W. Caldwell & Son, Inc., IBCA 824-2-70 (May 30, 1973), 80 I.D. 345, 73-2 BCA par. 10,069	369	Kinzley v. U.S., 661 F.2d 187 (Ct. Cl. 1981).....	395
Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364 (9th Cir. 1976).....	18, 435		
Imperator Carpet & Interiors, Inc., GSBGA No. 6167 (July 31, 1981), 81-2 BCA par. 15,266.....	240		
In re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983).....	359, 512		
Instructions, 51 L.D. 62 (1925)	365		
57 I.D. 365 (1941)	14		
International Potato Corp. v. U.S., 142 Ct. Cl. 604 (1958).....	305		

TABLE OF CASES CITED

LIII

Page		Page
	Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 679 F.2d 64 (5th Cir. 1982); rehearing denied, 691 F.2d 502 (5th Cir. 1982)	
394	Kraus v. U.S., 177 Ct. Cl. 108 (1966)	140
	Kubista v. Romaine, 87 Wash. 2d 62, 549 P.2d 491 (1976)	95
	Lehman, Paul E. v. U.S., 673 F.2d 352 (Ct. Cl. 1982)	492
	Lincoln Construction Co., Appeal of, IBCA 438-5-64 (Nov. 26, 1965), 72 I.D. 492, 65-2 BCA par. 5,234	27
	L.T.D. Builders, ASBCA No. 28005 (June 16, 1983), 83-2 BCA par. 16,685	444
	Lyburn Construction Co., ASBCA 9576 (Jan. 26, 1965), 65-1 BCA par. 4645	315
	McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)	481
	McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir 1955)	474
	McKinley v. Wheeler, 130 U.S. 630 (1889)	364
	Marathon Battery Co., ASBCA No. 9464 (July 14, 1964), 1964 BCA par. 4,337	372
	Marvel Mining Co. v. Sinclair Oil & Gas Co., 75 I.D. 407 (1968)	356
	Massa, Albert C. (Supp.), 63 I.D. 279 (1956)	8
	Maxwell Land-Grant Case, 121 U.S. 325 (1887)	468
	Mell, J. D., 50 L.D. 308 (1924)	15
	Melsheimer v. Ass't Secretary for Indian Affairs, 11 IBIA 155, 90 I.D. 165 (1983)	171
	Menominee Tribe v. U.S., 391 U.S. 404 (1968)	481
	Merritt-Chapman & Scott Corp., IBCA 257 (June 22, 1961), 68 I.D. 164, 61-1 BCA par. 3064	442
	Mid-West Construction, Ltd. v. U.S., 181 Ct. Cl. 774 (1967)	307
	Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (5th Cir. 1968)	424
	Mobile Oil Corp., 35 IBLA 375, 85 I.D. 225 (1978)	86
	Monier v. U.S. Dept. of Transportation, 465 F. Supp. 718 (E.D. Wis. 1979)	349
	Monson, Mary Adele, 71 I.D. 269 (1964)	436
	Morlis Industries, Inc., ASBCA Nos. 12218, 12681 (May 14, 1968), 68-1 BCA par. 7,048	35
	Morrison-Knudsen Co., Inc. v. U.S., 184 Ct. Cl. 661 (1968)	141
	Morton v. Ruiz, 415 U.S. 199 (1974)..98, 171, 288, 377, 521, 537, 540	
	M & P Equipment Co., Appeal of, IBCA 1088-11-75 (Sept. 28, 1979), 86 I.D. 527, 79-2 BCA par. 14,094	31
	Mullins & Bolling Contractors, 4 IBSMA 156, 89 I.D. 475 (1982)	185
	Nat'l Lawyers Guild v. Atty General, 94 F.R.D. 616 (S.D.N.Y. 1982)	394
	Native Americans for Community Action v. Deputy Ass't Secretary—Indian Affairs (Operations), 11 IBIA 214, 90 I.D. 283 (1983).... 377, 396, 478	
	Navajo Tribe v. Comm'r of Indian Affairs, 10 IBIA 78, 89 I.D. 424 (1982).....284, 377, 519	
	Nemnich v. Colyar, 47 L.D. 5 (1919)....	343
	New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	394
	Noble v. Union River Logging R.R., 147 U.S. 165 (1893)	468
	Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).....	348
	Norair Engineering Corp., Appeal of, GSBCA 3593 (Jan. 16, 1975), 75-1 BCA par. 11,062	368
	Northern Pacific Railway, 32 L.D. 342 (1903)	555
	Nunes-Correia v. Haig, 543 F. Supp. 212 (D.D.C. 1982)	394
	Oakland Construction Co., Inc., IBCA 871-9-70 (Mar. 23, 1971), 71-1 BCA par. 8,766	34, 369
	Oglala Sioux Tribe v. Andrus, 603 F.2d 707 (8th Cir. 1979)	531
	Oglala Sioux Tribe v. Comm'r of Indian Affairs, 7 IBIA 188, 86 I.D. 425 (1979)	102
	Old Ben Coal Co., 2 IBSMA 38, 87 I.D. 119 (1980)	180
	Oregon & California R.R. v. U.S., 238 U.S. 393 (1915)	191

	Page		Page
Oregon Portland Cement Co., 6 ANCAB 65, 88 I.D. 760 (1981).....	293	Roberts v. Johnson, 212 F.2d 672 (10th Cir. 1954).....	436
Orndorff Construction Co., IBCA 372 (Oct. 25, 1967), 74 I.D. 305, 67-2 BCA par. 6,665.....	162	Roberts, John, 55 I.D. 430 (1935).....	556
Otis Steel Products Corp. v. U.S., 161 Ct. Cl. 694, 316 F.2d 937 (1963).....	304, 307	Roehm v. Horst, 178 U.S. 1 (1900).....	101
Pacific Alaska Contractors, Inc. v. U.S., 193 Ct. Cl. 850 (1971).....	23	Roland Electrical Inc. v. Walling, 326 U.S. 657 (1946).....	178
Pack, D. E., 30 IBLA 166, 84 I.D. 192 (1977).....	436	Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982).....	471
(On Reconsideration), 38 IBLA 23, 85 I.D. 408 (1978).....	436	R & R Construction Co., IBCA 413 & 458-9-64 (Sept. 27, 1965), 72 I.D. 385, 65-2 BCA par. 5,109.....	29
Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R., 353 U.S. 436 (1957)	335	Ruff, John K. v. U.S., 96 Ct. Cl. 148 (1942).....	407
Paragon Energy Corp. v. U.S., 645 F.2d 966 (Ct. Cl. 1981).....	443	Runnells v. Andrus, 484 F. Supp. 1234 (D.C. Utah 1980).....	436
Parcoa, Inc., AGBCA 76-30 (July 19, 1977), 77-2 BCA par. 12,658.....	315	Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975).....	481
Pathfinder Mines Corp., 70 IBLA 264, 90 I.D. 10 (1983).....	435	Saturn Construction Co., Inc., ASBCA No. 22653 (1982), 82-1 BCA par. 15,704.....	405
Paul E. Lehman, Inc. v. U.S., 673 F.2d 352 (Ct. Cl. 1982).....	443	Schweiker v. Hansen, 450 U.S. 785 (1981).....	241
P & G Mining Co., 67 I.D. 217 (1960)....	13	Scientist's Institute for Public Infor- mation v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).....	347
Phillips Co. v. Walling, 324 U.S. 490 (1945).....	178	SEACC v. Watson, 697 F.2d 1305 (1983).....	363
Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. 1982).....	394	Secretarial Order No. 3016, 85 I.D. 1 (1977).....	293
Piedmont & Northern Ry. v. Comm'n, 286 U.S. 299 (1932).....	178	Secretary's Opinion, 28 L.D. 178 (1899).....	365
Plemens v. Didde-Glaser, Inc., 244 Md. 556, 224 A.2d 464 (1966).....	436	Securities & Exchange Comm'n v. C. M. Joiner Leasing Corp., 320 U.S. 344, 64 S.Ct. 120 (1943).....	424
Polley's Lumber Co. v. U.S., 115 F.2d 751 (9th Cir. 1940).....	96	Sellick, Brent L., GSBCA No. 4879 (Apr. 21, 1978), 78-1 BCA par. 13,196.....	229
Priebe & Sons, Inc. v. U.S., 332 U.S. 407 (1947).....	95, 373	Servicemaster of West Central Geor- gia, DOT CAB No. 1096 (Sept. 17, 1980), 80-2 BCA par. 14,676.....	46
Prime Roofing, Inc., ASBCA No. 25836 (Dec. 17, 1981), 82-1 BCA par. 15,667.....	240	Sessions, Inc. v. Miguel, 4 IBIA 84, 82 I.D. 331 (1975).....	253
Putman v. Ickes, 78 F.2d 223 (D.C. Cir.), cert. denied, 296 U.S. 612 (1935).....	469	Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Cal. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974).....	247, 332
R. A. Heintz Construction Co., IBCA 403 (June 30, 1966), 73 I.D. 196, 66- 1 BCA par. 5,663.....	375	Sessions, Inc. v. Ortner, 3 IBIA 145, 81 I.D. 651 (1974).....	253
Republic Aviation Corp., ASBCA No. 6826 (June 28, 1963), 1963 BCA par. 3,789.....	45	Shafco Industries, Inc., IBCA 1447-3- 81 (Mar. 16, 1982), 89 I.D. 92, 82-1 BCA par. 15,683.....	242
Rice v. U.S., 192 Ct. Cl. 903 (1970).....	48		
Riverside General Construction Co., IBCA 1603-7-82 (Nov. 12, 1982), 89 I.D. 583, 82-3 BCA par. 16,127.....	227		

TABLE OF CASES CITED

LV

	Page		Page
Shoshone & Arapaho Tribes v. Comm'r of Indian Affairs, 9 IBIA 263, 89 I.D. 200 (1982).....	98, 171, 529	Strate, Roy I., ASBCA No. 19914 (Mar. 29, 1978), 78-1 BCA par. 13,128.....	409
Skelly & Loy v. U.S., 685 F.2d 414 (Ct. Cl. 1982).....	443, 493	Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).....	216
Skoko v. Andrus, 638 F.2d 1154 (9th Cir. 1979).....	213	Sunny Cove Development Corp. v. Cruz, 3 IBIA 33, 81 I.D. 465 (1974)....	253
Smelting Co. v. Kemp, 104 U.S. 636 (1881).....	468	Sunset Construction, Inc., IBCA 494-9-64 (Oct. 29, 1965), 72 I.D. 440, 65-2 BCA par. 5,188.....	157
Smith v. U.S., 113 F.2d 191 (10th Cir. 1940).....	247	Tacoma & Roche Harbor Lime Co., 43 L.D. 128 (1914).....	384
Soledad Enterprises, ASBCA Nos. 20,376, 20,423, 20,424, 20,425, 20,426 (Apr. 19, 1977), 77-2 BCA par. 12,552.....	368	Tallman, James K., 68 I.D. 256 (1961), <i>aff'd</i> , Udall v. Tallman, 380 U.S. 1 (1965).....	20
Solicitor's Opinion, M-36584, 66 I.D. 361 (1959).....	384	Taylor, William G., 60 I.D. 227 (1948)..	108
M-36670, 71 I.D. 337 (1964).....	7	Texaco, Inc. v. Short, 454 U.S. 516 (1982).....	295
M-36900, 86 I.D. 293 (1979).....	345	T & H Construction, ASBCA Nos. 26561, 26726 (Dec. 29, 1982), 83-1 BCA par. 16,247.....	492
M-36914, 86 I.D. 553 (1979).....	81	Tibbets, Everett Elvin, 61 I.D. 397 (1954).....	468
M-36914 (Supp. I), 88 I.D. 1055 (1981).....	83	Tilton Machine & Tool Co., GSBCA No. 4198 (Feb. 6, 1976), 76-1 BCA par. 11,750.....	32
Southern Pacific Transportation Co. v. Watt, 700 F.2d 550 (1983).....	478	TMW, Joint Venture, ASBCA No. 24349 (Mar. 28, 1980), 80-1 BCA par. 14,389.....	443
Space Age Engineering, ASBCA No. 26028 (Apr. 22, 1982), 82-1 BCA par. 15,766.....	240	Tollage Creek Elkhorn Mining Co., 2 IBSMA 341, 87 I.D. 570 (1980); <i>aff'd mem.</i> , Tollage Creek Elkhorn Mining Co. v. Watt, No. 80-230 (E.D. Ky. 1982).....	429
Spencer v. Lapsley, 61 U.S. (20 How.) 264 (1857).....	469	Topaz Beryllium Co. v. U.S., 649 F.2d 775 (10th Cir. 1981).....	295
Spokane Inland Empire R.R. v. U.S., 241 U.S. 344 (1916).....	178	Topliff v. Topliff, 121 U.S. 121 (1887)...	26
Squire v. Capoeman, 351 U.S. 1 (1956)	168	Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966), <i>cert. denied</i> , 385 U.S. 1007, <i>rehearing denied</i> , 386 U.S. 939 (1967).....	247
Starr v. Federal Aviation Admin., 589 F.2d 307 (7th Cir. 1978).....	349	Underwood v. Pierce, 547 F. Supp. 256 (C.D. Calif. 1982).....	394
Stateside Machinery Co., Ltd. v. Alperin, 591 F.2d 234 (3rd Cir. 1979)....	250	Union National Bank & Trust Co. v. Board of Supervisors, 65 Ill. App. 3d 1004, 382 N.E. 2d 1382 (1978).....	59
Steel v. Smelting Co., 106 U.S. 447 (1882).....	468	United Indians of All Tribes Foundation v. Acting Deputy Ass't Secretary—Indian Affairs (Operations), 11 IBIA 226, <i>modified upon recon.</i> , 11 IBIA 276, 90 I.D. 376 (1983).....	516
Steenberg Construction Co., IBCA 520-10-65 (May 8, 1972), 79 I.D. 153, 72-1 BCA par. 9459.....	457		
Stewart v. Provence, 24 L.D. 522 (1897).....	342		
Stowhy, Estate of, 1 IBIA 269, 79 I.D. 428 (1972).....	174		
St. Pierre, Roger v. Comm'r of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982), disapproved in part, on other grounds, Burnette v. Deputy Ass't Secretary, 10 IBIA 464, 89 I.D. 609 (1982).....	69		

	Page		Page
U.S. v. Aberdeen Acting Area Director & Celina Young Bear Mossette, 9 IBIA 151, 89 I.D. 49 (1982).....	91	U.S. v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977), <i>aff'd sub nom. South Dakota v. Andrus</i> , 614 F.2d 1190, <i>cert. denied</i> , 449 U.S. 822 (1980).....	364
U.S. v. Acting Aberdeen Area Director, 9 IBIA 151, 89 I.D. 49 (1982).....	252	U.S. v. Polino, 131 F. Supp. 772 (N.D.W.Va. 1955).....	58
U.S. v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971).....	466, 558	U.S. v. Reylea, A-30909 (June 25, 1968), <i>aff'd</i> , Reylea v. Udall, Civ. No. 3-58-20 (D. Idaho 1970).....	270
U.S. v. Curtis-Nevada Mines, Inc., 415 F. Supp. 1373 (E.D. Cal. 1976).....	385	U.S. v. Strauss, 59 I.D. 129 (1945).....	355
611 F.2d 1277 (9th Cir. 1980).....	385	U.S. v. 2,005.32 Acres of Land, 160 F. Supp. 193 (D.S.D. 1958).....	480
U.S. v. Dawson, 58 I.D. 670 (1944).....	362	U.S. v. Union Oil Co. of California, 549 F.2d 1271 (9th Cir. 1977), <i>cert. denied</i> , 434 U.S. 930 (1978).....	467
U.S. v. Denison, 76 I.D. 233 (1969).....	360	U.S. v. Utah Construction & Mining Co., 384 U.S. 394 (1966).....	27
U.S. v. Electronic Missile Facilities, Inc., 364 F.2d 705 (2d Cir.), <i>cert. denied</i> , 385 U.S. 924 (1966).....	250	U.S. v. Watkins, A-30659 (Oct. 19, 1967), <i>aff'd sub nom. Barton v. Morton</i> , 498 F.2d 288 (9th Cir. 1974)	270
U.S. v. El Portal Mining Co., 55 I.D. 348 (1935).....	384	U.S. v. Weber Oil Co., 68 IBLA 37, 89 I.D. 538 (1982).....	271
U.S. v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970).....	285	U.S. v. Weiss, 642 F.2d 296 (9th Cir. 1981).....	385
U.S. v. Gunsight Mining Co., 5 IBLA 62 (1972), <i>aff'd</i> , Gunsight Mining Co. v. Morton, Civ. No. 72-92 TUX-JAW (D. Ariz. Sept. 12, 1973).....	274	U.S. Building Maintenance, ASBCA No. 20,887, 77-1 BCA par. 12,497....	370
U.S. v. Harris, 100 F.2d 268 (9th Cir. 1938).....	96	United Telecommunications, Inc., NASA BCA No. 771-13 (Oct. 31, 1972), 72-2 BCA par. 9,754.....	23
U.S. v. Henault Mining Co., 73 I.D. 184 (1966).....	271	Urban Data Systems, Inc. v. U.S., 699 F.2d 1147 (1983).....	241
U.S. v. H.G.D. & J. Mining Co., 561 F. Supp. 315 (S.D. W.Va. 1983).....	424	Utah v. Kleppe, 586 F.2d 756 (10th Cir. 1978), <i>rev'd on other grounds sub nom. Andrus v. Utah</i> , 446 U.S. 500 (1980).....	468
U.S. v. Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Calif. 1977), <i>aff'd mem.</i> , 625 F.2d 330 (9th Cir. 1980)....	95	Vallerto v. Patencio, 2 IBIA 140, 81 I.D. 9 (1974).....	253
U.S. v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973).....	363	Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604 (1982).....	3, 178, 186
U.S. v. Langmade, 52 I.D. 700 (1929)....	362	Vitarelli v. Seaton, 359 U.S. 535 (1959).....	529
U.S. v. Larsen, 9 IBLA 247 (1973), <i>aff'd</i> , Larsen v. Morton, Civ. No. 73-119 TUC-JAW (D. Ariz. Oct. 24, 1974).....	270	Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)..	216
U.S. v. Lavenson, 206 F. 755 (W.D. Wash. 1913).....	362	VTN Colorado, IBCA 1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542.....	240, 442
U.S. v. Lillibridge, 4 F. Supp. 204 (S.D. Cal. 1932).....	362	Walch Logging Co. v. Portland Ass't Area Director (Economic Development), 11 IBIA 85, 90 I.D. 88 (1983).....	252, 398, 527
U.S. v. Mitchell, 445 U.S. 535 (1980)....	394		
U.S. v. Moore, 95 U.S. 760 (1877).....	365		
U.S. v. Munsey Trust Co., 332 U.S. 234 (1947).....	45		
U.S. v. New Mexico, 438 U.S. 696 (1978).....	82		
U.S. v. Payne, 68 I.D. 250 (1961).....	556		

TABLE OF CASES CITED

LVII

	Page		Page
Walker v. U.S., 83 F.2d 103 (8th Cir. 1936).....	378	Williams v. Lee, 358 U.S. 217 (1959)....	480
Washington v. Seattle School Dist. No. 1, — U.S. —, 102 S. Ct. 3187 (1982).....	393	Wiskeno v. Deputy Ass't Secretary— Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982).....	65, 249, 334
Weiner v. Mullaney, 59 Cal. App. 2d 620, 140 P.2d 704 (1943).....	436	W. M. Schlosser Co. v. U.S., 705 F.2d 1336 (Fed. Cir. 1983).....	492
West v. Standard Oil Co., 278 U.S. 200 (1929).....	467	Wolverton v. Schweiker, 533 F. Supp. 420 (D. Id. 1982).....	394
Westclox Military Products, ASBCA No. 25592 (Aug. 4, 1981), 81-2 BCA par. 15,270.....	443	Woolard, William Thomas, Appeal of, 2 ANCAB 150, 84 I.D. 891 (1977).....	545
Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981).....	295	Worcester v. Georgia, 31 U.S. (6 Pet.) 214 (1832).....	480
Western Pacific Enterprises, ASBCA No. 25822 (June 17, 1981), 81-2 BCA par. 15,217.....	227	Wong Yang Sung v. McGrath, 339 U.S. 33; <i>modified</i> , 339 U.S. 908 (1950).....	395
Whitlock Corp. v. U.S., 141 Ct. Cl. 758 (1958).....	368	WPC Enterprises, Inc. v. U.S., 163 Ct. Cl. 1 (1964).....	142, 307
W. H. Moseley Co., Inc. v. U.S., 677 F.2d 850 (Ct. Cl. 1982).....	443, 492	Wyoming, State of, 27 IBLA 137, 83 I.D. 364 (1976), <i>aff'd sub nom.</i> Wyoming v. Andrus, 602 F.2d 1379 (10th Cir. 1979).....	365
Wickes Engineering & Construction Co., IBCA 191 (Nov. 30, 1960), 61-1 BCA par. 2,872.....	369	Yavapai-Prescott Indian Tribe v. Watt, 528 F. Supp. 695 (D. Ariz. 1981).....	247
Wilcox v. Jackson, 13 U.S. 266, 13 Peters 498 (1839).....	13	Young Bear, Victor, Estate of, 8 IBIA 254, 88 I.D. 410 (1981).....	285
William A. Smith Contracting Co., IBCA 88 (June 16, 1959), 66 I.D. 233, 59-1 BCA par. 2,223.....	157	Zarr, Diane v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983).....	288, 333, 396, 478

TABLE OF OVERRULED AND MODIFIED CASES FOR THE DEPARTMENT OF THE INTERIOR ¹

Volumes 1 to 90, inclusive

- Administrative Ruling (43 L.D. 293); modified, 48 L.D. 97 (1921).
- Administrative Ruling (46 L.D. 32); vacated 51 L.D. 287 (1925).
- Administrative Ruling (52 L.D. 359); distinguished, 59 I.D. 4, 5 (1945).
- Administrative Ruling Mar. 13, 1935; overruled, 58 I.D. 65, 81 (See 59 I.D. 69, 76 (1945)).
- Affinity Mining Co., 5 IBMA 126, 82 I.D. 439, 1975-76 OSHD par. 19,992 (1975); set aside. Order of dismissal below vacated & case remanded; 6 IBMA 193, 83 I.D. 236 (1976).
- Ahvakana, Lucy S., 3 IBLA 341 (1971); overruled to extent inconsistent, U.S. v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).
- Alabama By-Products Corp., 6 IBMA 168, 1975-76 OSHD par. 20,756 (1976); set aside, 7 IBMA 85, 83 I.D. 574 (1976).
- Alaska Commercial Co. (39 L.D. 597); vacated, 41 L.D. 75 (1912).
- Alaska Copper Co. (32 L.D. 128); modified in part, 37 L.D. 674; 42 L.D. 255 (1913).
- Alaska-Dano Mines Co. (52 L.D. 550); overruled so far as in conflict, 57 I.D. 244 (1941).
- Alaska Railroad, 3 ANCAB 273, 86 I.D. 397 (1979); affirmed in part, vacated in part 3 ANCAB 351, 86 I.D. 452 (1979).
- Alaska, State of, 7 ANCAB 157, 89 I.D. 321 (1982); modified to the extent inconsistent, 67 IBLA 344 (1982).
- Alaska, State of & Seldovia Native Ass'n., 2 ANCAB 1, 84 I.D. 349 (1977); modified, Valid Existing Rights Under the Alaska Native Claims Settlement Act, Sec. Order No. 3016, 85 I.D. 1 (1978).
- Aldrich v. Anderson (2 L.D. 71); overruled 15 L.D. 201 (1892).
- Alheit, Rosa (40 L.D. 145); overruled so far as in conflict, 43 L.D. 342 (1914).
- Alien Heirs (2 L.D. 98); overruled, 16 L.D. 463, 464 (1893).
- Allen, Henry J. (37 L.D. 596); modified, 54 I.D. 4 (1932).
- Allen, Sarah E. (40 L.D. 586); modified, 44 L.D. 331 (1915).
- Americus v. Hall (29 L.D. 677); vacated, 30 L.D. 388 (1900).
- Amidon v. Hegdale (39 L.D. 131); overruled, 40 L.D. 259 (1911) (See 42 L.D. 557).
- Anderson, Andrew (1 L.D. 1); overruled, 34 L.D. 606 (1906) (See 36 L.D. 14).
- Anderson v. Tannehill (10 L.D. 388); overruled, 18 L.D. 586 (1894).
- Applicability of Montana Tax to Oil & Gas Leases of Ft. Peck Lands—Opinions of Assistant Secretary (Oct. 27, 1966); *superceded* to the extent that it is *inconsistent* with Solicitor's Opinion—Tax Status of the Production of Oil & Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Archer, J. D., A-30750 (May 31, 1967); overruled, 79 I.D. 416 (1972).
- Armstrong v. Matthews (40 L.D. 496); overruled so far as in conflict, 44 L.D. 156 (1915).
- Arnold v. Burger (45 L.D. 453); modified, 46 L.D. 320 (1918).
- Arundell, Thomas F. (33 L.D. 76); overruled so far as in conflict, 51 L.D. 51 (1925).
- Ashton, Fred W. (31 L.D. 356); overruled, 42 L.D. 215 (1913).
- Atlantic & Pacific R.R. (5 L.D. 209); overruled, 27 L.D. 241 (1898).
- Auerbach, Samuel H. (29 L.D. 208); overruled, 36 L.D. 36 (1907) (See 37 L.D. 715).

¹ For judicial modification and reversals see the Table of Suits for Judicial Review on page XI. Abbreviations used in this table are explained in the note on page LXXVI.

- Baca Float No. 3 (5 L.D. 705; 12 L.D. 676; 13 L.D. 624); vacated so far as in conflict, 29 L.D. 44 (1899).
- Bailey, John W. (3 L.D. 386); modified, 5 L.D. 513 (1887).
- Baker v. Hurst (7 L.D. 457); overruled, 8 L.D. 110 (1899) (See 9 L.D. 360).
- Barash, Max, 63 I.D. 51 (1956); overruled in part by Solicitor's Opinion—Issuance of Noncompetitive Oil & Gas Leases on Lands within the Geologic Structures of Producing Oil or Gas Fields, M-36686, 74 I.D. 285 (1967); overruled; Permian Mud Service, Inc., 31 IBLA 150, 84 I.D. 342 (1977).
- Barbour v. Wilson (23 L.D. 462); vacated, 28 L.D. 62 (1899).
- Barbut, James (9 L.D. 514); overruled so far as in conflict, 29 L.D. 698 (1900).
- Barlow, S. L. M. (5 L.D. 695); *contra*, 6 L.D. 648 (1888).
- Barnhurst v. State of Utah (30 L.D. 314); modified, 47 L.D. 359 (1920).
- Bartch v. Kennedy (3 L.D. 437); overruled, 6 L.D. 217 (1887).
- Beery v. Northern Pacific Ry. (41 L.D. 121); overruled, 43 L.D. 536 (1914).
- Bennet, Peter W. (6 L.D. 672); overruled, 29 L.D. 565 (1900).
- Bernardini, Eugene J. (62 I.D. 231); distinguished, 63 I.D. 102 (1956).
- Big Lark (48 L.D. 479); distinguished, 58 I.D. 680, 682 (1944).
- Birkholz, John (27 L.D. 59); overruled so far as in conflict, 43 L.D. 221 (1914).
- Birkland, Bertha M. (45 L.D. 104); overruled, 46 L.D. 110 (1917).
- Bivins v. Shelly (2 L.D. 282); modified, 4 L.D. 583 (1886).
- Black, L. C. (3 L.D. 101); overruled, 34 L.D. 606 (1906) (See 36 L.D. 14).
- Blenkner v. Sloggy (2 L.D. 267); overruled, 6 L.D. 217 (1887).
- Boeschen, Conrad William (41 L.D. 309); vacated, 42 L.D. 244 (1913).
- Bosch, Gottlieb (8 L.D. 45); overruled, 13 L.D. 42 (1891).
- Box v. Ulstein (3 L.D. 143); overruled, 6 L.D. 217 (1887).
- Boyle, William (38 L.D. 603); overruled so far as in conflict, 44 L.D. 331 (1915).
- Braasch, William C. & Christ C. Prange (48 L.D. 448); overruled so far as in conflict, 60 I.D. 417, 419.
- Bradford, J. L. (31 L.D. 132); overruled, 35 L.D. 399 (1907).
- Bradstreet v. Rehm (21 L.D. 30); rev'd, 21 L.D. 544 (1895).
- Brady v. Southern Pacific R.R. (5 L.D. 407 & 658); overruled, 20 L.D. 259 (1895).
- Brandt, William W. (31 L.D. 277); overruled, 50 L.D. 161 (1923).
- Braucht v. Northern Pacific Ry. (43 L.D. 536, 538); modified, 44 L.D. 225 (1915).
- Brayton, Homer E. (31 L.D. 364); overruled so far as in conflict, 51 L.D. 305 (1925).
- Brick Pomeroy Mill Site (34 L.D. 320); overruled, 37 L.D. 674 (1909).
- Brown v. Cagle (30 L.D. 8); vacated, 30 L.D. 148 (1900) (See 47 L.D. 406).
- Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 31 L.D. 222 (1902) (See 35 L.D. 399).
- Browning, John W. (42 L.D. 1); overruled so far as in conflict, 43 L.D. 342 (1914).
- Bruns, Henry A. (15 L.D. 170); overruled so far as in conflict, 51 L.D. 454 (1926).
- Bundy v. Livingston (1 L.D. 152); overruled, 6 L.D. 280, 284 (1887).
- Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472 (1913).
- Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321 (1913).
- Burkholder v. Skagen (4 L.D. 166); overruled, 9 L.D. 153 (1889).
- Burnham Chemical Co. v. United States Borax Co. (54 I.D. 183); overruled in substance, 58 I.D. 426, 429 (1944).
- Burns, Frank (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454 (1926).
- Burns v. Bergh's Heirs (37 L.D. 161); vacated, 51 L.D. 268 (1925).
- Buttery v. Sprout (2 L.D. 293); overruled, 5 L.D. 591 (1887).
- Cagle v. Mendenhall (20 L.D. 447); overruled, 23 L.D. 533 (1896).
- Cain v. Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62 (1899).
- California and Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453 (1898).
- California, State of (14 L.D. 253); vacated, 23 L.D. 230 (1896).
- 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 & 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.* (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.* (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 & Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17 (1921).
- Central Pacific R.R. (29 L.D. 589); modified, 48 L.D. 58 (1921).
- Central Pacific R.R. *v. Orr* (2 L.D. 525); overruled, 11 L.D. 445 (1890).
- Chapman *v. Willamette Valley & 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
- Claffin *v. Thompson* (28 L.D. 279); overruled, 29 L.D. 693 (1900).
- Claney *v. Ragland* (38 L.D. 550) (See 43 L.D. 485).
- Clark, Yulu S. (A-22852) Feb. 20, 1941, unreported; overruled so far as in conflict, 59 I.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 I.D. 417 (1960).
- Clipper Mining Co. *v. Eli Mining & Land Co.* (33 L.D. 660); no longer followed in part, 67 I.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, & Outer Continental Shelf Lands Act Royalty Clause, M-36888 (Oct. 4, 1976), 84 I.D. 54 (1977).
- Conduct, W. C. (A-23366) June 24, 1942, unreported; overruled so far as in conflict, 59 I.D. 258-260 (1946).
- Continental Oil Co., 68 I.D. 186 (1961); overruled in pertinent part by Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).
- Continental Oil Co., 74 I.D. 229 (1967); distinguished by Solicitor's Opinion, M-36927, 87 I.D. 616 (1980).
- Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 227 (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 & 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).
- Corlis *v. Northern Pacific R.R.* (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. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131 (1895).
- Davidson, Robert A., 13 IBLA 368 (1973); overruled to the extent inconsistent, J. Burton Tuttle, 49 IBLA 278, 87 I.D. 350 (1980).
- Davis, E. W., A-29889 (Mar. 25, 1964); no longer followed in part, 80 I.D. 698 (1973).
- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110 (1917).
- Debord, Wayne E., 50 IBLA 216, 87 I.D. 465 (1980); modified, 54 IBLA 61 (1981).
- 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 & Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122 (1898).
- Deseret Irrigation Co. *v.* Sevier River Land & 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 & 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. (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).
- Engelhardt, Daniel A., 61 IBLA 65 (1981); set aside (On Recon.), 62 IBLA 93, 89 I.D. 82 (1982).
- 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).
- Esplin, Lee J., 56 I.D. 325 (1938); overruled to extent it applies to 1926 Executive Order to artificially develop water sources on the public lands, by Solicitor's Opinion, M-36914, 86 I.D. 553 (1979), Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation & the Bureau of Land Management.

- 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).
- Filtrot Co. *v.* Brittan & 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 & Pacific R.R. (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. 265); overruled, 27 L.D. 421 (1898).
- Florida Railway & 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); rev'd, 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 IBMA 434, 81 I.D. 723, 1974-75 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); overruled, United States *v.* Winegar, Frank W., 16 IBLA 112, 81 I.D. 370 (1974).
- Reinstated by U.S. *v.* Bohme (Supp.), 51 IBLA 97, 87 I.D. 535 (1980).
- Freeman *v.* Texas & Pacific Ry. (2 L.D. 550); overruled, 7 L.D. 13, 18 (1888).
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581 (1926).
- Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181 (1962).
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57 (1880).
- Gallup *v.* Northern Pacific Ry. (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 & Oregon R.R. (5 C.L.O. 150); overruled, 1 L.D. 336, 342 (1882).
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81 (1887).
- Glassford, A. W., 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159 (1963).
- 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).
- Gohrman *v.* Ford (8 C.L.O. 6); overruled, 4 L.D. 580 (1886).
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250 (1908).
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88 (1901).
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580 (1936).
- Gotego Townsite *v.* Jones (35 L.D. 18), modified, 37 L.D. 560 (1909).
- 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).
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 459 (1897).
- Gregg *v.* State of Colorado (15 L.D. 151); vacated, 30 L.D. 310 (1900).
- Grinnel *v.* Southern Pacific R.R. (22 L.D. 438); vacated, 23 L.D. 489 (1896).

- Ground Hog Lode *v.* Parole & 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. (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 I.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. *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.* Letroadec'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.* Hempfling (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 & vacated, 39 L.D. 211 (1910).
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 L.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.
- Hildreth, 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, 234 (1899).
- Howard *v.* Northern Pacific R.R. (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. (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).
- Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36 (1932).
- Interstate Oil Corp. & Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 288 (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).
- Keller, Herman A., 14 IBLA 188, 81 I.D. 26 (1974); distinguished, Robert E. Belknap, 55 IBLA 200 (1981).
- 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. (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. (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 Follette, 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).
- L. A. Melka Marine Construction & Diving Co., Inc., IBCA-1511-9-81, 90 I.D. 322 (1983); vacated & appeal dismissed (On Recon.), IBCA-1511-9-81, 90 I.D. 491 (1983).
- 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. (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 insofar as it conflicts with Schweigert, Inc. *v.* United States, Court of Claims, No. 26-66 (Dec. 15, 1967) & Galland-Henning Manufacturing Co., 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 & 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. (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); 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).
- Loneragan *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).
- Mable 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. 181 (1914).
- Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536 (1914).
- Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, U.S. *v.* Flynn, 53 IBLA 208, 88 I.D. 373 (1981).
- Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 368 (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 & 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, William 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 & distinguished, 56 L.D. 340 (1938).
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494 (1893).
- McKittrick Oil Co. v. Southern Pacific R.R. (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, 53 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 (1955).
- Miller, Duncan, A-29760 (Sept. 18, 1963); overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (Dec. 2, 1966); overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (Apr. 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. Sébastian (19 L.D. 288); overruled, 26 L.D. 448 (1898).
- Milner & North Side R.R. (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. (12 L.D. 79); overruled, 29 L.D. 112 (1899).
- Miner v. Mariott (2 L.D. 709); modified, 28 L.D. 224 (1899).
- Minnesota & Ontario Bridge Co. (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).
- Mobil Oil Corp., 35 IBLA 375, 85 I.D. 225 (1978); limited in effect, Carl Gerard, 70 IBLA 343 (1983).
- 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 (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 & 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551 (1908).
- Mountain Fuel Supply Co., 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 & Arnold Scott *v.* Smitty Baker Coal Co., 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 (1961); as supplemented, 71 I.D. 486 (1964); vacated, 72 I.D. 536 (1965).
- National Livestock Co. & Zack Cox, I.G.D. 55 (1938); 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); distinguished, 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. (26 L.D. 252); modified, 30 L.D. 216 (1900).
- Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108 (1899).
- Newlon, 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 (1898).
- Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).
- Northern Pacific R.R. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. (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. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224 (1894).
- Northern Pacific R.R. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191 (1895).
- Northern Pacific R.R. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464 (1898).
- Northern Pacific R.R. *v.* Marshall (17 L.D. 545); overruled, 28 L.D. 174 (1899).
- Northern Pacific R.R. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229 (1893).
- Northern Pacific R.R. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95 (1899).
- Northern Pacific R.R. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126 (1899).
- Northern Pacific R.R. *v.* Walters (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391 (1922).
- Northern Pacific R.R. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127 (1891).
- Northern Pacific Ry. (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. (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 & License Tax, Ft. Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); overruled by Solicitor's Opinion—Tax Status of the Production of Oil & 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 extend 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, opinion by Asst. Sec.; overruled by, Solicitor's Opinion—Tax Status of the Production of Oil & Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Opinion of Deputy Solicitor, M-36562, Aug. 21, 1959 (unpublished); overruled by Solicitor's Opinion, M-36911, 86 I.D. 151 (1979)—Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska.
- 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 on 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, M-27690, June 15, 1934, Migratory Bird Treaty Act; overruled to extent of conflict, M-36936, 88 I.D. 586 (1981).
- Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14; overruled so far as inconsistent, 77 I.D. 49 (1970).
- Opinion of Solicitor, 55 I.D. 466 (1936)—State of New Mexico, overruled to extent it applies to 1926 Executive Order to artificially developed water sources on public lands, Solicitor's Opinion, M-36914, 86 I.D. 553 (1979)—Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation & Bureau of Land Management.
- Opinion of Solicitor, M-28198, Jan. 8, 1936; finding, *inter alia*, that Indian title to certain lands within the Fort Yuma Reservation has been extinguished, is well founded & is affirmed by Solicitor's Opinion, M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within the Boundaries of the Ft. Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1885; overruled, Solicitor's Opinion, M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Fort Yuma (Now Called Quechan) Indian Reservation.
- 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-33183); 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 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, M-36410, Feb. 11, 1957—Imposition of North Dakota State Fish & Game Laws on Indian Claiming Treaty & Other Rights to Hunt & Fish; overruled to extent of conflict, M-36936, 88 I.D. 586 (1981).
- Opinion of Solicitor, M-36434 (Sept. 12, 1958); overruled to extent inconsistent, Smith, Turner, Jr., Signe D. Smith, 66 IBLA 1, 89 I.D. 386 (1982).
- 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 & 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, Aug. 26, 1959 (M-36575); affirmed in pertinent part by Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).
- Opinion of Solicitor, 68 I.D. 433 (1961); distinguished & 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); rev'd & withdrawn—Relocation of Flathead Irrigation Project's Kerr Substation & Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).
- Opinion of Solicitor—M-36779 (Nov. 17, 1969), Appeals of Freeport Sulphur Co. & Texas Gulf Sulphur Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to present value estimates & overruled with respect to applicability of exemption (5) of FOIA to present value estimates, Solicitor's Opinion, M-36918, 86 I.D. 661 (1979).
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- Opinion of Solicitor, M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within Boundaries of Ft. Yuma Indian Reservation as Established by Exec. Order of Jan. 9, 1885; overruled, Solicitor's Opinion, M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Ft. Yuma (Now Called Quechan) Indian Reservation.
- Opinion of Solicitor, M-36910, 86 I.D. 89 (1979); modified, M-36910 (Supp.), 88 I.D. 909 (1981).
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- Opinion of Solicitor, M-36915, 86 I.D. 400 (1979); modified to extent inconsistent, M-36915 (Supp. I), 90 I.D. 255 (1983).
- Opinions of Solicitor, Sept. 15, 1914, & Feb. 2, 1915; overruled, Sept. 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156 (1942)).
- Oregon and California R.R. 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).
- Orem Development Co. v. Leo Calder, A-26604 (Dec. 18, 1953), decision set aside & case remanded, A-26604 (On Recon.), 90 I.D. 223 (1983).
- 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. 284 & 624.
- 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 & 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. (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. Breazeale'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); modified, Vance W. Phillips & 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 L.D. 447; overruled so far as in conflict, 59 L.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 L.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 & vacated, 58 I.D. 272, 275, 290 (1942).
- Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320 (1866).
- Ranger Fuel Corp., 2 IBMA 163 (July 17, 1973), 80 I.D. 708; set aside by Memorandum Opinion & 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); rev'd, 21 L.D. 404 (1895).
- 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 Corp., 1 IBMA 71, 78 I.D. 362 (1971).
- Relocation of Flathead Irrigation Project's Kerr Substation & Switchyard, M-36735 (Jan. 31, 1968); reversed & withdrawn, M-36735 (Supp.), 83 I.D. 346 (1976).
- Rhonda Coal Co., 4 IBMSA 124, 89 I.D. 460 (1982); modified to extent inconsistent, Kimberly Sue Coal Co., Inc., 74 IBLA 170 (1983).
- 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. (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 & 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. (8 L.D. 255); modified, 13 L.D. 354 (1891) (See 32 L.D. 21).
- St. Paul, Minneapolis & Manitoba Ry. v. Fogelberg (29 L.D. 291); vacated, 30 L.D. 191 (1900).
- St. Paul, Minneapolis & Manitoba Ry. v. Hagen (20 L.D. 249); overruled, 25 L.D. 86 (1897).
- St. Pierre, Roger & the Original Chippewa Cree of the Rocky Boy's Reservation v. Comm'r of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982); overruled by an order: Burnette, Robert (Appellant) v. Deputy Ass't Secretary—Indian Affairs (Operations) (Appellee), 10 IBIA 464, 89 I.D. 609 (1982).
- Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93 (1910).
- Sangre de Cristo & Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88 (1921).
- Santa Fe Pacific R.R. 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); distinguished, 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. (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., 53 I.D. 213 (1930); overruled so far as in conflict, 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. (21 L.D. 432); vacated, 29 L.D. 135 (1899).
- Smith, M. P., 51 L.D. 251 (1925); overruled, Solicitor's Opinion, Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, & Outer Continental Shelf Lands Act Royalty Clause, M-36888 (Oct. 4, 1976), 84 I.D. 54 (1977).
- Snook, Noah A. (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364 (1914).
- Sorli v. Berg (40 L.D. 259); overruled, 42 L.D. 557 (1913).
- South Dakota Mining Co. v. McDonald, 30 L.D. 357 (1900); distinguished, 28 IBLA 187, 83 I.D. 609 (1976).
- Southern Pacific R.R. (15 L.D. 460); reversed, 18 L.D. 275 (1894).
- Southern Pacific R.R. (28 L.D. 281); recalled, 32 L.D. 51 (1903).
- Southern Pacific R.R. (33 L.D. 89); recalled, 33 L.D. 528 (1905).
- Southern Pacific R.R. v. Bruns (31 L.D. 272); vacated, 37 L.D. 243 (1908).
- South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523 (1922).
- Spaulding v. Northern Pacific R.R. (21 L.D. 57); overruled, 31 L.D. 151.
- Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467 (1889).

- Sprulli, Leila May (50 L.D. 549); overruled, 52 L.D. 339 (1928).
- Standard Oil Co. of Calif. (76 I.D. 271 (1969)); no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).
- Standard Oil Co. of Calif. v. Morton, 450 F.2d 493 (9th Cir. 1971); 79 I.D. 29 (1972).
- Standard Shales Products Co. (52 L.D. 552); overruled so far as in conflict, 53 I.D. 42 (1930).
- Star Gold Mining Co. (47 L.D. 38); distinguished, U.S. v. Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).
- State of Alaska, 7 ANCAB 157, 89 I.D. 321 (1982); modified to the extent inconsistent, 67 IBLA 344 (1982).
- State of Alaska & Seldovia Native Ass'n., Inc., 2 ANCAB 1, 84 I.D. 349 (1977); modified, Valid Existing Rights under the Alaska Native Claims Settlement Act, Sec Order No. 3016, 85 I.D. 1 (1978).
- State of California (14 L.D. 253); vacated, 23 L.D. 230 (1896) overruled, 31 L.D. 335 (1902).
- State of California (15 L.D. 10); overruled, 23 L.D. 423 (1896).
- State of California (19 L.D. 585); vacated, 28 L.D. 57 (1899).
- State of California (22 L.D. 428); overruled, 32 L.D. 34 (1903).
- State of California (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499; 46 L.D. 396).
- State of California (44 L.D. 118, 468); overruled, 48 L.D. 97 (1921).
- State of California v. Moccettini (19 L.D. 359); overruled, 31 L.D. 335 (1902).
- State of California v. Pierce (3 C.L.O. 118); modified, 2 L.D. 854 (1884).
- State of California v. Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343 (1894).
- State of Colorado (7 L.D. 490); overruled, 9 L.D. 408 (1889).
- State of Florida (17 L.D. 355); rev'd, 19 L.D. 76 (1894).
- State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).
- State of Louisiana (8 L.D. 126); modified, 9 L.D. 157 (1889).
- State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5 (1898).
- State of Louisiana (47 L.D. 366; 48 L.D. 201); overruled so far as in conflict, 51 L.D. 291 (1925).
- State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358 (1899).
- State of Nebraska v. Dorrington (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123 (1898).
- State of New Mexico (46 L.D. 217); overruled, 48 L.D. 98.
- State of New Mexico (49 L.D. 314); overruled, 54 L.D. 159 (1933).
- State of Utah (45 L.D. 551); overruled, 48 L.D. 97 (1921).
- State Production Taxes on Tribal Royalties from Leases Other Than Oil & Gas, M-36345 (May 4, 1956); overruled, Solicitor's Opinion—Tax Status of the Production of Oil & Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Stevenson, Heirs of v. Cunningham (52 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Stewart v. Rees (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401 (1900).
- Stirling, Lillie E. (39 L.D. 346); overruled, 46 L.D. 110 (1917).
- Stockley, Thomas J. (44 L.D. 178, 180); vacated, 260 U.S. 532 (See 49 L.D. 460, 461, 492 (1923)).
- Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51 (1925).
- Streit, Arnold (T-476 (Ir.)), Aug. 26, 1952, unreported; overruled, 62 I.D. 12 (1955).
- Stricker, Lizzie (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283 (1894).
- Stump, Alfred M. (39 L.D. 437); vacated, 42 L.D. 566 (1913).
- Sumner v. Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173 (1912).
- Superior Oil Co., A-28897 (Sept. 12, 1962); distinguished in dictum, 6 IBLA 318, 79 I.D. 439 (1972).
- Sweeney v. Northern Pacific R.R. (20 L.D. 394); overruled, 28 L.D. 174 (1899).
- Sweet, Eri P. (2 C.L.O. 18); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).
- Sweeten v. Stevenson (2 B.L.P. 42); overruled so far as in conflict, 3 L.D. 248 (1884).

- Taft *v.* Chapin (14 L.D. 593); overruled, 17 L.D. 414, 417 (1893).
- Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370 (1920).
- Talkington's Heirs *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200 (1892).
- Tate, Sarah J. (10 L.D. 469); overruled, 21 L.D. 209, 211 (1895).
- Taylor, Josephine (A-21994); June 27, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).
- Taylor *v.* Yates (8 L.D. 279); rev'd, 10 L.D. 242 (1890).
- Teller, John C. (26 L.D. 484); overruled, 36 L.D. 36 (1907) (See 37 L.D. 715).
- Thorstenson, Even (45 L.D. 96); overruled, 36 L.D. 36 (1907) (See 37 L.D. 258 (1919)).
- Tieck *v.* McNeil (48 L.D. 158); modified, 49 L.D. 260 (1922).
- Toles *v.* Northern Pacific Ry. (39 L.D. 371); overruled so far as in conflict, 45 L.D. 92, 93 (1915).
- Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27 (1925).
- Towl *v.* Kelly, 54 I.D. 455 (1934); overruled, Rosenbaum, Ralph F., 66 IBLA 374, 89 I.D. 415 (1982).
- Traganza, Mertie C. (40 L.D. 300); overruled, 42 L.D. 611, 612 (1913).
- Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98, 248 (1884).
- Tripp *v.* Dunphy (28 L.D. 14); modified, 40 L.D. 128 (1911).
- Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795 (1888).
- Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233 (1897).
- Tupper *v.* Schwarz (2 L.D. 623); overruled 6 L.D. 624 (1886).
- Turner *v.* Cartwright (17 L.D. 414); modified, 21 L.D. 40 (1895).
- Turner *v.* Lang (1 C.L.O. 51); modified, 5 L.D. 256 (1886).
- Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411 (1907).
- Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549 (1907).
- Union Oil Co. of California (Supp.), 72 I.D. 313 (1965); overruled & rescinded in part, U.S. *v.* Energy Resources Technology Land, Inc., et al., 74 IBLA 117 (1983).
- Union Pacific R.R. (33 L.D. 89); recalled, 33 L.D. 528 (1905).
- United Indians of All Tribes Foundation *v.* Acting Deputy Assistant Secretary—Indian Affairs, 11 IBIA 226 (1983); vacated in part, 11 IBIA 276, 90 I.D. 376 (1983).
- U.S. *v.* Barngrover (On Rehearing), 57 I.D. 533 (1942); overruled in part, U.S. *v.* Theresa B. Robinson, 21 IBLA 363, 82 I.D. 414 (1975).
- U.S. *v.* Bush (13 L.D. 529); overruled, 18 L.D. 441 (1894).
- U.S. *v.* Central Pacific Ry. (52 L.D. 81); modified, 52 L.D. 235 (1927).
- U.S. *v.* Dana (18 L.D. 161); modified, 28 L.D. 45 (1899).
- U.S. *v.* Edeline, 39 IBLA 236 (1979); overruled to extent inconsistent, U.S. *v.* J. Gary Feezor et al., 74 IBLA 56, 90 I.D. 262 (1983).
- U.S. *v.* Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285 (1971); set aside & case remanded, 12 IBLA 282, 80 I.D. 538 (1973).
- U.S. *v.* McClarty, Kenneth, 71 I.D. 331 (1964); vacated & case remanded, 76 I.D. 193 (1969).
- U.S. *v.* Melluzzo, Frank & Wanita, A-31042, 76 I.D. 181 (1969); reconsideration, 1 IBLA 37, 77 I.D. 172 (1970).
- U.S. *v.* Moutat, M. W. (60 I.D. 473); modified 61 I.D. 289 (1954).
- U.S. *v.* O'Leary, Keith V. (63 I.D. 341); distinguished, 64 I.D. 210, 369 (1957).
- Utah, State of (45 L.D. 551); overruled, 48 L.D. 97 (1921).
- Veach, Heir of Natter (46 L.D. 496); overruled so far as in conflict, 49 L.D. 461, 464 (1923) (See 49 L.D. 492 for adherence in part).
- Vine, James (14 L.D. 527); modified, 14 L.D. 622 (1892).
- Virginia-Colorado Development Corp. (53 I.D. 666); overruled so far as in conflict, 55 I.D. 287, 289 (1935).
- Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604 (1982); modified to extent inconsistent, Kimberly Sue Coal Co., Inc., 74 IBLA 170 (1983).
- Vradenburg's Heir *v.* Orr (25 L.D. 323); overruled, 38 L.D. 253 (1909).
- Wagoner *v.* Hanson (50 L.D. 355); overruled, 56 I.D. 325, 328 (1938).

- Wahe, John (41 L.D. 127); modified, 41 L.D. 636, 637 (1913).
- Walker v. Prosser (17 L.D. 85); rev'd, 18 L.D. 425 (1894).
- Walker v. Southern Pacific R.R. (24 L.D. 172); overruled, 28 L.D. 174 (1899).
- Wallis, Floyd A. (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22 (1963).
- Walters, David (15 L.D. 136); revoked, 24 L.D. 58 (1897).
- Warren v. Northern Pacific R.R. (22 L.D. 568); overruled so far as in conflict, 49 L.D. 391 (1922).
- Wasmund v. Northern Pacific R.R. (23 L.D. 445); vacated, 29 L.D. 224 (1899).
- Wass v. Milward (5 L.D. 349); no longer followed (See 44 L.D. 72 & unreported case of Ebersold v. Dickson, Sept. 25, 1918, D-36502).
- Wasserman, Jacob N., A-30275 (Sept. 22, 1964); overruled, 79 I.D. 416 (1972).
- Waterhouse, William W. (9 L.D. 131); overruled, 18 L.D. 586 (1894).
- Watson, Thomas E. (4 L.D. 169); recalled, 6 L.D. 71 (1887).
- Weathers, Allen E., Frank N. Hartley (A-25128), May 27, 1949, unreported; overruled in part, 62 I.D. 62 (1955).
- Weaver, Francis D. (53 I.D. 179); overruled so far as in conflict, 55 I.D. 287, 290 (1935).
- Weber, Peter (7 L.D. 476); overruled, 9 L.D. 150 (1889).
- Weisenborn, Ernest (42 L.D. 533); overruled, 43 L.D. 395 (1914).
- Werden v. Schlecht (20 L.D. 523); overruled so far as in conflict, 24 L.D. 45 (1897).
- Western Pacific Ry. (40 L.D. 411; 41 L.D. 599); overruled, 43 L.D. 410 (1914).
- Western Slope Gas Co., 40 IBLA 280, reconsideration denied, 48 IBLA 259 (1979); overruled in pertinent part, M-36917, 87 I.D. 27 (1980).
- Wheaton v. Wallace (24 L.D. 100); modified, 34 L.D. 383 (1906).
- Wheeler, William D. (30 L.D. 355); distinguished, & to the extent of any possible inconsistency overruled, 56 I.D. 73 (1937).
- White, Anderson (Probate 13570-35); overruled, 58 I.D. 149, 157 (1942).
- White, Sarah V. (40 L.D. 630); overruled in part, 46 L.D. 55, 56 (1917).
- Whitten v. Read (49 L.D. 253, 260; 50 L.D. 10); vacated, 53 I.D. 447 (1928).
- Wickstrom v. Calkins (20 L.D. 459); modified, 21 L.D. 533; overruled, 22 L.D. 392 (1896).
- Widow of Emanuel Prue (6 L.D. 436); vacated, 33 L.D. 409 (1905).
- Wiley, George P. (36 L.D. 305); modified so far as in conflict, 36 L.D. 417 (1908).
- Wilkerson, Jasper N. (41 L.D. 138); overruled, 50 L.D. 614 (1924) (See 42 L.D. 313).
- Wilkens, Benjamin C. (2 L.D. 129); modified, 6 L.D. 797.
- Williamette Valley & Cascade Mountain Wagon Road Co. v. Bruner (22 L.D. 654); vacated, 26 L.D. 357 (1898).
- Williams, John B., Richard & Gertrude Lamb (61 I.D. 31); overruled so far as in conflict, 61 I.D. 185 (1953).
- Willingbeck, Christian P. (3 L.D. 383); modified, 5 L.D. 409.
- Willis, Cornelius (47 L.D. 135); overruled, 49 L.D. 461 (1923).
- Willis, Eliza (22 L.D. 426); overruled, 26 L.D. 436 (1898).
- Wilson v. Heirs of Smith (37 L.D. 519); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Winchester Land & Cattle Co., 65 I.D. 148 (1958); no longer followed in part, 80 I.D. 698 (1973).
- Witbeck v. Hardeman (50 L.D. 413); overruled so far as in conflict, 51 L.D. 36 (1925).
- Wolf Joint Ventures, 75 I.D. 137 (1968); distinguished, U.S. v. Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).
- Wostenberg, William, A-26450 (Sept. 5, 1952); distinguished in dictum, 6 IBLA 318, 79 I.D. 439 (1972).
- Wright v. Smith (44 L.D. 226); overruled, 49 L.D. 374 (1922).
- Young Bear, Victor, Estate of, 8 IBIA 130, 87 I.D. 311 (1980); rev'd by Supp., 8 IBIA 254, 88 I.D. 410 (1981).
- Zeigler Coal Co., 4 IBMA 139, 82 I.D. 221, 1974-75 OSHD par. 19,638 (1975); overruled in part, Alabama By-Products Corp. (On Reconsideration), 7 IBMA 85, 83 I.D. 574 (1976).

Zimmerman v. Brunson (39 L.D. 310); overruled, 52 L.D. 714 (1929).

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.—Error.

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

VIRGINIA FUELS, INC.

5 IBSMA 1

Decided *January 19, 1983*

Appeal by Virginia Fuels, Inc., from the March 17, 1982, decision of Administrative Law Judge Tom M. Allen, upholding Office of Surface and Reclamation and Enforcement jurisdiction and thus sustaining the validity of Notice of Violation No. 81-I-87-12 and Cessation Order No. 81-I-87-1 (Docket Nos. CH 2-18-R and CH 2-37-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

The area of an access and haul road used by more than one coal mine operator is properly attributed, at least in part, to each operator in calculating the extent of the surface area affected by each operator for the purpose of determining whether the operator qualifies for the 2-acre exemption of sec. 528(2) of the Surface Mining Control and Reclamation Act of 1977 and 30 CFR 700.11(b). Where only one operator is using the haul road at the time a notice of violation is issued, the entire road may be properly attributed to that operator.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Generally

A road used in surface coal mining and reclamation operations is subject to regulation by OSM, unless it is shown to be maintained with public funds.

APPEARANCES: Dennis E. Jones, Esq., Jones and Godfrey, Lebanon, Virginia, for Virginia Fuels, Inc.; John Woodrum, Esq., and Robert Miller, Esq., Office of the Field Solicitor, Charleston, West Virginia, John Pendergrass, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

90 I.D. No. 1

*OPINION BY ADMINISTRATIVE JUDGE PARRETTE**INTERIOR BOARD OF SURFACE MINING AND RECLAMATION
APPEALS*

Virginia Fuels, Inc. (VFI), has appealed from the March 17, 1982, decision of Administrative Law Judge Tom M. Allen, Docket Nos. CH 2-18-R and CH 2-37-R, in which he held that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation (NOV) No. 81-I-87-12 and Cessation Order (CO) No. 81-I-87-1, charging VFI with three violations of the Act and with failure to abate two of the violations. Judge Allen found the evidence sufficient to hold VFI liable for the violations, and it appealed, essentially on the ground that the total area it had disturbed (excluding the haul road) was less than 2 acres, and that it was therefore exempt from coverage under the Act. We affirm the decision of the Administrative Law Judge.

Facts

On September 28, 1981, OSM Inspector Dewey K. Brook issued NOV No. 81-I-87-12 to VFI, alleging three violations of the regulations at the company's No. 1 Auger Mine, located off Route 638, near Dismal Creek, in Buchanan County, Virginia. The violations were (1) failure to install sedimentation ponds, (2) failure to maintain the access and haul road, and (3) failure to display a proper minesite identification sign. VFI applied for review, and the primary question presented at the hearing was whether it was subject to the Act. Prior to the hearing, OSM revisited the site and, finding that the violations (2) and (3) had not been corrected, issued CO No. 81-I-87-1.

Evidence presented by OSM at the hearing detailed the nature of the violations and established that the VFI minesite itself consisted of 1.907 acres. During the period VFI operated, it was the only operator using the haul road (Tr. 8-9), which consisted of 1.91 acres. These acreages were determined by survey, and they totaled 3.817 acres (OSM Exh. 1). Thus, OSM considered the minesite to be subject to its jurisdiction, notwithstanding the fact that the haul road was a preexisting one (inasmuch as the area had been previously mined) (Tr. 33), and that it was deeded to the county after the NOV was issued (Tr. 36-37).

VFI presented no evidence at the hearing but, at its conclusion, moved for summary judgment on the ground that there had been no showing that VFI had mined in excess of 250 tons of coal on the site. The Administrative Law Judge denied the motion, stating that exemption from the Act was an affirmative defense, and that OSM was required only to prove that the Act was violated (Tr. 52). On appeal,

January 20, 1983

however, VFI relies on the 2-acre exemption, rather than on the exemption relating to the amount of coal extracted.

Discussion

It is immaterial whether VFI chooses to rely on the specific 2-acre exemption of section 528(2) of the Act or the subsequent under-250-tons exemption set forth in section 700.11(c) of the regulations. This Board has consistently held that any claim of exemption from the Act is a matter of affirmative defense. See *Virginia Fuels, Inc.*, 4 IBSMA 185, 89 I.D. 604 (1982), and cases cited.

Since VFI did not undertake any affirmative defense in this case, and since the uncontradicted testimony and area survey introduced by OSM were clearly sufficient to establish the necessary prima facie case on the Government's part, we have no basis for modifying the holding of the Administrative Law Judge.

Accordingly, the decision appealed from is affirmed.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Acting Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

IRVIN WALL

70 IBLA 183

Decided January 20, 1983

Appeal from separate decisions of the Oregon State Office, Bureau of Land Management, rejecting oil and gas lease offer OR 28232 in part and oil and gas lease offer OR 29036 in full.

Affirmed in part; vacated and remanded in part.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: First-Qualified Applicant

Because a noncompetitive oil and gas lease may be issued only to the first-qualified applicant, a junior offer is properly rejected to the extent that it includes land described in a senior offer and the junior offeror fails to provide valid reasons why the senior offer should be considered defective.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: 640-acre Limitation--Oil and Gas Leases: Lands Subject to

It is improper to issue an oil and gas lease for less than 640 acres where there is land available for leasing adjacent to the parcel described in the offer. Land included in an offer which has not become an issued lease is available for filing of another offer until a lease is signed by an authorized officer of BLM.

3. Oil and Gas Leases: Applications: Description--Oil and Gas Leases: Description of Land

The failure to designate a meridian is not a fatal defect in the land description in an over-the-counter noncompetitive oil and gas lease offer where the state in which the land is located is governed by only one meridian.

4. Oil and Gas Leases: Acreage Limitations--Oil and Gas Leases: Applications: Generally

The Mineral Leasing Act of 1920, *as amended*, establishes the maximum acreage a person may hold, own, or control at one time. If an offeror files a group of applications, any one of which causes him to exceed the acreage limitations, the entire group must be rejected pursuant to 43 CFR 3101.1-5(c)(3)(ii).

5. Oil and Gas Leases: Acreage Limitations--Oil and Gas Leases: Applications: 640-acre Limitation

Offers for less than 640 acres are not null and void but remain pending until BLM determines a proper showing under 43 CFR 3110.1-3(a) has been made, or the offers are rejected for lack of an adequate showing. While such offers remain pending, the lands described therein are chargeable to the offeror's acreage account.

6. Oil and Gas Leases: Acreage Limitations--Oil and Gas Leases: Applications: Generally

Exceeding the maximum acreage limit of 43 CFR 3101.1-5 when filing an offer to lease is not a minor defect which may be cured.

7. Oil and Gas Leases: Acreage Limitations--Oil and Gas Leases: Lands Subject to

Where lease offers include lands which are in national parks and Indian reservations, or which are otherwise unavailable for leasing, the acreage described is chargeable to the offeror until such time as BLM makes its determination of the status and availability of the land and rejects the offers as to the lands not available.

APPEARANCES: Irvin Wall, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Irvin Wall has appealed from separate decisions of the Oregon State Office, Bureau of Land Management (BLM), rejecting in part his over-the-counter noncompetitive oil and gas lease offers OR 28232 in part and OR 29036 in full. The offers were rejected to the extent that they included land leased to senior offerors.

January 20, 1983

[1] Wall filed oil and gas lease offer OR 29036 on September 19, 1981.¹ His offer described land overlapping with land described in senior offers OR 26411, filed April 17, 1981, by Shell Oil Co. (Shell), and OR 27567, filed on June 25, 1981, by J. A. Padon, Jr. Wall contends that Shell's offer is defective because it failed to indicate its qualifications to hold a lease. Wall's assertion is incorrect as Shell's qualifications are referred to on the offer form. Because a noncompetitive oil and gas lease may be issued only to the first-qualified applicant, 30 U.S.C. § 226(c) (1976), a junior offer is properly rejected to the extent that it includes land designated in a senior offer and the junior offeror fails to provide valid reasons why the senior offer should be considered defective. *Irvin Wall*, 68 IBLA 243 (1982).

[2] Wall challenges Padon's offer by asserting that the applicant's qualifications to hold the lease were not stated and that the percentage to be owned by another party in interest was not set forth. These allegations are incorrect. The applicant's qualifications were stated, and an attachment to the offer indicates that the applicant and the other party in interest each had an undivided 50 percent interest. Wall's third assertion against Padon's offer raises a different issue. He asserts that the offer was filed for 162.93 acres which included lots 3 and 4 of sec. 31, T. 5 S., R. 25 E. This is adjacent to lot 4 of sec. 6, T. 6 S., R. 25 E., for which Padon did not apply but which, Wall contends, was available for leasing. If Wall's contention is correct, Padon's offer violates the 640-acre rule, set forth in Departmental regulation 43 CFR 3110.1-3(a), which provides in pertinent part: "No offer may be made for less than 640 acres except where * * * the land is surrounded by lands not available for leasing under the Act." The status plat indicates that when Padon filed his offer, lot 4 of sec. 6 was subject to the senior offer filed by Shell, OR 26411. However, no lease for this land was effective until July 1, 1982. Land included in an offer which has not become an issued lease is still available for filing of another offer until the first lease is signed by an authorized officer of BLM. *Helen E. Reid*, 39 IBLA 378 (1979). Thus, Wall is correct that oil and gas lease OR 27567 improperly included lots 3 and 4 of sec. 31, T. 5 S., R. 25 E. To the extent that BLM rejected Wall's offer because of its conflict with Padon's lease, the decision must be vacated.

[3] Wall filed oil and gas lease offer OR 28232 on July 29, 1981, which described land partially overlapping with land described in senior offers OR 26522, filed April 30, 1981, by Shell, and OR 26851, filed May 22, 1981, by Aeon Energy Co. (Aeon). Wall gives two reasons why Aeon's offer should have been disqualified. First, he asserts, no qualification to hold the lease was shown or listed on the filing. This appears to be incorrect. Aeon separately executed a statement of its qualifications on the same date that it executed its offer. The second

¹ Oil and gas lease offer OR 29036 was originally filed by Wall on Aug. 24, 1981. However, on Sept. 19, 1981, Wall filed an amended offer with the Oregon State Office.

reason Wall gives for holding Aeon's offer to be defective is that the meridian was not indicated on the land description. In *Irvin Wall*, 68 IBLA 308 (1982), we held that an over-the-counter noncompetitive oil and gas lease offer need not be rejected for failure to indicate the meridian where only one meridian governs the state in which the land is located. We pointed out that Departmental regulation 43 CFR 3101.1-4(a) requires that oil and gas lease offers for surveyed lands must describe the lands by legal subdivision, section, township, and range. We noted that the form also provides a space for "filling" in the applicable meridian, and designation of the meridian clearly is necessary for states such as California which are governed by more than one meridian. However, Oregon is governed by only one meridian, so the designation of the meridian is surplusage.

Wall contends that Shell's application was defective because its qualification to hold a lease was not shown as indicated on the filing nor were the qualifications filed within 15 days after filing. Wall asserts that the qualifications were filed in July, 3 months after Shell's offer was filed. Even if Wall's allegations were correct, Shell's offer was complete prior to Wall's offer and has priority over it. However, Shell's offer did refer to its qualifications on file at that time. Wall's assertion is simply incorrect. Nevertheless, Shell's lease must be canceled for another reason: The record in *Jerry M. Pritchard*, 70 IBLA 154 (1982), of which we take official notice,² demonstrates that when Shell filed offer OR 26522, it exceeded the maximum acreage established by 30 U.S.C. § 184(d) (1976).

On April 30, 1981, Shell filed 54 noncompetitive oil and gas lease offers for certain lands in Oregon, including OR 26522. The Shell offers, numbered OR 26502 through OR 26555, were stamped as being filed at precisely the same moment. Pritchard contended that BLM's rejections of his offers were erroneous where Shell was deemed to be the first-qualified applicant based upon its April 30, 1981, offers. He asserted that Shell's April 30 offers were not in "good standing" because Shell had exceeded the maximum acreage permitted to be held under 43 CFR 3101.1-5. Shell filed a reply, giving reasons why its offers did not cause it to exceed the maximum allowable acreage. However, Pritchard withdrew his appeal and the Board dismissed the case.

Although Wall did not raise the issue of excess acreage, he served Shell with a copy of his notice of appeal, but Shell has entered no appearance. Pritchard's appeal, however, gave Shell specific notice of this issue with respect to each one of the 54 offers, filed on April 30, 1981, including OR 26522. The effect of that notice is not merely confined to those Shell offers in conflict with Pritchard's, since it was only the combined effect of all of Shell's offers that placed it over the limit. Although Shell did not respond to Wall's appeal, we consider it appropriate to address the contentions Shell made in Pritchard's appeal.

² See 43 CFR 4.24(b).

January 20, 1983

Before BLM rejected his offers, Pritchard, through an agent, inquired of BLM concerning Shell's acreage holdings in Oregon, contending that Shell had exceeded the limit by 4,281.08 acres. BLM's response, dated May 7, 1982, set out which acreage in Shell's offers was charged to Shell's acreage account. BLM took the position that Shell was chargeable for 245,478 acres after the April 30 filing. Excluded from BLM's calculation were offers rejected for nonconformity with 43 CFR 3110.1-3, the "640-acre rule."³ 43 CFR 3110.1-3 requires that all noncompetitive offers to lease must be for at least 640 acres in the absence of certain exceptions. Inclusion of those offers in Shell's chargeable allotment would result in excess acreage over the allowed maximum at the time Shell submitted the 54 offers on April 30, 1981.

BLM reasoned that "offers filed in violation of the 640-acre rule cannot mature to lease and are not chargeable." Pritchard argued that those offers later rejected as less than 640 acres must be included in the calculations of chargeable acreage while they were pending, and, if Shell exceeded its permissible chargeable limit by its group filing of April 30, every offer in that group must be rejected.

In its reply to Pritchard's statement of reasons for appeal, Shell argued that its offers which violated the "640-acre rule" were not chargeable because those offers were null and void.

[4] The Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 184(d) (1976), provides that:

No person, association, or corporation * * * shall take, hold, own or control at one time, whether acquired directly from the Secretary under this chapter, or otherwise, oil or gas leases (including options for such leases or interests therein) on land held under the provisions of this chapter exceeding in the aggregate two hundred forty-six thousand and eighty acres in any one State other than Alaska.

The corresponding regulation, 43 CFR 3101.1-5, includes acreage in applications and offers for oil and gas leases in the total holdings calculated.⁴

That regulation further provides: "For tracts not subject to the simultaneous filing procedures of Subpart 3112, *if [the offeror] files a group of applications or options or offers or interests in options at the same time, any one of which causes him to exceed the acreage limitations the entire group [of] applications, offers, options, or interests in options will be rejected.*" 43 CFR 3101.1-5(c)(3)(ii) (italics added). Thus, if any one of the offers on April 30, 1981, caused Shell to exceed the maximum limit for acreage holdings, the entire group should have been rejected. Therefore, to determine whether Shell exceeded the acreage limitation, we must first decide whether Shell's acreage

³BLM listed the following as later rejected under the 640-acre rule: OR 26511, 120 acres; OR 26512, 480 acres; OR 26518, 80 acres; OR 26527, 79.47 acres, a total of 759.47 acres.

⁴Inclusion of offers for over-the-counter noncompetitive oil and gas leases in acreage holdings computations is a well established practice of the Department. See *Shell Oil Co.*, A-30575 (Oct. 31, 1966); *Solicitor's Opinion*, M-36670, 71 I.D. 337 (1964); 2 Rocky Mountain Mineral Law Foundation, *Law of Federal Oil and Gas Leases*, § 25.7 (Supp. 1980).

account should have been charged for acreage in offers later rejected under 43 CFR 3110.1-3(a), the 640-acre rule.

[5] Departmental regulation 43 CFR 3110.1-3(a) reads in part: "No offer may be made for less than 640 acres except where the offer is accompanied by [certain showings]." Violation of the 640-acre rule results in rejection of the offer and loss of priority. See *James M. Chudnow*, 65 IBLA 64 (1982); *Douglas R. Willson*, 52 IBLA 246 (1981). The rule is applied when an offer is adjudicated. All else being regular, BLM must take action to accept the offer if it determines a proper showing has been made under section 3110.1-3(a), or to reject the offer if it determines the showing is insufficient. Thus the acreage of an offer is not the sole criterion against which the rule is applied. BLM must adjudicate such an offer with regard for the exceptions to the rule.⁵ See, e.g., *Dayton F. Hale*, 69 IBLA 167 (1982). Until a determination has been made, an offer is not simply null and void, but must be considered a pending offer.

In computing an offeror's chargeable acreage, it is necessary to include all pending offers filed over-the-counter for noncompetitive oil and gas leases. In one Departmental decision where chargeable acreage was addressed, the amount was calculated, "on the assumption that no additional offers were filed, that *no pending offers were rejected.*" *Albert C. Massa (Supp.)*, 63 I.D. 279, 285 (1956) (italics added). An offer is "pending" from its inception until the rendering of a determination. See *Black's Law Dictionary*, 1291 (4th ed. 1968). Such a determination includes rejection, after which the rejected acreage is no longer chargeable.

The Department, at one time, considered *all* offers for noncompetitive oil and gas leases as chargeable to the holdings amounts. In *Melvin A. Brown*, 69 I.D. 131 (1962), the Department held that offers filed under the public drawings process were chargeable, even after the drawing had occurred and the offeror was unsuccessful. That decision was reversed in *Brown v. Udall*, 335 F.2d 706 (D.C. Cir. 1964). The court held that neither the statute nor the regulation justified the chargeability of an unsuccessful *simultaneous* offer before or after the public drawing.

The Department, however, has continued to hold that a "regular" lease offer, filed on an over-the-counter basis, is chargeable. The rationale for the distinction is that the offeror gains control over the acreage of an over-the-counter offer. *Solicitor's Opinion*, M-36670, 71 I.D. 337 (1964); *Shell Oil Co.*, A-30575 (Oct. 31, 1966). 43 CFR 3101.1-5(a) reads in part: "No person, association, or corporation shall take hold, own, or control at one time oil and gas leases * * * or offers therefor * * * for more than 246,080 acres in any one State." (Italics added.) It is appropriate that land embraced in an offer for a noncompetitive oil and gas lease should be charged against the offeror when the lease is

⁵ BLM Manual, Vol. VI Minerals, 2.3A (1954) reads: "All lease offers for less than 640 acres, or the equivalent of a section, should be considered under the regulation * * * and if allowable, copies of the serial register should be sent to the Geological Survey for a structural report."

January 20, 1983

to be issued on a first come, first served basis. Although no lease has been issued, the offeror has a measure of control over the acreage embraced in his offer. By filing his application he has obtained priority and has precluded anyone else from obtaining a lease until there has been some disposition of his own application. *Solicitor's Opinion*, M-36670, *supra* at 338. If no limitation were imposed on the acreage that could be included in offers, any offeror could file for more acreage than he could receive in leases and then pick and choose what acreage he wanted. *Melvin A. Brown, supra* at 133.

As pending offers, Shell's applications for leases less than 640 acres remained fully chargeable to its holdings until such time as they were rejected under 43 CFR 3110.1-3(a). It is unfortunate that Shell's chargeable holdings were miscalculated. However, Shell, and not BLM, is responsible for the acreage amount for which it submits offers. Shell filed its offers because it believed they had value. Shell cannot argue the genuineness of its applications on the one hand and deny their effectiveness and value on the other. It is unlikely Shell would have refused the leases if BLM had issued them. If Shell had truly considered certain of its applications to be of no avail, it could have refrained from submitting them and avoided a lock on the land pending administrative determination of the offers.

We see no reason why confusion should result. An offeror knows, or certainly should know, how much acreage it applied for. It may at any time withdraw previous offers, but while it maintains any offer, it is chargeable with acreage included therein.

[6] The Department, until January 1959 (Circular 2009, 24 FR 281 (Jan. 13, 1959)), accorded offerors a grace period of 30 days within which to reduce their holdings in leases and lease offers upon a determination that they held excess acreage. 43 CFR 192.3(c) (1954). Because of abuses and administrative inconveniences, the grace period was eliminated. *Melvin A. Brown, supra* at 133. When Shell filed its offers together, causing it to exceed the maximum acreage for holdings, BLM was not permitted to afford it an opportunity to reduce its interests to conform to the limitation. BLM was required to reject in its entirety the group of offers which caused the excess. See *Edwin G. Gibbs*, 68 I.D. 325, 327 (1961). Thus, Shell was not qualified to maintain its offers when Wall or Pritchard filed theirs.

[7] Finally, Shell argued in its reply to Pritchard's statement of reasons that it did not exceed the maximum allowable acreage regardless of the interpretation of the 640-acre rule as applied to the acreage calculations. Shell explained that its offers included 733.02 acres within a National Park or Monument and 3 lots within an Indian Reservation. In addition, there were various offers filed for lands in which Shell claimed that the United States had no title. Shell contended that these several offers were not chargeable to its acreage calculations and when all calculations are made, it did not exceed the

acreage limits. As explained, the total acreage in an offer is considered chargeable acreage. The reasons for chargeability of an offer have been expressed above. Those reasons extend to Shell's argument here. Until BLM adjudicates the offers and officially ascertains that the lands are not available and its offers are rejected, Shell is chargeable for the acreage for which it has applied.

According to BLM's conclusions found in its May 7, 1982, letter, Shell was accountable for 245,478 acres in outstanding leases and offers. After adding to that figure the 759.47 acres BLM did not include because of the 640-acre rule, Shell had exceeded the maximum allowable acreage by its group filing of April 30, 1981. Moreover, this excess is increased by the acreage not charged to Shell by BLM because the land was not available.⁶

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from is affirmed in part, and vacated and remanded in part for further action consistent with this opinion.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

WILL A. IRWIN
Administrative Judge

JAMES L. BURSKI
Administrative Judge

PATHFINDER MINES CORP.

70 IBLA 264

Decided *January 26, 1983*

Appeal from decision of the Arizona State Office, Bureau of Land Management, declaring the Mud Nos. 1 through 22 lode mining claims null and void ab initio. A MC 156494 through A MC 156515.

Affirmed.

I. Mining Claims: Lands Subject to--Public Lands: Generally--Withdrawals and Reservations: Generally

Where an Act of Congress authorizes the setting aside of lands for particular public purposes, and does not either expressly continue or prohibit the operation of the general

⁶ It further appears that BLM did not charge Shell for the acreage of certain acquired lands included in the Apr. 30, 1981, filings. If those acquired lands were listed in offers filed pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1976), the acreage would not be chargeable. However, if the acquired lands were included in the Shell offers filed for public lands under the Mineral Leasing Act of 1920, that acreage would also be chargeable for so long as the offers for such lands remained pending. However, we need not resolve that question in order to decide this appeal.

January 26, 1983

mining laws, the intent of Congress in that respect must be gathered from the Act itself, or by historical interpretation of this Department of that Act and similar Acts relating to lands of the same status.

2. Mining Claims: Lands Subject to--Public Lands: Generally--Wildlife Refuges and Projects: Generally--Withdrawals and Reservations: Generally

Land within the Grand Canyon Game Preserve is not open to the location of mining claims, and mining claims located on land after it was included in the preserve are properly declared null and void ab initio.

3. Administrative Authority: Estoppel--Estoppel--Federal Employees and Officers: Authority to Bind Government--Public Lands: Administration--Secretary of the Interior

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest. The Board of Land Appeals, in exercising the Secretary's review authority as fully and finally as might the Secretary, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

4. Mining Claims: Lands Subject to--Public Records--Withdrawals and Reservations: Generally

If land has been withdrawn from mining, an erroneous public land record does not open the land to entry. A mining claim located on withdrawn land is null and void even if the land records erroneously indicate that the land is open.

APPEARANCES: John C. Lacy, Esq., and Spencer A. Smith, Esq., for appellant; Fritz L. Goreham, Esq., for the Bureau of Land Management; Joseph D. Cummings, Esq., for the United States Forest Service; Robert J. Golten, Esq., Denver, Colorado, for the National Wildlife Federation and Arizona Wildlife Federation, amici curiae.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Pathfinder Mines Corp. (Pathfinder) has appealed from the March 19, 1982, decision of the Arizona State Office, Bureau of Land Management (BLM), declaring the Mud Nos. 1 through 22 lode mining claims null and void ab initio. The claims were located on November 20, 1981, and Pathfinder filed copies of the notices of location for the claims on February 11, 1982, as required by section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976). BLM determined that the land on which the claims were located was then, and remains, closed to entry under the mining laws, and declared the claims null and void ab initio.

The land involved in this appeal is presently within Kaibab National Forest. This forest was created on February 20, 1893, and enlarged to include the subject land on May 6, 1905. It was at that time called the Grand Canyon Forest Reserve. By a proclamation dated November 28, 1906, President Roosevelt declared this area the Grand Canyon

National Game Preserve, pursuant to the authority given him under the Act of June 29, 1906, ch. 3593, 34 Stat. 607. The BLM, the Forest Service, and amici¹ assert that this proclamation closed the land to mineral location. The proclamation, which substantially incorporates the provisions of the authorizing statute, makes no mention of whether the land is open to mineral entry.²

Appellant does not question the authority of the President to withdraw land from mineral entry; it merely contends that no such withdrawal was made as to this land. BLM's decision appears to have been based in part on an October 7, 1966, memorandum from the Field Solicitor to the Manager, Arizona Land Office. That memorandum states as follows:

The present area of the preserve consists of three small parcels. Two of these parcels adjoin the Kaibab National Forest. The other parcel adjoins both the Kaibab National Forest and the Grand Canyon National Park.

The question of whether mining locations may be made within the boundaries of the Grand Canyon National Game Preserve was previously considered by Assistant Secretary of the Interior Orme Lewis. In a letter dated January 4, 1955 to the Director, Department of Mineral Resources, State of Arizona, he stated that the preserve was not open to mineral location. The Assistant Secretary made reference to the fact that lands within the Wichita National Game Reserve in the State of Oklahoma were not subject to mineral location. 38 Op. Atty. Gen. 192 (February 5, 1935). It was also noted that the lands included within the Custer State Park Game Sanctuary in the State of South Dakota were not open to mineral location. *A. Jackson Birdsell*, A-25440 (January 31, 1949).

The Assistant Secretary thus determined that since the Act creating the Grand Canyon National Game Preserve was similar to the Acts under which the Wichita National Game Reserve and the Custer State Park Game Sanctuary were created, the lands within the boundaries of the Preserve were not open to mineral location.

Appellant contends, however, that the words of the authorizing statute indicate no intent to withdraw the land from mineral entry. Appellant argues that the only clear purpose emerging from the language of the proclamation was the protection of game animals and

¹ By order dated Oct. 8, 1982, we granted the National Wildlife Federation and the Arizona Wildlife Federation leave to file a brief as amici curiae.

² The proclamation provides:

"Whereas, it is provided by the Act of Congress, approved June twenty-ninth, nineteen hundred and six, entitled, 'An Act For the protection of wild animals in the Grand Canyon Forest Reserve,' 'That the President of the United States is hereby authorized to designate such areas in the Grand Canyon Forest Reserve as should, in his opinion, be set aside for the protection of game animals and be recognized as a breeding place therefor.

"Sec. 2. That when such areas have been designated as provided in section one of this Act, hunting, trapping, killing, or capturing of game animals upon the lands of the United States within the limits of said areas shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture; and any person violating such regulations or the provisions of this Act shall be deemed guilty of a misdemeanor, and shall, upon conviction in any United States court of competent jurisdiction, be fined in a sum not exceeding one thousand dollars, or by imprisonment for a period not exceeding one year, or shall suffer both fine and imprisonment, in the discretion of the court.

"Sec. 3. That it is the purpose of this Act to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private, State, or Territorial lands';

"And whereas, for the purpose of giving this Act effect, it appears desirable that a part of the Grand Canyon Forest Reserve be declared a Game Preserve;

"Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power in me vested by the aforesaid Act of Congress, do hereby make known and proclaim that all those lands within the Grand Canyon Forest Reserve, lying north and west of the Colorado River, in the Territory of Arizona, are designated and set aside for the protection of game animals, and shall be recognized as a breeding place therefor, and that the hunting, trapping, killing, or capturing of game animals upon the lands of the United States within the limits of said area is unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture."

January 26, 1983

the land from trespass and contends that it was only in this respect that the preserve would differ from the Forest Reserve. Appellant refers to Congress declaration that "all valuable mineral deposits in lands belonging to the United States, * * * shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase * * *," 30 U.S.C. § 22 (1976), and appellant notes that in 1897, Congress expressly provided that land within forest reserves would be open to mineral entry. 16 U.S.C. § 482 (1976). Appellant seeks to derive a principle of construction from a 1906 Departmental opinion which considered the authority of the Department to withdraw from mineral location lands within a forest reserve for administrative sites:

Authority to appropriate mineral lands for, or subject them to, use in aid of the administration of forest reserves can not be predicated upon the general authority of the Executive over the public lands or over forest reserves.

If there be such authority it must be found in some provision of law which grants it or plainly recognizes it either by express terms or by inference so strong as to clearly indicate an intention to grant or recognize it.

Assistant Attorney General's Opinion, "Authority to Withdraw Lands Within a Forest Reserve," 35 L.D. 262, 265 (1906). Appellant contends that the Act authorizing the reserve did not clearly withdraw the land, and that the President only exercised the authority granted in this statute without exercising any additional power to withdraw land from mineral entry. Appellant cites statutes and orders that have expressly withdrawn land from mineral entry and contends that the failure to do so here means that the lands should be considered open. We recognize that if public lands are to be efficiently managed, their status should be easily ascertainable. Orders permitting use of public land should make clear what uses are permitted and which are not. Appellant's argument is attractive because it is directed at this concern for clarity of land status.

A number of decisions, however, make it clear that a statute or order may close land to mineral entry without expressly mentioning the mining laws. If land was reserved from sale and set apart for public uses, that was sufficient to preclude location of claims under the mining laws. See 17 Op. Atty. Gen. 230 (1881). It has also been held that when a particular portion of a public domain is reserved or set aside for public use, it is severed from the public domain so that the laws which permit the acquisition of private rights in public land do not apply. See *Wilcox v. Jackson*, 13 U.S. 266, 13 Peters 498 (1839); *P & G Mining Co.*, 67 I.D. 217, 218 (1960).

Under the reasoning of these cases, if land is set aside from the public domain, it is presumed that the land is no longer subject to laws permitting acquisition of title in the absence of an express provision to the contrary. The *Birdsell* opinion cited in the Field Solicitor's opinion, *supra*, follows this principle. The syllabus states: "Public lands

included in a game sanctuary established pursuant to an Act of Congress which made no provision for appropriation under the mining laws are not thereafter subject to location under the mining laws." The decision holds: "It is clear that the effect of the establishment of the game sanctuary pursuant to the Act of June 5, 1920, [ch. 247, 41 Stat. 986,] which made no provision for appropriation under the mining laws, had the affect of withdrawing the lands included in the sanctuary from such appropriation."

The *Birdsell* opinion concerned the Custer State Park Game Sanctuary which was authorized by the Act of June 5, 1920, *supra*, which made no reference to the mining laws. The sanctuary was renamed the Norbeck Wildlife Preserve by the Act of October 6, 1949, ch. 620, § 1, 63 Stat. 708. Meanwhile, Congress had recognized that the land within the game preserve was not open to mineral location, and enacted legislation in 1948 providing for the location of mining claims under the general mining laws but subject to numerous surface restrictions as well as a provision that no patent may be issued on any location filed within the game preserve. Act of June 24, 1948, *as amended*, 16 U.S.C. § 678a (1976). Thus, notwithstanding the failure of Congress or the President to specify that the land was withdrawn from mineral location when the Custer State Park Game Sanctuary was created in 1920, both this Department and Congress have recognized that the order creating the sanctuary had the effect of closing the land to mineral location.

[1] The *Birdsell* decision relied on a 1941 decision concerning the applicability of mining laws to revested Oregon and California and reconveyed Coos Bay grant lands which were to be managed for permanent timber production. *Instructions*, 57 I.D. 365 (1941). The Department noted how the purpose of the legislation relating to those lands could be thwarted by full exercise of rights under the mining law. In that opinion, the Department made a thorough analysis of the principles to be applied in determining whether lands were open to mineral entry when Congress was silent on that issue, recognizing that lands could be closed to mineral entry with no express withdrawal:

While the policy is well established that mineral lands are not to be sold or other wise disposed of except by express provisions of law, *the Department is not aware of any established or stable public policy that lands set aside for particular public uses and purposes under any acts of Congress, which neither expressly exclude nor include mineral lands, are to be construed as subject to the mineral land laws. To the contrary, in many instances public lands reserved or withdrawn for sundry public uses and purposes by acts or pursuant to acts of Congress which do not in terms expressly include mineral lands, and likewise lands reserved or withdrawn by the President by virtue of his inherent power, which contain no reference to mineral land, are not subject to the operation of the mineral land laws.* Among these instances of reserves where mineral exploration, location and development are not expressly inhibited but are not permitted, may be mentioned military reservations (17 Op. Atty. Gen 230); national monuments created under the act of June 8, 1906 (34 Stat. 225); *Cameron v. United States*, 252 U.S. 450. The various acts creating bird and game reserves (16 U.S.C. ch. 7) do not expressly forbid mineral location and entry or operations under the mineral land laws, nevertheless applications for permits under the General Leasing Act have been denied on such

January 26, 1983

reserves where the operations would jeopardize or impair (*J. D. Mell et al.*, 50 L.D. 308), or destroy (*R. G. Folk*, A. 20601, unreported, decided March 4, 1937) the usefulness of the reserve as a wildlife refuge. Mineral lands within withdrawals for stock-driveway purposes made under section 10 of the act of December 29, 1916 (39 Stat. 862), became subject to the mining laws under rules, regulations and restrictions provided by the act of January 29, 1929 (45 Stat. 1144). See 43 CFR 185.35. And likewise mineral land included in withdrawals for construction purposes under the reclamation act of June 17, 1902 (32 Stat. 388), were by the act of April 23, 1932 (47 Stat. 136), made subject to location and entry and patent under the mining laws in the discretion of the Secretary where the rights of the United States would not be prejudiced, with reservation of such rights, ways and easements necessary to the protection of the irrigation interests.

While in the National Forest Act the Congress expressly opened the land to the miner, and other acts, such as the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), opened the withdrawals made thereunder to the miner of metalliferous minerals, the acts creating the national parks in the public land States have closed the door to the miner in such parks. See 16 U.S.C. secs. 21 to 355, inclusive; Lindley on Mines, sec. 196. *As to acts setting aside lands for particular public purposes which do not expressly extend or prohibit the operation of the mineral land laws, there is no sufficient basis for the presumption that the mineral land laws, unless there are express words of exclusion, extend to them. On the contrary, in all such cases the intent of Congress in that respect must be gathered from the act itself.* [Italics added.]

Id. at 372-73.

Appellant has argued that when Congress or the Executive wishes to remove an area from mineral entry, such intent was clear on the face of the legislation or the proclamation. The above authorities demonstrate that this argument is incorrect. Since the issue raised in this appeal cannot be resolved merely by looking at the language of the statute and proclamation itself, we must look for other evidence of congressional intent and we must construe the Act in a manner that gives effect to the objectives set forth in the Act and its legislative history; we should not construe the Act in a manner which would frustrate the achievement of those goals. For example, in considering whether the allowance of mineral entry would be consistent with congressional intent to manage reconveyed grant lands for permanent timber production, the Department analyzed the effects of allowing mining entry and contrasted them with the purposes of the legislation, finding that those purposes would be thwarted by mining activity and by acquisition of title to the land by miners. *Instructions, supra* at 370.³

³ This analysis of the effects of allowing mineral entry has pertinence here:

"Under the mineral land laws * * * the locator of a mining claim based upon a sufficient discovery of mineral would have the right to the exclusive possession and enjoyment of the claim, except as to such rights of entry by the United States as might be necessary for the cutting and removing of timber sold. He would have the right to use any quantity of timber necessary for his mine, no matter how much it would interfere with management for permanent forest production or with the principle of sustained yield or with the object of providing a permanent source of timber supply. He could upon compliance with the prerequisite conditions obtain absolute title to the land and thus prevent reforestation of the land, and even if he never applied for or acquired a patent, he could, * * * in the legitimate exercise of rights under the placer mining laws, completely denude the land claimed of its soil and vegetation so as to render it thereafter valueless for future timber growth and supply. A grant of rights under the mining law which in their lawful exercise would entail such possible consequences, is clearly inconsistent with the object and purpose of the act of 1937."

In 1948, Congress reopened revested Oregon and California and Coos Bay lands to mineral location, declaring previously located claims valid "to the same extent as if such lands had remained open to exploration, location, entry,

Continued

If the Grand Canyon National Game Preserve had remained open to the location of mining claims, the exercise of rights under the mining law would not be limited as they are in the Norbeck Wildlife Preserve under 16 U.S.C. § 678a (1976). Appellant contends that the purpose of the game preserve can be achieved through a multiple use concept which would not require closing the preserve to mineral entry, but we note that where land set aside for the protection of game or wildlife has been opened to mining, the legislation places some restrictions on the location of mining claims that would not be applicable here. The legislation affecting the Norbeck Wildlife Preserve illustrates that point. In determining whether mineral entry is inconsistent with the purposes of the preserve, we must assume that the mineral claimant will exercise fully his rights under the mining laws. Amici assert that more than 1,600 claims have been located in the Grand Canyon Game Preserve since November 1981.

Appellant claims that the legislative history suggests that no change in the use of the forest was intended as a result of the designation of the lands as a game preserve. The House of Representatives report states that the "protection of game in this reserve will in no wise impair the use of the forest reserve for any of the uses to which it is already set apart, and will prevent the extermination of the small remains of harmless wildlife now found therein." H.R. Rep. No. 4973, 59th Cong., 1st Sess. 2 (1906). This statement, however, does not indicate an intent to leave the land open to mineral entry, but only to leave it open to those uses for which the forest was already set apart. Because mining is a use generally applicable to the public domain, mining cannot be characterized as a use for which forests were set apart from the public domain. Although Congress provided that land within forest reserves would be open to mineral entry, it does not follow that land within the game preserve is also open.

We note that the legislative history of the Act creating the Grand Canyon National Game Preserve indicates that the legislation "is substantially in the same form as the Act authorizing the designation of the Wichita Forest Reserve as a game refuge." H.R. Rep. No. 4973, *supra*. It has been the Department's view that land within the Wichita National Game Reserve is not subject to entry under the mining law, as indicated in the *Birdsell* decision. The Department has based this conclusion on an opinion of the Attorney General that land added to the Wichita Forest Reserve is *open* to mineral entry because that additional land was never made a part of the Wichita National Game Reserve. 38 Op. Atty. Gen. 192, 193 (1935). The clear implication of this opinion is that if the land had been included in the game reserve, it

and disposition" under the mining laws from Aug. 28, 1937, when Congress directed that those lands should be managed for permanent timber production. Act of Apr. 8, 1948, 62 Stat. 162. The conditional nature of the underscored language indicates that the 1948 Congress viewed the 1937 Act as closing the land to mineral location. In reopening the land, Congress made the claims subject to certain conditions that would not have been applicable had the land in fact been open between 1937 and 1948. Claimants acquired no title to timber on their claims and were required to record their claims with the Department and file annual statements relating to assessment work.

January 26, 1983

would not have been open to mineral entry. Notwithstanding appellant's arguments to the contrary, this conclusion is inescapable.⁴

Furthermore, the House Report cites with approval a Presidential message to Congress calling attention to the propriety of making such preserves, noting that they should "afford perpetual protection" and be "set apart forever."⁵ We find it difficult to reconcile these purposes with the intention to leave the land open to any form of entry that would result in alienation of title. Indeed, Acting Secretary Chapman's letter concerning the legislation to allow limited mining in the Norbeck Wildlife Preserve illustrates the Department's general view that the full exercise of rights under the mining laws is inconsistent with the purposes of a game preserve.⁶ Although appellant contends that decisions affecting other areas set aside for protecting game and wildlife provide no authority for construing the effect of the legislation and proclamation creating the Grand Canyon National Game Preserve,

⁴The controversy focuses on the following sentences of the Attorney General's opinion:

"It appears, however, that these additional lands have never been made a part of Wichita National Game Reserve, either by Act of Congress or by Proclamation or Executive order. Such added areas are, therefore, subject to all legal restrictions applicable to national forest reservations, but are not subject to any additional restrictions applicable to the original area of the Wichita Forest Reserve by reason of its establishment as the Wichita National Game Reserve."

Appellant contends that the phrase "additional restrictions" in the game reserve refers to restrictions other than the closure of land to mining. This argument makes no sense. The very issue addressed by the Attorney General was whether land outside of the game reserve was open to mining. There would be no reason to refer to additional restrictions in the game reserve unless those restrictions involved mining.

⁵The text of the message quoted in the H.R. Rep. No. 4973, *supra* at 1-2, follows:

"Certain of the forest reserves should also be made preserves for the wild forest creatures. All of the reserves should be better protected from fires. Many of them need special protection because of the great injury done by live stock, above all by sheep. The increase in deer, elk, and other animals in the Yellowstone Park shows what may be expected when other mountain forests are properly protected by law and properly guarded. Some of these areas have been so denuded of surface vegetation by overgrazing that the ground-breeding birds, including grouse and quail, and many mammals, including deer, have been exterminated or driven away. At the same time the waterstoring capacity of the surface has been decreased or destroyed, thus promoting floods in times of rain and diminishing the flow of streams between rains.

"In cases where natural conditions have been restored for a few years, vegetation has again carpeted the ground, birds and deer are coming back, and hundreds of persons, especially from the immediate neighborhood, come each summer to enjoy the privilege of camping. Some at least of the forest reserves should afford perpetual protection to the native fauna and flora, safe havens of refuge to our rapidly diminishing wild animals of the larger kinds, and free camping grounds for the ever-increasing numbers of men and women who have learned to find rest, health, and recreation in the splendid forests and flower-clad meadows of our mountains. The forest reserves should be set apart forever for the use and benefit of our people as a whole and not sacrificed to the shortsighted greed of a few.

"The forests are natural reservoirs. By restraining the streams in flood and replenishing them in drought they make possible the use of waters otherwise wasted. They prevent the soil from washing, and so protect the storage reservoirs from filling up with silt. Forest conservation is therefore an essential condition of water conservation."

⁶In his comments on the proposed legislation to open the Norbeck Wildlife Preserve to mining, Acting Secretary Chapman makes clear his view that mining locations are generally incompatible with game sanctuaries:

"The bill would permit mining locations under the general mining laws within the Custer State Park Game Sanctuary in the Harney National Forest in South Dakota. The locator would obtain the right to occupy and use the surface area necessary for his operations and to use timber and mineral deposits necessary for the operations. No patent, however, would be issued for the location. The mining operations would be subject to such rules and regulations as the Secretary of Agriculture may deem necessary to further the purpose of the sanctuary. The Secretary would also be authorized to prohibit mining operations within 660 feet of any Federal, State, or county road and within such other areas where the location of mining claims would not be in the public interest. Various other safeguards to protect the surface use and timber are provided.

"While I do not favor the authorization of activities within game sanctuaries which would impair their usefulness for wildlife purposes, in this particular instance, since the official administering the land believes that such impairment would not result from the passage of the bill, I interpose no objection to it. I must emphasize, however, that this should not be construed as a general concurrence by the Department with this type of legislation, since conditions may be considerably different in other instances."

Letter from Acting Secretary Chapman to Hon. Richard J. Welch, quoted in S. Rep. No. 1597, 80th Cong., 2d Sess., reprinted in 1948 U.S. Code Cong. & Ad. News 2111, 2113.

the House of Representatives report makes explicit reference to the Wichita Game Reserve, and refers to the Presidential message relating generally to lands set aside for the protection of wildlife and game. Clearly, then, decisions affecting other areas set aside for the protection of game and wildlife constitute authority for construing the Act authorizing the Grand Canyon National Game Preserve.

[2] Appellant has attempted to make numerous distinctions between the Grand Canyon Preserve and other areas set aside for the protection of qualified game.⁷ However, we find none of those distinctions so great as to warrant giving opposite meaning to acts and proclamations which use essentially, the same language, particularly in view of the evident congressional intent to give the areas similar protection. Accordingly, we hold that land within the Grand Canyon Game Preserve is not open to the location of mining claims, and claims located on land after it was included in the preserve are properly declared null and void ab initio.

[3] Appellant contends that if the language of the statute and proclamation is ambiguous, the statute must be interpreted by examining the manner in which it was applied in the years immediately following its enactment.⁸ There is only one indication that the issue has been considered previously at the Departmental level, i.e., the Assistant Secretary's letter cited in the above-quoted Field Solicitor's opinion. The position adopted in that letter apparently was adverse to appellant's position.⁹ In considering the significance of actions taken by local officials in the administration of the preserve, we must bear in mind that the Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or his predecessors in interest. See *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976). It necessarily follows that this Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates. We note that appellant had been specifically advised that this land was not open to entry prior to its attempt to

⁷ Appellant asserts that this reserve is managed differently than other game preserves. Appellant notes that during the early 1900's, there were a number of withdrawals of Federal lands made for the purposes of protecting the Nation's wildlife resources. Appellant claims that these withdrawals resulted in the beginning of a transitional management scheme that developed out of a traditional forest reserve management and involved into the National Wildlife Refuge System which is managed in a highly restrictive manner by the Fish and Wildlife Service. Appellant claims that the Grand Canyon Game Preserve was found to be unsuitable for Fish and Wildlife jurisdiction and its attendant management policies, so it remained under the jurisdiction of the Forest Service to be managed as a national forest. Land within the National Wildlife Refuge system, such as the Wichita Mountains Wildlife Refuge, are closed to mineral entry unless otherwise provided by law. 50 CFR 27.64. Nevertheless, the fact that land within the Grand Canyon Game Preserve has subsequently been managed somewhat differently than those reserves which evolved into wildlife refuges has no bearing on the issue of whether or not the 1906 Act and proclamation left it open to location under the mining laws. The Norbeck Wildlife Preserve was opened to mining on a limited basis by an Act of Congress, not by some evolutionary process of administrative decisionmaking.

⁸ In support of this contention, appellant cites *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980), which held that an earlier Departmental decision governed in determining the validity of certain oil shale claims instead of the legal principles announced in the decision issued more than 50 years after the claims were located overruling the prior interpretation. The case is not at all analogous, since there has been no prior Departmental decision that specifically addresses the issue of the location of mining claims within the Grand Canyon Game Preserve.

⁹ This letter by Assistant Secretary Orme Lewis is not available; even if it were, it has not been indexed so it is not available as decisional precedent. See 5 U.S.C. § 552 (1976).

January 26, 1983

locate these claims. This totally precludes any finding that appellant has relied on any prior Departmental action with respect to the lands in question, so we are not now estopped from considering the correctness of those prior actions in determining the effect of the proclamation in this particular case.

Although appellant insists that we consider prior administrative actions, we note that with few exceptions, the administrative records relating to the preserve that have been provided us overwhelmingly demonstrate the views of local managers that the preserve was closed to any form of entry that could lead to the alienation of title from the United States. Although few of these materials date from the first two decades of the life of the preserve, the administrative records since that time are generally consistent on this point. Rather than recite each item in this history, we will turn our attention to those relatively few instances of administrative action cited by appellant which tend to indicate that the land was treated as open to mineral entry.

[4] A memorandum dated August 20, 1981, from the Acting Field Solicitor to the Chief, Branch of Lands and Minerals Operations, notes that the public records show that the area is open to entry. This would not be the first time that land records erroneously indicated that land was open. If land has been withdrawn from mining, an erroneous public land record does not open the land to entry. A mining claim located on withdrawn land is null and void even if the land records erroneously indicate that the land is open. *See Rod Knight*, 30 IBLA 224 (1977). We see no reason to hold otherwise here.

Appellant refers to a letter dated April 19, 1941, from the Acting Register, Phoenix District Land Office, that states that there are no restrictions to mining locations on Federal game preserves. This letter does not refer specifically to the Grand Canyon Game Preserve, and as a statement of general policy, it is demonstrably incorrect when compared with the letter from Acting Secretary Chapman on the legislation to open the Norbeck Wildlife Preserve to mining.¹⁰ Furthermore, appellant notes that certain land within the preserve was withdrawn from entry under the mining law for a ranger station, an action which would not have been necessary had the land already been withdrawn from such entry by the proclamation of 1906. Public Land Order (PLO) No. 4715, 34 FR 15843-44 (Oct. 18, 1969). Amici note that Forest Service administrative site withdrawals routinely withdraw land from entry under the mining laws because national forests in general are open to entry under the mining laws and such withdrawal is necessary. They speculate that this particular withdrawal order was copied from those which are used for Forest Service land generally, with no deletion of reference to the mineral laws. Regardless of this speculation, we view this order as having little probative value in

¹⁰ See note 6 *supra*.

determining the status of the land, as it indicates no conscious determination of its prior status.

Finally, appellant notes that patents were issued in 1917 and in 1922 for claims located within the preserve after it was created. While these acts may constitute evidence that the land was considered by one or more employees to be open to mineral entry, that erroneous view on the status of the land does not bind the Department in other cases arising later. Amici and the solicitor suggest that issuance of the patents resulted from inadvertance, and note that the land was later reacquired by the United States, illustrating the senselessness of a procedure which would expose to alienation land which the Government desires to retain for a public purpose. It would clearly contravene public policy to hold that the Government must surrender its title to lands reserved by it, and then reacquire them in order to devote them to the public purpose for which they were reserved in the first place.

In conclusion, we note that there are a number of statutes enacted in the early part of the century which, in setting aside public lands, have had the effect of segregating those lands from mineral entry without making express reference to minerals.¹¹ We further note that statutes which authorize the setting aside of public land for the protection of game and wildlife have been construed as precluding mineral entry, and appellant has established no basis for construing the legislation authorizing the Grand Canyon Game Preserve or the proclamation creating it any differently. Accordingly, we find that BLM correctly determined appellant's claims to be null and void because the lands are closed to mineral location.

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:

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

¹¹ Where no mention of mineral use or entry is made in an order withdrawing or reserving public land, the rule of interpretation applied to the location of claims under the general mining law is diametrically different from that applied to the operation of the mineral leasing laws on the same land. That is, unless a withdrawal or reservation of public land specifically provides otherwise, the land is presumed to remain subject to mineral leasing. *Esdras K. Hartley*, 54 IBLA 38, 88 I.D. 437 (1981). There are two excellent reasons for this distinct treatment. First, mineral leasing is at Secretarial discretion where the lands are open to leasing. Thus, where it is perceived that mineral leasing would be inimical to the public purpose for which the land has been reserved, it may be precluded by the exercise of Secretarial discretion. See, e.g., *James K. Tallman*, 68 I.D. 256 (1961), *aff'd*, *Udall v. Tallman*, 380 U.S. 1 (1965); *Nugget Oil Corp.*, 61 IBLA 43 (1981); *J. D. Mell*, 50 I.D. 308 (1924) (upholding denial of a prospecting permit under the Mineral Leasing Act for land in Carlsbad Bird Reserve). Second, mineral leasing cannot divest the United States of its title to land which it has acted to reserve and retain in the public interest, whereas mining claim locations can result in alienation of the Federal title.

January 27, 1983

APPEAL OF THORN CONSTRUCTION CO., INC.

IBCA-1254-3-79

Decided *January 27, 1983*

Contract No. N00-C-1420-5949A, Bureau of Indian Affairs.

Sustained in part

1. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Disputes and Remedies: Burden of Proof

Upon finding that the evidence established a 6.8 percent difference between the actual site conditions encountered at the pit and the test results shown on the plans of the average amount of aggregate passing a No. 4 screen, as opposed to a difference of 26.5 percent asserted by the contractor on appeal, the Board holds, considering all the circumstances involved, that the 6.8 percent does not constitute a material difference and that the contractor failed to sustain its burden of proving a differing site condition.

2. Contracts: Construction and Operation: Changes and Extras--Contracts: Disputes and Remedies: Substantial Evidence

The Board denies claims based upon a constructive change theory (operational breaches) where it finds from the evidence of record: That work claimed by the contractor to be extra work was required by the contract to be performed by the contractor at its own expense; that there is no substantial showing of Government fault; that the purported proof rests upon unsupported opinion or mere allegations; that claimed delays alleged to be caused by the Government are not shown to be unusual, unreasonable, or unauthorized by the contract documents; or, that the contractor was paid for the claimed extra work in accordance with the contract provisions.

3. Contracts: Construction and Operation: Changes and Extras--Contracts: Disputes and Remedies: Burden of Proof

Where the Government admits that a change to the contract occurred, but refuses to pay the contractor for claimed resulting extra work, contending that the contractor was paid therefor, the Board holds that the burden of proof shifts to the Government to prove the alleged payment, and upon a failure to sustain that burden, holds the contractor entitled to the amount claimed.

APPEARANCES: Mr. Steven H. Stewart, Attorney at Law, Stewart, Young & Paxton, Salt Lake City, Utah, for Appellant; Mr. William D. Back, Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Thorn Construction Co., Inc. (Thorn) with its principal place of business in Provo, Utah, entered into construction contract No. N00-C-1420-5949A on Standard Form No. 23A with the Bureau of Indian

Affairs (BIA), an agency of the U.S. Department of the Interior. The contract was dated April 19, 1974, and required Thorn to furnish all labor, equipment, materials, and incidentals necessary for the construction of 14.29 miles of roadway consisting of grading, drainage, emulsified asphalt stabilized or Portland cement stabilized base, and hot bituminous concrete pavement. The project began 4.7 miles north of Coppermine and extended 14.29 miles north to IRS 22 near Page, Arizona, in Coconino County, on the Navajo Indian Reservation.

Thorn's bid, and the initial contract price, was in the amount of \$2,485,000, but after numerous change orders throughout the construction period, the contract price was reduced to a final figure of \$2,469,084.43 (Appeal File (AF)-28).¹ The two next lowest bids received by BIA for this project were for \$2,782,095.75 and \$2,788,997.70 (AF-I). The BIA engineer's estimate was in the amount of \$2,847,023.90 (AF-J). Another significant comparison is the single item 403(l), involving 50,760 tons of hot bituminous concrete pavement. Thorn's unit price bid for that item was \$4.18. The next two lowest bidders bid \$7 and \$7.50 respectively, while the Government engineer's estimated cost for this item was \$9 per ton.

Notice to proceed was issued on May 3, 1974, and received by Thorn on May 6, 1974 (AF-24). The contracting officer (CO) advised Thorn by letter dated May 10, 1974 (AF-25), that the contract time started May 7, 1974, and under the terms of the contract, would expire May 6, 1975, 365 calendar days after date of receipt of the notice to proceed. Substantial completion was established as of August 28, 1975 (AF-26), and final acceptance occurred on November 18, 1975 (AF-27).

On December 7, 1977, Thorn executed a release of claims in consideration of the payment of \$250,949.75, but excepted from the release the amount of \$781,418.37 representing total claims then pending review by the BIA (AF-F-1). Thorn had previously received payments on the contract totaling \$2,469,084.43 (AF-28).

By letter dated July 8, 1976 (AF-D), Thorn presented 15 claims to the CO for extra compensation contending that additional costs were incurred during the course of construction. The total amount claimed was \$790,426. By his findings of fact and decision, the CO denied the claims in their entirety. A timely appeal was filed with this Board from the CO's decision and a 3-day evidentiary hearing was held before the Board at Phoenix, Arizona. At the hearing, by agreement of the parties, claims 6 and 8 were settled and withdrawn from consideration by the Board.

In his posthearing brief, counsel for Thorn claims a total amount of \$785,428.37 for the remaining 13 claims and characterizes them as falling within the following three categories: (1) Differing Site Conditions claims, under paragraph 4 of the General Provisions of the contract, which include claim 11, and to a limited extent, claim 7;

¹ References to the record throughout this opinion will be abbreviated typically as follows: Appeal File, Exhibit, or Tab No. 24 - (AF-24); Appellant's Exhibit No. 1 - (AX-1); Government's Exhibit A - (GX-A); and Transcript, page 32 - (Tr. 32).

January 27, 1983

(2) Operational breaches, which include claims 1, 4, 5, 7, 9, 10, 12, 13, 14, and 15; (3) Changes claims, under paragraph 3, of the General Provisions of the contract, which include claims 2 and 3.

DISCUSSION

Differing Site Conditions Claims

By its claim 11, Thorn contends that it incurred \$366,230.96 additional costs for labor, material, and equipment to obtain asphalt gravel pertaining to bid item 403(1). The amount of that bid item was \$212,176.80 to produce 50,760 tons of hot bituminous concrete pavement at \$4.18. Thorn asserts that it relied on the test results shown on the plans, designating the Antelope Wash Pit as a potential source of aggregate material, to calculate the 25 crusher shifts it estimated in bidding the asphalt aggregate item; that the results of tests made at the pit, and shown on the plans, indicated an average of 54.8 percent of the aggregate material tested passed through a No. 4 sieve or screen;² and that the conditions actually encountered by Thorn at the Antelope pit revealed that approximately 75 percent of the processed material passed through a No. 4 screen.

On the other hand, for its defense to this differing site condition claim, the Government contends: That the comparison of the aggregate material, which had been processed through the crusher and resulted in 75 percent passing through the No. 4 screen, was not valid, since the samples originally tested, and shown on the plans to have been taken from the Antelope pit, consisted of raw, unprocessed material; that the specifications required that 30 percent of the material retained on the No. 4 screen have at least one fractured face; that the contract also required that 2 percent filler, Portland cement, a fine material, be added; that the testimony of Mr. Junior Meir, materials engineer for the Government (Tr. I, 355-56), showed that such fine material, when added, would increase the dry aggregate from 4 or 5 up to 6 or 7 percent passing the No. 4 screen; and that the requirements to add the filler and for fracturing or crushing accounts for the difference between the test results shown on the plans and the test results of the processed aggregate.

To prevail with respect to this claim, the contractor must bear the burden of showing by a preponderance of the evidence that the site conditions encountered differed materially from those represented by the contract drawings and specifications. *Pacific Alaska Contractors, Inc. v. United States*, 193 Ct. Cl. 850 (1971); *United Telecommunications, Inc.*, NASA BCA No. 771-13 (Oct. 31, 1972), 72-2 BCA par. 9,754.

The representations of the Government as to the site conditions are not in dispute. They are contained on sheet 39 of the project plans

²A No. 4 screen is a wire screen with approximately four square spaces per square inch.

designated as "Material Deposit Layout Sheet," showing four aggregate pits numbered 6, 7, 8, and 9. Pit No. 9 is also called the Antelope Wash Pit. The layout of the Antelope Wash Pit shows that 12 drill holes or borings were made at that pit from which nine samples were taken and tested with a No. 4 screen; that there was no overburden; and that the pit contained 320,000 cubic yards of gravel. The test results of the nine samples taken indicate the percentage of material passing through the No. 4 screen for each sample and that it varies from 38 percent, the least, to 66 percent, the most. The average for the nine samples is 54.8 percent. By removing the disparate sample taken from the No. 10 hole, which tested 38 percent of the material passing and 10 percent lower than the next lowest sample, the average of the remaining eight samples is 56.9 percent passing through the No. 4 screen. Although the plans did not expressly specify any of the pits as type A or type B,³ the layout for the Antelope Wash Pit did contain the following note in bold print: "Boring information of material and borrow sources logged and presented within these plans is for informational purposes only, and should be considered as representing only the location sampled. No guarantee is given or implied as to the quantity, quality or uniformity of material throughout the pit area."

The precise issue to be resolved by the Board with respect to the differing site condition claims is whether the record evidence establishes that the conditions actually encountered by the contractor with regard to the aggregate within the Antelope Wash Pit differed materially from the Government's representation contained on layout sheet 39.

The evidence shows that during the initial phases of the project, Thorn had difficulty at the Antelope pit with respect to a high percentage of asphalt and cement treated base (CTB) course aggregate that would pass through a No. 4 screen. A meeting was held with Government representatives on March 11, concerning this problem and it was decided to conduct some tests of the aggregate material at the Antelope pit. According to the testimony of Mr. J. Lawrence Davis, vice-president of Thorn, and general manager for the Page project, between March 11 and March 17, 1975, six test holes were dug "around the north periphery of the Antelope Pit *where we'd been excavating*" (Tr. 285; italics added). The test results of those test holes showed an

³ Section 106.02(a) of the General Provisions of the Specification identifies a type A source as one for which the Government assumes responsibility for the adequacy of acceptable materials in accordance with the following paragraph (1), while a type B source is a source with respect to which the contractor shall satisfy himself as to the quantity of acceptable material that may be produced in accordance with the following paragraph (2):

"(1) *Type A Sources* - Should the contractor elect to obtain material from a type A source and it is subsequently determined by the contracting officer that due to causes beyond control of the contractor the source contains insufficient available acceptable material to meet the contract needs, the Government will provide another source. In this event an equitable adjustment in payment and contract time will be made in accordance with Clause 3, Changes in SF 23-A, General Provisions. Should the contractor choose, for some other reason, to change the source of material from a type A source at which he has installed a plant, no adjustment in payment or contract time will be made.

"(2) *Type B Sources* - Should the contractor elect to obtain material from a type B source and it is subsequently determined by the contracting officer that the source contains insufficient acceptable material to meet the contract needs and it becomes necessary for the contractor to select a new source, or if the contractor chooses, for some other reason to change the source of material, no adjustment in payment or contract time will be made, regardless of the conditions which cause such insufficiency of acceptable material or of the fact that the contractor has installed a plant at a type B source."

January 27, 1983

average of 81.3 percent passing the No. 4 screen, and 52.2 percent passing the No. 40 screen (Tr. 286-87). Mr. Davis admitted, however, that when he brought up the problem at the meeting he stated that the 75 percent passing the No. 4 screen was what Thorn was getting through the crusher plant (Tr. 285). After the test results were received from the six test holes dug around the northern periphery of the Antelope pit, Mr. Junior Meir, a materials engineer for the Government, was sent to the project site to go over the problem. He arrived on March 17, 1975 (Tr. 289). In describing the meeting held that date with Junior Meir and George Maestas, the Government's project engineer, Mr. Davis testified as follows:

We talked over the results of what had happened, what had happened, what had been given. We went down to the Antelope Pit site, went over and looked at the test pits that were taken around the periphery. *By the way they were outside of the pit boundary on the north side, and we looked at those.* [Italics supplied].

(Tr. 290).

On the next day, March 18, 1975, an additional five test holes were dug by Mr. Davis with a bulldozer. Mr. Meir and Mr. Maestas were present. This time, one hole was south of the pit boundary and the other four were between the south pit boundary and 1,100 feet south of the north end of the boundary where the crusher was located (Tr. 291). The results from these tests showed an average of 61.6 percent passing the No. 4 screen and an average of 35.6 percent passing the No. 40 screen (GX-5). There were no other tests made of the raw material in the Antelope pit.

It is undisputed that Thorn continued operating the crusher at the Antelope pit for a total of 97 shifts, obtained 16,000 tons of coarse material, and needed an additional 8,500 tons; that on July 7, 1975, having calculated that it would take an additional 46 crusher shifts to obtain the necessary coarse material at the Antelope pit, Thorn made the unilateral decision, without notice to the CO, to move the crusher to Paria Canyon, Utah, approximately 35 miles away, where the crusher was needed anyway in connection with one of Thorn's other projects (Appellant's Brief at 5, 6). It required about 1 month to dismantle, move, and reassemble the crusher. Thorn began crushing again at the Paria Canyon pit on August 4, 1975, and completed the necessary crushing to obtain the needed coarse aggregate within 10 days (Tr. 297-98). The approximately 8,500 tons were hauled from Paria Canyon to the Page project by truck (Tr. 309-10).

Thorn argues that the pivotal issues are whether the Antelope pit is a type A or type B source within the meaning of section 106.02(a) of the General Provisions of the contract; and if the pit is construed to be a type B source, whether the subsurface or latent physical conditions at the site differed materially from those indicated on sheet 39 of the project plans (Appellant's Brief at 16).

We find that the Antelope pit was a type B source for two reasons. First, although the plans did not specifically designate the pit as either an A or B type, the exculpatory language in bold print on the plans strongly implies that the Government had no intention of providing another pit with the concomitant equitable adjustment characteristic of a type A source as spelled out under section 106.02(a)(1) of the General Provisions of the specifications (see note 3). Secondly, by choosing to move the crusher to Paria Canyon, without notice to the CO, or without requesting the Government to provide another pit, the contractor itself construed the plans as designating the Antelope pit as a type B source. Where a contract is not clear on its face, the conduct of the parties and their interpretation of its various provisions before the controversy develops will be given effect by the courts. *Topliff v. Topliff*, 121 U.S. 121, 131 (1887); *Houston Ready Cut House Co. v. United States*, 119 Ct. Cl. 120, 96 F. Supp. 629, 635 (1951); *Florida Builders, Inc.*, ASBCA No. 8728 (Sept. 30, 1963), 1963 BCA par. 3,886.

In its posthearing reply brief, Thorn argues: That a 26.5 percent difference between conditions represented in the Government's initial test results (shown on sheet 39 of the plans) and the conditions actually encountered is a material difference, entitling Thorn to an equitable adjustment in the amount of \$366,230.96 under claim 11. But to arrive at the 26.5 percent, Thorn subtracts 54.8 percent, the average of the test results from samples taken inside the Antelope pit and shown on sheet 39, from 81.3 percent, the average of the test results from six test holes dug between March 11 and March 17, 1975, and admitted by Thorn's own witness, Mr. Davis (Tr. 290), to be located "outside of the pit boundary on the north side."

The Government did not purport to represent in any respect on sheet 39 what percentage of aggregate might be expected to pass through a No. 4 screen when taken from areas outside the pit boundaries. The figure of 81.3 percent is, therefore, entirely irrelevant to the differing site condition issue presented here.

To be relevant and probative of what the actual site condition was, Thorn was obliged to rely on the percentage of aggregate passing the No. 4 screen from test holes *within* the pit. The record, as it stands, shows that on March 18, 1975, five test holes were dug by Mr. Davis; one was south of the pit boundary and four were between 1,100 feet south of the north boundary and the south boundary of the pit. Government Exhibit 5 discloses that the test results of the samples taken from those five holes were 62 percent, 40 percent, 70 percent, 67 percent, and 69 percent passing the No. 4 screen, averaging 61.6 percent.⁴ This exhibit does not show which one of the five holes was outside the pit, south of the south boundary. Nevertheless, with four out of five test holes being inside the pit, the average of 61.6 percent is obviously a more reliable representation of the actual site condition

⁴ Neither party has explained why test holes were not dug entirely within the boundaries of the pit and in reasonable proximity to the test holes shown on sheet 39 of the plans, particularly, after it became apparent that differing site condition claims probably would be made and become the subject of litigation.

January 27, 1983

than the 81.3 percent average of six test holes all outside the pit boundary.

[1] The difference between 61.6 percent and 54.8 percent is 6.8 percent. This is a wide variance from the 26.5 percent difference asserted by Thorn. Furthermore, if the disparate sample is removed from the nine samples shown to have been tested on the plans, the difference of the averages is only 4.7 percent. We find neither 6.8 percent nor 4.7 percent to constitute a material difference under the circumstances of this case.

Based on the foregoing discussion, we hold that the appellant failed to sustain its burden of proving that the site conditions actually encountered at the Antelope pit differed materially from those represented on sheet 39 of the plans.

Accordingly, claim 11 is denied and claim 7, insofar as it is based on a differing site condition theory, is likewise denied.

Operational Breach Claims

Except for disputes subject to the Contract Disputes Act of 1978, boards of contract appeals have no jurisdiction to decide breach of contract claims, and are limited to granting relief under the disputes clause of the contract. Since this proceeding involves a pre-Contract Disputes Act contract, we are, therefore, bound to treat the term "operational breach" as used by appellant, to mean a claim for relief arising out of a constructive change theory entitling the contractor to an equitable adjustment for increased costs, and not a claim for breach of contract. (See *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966); *Bennett v. United States*, 178 Ct. Cl. 61, 69-70 (1967); *Appeal of Frank Briscoe Co., Inc.*, GSBCA No. 2591 (Sept. 11, 1968), 68-2 BCA par. 7,239; and *Appeal of Lincoln Construction Co.*, IBCA 438-5-64 (Nov. 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234.

[2] For the reasons hereinafter explained, however, we find that no substantial evidence has been adduced by Thorn to support its operational breach claims.

Claim 1 -- Pit Permit Claim

Appellant claims \$2,050 for additional supervisory and administrative costs allegedly incurred as a result of inconsistent positions taken by the Government with respect to obtaining a permit to remove and crush aggregate material at the Antelope pit. The Government asserts that pursuant to special provision section 106.02 of the Specifications, all expenses in connection with obtaining a pit permit were to be borne by the contractor.

The salient facts pertaining to this claim are undisputed in the record and may be summarized as follows: After the contract was awarded, at a preconstruction conference held at Gallup, New Mexico,

April 19, 1974, representatives of Thorn were advised that an application for the necessary pit permit from the Navajo Tribe was to be submitted to the office of Mr. John Bokan of the real property division of BIA (Tr. 40, 42-43; AF-M). On May 3, 1974, Mr. Davis, of Thorn, by letter, applied to Mr. Bokan for a permit to use gravel from the Antelope Wash Pit No. 9 (AX-U; Tr. 43). On May 8, 1974, Mr. Thomas Lynch, a BIA employee working under the supervision of Mr. Bokan, wrote a reply on the bottom of a copy of the May 3rd letter enclosing an application form and instruction sheet (AX-V, AX-W), and stating that the bond should be in the amount of \$15,000. Upon reading the application form, Mr. Davis determined that in addition to obtaining signatures of tribal officers, a survey of the pit would be necessary in order to provide a legal description of the pit. After finding that BIA did not have a survey of the pit on hand (Tr. 51), Mr. Davis made the survey in about 2-days' time, August 5 through 7, 1974 (Tr. 55), and obtained the signatures of four tribal council members (AX-V). The exhibit, however, does not show that it was signed by Thorn as permittee. Nevertheless, on September 4, 1974, Mr. Davis went to Window Rock, Arizona, delivered the incomplete application to Mr. Lynch who informed him that the permit was not needed (Tr. 60). At the request of Mr. Davis, Mr. Lynch gave him a memorandum, written in longhand (AF-29), which reads as follows:

Date: Sept. 4, 1974

MEMORANDUM

To: Horn [sic] Construction Co.

From: Ariz. Real Property Mgmt. T. Lynch

Subject: Coppermine - Page Road Project N 20(1) 2 & 4

106.02 of Road contract specifically states that the contractor need not obtain a permit when the material source or pit is designated on the contract or plans. Antelope Wash Pit #9, according to Horn [sic] Construction Co. is designated in the plans and therefore should not require a permit unless it is not designated. This info confirmed in telephone conversation with Messrs. Keene and Frazier of Gallup office.

The apparent conflict, between the instructions given at the prework conference and the interpretation by Mr. Lynch of the contract provisions relating to the pit permit, was never presented to the CO for clarification or resolution. Mr. Davis testified that, in fact, he never did get a pit permit; that Mr. Roman Welfl, the contracting officer's representative (COR), called and asked where the permit was; that 2 months later, on September 17, 1975, Mr. Lynch wrote a letter (AX-X) requesting the permit; and that in both instances, Mr. Davis wrote back enclosing a copy of the September 4, 1974, memorandum and never received an answer (Tr. 85).

Section 106.02 of the General Provisions of the Standard Specifications (AF-A at page 93), among other things, provides: "The contractor shall be solely responsible for obtaining any permits required by Tribal Officials in connection with removal of material

January 27, 1983

from Type A or B sources at his own expense but will not be held responsible for the payment of royalty charges."

The Navajo Tribal Code (N.T.C.) allows the chairman of the tribal council, with the approval of the Secretary of the Interior, and upon the recommendation of a majority of the council delegates from the Land Management district involved, to issue permits for the extraction of sand, gravel, topsoil, building stone, or any combination of such material, from tribal lands (18 N.T.C. section 1001); and it is a trespass for any person, except a Navajo Indian for his own use and not for resale, to extract any material from tribal lands without holding a valid permit (18 N.T.C. section 1002).

We find nothing in section 106.02, *supra*, which relieves the contractor from obtaining a pit permit where the plans designate a pit. Mr. Lynch clearly erred by advising Mr. Davis that it did, and had no authority to change, constructively or otherwise, the specifications relating to pit permits. As was indicated in *R & R Construction Co.*, IBCA 413 and 458-9-64 (Sept. 27, 1965), 72 I.D. 385 at 390, 65-2 BCA par. 5,109, at 24,062, the doctrine of apparent authority has no application where the Government is involved. Furthermore, the minutes of the preconstruction conference, transmitted to the contractor on April 29, 1974 (AF-M), among other things, state: "All changes involving contract price, time and *specifications* must be authorized by the contracting officer." (Italics supplied.)

Based upon our analysis of the record and the foregoing discussion, we find and conclude:

1. That the contractor was required by the contract documents, and was so advised at the preconstruction conference, to obtain a pit permit from the Navajo Tribe at its own expense;
2. That a Mr. Thomas Lynch, although an employee of BIA and not an authorized representative of the CO, erroneously and without authority, advised the contractor that a pit permit was not necessary;
3. That the contractor made no attempt to inquire of the CO for an explanation or clarification of the apparent conflicting and inconsistent information;
4. That the contractor never did obtain the required permit, but did incur some expense in connection with a partial completion of the permit application;
5. That no change, constructive or otherwise, occurred with respect to pit permit requirements; and
6. That the contractor adduced no evidence showing that it incurred more expense by partially completing the permit application than it would have incurred had the permit been obtained.

In other words, the sum and substance of this claim is that Thorn asks the Board to award it an equitable adjustment for expenses incurred for partial performance of a contractual requirement, which, if performed, was to have been at the contractor's own expense.

Appellant has cited no authority, and we know of none, which would justify such an award.

Accordingly, we hold that Thorn has failed to bear its burden of proof in establishing entitlement to an equitable adjustment under claim 1. Therefore, the claim is denied.

Claim 4 -- The Damaged Culvert Claim

Appellant claims additional costs incurred for material, equipment, and labor to remove and replace a broken corrugated metal pipe or culvert at approximately Station 867 + 50. The amount claimed is \$1,560.33.

Counsel stipulated (Tr. 467-70) that with respect to this claim and claims 5, 9, 10, 12, 13, 14, and 15, in order to expedite the hearing, counsel for the parties would state for the record to what their respective witnesses would testify, if called upon to do so.

Counsel for appellant stated, if called upon, Mr. Davis would testify that: There was a contractor, employed by BIA, working in the Lee Chee Subdivision adjacent to the project operating some heavy equipment, including an elevating scraper, and that the subject culvert was placed and covered so that the only way in which the pipe could have been damaged would have been by a piece of heavy equipment (Tr. 470-71); the extent of the cover over the pipe was not intended to support a piece of heavy equipment thought to have caused the damage (Tr. 473); and the quantum elements of this claim are in accordance with Exhibit E of the appeal file (Tr. 471).

Counsel for the Government stated that if called, Mr. Maestas would testify: That there must have been insufficient cover or dirt over the pipe to result in the damage (Tr. 471); that in response to the Government's interrogatories on page 11, question 27, Thorn indicated it knew of no witnesses to the destruction of the culvert (Tr. 472); and that if there was heavy equipment operating in the Lee Chee Subdivision, it was not being operated by an employee of the Government (Tr. 472).

Appellant did not present any argument with respect to this claim in its posthearing brief, but referred only to the above-stated testimony of its witness. The Government argued: That appellant did not contradict the testimony that appellant knew of no witnesses to the destruction of the pipe; that it is elementary that the contractor is obligated to take reasonable precautions to protect its own work during the course of construction and is required to do so by Clause 12 of the SF23-A Construction Contract, General Provisions; and that if appellant knew that there was heavy equipment working adjacent to the project site, it should have taken proper precautions, such as placing sufficient cover over the culvert to protect it from damage. The Government further asserted that even assuming the damage to the pipe was not caused by appellant's failure to place sufficient cover over the pipe, when work is damaged without the fault of either party, the contractor is obliged to repair the damage at its own expense in the absence of a contract

January 27, 1983

provision shifting the risk of loss to the Government. *Appeal of M & P Equipment Co.*, IBCA 1088-11-75 (Sept. 28, 1979), 86 I.D. 527, 537, 79-2 BCA par. 14,094 at 69,328; *Charles T. Parker Construction Co.*, IBCA 335 (Jan. 29, 1964), 71 I.D. 6 at 10, 1964 BCA par. 4,017 at 19,792-93.

Appellant made no response to the Government's argument in its posthearing reply brief.

We find that the evidence produced by appellant to support this claim is not only limited, but speculative to such an extent that it has little, if any, probative force. We further find that the preponderance of the evidence weighs heavily in favor of the Government's position that it was neither responsible, nor at fault, for the damage to the subject culvert.

Accordingly, we hold that appellant has failed to sustain its burden of proof with respect to this claim. Claim 4 is denied.

Claim 5 -- The Alleged Improper Testing and Price Reduction Claim

Appellant claims entitlement to \$3,912.70 as a result of alleged incorrect test results in connection with a July 2, 1975, test of asphalt hot mix (Tr. 477).

The evidence produced by appellant was: That Mr. Davis would testify that some tests were made by the Government on July 1, 1975, pertaining to bituminous asphalt hot mix, which indicated that on the No. 4 screen 43 percent was passing (AX-GG); that the tolerance for passing material on that screen was 50 to 70 percent, so that 7 percent more of that material was needed to meet the specification (Tr. 473-75); that Mr. Davis made adjustments on the dials of the hot mix plant in order to bring the percentage of material passing the No. 4 screen up to 50 percent; that on the next day, July 2, 1975, another test was run which showed that the material passing a No. 4 screen, instead of increasing up to 50 percent, dropped to 35.3 percent (AF-32A); that there was a conversation between Mr. Davis and Mr. Maestas without agreement as to what went wrong; that no adjustments were made with respect to the hot mix plant as a result of the July 2, 1975, test; that another test was run on July 3, 1975, which indicated 57.5 percent of the material passing the No. 4 screen, or that it fell within the specification tolerance; that in his opinion, as an engineer and based on his construction experience, the test result of July 2, 1975, was incorrect and the amount of \$3,912 was improperly deducted (Tr. 475-77).

The Government's evidence, on the other hand, was that Mr. Maestas would testify: That 2 or 3 days is a normal and usual period required for calibrating a hot mix plant and that this opinion is based on 20 years' experience in calibrating hot mix plants; that he has no personal knowledge of what adjustments appellant made or did not make, but that the tests he performed for the Government were in accordance with the contract specifications and performed in the same

manner as all other hot mix material tests throughout the course of the contract (Tr. 477-78). Mr. Maestas would also testify (Tr. 478) that appellant knew of the price reduction for the out of specification material from the hot mix plant by its concurrence in the reduction indicated on Exhibit 32 of the appeal file which contains the signature of Mr. Merlin Fox, job superintendent for Thorn.⁵

The parties stipulated (Tr. 381, 493) that the contract price was, in fact, reduced by \$3,912.70, and Thorn, by way of rebuttal (Tr. 483) would produce Mr. Fox who would acknowledge that he signed AF-32, but did not know that he was agreeing that the contract price would be reduced by that particular amount.

On the basis of the total evidence produced, we are unable to reasonably conclude that appellant, by a preponderance, sustained its burden of proof. There was no evidence adduced with respect to what appellant contended was incorrect about the testing procedures actually employed by the Government. In fact, Thorn did, by virtue of its concurrence on AF-32, accept a reduction of price without protest until nearly a year later, on July 8, 1976, when it transmitted to the CO its 15 claims originally involved in this appeal (AF-D). The opinion of Mr. Davis, to the effect that the testing procedures were incorrect, standing alone, is insufficient to preponderate.

There is a presumption that the method of testing followed by the Government is proper and must be overcome by concrete evidence to the contrary, in order for the contractor to prevail. The contractor's opinions, even if supported by contrary test results, are not a sufficient basis to show the Government's tests to be erroneous. *Continental Chemical Corp.*, GSBCA No. 4483 (June 18, 1976), 76-2 BCA par. 11,948 at 57,270; *Tilton Machine and Tool Co.*, GSBCA No. 4198 (Feb. 6, 1976), 76-1 BCA par. 11,750. In addition, the delay of nearly a year before advising the CO of this claim strongly implies little substantive merit in the claim. *Kent d/b/a Dorald Engineering Co.*, DOT CAB No. 67-35 (Mar. 28, 1969), 69-1 BCA par. 7590, at 35,244; *Futuronics, Inc.*, DOT CAB No. 67-15 (June 17, 1968), 68-2 BCA par. 7,079 at 32,759.

Accordingly, claim 5 is denied.

Claim 7 -- The Crusher Shutdown Claim

In its complaint, totally denied by the Government's answer, with respect to claim 7, appellant alleged: "During the course of construction, the Government, without justifiable cause, required the shutting down of Thorn's crushing operation while tests were run on the cement treated base course which was being crushed. The crusher was shut down for a total of fifteen days. Amount: \$36,000.00."⁶

⁵ Although Exhibit 32 does not specify the total figure by which the contract price was reduced, it does show that a reduction was being applied for July 2 and 3, 1975, in accordance with the Specifications, and it does show the precise computations for those 2 days. It shows a concurrence on behalf of Thorn Construction Co., Inc., by Merlin J. Fox on July 30, 1975.

⁶ We note that this allegation is nearly identical with the wording of the claim originally transmitted to the CO by Thorn on or about July 8, 1976, and for the same amount of \$36,000 (AF-D).

January 27, 1983

The evidence on this claim, adduced at the hearing on behalf of appellant, consisted entirely of the testimony of Mr. Lawrence Davis (Tr. 273-76), which may be summarized as follows: That during the initial phases of its crushing operations at the Antelope pit, Thorn could not meet the 8-15 percent No. 200 screen specification; that on October 10, 1974, Mr. Davis talked to the COR, Mr. Welfl, at the BIA office in Tuba City, Arizona, who told him to write a letter; that on October 11, 1974, Mr. Davis was about to write the letter when Mr. Maestas contacted him at Page and said "Do not write the letter. We're going to take test samples and send them to Gallup to be tested on the material that you've crushed"; that it took from October 11 to October 31 to receive the test results by word of mouth from George Maestas that a change in specifications would be approved; that during that period, the crusher was idle (Tr. 274);⁷ that an answer can be obtained for that kind of test (compression) from the Utah State Highway Department in 10 days (Tr. 275); that as a result of the tests it was determined that the material produced through the crusher was 50 percent better than the compression PSI required in the specifications, so that Thorn was no longer required to put a minimum of 8 percent minus 200 material into the CTB aggregate; that in the meantime he did not know what to do, and, as a result, claims the additional compensation found in Exhibit E (AF-E).⁸

Among other items, the Government produced the following evidence: A letter from the soil scientist at the BIA laboratory in Gallup, New Mexico, to the CO (AF-34) and testimony of Mr. W. R. Meier, Jr., materials engineer for BIA (Tr. 389), both indicating that the 15 days' time spent on the tests was normal and reasonable; testimony of Mr. Meier that appellant had requested BIA to reduce the required percentage of aggregate passing the No. 200 screen (Tr. 372); contract modification 3, showing that this was done, effective November 19, 1974, by reducing the tolerance percentage for material passing the No. 200 sieve from 8-15 percent to 3-10 percent (AF-4); and a memorandum from the COR to the CO, dated August 20, 1976, wherein the COR opined, among other things, that claim 7 was not justified because "at no time did the Government personnel recommend or instruct the contractor to shut down crushing operations" (AF-G).

Appellant offered no rebuttal evidence to offset the Government's evidence; neither did it dispute, by argument in its posthearing reply brief, the Government's assertion that appellant failed to show that the Government suspended the crushing operations or that the testing

⁷ The testimony of Mr. Davis, simply "that the crusher was idle," is a significant variance from the allegation in the complaint that, "the Government, without justifiable cause, required the shutting down of Thorn's crushing operation while tests were run."

⁸ This testimony presented at the hearing indicates appellant at that time was claiming \$59,537.81, the amount shown on page 10 of exhibit E of the appeal file; but, in its posthearing brief, page 7, Thorn indicates the amount for claim 7 to be \$14,748. There is no explanation whether this latter amount was intended to be a revised final amount claimed under claim 7, or a sum to be added to one of the two amounts previously claimed. However, since we find no proof supporting entitlement, the confusion and uncertainty surrounding this quantum element becomes irrelevant.

time was unreasonable. See *Drexler Construction Co.*, ASBCA No. 9776 (Feb. 17, 1966), 66-1 BCA par. 5,389.

We find from the foregoing that appellant failed to support its allegations with respect to claim 7 by any substantial evidence. As we stated in *Oakland Construction Co., Inc.*, IBCA 871-9-70 (Mar. 23, 1971), 71-1 BCA par. 8766, "Mere statements in letters and assertions in appellant's complaint cannot be accepted as proof of facts." See also *C.I.C. Construction Co., Inc.*, IBCA 1190-4-78 (Sept. 25, 1979), 86 I.D. 475, 79-2 BCA par. 14,057.

Therefore, appellant having failed to sustain its burden of proof, claim 7 is denied.

Claim 9 -- Government Delays Claim

As in claim 7, appellant for this claim at various times has claimed three different amounts. As of July 8, 1976 (AF-D), the amount submitted to the CO was \$203,066. This coincides with the amount claimed in the complaint filed May 21, 1979. The amount shown on Exhibit E, appeal file, which was submitted to the CO on April 20, 1977, is \$162,831.56, while in the appellant's posthearing brief, the claim becomes \$195,670.75. We need not make a choice from these figures, however, since they relate to the element of quantum, and we do not reach the quantum question because, for the reasons hereafter stated, we hold that, as in the preceding claims, appellant has failed to sustain its burden of proof in establishing entitlement to any amount.

According to the complaint, the basis for this claim is the Government's alleged failure to award the contract within a reasonable time after the bids were opened and because of other delays in construction caused by the Government. The "other delays" claimed by appellant are in connection with the CTB test results, claim 7, and the differing site conditions claimed in claim 11. Since we have already found against appellant on those claims for insufficient proof, the only remaining item requiring our discussion here pertains to the claimed delay in awarding the contract.

The facts are undisputed that the contract was awarded April 19, 1974 (AF-1); that the bid opening was on March 7, 1974; that the notice to proceed, issued May 3, 1974, was received by appellant on May 6, 1974; and that the contract time began to run on May 7, 1974 (AF-24, 25).

Page 2 of Standard Form 21, Construction Contract Bid Form, and executed by appellant on March 6, 1974 (AF-A 26), provides that the bid will be accepted within 60 calendar days unless the bidder inserts a different period for such acceptance. Thus, since the award was made on April 19, 1974, the acceptance occurred within 43 days after the bid opening or 17 days sooner than the time allowed. We find in this circumstance no unreasonable delay on the part of the Government. The contractor had the option of shortening the time for award in the bid submitted, but failed to do so, and as a consequence, is in no position to complain.

January 27, 1983

The Government had an absolute right to award the contract at any time up to and including May 6, 1974, in light of the contractor's failure to opt for a lesser time. *Morlis Industries, Inc.*, ASBCA Nos. 12218, 12681 (May 14, 1968), 68-1 BCA par. 7048. Although not mentioned in the complaint, counsel for appellant at page 9 of his posthearing brief alludes to a delay between the award and notice to proceed because of the restaking of the entire project during that period. But no evidence was offered to show that such period was unreasonable. Consequently, we hold that claim 9 must be denied for lack of proof. See *Freeman Electric Construction Co.*, DOT CAB Nos. 74-23A, 74-23B (Dec. 6, 1976), 77-1 BCA par. 12,258 at 59,015-16; and *COAC, Inc.*, IBCA 1004-9-73 (Dec. 6, 1974), 74-2 BCA par. 10,982, *On Motion for Reconsideration* (Feb. 19, 1975), 81 I.D. 700, 75-1 BCA par. 11,104.

Claim 10 -- Price Escalation Claim

This is a claim for \$101,000.40 (Appellant's Brief at 10), allegedly resulting from the escalation of prices for bituminous asphalt material and Portland cement and allegedly caused by the same delays already discussed with respect to claims 7 and 9. Thorn claims that it was required to complete the project in the spring of 1975, when it could have been completed in the fall of 1974 but for the Government-caused delays. Since we have already found that appellant has failed to prove Government fault with respect to the alleged delays involved with claims 7 and 9, this claim also must be and is denied.

Claim 14 -- Rental Income Claim

Appellant claims that it is entitled to \$11,500 loss of rental income in connection with a stabilization plant which was leased to another contractor beginning April 14, 1975, but which Thorn was required to use to complete the Page project (Appellant's Brief at 11). The loss is alleged to have resulted from Government-caused delays between January 7, 1975, and April 14, 1975 (Tr. 513). No evidence was offered by appellant, however, with respect to that period of time other than the general allegation of Government-caused delays already discussed with respect to claims 7, 11, 9, and 10. We find, therefore, that appellant has again failed to sustain its burden of proof, and claim 14 is denied.

Claim 15 -- Supervisory Costs

Appellant alleges that because of Government-caused operational delays, discussed in connection with claims 7, 9, and 10, certain supervisory employees, including a superintendent, engineer, foreman, timekeeper, and office man were required to spend an extra 5 months of time on the Page project at an increased cost of \$58,075. However, as in the previous claim, appellant again relies on delays alleged to have

been caused by the Government, but which we have already found it has failed to prove. Consequently, claim 15 is denied for lack of proof.

Claim 12 -- Lease of Private Property

Appellant claims entitlement to \$5,540 arising out of an alleged representation to Mr. Davis on February 14, 1974, at a prebid inspection tour in connection with the Page project, by Mr. Lester Charley, an employee of BIA, to the effect that certain Bureau of Reclamation land could be used by Thorn for a plant site and stockpiling at no charge. It is further alleged, that the Bureau of Reclamation, however, refused to issue a permit and Thorn was required to lease private property upon which to locate its plant (Tr. 517-19).

Not only was the testimony of Mr. Charley contradictory of the testimony of Mr. Davis (GX-3), which makes a preponderance difficult for Thorn to achieve, but as pointed out on pages 28 and 29 of the Government brief, certain contract provisions make such a claim unallowable as a matter of law.

Clause 13 of the General Provisions of Standard Form 23-A, the construction contract, provides as follows:

13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. *The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.* [Italics supplied.]

(AF-A, 47).

Similar language is found in the last sentence of paragraph 2, Standard Form 22, Instructions to Bidders, which reads:

2. Conditions Affecting the Work. * * *

The Government will assume no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of the contract, unless included in the invitation for bids, the specifications, or related documents.

(AF-A, 21).

In addition, at the hearing (Tr. 529), three Government witnesses would testify that Thorn did not notify the contracting officials for the Government of the rent-free site problem, thus preventing them from assisting the contractor in locating a rent-free site, which the CO, in his Findings of Fact and Decision at page 68, stated would have been available on tribal lands and would have eliminated this claim.

Again, we find that appellant has failed to sustain its burden of proof. Claim 12 is, therefore, denied.

January 27, 1983

Claim 13 -- Earthwork Balances

The total presentation of this claim in appellant's posthearing brief, pages 10 and 11, is as follows:

Claim No. 13 - Mr. Davis and Mr. Weir testified that Thorn incurred additional costs in the amount of \$5,540.00 because certain calculations in connection with earth work balances furnished by the Government were incorrect. (T. III at 525-26). As a result of incorrect earth work balances furnished by the Government, Thorn incurred additional expenses in the amount of \$6,258.60. (T. III at 528).

Our examination of the transcript at pages 525 and 526 reveals no mention of the figure \$5,540, but at page 528 of the transcript, counsel for appellant states the total amount of the claim to be \$6,258.60. The sum and substance of appellant's testimony with regard to this claim is that when the earthwork was begun sometime in June or July 1974, Thorn experienced areas where they were wasting material; that Mr. Davis requested additional earthwork balances from Mr. Maestas; that the actual construction work revealed something different, in terms of waste and earthwork balances shown on the plans and different from the information furnished by Mr. Maestas as shown on appellant's exhibits HH, II, and JJ; that such furnished information was incorrect; and that as a result of the incorrect and inconsistent earthwork balances furnished by the Government, Thorn was required to haul material greater distances than it would have been required to do had the earthwork balances been correct and consistent (Tr. 525-28).

The Government's position, as we glean it from the record, is: That Mr. Maestas would testify that the earthwork balance points were provided to the contractor in the drawings at the prebid stage; that at the preconstruction conference, Thorn advised the Government that it would move from the beginning to the end of the project, but that, instead of doing so, jumped to the middle of the project which interrupted the staking and may have affected the balance points; that the balance points shown on the drawings were accurate and if the contractor had proceeded from the beginning to the end of the project, there would have been no waste at all; that furthermore, if there had been waste, the borrow item would have been reduced accordingly in that the waste would have been substituted for material hauled in from a borrow pit; that the contractor was provided with balance points, as shown on appellant's exhibits HH, II, and JJ, during the course of construction based on stakes set by the Government but were furnished only as a courtesy to the contractor at its request; and that there was no responsibility in the contract documents placed upon the Government to furnish balance points above and beyond those shown on the drawings (Tr. 529-33). In its posthearing brief, pages 29-31, the Government also points out: That the earthwork planned quantities, as shown on the plans, were very close to the earthwork quantities as performed on the project; that the planned excavation and borrow were 588,594 cubic yards and 17,289 cubic yards, respectively, while the

actual quantities as performed were 575,113 cubic yards and 12,308 cubic yards, respectively, or an underrun difference of 3 percent; that appellant was fully compensated at the contract unit price for all earthwork performed on the job; and that throughout the earthwork process appellant gave no notice, as required by the contract, to the Government that it had a problem; and that the Government was thereby deprived of the opportunity to relieve any undue burdens on appellant since the first question was raised a year later.

Regardless of the question of notice here, the record shows no response by appellant in its posthearing brief, or otherwise, to the assertion by the Government that appellant has been fully compensated at the contract unit prices for all earthwork performed. Thus, on the principle that "silence is acquiescence," and because we feel the general and conclusory nature of appellant's evidence diminishes its probative value, we find by a preponderance of the evidence that appellant was paid in accordance with the contract for all earthwork performed and has failed to sustain its burden of proving entitlement to any additional compensation under this claim. Therefore, claim 13 is denied.

Changes Claims

Claim 2 -- Embankment-Fill Claim Outside of Right-of-Way

This claim is for \$1,108.78 resulting from alleged additional costs incurred by Thorn for materials, equipment, and labor to place embankment outside the right-of-way for a cattle crossing at approximately Station 997+50 on the project.

By his testimony on direct examination, Mr. Davis explained that around the first of August, 1975, near completion of the first lay of the asphalt on the road, he had a conversation with George Maestas regarding the embankment and finalizing of the road outside of the right-of-way at about Station 997+50; that the contract called for putting in a turn-out road to the right-of-way and a cattle guard; that the cattle guard when staked resulted in being about 2 feet above the original ground, which meant there had to be some fill put on the outside of the cattle guard so it could be crossed without someone dropping to the ground; that he was instructed to put the fill in and bring it up to approximately the grade of the cattle guard opposite the cattle guard itself, then turn and go south for approximately 200 feet to bring it in level with the grade of the original road; that he was instructed to place hot mix asphalt on top of the embankment after it had been installed, watered, rolled, and compacted to the specified density for the road prior to the placement of the asphalt; that Mr. Davis questioned Mr. Maestas concerning working outside the right-of-way fences and the fact that the work was not called for in the specifications and plans; that Mr. Maestas stated that the asphalt would be paid for, which it was, but that the watering, rolling, compacting, and tying in of the embankment material would not be

January 27, 1983

paid for; and that he, Mr. Davis, helped Mr. Weir prepare the breakdown of the alleged extra costs (AF-E) for claim 2 (Tr. 141-44).

Mr. Davis further testified in detail with respect to the calculation of the claimed costs regarding claims 2 and 3 and specifically that the breakdown of the labor and equipment costs were derived from the foreman's daily payroll records and the individual timesheets of the workmen (Tr. 153-56, 158-62). Mr. Weir who was in charge of the financial affairs of Thorn, verified that the amounts claimed for claims 2 and 3 were determined in accordance with the contract provisions and that Mr. Davis had correctly explained the method used to determine the cost breakdown for those claims (Tr. 152-53); and that costs for a particular claim could be identified by the use of timecards and payroll reports (Tr. 166-67); and that 10 percent of the labor costs was charged for profit in error in that 20 percent was actually allowable under section 109.04(a) of the specifications dealing with determining costs (Tr. 172-73).

The Government agrees that the work involved under this claim constituted a *minor change to the contract* but contends that appellant was compensated for the work (Govt. Brief at 4, italics supplied).

[3] It is our view that where the Government admits to a change in the contract and the contractor contends that he has not been paid for the change, the burden should shift to the Government to prove that payment therefor has been made, and the contractor should be relieved of having to prove a negative.

Mr. Maestas testified (Tr. 191) that the payment for bid item 308(1), Portland treated cement base, includes mixing, watering, and placement of materials, and that appellant was paid for the claimed costs because of substantiation by certain delivery tickets (Tr. 176-94). These delivery tickets, seven in number, were offered in evidence in composite form (GX-2) and showed that truck loads 8 through 14 were received on August 6, 1975, at Station 997 + 45 of item 308(1) CTB, cement-treated base, having a total weight of 316,900 pounds or 158 tons. Although Mr. Maestas testified that GX-2 is a record for payment (Tr. 194), he also testified (Tr. 197) as follows: "We paid [for] approximately 158 tons of Portland cement treated base at the bid price of the Portland cement treated base price, *although the material at that time did not have the cement* because the plant had long been removed before that time." (Italics supplied.)

We find it difficult to envision the Government paying for cement-treated base material at the contract price for that item knowing that the cement was missing. If Mr. Maestas knew that the cement ingredient was missing, we must assume that the officials actually responsible for making payments to the contractor knew it also. Furthermore, we observe that this claim, throughout the proceeding is identified with Station 997 + 50 while the material receipts in GX-2 reflect Station 997 + 45. This variance remains unexplained in the

record. We also note that the Monthly Construction Report for the period July 25 to August 25, 1975, shows a zero quantity of item 308(1), Portland cement-treated base, delivered to the project. Although these inconsistencies may be explainable, they were not explained by the Government sufficiently to satisfy us that appellant was in fact paid for the admittedly changed work. We find, therefore, that the Government has failed to prove its alleged payment for this claim. We also find that the Government offered no proof that the quantum amount was incorrect. Since it is obvious that the Government was aware that it required the extra work to be done and defends only on the ground that appellant had been paid therefore, the Government's argument that appellant is precluded from recovery due to inadequate notice is without merit.

Therefore, claim 2 is sustained in the amount of \$1,108.78.

Claim 3 -- Road Elevation Grade Raise

Appellant claims additional costs incurred for material, equipment, and labor to raise the grade of the road from approximately Station 998+00 to Station 1003+50 in the amount of \$1,950.

Mr. Davis testified that on or about April 3, 1975, Mr. Maestas told him that they wanted to raise the road elevation near where it ties into the Power Plant Road for about 300 to 400 feet; that he complained to Mr. Maestas that the grade had already been roughly finished and that Thorn would have to put a layer up to 3 or 4 inches on top, reshape, reroll, and refinish the grade that was there, and that it would be costly work to come in and do this over again; and that the work was done as directed with additional expenses incurred in the amount claimed (Tr. 148-49). On cross-examination (Tr. 150), Mr. Davis acknowledged that roadways are built with respect to connecting with other roadways so that they meet the edge of the pavement on the existing road, but further stated, that we (contractors) build the roads to the stakes of the engineer; that here, the stakes were once set, the road was brought to that grade and then they were raised 3 to 4 inches for around 400 feet. Mr. Davis also stated (Tr. 151) that he did not ask for a change order and did not know why he did not.

The Government's position is that the contract documents, particularly sheet 29 of the plans, required that the subject road be built to meet the edge of the existing pavement on the intersected road by the following notation: "Meet Exist. Edge Pavt." Mr. Maestas explained that although the original Government staking may have been a few inches low, the restaking was done when the appellant was working in the area (Tr. 203-19); that because the contract required that compacting had to be in layers, the second compaction would have been necessary in any event under the terms of the contract (Tr. 222); and since the unclassified excavation was not completed and actually the contractor was wasting the material, putting it on as the second layer did not cost him any more money (Tr. 222, 223). The Government

January 28, 1983

points to the explicit language of paragraph 105.08 of the contract specifications which provides:

The contractor shall notify the contracting officer of apparent errors discovered in initial stakeout before the affected work is begun. Should work be performed in accordance with inaccurate initial stakeout made by the contracting officer and not discovered by the contractor, payment for such work and any directed correction thereof will be made at applicable unit prices of the contract unless such work differs substantially from that described on the plans or in the specifications, in which case the provisions of Clause 3, Changes of SF 23-A, will apply.

Thorn has presented no rebuttal evidence or rebuttal argument to the Government's position on this claim that, if paid, the appellant would be doubly compensated for the unclassified excavation pay item. We find from our analysis of the record that appellant has failed to establish by a preponderance of the evidence that a change occurred, constructive or otherwise, from the contract provisions with respect to the grade raising work under claim 3. Claim 3 is, therefore, denied.

Recapitulation

Except for claim 2 where we found appellant entitled to an equitable adjustment in the amount of \$1,108.78, the Board has found no merit in the claims of appellant in this appeal. Claims 6 and 8 having been withdrawn, claims 1, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, and 15 are denied.

DAVID DOANE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF DODD, FRAZIER & CO.

IBCA 1591-6-82 & IBCA 1605-7-82

Decided January 28, 1983

Contract No. 68-01-3978, Environmental Protection Agency.

Appellant's claims denied; Government claims sustained.

I. Contracts: Contract Disputes Act of 1978: Jurisdiction

The Board finds that it has jurisdiction over a Government counterclaim against a contractor under the Contract Disputes Act of 1978, where such claim was the subject of a decision of the contracting officer.

2. Contracts: Contract Disputes Act of 1978: Generally--Contracts: Disputes and Remedies: Burden of Proof

Where the Government as the moving party on a counterclaim sustains its burden of proof concerning an overpayment to the contractor, the Board concludes that the withholding and set off of funds otherwise payable to the contractor by the Government was proper.

APPEARANCES: William L. McElroy, Attorney at Law, Bessemer, Alabama, for Appellant; Richard D. Feldman, Government Counsel, Environmental Protection Agency, Washington, D.C., for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

In these consolidated appeals, Dodd, Frazier & Co. (appellant), claims a total of \$14,520.72 plus interest, in addition to the amounts allowed by the contracting officer under an indefinite quantity service contract. The Government requests that the appeals be denied, counterclaims that appellant was overpaid for services rendered under the contract in the amount of \$10,240.24, and asks that it be awarded the claimed overpayments plus interest.

Background

Contract No. 68-01-3978, an indefinite quantity labor-hour service contract in the amount of \$61,950 was awarded to appellant on November 2, 1977, by the Environmental Protection Agency (EPA/Government) (Appeal File, Exh. 3).¹ The contract required appellant to furnish personnel, materials, services, and facilities in order to perform on-site audits of EPA grants and contracts, consisting of an examination of financial and compliance matters, as well as a review of grantee efficiency and economy in carrying out project responsibilities (AF-1, 3).

Article III of the contract set the performance period through September 30, 1978. Article IV, entitled "Compensation and Payment" provided that appellant would be paid for performance of the contract in accordance with the following rates:

B. Rate Per Audit Hour by Professional Staff Categories:

Partner . . . \$25; Supervisor and/or Manager . . . \$18; Senior and/or In Charge Accountant . . . \$14; Junior and/or Assistant Accountant or Staff Assistant . . . \$12 [2]

¹ Hereafter, appeal file exhibits will be designated "AF" followed by reference to the particular number of the exhibit being cited. Citation to the official hearing transcript shall be abbreviated "Tr.," with reference to the appropriate page number.

² As stated in Article IV(C), the rates set forth above were to cover all expenses of appellant, including report preparation, salaries, overhead, general and administrative expenses, and profit, excluding costs of per diem and travel which were to be reimbursable as provided under the contract. The amounts payable to appellant were to be computed by multiplying the appropriate rate by the number of defined audit hours performed. The number of hours of work to be invoiced were to include only the actual working time of any of the defined personnel whose services were applied to the work called for in the individual assignments (AF-3).

January 28, 1983

Article IV further provided: "*The Contractor shall maintain on file all daily job records to substantiate the number of hours charged*" (AF-3) (italics supplied).

The services to be provided under the contract were obtained by the issuance of audit service orders (ASO's) by the project officer. The ASO's were to be furnished to appellant for each assignment specifying an estimated cost for travel, per diem and transportation, starting and completion dates, the number of "audit hours" by professional category, and the total audit hours deemed necessary and authorized for the assignment.³ A total of 59 ASO's were issued during performance of the contract, from November 2, 1977, to May 8, 1979 (AF-7).

By modifications one through six (effective August 30, 1979) total funding under the contract was increased to \$219,000, and the term of the contract was extended, pursuant to Article IX, through September 30, 1979 (AF-4). By Interim Audit Report No. E3b09-11-013-91797, dated July 20, 1979, EPA questioned labor costs invoiced by appellant in the total amount of \$25,622 (AF-9).

On November 2, 1979, a revised interim audit report was issued accepting \$1,544 of appellants claimed costs which were originally questioned, resulting in remaining questioned costs in the amount of \$24,078 (AF-10). By letter dated December 20, 1979, the contracting officer notified appellant that payment was being withheld on invoices amounting to \$8,683.62, and that payment would be suspended on an additional \$15,394.38 in order to offset the questioned costs of \$24,078 (AF-11). On July 13, 1981, the final audit report was issued recommending that the contracting officer institute action to collect \$15,394.38 to offset the balance of the previously questioned costs (AF-16).⁴

On October 9, 1981, appellant was notified of the result of the final audit by EPA final settlement on Contract No. 68-01-3978. The final settlement indicated that allowable costs amounted to \$177,506 and that \$193,547.24 in vouchers had been paid resulting in an overpayment to appellant of \$16,041.24 which was due the Government (AF-18). By letter dated May 12, 1982, the contract administrator requested appellant to submit to the Government a refund check and credit voucher in the amount of \$16,041.24, and a release in the amount of \$177,506 (AF-18). In a meeting held on May 21, 1982, appellant was notified by the contracting officer that a final decision would be issued if appellant failed to submit a credit voucher and refund check or

³ Article II(D) of the contract defines an "audit hour" as a "unit of time required to be expended in actual audit work for an EPA ordered assignment by the Contractor's professional audit personnel" as categorized in Article IV(B). Article II(D) further provides that the sum of the products of audit hours times the agreed work unit prices by professional category would constitute a ceiling price for the audit services orders (AF-3).

⁴ The final audit report also reviewed documentation for 242 hours worked between July 1979 and September 1980 which were not billed to the Government. In accordance with this review, these hours were determined to be acceptable costs, and "would be billable at a total cost of \$5,801" (AF-16 at 2, 4). There is no evidence, however, that these claims were presented to the contracting officer for decision prior to June 4, 1982 (AF-21).

documentation to support reconsideration of the final settlement (AF-19).

By letter dated June 2, 1982, appellant objected to the findings contained in the final audit report and formally "appealed" the May 12, 1982, determination of the contract administrator (AF-21).⁵ On June 8, 1982, the contracting officer, concluding there was insufficient data to support reconsideration of the final settlement issued her final decision concluding that the total amount of allowable costs under the contract was \$177,506, thus resulting in an overpayment of \$16,041.24. The decision to disallow \$24,078 in claimed costs was based on: "Unacceptable practices such as billing labor hours that are not supported by time and attendance records, avoiding cost overruns by switching labor hours among audit services orders, and billing firm personnel at labor rates in excess of their professional classifications" (AF-20).

On June 23, 1982, appellant filed its notice of appeal from the June 8, 1982, final decision of the contracting officer, and filed an additional claim of \$5,837.10 for further costs incurred under the contract (AF-24). On June 25, 1982, the Board issued an order dismissing for lack of jurisdiction appellant's claim for \$5,837.10, and remanding said claim to the contracting officer for decision (AF-28). Subsequently, on July 8, 1982, the contracting officer issued a supplement to her final decision of June 8, 1982, accepting \$5,801 as additional allowable charges under the contract (AF-29).⁶ As a result of this determination, the contracting officer concluded that the Government's overpayment to appellant, as revised, amounted to \$10,240.24, for which the Government sought a refund and credit voucher.

On July 22, 1982, the Board, pursuant to appellant's notice of appeal dated June 23, 1982, reinstated appeal No. IBCA-1591-6-82 to the active docket (AF-30). On July 29, 1982, appellant filed a notice of appeal from the contracting officer's decision of July 8, 1982, denying *inter alia*, its indebtedness to the Government in the amount of \$24,078 in claimed costs (AF-32). Appellant's notice was docketed by the Board as appeal No. IBCA-1605-7-82 (AF-33).

On August 19, 1982, appellant filed its complaint in IBCA-1591-6-82 seeking \$8,683.62 plus interest in unpaid costs (AF-34). On September 9, 1982, appellant filed its complaint in IBCA-1605-7-82, denying any indebtedness to the Government, and sought payment in the amount of \$5,837.10 plus interest for additional services rendered under the contract.⁷ On September 16, 1982, the Board issued an order

⁵ Appellant indicated in its June 2, 1982, letter that "[w]e are uncertain whether your letter of May 12, 1982, constitutes a 'Decision of the Contracting Officer' of your agency within the meaning of Section 6(a) of the Contract Disputes Act of 1978 (Public Law 95-563). Accordingly, pursuant to such law, we respectfully request a proper 'Decision of the Contracting Officer' in order that we may file a timely appeal therefrom to the Board of Contract Appeals for your agency."

⁶ In her July 8, 1982, decision, the contracting officer indicated that appellant's additional claim of \$5,837.10 was not billed to the Government until June 4, 1982, and as such was considered unbilled by the auditor at the time of the audit report.

⁷ Appellant acknowledges the contracting officer's acceptance of \$5,801 in additional costs as stated in her July 8, 1982, supplemental decision, but argues that since it denies its alleged indebtedness to the Government, that payment of the \$5,801 was wrongfully withheld.

January 28, 1983

consolidating the above appeals for purposes of hearing and briefing, and notified the parties that the appeal would be processed in accordance with the procedures applicable to Accelerated Procedure cases pursuant to 43 CFR 4.113 (b)(2) (effective December 24, 1981).⁸

An evidentiary hearing was held on the consolidated appeals in Dallas, Texas, on November 18-19, 1982. Neither party elected to file posthearing briefs with the Board.

Discussion

The gravamen of appellant's claim and the substance of the Government's claim against appellant present questions going to this Board's subject matter jurisdiction under section 3 of the Contract Disputes Act of 1978 (Act), 41 U.S.C. § 601-613 (Supp. II 1978), which have not been addressed by the parties in their respective pleadings.

[I] In recognition of the fact that disputes relating to Government contracts are not limited simply to claims by contractors against the Government, section 6(a) of the Act provides in pertinent part, that: "All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." 41 U.S.C. § 605(a) (Supp. II 1978). Accordingly, the various Boards have held that a decision of the contracting officer must be issued and furnished to the contractor as a condition precedent to the Government's asserting a counterclaim in an appeal. *Burgett Investment, Inc.*, AGBCA No. 81-108-1 (Jan. 27, 1981), 81-1 BCA par. 14,913; *Facilities Construction Co.*, AGBCA No. 79-161-1 (Sept. 18, 1980), 80-2 BCA par. 14,678; and *Holly Corp.*, ASBCA No. 24975 (Sept. 2, 1980), 80-2 BCA par. 14,675. This prerequisite has been clearly met in the instant case with the issuance and receipt by appellant of the contracting officer's final and supplemental decisions dated June 8 and July 8, 1982 (AF-20, 29, 34). Thus, for purposes of deciding the issues in the context of the Government's counterclaim, we note subject matter jurisdiction under section 3(a)(2) of the Act, 41 U.S.C. § 602(a)(2) (Supp. II 1978).

Having established the Board's jurisdiction, it is incumbent that the Government, in asserting a monetary claim against the contractor, be the moving party on appeal and have the burden to show at least a prima facie case sufficient to establish the essential elements of its claim. *Republic Aviation Corp.*, ASBCA No. 6826 (June 28, 1963), 1963 BCA par. 3789. Only after this burden has been met does the burden shift to appellant to establish any affirmative defenses it may have.

Addressing first, the propriety of the Government's position regarding its right to withhold monies otherwise payable to the contractor to satisfy an overpayment (Tr. 320-21), the law is well settled that the Government has a common law right of set off. *United States*

⁸ Although the subject contract was entered into before March 1, 1979, appellant has exercised its right to proceed under section 16 of the Contract Disputes Act of 1978 (AF-24).

v. Munsey Trust Co., 332 U.S. 234 (1947), and that such set off for the amount of estimated debts is proper, notwithstanding the absence of final resolution of a contract dispute underlying the debt.

Servicemaster of West Central Georgia, DOT CAB No. 1096 (Sept. 17, 1980), 80-2 BCA par. 14,676. Appellant's assertion that the Government's withholding amounts to a breach of contract (AF-34) is therefore without foundation.

As evidence of the unreliability of appellant's time and attendance records, the Government introduced Government Exhibits 1 and 2, billing forms containing the handwriting of John Wesley Dodd (sole proprietor of appellant at the time of contract award) which were used by appellant to prepare invoices to be submitted to the Government for payment (Tr. 16, 78, 81, 174). Page 1 of Government Exhibit 1 reflects that 85 hours of staff time had been performed on a particular ASO during the period ending September 30, 1978. Page 3 of that exhibit, the actual invoice submitted to the Government on the same ASO, reflects a billing of 140 hours, indicating an overbilling by appellant of 55 hours (Tr. 80). Similarly, a review of Government Exhibit 2 reveals that when certain jobs were overrun, the unbilled hours were accumulated in a pool for subsequent billings against other ASO's which had been underrun (Tr. 82-83, 87-88). The Government auditor testified that such a "pooling" approach to billing is not an "acceptable practice" (Tr. 90), and as indicated in the interim audit was "in direct conflict with the terms of the contract" (AF-10 at 14).

The Government further asserts through the testimony of the auditor and the contracting officer, that there were several occasions where appellant billed firm personnel at labor rates in excess of their professional classifications (Tr. 94-95, 133).

Examination of the record reveals that appellant admitted throughout the course of the hearing, the allegations raised against it (Tr. 9, 28, 29, 180, 314). It concedes that it does not have the required time and attendance records to substantiate the service hours questioned by the Government (Tr. 278-79). The evidence further shows that appellant failed to respond to the audit report which it received on August 4, 1979, and failed to file a claim with the contracting officer until June 4, 1982 (AF-13, 18, 19; Tr. 118, 143, 145, 184, 210, 321-22). These findings alone would lead us to discount a substantial portion of appellant's argument in this proceeding. However, there are other equally compelling reasons for denying its claim.

Appellant's principal defense to the Government's set off is based on its interpretation of the contract, which is twofold: First, as to switching labor hours among audit service orders, it is appellant's position that such services were "properly billed" (Tr. 299), and that the allocation of hours on individual ASO's were merely "estimates" which permitted appellant to pool labor hours in order to avoid exceeding price requirements of the Government (Tr. 304, 315). Second, regarding its practice of billing firm personnel at labor rates in excess of their professional classifications, appellant argues that such billing

January 28, 1983

procedures were based not on an arbitrary classification, or even the classification of employees within appellant's own firm, but upon the level of responsibility and/or the actual function or skills rendered by the individuals involved (Tr. 174, 315). Both arguments are without merit and cannot support any recovery.

With respect to appellant's first contention, the Government auditor testified that the ASO's constituted an "authorization" for work and contained definite restrictions and limitations with regard to the quantity of audit hours allowable per job (Tr. 84-86). Article II(D) of the contract (AF-3), substantiates this testimony by providing that the contractor "*shall not exceed the ceiling price without the authorization of the Project Officer.*"⁹ (Italics supplied.) Appellant has failed to produce any evidence in support of its argument that the audit hours required by the ASO's were merely "estimates," or that the pooling of labor hours was otherwise an acceptable accounting practice pursuant to the terms of the contract. Disputed allegations standing alone do not constitute evidence and cannot be accepted as proof of facts. *Appeal of E. H. White & Co., IBCA-1216-9-78* (July 19, 1982), 82-2 BCA par. 15,920. We therefore find appellant's first contention to be unsupported by the evidence and inconsistent with the contract language.

We further find that there is no justifiable basis for appellant's practice of billing firm personnel at rates exceeding their professional classification. Appellant's witness, Dan Jefferson, a certified CPA and former member of appellant's firm, testified as to the propriety of such a practice (Tr. 50-52), but had no personal knowledge of the agreement between the parties or matters occurring during the course of the contract. Even so, he testified that a contractor would have to bill in accordance with the contractual arrangement on compensation (Tr. 59), and that *he* would not bill at a different rate without first receiving permission of the "customer" (Tr. 60).

A review of the record indicates that in no instance did appellant seek Government approval of an adjustment in the rate of payment provisions of Article IV (AF-3). Alphonso Solomon, a former audit supervisor for appellant, responsible for staff assignments and review of work reports, testified that in his capacity, he never discussed billing at higher professional rates with any Government official (Tr. 160-61). The Government auditor testified that not only was appellant's overbilling inconsistent with the contract, but that Mr. Dodd's explanation for doing so was simply that his interpretation of the contract allowed him to bill employees at their level of function, without regard to their official classification within the firm (Tr. 94, 98-99).

We consider appellant's failure to adduce any direct evidence supporting its position inexcusable, in view of the clear contract

⁹ Similarly, the language of the ASO's provide: "The Contractor must contact the Project Officer * * * before incurring costs in excess of the Grand Total" (AF-7).

provision in Article IV that it "maintain on file all daily job records to substantiate the number of hours charged" (AF-3). In the absence of any express contractual provision allowing for the adjustment of professional rates, or the prior approval of the Government to do so, appellant has failed to live up to the bargain it struck with respondent by billing in excess of the contractually agreed rates. The subject matter of appellant's claim involving extra labor hours and additional costs should be proved by documentary evidence, rather than by conclusionary assertions without supporting detail. *Rice v. United States*, 192 Ct. Cl. 903, 910 (1970).

[2] We have found no merit to appellant's claims to reduce the amount of overpayment by the Government on Contract No. 68-01-3978. We find that appellant has failed to rebut the prima facie case made by the Government. In the absence of such countervailing evidence, we conclude that the withholding and set off of funds by the Government was proper.

Decision

Appellant's claims are denied and the Government's counterclaim is sustained. We find, therefore, that the appellant is obligated to refund to the Government the total amount of \$10,240.24 with interest computed from the day of the first final settlement letter, which is October 9, 1981.¹⁰

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

DAVID DOANE
Administrative Judge

¹⁰ Clause 30 of the Additional General Provisions of the Contract provides in pertinent part:

"Notwithstanding any other provision of this contract, unless paid within 30 days, all amounts that become payable by the Contractor to the Government under this contract * * * shall bear interest at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97. Amounts shall be due upon the earliest of (a) the date fixed pursuant to this contract; (b) the date of the first written demand for payment, consistent with this contract, including demand consequent upon default termination; (c) the date of transmittal by the Government to the Contractor of a proposed supplemental agreement to confirm completed negotiations fixing the amount; or (d) if this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or in connection with a negotiated pricing agreement not confirmed by contract supplement."

We conclude that the Oct. 9, 1981, final settlement letter is the first Government demand for payment (AF-18).

CONSOLIDATION COAL CO.

5 IBSMA 6

Decided February 2, 1983

Appeal by Consolidation Coal Co. from the December 8, 1981, decision of Administrative Law Judge Sheldon L. Shepherd, affirming Notice of Violation No. 80-I-42-25 and increasing the points assessed and the resulting penalty (Docket No. CH 1-186-P).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

Under 43 CFR 4.1157, the Administrative Law Judge in a civil penalty hearing, if he finds that a violation occurred, is required to determine the amount of the penalty. He is not bound by the proposed assessment, regardless of whether there has previously been an assessment conference.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Under 30 CFR 722.14(a), issuance of a notice of violation is complete only when the notice is either personally served by physical tender to an appropriate person or actually or constructively received by such person in the mails. The mere mailing of the notice does not constitute issuance, even if there has been oral notification to the recipient of its mailing.

APPEARANCES: Daniel E. Rogers, Esq., Senior Counsel, Consolidation Coal Co.; Phillip J. North, Esq., Office of the Field Solicitor, Charleston, West Virginia, and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Consolidation Coal Co. (Consolidation) has appealed from the December 8, 1981, decision of Administrative Law Judge Sheldon L. Shepherd, Docket No. CH 1-186-P, which held that the Office of Surface Mining Reclamation and Enforcement (OSM) properly issued Notice of Violation (NOV) No. 80-I-42-25 under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations); and which imposed a civil penalty in the amount of \$7,000 under the provisions of 30 CFR

Part 723. We affirm the decision but reduce the penalty to \$3,500 for the reasons set forth below.

Facts

On September 2, 1980, OSM Inspector Lois Uranowski conducted an inspection of the acid mine drainage (AMD) facility at Consolidation's Montour No. 4 underground mine in Washington County, Pennsylvania. As a result of the inspection, Inspector Uranowski, on September 5, issued NOV No. 80-1-42-25 charging Consolidation with exceeding the effluent limitations for total iron set forth in section 717.17(a) of the regulations. The delay in issuing the NOV occurred because the inspector waited for the results of a laboratory analysis before taking further action (Tr. 30). Upon receiving the analysis, however, she immediately called Consolidation's environmental engineer, gave him the results, and told him that she was going to issue the NOV (Tr. 32). She explained to him in detail the nature of the violation, the time for abatement, the remedial action required, and the rights of appeal (Tr. 33). She mailed the NOV to Consolidation the same day. The time for abatement was 8 a.m. on September 11, 1980 (Tr. 35). When Inspector Uranowski arrived at the facility on the morning of the 11th, no water was being discharged, so she terminated the violation. But she was unable to say when the pumping activity which caused the discharge actually ceased (Tr. 36).

The reason for the pumping was that, on August 24, 1980, water from a flooded adjacent abandoned mine (Montour No. 10) breached an underground barrier and began pouring into Montour No. 4, which was then an active mine employing 429 people. At the time of OSM's inspection, Consolidation was making extraordinary efforts to save Montour No. 4 and the equipment it contained, and one of these efforts consisted of drastically increasing the rate at which it pumped accumulated water out of Montour No. 10 and into the adjacent AMD facility. Since the AMD facility was unable to keep up with the volume of water involved, untreated water was being discharged into a nearby stream, and the iron contained in the untreated water thus exceeded the effluent limitations of the regulations (Tr. 83-105).

Testimony at the hearing also established that Consolidation made a decision on September 3 to close Montour No. 4 and lay off the mine's employees (Tr. 100). The pumps were then shut down on September 6 because Consolidation was unable to obtain permission from the State of Pennsylvania to continue pumping in order to save its equipment (Tr. 116).

On the basis of the NOV, OSM initially proposed to assess a civil penalty of \$2,100, but that amount was later reduced to \$1,000 as a result of an assessment conference at which the conference officer subtracted 10 points for Consolidation's good faith in promptly abating the violation (Tr. 37-38). However, the OSM inspector felt that reduction was unjustified, since Consolidation could have shut off its pumps on September 2 as a result of the inspection but chose instead

February 2, 1983

to continue pumping in an effort to save the mine equipment (Tr. 39-40).

In his decision, the Administrative Law Judge found Consolidation liable for the violation, despite the fact that, at the hearing and in its briefs, Consolidation argued that the violation occurred under emergency circumstances and that its actions were justified because of the value of the mine, the jobs at risk, and the millions of dollars worth of equipment in the mine. Consolidation contended that no notice of violation should have been written where the operator was doing the best it could in an emergency situation. The Administrative Law Judge nevertheless concluded as follows:

Much of this argument is persuasive; however, in considering the argument, the petitioner is considering a situation from the economic point of view of a commercial enterprise. Certainly all of the people who did work in the emergency situation were paid, probably overtime. The economic consequences of every factor seemed to be considered but not the consequences to Brush Run Creek. Without any economic consequences to the petitioner for what was done to this creek, the economic question is not complete. It is my belief that this was one reason for the system of penalty assessments established by the Act and the regulations. Perhaps if there is another such emergency, the petitioner's economic equation will include as an element the consequences of a violation of the interim regulations.

I affirm Notice of Violation No. 80-I-42-25. I further conclude that the probability of occurrence mandates the imposition of 15 penalty points since the event had occurred.

The extent of potential or actual damage must be between 8 and 15 points if the damage or impact which it is designed to prevent would extend outside the permit area. In this instance, of course, Brush Run Creek was polluted by the petitioner and for that matter the pollution was even observed by the inspector in Chartiers Creek, of which Brush Run is a tributary. The duration and extent of the damage or impact extended for at least two weeks, at which time the volume of water in Brush Run Creek was more than tripled and which during the time carried the effluent limitations in violation of the regulations. I, therefore, conclude that the proper amount of points in the circumstances would be 15 for extent of potential or actual damage.

Negligence may be assigned up to 25 points depending upon the degree of fault. In the instant case, the violation by the petitioner was intentional and, therefore, deserves points between 13 and 25 since this was a greater degree of fault than negligence. I, therefore, conclude that the proper number of points in the premises for this element would be 25.

I do not feel any good-faith points should be awarded; compliance was not achieved in the shortest possible time. Indeed, after the petitioner was notified that a notice of violation was to be issued, it contacted the DER [Department of Environmental Resources] again in an effort to obtain an oral variance for an additional period of time.

Thus, the total points assessed by the Administrative Law Judge were 55. That assessment had the effect, under section 723.14 of the regulations, of increasing the civil penalty from \$1,000 to \$3,500. He then imposed the penalty for 2 days, September 5 and 6, under section 723.15(a) of the regulations, for a total penalty of \$7,000.

Discussion

There is no suggestion in this case that the water discharged from the AMD facility actually met the effluent limitations of the

regulations. Rather, on appeal, Consolidation again argues that its actions were reasonable under the circumstances and that no NOV should have been issued. It also challenges the Administrative Law Judge's authority to increase the civil penalty. Finally, it urges that OSM has no authority to assess a penalty for a period before the NOV was issued, citing section 722.14(a) as proof that an NOV is not "issued" until it is served (in this case, 2 days after the pumping ceased), and then quoting the preamble to that regulation, which noted that section 722.14 "states expressly OSM's interpretation * * * regarding service, namely, that service is complete upon tender and shall not be deemed incomplete because of refusal to accept." 45 FR 2627 (Jan. 11, 1980). Consolidation urges, in effect, that what is sauce for the goose is sauce for the gander, so OSM cannot legally construe the NOV as having been issued before Consolidation received it.

Testimony in this case is undisputed that when the OSM inspector arrived at the AMD facility on September 3, the adjacent streams were running bright orange with high concentrations of newly oxidized iron, and that the flow from the treatment facility was four to five times its permitted capacity (Tr. 7-10). Consolidation's environmental quality control officer was present when OSM inspected the area, and he was fully aware of the extent of the pollution problem (Tr. 8, 11, 14). However, Consolidation's purpose at that point was to try to save its mine (Montour No. 4) and equipment, even though it knew that the effluent limitations were being violated (Tr. 104-05, 109-11).

A careful reading of section 717.17 of the regulations leaves little doubt that its essential purpose is, as its title indicates, the adequate protection of the hydrologic system in connection with the operation of underground mines, which is only a part (albeit an important part) of the overall environmental protection envisioned by section 102 of the Act. The philosophy of the Act, as we see it, is that the cost of environmental protection is a cost of doing business, and we see no basis for disputing, much less overturning, the decision of the Administrative Law Judge that Consolidation should be made to bear the relatively minor economic penalty resulting from its decision to protect its mine at the expense of the environment. Perhaps if the costs to Consolidation of causing environmental damages were higher, as the Administrative Law Judge implies, the likelihood of damage to the environment would play a larger role in the company's economic decisions.

[1] As to Consolidation's argument that an Administrative Law Judge has no authority to increase a civil penalty, particularly one that has been reduced as a result of an assessment conference, we read 43 CFR 4.1157(b)(1) as unequivocal in requiring him to establish the amount of the penalty in accordance with the point system and conversion table of sections 723.13 and 723.14 of the regulations, once he finds that a violation has occurred. That is what the Administrative Law Judge did in this case, and we hold that he was correct in doing so.

February 2, 1983

[2] On the other hand, we believe there is merit in Consolidation's contention that it should not be held liable for a continuing violation that occurred before the NOV was actually served. The OSM inspector certainly could have issued an NOV as early as September 2 on the basis of the results of her field tests (*see D and D Mining Co.*, 4 IBSMA 113, 89 I.D. 409 (1982)), or she could personally have delivered the NOV to Consolidation on September 5. She did neither. Instead, she first called Consolidation's representative by telephone to tell him that the NOV was being issued, and then simply put it in the mail. That is not what section 722.14(a) of the regulations requires in order to constitute service. Consolidation should not be charged with more than one instance of violation under section 723.15, inasmuch as it had ceased its pumping activity before it received the NOV. In summary, we hold that for the purposes of 30 CFR 723.15(a), issuance of a notice of violation is complete only when the notice is either personally served by physical tender to an appropriate person or actually or constructively received by such person in the mails. The mere mailing of the notice does not constitute issuance, even if there has been oral notification to the recipient of its mailing.¹

Nevertheless, it is clear that an NOV may be issued even after a violation of the regulations has been terminated, and there is no reason to excuse Consolidation from all liability under the Act simply because it ceased pumping polluted water from its AMD facility before the NOV was actually received. *See* 30 CFR Part 722. We therefore conclude that the Administrative Law Judge was correct in affirming a violation of the regulations and assessing a penalty in light of the evidence presented.

Accordingly, we affirm the decision of the Administrative Law Judge as to the number of points assessed for the violation, but we modify the decision to impose the \$3,500 penalty for only 1 day instead of 2.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Acting Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

¹ We are aware that it would technically be possible to hold otherwise, since section 723.15(a) appears to authorize separate penalties for each day of a continuing violation "from the date of issuance," and section 722.14(a) appears to distinguish between issuance and service. However, at least for the purpose of assessing civil penalties, we do not believe that such a distinction is warranted, and we find no evidence that it was intended.

RONALD W. JOHNSON

5 IBSMA 19

Decided February 4, 1983

Appeal by Ronald W. Johnson for review of the decision of the Office of Surface Mining Reclamation and Enforcement upholding a claim of valid existing rights, raised pursuant to 30 CFR 761.5, to conduct surface coal mining operations within 300 feet of an occupied dwelling, as an exception to the general prohibition against such mining set forth in section 522(e)(5) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(5) (Supp. IV 1980), and 30 CFR 761.11(e).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Areas Designated by Congress—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

“Valid Existing Rights.” To demonstrate “valid existing rights,” and thereby avoid a restriction on surface coal mining under sec. 522(e) of the Act and 30 CFR Part 761, the claimant must show that it held property rights on Aug. 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the claimant to produce coal by a surface coal mining operation.

2. Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Areas Designated by Congress--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

“Valid Existing Rights.” Relevant state law is a proper aid in the interpretation of the terms of the document relied upon to establish “valid existing rights” under sec. 522(e) of the Act and 30 CFR Part 761.

3. Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Areas Designated by Congress--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

“Valid Existing Rights.” When the document relied upon to establish “valid existing rights” to surface mine coal is a deed which conveys both the mineral and overlying surface estates, authorization to surface mine will be presumed, for the purposes of sec. 522(e) of the Act and 30 CFR 761.5, in the absence of language to the contrary in the conveyance.

4. Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Areas Designated by Congress--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

“Valid Existing Rights.” A local government’s zoning ordinance which contains restrictions on surface coal mining will not be considered to preclude “valid existing rights,” under sec. 522(e) of the Act and 30 CFR 761.5, where it is shown that the restrictions of the local ordinance have been preempted by state law.

February 4, 1983

APPEARANCES: Donald W. Urban, Esq., Sprague, Sprague & Ysursa, Belleville, Illinois, for appellant, Ronald W. Johnson; Thomas Gallagher, Esq., St. Louis, Missouri, and Edward L. Sullivan, Jr., Esq., Fairview Heights, Illinois, for appellee, Peabody Coal Co.; William F. Patten, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, for appellee, Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MIRKIN

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Ronald W. Johnson has appealed the decision of the Regional Director (Region III) of the Office of Surface Mining Reclamation and Enforcement (OSM) that Peabody Coal Co. (Peabody) has valid existing rights to conduct surface coal mining and reclamation operations within 300 feet of two occupied dwellings owned by Johnson in Randolph County, Illinois. We affirm the decision.

Factual and Procedural Background

OSM rendered the decision under appeal pursuant to the instructions of the Board in *Ronald W. Johnson*, 3 IBSMA 118, 88 I.D. 495 (1981). In that case Johnson appealed OSM's decision not to take enforcement action against Peabody following Johnson's complaint that the company was mining within 300 feet of occupied dwellings owned by him.¹ OSM's decision was based on a June 27, 1981, inspection report which contained the statements:

Peabody coal has valid existing rights because of (1) those property rights in existence on August 3, 1977, that were created by a legally binding conveyance (Deed of December 1975) and (2) the person (Peabody Coal Company) proposing to conduct surface coal mining operations on such lands can (probably) demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977 (#560-79).

*** Because "documents dealing with the property rights entitling one to surface mine coal will be interpreted in accordance with appropriate state court decisions" [*In re: Permanent Surface Mining Regulation Litigation*, Civil Action No. 79-1144 at 17-18 (D.D.C. February 26, 1980); 47 FR 25278, 25281-82 (June 10, 1982)] this question of valid existing rights may be raised with the state regulatory authority (Illinois Department of Mines and Minerals). At present Department of Mines and Minerals personnel are aware of the presence of the mobile homes and have not, to the inspector's knowledge, restricted any present mining activity within 300 feet of the mobile homes. [2]

¹ Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (Act) provides, in relevant part: "After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment [Aug. 3, 1977] shall be permitted- * * * (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof * * *." 30 U.S.C. § 1272(e)(Supp. IV 1980). The term "valid existing rights" is not defined in the Act. The regulatory definition, at 30 CFR 761.5, is quoted, *infra*, in the text.

² The factual background of Peabody's claim of valid existing rights is set forth more fully in the Board's earlier *Johnson* decision, 3 IBSMA at 120-21, 88 I.D. at 496-97. Portions of that information are repeated herein where relevant.

In its earlier decision the Board recognized that, under 30 CFR 710.4, the state regulatory authority has "the primary responsibility for determining whether a permittee has valid existing rights * * * for those areas over which the state has control." 3 IBSMA at 122, 88 I.D. at 497. The Board went on to say, however, that the state's responsibility "is not exercised totally independently of Federal oversight. * * * Thus, although OSM may defer to the state for an initial determination on valid existing rights, * * * OSM has an independent responsibility to review it to ensure that it was made in compliance with the initial program regulations." 3 IBSMA at 122-23, 88 I.D. at 497-98. The case was remanded to OSM for the required independent review.

In his decision on remand, the Regional Director based his determination that Peabody has valid existing rights on the following findings:

The Regional Director finds that:

(1) "Valid existing rights" are defined by 30 C.F.R. 761.5 to mean:

"(a) Except for haul roads,

"(1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and

"(2) The person proposing to conduct surface coal mining operations on such lands either (i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands, or

"(ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977."

(2) Peabody had the requisite property rights on August 3, 1977, as required by 30 C.F.R. 761.5(a)(1), which would authorize the company to produce coal by a surface coal mining operation, pursuant to a memorandum of agreement dated December 29, 1975, and a deed executed on July 14, 1977. By means of these instruments, Peabody acquired the necessary surface property and mineral rights. The property rights contemplated by 30 C.F.R. 761.5 were such as were held by Peabody in the instant case, i.e., a legally binding conveyance, the parties to which, at the time the deed was executed, contemplated Peabody's right to conduct surface coal mining activities.

[See 44 FR 14992 (Mar. 13, 1979).]

(3) An investigation by OSM's Reclamation Specialists establishes that the Peabody River King #6 surface operation was an operation which was established on Illinois permit 560-79 issued in 1976. Consequently, an ongoing surface coal mining operation had been installed by Peabody Coal Company prior to August 3, 1977, as required by 30 C.F.R. 761.5(a)(2)(ii);

(4) Aerial photographs dated 1978, 1979, and 1980, reviewed by the OSM Reclamation Specialist, in addition to field observations, establish the direction of the Peabody River King #6 operation. The coal contained in Illinois permit 920-82 is immediately adjacent to the pit established in Illinois permit 560-79 and is the logical extension of the pit established in Illinois permit 560-79 as is necessary to meet the requirements of 30 C.F.R. 761.5(a)(2)(ii);

(5) The Reclamation Specialist, based upon his field observations, determined that the coal was needed to continue the existing operation because of the configuration of the existing operation. In addition, Peabody Coal Company, in its request to the Department of Mines and Minerals, indicates that loss of coal would be approximately 31,000 tons.

(6) A review of the decision made by the Illinois Department of Mines and Minerals indicates that its conclusion that Peabody Coal Company had valid existing rights to

February 4, 1983

mine within 300 feet of the Johnson mobile homes is consistent with Findings (1) - (5), in that Illinois found that:

"(a) Peabody had purchased the property in question prior to August 3, 1977; and

"(b) Peabody had an operation in existence on August 3, 1977 for which all permits had been issued and that the area in question is adjacent to the pre-existing permit and that the coal from the area is needed for its operation."

(7) In the additional information filed by the Applicant on September 19, 1980, the Applicant alleges that:

"On August 3, 1977, Peabody did NOT have VER in this area because it was not zoned to permit surface mining until *February 27, 1978*."

However, 30 C.F.R. 761.5 does *not* require that at the time a company acquires requisite property rights that it also have complete assurance, by virtue of zoning and/or permit, that it will be allowed to immediately mine the area. Neither a permit to mine nor appropriate zoning constitutes a "property right" within the meaning of 30 C.F.R. 761.5(a)(1). All that is required is property ownership and the contemplation of surface mining by the parties to the conveyance. In the instant case the conveyance clearly and properly transferred marketable title to Peabody, thus satisfying the ownership requirement. That the parties to the conveyance contemplated surface mining is evident from the fact that seller, William Lamont, transferred both surface and mineral rights to purchaser, Peabody Coal Company, a coal company conducting surface mining activities adjacent to the property in question. [Footnotes omitted.]

(Decision of Regional Director at 2-5).

In his appeal, Johnson has focused on the "property rights" requirement set forth in 30 CFR 761.5(a)(1) and has not disputed the Regional Director's findings, pursuant to 30 CFR 761.5(a)(2)(ii), that the coal to be mined by Peabody within 300 feet of the occupied dwelling was "needed for, and immediately adjacent to, an on-going surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977."

Discussion

Johnson contends that the deed executed by Peabody and William V. Lamont did not serve to convey to Peabody the property rights necessary to satisfy the requirements of 30 CFR 761.5(a)(1) because (1) the deed did not specifically authorize Peabody to produce coal by surface mining methods and (2) the zoning ordinance of the city of Sparta precluded surface coal mining at the time of the conveyance. The Regional Director found that the conveyance of both mineral and surface property rights demonstrates that the parties to the deed contemplated that Peabody would surface mine coal and that it was unnecessary for Peabody to have "complete assurance by virtue of zoning and/or permit that it [would] be allowed to immediately mine the area," because "[n]either a permit to mine nor appropriate zoning constitutes a 'property right' within the meaning of 30 CFR 761.5(a)(1)." Decision of Regional Director at pars. 2 and 7 (footnotes omitted).³

³ In a footnote to this statement, the Regional Director acknowledged Illinois case law to the effect that the Sparta zoning ordinance had been preempted with respect to surface mining by the Illinois Surface Mined Land Conservation and Reclamation Act of 1971. We discuss the significance of that case law *infra*.

[1, 2] As is noted among the Regional Director's findings, the first element of the Department's definition of "valid existing rights," set forth at 30 CFR 761.5(a)(1), is "[t]hose property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation." Concerning the intended meaning of this language, OSM originally specified:

Interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

30 CFR 761.5(c). In connection with litigation before the District Court for the District of Columbia, however, the Department agreed that, as an alternative to the above provision, "existing State law may be applied to interpret whether the document relied upon establishes valid existing rights." 44 FR 67942 (Nov. 27, 1979); *In re: Permanent Surface Mining Regulation Litigation*, Civil Action No. 79-1144 at 17-18 (D.D.C. Feb. 26, 1980). Against this background, we turn to the specific contentions of appellant.

[3] First, appellant argues that the deed between Lamont and Peabody did not convey the necessary property rights for valid existing rights under 30 CFR 761.5(a)(1) because the deed did not specify that Peabody could surface mine coal. We reject this contention.

Under the terms of the deed, Peabody purchased approximately 406 acres of surface land and approximately 410 acres of coal and other minerals.⁴ Peabody took these surface and mineral estates subject only to "easements of record and rights of the public and present farm tenant in possession."⁵ Since the grantor did not reserve to himself any interest in the surface or mineral estates conveyed, it is immaterial that he did not specify that Peabody could surface mine the mineral estate. For the purposes of section 522(e) of the Act and 30 CFR Part 761, we assume the requisite authorization to surface mine coal, in the absence of language to the contrary in the conveyance, from the fact of Peabody's purchase of both the mineral and surface estates.⁶

Johnson's contention, that the lack of express authorization to surface mine coal precludes valid existing rights, may be the result of a misunderstanding of the regulatory background of 30 CFR 761.5. The manifest intention of the parties to the document by which one claims valid existing rights was deemed relevant by the Department because of Congressional references to *United States v. Polino*, 131 F. Supp. 772 (N.D. W.Va. 1955), in the legislative history of the term "valid existing

⁴ Four acres of the mineral estate acquired by Peabody underlies the surface estate Johnson purchased from Lamont in December 1972. As the Board noted in its earlier decision concerning this matter, Johnson moved two mobile homes onto this property in May 1980. One he placed on the northwest corner of his lot; the other on the southwest corner. The first mobile home became occupied as a dwelling in June 1980 by a watchman employed by Johnson.

⁵ The "farm tenant in possession" has not been identified in the proceedings before the Board, and there has been no suggestion that the interests of that tenant could have precluded surface mining by Peabody as of Aug. 3, 1977.

⁶ Indeed, in 1976 Peabody had already commenced surface mining on the land pursuant to a State permit (# 560-79).

February 4, 1983

rights." 44 FR 14993 (Mar. 13, 1979). That case concerned the interpretation of a deed whereby a land company conveyed surface land to the United States but reserved the mineral estate and the right to remove minerals from the land subject to certain rules and regulations prescribed by the Secretary of Agriculture. The court was called upon to determine whether the reservation permitted strip mining of coal and, in doing so, relied upon state law to interpret the meaning of the reservation language. Under relevant state (West Virginia) law, the right to surface mine the mineral estate under a reservation clause was determined by the court to depend on usage and custom in the locality in which the document containing the reservation language was executed. Neither the *Polino* decision nor the regulatory language in 30 CFR 761.5 based on that decision dictates that valid existing rights cannot be established absent express language authorizing surface mining in the document under which the requisite property rights are claimed.

[4] Appellant's second contention is, in effect, that the zoning ordinance of the city of Sparta was a right of the public, as referred to in the deed, that precluded the necessary authorization to produce coal by surface mining under 30 CFR 761.5(a)(1). As was noted above, the Regional Director determined that the regulation "does *not* require that at the time a company acquires requisite property rights that it also have complete assurance, by virtue of zoning * * * that it will be allowed to immediately mine the area." Under the facts before us we need not assess the correctness of this proposition,⁷ because the record reveals the existence of Illinois case law holding, in effect, that Sparta's zoning law could not operate to preclude surface coal mining either at the time the deed between Lamont and Peabody was executed,⁸ or on August 3, 1977, the effective date of the Act.

The state law to which we refer is the Illinois Surface Mined Land Conservation and Reclamation Act of 1971, Ill. Rev. Stat., ch. 96-1/2, par. 4501 (1977) (Reclamation Act), as interpreted in *American Smelting & Refining Co. v. County of Knox*, 60 Ill. 2d 133, 324 N.E.2d 398 (1974), and *Union National Bank and Trust Co. v. Board of Supervisors*, 65 Ill. App. 3d 1004, 382 N.E.2d 1382 (1978). In the former case the Illinois Supreme Court held that reclamation of strip mined land is governed exclusively by the Reclamation Act and, therefore, that counties have no authority to regulate reclamation procedures. In

⁷ Because the concern of Congress in recognizing valid existing rights apparently was to avoid takings under the Act (44 FR 14992 (Mar. 13, 1979)), we might well question whether a taking would be effected by a section 522(e) restriction when a local zoning ordinance already restricted the property rights of the person claiming valid existing rights to the same degree as they would be restricted under section 522(e) in the absence of the Department's recognition of valid existing rights. We need not address this issue in view of certain pronouncements concerning local zoning ordinances by the Illinois courts. See *infra* note 8 and accompanying text.

⁸ We refer to this state law in construing the nature of the authorization in the deed because the deed contains language conditioning Peabody's rights on the "rights of the public" and, in accordance with 30 CFR 761.5(c) as discussed in the text *supra*, we are to interpret this restriction in the light of local usage and custom, and/or state law.

the latter case an Illinois appellate court extended the rationale in *American Smelting* to conclude:

The General Assembly by enacting a comprehensive regulatory scheme with respect to surface mining and reclamation implied that counties and other non home rule units of local government should have no power to regulate this activity. To the extent that this implied restriction is inconsistent with the broad zoning powers conferred upon the counties by the County Zoning Act of 1935, the earlier act is, to that extent, repealed. The result in our view is that the County of Kendall has no power to seek to prohibit the operation of strip-mining subject to the Reclamation Act anywhere in the county, pursuant to a zoning ordinance.

* * * * *

* * * *American Smelting* suggests that non home rule counties not only have no right to regulate strip-mining operations pursuant to their zoning powers but also have no right to interfere with the *location* of a strip-mine.

382 N.E.2d at 1385, 1386. This conclusion is the most authoritative statement of relevant state law before us.⁹ On its basis we conclude that the Sparta zoning law did not prohibit surface coal mining on the land deeded to Peabody.¹⁰

Having rejected Johnson's arguments against the Regional Director's decision, and lacking an independent reason to disturb the decision, we uphold the determination that Peabody has valid existing rights to surface mine coal within 300 feet of the occupied dwellings on Johnson's property.¹¹

MELVIN J. MIRKIN
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Administrative Judge

BERNARD V. PARRETTE
Administrative Judge

⁹ We are not unsympathetic to Johnson's arguments to the effect that the appellate court's conclusion in *Union National Bank* is not compelled by the Illinois Supreme Court's decision in *American Smelting*. As a matter of policy, however, we are not inclined to question interpretations of state law by a competent state tribunal in the absence of a clearly contrary pronouncement by another state tribunal of equal or greater authority.

¹⁰ The city of Sparta is identified as a non-home rule government in the record of *Ronald W. Johnson v. City of Sparta*, No. 78-Ch-3 (pending before the Circuit Court, Twentieth Judicial Circuit of Illinois, Randolph County), which has been made a part of this record by the parties. Accordingly, the pronouncements of the appellate court in *Union National Bank*, which pertained to "counties and other non home rule units of local government," are relevant to our assessment of the zoning law of the city of Sparta.

¹¹ This determination merely excepts Peabody's coal mining operation from the restrictions of section 522(e) of the Act, as applied to the facts of this case, and does not shield Peabody's operation from similar restrictions that might result from the application of relevant state or local laws.

February 10, 1983

CHEYENNE AND ARAPAHO TRIBES OF WESTERN OKLAHOMA
v.
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS), READING & BATES PETROLEUM CO., AND
WOODS PETROLEUM CORP.¹

11 IBIA 54

Decided February 10, 1983

Appeal from decision of Deputy Assistant Secretary--Indian Affairs (Operations) approving two cooperative unit plans affecting tribal oil and gas leases.

Affirmed.

1. Board of Indian Appeals: Jurisdiction

Where an appeal raises legal questions, these matters are reviewable by the Board. Insofar as the issues raised involve matters committed solely to the discretion of the Secretary, the Board is bound by the exercise of Secretarial discretion. In this case, the ultimate decision, whether to approve a unit cooperative agreement affecting Indian oil and gas leases, was discretionary. The appeal raises certain legal issues, however, and it is appropriate for the Board to resolve those questions notwithstanding that deference must be given to BIA's discretionary authority.

APPEARANCES: Anita Remerowski, Esq., for appellant tribes; James C. T. Hardwick, Esq., for Reading & Bates Petroleum Co. and Woods Petroleum Corp. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

The Cheyenne and Arapaho Tribes of Western Oklahoma (appellants) have sought review of the February 9, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations). That decision affirmed a determination of the Acting Anadarko Area Director (Area Director), Bureau of Indian Affairs (BIA), approving the cooperative unit operation of certain Indian trust land leased by appellants to Reading & Bates Petroleum Co. (Reading & Bates) and Woods Petroleum Corp. (Woods) for oil and gas development.

Reading & Bates and Woods entered into oil and gas leases covering restricted Indian land owned by appellants. The first of these leases was approved on May 10, 1976, for sec. 32, T. 14 N., R. 20 W., in Custer County, Oklahoma. A second lease, approved on February 22, 1980, covered the NE 1/4 and SW 1/4 of sec. 29, T. 14 N., R. 20 W., also in Custer County. Each of these leases was for a term of 5 years.

¹ Previously denominated *Cheyenne and Arapaho Tribes of Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations)*. The names of the corporate parties are added to reflect their participation as parties to the appeal.

On July 17, 1980, Reading & Bates received pooling orders for these two sections from the Oklahoma Corporation Commission. Drilling operations were commenced in sec. 29 on November 30, 1980, and on sec. 32 on May 6, 1981.

When the earlier of these leases was nearing its expiration date, Reading & Bates and Woods sought to retain the lease through the use of a communitization agreement. Under such an agreement, drilling operations on any part of the communitized area would be deemed drilling on all of the leaseholds in the area and would therefore extend the term of the leases even though actual drilling had not been conducted on each and every leasehold. Such cooperative unit operation is often required for the orderly and economic development of oil and gas resources.

On April 16, 1981, appellants rejected the proposed communitization agreements. Appellants indicated they wanted a payment of \$1,500 per acre for the 960 acres covered by the leases and a 5 percent carried working interest in all of the affected leases. Unless the agreements incorporated these provisions, they would not sign. This position was reiterated in meetings on May 1 and 4, 1981.

On May 5, 1981, pursuant to Departmental procedures, Reading & Bates submitted the communitization agreements to the Geological Survey for approval, indicating that appellants had been notified of the proposed agreements but had refused to sign. Geological Survey recommended approval of the agreements the same day. The agreements were subsequently approved by the Concho Agency on May 6, 1981, and by the Anadarko Area Office on May 8, 1981.

On May 9, 1981, an employee of Reading & Bates informed appellants by telephone that BIA had approved the agreements. On May 11, 1981, representatives of appellants met with the Area Director, the Director of Tribal Governmental Services, and the Field Solicitor of the Anadarko Area Office. The approval of the agreements was discussed at this meeting. Appellants continued to express their dissatisfaction with the economic terms of the agreements.

Appellants filed a notice of appeal challenging the May 8, 1981, approval of the leases on August 5, 1981. Despite objections from Reading & Bates and Woods that this appeal was not timely filed, the Deputy Assistant Secretary affirmed the Area Director's decision on the merits on February 9, 1982, without discussing the timeliness of the appeal.² Appellants' notice of appeal from this decision was received by the Board on April 12, 1982.

² Appellees contend that BIA procedural regulations found at 25 CFR 2.4, required dismissal of this appeal as untimely filed. It appears, as appellees contend, that similar rules within the Department have been strictly construed. See *Kathleen Face v. Acting Assistant Secretary-Indian Affairs*, 11 IBIA 35 (1983); *Hamlin v. Area Director*, 9 IBIA 16 (1981); *Donald Victor Beck v. Bureau of Indian Affairs*, 8 IBIA 210; *On Reconsideration*, 8 IBIA 211 (1980). And see *Ilean Landis*, 49 IBIA 59 (1980); *Northway Natives, Inc.*, 4 ANCAB 207 (1980); *Appeal of Harry Claterbos Co.*, 10 IBCA 216, 84 I.D. 969 (1977); *Royalty Smokeless Coal Co.*, 9 IBMA 306 (1976). Nonetheless, on the record presented, BIA apparently found notice to appellants to have been defective or time limits for appeal were waived under authority of 25 CFR 1.2. At any rate, the matter was considered and decided on the merits in favor of appellees. Any error, if there be any, is harmless.

February 10, 1983

[1] On the record before it, the Board finds the decision to approve the communitization agreements at issue was based partly on the exercise of Secretarial discretion and partly on a legal conclusion. Except as such cases may be specifically referred to it, the Board does not have general jurisdiction to review decisions of the BIA made in the exercise of discretionary authority given to the Secretary by Congress. See 43 CFR 4.330(a)(2). The ultimate decision whether or not to approve a particular communitization agreement is clearly discretionary under 25 U.S.C. § 396d (1976), which states:

In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a-396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

This statute clearly places the approval of a communitization agreement within the discretion of the Secretary. The Board is without jurisdiction to review that decision unless the question is specifically referred to it under 43 CFR 4.330(b). No such referral has been made. Therefore, the Board lacks jurisdiction to review the merits of these particular communitization agreements.³

The appeal does, however, raise the legal questions whether appellants' approval of the communitization agreements was a prerequisite for Secretarial approval and whether Clause 9 of the leases appellants signed when they leased their land to Reading & Bates and Woods constitutes approval of a future communitization agreement. Clause 9 states:

Unit operation.—The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

The Board finds, as did the Deputy Assistant Secretary, that this language constitutes appellants' agreement to abide by any future communitization agreement found by the Secretary or his delegate to be in the best interests of the Indian lessors. In agreeing to the original lease, the appellants also agreed to be bound by the Secretary's determination of whether a communitization arrangement was appropriate.⁴

Therefore, for the reasons discussed above and pursuant to the authority delegated to the Board of Indian Appeals, 43 CFR 4.1, the

³ Appellants' arguments based on *Kenai Oil & Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (10th Cir. 1982), are not within the Board's jurisdiction to review, notwithstanding the attempt by the dissent to apply the holding in that case to the facts here presented. Had the appellant made a showing that BIA approval was not in the best economic interest of the tribe, as the dissent assumes, and caused thereby a breach of the Department's trust responsibility in a legal matter reviewable by the Board, a different result would be possible. These matters, speculated upon by the other Board members, are not raised by the facts now before the Board.

⁴ The Board does not accept appellants' argument that the term "subscribe" in Clause 9 contemplated that their signature on the communitization agreement was required for the agreement to be effective.

decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

FRANKLIN D. ARNESS
Administrative Judge

**CHIEF ADMINISTRATIVE JUDGE HORTON SPECIALLY
CONCURRING:**

I agree that it was proper for the Deputy Assistant Secretary to uphold the Area Director's approval of the communitization plan in question. I do not agree, however, that the only legal issues presented by this appeal are "whether appellants' approval of the communitization agreements was a prerequisite for Secretarial approval and whether Clause 9 of the leases * * * constitutes approval of a future communitization agreement" (Opinion, 11 IBIA at 58, 90 I.D. 63).¹

Appellants submit that while the Secretary's authority to approve communitization agreements affecting Indian leases is discretionary under the provisions of 25 U.S.C. § 396d (1976), no exercise of discretion "as required by law and by government obligations as trustee of tribal lands" took place in this matter (appellants' reply brief at 6; see also appellants' opening brief at 17-18, 20-23). This contention, based on claims that the BIA gave the proposed communitization "rubber-stamp approval" at the "eleventh hour," raises questions concerning the legal sufficiency of the BIA's actions.

That the Secretary or his delegated representative may not rubberstamp proposed communitization plans affecting Indian lands was firmly answered in *Kenai Oil & Gas, Inc. v. Department of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982):

While it is true that 25 U.S.C. § 396d and 25 C.F.R. § 171.21(b) do not detail any specific standards governing the exercise of the Secretary's discretion in approving communitization agreements, those actions nevertheless are limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands.

The court concluded in *Kenai* that the BIA has an obligation as trustee to ensure that communitization plans are in the Indians' best interest, including a determination that plans are economically satisfactory to Indians. *Id.* at 387.

¹ There is no question that tribal consent is required for communitization agreements to be effective. The requirement is made plain by 25 CFR 171.21(b) (now codified at 25 CFR 211.21(b)).

As to whether or not Clause 9 of the leases constitutes consent to future communitization agreements approved by the Secretary, the Deputy Assistant Secretary held, without discussion, that the clause provides such consent. The main opinion here repeats this conclusion of law.

Appellants contend that the provisions of Clause 9 are ambiguous, requiring resort to the intentions of all parties as to what is meant by the language. The tribes contend they never intended to commit themselves to future communitization plans without any opportunity to consider the particular plan (appellants' opening brief at 25-30). According to appellants, Clause 9 is nothing more than an unenforceable agreement to agree or negotiate in the future.

Presumably, the Deputy Assistant Secretary regarded Clause 9 as a plain and unambiguous statement that the tribes had consented to future communitization plans where they were approved by the Secretary during the period of supervision. That is how I read Clause 9. Considering the two mining leases in their entirety, including their nature, purpose, and subject matter, the intent of the parties is apparent from the actual words used in Clause 9. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. This rule applies to Indian leases. *Whatcom County Park Board v. Bureau of Indian Affairs*, 6 IBIA 196 (1977).

February 10, 1983

Because of the jurisdictional limitation which precludes the Board from reviewing discretionary decisions of the BIA, it is correctly noted in the main opinion that it would not be proper for the Board to substitute its judgment for the agency's as to whether a given plan is in the Indians' best interest, economically or otherwise. It is clearly within our jurisdiction, however, to determine whether legally required standards controlling the agency's exercise of discretion in communitization disputes were followed. If legally required standards are found to have been ignored, it would be incumbent upon the Board to remand the matter to the agency for appropriate action. *Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982).

The burden of proof is on appellants to show that agency action complained of was legally deficient. *Hazel Hawk Visser v. Bureau of Indian Affairs*, 7 IBIA 22 (1978). Accepting the holding in *Kenai* as controlling law in the case before us, this means appellants must show that BIA's communitization approval was not in the tribes' best economic interest. This appellants failed to do. Nor does the record as constituted support appellants' allegation that the BIA rubberstamped its approval of recommendations submitted by the Geological Survey. While it appears the case that the Concho Agency approved the agreements on the same day they were approved by the Geological Survey, and that subsequent approval by the Anadarko Area Office occurred within 48 hours, these facts, standing alone, do not prove that the BIA failed to evaluate the communitization plan from the standpoint of what was best for the tribes. It is obvious from the record that although formal BIA approvals were obtained very near the expiration time for one of the leases, all parties had vigorously discussed communitization agreements reasonably in advance of any lease termination. Under the circumstances, it was perhaps not difficult for officials accustomed to such matters to evaluate a Geological Survey recommendation on an expedited basis.²

Appellants' contention that the BIA routinely approves any communitization plan presented by the Geological Survey is not persuasive. The very matter at issue in *Kenai* was the BIA's disapproval of a communitization agreement which the agency concluded was not in the Indian lessor's best economic interest.

² Following the *Kenai* decision, the BIA adopted guidelines relating to the approval of communitization agreements which, among other things, encourage lessees of Indian lands to submit proposed plans to the BIA not less than 90 days prior to the expiration date of the first Indian lease in the proposed unit. The guidelines require that Superintendents and Area Directors prepare a written determination, based upon logical engineering and economic facts, that a proposed agreement and its long term effects are in the best interests of the Indian lessor (see appellants' opening brief, Appendix 16).

For the additional reasons given, I specially concur that the decision appealed from be affirmed.

WM. PHILIP HORTON
Chief Administrative Judge

**ADMINISTRATIVE JUDGE MUSKRAT CONCURRING IN PART
AND DISSENTING IN PART:**

The factual and legal issues involved in the appeal presently before the Board are identical to those examined by the Tenth Circuit Court of Appeals in *Kenai Oil & Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (10th Cir. 1982). The analysis and reasoning of the circuit court in that case, therefore, are directly applicable to the case at bar. Consequently, application of the *Kenai* holding necessitates my concurring in part and my dissenting in part from the decision of my colleagues.

I agree that appellee's motion for dismissal on grounds of untimeliness should be denied and that the Board has jurisdiction to review the legal sufficiency of the BIA's decision to approve these communitization agreements, though not the substantive content of that decision. Furthermore, I agree that the statutory and regulatory scheme regarding the communitization of oil and gas leases on Indian trust lands was correctly followed in this instance and that Clause 9 of this lease constitutes the tribe's prior consent to a reasonable communitization agreement approved by the Secretary.

I respectfully dissent from my colleagues, however, with regard to whether or not the Federal trust responsibility to the Indian lessors was fulfilled in this case. In light of *Kenai*, I would remand this case to the Bureau for action consistent with that decision, and with the specific communitization guidelines and general policy pronouncement regarding approval of communitization agreements issued in response to *Kenai* by the Deputy Assistant Secretary-Indian Affairs (Operations) and published in the *Federal Register*.

As does the case before us, *Kenai* involved a challenge to the exercise of the Secretary's authority to approve a communitization agreement of oil and gas leases on Indian trust lands. After quoting 25 U.S.C. § 396d (1976) and 25 CFR 171.21(b) (now 25 CFR 211.21(b)), the court explained:

While it is true that 25 U.S.C. § 396d and 25 C.F.R. § 171.21(b) do not detail any specific standards governing the exercise of the Secretary's discretion in approving communitization agreements, those actions nevertheless are limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands. Pursuant to the trust responsibilities of the United States, the Department of the Interior is charged with the administration and supervision of oil and gas leases on restricted tribal lands. 25 U.S.C. §§ 396a-396f. Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease

February 10, 1983

revenues. *Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir.), cert. denied, 392 U.S. 906, 88 S.Ct. 2056, 20 L.Ed.2d 1364 (1968).

* * * In light of these trust responsibilities, the Superintendent must take the Indians' best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors affecting their interests. The Superintendent has no obligation to approve a plan which does not serve the Indians' best interests and he has acted within his discretion in refusing to approve an economically unsatisfactory plan. [Italics added.]

71 F.2d at 386, 387. *Kenai*, thus, clearly establishes that although the authority to approve or disapprove communitization agreements is discretionary, its exercise must be within the legal framework of the trust responsibility owed by the United States Government to the Indian tribes and people.

The Deputy Assistant Secretary responded to the *Kenai* decision by issuing to all BIA area directors a memorandum, dated April 23, 1982, setting forth guidelines for the approval of communitization agreements. The memorandum stated:

[T]he recent decision of the 10th Circuit Court of Appeals in *Kenai* * * * provides us with some guidance on the scope of * * * [BIA's] authority [to approve communitization agreements of Indian oil and gas leases]. Therefore, the following guidelines have been developed to assist Area Directors and Superintendents in exercising this authority.

2. The Secretary has the discretion to approve or disapprove Communitization or Unit Agreements based on a determination of whether approval would be in the best interests of the Indian lessor. Area Directors and Superintendents must prepare such a determination in writing, based on logical engineering and economic facts, whether the agreement is approved or disapproved, and that document should be given to the applicant and the Indian lessor. In determining whether the agreement is or is not in the best interest of the Indian lessor, the following should be considered:

- a) The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects.
- b) The Minerals Management Service is required to recommend approval or disapproval based upon the engineering and technical aspects of the agreement to assure protection of the interests of the Indian lessor, and BIA officials should rely on that recommendation.
- c) The lessee in question must have complied with the terms of the lease in all respects, including the commencement of drilling operations, or actual drilling, or actual production in paying quantities (depending on the terms of the lease), within the unit area prior to the expiration date of any Indian lease.
- d) Central Office must approve any format of a Communitization Agreement developed by an Agency or Area Office before implementation.
- e) Applications to form Communitization Agreements should include an affidavit certifying that all Indian mineral owners have been given notice of the pending action.
- f) The party applying for approval of a Communitization Agreement may be requested to provide copies of farm out or similar type agreements in cases where such agreements could have a bearing upon the ownership of the working interest in the unit.

An announcement of the adoption of these guidelines was published in the *Federal Register* (47 FR 26920 (June 22, 1982)). The explanatory material appearing in the *Federal Register* stated:

It is the intent of the BIA that in exercising the Secretary's discretionary authority to approve or disapprove communitization or unit agreements, BIA officials should take into consideration the Indian owner's best interests and consider all of the factors, including economic considerations, as prescribed by the U.S. Court of Appeals in its decision in *Kenai Oil and Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (February 17, 1982). In that decision * * * [t]he Court concluded that the Secretary, acting in his capacity as a trustee, has the responsibility to manage Indian lands so as to make them profitable for the Indian and to maximize lease revenues. Accordingly, the new guidelines require that in the future BIA Area Directors and Superintendents must prepare a written determination, based upon logical engineering and economic facts, that a proposed agreement is in the best interests of the Indian lessor. The guidelines also require that the long term effects of the agreement must be in the best interests of the Indian lessor and these effects must be documented.

The Bureau is aware that the process of reaching the determinations required by the guidelines will require that Area Directors and Superintendents receive proposed agreements sufficiently in advance of the expiration of the primary term of any Indian lease within the proposed unit in order to conduct an adequate review of the engineering and economic factors involved.

Consequently, in order to ensure adequate consideration, lessees of Indian lands are encouraged to submit all future communitization agreements to the appropriate Bureau of Indian Affairs office not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit.

The facts of the present appeal raise a serious question as to whether or not the BIA's approval of the communitization agreements in question comports with the requirements of its trust responsibility as set forth in the guidelines and policy statement. The BIA's "eleventh hour" approval of the communitization agreements, the summary recommendation by the Concho Agency for approval of the agreements the very day they were approved by Geological Survey, and the subsequent approval by the Anadarko Area Office within the next 48 hours all cast doubt as to whether the BIA exercised its discretionary authority in conformity with its trust responsibility to the Indian lessors as interpreted by both the Tenth Circuit Court and the Department. Few, if any, of the present guidelines for approval of communitization agreements appear to have been followed. Neither the original decision of the Acting Area Director to approve the communitization agreements, nor the affirmance by the Deputy Assistant Secretary adequately considers the Government's trust responsibility. Nor has BIA provided a justification or explanation on appeal. The facts of this case raise reasonable doubt that the BIA's action comports with its recognized and delineated trust responsibility regarding approval of communitization agreements. Therefore this case should be remanded to the BIA for action consistent with its trust responsibility as defined by the Tenth Circuit in *Kenai* and by the Bureau itself in its guidelines and policy pronouncement.

Such a remand, however, is not only justified by the facts of this case but is required as a matter of course. Although the *Kenai* decision of February 17, 1982, postdated the decision of the Deputy Assistant

February 14, 1982

Secretary which is the subject of this appeal, this Board is bound by the circuit court opinion and consequently its own decision and disposition must be in accord. Remand then to the Deputy Assistant Secretary with instructions for him to exercise his discretion according to the procedures (e.g., guidelines) and policies (e.g., *Federal Register* notice) adopted by the Department in compliance with *Kenai* is obligatory.¹

In conclusion I wish to emphasize that on remand the substantive decision to approve or disapprove the communitization agreements would not be at issue. This decision is clearly discretionary. Rather, a remand would merely require that the decision be made within the legal parameters set forth by the court and adopted by the Department. *Wesley Wishkeno v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982).

For these reasons, I respectfully dissent from the affirmation of the Deputy Assistant Secretary's approval of the communitization agreements. Under the circumstances of this case, the BIA's actions and decisions, without more, constitute a clear breach of the trust responsibility and fiduciary duty owed the appellant lessors.

JERRY MUSKRAT
Administrative Judge

APPEAL OF RAIMONDE DRILLING CORP.

IBCA-1359-5-80

Decided February 14, 1983

Contract No. 14-08-0001-16394, Geological Survey.

Sustained in part.

1. Contracts: Construction and Operation: Contract Clauses

Where a contractor claimed that it should have been allowed to drill or ream all sampled areas of wells to a 9-inch diameter for additional payment, but the contractor had been paid for the maximum contract amount of drilling and reaming, the Board found that the contractor could not have had a reasonable expectation of payment for more than the maximum amount stated in the contract.

¹ As this Board observed in a previous decision involving the trust responsibility:

"After the trust responsibility is established, it is appropriate for those departments of the Federal Government charged with executing the trust to determine, initially at least, the specific content of the fiduciary role. * * * However, courts and by analogy the Board, in its quasi-judicial capacity, have the authority to review actions of the trustee * * * and to direct the trustee in regard to the fulfillment of its trust responsibilities. * * * In fact, once the trust responsibility is established, there can be judicial establishment of the standard of care owned by the Government under its fiduciary duty. * * * And, as the Supreme Court has indicated, 'Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts.'"

Roger St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 236-37, 89 I.D. 132, 147 (1982). disapproved, in part, on other grounds in *Burnette v. Deputy Assistant Secretary*, 10 IBIA 464, 89 I.D. 609 (1982) (citations omitted).

February 14, 1982

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2. Contracts: Construction and Operation: Duration of Contract-- Contracts: Performance or Default: Compensable Delays

In an indefinite quantity contract with a 4-month ordering period where the maximum quantity of services was ordered immediately after award and an additional delivery order for services exceeding the maximum was issued within 2 months, the Board held that the Government could not require the contractor to perform services in excess of the maximum but when the contractor accepted the order he was bound by the unit prices therein and was not entitled to standby costs prior to receipt of the order which exceeded the maximum quantities stated in the contract.

3. Contracts: Contract Disputes Act of 1978: Interest

Where the Government withheld funds, due to the contractor for work performed, to cover the cost of site restoration and seeding pursuant to a site restoration clause which required ruts to be smoothed and depressions to be filled but did not require seeding, the Board held that the contractor was entitled to be paid for the amount erroneously withheld for seeding, plus interest from the date the claim was presented to the contracting officer.

APPEARANCES: Joseph C. Kovars, Attorney at Law, Braude, Margulies, Sacks & Rephan, Washington, D.C., for Appellant; Ross W. Demblin, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from the contracting officer's decision denying appellant's claim for an equitable adjustment for additional costs incurred pursuant to the changes clause and Government Furnished Property clause of the contract.

This appeal arose under Contract No. 14-8-0001-16394, awarded by Geological Survey to Raimonde Drilling Corp. (Raimonde) on September 17, 1979. The contract was a fixed unit price, indefinite quantity contract for furnishing test well drilling services at the Sheffield solid waste burial grounds in Bureau County, Illinois. The contract contained a schedule of prices for seven work items. For each item, the contract set forth a guaranteed minimum quantity, an estimated quantity, and a maximum quantity. The term of the contract was set at a period of 5 months commencing with the date of award. Orders for the services were required to be placed during a 4-month period beginning on the date of the award (Appeal File, Tab 2).

On September 20, 1979, the contracting officer ordered the maximum quantities set forth in the contract for each of the seven items of work, a total of \$32,037.50 worth of work (Appeal File, Tab 4).

Claim for Drilling or Reaming to Bedrock

Raimonde's claim for an equitable adjustment is broken down into eight separate items which will be addressed in order. Claim item 1, as submitted in Raimonde's letter of March 12, 1980 (Appeal File, Tab 15), asserted that for wells 538, 543, 546, 547, 550, and 553 the total footage

February 14, 1982

drilled and reamed amounted to 77.05 feet more than was allowed by the Government. At a unit price of \$19.50 per foot under work item 2, Raimonde's claim was for \$1,502.48. An error in subtracting the amount allowed from the alleged amount drilled and reamed for well 553 understated the difference by 20 feet and thereby resulted in the claim being \$390 less than it would have been with a more careful calculation.

At the hearing, this claim was presented in a different manner. Instead of claiming that more footage had been drilled and reamed than the Government allowed payment for, testimony was offered on behalf of Raimonde that it was permitted to ream the wells to a diameter of 9 inches only to the depth at which the screens were set and that Raimonde felt this was a change in that it should have been allowed to ream the wells to a diameter of 9 inches all the way to bedrock regardless of the depth at which the screens were set (I Tr. 18-25).

Government exhibit I negates the basis for this claim in either manner of presentation. The exhibit consists of pages 51 through 141 of the Government's well log book, showing that Raimonde drilled or reamed the six wells in which screens were set only to the depths allowed by the Government for pay purposes and there was no additional drilling or reaming performed.

Since the Government has ordered the maximum quantity of drilling, 600 feet, provided for pay item 2 and Raimonde performed and was paid for 612 feet, slightly more than the maximum quantity, Raimonde could not have had a reasonable expectation that it would be permitted to perform additional quantities of drilling that were greatly in excess of the maximum quantity. There was no change in the work involved in limiting the amount of drilling ordered to the specified maximum. Raimonde's claim item 1 is denied.

Sample Attempts

Claim item 2 is for payment for four sample attempts in which no core recovery was made. In its claim letter of March 12, 1980, Raimonde alleged that one such attempt occurred at well 554, two at well 556, and one at well 557. Raimonde asserts that the failure to recover a core in these four attempts was due to the Government direction to use a Shelby tube for sampling. Raimonde's position is that a split spoon should have been used and that use of the Shelby tube was inappropriate in the conditions encountered.

The contracting officer denied the claim for payment for one sampling attempt at well 557 because no sampling occurred at that well, and denied the claim for the remaining three attempts because Raimonde did not turn the Shelby tubes two full revolutions before extricating them from the wells (Appeal File, Tab 17).

The Government hydrologist who prepared the specifications for the contract conceded on cross-examination that turning the Shelby tube would be irrelevant to the success of the sampling if the tube had been used in soil that was either too hard or too sandy (II Tr. 138). He further stated that payment was appropriate for sample attempts where no core recovery resulted, so long as proper procedures were followed. The use of the Shelby tube was at the Government's direction (II Tr. 151-56).

Government exhibit 1 records that there were three sample attempts at well 554 with two core recoveries, five attempts at well 556 with four core recoveries, and no core sampling attempts at well 557. The Board finds that Raimonde is entitled to payment for one core sampling attempt at well 554 and one attempt at well 556. At the contract price under pay item 1 of \$80 per sample, the amount due under this claim item is \$160.

Suspension or Standby Costs

Claim item 3 is for standby costs and administrative expense incurred after Raimonde suspended operations on November 8, 1979, when it realized that for some work items it had reached or exceeded the maximum quantities set forth in the contract and in the Government's original delivery order. Upon suspension of operations, Raimonde requested a meeting to discuss the scope of the work with the contracting officer's representative (COR). The meeting was held on November 14, 1979, and when it appeared that the COR lacked the authority to modify the purchase order to increase the maximum quantities, Mr. Frank Raimonde, president of Raimonde Drilling Corp., called Ms. Catherine Gloekler, the contracting officer, to advise her that the work performed had reached the total contracted price and to ask about another purchase order (I Tr. 30, 125).

Ms. Gloekler advised Mr. Raimonde that she had issued an amendment to the delivery order on November 13, 1979, but since maximum quantity had previously been ordered, he had a right to refuse to perform additional work in the amendment pursuant to contract clause J-2, Delivery Order Limitation (II Tr. 206). She further advised Mr. Raimonde that he could proceed or he could wait until he received the amendment, as he chose. After telling Mr. Raimonde the contents of the amendment, she verbally authorized him to proceed and stated that she hoped that he would do so (II Tr. 215-16).

Although Mr. Raimonde wrote to the contracting officer on November 15, 1979, that pursuant to her direction, he would not proceed until receipt of the written extension to the purchase order (Appeal File, Tab 6), the statement is at variance with the testimony of Mr. Raimonde at the hearing. On direct examination, Mr. Raimonde did not respond to leading questions referring to the contracting officer's alleged direction to stop work, but stated that he gave the direction to stop work to wait for the purchase order (I Tr. 127). Mr. Raimonde testified that he received the amendment dated

February 14, 1982

November 13, 1979, on November 25, 1979, as set forth in his letter of December 1, 1979 (Appeal File, Tab 9, I Tr. 128). The Board takes official notice of the fact that November 25, 1979, was a Sunday. Ms. Gloekler was unable to state when the amendment was mailed (II Tr. 214).

The amendment increased the original amount of the contract, \$32,937.50, by \$5,312.50 to \$37,350 for the following additional services: 50 Shelby tube samples, installing 100 feet of 4-inch casing, grouting 100 feet of casing, and backfilling 85 feet with grout.

Appellant contends that it incurred additional costs entirely through no fault or negligence of its own and the delay or suspension costs are compensable either under the changes clause or as a breach of contract. Appellant insists that because the Government knew weeks in advance that additional work requiring an amendment to the original delivery order would be needed, the Government breached its duty to cooperate and not to delay the appellant when it delayed issuance of the amendment until November 13.

This argument ignores the essential nature of the indefinite quantity contract, which provided that the Government could issue delivery orders for a period of 4 months after the award date of September 17. The purchase order amendment issued on November 13 was issued less than 2 months after the award date and cannot be categorized as delayed. The Board finds there was no change and no breach involved in the Government's exercise of a right set forth in the contract. Appellant's reliance on *Chantilly Construction Corp.*, ASBCA No. 24138 (Dec. 12, 1980), 81-1 BCA Par. 14,863, for the proposition that a delay in issuing a change order permits a subsequent claim for impact costs, is inapposite. In the present case, there was no change order but a timely delivery order for services for which the contract provided fixed unit prices.¹

With respect to the assertion that the contracting officer's inability to order appellant to proceed constituted a constructive order not to proceed, the assertion does not take into account the rights and obligations of the parties at the time of the issuance of the delivery order on November 13. The Government had a right to issue a delivery order for more than the maximum amounts of service set forth in the contract, but it could not require the contractor to perform the additional services. The sole choice was reserved by the contract for the contractor to decide whether to accept the delivery order, including its fixed unit prices, or whether to reject the delivery order in its entirety. There was no middle ground. The contractor did not have the

¹ Appellant's claim for \$11,150.43 for 10 days of suspension or standby costs includes an allegation that home office overhead was allocable to this contract at a rate of \$496.03 per day and that standby equipment costs amounted to \$7,590 per month. Appellant had contracted to stand by for a 4 months ordering period at no cost to the Government and to accept a minimum order \$20,825 worth of services. Appellant's cost presentation would have the Board believe that appellant was willing to incur overhead costs of \$59,523.60 (\$496.03 per day times 120 days) and standby equipment costs of \$30,360 (\$7,590 per month times 4 months), a total of \$89,883.60 in costs, for the guarantee of a minimum order of \$20,825. The presentation is not persuasive.

option of accepting the delivery order only for the amounts of services requested and rejecting the fixed unit prices in the order.

The Board finds no basis for allowing suspension or standby costs in addition to the fixed prices contained in the delivery order, and the claim for such costs is denied.

Cleanup of Excess Grout

Appellant's fourth claim is for \$565.22 for cleaning up excess grout which overflowed the drilling holes when grout was pumped in accordance with the Government's directions.

The Government hydrologist at the drilling site testified that he made the calculations as to how much cement was required to grout each hole and the superintendent for Raimonde followed his suggestion (II Tr. 175-77). The result of pumping the quantities of grout calculated by the Government resulted in excessive amounts flowing out on the ground. Raimonde's records show that 35-1/2 hours were expended in cleaning up the excess grout, at a cost of \$565.22. The Government did not dispute the cost of the cleanup, but argued that it did not require appellant to use its suggestions as to the amount of cement required for each hole. By characterizing his calculations as a requirement, the Government hydrologist went beyond the area of suggestion and entered the area of directing appellant's grouting operation. The Board finds that Raimonde is entitled to recover \$565.22 for cleaning up the excess grout pumped at the Government's direction.

Lack of Access to Site

The fifth claim presented by Raimonde is for \$1,472.50 for excess costs incurred because the drilling sites were not reasonably accessible as represented in the contract.

Subsection F.2 of the specifications makes the following representations:

2. **LOCATION AND ACCESS:** All wells are to be drilled on land owned by the State of Illinois, and leased to Nuclear Engineering Company. The site is located about 4.5 miles southwest of Sheffield, Illinois (see exhibit 1). The drilling site is accessible by asphalt and gravel all-weather road, except for in some cases the 50-100 yards to the drilling location from an access road. The exact drilling site will be selected by a representative of the U.S. Geological Survey.

The land is moderately level and cleared. Soils are rich in clay and slippery when wet.

(Appeal File, Tab 2).

Appellant's superintendent testified that there was very little gravel on the roads inside the fence of the disposal site and those roads became very slippery when wet (I Tr. 160-63). He estimated that only one well site was accessible within 50 to 100 yards of a road as represented by the contract (I Tr. 195).

The Government hydrologist who drafted the specifications testified that the Government had selected the drilling sites for the wells on August 22, 1979, when the invitation for bids was issued, but did not disclose the sites to bidders because it was necessary to retain the

February 14, 1982

option to move a site in the event that unusual conditions were found (II Tr. 127-28). He further testified that six wells were more than 100 yards from an access road and three of them were more than 700 feet from an access road (II Tr. 120-21). Access to some of the well sites was over terrain that was not "moderately level" as specified in the contract (II Tr. 121-22).

Based on appellant's daily work reports (Appellant's Exh. 6) appellant calculated that unanticipated expenses due to lack of access amounted to \$1,472.50 (I Tr. 46-52). The Government offered no evidence to oppose the amount calculated. The Board finds that appellant is entitled to an equitable adjustment of \$1,472.50 for the expenses incurred due to lack of access as specified in the contract.

Lack of Egress

Appellant's sixth claim is for \$780 for additional expenses incurred because the gates to the disposal site were sometimes locked for security reasons before appellant had finished work for the day.

This claim was not presented to the contracting officer for decision in appellant's claim letter of March 12, 1980, or at any other time. This claim has not been the subject of a decision by the contracting officer.

The linchpin for appealing claims under the Contract Disputes Act of 1978 is the contracting officer's decision. No appeal may be taken to a Board under 41 U.S.C. § 606 (Supp. II 1978) without such decision.

Paragon Energy Corp. v. United States, 645 F.2d 966 (1981).

Accordingly, Raimonde's claim based on lack of egress is hereby dismissed for lack of jurisdiction.

Failure to Furnish Government Furnished Property

Appellant's seventh claim arose when the Government failed to deliver some of the Government furnished property (GFP) described in subparagraph 24, page C-3 of the contract:

24. GOVERNMENT FURNISHED PROPERTY (GFP)

The Government will furnish the Contractor, for use in performance of this contract only, the following parts:

<i>Description</i>	<i>Value</i>
1. Casting and caps.....	\$2,885
2. Screens, etc.	2,742
3. Cement	440
4. Split spoon	75
5. Driver hammer	250
6. "A" Rod	500

Government furnished property (GFP) shall be furnished as required throughout the term of the contract. The total estimated value of GFP is \$6,892. All GFP not consumed during the performance must be returned f.o.b. destination, within ten (10) calendar days of completion of the required work.

NOTE: Bidders are advised to familiarize themselves with the provisions of the GOVERNMENT-FURNISHED PROPERTY provision of Section L.

Section L of the contract provides as follows:

GOVERNMENT-FURNISHED PROPERTY

(SHORT FORM)

(a) The Government shall deliver to the Contractor, for use only in connection with this contract, the property described in the schedule or specifications (hereinafter referred to as "Government-furnished property"), at the times and locations stated therein. If the Government-furnished property, suitable for its intended use, is not so delivered to the Contractor, the Contracting Officer shall, upon timely written request made by the Contractor, and if the facts warrant such action, equitably adjust any affected provision of this contract pursuant to the procedures of the "Changes" clause hereof.

(b) Title to Government-furnished property shall remain in the Government. The Contractor shall maintain adequate property control records of Government-furnished property in accordance with sound industrial practice.

(c) Unless otherwise provided in this contract, the Contractor, upon delivery to him of any Government-furnished property, assumes the risk of, and shall be responsible for, any loss thereof or damage thereto except for reasonable wear and tear, and except to the extent that such property is consumed in the performance of this contract.

(d) The Contractor shall, upon completion of this contract, prepare for shipment, deliver f.o.b. origin, or dispose of all Government-furnished property not consumed in the performance of this contract or not theretofore delivered to the Government, as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or paid in such other manner as the Contracting Officer may direct.

The Government did not have the split spoon, drive hammer, and "A" rod, items 4, 5, and 6 of subparagraph 24, but had arranged to borrow the equipment from the State of Illinois. When appellant's driller indicated that Raimonde could use its own equipment, the Government made no further effort to furnish these three items (II Tr. 94-95).

Testimony offered on behalf of Raimonde described \$1,197.18 worth of damages or depreciation to the equipment used instead of the GFP which was not furnished. However, \$500 of the damage was to "N" rods which were used since "A" rods were not suitable for use on this project. No explanation was offered as to how damage of \$697.18 could have occurred to the split spoon and drive hammer which have a value of \$75 and \$250, respectively, pursuant to the GFP clause (I Tr. 55-56).

The contracting officer denied the claim for GFP in its entirety, primarily because Raimonde did not make a written request for the GFP but also because of the use of "N" rods which would not have been affected if the Government had furnished an "A" rod (Appeal File, Tab 17).

The Board finds that the contracting officer erred in interpreting the requirement for a written request to mean a request for the GFP rather than a request for an equitable adjustment upon failure to

February 14, 1982

furnish the GFP. The Board further finds that Raimonde requested an equitable adjustment for the failure to furnish GFP in its claim letter of March 12, 1980.

With respect to the Government's failure to furnish an "A" rod, the Board finds that Raimonde suffered no detriment in view of the testimony on its behalf that an "A" rod was not suitable for this project. The Board finds that Raimonde is entitled to an equitable adjustment of \$325, the value stated for the split spoon and drive hammer in the GFP clause, for the Government's failure to furnish those items.

Site Protection

Subparagraph 12 of the contract provides:

12. *SITE PRESERVATION AND RESTORATION*: The drilling site(s) chosen are reasonably accessible and will have ample maneuvering space for the contractor's trucks and equipment. Structures, grounds, and natural environment around the site(s) must be protected and, therefore, the contractor will be responsible for damage in connection with his drilling operations. If, upon inspection of the site, it is determined that there is not sufficient cleared area for efficient operations, the bidder shall notify the COR prior to the Bid Opening.

At the completion of drilling and testing and before acceptance by the COR, the site will be restored as nearly as possible to its previous condition. All equipment shall be removed, and depressions, tire ruts, etc. resulting from drilling will be filled in and leveled and debris removed. Cuttings removed from the hole and any drilling water that may be produced will be disposed of under the direction of a representative of the Illinois Department of Public Health. The work specified in this contract shall not be considered complete, nor will the invoice for the work be approved, until the site restoration is completed to the satisfaction of the COR.

(Appeal File, Tab 2).

On February 6, 1980, the Government forwarded to Raimonde a bill from the Nuclear Engineering Co. for \$6,862.70 for site restoration, which included an estimate of \$5,703.50 for seeding. The Government withheld the total of \$6,862.70 from payments due to Raimonde. In August 1980, the bill was revised downward and the Government released \$3,331.82, receipt of which was acknowledged by Raimonde's letter of October 24, 1980. The Government has continued to withhold \$3,682.88 (Appellant's Exh. 3-5). The original bill contained \$943.20 for the cost of completed work to level rutted areas and to haul fill dirt (Appeal File, Tab 13).²

The site preservation and restoration clause of the contract does not impose a requirement for seeding but requires only that any depressions and tire ruts be filled in and leveled. It was improper for the Government to withhold funds due to appellant to cover seeding costs.

Government exhibit F shows that approximately one-third of the total distance of the well sites from access roads exceeded the

² Although appellant's brief contains repeated references to charges for sodding as well as seeding, none of the transcript references and none of the documents referred to by appellant contain any mention of sodding.

maximum distance of 100 yards represented by the Government in the location and access clause. Appellant could not reasonably have anticipated restoration of access routes exceeding 100 yards. The Government is entitled to retain two-thirds of the amount expended to level ruts and haul fill dirt, or \$628.80. Appellant is entitled to be paid \$3,054.08 of the amount withheld by the Government for restoration and seeding costs (\$3,682.88 minus \$628.80).

Appellant cites *Joseph Fusco Construction Co.*, GSBCA No. 5717 (Dec. 10, 1980), 81-1 BCA par. 14,837, for the proposition that interest should run on funds improperly withheld from a contractor from 30 days after completion of contract work until payment is made. The decision cited was decided under the General Services Board of Contract Appeals (GSBCA) Rule 12.1(b), the small claims procedure. Such rule further provides that decisions under the small claims procedure will have no value as precedent. Publication of such a case is contrary to GSBCA Rule 12.1(b)5. We decline to speculate how the decision reached the Commerce Clearing House for publication.

In our view, there is no reason to distinguish a claim for improper withholding of funds from any other claim under the Contract Disputes Act. The Board finds that interest on the present claim runs from the date the claim was submitted to the contracting officer, March 12, 1980 (Appeal File, Tab 14). With respect to the refund of \$3,331.82, receipt of which was acknowledged by Raimonde on October 24, 1980, interest shall run from March 12, 1980, to the date of repayment.

Summary

Appellant is entitled to an equitable adjustment as follows:

Claim 2	Sample Attempts.....	\$160.00
4	Cleanup of Grout.....	565.22
5	Lack of Access.....	1,472.50
7	Failure to Furnish GFP.....	325.00
8	Withholding for Site Restoration.....	<u>3,054.08</u>
	Total.....	5,576.80

The appeal is sustained in the amount of \$5,576.80 plus interest from March 12, 1980, in accordance with the Contract Disputes Act of 1978. In addition, appellant is entitled to interest on \$3,331.82, which was erroneously withheld from March 12, 1980, to the date of repayment. All other claims are denied in their entirety.

G. HERBERT PACKWOOD
Administrative Judge

February 14, 1982

I CONCUR:

WILLIAM G. MCGRAW
Chief Administrative Judge

February 16, 1983

**PURPOSES OF EXECUTIVE ORDER OF APRIL 17, 1926,
ESTABLISHING PUBLIC WATER RESERVE NO. 107***

M-36914 (Supp.II)

February 16, 1983

Water and Water Rights: State Laws

The right to use water from reserved springs and waterholes for any purpose other than the purposes of human and animal consumption must be obtained pursuant to applicable state law.

Water and Water Rights: Generally

The Executive Order of Apr. 17, 1926, reserved the minimum amount of water necessary in springs and waterholes to provide water for the purposes of human and animal consumption. The entire flow of these water sources was not necessarily reserved.

Withdrawals and Reservations: Springs and Waterholes

The purpose of reserving land surrounding important springs and waterholes was to prevent monopolization of the surrounding public lands.

OPINION BY SOLICITOR COLDIRON

OFFICE OF THE SOLICITOR

MEMORANDUM

TO: SECRETARY

FROM: SOLICITOR

**SUBJECT: PURPOSES OF EXECUTIVE ORDER OF APRIL 17, 1926,
ESTABLISHING PUBLIC WATER RESERVE NO. 107**

The Assistant Secretary for Land and Water has requested my review of the purposes for which water may be reserved under the Executive Order of April 17, 1926 (Public Water Reserve No. 107), as determined in the Solicitor's Opinion on "Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management" 86 I.D. 553 (Sol. Op. #M-36914, June 25, 1979). Both the Colorado Supreme Court in *Denver v. United States*, No. 79SA99 (Nov. 29, 1982) (Colorado Water Divisions 4, 5 and 6) and the United States and the State of Wyoming in a proposed stipulated settlement of the Wyoming Big Horn River Adjudication (Civil No. 4993, 5th Judicial District, Wyoming) entered into on November 22, 1982, limited the purposes for which water could be reserved for a public spring or water hole withdrawn by Public Water Reserve No. 107. The reasoning of the Colorado Supreme Court regarding the purposes of reserved public springs and water holes is persuasive and is incorporated herein as modifying Solicitor's Opinion M-36914.

* Not in chronological order.

Background

The Executive Order of April 17, 1926, withdrew from settlement, location, sale or entry and reserved for public use in accordance with the provisions of section 10 of the Act of December 29, 1916, 39 Stat. 865, 43 U.S.C. § 300, and in aid of pending legislation:

* * * every smallest legal subdivision of the public land surveys which is vacant, unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, * * *

The June 25, 1979 Solicitor's Opinion made an analysis of the statutory background, legislative history and Departmental regulations and interpretations of the April 17, 1926 Executive Order, 86 I.D. at 579-588. The Solicitor found that "the purposes for which public springs and water holes were withdrawn were relatively narrow and specific," 86 I.D. at 581. These purposes obviously included "stock watering and human consumption," *id.* the former Solicitor held, on "important springs and water holes," *supra* at 583. The agency was to determine the quantity of water necessary for a spring or water hole to be considered "important." These conclusions are in my opinion consistent with the United States Supreme Court's holding in *United States v. New Mexico*, 438 U.S. 696 (1978), that water is reserved for use by the United States on reserved lands only for the primary purposes of the reservation and that the reserving documents are to be narrowly construed in determining those purposes. *Id.* at 699-701.

The Solicitor went on, however, to find that additional purposes should also be within the scope of the Executive Order.

(1) water for growing crops and sustaining fish and wildlife to allow the settlers on the public land to obtain food for their families and provide forage for their livestock; and (2) water for flood, soil, fire and erosion control, the control of which was essential to protect the public and to allow the new patentees and settlers on the public domain to make a viable living in this arid and semi-arid region of the Nation. 86 I.D. 581-582, 588.

The Solicitor furthermore found "that the quantity of water reserved at each public water hole or spring is the total yield of each source" *Id.* at 582 regardless of whether the total yield was needed to fulfill the reservation purposes. These conclusions were reasoned by the Colorado Supreme Court to be inappropriate and unsupported by the Executive Order. I agree.

Colorado Supreme Court's Opinion

The Colorado Supreme Court is the first Court of general jurisdiction (either state or federal) to consider the purposes of a Public Water Reserve 107 reservation. The Court considered the Solicitor's Opinion, the arguments of the United States in support thereof as well as the arguments of all interested parties against the government's interpretation. The Court engaged in an analysis similar to that in the Solicitor's Opinion and concluded that

February 16, 1983

The purpose of the [PWR 107] reservation was to prevent monopolization of water needed for domestic and stock watering purposes. * * * Reserved water from public springs and waterholes is available for the purposes of human and animal consumption in the amount necessary to prevent monopolization of the water resources. * * * [there was, however,] no intent to reserve the entire yield of public springs and waterholes. *Denver v. U.S.*, *supra*. Slip opinion at 57.

The Court agreed with the Solicitor's Opinion on a related issue that it made no difference whether or not the spring or water hole was tributary to another water source. Slip op. at 58.

After close scrutiny, it is my opinion that the Colorado Supreme Court correctly interpreted the Executive Order of April 17, 1926. The Court found that the purpose for reserving public springs and water holes was to prevent monopolization of the public lands by withdrawing from settlement, location, sale or entry the lands surrounding important springs and water holes on the public lands and reserving only the minimum amount of water from those sources necessary to serve the needs of the homesteaders and their livestock.¹

These narrow purposes represent a realistic statement of the primary purposes of the reservations and provide a practical standard by which the minimum quantities of water needed to fulfill the federal purposes may be measured. This standard should be applied to all reserved springs and water holes administered by the Bureau of Land Management.

Conclusion

The springs and water holes reserved pursuant to the Executive Order of April 17, 1926, were reserved to prevent "private monopolization," 86 I.D. at 581 of the public domain through control of important springs and water holes which provide the water supply for tracts of public domain land larger than the 640 acres allowed to be homesteaded by an individual. The purposes for which water was thus reserved in these water sources are limited to human and animal consumption. The right to use water from these water sources for any other purpose must be obtained pursuant to state law because those other purposes do not come within the reserved water right. (See *Federal Non-Reserved Water Rights*, 88 I.D. 1055 (M-36914 Supp. I, Sept. 11, 1981.) The entire flow or quantity of water these reserved sources was accordingly not reserved unless necessary for the primary purposes—a fact which must be determined on a case-by-case basis.

¹The Justice Department, with the concurrence of the Department of Interior, reached a similar conclusion to that of the Colorado Supreme Court in signing a settlement agreement with the State of Wyoming on Nov. 22, 1982, in *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, Civil No. 4993, 5th Jud. Dist. In this case this Department has determined that as a practical matter the United States interests in springs and water holes reserved pursuant to Public Water Reserve 107 will be adequately protected and recognized under a decree that provides that reserved water in public water reserves can be used only for human and animal consumption.

Solicitor's Opinion M-36914 of June 15, 1979, is hereby modified accordingly.

WILLIAM H. COLDIRON
Solicitor

FORTUNE OIL CO.

71 IBLA 153 ¹

Decided *March 9, 1983*

Appeal from decisions of the Oregon State Office, Bureau of Land Management, rejecting oil and gas lease offers OR 26208 through OR 26210, OR 26213, and OR 26214.

Affirmed in part, set aside and remanded in part.

1. Oil and Gas Leases: Stipulations—Rules of Practice: Appeals: Generally—Rules of Practice: Appeals: Notice of Appeal

Where BLM affords an offeror a period of 30 days to execute stipulations as a condition to issuance of an oil and gas lease and states that failure to comply will result in rejection of the offer to lease, the decision is interlocutory and there is no right of appeal. The offeror may elect to comply, to comply under protest, or to let the 30-day period run without complying and appeal the resulting BLM decision rejecting the offer. In the latter case the offeror has waived the right to comply and, if the appeal is unsuccessful, the rejection is final and no additional opportunity to execute the stipulations will be granted.

2. Federal Land Policy and Management Act of 1976: Wilderness—Oil and Gas Leases: Applications: Generally

Action must be suspended on an oil and gas lease offer to the extent it includes lands in either a wilderness study area or an instant study area until Congressional action on the President's recommendations as provided by sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976).

APPEARANCES: John R. Anderson, President, Fortune Oil Co.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

On April 2, 1981, Fortune Oil Co. (Fortune) filed several noncompetitive oil and gas lease offers for various lands in south central Oregon. By three separate decisions in May and June 1982 the Oregon State Office, Bureau of Land Management (BLM), notified Fortune that it was prepared to issue the leases provided that Fortune sign and return enclosed stipulations. BLM allowed Fortune 30 days from receipt of each decision to return the signed stipulations and stated that the failure to timely meet this requirement would result in rejection of its offers. The decision concluded with the statement, "This decision is not final, but is an interlocutory decision from which no

¹The Board has consolidated these appeals [82-1182, 82-1219 and 83-39] sua sponte because they involve the same appellant and the same issues.

March 9, 1983

appeal may be taken." Fortune nevertheless filed notices of appeal from each decision, asserting that it was adversely affected by the decision and citing 43 CFR 4.410 as affording it a right of appeal.

BLM treated the notices of appeal as protests that it dismissed by separate decisions in July and August 1982. The decisions asserted that Fortune was incorrect in stating that the earlier decisions were adverse to it because they took no action to terminate the applications, priorities, or interests in the mineral estate of the lands involved and therefore were not adverse. The decisions also rejected the oil and gas lease offers because the 30 days for return of the signed stipulations had passed in each case. BLM noted as well that it had required the signing of a wilderness protection stipulation and that the Board had upheld the stipulation requirement in its decision, *John R. Anderson*, 57 IBLA 149 (1981). A right of appeal from these decisions was afforded and Fortune timely submitted a second notice of appeal for each case.

In its statements of reasons Fortune contends that the distinction that BLM has made between its two types of decisions is self-contradictory and has no merit. Fortune argues that by including a threat of adverse action if the stipulation requirements were not met, BLM has taken action that is adverse to its interests. Fortune requests that the decisions be remanded to BLM and that the Board instruct BLM to comply with the regulations governing treatment of appeals.

[1] In a recent decision, *Carl Gerard*, 70 IBLA 343 (1983), the Board examined the effect on appeal rights of various types of BLM decisions. The case dealt with a decision rejecting an application subject to compliance within 30 days, but the Board also examined the opposite circumstance, a decision "holding for rejection" an offer for some identified deficiency but affording a period of time within which the deficiency might be corrected, failing in which the offer would be considered rejected without further notice. This latter situation is similar to the situation presented in this case where BLM has imposed a requirement on appellant and indicated that failure to comply within the specified time would result in rejection of its offers. The only difference is that a decision "holding for rejection" contemplates that no further decision will issue, whereas the BLM decision in this case stated that a rejection decision would issue. With respect to a BLM decision "holding for rejection," the Board said:

It is our view that, where such a decision clearly contemplates that rejection will occur upon the running of the prescribed period, such a decision is interlocutory. It is, in effect, an interim determination affording an applicant an opportunity to correct a perceived deficiency prior to rejection of the application. On receipt of such a decision, a party may elect to comply in the manner prescribed, comply under protest, or await the running of the identified period and appeal the final rejection. In such a case, the 30-day appeal

period commences upon the expiration of the 30-day compliance period. See *State of Alaska*, 42 IBLA 94 (1979); *State of Alaska*, 41 IBLA 309 (1979).²

² We would note that under such an analysis, by failing either to comply or to comply under protest, an applicant waives his right to comply should a subsequent appeal be determined adverse to his interests and thus his offer or application is properly rejected with finality. To the extent that *Mobil Oil Corp.*, 35 IBLA 375, 85 I.D. 225 (1978), implies an opposite conclusion, it is hereby prospectively overruled to the extent it is inconsistent.

70 IBLA at 346.

Thus, in a case where BLM has required execution of stipulations subject to rejection for failure to comply, a party has a choice of three courses of action that would have three different results. The party may execute and return the stipulations timely and be issued the lease. He may execute the stipulations under protest; meaning, that although he objects to the stipulations and protests their inclusion, he wants the lease regardless. In these circumstances, BLM would then be required to examine the protest and rule on it in a decision granting a right of appeal and issuing the lease. If the Board's decision were adverse, the party's lease would stand as issued. A party's third choice would be not to comply, await receipt of a rejection of his offer and then appeal to this Board. He would take this course where he did not want the lease if the stipulations were attached, since he would have waived his right to comply. No additional opportunity to accept the stipulations would be granted if the party lost on appeal to the Board.

We conclude that BLM properly characterized its decision as interlocutory and properly treated appellant's initial appeals as protests, even though not accompanied by the stipulations. Since the Board has not previously delineated the choices available to a party in these circumstances, we will not hold appellant to have waived his right to comply in this case.

[2] The stipulation in question in these cases provides for the interim protection of the wilderness values of the lands being inventoried and evaluated for their wilderness potential under section 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976). As BLM noted in its decision, and appellant is well aware, the Board has consistently upheld the reasonableness of the wilderness protection stipulation as properly required in furtherance of the Secretary's obligation under 43 U.S.C. § 1782(c) "to manage such lands * * * in a manner so as not to impair the suitability of such areas for preservation as wilderness." *Ida Lee Anderson*, 67 IBLA 340 (1982); *Banner Oil & Gas, Ltd.*, 63 IBLA 23 (1982); *John R. Anderson, supra*.

In these cases, however, appellant does not appear to be objecting to the stipulation itself but the fact that BLM has not expressly identified the areas affected by the stipulation. In statements of reasons filed with the Board in connection with appellant's initial appeals, which BLM treated as protests, appellant notes that the stipulation begins: "By accepting this lease, the lessee acknowledges that the following described lands are being inventoried or evaluated for their wilderness potential," and concludes: "In order to expedite leasing, the exact areas

March 9, 1983

involved have not been delineated [*sic*], they may be ascertained from the attached map or the BLM district office having jurisdiction over the area." Appellant argues that the attached map is of such small scale that it cannot be determined which lands are definitely affected by the wilderness protection stipulation and that it should not have to make a decision whether to accept or reject the lease without knowing the exact areas involved. Appellant urged that BLM be directed to describe the lands affected by the stipulations by appropriate legal subdivision.

We agree that appellant has a right to know exactly which lands are covered by a wilderness stipulation. The maps referenced in the wilderness stipulations are not included in any of the lease files before us, but review of the files for lease offers OR 26208 and OR 26210 reveals a list by legal subdivision of the areas needing wilderness protection prepared during BLM's evaluation of these lease offers. We can think of no reason why it would be any more difficult for BLM to prepare such a listing for attachment to the stipulation than to prepare a map of the areas. We note that other BLM state offices apparently provide a specific listing. *E.g., Banner Oil & Gas, Ltd., supra* at 23 n.1. Furthermore, although a map may reasonably show the covered areas if they are whole sections or regular subdivisions of a section, wilderness study area boundaries are often irregular and a small scale map could not easily set apart the lands encompassed by the stipulation so that the offeror would know which lands in his lease are affected.

Ordinarily in these circumstances we would set aside BLM's rejection of the lease offers and afford appellant a period of time to execute the stipulations. However, on December 30, 1982, the Secretary of the Interior announced that the Department would issue no leases in either designated wilderness areas or in wilderness study areas. Pursuant thereto, the Director, BLM, has issued Instruction Memorandum No. 83-237 (Jan. 7, 1983). In relevant part this provides that "leases currently in process should not be issued. * * * All such applications are to be maintained as pending until further notice." Therefore, in accordance with the instruction memorandum, the State Office is directed to suspend further action on appellant's lease offers, to the extent that they embrace lands in a wilderness study area, and to hold them "pending with priority as of the date of filing until Congressional action is taken on the President's recommendation," and to issue leases for the lands not in the wilderness study area, all else being regular.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

of the Oregon State Office is affirmed in part and set aside and remanded for action consistent with this decision.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

**WALCH LOGGING CO., INC., DANT & RUSSELL, INC. v.
ASSISTANT AREA DIRECTOR (ECONOMIC DEVELOPMENT),
PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS**

11 IBIA 85

Decided *March 18, 1983*

Appeals from determinations of liability for damages and of the amount of damages for breach of two timber logging contracts on the Makah Indian Reservation in Washington State.

Affirmed in part, modified in part, reversed in part, and remanded.

1. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

The mitigation of damages resulting from the breach of an Indian timber sale contract is ordinarily best accomplished through a resale of the remaining timber on terms approximating those of the original contract.

2. Administrative Procedure: Administrative Review—Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Decisions made by officials of the Bureau of Indian Affairs as supervisors of Indian leases will be upheld when they are reasonable and based upon substantial evidence in the record. Where the Board finds that BIA has calculated damages improperly or in violation of contractual or regulatory requirements, the agency's action will be set aside.

3. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Standard Provision B6.12 of the standard Bureau of Indian Affairs Indian timber sale contract applies when a cutting deficiency incurred in one contract term is cured by cutting during a subsequent term or terms.

4. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

In calculating damages for breach of an Indian timber sale contract, it is reasonable to apportion the amount of timber required to be cut evenly over the term or terms during which logging was to have occurred.

5. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

March 18, 1983

In calculating damages for anticipatory breach of an Indian timber sale contract, it is proper to determine market value at the time or times set for performance through the date of trial.

6. Evidence: Presumptions—Evidence: Sufficiency

A legal presumption of regularity supports the official acts of public officers acting in their official capacities.

7. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Expenses incurred in the expectation that an Indian timber sale contract might be breached are not recoverable.

8. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Expenses incurred in order to resell timber remaining after the breach of an Indian timber sale contract are recoverable.

9. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Recovery of reasonable administrative costs incurred by the Bureau of Indian Affairs as a direct result of the breach of an Indian timber sale contract will be allowed.

10. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

The language of Standard Provision B2.7 of the standard Bureau of Indian Affairs Indian timber sale contract, to the effect that "any costs or expenses" incurred because of a breach of contract are recoverable, will be interpreted in accordance with the general rules governing the determination of damages unless it is shown that all parties accepted a broader interpretation of the language.

11. Evidence: Generally

The true nature of the relationship between apparently separate business entities is a question of fact.

APPEARANCES: Craig A. Ritchie, Esq., Doherty, Doherty & Ritchie, Port Angeles, Washington, for Walch Logging Co., Inc.; Ronald T. Adams, Esq., Black, Helterline, Beck & Rappleyea, Portland, Oregon, for Dant & Russell, Inc.; Alvin J. Ziontz, Esq., Samuel J. Stiltner, Esq., and Frank R. Jozwiak, Esq., Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, Seattle and Neah Bay, Washington, for the Makah Tribe; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Assistant Area Director (Economic Development). Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

This appeal was brought by Walch Logging Co., Inc. (Walch), and Dant & Russell, Inc. (Dant) (appellants), from an October 30, 1981,

decision of the Assistant Area Director (Economic Development),¹ Portland Area Office, Bureau of Indian Affairs (BIA) (appellee). That decision found that appellants were liable to the Makah Tribe and to BIA for damages in the amount of \$3,690,563.80 for breach of two logging contracts covering logging units on the Makah Reservation in Washington State. These contracts were entered into pursuant to 25 U.S.C. § 407 (1976) and 25 CFR Part 163 (formerly Part 141; see 47 FR 13,327 (Mar. 30, 1982)). Appellants' appeals of that decision to the Deputy Assistant Secretary—Indian Affairs (Operations) were transferred to the Board of Indian Appeals for decision on July 2, 1982.

Background

On April 7, 1978, the Makah Tribe entered into logging contract No. 14-20-0510-316 with V.V.P., Inc. (VVP), covering a unit of the tribe's reservation designated as the Cape Flattery Logging Unit (Cape Flattery) (Doc. #58).² Before any logging activity was commenced, VVP initiated the assignment of its rights under the contract to Walch on September 21, 1978. This assignment was approved by BIA on December 6, 1978 (Doc. #72), following the issuance to Walch of Performance Bond No. U-076568 in the amount of \$123,000 by United Pacific Insurance Co. (UP) on November 11, 1978 (Doc. #70).

Under the terms of this contract, Walch was required to log a minimum of 3 million board feet of timber by January 31, 1979, and thereafter to cut and scale a minimum of 6 million and a maximum of 12 million board feet each contract year (February 1 through January 31) through January 31, 1983 (Doc. #51). According to appellee and undisputed by appellants, Walch's actual performance during contract year 1978 resulted in a deficiency of 139,570 board feet. During the first quarter of 1979 Walch cut 2,326,210 board feet, of which 139,570 board feet were allocated to cover the 1978 deficiency as provided in Standard Provision B6.12 of the contract.³ A total of 2,186,640 board feet were consequently allocated to the first quarter of 1979. Walch removed its men and equipment from the Cape Flattery site in April 1979 and did not return.⁴

After Walch left the Cape Flattery site, it was BIA's position that several contract violations existed (Doc. #242). By letter dated June 15, 1979, the Superintendent of the Western Washington Agency gave Walch 10 days in which to inform the agency of its intentions with regard to the contract (Doc. #251). On June 22, 1979, Walch informed the Superintendent that it intended to perform the contract if it could obtain a modification or if the market conditions improved.

¹In its opening brief, Walch erroneously attributes this decision to the individual who prepared the damage figures. See Appeal of Walch Logging, Inc., Feb. 1, 1982 ("Opening Brief"), throughout, but especially at 1, 46-48.

²All references to document numbers ("Doc. #") are to documents found in the administrative record compiled by BIA. Some of these documents appear as exhibits to Walch's opening brief with different numbers. This decision will reference duplicate documents only by the numbers appearing in the compilation of documents prepared by BIA.

³This contract clause is quoted and discussed in the Discussion and Conclusions section, *infra*.

⁴Appellee's Answer Brief ("Answer Brief") at 37-39; Doc. #219. Since the contract required a minimum cut of 6 million board feet in 1979, Walch concluded the year with a deficiency of 3,813,360 board feet (Answer brief at 37-39; Doc. #219).

March 18, 1983

Walch stated that it would submit a revised logging plan within 3 weeks (Doc. #254). When a revised plan was not submitted, appellee informed Walch on July 17, 1979, that it was in breach of the Cape Flattery contract and that all rights under the contract were revoked (Doc. #261).

Walch exercised its appeal rights as outlined in the July 17, 1979, letter in an undated letter received by BIA on August 24, 1979. Walch alleged surprise at being informed that BIA had declared the contract breached, reciting regular contacts with BIA regarding modification of the contract, stated that it fully intended to perform the contract, and disputed that any breach had occurred (Doc. #271). Following discussions on the status of the contract, on October 4, 1979, appellee wrote Walch, stating:

We have held in abeyance any further action on your appeal because of the discussions being pursued between yourself and the Makah Tribe. Should your efforts to resolve this matter with the Tribe fail, or should negotiations not proceed in a timely manner, the appeal will be re-activated by letter from this office. This will provide a new date from which to calculate the 30-day time period in which you may file your appeal.

(Doc. #284).⁵ Efforts to negotiate a resolution were unsuccessful and, by letter dated February 7, 1980, appellee advised Walch that the appeal had been reactivated (Doc. #325).

Contemporaneously with the execution of the Cape Flattery contract, on September 8, 1978, the tribe entered into a second logging contract, No. P10C14200356, with VVP covering the Bear Creek Logging Unit (Bear Creek) (Doc. #1055). VVP sought to assign its rights under this contract to Walch on September 21, 1978. Performance Bond No. U-076566 in the amount of \$90,000 was issued to Walch by UP on November 11, 1978 (Doc. #1068). The assignment was approved by BIA on December 6, 1978 (Doc. #1070).

Under the Bear Creek contract, Walch was required to log a minimum of 2 million board feet by January 31, 1979, and thereafter to cut and scale a minimum of 6 million and a maximum of 12 million board feet each contract year (February 1 through January 31) through September 30, 1981 (Doc. #1048). Despite some logging during 1978, an undisputed deficiency of 795,830 board feet existed at the end of the contract year. Again, Walch removed its men and equipment from the site in April 1979 and did not return.⁶

As was also the case on the Cape Flattery unit, BIA believed that several contract violations existed at the Bear Creek site. The BIA

⁵The Board has previously noted that BIA decisions are not always couched in legal or judicial terminology, although they are determinations in an administrative appellate proceeding. See *United States v. Aberdeen Acting Area Director and Celina Young Bear Mossette*, 9 IBIA 151, 153 n.1, 89 I.D. 49, 50-51 n.1 (1982). In this case, the Superintendent reconsidered the initial determination that the Cape Flattery contract had been breached following Walch's appeal and reinstated Walch's rights under that contract pending the outcome of negotiations with the tribe.

⁶Appellee states that by the end of 1979 Walch was in deficit on this contract by 6,498,690 board feet. Since the Bear Creek contract also required a minimum cut of 6 million board feet during 1979, Walch apparently logged 1,204,170 board feet during 1978 and 297,140 board feet during 1979. Under section B6.12, the amount logged in 1979 was applied against the 1978 deficiency, leaving a deficiency of 498,690 board feet for 1978 in addition to a deficiency of the total minimum cut of 6 million board feet for 1979 (Doc. #1211).

informed Walch of the nature of these alleged violations by letter dated May 9, 1979 (Doc. #1237). Unlike the situation with the Cape Flattery unit, BIA did not formally declare Walch to be in breach of the Bear Creek contract until February 7, 1980 (Doc. #1295).

Walch appealed the February 7, 1980, decision that it was in breach of the Bear Creek contract and that the Cape Flattery appeal was reactivated to the Deputy Assistant Secretary—Indian Affairs (Operations) on March 7, 1980 (Doc. #316, #1305). On May 9, 1980, the Acting Deputy Assistant Secretary required Walch to post appeal bonds in the amounts of \$600,000 for the Cape Flattery unit and \$150,000 for the Bear Creek unit (Doc. #336, #1323). These bonds were intended to protect the tribe's interests pending appeal. When Walch failed to post the required bonds, the appeal was dismissed on June 5, 1980 (Doc. #340, #1327). The decision that Walch was in breach of the two contracts is a final decision of the Department and has not been disputed in this case.

In his dismissal of the appeal on the issue of breach, the Acting Deputy Assistant Secretary directed BIA immediately to resell the timber covered by the two contracts. The BIA divided the timber into two groups for purposes of resale. The first group was timber already felled but not removed from the sites. The felled timber was in danger of immediate deterioration if not removed expeditiously. Under the authority of 25 CFR Part 163, BIA had initiated attempts to resell this timber on April 10, 1980, prior to the Acting Deputy Assistant Secretary's June 5 dismissal (Doc. #328, #1316). The resales of felled timber were designated Pickup One (timber on the Bear Creek unit) and Pickup Two (timber on the Cape Flattery unit).

The BIA first attempted to resell the felled timber at the rates in effect under the initial contracts. No bids were received on this advertisement by the May 6, 1980, bid date. A second attempt to resell was made using a reappraised rate consistent with the then current Industrial Forestry Association (IFA) rates for the Puget Sound area. Again, no bids were received by the bid date of April 23, 1980. On the third resale attempt, a bid was received on June 24, 1980, and was accepted by BIA on September 12, 1980 (Doc. #105, #1102).

The BIA began attempts to resell the standing timber on June 10, 1980. These resales were designated Cape Flattery 2 and Bear Creek 2. The initial advertisements of these units were made on terms similar to those of the original contracts, revised to reflect the first quarter 1980 IFA Puget Sound log values. When no bids were received by the August 25, 1980, bid date, representatives of BIA and the tribe met with prospective purchasers to determine what would constitute an acceptable advertisement. As a result of these meetings, the contract offer was substantially revised and readvertised. One satisfactory bid was received on September 18, 1980, and was accepted by BIA on October 23, 1980 (Doc. #125, #1122).

On July 7, 1980, BIA made demand upon UP, Walch's insurer, for payment in full of the \$123,000 performance bond for the Cape

March 18, 1983

Flattery unit and of the \$90,000 performance bond for the Bear Creek unit (Doc. #343, #1330). Following a request for further information and a meeting with BIA, UP initially rejected the demand until preliminary demand for payment was made upon Walch (Doc. #345, #1332). Because of this response, BIA provided further documentation of damages to Walch, UP, and Dant⁷ on September 17, 1980 (Doc. #352, #1339).

On January 30, 1981, BIA demanded payment of damages from Walch. This initial demand stated that the preliminary calculation of damages was for \$1,391,709.15 on the Cape Flattery unit and for \$681,370.57 on the Bear Creek unit (Doc. #362, #1349). These figures were discussed at a meeting between BIA and UP on April 1, 1981. Although invited, neither Walch nor Dant attended this meeting. Revised damage calculations after this meeting were \$927,842.09 on the Cape Flattery unit and \$654,366.25 on the Bear Creek unit (Doc. #377, #1364). After the meeting, UP tendered payment in full of the \$123,000 bond on the Cape Flattery unit and of \$82,015.44 of the \$90,000 bond on the Bear Creek unit (Doc. #384, #1371).

By letter dated May 22, 1981, UP requested BIA to delay cashing the tendered checks because Walch and Dant had requested an opportunity to discuss the damage issue with BIA (Doc. #385, #1372). Either during or after a May 27, 1981, meeting with all interested parties present, UP, Walch, and Dant each presented alternative methods of calculating damages. The BIA considered these alternatives and other suggested changes and, on June 18, 1981, proposed final settlement damage figures of \$888,258.20 on the Cape Flattery unit and of \$1,171,655.73 on the Bear Creek unit (Doc. #394, #1381).

A final settlement meeting was held on July 31, 1981. When BIA received no settlement offers that it considered realistic, settlement efforts were discontinued (Doc. #417, #1404).

In August 1981, UP filed a complaint for interpleader and declaratory relief with the United States District Court for the District of Oregon and tendered payment of the two performance bonds, in the amount of \$213,000 to the registry of the court. *United Pacific Ins. Co. v. United States, et al.*, Civ. No. CV 81-746 (D. Or., filed Aug. 14, 1981) (Doc. #2500). On November 13, 1981, the court ordered that, upon deposit of the funds, UP would be exonerated and released from all of its obligations and liabilities as surety (Doc. #2501). On April 1, 1982, the court stayed its proceeding pending a final Departmental decision on the issue of damages (Doc. #2507).

Following the decision to discontinue settlement attempts, BIA began a systematic review of all preliminary damage calculations. This review included an update of costs and expenses incurred by the tribe and BIA from October 1980, when the initial calculation was made, to

⁷The extent of Dant's liability for damages is one of the issues raised in this appeal. The nature of Dant's involvement with these contracts is discussed in the Discussion and Conclusions portion of this decision, *infra*.

October 1981 when final demand was made. The final determination of damages was set forth in the October 30, 1981, letter to Walch and Dant from which the present appeals were taken. That letter showed damages of \$1,532,322.43 on the Cape Flattery unit and of \$2,158,241.37 on the Bear Creek unit. This letter for the first time informed Dant that BIA considered it fully liable as a principal for the entire amount of damages (Doc. #435, #439, #1421, #1425).

Appeals were filed by Walch and Dant from this decision to the Deputy Assistant Secretary on November 27, 1981 (Doc. #457, #459, #1433, #1435). All parties filed briefs on appeal. On July 2, 1982, the case was transferred to the Board of Indian Appeals pursuant to 25 CFR 2.19(a)(2). In the transmittal memorandum, the Acting Deputy Assistant Secretary indicated that an evidentiary hearing might be required in this case. Therefore, in its July 12, 1982, notice of docketing, the Board requested the parties to inform it whether they believed an evidentiary hearing should be conducted. Based on the negative responses of all parties, the Board determined not to order a hearing at that time and, on August 13, 1982, established a simultaneous briefing schedule for the submission of any additional arguments. Both Walch and Dant filed additional briefs in response to this order.

By letter dated September 30, 1982, the Makah Tribe requested oral argument. On October 5, 1982, the Board issued an order giving other interested parties until October 13, 1982, to respond to the motion. Appellee concurred in the tribe's request and Dant opposed oral argument. Based on these responses the Board initially determined to grant oral argument and requested counsel for appellee to determine an acceptable date.

On October 21, 1982, the Board received a letter dated October 18, 1982, from Walch, also opposing oral argument. In view of the then substantial opposition to oral argument, the Board reconsidered its decision to grant oral argument and undertook a more extensive review of the administrative record. Based on this review, the Board determined that it would attempt to reach a decision without oral argument. By order dated October 28, 1982, the Board denied oral argument, while reserving its options to order an evidentiary hearing, further briefing, or oral argument at a later time should it become apparent that such supplementary procedures were necessary.

Issues on Appeal

The briefs of the parties indicate that the following questions are at issue:

1. Did BIA and the tribe properly mitigate damages?
2. Did BIA correctly compute the depreciation in the value of the timber covered by the breached contracts?
3. Are the costs of mistletoe control, planting, stream cleanout, and road bank stabilization adequately substantiated?

March 18, 1983

4. Are administrative costs for BIA and the tribe in relation to the determination of breach, calculation of damages, and resale of the timber recoverable, and, if so, are they properly substantiated and reasonable?
5. May the tribe recover as damages lost interest and the cost of borrowed funds through December 31, 1983?
6. Is Dant liable as a principal for the full amount of damages?

Discussion and Conclusions

1. Mitigation of Damages.

The construction of Federal contracts, including contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity, is a question of Federal law. Federal contract law is governed by principles of general contract law. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *United States v. Humboldt Fir, Inc.*, 426 F. Supp. 292 (N.D. Calif. 1977), *aff'd mem.*, 625 F.2d 330 (9th Cir. 1980). In the absence of Federal cases on point, state law may be used as an indication of the general common law. *Humboldt Fir, Inc., supra*.

The common law of contracts places a duty on the nonbreaching party to mitigate damages incurred as a result of a breach of contract. This common law principle is incorporated into the statutory and decisional law of the State of Washington. Wash. Rev. Code § 62 A.2-706 (1974); *Kubista v. Romaine*, 87 Wash. 2d 62, 549 P.2d 491, 495 (1976).⁸

The BIA attempted to mitigate damages in this case by reselling the timber covered by the contracts. The first advertisements were made on terms closely approximating those of the original contracts. Because these advertisements were not acceptable to prospective purchasers, no bids were received. Consequently, BIA was forced to readvertise, twice for felled timber and once for standing timber. Readvertisement resulted in a delay between the times when the contracts were breached and when new contracts were approved.

[1] Although it is now apparent that the timber market was rapidly deteriorating during this period, the Board declines to fault BIA for first attempting to resell the contracts on terms closely approximating the original terms. If such resales had been possible, they would ordinarily have been the best means for mitigating damages.⁹ The Board finds no violation of the duty to mitigate damages in the advertisement and acceptance of the resale contracts.

2. Computation of Depreciation in the Value of Timber.

⁸The Bear Creek and Cape Flattery contracts pertain to timber located on the Makah Indian Reservation in the State of Washington. Other circumstances also reveal that the State of Washington has the most significant relationship to these contracts. See Answer Brief at 27; Tribe's Answer Brief at 22.

⁹Furthermore, the Board finds that the period between the determination of breach as to both contracts (Feb. 7, 1980) and the first advertisements for felled timber (Apr. 10, 1980) and for standing timber (June 10, 1980) was not unreasonable. See Opening Brief at 52-54.

On October 7, 1980, appellee instructed the BIA Portland Area Branch of Forestry to proceed with the calculation of damages incurred as a result of the breach of the two contracts. The memorandum requiring the calculation of damages stated:

In order for us to make the claim for damages, we need a detailed assessment of damages incurred, in monetary terms, on both contracts. * * * [C]alculate the dollar value differences that would have been received between the original Cape Flattery and Bear Creek Logging Units and the resold Pickup One and Two Logging Units, regarding the felled timber, and the Cape Flattery 2 and Bear Creek 2 Logging Units, for standing timber. As a guide to determine monetary damages, make calculations based on the continued operations of the Cape Flattery and Bear Creek Logging Unit Contracts under the original contract terms. Estimates of damages for changed time periods of operation between the old and new contracts should be documented and listed carefully.

(Doc. #194). Following these instructions, damages were calculated and the approving officer issued the October 20, 1981, letter from which these appeals have been taken.

The first question that must be addressed in determining whether the approving officer's calculation of damages should be upheld is the standard of review. Appellee argues that his method must be upheld unless it is shown to have been based on "bad faith, or * * * mistake so gross as to imply bad faith or the failure to exercise an honest judgment." *Polley's Lumber Co. v. United States*, 115 F.2d 751, 754 (9th Cir. 1940); see also *United States v. Harris*, 100 F.2d 268 (9th Cir. 1938); Answer Brief at 27-28. In the cases on which appellee relies, the Ninth Circuit Court of Appeals held that the approving officer's selection of the method for calculating damages and determination of the amount of damages were conclusive under the terms of the contracts and regulations at issue. Furthermore, the court declined to disturb those determinations on appeal even though it might have chosen a different methodology or reached a different damage figure if it had the responsibility to determine damages. *Polley's, supra* at 754.

Despite appellee's arguments, administrative review of the approving officer's determination, as distinct from judicial review, is governed by specific provisions of the contracts and by administrative review considerations, not by restraints placed upon review of a final decision of the Department by the Federal courts. Standard Provision B2.2 of the contracts states that "[t]he decision of the Approving Officer shall prevail in the interpretation of the contract, subject to the right of appeal prescribed in Section B2.11." Section B2.11 provides that "any action or decision taken by the Approving Officer or his superior officers" may be appealed in accordance with regulations set forth in 25 CFR Part 2. The regulations in 25 CFR Part 2 in turn reference the Board's procedural regulations in 43 CFR Part 4, Subpart D.

[2] The Board has held that BIA's actions as supervisor of Indian leases will be upheld when they are reasonable and based upon substantial evidence in the record. See *Robert B. Wooding v. Portland Area Director*, 9 IBIA 158 (1982); *Fort Berthold Land & Livestock Association v. Aberdeen Area Director*, 8 IBIA 230, 88 I.D. 315 (1981). Where the Board finds that the BIA has calculated damages

March 18, 1983

improperly or in violation of contractual or regulatory requirements, the agency's action will be set aside. *Jackson v. Anadarko Area Director*, 4 IBIA 39, 82 I.D. 191 (1975). Cf. *Isaac and Katherine Bonaparte v. Commissioner of Indian Affairs*, 9 IBIA 115 (1981) (regarding improper cancellation of an Indian lease). The Board will apply the same standard of review in this case.¹⁰

The second and major issue is whether the approving officer properly determined the amount of damages. Under the methodology used, which appellee describes as "[i]n keeping with the general standard prevailing in this [the 9th] circuit," the approving officer calculated "the difference between the original contract price (labeled as 'anticipated proceeds') minus the resale price of timber remaining after breach (felled and standing) * * * [minus also] the money in advance deposit accounts and the value of timber logged * * * prior to breach" (Answer Brief at 30). This methodology necessitates the determination of (1) the original contract price, (2) the resale price of felled and standing timber, and (3) value received by the tribe under the original contracts before breach.

The first step in BIA's calculation of depreciation in value is the determination of the original contract prices established under the two contracts. This determination is complicated by the fact that both of the contracts were tied to the fluctuating IFA stumpage rate (Doc. #53-#55, #1050-#1052). Thus the price of timber cut during each quarter was not determined until the new stumpage rates were known. Consequently, BIA was faced with the problem of determining future values in a constantly changing market. The BIA was also required to make assumptions about when the minimum required cut of 6 million board feet per contract during each contract year after 1978 would be logged. Finally, the fact that each contract permitted the removal of up to 12 million board feet per contract year had to be ignored in the calculations because the question whether more than the required minimum cut would be logged was speculative. Any calculation made under these circumstances was at best an attempt to approximate the value of the contracts.

The first question concerning the methodology BIA employed in calculating the original contract price is whether Standard Provision B6.12 may be invoked for the period prior to breach. Section B6.12, which concerns damages resulting from failure to meet the minimum cutting requirements imposed by the contracts, states:

If the Purchaser fails to meet the minimum cutting requirements * * * [t]he volume of timber scaled during the following contract year shall not be applied to the minimum requirements for that year until the existing deficiency has been made up. All timber scaled to correct a cutting deficiency shall be paid for at the stumpage rates in effect at the end of the contract year in which the deficiency occurred or at the rates in effect at

¹⁰The use of appellee's "bad faith" standard would effectively eliminate the Secretary's authority to review the decisions of his subordinates, as well as directly contravening the provisions of the contracts at issue.

the time of scaling, whichever are higher * * *. Normal stumpage rate procedures shall be applied at the start of the first monthly period subsequent to the monthly reporting period in which the deficiency is satisfied. [11]

Walch argues that section B6.12 may not be used in calculating damages because once the contracts were breached, section B2.6 requires that all damages must be calculated in accordance with section B2.7, which states:

In the event of failure to complete all obligations assumed under the contract, the Purchaser shall be liable for the depreciation in the value for the remaining timber and for any costs or expenses incurred by or caused to the Seller or the Government as a result of such failure, in an amount to be determined by the Approving Officer.

Because section B2.7 does not reference section B6.12, Walch contends that section B6.12 cannot be applied in the present damage calculation.

Although sections B6.12 and B2.7 are apparently both standard provisions incorporated into many BIA timber sales contracts, no prior Departmental interpretations of either provision or of their interaction have been cited.¹² Consequently, the Board must determine these issues as matters of first impression.

[3] Section B6.12 refers to a situation in which a cutting deficiency is later cured. The section fixes the stumpage rate to be applied when timber is actually scaled to correct a cutting deficiency, and defines the stumpage rates that will apply to subsequent cutting. Section B6.12 appears to anticipate that in a lengthy contract, such as those at issue, performance may be interrupted and minimum cutting requirements may not be satisfied by the purchaser without constituting breach as long as any deficiencies are eventually remedied.

Walch never cured its cutting deficiencies. Instead, BIA declared the contracts to be in breach. By its terms, section B6.12 cannot apply in this situation. Once the contracts were breached, all damages were subsumed under section B2.7. The BIA should, therefore, have calculated damages in accordance with section B2.7.

The primary question under section B2.7 is how to allocate the minimum cutting requirements imposed by the contracts over each contract year. In its calculations, BIA averaged the minimum cutting requirements over the four quarters of each contract year. On the Cape Flattery contract, BIA averaged the annual minimum cutting requirement of 6 million board feet per contract year in allocating

¹¹ The sections of this provision relating to liquidated damages, which apply only if specifically provided for in the contract, are omitted as irrelevant to the present discussion.

¹² Walch alleges that it attempted to get copies of several BIA documents, including the Bureau of Indian Affairs Manual (BIA manual), containing interpretations of the contract language. The BIA allegedly declined to produce any documents, stating in regard to the BIA manual that damage computations were based on the individual contracts and that the manual was not pertinent or related to such damage computations (Opening Brief at 5).

Walch argues that because BIA has not made its interpretations of these contract clauses known as required by 5 U.S.C. § 552 (1976), the interpretation advanced in this case cannot be used against Walch. See *Morton v. Ruiz*, 415 U.S. 199 (1974). The Board has previously held that BIA policy interpretations of general applicability will not be upheld when they contravene the provisions of 5 U.S.C. § 552. See *Matthew Allen v. Navajo Area Director*, 10 IBIA 146, 162-65, 89 I.D. 508, 516-18 (1982); *Shoshone and Arapaho Tribes v. Commissioner of Indian Affairs*, 9 IBIA 263, 267-69, 89 I.D. 200, 202-03 (1982). In this case, however, the "interpretation" advanced is merely a construction of contract language made in the context of an adversary proceeding. The Board does not believe that a legal argument of this nature constitutes the type of general policy interpretation contemplated by section 552.

March 18, 1983

1,500,000 board feet to each quarter of contract years 1980, 1981, and 1982. The 1,500,000 board foot figure was multiplied by the IFA stumpage rates for each quarter during contract year 1980. For contract years 1981 and 1982, the stumpage rate was frozen at the rate in effect on October 23, 1980, the date the standing timber was resold (Doc. #219).

In contrast to the straight averaging undertaken for the Cape Flattery contract, for the remainder of the timber covered by the Bear Creek contract, BIA attributed 1,500,000 board feet to the first, second, and third quarters of contract year 1980; 1,600,000 board feet to the fourth quarter of contract year 1980 and to the first and second quarters of contract year 1981; and, finally, 1,405,000 board feet to the third quarter of contract year 1981, concluding the calculation at that point. The concluding point of this calculation seems intended to coincide with the final date for performance prescribed in the Bear Creek contract (September 30, 1981). The IFA stumpage rates were again allowed to fluctuate until the fourth quarter of contract year 1980, at which time they were frozen following the resale of standing timber on October 23, 1980 (Doc. #1211).

Walch argues that averaging is improper and that the amount of timber which would be cut in each quarter must be determined after analysis of the IFA stumpage rates for the entire year. Thus, for example, Walch contends that all 6 million board feet required to be cut during contract year 1981 must be allocated to the third and fourth quarters of 1981 based upon the fluctuation of the stumpage rates (Opening Brief at 8-10). Walch considers these cutting schedules more "intelligent" and "informed" than the one used by BIA, and states that these schedules would be followed by a prudent purchaser (Opening Brief at 9).¹³

[4] The Board finds that BIA's apportionment of the minimum cutting requirement over the contract year is reasonable and, therefore, upholds that determination.¹⁴ It is possible with the benefit of hindsight to devise many formulations that would result in shifting the cutting requirement throughout the year to maximize the advantage either to Walch or to the tribe. The BIA chose a logical alternative that would share either a market loss or gain between Walch and the tribe.

Once it has chosen the method by which to determine the original contract prices, BIA should, as a matter of reasonableness, apply that method consistently in both contracts or offer an explanation for the deviation. It is clear that BIA averaged the minimum annual cut required under the Cape Flattery contract over the four quarters of each contract year. It is not clear how BIA reached either the total

¹³ Walch makes no factual allegation that it had the capacity to fulfill this schedule.

¹⁴ The Board does not hold that this is the only method that could be used to determine the original contract price. It merely holds that this method is not unreasonable and is based upon substantial evidence in the record.

figures or the allocation among contract quarters used under the Bear Creek contract. The BIA attributed 6,100,000 board feet to contract year 1980 of the Bear Creek contract, and 4,605,000 board feet to contract year 1981. The breakdown of figures allocated to each quarter during these contract years was not reached through averaging.¹⁵ Because appellee failed consistently to average the Bear Creek minimum cutting requirement after the date of the resale contract, contrary to the approach taken in the Cape Flattery calculations, and failed to offer any reasonable explanation for such deviation, these figures must be adjusted and the original price under the Bear Creek contract recalculated.

Furthermore, because the Board has disapproved BIA's use of section B6.12 for determining damages resulting from Walch's failure to meet the minimum cutting requirements of both contracts for contract year 1979, these deficiencies should similarly be calculated in accordance with the method chosen to determine damages under section B2.7. In calculating damages prior to the determination of breach on the Cape Flattery contract, BIA found that, after subtracting the logging which took place during the first quarter of contract year 1979, a deficiency of 3,813,360 board feet existed for that year. The BIA averaged this deficiency over the remaining three quarters of the 1979 contract year. The resulting average of 1,271,120 board feet per quarter was multiplied by the fluctuating IFA stumpage rates during each of those three quarters (Doc. #219). This procedure is consistent with the Board's holding that the minimum cutting requirement may be averaged in determining the original contract price under section B2.7, and is therefore affirmed.¹⁶

In determining the original contract price for contract year 1979 on the Bear Creek unit, BIA attributed the entire deficiency for that year to the first quarter of contract year 1980.¹⁷ After subtracting the logging which took place during the first quarter of contract year 1979, a deficiency of 6,498,690 board feet existed at the end of the year on the Bear Creek contract (Doc. #1211). In accordance with the Board's holdings, this deficiency should be averaged over the remaining three quarters of contract year 1979 and the average multiplied by the IFA stumpage rates in effect during each of those quarters.

The final issue under the calculation of the original contract price is whether BIA properly used the IFA stumpage rate in effect when the standing timber was resold in determining damages for those quarters following resale. Upon the determination of breach, BIA was faced with a difficult projection of the timber market. The decision to freeze

¹⁵The BIA states that it averaged the timber remaining under the Bear Creek contract until the date of the mitigation resale, Oct. 23, 1980 (Answer Brief at 58).

¹⁶The BIA, however, used this method to determine damages for the Cape Flattery contract under section B6.12. Averaging is improper under that section, which, in requiring the use of the higher of the stumpage rates in effect when actual scaling takes place or at the end of the contract year in which the deficiency occurred, establishes when a cutting deficiency will be allocated and valued.

¹⁷This procedure would be an improper application of the language of section B6.12 if that section could properly have been used in this determination. The stumpage rate in effect during the last quarter of contract year 1979, rather than during the first quarter of contract year 1980, should have been used.

March 18, 1983

the stumpage rates was reasonable at the time and could have served as the basis for a settlement. The Board declines to fault BIA's attempt to reach a fair calculation of damages and to avoid speculating about the timber market under the circumstances of these cases.

Walch argues, however, that the proper procedure for computing the depreciation in value for a contract which was breached before the date for performance is set forth in an October 23, 1983, memorandum of the Solicitor of the Interior entitled "Memorandum to Mr. Collier Re: Defiance Plateau Unit Timber Sale Contract" (Op. Sol., Vol. I at 376). In this memorandum, the Solicitor stated that the majority rule in Federal courts in regard to this situation is that "the breach should be treated as an anticipatory breach * * *. The proper ruling, in view of the general purpose of damages, placing the damaged party in the same position he would have enjoyed in event of performance, would be that the market value should be determined as of the date or dates set for performance. *Roehm v. Horst*, [178 U.S. 1 (1900)]." *Id.* at 380. The Solicitor further stated that if this majority rule were adopted, in order "to establish the market value at the various future times set for performance, evidence of market values existing between the date of breach and the date of trial would be admissible." *Id.* at 380-81.

[5] The BIA's calculation was reasonable at the time it was made and under the circumstances described. It was, therefore, a proper basis for settlement. The Board, however, agrees with the reasoning in the cited Solicitor's opinion and holds that, when a settlement is not reached and the case goes to trial, or in administrative review terms, is appealed to a higher Departmental official, damages for breach of a contract before the date set for performance should be determined under the rules relating to anticipatory breach.

In this case, the final cuts under the Bear Creek contract were to be completed by September 30, 1981, and under the Cape Flattery contract by January 31, 1983, both of which are prior to the date of trial (Departmental adjudication). Therefore, the original contract prices should be recalculated using the actual IFA stumpage rates in effect for those quarters between October 23, 1980 (the date of the resale contracts for standing timber used by BIA as the date to freeze the fluctuating IFA stumpage rate), and the dates set for final performance under the contracts.

In summary, the Board holds that Standard Provision B6.12 applies only when a contract has not been breached; that the minimum cutting requirement for each contract year after breach may be averaged over the contract year; that under the averaging method chosen by BIA, cutting deficiencies for contract year 1979 should also be averaged over the contract year and valued at the IFA stumpage rate for each quarter; and that the IFA stumpage rates should be allowed to fluctuate through the date set for performance or the date of decision, whichever comes first.

The second step in BIA's methodology for determining depreciation in value involves calculating the amounts realized or to be realized by the Makah Tribe under the provisions of the four resale contracts, two for felled timber and two for standing timber. These calculations are simplified by the facts that the felled timber contracts have been completed and the standing timber contracts involved fixed stumpage rates.

With respect to the Cape Flattery unit, the tribe received \$320,383.68 from the Pickup Two contract (felled timber). The tribe will also realize \$3,586,473.22 as a result of the resale of standing timber (Cape Flattery 2) (Doc. #219). Thus, the tribe will recover \$3,906,856.90 as a result of the resale of this logging unit (*see also* Decision letter of Oct. 30, 1981).

The Pickup One resale contract for felled timber on the Bear Creek unit resulted in income of \$49,290.12 for the tribe. The resale of standing timber (Bear Creek 2) will result in income of \$3,994,278.75 (Doc. #1211). The resale of the Bear Creek logging unit will give the tribe \$4,043,568.87 (*see also* Decision letter of Oct. 30, 1981).

The third and final step is the determination of the value of timber logged before breach and the amount of money in advance deposit accounts. There is apparently no dispute that these amounts were \$745,705.08 and \$37,675.42 for the Cape Flattery unit and \$264,752.36 and \$67,914.08 for the Bear Creek unit.

Therefore, after redetermining the original contract prices under the two contracts in accordance with this decision, BIA must subtract \$4,690,237.40 (\$3,906,856.90 plus \$745,705.08 plus \$37,675.42) to determine depreciation in value of timber on the Cape Flattery unit and \$4,376,235.31 (\$4,043,568.87 plus \$264,752.36 plus \$67,914.08) to determine depreciation in value of the timber on the Bear Creek unit.

3. Mistletoe Control, Planting, Stream Cleanout, and Road Bank Stabilization Costs.

The BIA determined that Walch was liable for \$40,376.50 in regard to the Cape Flattery contract and \$11,441 on the Bear Creek contract for mistletoe control, planting, stream protection, and road bank stabilization costs. Walch does not dispute that it was required to perform these operations under the contracts or that such expenses were generally included within Standard Provision B2.7. Instead, it alleges that these costs are not properly substantiated and that they were offset by increased revenues due to the resale of the two logging units.

[6] The BIA's calculation of these damages is set forth in a memorandum from the Acting Superintendent of the Olympic Peninsula Agency (Doc. #187). A legal presumption of regularity supports the official acts of public officers acting in their official capacities. *Oglala Sioux Tribe v. Commissioner of Indian Affairs*, 7 IBIA 188, 200, 86 I.D. 425, 431 (1979); *see also Alan T. Trees*, 66 IBLA 334 (1982). As applied to the Acting Superintendent's statement of the calculation of these damages, this presumption is

March 18, 1983

sufficient to constitute prima facie evidence that the costs incurred by BIA were as stated.

In appeals brought to the Board under 25 CFR Part 2, the burden of proof is on an appellant to show that agency action complained of was erroneous or not supported by substantial evidence. *Cheyenne-Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary—Indian Affairs (Operations)*, 11 IBIA 54, 90 I.D. 61 (1983); *Hazel Hawk Visser v. Portland Area Director*, 7 IBIA 22 (1978). Walch has presented no evidence to support a conclusion that BIA did not incur the enumerated expenses in the amounts claimed. The mere statement that the costs are not properly substantiated is insufficient to overcome the prima facie showing that such costs were incurred.

Walch does not further develop its allegation that these costs were offset by increased revenues generated by the resale contracts. Even assuming this statement to be entirely true, the fact that the tribe could or did receive greater revenues under another contract does not excuse Walch from obligations accepted under its contract.

Therefore, the Board affirms BIA's determination of damages relating to mistletoe control, planting, stream protection, and road bank stabilization costs.

4. Administrative Costs Relating to Determination of Breach, Calculation of Damages, and Resale.

The BIA determined that certain administrative costs incurred by the Department and by the Makah Tribe were recoverable under Standard Provision B2.7. These costs amounted to \$11,772.56 for the Cape Flattery contract and \$8,524.95 for the Bear Creek contract (\$20,297.51 total) (Answer Brief at 44; Doc. #218, #1210).

Walch argues that these expenses are generally unsubstantiated, unreasonable where substantiated, and in most cases constitute nonrecoverable "overhead expenses" (Opening Brief at 13-19). The BIA answers that these expenses are both substantiated and reasonable and their recovery was anticipated under Standard Provision B2.7 which provides for recovery of "any costs or expenses incurred by or caused to the Seller or the Government as a result of * * * failure [to complete the obligations assumed under the contract]" (Answer Brief at 44-46 (italics added)).

The types of administrative expenses incurred by BIA and the tribe because of the breach fall into two general categories: (1) amounts paid to outside people or organizations to facilitate resale, and (2) expenses related to BIA personnel and equipment costs for time spent working on this matter. Each of these categories can further be broken down into periods before and after February 7, 1980, the date these contracts were finally declared to be breached.

[7] Any expenses incurred prior to February 7, 1980, are not recoverable because they did not result from the breach of the contracts. At most, such expenses were incurred in the expectation

that the contracts would be breached. Therefore, the Board will disallow all expenses shown to have been incurred prior to breach.

[8] The BIA and the tribe are entitled to recover all reasonable amounts paid after February 7, 1980, to outside entities, including but not limited to accountants and newspapers, incurred because of the necessity to readvertise the two logging units. As previously stated, the recitation of these costs by a public official acting in his official capacity is sufficient to invoke the presumption of regularity and to establish a prima facie case that they were incurred in the amounts and for the purposes stated.

The Board has examined the statements of expenses paid to outside persons and disagrees with Walch's general allegation that the costs are unreasonable. Therefore, BIA and the tribe are entitled to recover the amounts paid to outside entities after February 7, 1980, as claimed.

The largest item of administrative expenses claimed by BIA is related to internal salary and equipment costs. These costs, usually termed overhead expenses, are, as Walch alleges, frequently not allowed as items of damage when the office would continue in operation and overhead expenses would be incurred without regard to the breach of any particular contract. See *Boyajian v. United States*, 423 F.2d 1231 (Ct. Cl. 1970).

[9] Under such an analysis, if BIA had been required to hire additional employees solely to deal with the breach of these contracts, such expenses would probably be recoverable, as long as the additional hiring did not violate BIA's duty to mitigate its damages. Instead, BIA used its own employees to do this additional work, causing them to spend time on these matters that could have been spent on other Governmental business. Walch cites no cases denying recovery of overhead expenses incurred by the Federal Government under these circumstances.

It is the Board's conclusion that BIA's itemization of internal administrative costs incurred as a result of the breach of these contracts is not unreasonable and that appellants should have reasonably foreseen that their breach would produce added costs to the Government for such matters as administering resales of the remaining timber. The approving officer appears to have been conservative in his calculation of administrative costs by excluding, among other things, compensation for attorneys.

Therefore, after examination of the expenses claimed, the Board finds they are reasonable and recoverable. The BIA is entitled to recover the amounts paid for internal administrative costs.

5. Lost Interest and Interest Paid on Borrowed Funds.

By far the largest item of damages claimed is interest lost to the Makah Tribe through December 31, 1983,¹⁸ and interest paid on loans through September 30, 1980. These claimed damages amount to \$1,055,477 for the Cape Flattery unit and \$1,552,065 for the Bear Creek

¹⁸Dec. 31, 1983, is the closing date for the Cape Flattery and Bear Creek 2 mitigation resale contracts.

March 18, 1983

unit. These figures appear to represent interest lost on money allegedly taken out of investments and interest paid on commercial loans allegedly necessitated when the tribe did not receive the income it expected under these contracts.

The primary question involving these claimed damages is whether they are recoverable. The tribe and BIA argue that they are recoverable under Standard Provision B2.7, which states that "*any costs or expenses*" incurred because of the breach are recoverable. (*Italics added.*) As BIA and the tribe interpret this provision, Walch agreed in advance that all consequences emanating from a breach of these contracts that were susceptible to economic evaluation would be part of the measure of damages without regard to any existing contract law principles, such as foreseeability and mitigation. Furthermore, Walch allegedly agreed that the approving officer's determination of the amount of those damages would be conclusive unless that determination was made in bad faith.

[10] In the absence of a clear showing that Walch understood and accepted this interpretation of the provision, the Board declines to adopt BIA's and the tribe's arguments concerning the interpretation of the language in Standard Provision B2.7. Such an interpretation is too inconsistent with recognized general contract law to be adopted without positive evidence that all parties knew of and agreed to this construction. The language "*any costs or expenses*" will, therefore, be construed in accordance with general rules governing the determination of damages for breach of contract.

General contract law has accepted the principle of foreseeability since the historic case of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1845). This rule, as commonly followed, requires that the claimed damages must have arisen naturally from the breach itself without any intervening causes and must have been contemplated by the parties as a probable result of breach at the time of contracting. *See, e.g., J. D. Calamari and J. M. Perillo, Contracts* § 206 at 330 (1970). The purpose of this rule is to prevent a breaching party from being held responsible for occurrences that were not directly related to the breach and to prevent the nonbreaching party from being unduly enriched. The principle recognizes that contract law attempts to do equity between the contracting parties, rather than to punish the breaching party.

The tribe and BIA allege that Walch knew at the time of contracting that the tribe would be relying on steady income from the logging of these two units. This allegation is based upon a statement made by Walch in a letter to the tribe during the period in which Walch was seeking assignment of VVP's original contract:

I feel that I can prove to you a more equitable way to guarantee a constant income for the "Makah Reservation Members." Because the revenue derived from your timber sales

are a primary source of income for all tribal members I feel my ideas are timely and of interest to all.

(Doc. # 225, # 1218). Neither the tribe nor BIA claims that the specific use to which the tribe intended to put this income was communicated to Walch, or that the consequences of failure to generate steady income were explained. Nothing in the contract package shows the intended use of the funds. According to post-breach representations made by BIA, the tribe intended these funds to finance the employment of approximately 150 tribal members.¹⁹

Walch states that it had no knowledge of the intended use of this income. Indeed, the letter upon which BIA and the tribe rely for the proposition that Walch knew of the tribe's need for steady income states Walch's concern with a source of income for the tribal members, not for financing tribal operations.

The tribe cites numerous cases in support of its position that interest is an allowable element of damages. The Board does not disagree that, under appropriate circumstances, interest may be a proper item of damage. However, as the Board interprets the cases cited in the briefs before it and in the tribe's justification of this item to appellees (Doc. # 405, # 1392), interest will be awarded when borrowing or liquidation of assets is required to finance the operations covered by the contract because of such factors as increased costs, delays in completion, or the necessity to secure other persons to complete the project. The Board knows of no case in which interest was allowed as an item of damage when the interest expense or loss was incurred in order to finance the continuation of operations totally unrelated to the contract and not specifically made known before the parties entered into the contract.

The Board finds that the administrative record does not show that Walch knew of the intended use of the revenues generated under these contracts and that Walch had no reason to foresee that the tribe would or might incur the claimed interest expenses as a result of the breach of these contracts. Furthermore, the tribe's decision to liquidate assets and to borrow money constituted an independent business judgment and was not a natural and inevitable result of the breach of contract. Therefore, the need to secure alternate funding for the financing of tribal operations was not a foreseeable consequence of Walch's breach of these contracts and recovery of the claimed interest damages is denied.²⁰

¹⁹ Doc. # 355, # 1342. Letter from Assistant Area Director (Economic Development) to Walch Logging, Inc., Sept. 17, 1980, at 1: "Unfortunately, due to your breach of contract the Makah Tribe has been placed in severe financial hardship and to enable continued employment of approximately 150 tribal members it is necessary that these contracts be sold at this time."

²⁰ The Board's conviction in the correctness of this conclusion is strengthened by two additional factors. First, under Standard Provision B6.12 liquidated damages are allowed for failure to make timely payments under the contracts. The liquidated damages provisions are, by their own terms, inapplicable unless specifically provided for in the negotiated sections of the contracts. Neither contract incorporated liquidated damages. Under these circumstances, it was reasonable for Walch to believe that no great harm would result from failure to provide a steady flow of revenue under the contracts. This conclusion is entirely consistent with the nature of the contracts which permitted logging to occur at those times most economically favorable, rather than steadily over the course of the contract year or term of

March 18, 1983

6. Liability of Dant & Russell.

The last major question in this case concerns the extent of the liability, if any, of Dant & Russell for damages incurred because of the breach of these contracts. The tribe and BIA contend that Dant should be held liable as a principal for the full amount of the damages. This contention is based upon a factual determination that Dant, rather than Walch, was in charge of the operations under the contracts, including the original assignment of the contracts from VVP to Walch, actual logging operations conducted on the sites, negotiations on contract modification, and the decision to breach the contracts.

Much of the argument for the tribe's and BIA's determination is based on a September 1, 1978, document between Walch, Dant, and VVP entitled "Log Sale Agreement" (Doc. #2178). This document was not discovered by either the tribe or BIA until May 10, 1982, following a Washington State civil case against Walch and Dant. Accordingly, the document was not before the approving officer at the time of the October 30, 1981, decision which is under consideration.

Dant maintains that it was at most an indemnitor on Walch's performance bonds. It argues that there is no evidence that it was more involved in the operations under these contracts and that the log sale agreement cannot be considered because it was not before the approving officer at the time of the decision.

[11] The true nature of the relationship between apparently separate business entities is a question of fact. *See, e.g., Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460 (1982)*. The Board has, accordingly, carefully examined the documents cited by BIA and the tribe in support of their contention that a relationship different from the apparent one existed between the two businesses (Doc. #2000-#2207; #3001-#3004, being exhibits to the Answer Brief of the Makah Tribe).

Based upon these documents, the Board finds that BIA and the tribe both had reason to believe that Walch was not in control of the operations on the Cape Flattery and Bear Creek logging sites prior to the February 7, 1980, breach of the contracts. From these documents it appears both Walch and Dant considered that Dant was responsible for handling all financial and administrative aspects of the contracts, including the payment of advances; Walch deferred to Dant in all decisions affecting day-to-day operations under the contracts; BIA foresters were told on numerous occasions by both Walch and Dant that they should deal directly with Dant rather than with Walch; in response to a BIA statement that it would continue to deal with Walch because it held the contract assignments, Walch wrote BIA making

the contract. Although the tribe was entitled to believe that income would be generated under the contracts, the contracts did not require a steady flow of income.

Furthermore, there is no indication in the administrative record that the tribe made any attempt to mitigate the claimed damages by laying off or furloughing employees, deferring payrolls, or taking any other measure that might reasonably be expected of an organization faced with loss of income. The general contract law principle that the non-breaching party is required to mitigate damages has already been discussed, *supra*.

Dant its representative in all matters relating to the contracts; Dant employees were present at and dominated meetings with BIA and tribal representatives, including one meeting at which the Dant employees indicated that Dant would be making the decision whether or not the contracts would be breached.

Dant's involvement in the day-to-day operations in the field and in the financial and administrative aspects of the contracts belies its alleged "mere indemnitor"²¹ status and clearly and unmistakably shows that it, rather than Walch, was in control of the operations. The log sale agreement that was discovered after the declaration of breach simply clarifies and explains the actual nature of the relationship between Dant and Walch; it does not provide the only basis for the decision on the extent of Dant's involvement with and consequent liability under these contracts.

The Board finds that sufficient evidence exists to support the conclusion that Dant was the actual motivating force behind the Cape Flattery and Bear Creek contracts and should, therefore, be held equally liable with Walch for all damages resulting from the breach of those contracts. Therefore, the Board affirms BIA's finding that Dant should be held liable as a principal for the full amount of damages sustained as a result of the breach of the Cape Flattery and Bear Creek contracts.²²

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, modified in part, and reversed in part as indicated in this decision. The case is remanded to the Bureau of Indian Affairs for the recalculation of damages as required by this decision.²³

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

JERRY MUSKRAT
Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

²¹ *Black's Law Dictionary* (Rev. 4th Ed. 1968) at page 910 defines "indemnitor" as "[t]he person who is bound, by an indemnity contract, to indemnify or protect the other." "Indemnity" is defined as

"A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person."

²² The Board rejects Dant's contention that it is without authority to determine that Dant is liable as a principal on the timber contracts. While it is true that disputes involving agency questions commonly adjudicated by the Department have involved assertions by private parties, not the Government, that another party was lawfully acting on their behalf to perform deeds required by regulation or contract (see, e.g., *Frederick C. Farrington, George M. Hoffman*, 36 IBLA 70 (1978); *Charlotte E. Brown*, 70 I.D. 491 (1963); *Lauren W. Gibbs*, 67 I.D. 350 (1960); *Earl C. Hartley*, 65 I.D. 12 (1958); *William G. Taylor*, 60 I.D. 227 (1948), this does not mean that the Government may not raise the issue of agency in determining liability under Federally approved contracts. With respect to private sector dealings with Indian trust property, it would also seem incumbent upon the Secretary and his authorized representatives, in the exercise of their fiduciary responsibility, to know fully with whom trust property is being bargained and on what terms.

²³ Although Walch includes tables in its reply brief at 22, 24 that allege to show the IFA stumpage rates in effect for the periods after Oct. 23, 1980, these figures have not been shown to be accurate. Therefore, remand is required because these figures are known to the parties, but not to the Board.

March 25, 1983

APPEAL OF CENTRAL COLORADO CONTRACTORS, INC.

IBCA-1203-8-78

Decided March 25, 1983

Contract No. MOOC14201837, Bureau of Indian Affairs.

Granted in part.

1. Contracts: Disputes and Remedies: Burden of Proof—Evidence: Credibility—Evidence: Weight

Where under a contract for the construction of a road and a bridge involving a substantial amount of unclassified excavation, the contractor's general superintendent and the then project engineer and the then project inspector testified in support of their widely divergent views as to the representations allegedly made by the Government representatives to the general superintendent during tours of the site to the effect that the slope stakes when placed would fall beneath a prominent ledge of rock known as caprock, the Board accepts the corroborated testimony of the general superintendent over the uncorroborated testimony of the project engineer but it refuses to accept the testimony of the general superintendent over that of the project inspector where the former's testimony is not corroborated with respect to the representations attributed to the inspector.

**2. Contracts: Construction and Operation: Changes and Extras—
Contracts: Construction and Operation: Contracting Officer—
Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Disputes and Remedies: Equitable
Adjustments**

Where during a visit to the project site preparatory to submitting a bid for the construction of a road and bridge, a contractor is told by the project engineer that the slope stakes to be placed would fall beneath a prominent ledge of rock known as the caprock but when placed the slope stakes required all of the caprock to be excavated and moved; and where the Government admitted other significant staking errors, the Board finds that the contractor is entitled to an equitable adjustment under the standard Changes Clause for excavating and moving the caprock and doing additional work as a result of the Government's staking errors.

**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 the extent to which the Government's actions increased the costs of contract performance, the amount of the equitable adjustment to which the contractor is entitled is determined by the Board on the basis of the so-called jury verdict approach.

**4. Contracts: Construction and Operation: Changes and Extras—
Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Disputes and Remedies: Equitable
Adjustments—Rules of Practice: Appeals: Burden of Proof**

In a case involving the construction of a road and a bridge in which the Government has stipulated that it has made slope staking errors throughout the entire project, a claim for additional costs allegedly involved in correcting slope staking errors in specified areas of the project is denied where the appellant fails to show by a preponderance of the evidence that additional costs were incurred. In support of its denial the Board notes that the lack of persuasive evidence of any contemporaneous objection to performing the work in question and a delay of over 31 months in presenting the claim now asserted raise presumptions against its validity.

**5. Contracts: Construction and Operation: Changes and Extras—
Contracts: Construction and Operation: Contracting Officer—
Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Performance or Default: Compensable
Delays:**

When under a contract for the construction of a road and a bridge, the Government denied the contractor's request to use the bridge for its construction operations following the completion of the bridge and the contractor files a claim for the costs said to have resulted from the Government's refusal, the Board finds that the refusal was justified where (i) the contract contains no provision authorizing the contractor to use the completed bridge; (ii) whatever costs the contractor may have incurred as a result of the Government's action have not been shown to be attributable to unforeseen work; (iii) appellant has not shown any custom in the construction business in support of its contentions; and (iv) the action of the project engineer in refusing the appellant permission to use the bridge was not shown to constitute an abuse of discretion.

**6. Contracts: Construction and Operation: Actions of Parties—
Contracts: Construction and Operation: Contract Clauses—Contracts:
Formation and Validity: Mistakes—Rules of Practice: Appeals:
Burden of Proof**

A claim for additional rock excavation is denied where the Board finds (i) that the contract provided for volume of excavation to be measured by the average end area method; (ii) that all excavation including rock boulders was so measured; and (iii) that the appellant failed to show by a preponderance of the evidence that there were any rock boulders placed in embankments for which it has not been paid.

**APPEARANCES: Harry S. Connelly, Jr., Attorney at Law, Byrd,
Connelly & Patterson, Santa Fe, New Mexico, for Appellant;
Harold A. Ranquist, Department Counsel, Albuquerque, New Mexico,
for the Government.**

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

In this timely appeal ¹ appellant seeks additional compensation in the amount of \$223,865.68 ² for (i) additional excavation attributed to admitted Government errors in design and slope staking; (ii) increased costs claimed to have resulted from the Government's refusal to permit the contractor's vehicles to use a bridge constructed under the contract; (iii) additional sums said to be due the contractor for excavation as a result of the Government having improperly measured boulders prevalent in some areas of the project; and (iv) release of \$4,500 assessed as liquidated damages.

¹Throughout this opinion references will be made by use of the following abbreviations: Appeal File (AF); Appellant's Exhibits (AX); Government Exhibits (GX); transcript (Tr.); Appellant's Opening Brief (AOB); Government's Posthearing Brief (GPHB); and Appellant's Reply Brief (ARB). The abbreviations used will be followed by reference to the number of the particular exhibit or the page of the transcript or brief being cited.

² See opening statement of appellant's counsel (Tr. 4-5).

March 25, 1983

Findings of Fact

1. Appellant has submitted claims totaling \$223,865.68 comprised of the following items:

Claim No.	Description of Claim	Amount	Exhibit No.
1	Excavation from station 227+90.20 to station 250+74.60.	\$93,441.92	Schedules 1 & 3-AX 8.
2	Excavation from station 98+00 to station 101+50.	1,025.10	(Tr. 4)
3	Excavation from station 95+00 to station 97+50.	27,805.83	Schedule 4-AX 10.
4	Excavation from station 92+40 to station 93+90.	19,801.86	Schedule 4-AX 10.
5	Non-use of bridge.....	28,361.17	Schedule 5-AX 11.
6	Boulder excavation claim (38,600 cubic yards) ³ .	38,600.00	Schedule 6-GX 20; AX 14.
7	Release of liquidated damages ⁴	4,500.00	AX 7.
8	11,268 cubic yards of excavation.....	9,577.80	Agreed to at hearing (Tr. 4).
9	Miscellaneous claims.....	752.00	Not contested; AF 1.
	Total.....	\$223,865.68	

2. The instant contract was awarded to appellant under date of April 25, 1975, in the amount of \$566,556.77. The contract called for the Grading and Draining Ignacio-Bondad Road and Construction of Florida River Bridge - Project SU110(1) 1 & 2, Southern Ute Indian Reservation, La Plata County, Colorado. Notice to proceed with the contract work was given to the contractor by telephone on May 23, 1975, effective May 27, 1975. Although some clearing and other preliminary work had been done at an earlier time, the initial excavation on the project took place on June 13, 1975, between stations 225+00 and 227+00 (AF 6).

The bid schedule showed unclassified excavation (Item No. 203(3))⁵ in the estimated amount of 397,530 cubic yards. The final audited

³The Government audit (GX 10) shows that the initial claim for this item was in the amount of \$117,804.05. The figure shown in the text, *supra*, of \$38,600 may represent an inadvertent overstatement of the claim by \$9,525.75. This is so because appellant is claiming for rock excavation at the price of 85 cents per cubic yard and the amount of rock excavation involved totals 34,205 cubic yards (Tr. 5; AX 14). Unless included in the \$38,600, no claim for 7,124 cubic yards of excavation involving waste berms (AX 14) is reflected in the total amount claimed by appellant.

⁴The final audit of the project shows that the contract was initially scheduled to be completed by June 24, 1976, but that it was extended by 21 days to July 15, 1976. As the contract was accepted as substantially complete on Aug. 2, 1976, the delay in completion of the contract amounted to 18 days. Liquidated damages assessed for the 18 days of delay involved at the rate of \$250 per calendar day total \$4,500 (AX 7, "Final Audit Project SU110(1) 1 & 2, Recommendation for the Assessment of Liquidated Damages").

⁵The term is defined as follows: "203.04 Unclassified Excavation. Unclassified excavation shall consist of the excavation and disposal of all materials of whatever character encountered in the work" (GX 11, Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-69 (1969)).

quantity prior to hearing was 441,245 cubic yards. At the hearing the Government stipulated that it was liable for an additional 11,268 cubic yards of excavation making for a total excavated quantity of 452,513 cubic yards (Tr. 30, 35; GPHB at 4, 6). According to the figures shown by the Government in the final audit for the project under the caption "RECAP OF 'UNFORESEEN WORK' COSTS," the contractor was allowed \$9,176 for unforeseen work (AX 7, Sheet 5 of 28).

3. Prepared on standard forms for construction contracts, the contract includes the General Provisions set forth in Standard Form 23-A (October 1969 edition)⁶ and in the Additions to the General Provisions.⁷ The contract also contains various special provisions and numerous specification provisions. Other provisions of special interest are quoted below either in their entirety or in pertinent part:

SPECIAL PROVISIONS

* * * * *

ARTICLE 5 - LIQUIDATED DAMAGES RATE:

⁶Clause 3, Changes of the General Provisions reads as follows:

"3. Changes

"(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

"(i) In the specifications (including drawings and designs);

"(ii) In the method or manner of performance of the work;

"(iii) In the Government-furnished facilities, equipment, materials, services, or site; or

"(iv) Directing acceleration in the performance of the work.

"(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, 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.

"(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

"(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: *Provided, however,* 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: *And provided further,* That in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

"(e) If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

"(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

⁷Clause 31 of the Additions to General Provisions (SF 23-A) is set forth below:

"31. 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, simple interest on the amount of the claim finally determined owned [sic] 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."

March 25, 1983

Liquidated damages will be assessed in the amount of \$250.00 per day for each calendar day of delay, in accordance with subsection 108.07, Liquidated Damages, of Section 100 - General Provision.

* * * * *

Article 11 - UNFORESEEN CONTRACT WORK: In the event of unforeseen work, including damage to service lines, locations unknown to either the Contractor or the Government, the Contractor shall be compensated for the unforeseen repair work in the following manner:

1: *Labor*—For all labor and foreman employed on the specific operation, the Contractor shall receive the rate of wage applicable in this contract for each and every hour that said labor and foreman are actually engaged in such work. The Contractor shall receive compensation in the actual amount, for his cost of payroll, tax levies, insurance premiums, and employment benefits applicable to his employees, in proportion to the wages paid above. In addition, he will receive an amount equal to 20% of the compensation as determined herein. The Contractor shall maintain records of the cost of work done each day as ordered for each specific operation.

2: *Materials*—For materials accepted and used, the Contractor will receive the actual cost of such materials, to which cost 15% will be added.

3: *Equipment*—For any machinery or special equipment (other than small tools), the Contractor shall be paid the rental rate as may be applicable in the latest edition of Rental Rate Blue Book for Construction Equipment. Payment will be made for the actual number of hours that the equipment is in operation and will include fuel and lubricants.

4: *Payments*—Payment for work performed under this clause shall be made with regular progress payments and will be based on records, receipted invoices for materials or affidavits certifying that such materials were taken from the Contractor's stock and that the price claimed represents the actual cost to the Contractor.

SECTION 100 - GENERAL PROVISIONS

SPECIAL NOTICE

* * * * *

101.02 Definitions

Engineer - Wherever the term "engineer" is used in the "Construction Details" sections of FP-69 or elsewhere in these specifications, it is changed to "contracting officer."

104.01 Intent of Contract

The intent of the contract is to provide for the construction and completion in every detail of the work described. The contractor shall furnish all labor, materials, equipment, tools, transportation and supplies required to complete the work in accordance with the plans, specifications and terms of the contract.

104.02 Alteration of Plans or Character of Work

The quantities appearing in the "bid schedule" are approximate only and are prepared for the comparison of bids; they do not govern final payment. Payment will be made only for the actual quantities of work performed and accepted or materials furnished in accordance with the contract. The scheduled quantities of work to be done and materials to be furnished may each be increased, decreased, or omitted as required. Bid schedule quantities will be considered the original contract quantities.

It is mutually agreed that it is inherent in the nature of highway construction that some changes in the plans and specifications may be necessary during the course of construction to adjust them to field conditions and that it is of the essence of the contract to recognize a normal and expected margin of change within the meaning of Clause 3, "Changes" of the "General Provisions," SF 23-A, as not requiring or permitting any adjustment of contract prices except as follows:

(a) When the quantity of work to be done or material to be furnished under any major item of the contract is increased to more than 125 percent of the quantity stated in the

bid schedule, then either party to the contract upon demand, shall be entitled to an equitable price adjustment on that portion of the work above 125 percent of the quantity stated in the bid schedule when the facts establish that a price adjustment is in fact warranted.

(b) When the quantity of work to be done or material to be furnished under any major item of the contract is reduced to less than 75 percent of the quantity stated in the bid schedule, then either party to the contract, upon demand, shall be entitled to an equitable price adjustment for the work quantity actually performed when the facts establish that a price adjustment is in fact warranted, limited to a total payment of not more than 75 percent of the amount originally bid for the item.

Payment for work occasioned by changes or alterations will be made in accordance with the provisions set forth under subsection 109.03. If the change in the work is of sufficient magnitude as to require additional time in which to complete the project, such time adjustment may be made in accordance with the provisions of Clause 3, Changes SF 23-A.

104.04 Maintenance of Roadway and Detours for Traffic

* * * * *

The contractor shall keep the portion of the project being used by public traffic in such condition that traffic will be safely and adequately accommodated. The contractor shall also provide and maintain in a safe condition temporary approaches or crossings and intersections with trails, roads, streets, businesses, parking lots, residence, garages and farms and shall furnish and apply water or use other satisfactory means for dust control, provided, however, that snow removal will not be required of the contractor.

The contractor shall bear all expense of maintaining traffic over the section of existing road undergoing improvement and of constructing and maintaining such approaches, crossings, intersections, and other features as may be necessary, without direct compensation, except for snow removal and as provided in (a) below.

* * * * *

105.04 Coordination of Plans, Specifications, and General Provisions

* * * In the event of a conflict between the following contract documents, each shall prevail over the other or others in the following order: (1) General Provisions, SF 23-A, and Labor Standards Provisions, SF 19-A, (2) Section 100 - General Provisions, (3) Special Provisions, (4) Construction Details (Specifications in FP-69 or modifications thereto), and (5) Drawings.

105.08 Construction Stakes, Lines, and Grades

* * * * *

The contractor will be held responsible for the preservation of all stakes and marks; and if any of the construction stakes or marks have been carelessly or willfully destroyed or disturbed by the contractor, the cost to the Government of replacing them may be charged against him and may be deducted from the contract price.

The contractor shall notify the contracting officer of apparent errors discovered in initial stakeout before the affected work is begun. Should work be performed in accordance with inaccurate initial stakeout made by the contracting officer and not discovered by the contractor, payment for such work and any directed correction thereof will be made at applicable unit prices of the contract unless such work differs substantially from that described on the plans or in the specifications, in which case the provisions of Clause 3, Changes of SF 23-A, will apply.

* * * * *

109.01 Measurement of Quantities

All work completed under the contract will be measured by the contracting officer according to the United States standard measure.

A station when used as a definition or term of measurement will be 100 linear feet.

March 25, 1983

The methods of measurement and computation to be used in the determination of quantities of materials furnished and work performed under the contract will be those recognized as conforming to good engineering practice.

Plan Quantity

(a) When the contract specifies payment of an item or of a portion of an item on a plan quantity basis, the quantities for payment will be those shown on the plans with deductions from or additions to such quantities resulting from authorized deviations from the plans.

(b) If the contractor believes that a quantity which is specified for payment on a plan quantity basis is incorrect, he may request the contracting officer in writing to check the questionable quantity. The request shall be accompanied by calculations, drawings, or other evidence indicating why the plan quantity is believed to be in error. If the quantity is found to be in error, payment will be made in accordance with the corrected plan quantity if approved by the contracting officer.

Unless otherwise specified herein or on the plans for individual construction items, longitudinal measurements for area computations will be made horizontally; and no deductions will be made for individual fixtures having an area of 9 square feet or less. Unless otherwise specified, transverse measurements for area computations will be the neat dimensions shown on the plans or ordered in writing by the contracting officer.

* * * * *

In computing volumes of excavation, the average end area method will be used, unless another method is specified.

109.02 Scope of Payment

The quantities listed in the bid schedule do not govern final payment. Payments to the contractor will be made only for the actual quantities of contract items performed in accordance with the plans, specifications and terms of the contract; and if, upon completion of the construction, these actual quantities show either an increase or decrease from the quantities listed in the bid schedule, the contract unit price will still prevail, except as provided in subsection 109.03.

109.03 Compensation for Altered Quantities

When the accepted quantities of work vary from the quantities in the bid schedule, the contractor shall accept as payment in full, so far as minor contract items are concerned, payment at the original contract unit prices for the accepted quantities of work done. No allowance except as provided in subsection 104.02 will be made for any expense or loss suffered by the contractor resulting either directly from such alternations or indirectly from unbalanced allocation among the contract items of overhead expense or from any other cause.

For variations in accepted quantities of major items, in accordance with subsection 104.02, the prices agreed upon and any agreed adjustment in contract time will be incorporated in the written order issued by the contracting officer subject to the provisions of Clause 3, "Changes" of SF 23-A.

4. At the commencement of the hearing, the parties stipulated on the record as to the following: (i) That the Bureau of Indian Affairs (BIA) did not measure each surface boulder; (ii) that there was a design error near station 245+25; (iii) that cross sectioning was not done by BIA at the time of slope staking throughout the whole job although it should have been done and the results are more than usual slope staking errors; (iv) that the Federal Highway Administration's (FHWA) staking was incomplete and inaccurate with the result that the BIA supplemented the FHWA information to the extent necessary to determine the unclassified excavation (excluding boulders) upon the understanding that appellant claims that the boulders were not

included and the Government claims that they were; and (v) that a claim for boulders has been submitted to and considered by the contracting officer and denied (Tr. 48-49).

The parties also stipulated to the testimony that would be adduced from two Government employees if they were called to testify. Counsel for the parties stipulated that if Mr. Victor J. Fattor were to be called as a witness he would testify to the following: (i) That he is employed by the Albuquerque Area Office of BIA as the Area Road Engineer; (ii) that when a dispute arose over the BIA survey crew doing a final as-built cross section of the project, he recommended that the FHWA be used as an independent third party to make the cross section; (iii) that BIA subsequently entered into a contract with FHWA (GX 2); (iv) that there would not be any changes made in the centerline of the roadway on the project without his approval as Area Road Engineer; and (v) that immediately prior to and after the bidding, there were no changes in the centerline of the project except for a small change made around station 275+00 in connection with a contact made with Highway 555 (Tr. 643-46).

Counsel for the parties also stipulated that if Mr. David Herrera were to be called as a witness, he would testify to the following: (i) That he is the Assistant Area Road Construction Engineer for the Albuquerque Area Office (BIA); (ii) that he worked on the instant project including the computerization of the final earth work quantities in cooperation with other BIA engineers; (iii) that he prepared an exhibit (GX 4) on which he has calculated—pursuant to the final earth work quantities and the original computer design of the roadway—the amount of material excavated between each of the stations with the black line depicting the design earth work quantities of 394,195 cubic yards (showing the stations at which it was calculated that excavation would occur); and, (iv) that on the same exhibit (GX 4) Mr. Herrera has calculated the final audit quantities reflecting the final cross sections on an as-built basis, as shown by the red line (demonstrating the amount of actual excavation at each point) (Tr. 646-47).⁸

5. Very prominent features of the terrain involved in the project work were large boulders prevalent in various areas and a ridge of rock generally referred to at the hearing as "the caprock." The appellant's expert witness, Robert Sykes, identified the caprock as extending generally from station 237+00 to station 245+00 (800 feet), and estimated that it was 200 feet from the roadway elevation to the top of the cliff. Government expert witness David H. Holmes considered the caprock to have been confined to the area from approximately station 240+00 to station 245+00 (500 feet) (Tr. 400-04,

⁸The amount of actual excavation shown by the red line on GX 4 reflects the final cross sections performed by FHWA as supplemented by BIA because of their inadequacy and finally worked into the BIA computer. The computerization of those quantities are shown by the red line in the total amount of 441,245 cubic yards. The payments provided for in Change Order No. 5 is predicated upon these calculations (AX 7; AX 16). The blue line of GX 4 reflects the total figure for excavation agreed to at the hearings (exclusive of boulders) of 452,513 cubic yards (Tr. 647).

March 25, 1983

807-08). The experts also differed in the conclusions they reached concerning the knowledge imputable to a prospective bidder from the contract plans (GX 1(A)).

Not disputed by either party are the following facts: (i) The word "Cliffs" is shown in the general area where the caprock was located (Sheet No. 14 of 26); (ii) the project was not slope staked until after contract award; (iii) the typical cross section included in the plans show a 1 to 1 slope;⁹ and (iv) prior to bidding the contractor was furnished a set of plans but was not furnished cross sections.

Upon direct examination, Government witness Holmes stated:

Well, in looking at the plans, it appeared to me that the construction limits in that area, where cliffs are shown, extend out to the right-of-way line, and I would say that if I were a contractor looking at this project from the center line of road and looked up at that cliff or that outcrop of sandstone, I would think to myself that I had better bid my project accordingly for removing rock, that rock, even regardless of what anybody told me.

* * * * *

* * * This project * * * is in very rough terrain.

(Tr. 795-97).

Appellant's witness Mr. Sykes testified (i) that the plans indicate the slope stakes would be set along the construction limit line but it could not be determined from them whether the stakes would be set at the bottom of the cliffs or the top of the cliffs; (ii) that the exact location of the cliffs could not be determined without contour lines; (iii) that the contractor could not determine from the plans that it would be on the top of the caprock; (iv) that the contractor should be able to rely upon statements made by the project engineer as to where the slope stakes would be set in the absence of slope stakes being there or having cross sections; and (v) that caprock would be more expensive to move¹⁰ and would require more time for its removal (Tr. 376-81).¹¹

6. There are material differences between the testimony given by appellant's witnesses and that offered by Government witnesses with respect to what transpired during the prebid examinations of the

⁹Upon cross-examination, Mr. Holmes gave the following testimony:

"Q. * * * I'm trying to get this figured out. If you tell him to build it and he builds it and it comes out less than 1 to 1 or more than 1 to 1, he builds it the way you say that he's supposed to build it, how can he be held to a 1 to 1 slope?"

"A. Because the slope stakes are set and it is clearly indicated on the slope stakes what slope you want: 1 to 1. He has grade foremen who are checking for mistakes as they go down where there's excavation, to be sure they're staying on that 1 to 1 slope. And in this particular case, they did not do it. So, you know, we're not trying to hide the fact that we didn't make any errors; we've already acknowledged we made errors. And, in some cases, the contractor had problems. But we accepted the job, regardless of whose problem it was, as is built." (Tr. 829-30).

¹⁰Addressing the question of whether the caprock could be moved for the same unit price as the other unclassified excavation, Mr. Sykes stated: "I think that when a contractor bids on an unclassified excavation contract, that he, in his judgment, has to determine how much rock there is, how much common excavation, and balance that to his experience and costs, and bid accordingly * * * ." (Tr. 379).

¹¹Mr. Sykes considered that the amount of excavation involving caprock totaled approximately 10,000 cubic yards and that a reasonable time for getting through the caprock would range from 20 to 30 days (Tr. 400-04, 407-08). The Government had originally estimated that the excavation required by the contract involved approximately 8,200 cubic yards of caprock. Based upon accepting Mr. Sykes estimate of approximately 10,000 cubic yards of caprock, however, the Government concluded (on the basis of estimates contained in its daily construction reports) that the contractor excavated and moved approximately 10,300 cubic yards of caprock between stations 240 to 245 in 8 working days (GX 21; Tr. 809, 814-18).

project site. Mr. Herbert Sharpe (the contractor's general superintendent) states that he had made three visits to the jobsite prior to the opening of bids. On one of these visits, he asked Mr. Frank Romero (project engineer) about the caprock and reportedly was told that the contract work would be underneath it. On another of these visits, he was accompanied by Mr. Javin (Jay) Herrera and Mr. Roland Norris. During the course of that visit, Mr. Herrera is said to have told Mr. Sharpe that the required work would be underneath the caprock.

On cross-examination, Mr. Sharpe stated that he had been told that it would not be necessary to get on top of the caprock in order for the contractor to do the job according to the plans and specifications. The information included in the plans did not cause Mr. Sharpe to question the information he had received and the job was bid on the basis that performing the contract work would not entail having to get on top of the caprock.

Mr. Sharpe also testified that when he found the slope stakes were on top of the caprock, he had protested to the Government people¹² day in and day out. While denying that he had first protested after September 30, 1975,¹³ he acknowledged that no written protest was filed with the contracting officer (Tr. 218-19, 247-53, 260-65).¹⁴

7. Another of appellant's witnesses who had been involved in the prebid examination of the project site was Mr. John D. Snider (employed by the contractor as a mechanic in April of 1975). It was Mr. Snider's testimony (i) that in April of 1975 he had gone out on a prebid inspection of the project site with Mr. Sharpe accompanied by Mr. Davis, Mr. Romero, and Mr. Herrera; (ii) that they were all in Mr. Snider's vehicle; (iii) that they stopped on a curve in the area between stations 237+40 and 243+00 and asked Mr. Romero where the stakes would fall; (iv) that Mr. Romero said that they would fall below the bluffs (*i.e.*, caprock) there; (v) that Mr. Davis (a cat operator in the employ of the contractor) and Mr. Herrera left the car and walked up the slope; and (vi) that Mr. Herrera supposedly showed Mr. Davis that the cut stakes would be below the caprock (Tr. 96-99).

8. Also testifying for appellant was Mr. John J. Siegrist, a graduate civil engineer and president of Burnett Construction Co. (an

¹² According to the testimony offered by Mr. Herrera, no protest was made when the contractor started excavating the caprock but the contractor did file an oral protest with him about having to do such work in September or October of 1975. This was after Mr. Romero's departure from the project (Tr. 499-500).

¹³ The following exchange occurred between Mr. Sharpe and Government counsel:

"Q. Isn't it true, Herb, that your first protest to them with respect to this occurred after September 30th, 1975?"

"A. No, that is not correct.

"Q. Isn't that the first time you ever called attention to the fact that Mr. Romero had said that you were only required to excavate to the foot of the cap rock was after Mr. Romero had actually left?"

"A. No, that is completely erroneous, sir."

(Tr. 260).

¹⁴ Set forth below is a colloquy which occurred upon cross-examination:

"Q. * * * Why didn't you write the contracting officer and say, I was told I don't have to get on top of the cap rock and here you're making me do it and say this is a claim?"

"A. Okay. I'm out there on a brand new job, okay? I'm going to start writing letters? I'm going to write all the rest of it and whatnot? I was just hoping I could get along with the project engineer and all the rest of the people out there and build a job * * *"

(Tr. 259-60).

March 25, 1983

unsuccessful bidder on the project). According to Mr. Siegrist, he made a prebid visit to the site and looked at the job with Mr. Romero.¹⁵ It was Mr. Siegrist's testimony (i) that he had a conversation with Mr. Romero, the project engineer, in the vicinity of station 242+50; (ii) that because the job had not been staked, he asked a question as to where the slope stakes would be and if they would be below the rock outcrop; and (iii) that Mr. Romero indicated that the alignment of the road was far enough out so that the stakes would be below the solid rock outcrop;¹⁶ and (iv) that in submitting its bid on the project, the Burnett Construction Co., had relied on the information received from Mr. Romero.¹⁷

Upon cross-examination, Mr. Siegrist's attention was directed to the fact that Sheet No. 2 of the Plans (Sheet No. 2 of 26) had a typical cross section which shows that for objects more than 15 feet high a one to one slope is to be maintained. Commenting upon what was conveyed to him by what was so shown, Mr. Siegrist noted: (i) That the reference sheet was a standard drawing which goes in all of the plans; (ii) that the slopes shown thereon refer to normal excavation; (iii) that where rock excavation is involved, the slopes are normally steepened up; and (iv) the fact that the typical cross section shows a one to one slope does not mean that all slopes on the job were going to be one to one.

Mr. Siegrist also testified that from an examination of the plans (Sheet No. 14 of 26) he could not tell whether the road would be staked to include the caprock, since it was not possible to tell exactly where the cliffs were without a contour map. Acknowledging that he had not undertaken to determine whether the slope would meet the contract requirement if the job began at the bottom of the caprock, Mr. Siegrist stated that bidders do not have the time to go and engineer all those details and that this is why they ask questions of the project engineer (Tr. 54-68, 70-76, 81-88).

9. Testifying for the Government, Mr. Romero denied that he had made the representations attributed to him by Messers. Sharpe, Snider, and Siegrist. As to Mr. Sharpe's prebid visits to the site, Mr. Romero stated that he had accompanied him on two occasions. On one of the visits they had stopped in the vicinity of station 220 to station 250, just off the point where the caprock is shown. Mr. Romero

¹⁵ Although Mr. Siegrist's recollection as to who else accompanied Mr. Romero and himself was somewhat hazy, he thought that Mr. Herrera from the BIA was present during the tour of the site (Tr. 65).

¹⁶ After Mr. Siegrist had indicated that there would be considerably more expense to removing the caprock, the following colloquy ensued on direct examination:

"Q. And that means you'd have to get up on top of the mountain. Would that be a pretty hard project in and of itself?"

"A. That's one of the most difficult problems that I'd say we have in our work, is to try to get up on top of a ledge like that and bring it down."

(Tr. 59).

¹⁷ In the course of his testimony, Mr. Siegrist acknowledges that there was no necessary connection between what was represented to him and what representations may have been made to the contractor. Mr. Siegrist was unable to recall when he first told the contractor about Mr. Romero having told him that the caprock would not have to be moved (Tr. 87-90).

had no recollection of any question being raised about slope staking in the area ¹⁸ but does recall that they talked about the centerline.

Mr. Romero also recalls telling Mr. Sharpe where the slope stakes would be approximately but he noted in his testimony that Mr. Sharpe may not have heard him, as Mr. Davis was talking at the same time.

Mr. Romero also testified (i) that the contractor began excavating on top of the caprock while Mr. Romero was there; (ii) that Mr. Sharpe never complained to him prior to the time he left the job; (iii) that prior to his leaving the project, Mr. Sharpe never informed him that he (Mr. Romero) had told Mr. Sharpe that he would not have to get on top of the caprock; (iv) that he had never had a complaint from the contractor either in writing or otherwise; (v) that some time after he left the job in late September of 1975, he had been informed by Mr. Herrera of the representations attributed to him (Mr. Romero) by Mr. Sharpe; (vi) that his responsibility as project engineer was to insure that the job was built according to the contract specifications; and (vii) that he had never changed the contract as he had no authority to do so.

Upon cross-examination, Mr. Romero testified concerning Mr. Sharpe's two prebid visits to the site. Accompanying Mr. Romero on the first visit were Mr. Sharpe and Mr. Davis. On the second visit to the site, he was accompanied by Mr. Sharpe, Mr. Snider, and Mr. Foreman (the BIA's Natural Resource man).¹⁹ In response to questions concerning the second prebid site visit, Mr. Romero stated (i) that he and Mr. Foreman got in the back of Mr. Sharpe's pickup truck; (ii) that during the trip Mr. Foreman commented to Mr. Sharpe about the need to have a lot of dynamite to blast the hill, noting that there was a lot of rock there; (iii) that the contractor's representatives responded by stating that the D-9 is going to rip everything; (iv) that he had no recollection of slope stakes being discussed; and (v) that at the time of the visit the centerline stakes were in but the slope stakes were not in. Mr. Romero also testified that the BIA began setting slope stakes as soon as it was informed where the contractor was going to start (Tr. 567-82, 586-92).

10. With respect to Mr. Siegrist's prebid visit to the project, Mr. Romero testified (i) that together with Mr. Herrera, he had accompanied Mr. Siegrist on a site visit; (ii) that it was a miserable day and they got stuck in the mud several times; (iii) that they only stopped in three or four locations but they did stop underneath the point where the caprock was; (iv) that he has no recollection of making any statements to Mr. Siegrist about the setting of slope stakes in the

¹⁸ Upon direct examination Mr. Romero gave the following testimony:

"Q. Did you ever tell him that the slope stakes would be set at the foot of the caprock?"

"A. No, because it was too close, the center line was too close to that. If you check your cross section—you know, if they'd have walked over that hump, they would have seen it. They'd have to hit up there somewhere."

(Tr. 579-80).

¹⁹ According to Mr. Romero, Mr. Herrera had not been with him on either his first or second prebid visits to the site with Mr. Sharpe. Mr. Herrera did accompany Mr. Romero, however, when Mr. Siegrist made his prebid visit to the site (Tr. 587-88).

March 25, 1983

vicinity of the caprock²⁰ but he does recall showing him where the centerline was; and (v) that they did not get out and walk over the hump as it was too muddy (Tr. 582-85).

11. According to Mr. Herrera's recollection, the first time that he met Mr. Sharpe was in April of 1975 when Mr. Romero and Mr. Siegrist²¹ were also present. At the first meeting with Mr. Sharpe a question was raised as to the location of the centerline. The centerline was in all areas except in those areas where the centerline crossed the roadway. In those instances offset stakes had been used. Another question brought up at the first meeting was whether they would run into some rock that was below where the party was standing. Mr. Herrera's response to this question was that he did not know because he did not know how far the cut would be in that area. No one asked him, however, as to where the slope stakes would strike; nor did Mr. Herrera take anyone up the hill to show where the slope stakes would fall.

Concerning the second prebid visit to the site with Mr. Sharpe, Mr. Herrera does not recall whether they came out to the same point on the project or not. He does recall, however, that Mr. Sharpe followed in his Lincoln. The conversation that Mr. Herrera remembers was about what kind of soil did Mr. Herrera think was down there. Mr. Herrera also testified (i) that at no time had Mr. Sharpe asked him anything about stakes on the caprock; (ii) that that subject was never discussed at any meeting; (iii) that he never told Mr. Sharpe or anyone else that the slope stakes would not go on top of the caprock; (iv) that the contractor began excavating in the caprock area; (v) that at that time the contractor did not say anything to Mr. Herrera about someone having told the contractor that it would not need to go on top of the caprock; and (vi) that Mr. Herrera was not so informed until September or October of 1975 (*i.e.*, after Mr. Romero had left the project).

Upon cross-examination Mr. Herrera testified (i) that he had toured the project with Mr. Snider before the project was bid; (ii) that he remembered being around stations 237 to 243; (iii) that he does not recall talking to Mr. Snider about the area between those stations; (iv) that in that area he was acting mostly as a guide; (v) that in the meeting where Messrs. Snider and Davis were present questions were directed at him which he answered if he thought he could; (vi) that he could not recall whether Mr. Snider was with Mr. Sharpe; and

²⁰In a "To Whom It May Concern" statement dated Oct. 29, 1979 (AX 1), Mr. Siegrist states that when he was shown the project by Romero, he asked him where the slope stakes would catch at station 242 right, because there was a very high point of solid rock in this area; that he was told the slope stakes would catch below the outcrop and therefore bid the job based on this information; and that he understood that in actual construction of the project, the slope stakes went to the top of the high point which in his estimation would have added substantially to the contractor's cost to do the work.

²¹Later Mr. Herrera corrected his testimony by stating (i) that Mr. Siegrist was not present at this first meeting with Mr. Sharpe; (ii) that he had not visited the site when both Mr. Siegrist and Mr. Sharpe were present; and (iii) that he had visited the site with both of them but at different times (Tr. 515-16).

(vii) that he has no recollection of a conversation with Mr. Snider and Mr. Sharpe about the caprock.²²

Mr. Herrera also testified that on one of the prebid visits to the site he could remember going out in Mr. Sharpe's vehicle; that Mr. Romero was not along on one of the prebid visits he made to the site; and that he could not recall²³ whether he was ever present on the job site with Messrs. Romero, Snider, Davis, and Sharpe (Tr. 492-500, 517-28, 572-73).

12. In the course of his testimony, Mr. Herrera also stated (i) that on the occasion when he accompanied Mr. Siegrist on his prebid tour of the site, Mr. Siegrist did not ask him where the slope stakes would be on the caprock; (ii) that Mr. Siegrist had not had such a discussion with Mr. Romero in his presence; and (iii) that Mr. Siegrist had not had such a discussion with Mr. Romero that he had heard (Tr. 516).

13. At the preconstruction conference it was noted by one of the participants that the project had been cross sectioned 3 years or more before. While early in the meeting there was some discussion of using the original cross sections from stations 0 to 235 and only cross section as they slope staked from station 236 to the end of the project, it was finally agreed to cross section the whole works (AX 4). In his report of a trip to the project site on June 11, 1975,²⁴ Mr. David H. Holmes (BIA Area Office) refers to Mr. Romero having informed him that he did not have sufficient personnel to recross section the natural ground at the time the BIA survey crew set slope stakes on the project. Immediately thereafter the report states:

I suggested to Mr. Romero and Mr. Jay Herrera that, if these cross-sections could not be taken, the slope stakes should at least be set with a level so accurate ground elevations and offsets from centerline could be obtained. The Agency Roads crew did cross-section the entire project several years ago for design purposes, but it could be very difficult, in slope staking the project this year, for the survey crew to stay on exactly these same right angles. This could result, with the rough terrain of the job in as much as a five foot difference in ground elevation at the slope stake location shown on the computer printout, which is based on the original surveys. These differences, if any, would show up when the roadway dirt work takes shape and would result in a varying width and elevation roadside ditch and subgrade * * *

²² Testifying upon cross-examination, Mr. Herrera stated that he could locate the cliffs shown in the contract drawings pretty close to where they were and that anyone else could do so by using a scale rule. Using the scale rule he then located where one of the cliffs shown on the drawings was from center line. Mr. Herrera acknowledged, however, that without using a scale rule, it was not possible to ascertain the location of particular cliffs shown on the drawings (Tr. 544-46).

²³ The following exchange occurred between Mr. Herrera and appellant's counsel upon cross-examination:
 "Q. Now, these conversations that are alleged to have occurred, to have happened, do you remember whether or not they did or are you not sure that they happened?"

"A. I don't remember if they did.

"Q. You don't remember?

"A. No."

(Tr. 517).

²⁴ Mr. Holmes had attended the preconstruction conference on May 13, 1975, and he participated in the discussion concerning the specifications and plan requirements. In his trip report pertaining to the preconstruction conference, he states:

"After the meeting I discussed with both Messrs. Romero and Herrera that this contractor had considerably underbid both the competing contractors and the probable cost of building the job, and, because of this, good records, diaries, reports, and other documentation as well as aggressive inspection, accurate testing, and precise surveying procedures should be maintained by the Agency Roads staff and crew."

AF 12, Trip Report (May 19, 1975).

March 25, 1983

(AF 12).

14. Throughout performance of the contract the project inspectors were responsible for recording information pertaining to the job on a form entitled, "Daily Construction Report."²⁵ The daily construction reports for the project do include the information contemplated by the form with respect to the stations involved in the work, the type of work being performed and the inspectors estimate of the work accomplished (e.g., estimated amount of excavation in cubic yards) on any given work day.²⁶ These reports also show for each day the composition of the contractor's work crew, the equipment available for use and that actively in use.²⁷

Diaries for the project were maintained by both the project engineer²⁸ and the project inspector.²⁹ The project engineer's diary covers the period from May 27, 1975, to October 23, 1975 (GX 9, Master Diary). The project inspector's diary embraces the period beginning on June 18, 1975, and concluding on August 11, 1976 (GX 9, Project Inspector's Diary).

15. According to the daily construction reports, the contractor excavated 10,300 cubic yards of material from the caprock area in 8 working days during the period beginning on June 16, 1975, and concluding on June 26, 1975 (GX 21).

On June 18, 1975, the project inspector noted in his diary that too much water was being placed on the material with no mixing. On the same date, the project engineer informed Mr. Sharpe that he rejected the materials being used as the base for the culverts at station 221+63 and station 214+62 and that the materials would have to be removed. Discussing this matter with Mr. Sharpe on June 25, 1975, the project inspector reiterated the need for removal of this material from both of

²⁵The record includes a total of 318 daily construction reports as part of the Appeal File (AF 6). Report No. 1 dated May 27, 1975, describes the surveying crew as slope staking between station 118+00 and station 150+00 and the contractor as clearing with a D-9 tractor from station 134+00 to station 140+00. Report No. 318 dated Aug. 4, 1976, refers to a survey crew as involved in running a center line from station 175+00 to 194+00 and the contractor as engaged in completing work on a cattle guard and installing a gate at station 0+00, as well as starting cleanup from that station.

²⁶Following a review of the project's daily construction reports, Mr. Fattor, Area Road Engineer, states in a memorandum dated Sept. 7, 1978:

"These daily construction reports, unfortunately, do not indicate any documentation for matters such as: Decisions by and details discussed with inspectors; instructions to contractors; delivery of materials; substance of important conversations with contractor reference conduct, progress, changes, interpretations of specifications and details; any information not covered in notebooks which might have bearing in case of future disagreement * * *"

(AF 12).

²⁷In the same memorandum (note 26 *supra*) Mr. Fattor states at page 1: "[T]he documentation of a large percentage of the contractor's equipment sitting either idle or down for mechanical repairs is considered important as this would point out poor equipment management on the contractor's part."

²⁸Mr. Romero was on the job from the commencement of work on May 27, 1975, until his transfer to another project on or about Sept. 27, 1975. See AF 6 (May 27, 1975); GX 9, Master Diary.

²⁹Mr. Javin Herrera was project inspector from June 18, 1975, until he assumed Mr. Romero's duties on Sept. 27, 1975. Thereafter, except when absent, Mr. Herrera continued to sign the daily construction reports as project inspector until the job was completed in August of 1976. Mr. Norris maintained the project inspector's diary from Oct. 1, 1975, until the completion of the contract work (AF 6; GX 9, Project Inspector's Diary; GX 9, Master Diary). Although Mr. Norris was present at the hearing (Tr. 219), neither party called him to testify.

these areas and also called Mr. Sharpe's attention to the second paragraph on page 97 of FP 69.³⁰

16. The contractor had difficulty in obtaining the required compaction at stations 221+63 and 214+62 as evidenced by the entries in the project inspector's diaries on July 14, 1975, and July 28, 1975, respectively. In checking slope stakes, the survey crew discovered that the fill section between stations 237+00 and 238+25 was 1 foot to 1 foot plus too low.³¹ The matter was reported to Mr. Sharpe and discussed with Mr. Earl Archuleta, the contractor's grade foreman. The latter agreed to fill the area and said they would bench beginning at station 237+00 and fill, water and compact to station 238+25. He also agreed to straighten out his slope stakes bringing them more to a 90 degree angle in relation to the slope (GX 9 (July 24, 1975)).

In the report pertaining to his trip to the project in July of 1975,³² Mr. Holmes noted that Mr. Fattor and he had again repeated their previous suggestions (i) that the project be recross sectioned during the slope staking operations and (ii) that the setting of slope stakes should be with a level to insure accuracy.

17. In August of 1975, a shortage of operators for the equipment available was called to the attention of the contractor by both the project engineer (GX 9 (Aug. 14, 20, and 22, 1975)) and by the project inspector (GX 9 (Aug. 20, 21, and 22, 1975)).³³ On August 5, 1975, Mr. Sharpe told the project inspector that he thought the slope at station 246+00 was too flat. Concerning the slope at station 246, Mr. Herrera states:

Mr. Archuleta said he was sure it was alright, it is almost impossible for the survey crew to check the slope because of the 1:1 slope and the fact that there is no center line to go by. The contractor would have to cease operations in this area for the crew to run center line. Mr. Romero and myself informed Mr. Archuleta and Mr. Sharpe to cut into the hump which is showing and more or less "eye it in" between the cut behind and ahead * * *. [34]

On August 7, 1975, Mr. Archuleta and Mr. Herrera (project inspector) set slope stakes at stations 224, 225, and 226 because the original slope stakes were inaccurate due to the fact that the contractor while breaking large boulders had made a 5-foot to 2-foot

³⁰The cited paragraph from FP 69 reads as follows:

"Where a firm foundation is not encountered at the grade established, due to soft, spongy, or other unstable soil, such unstable soil under the pipe and for a width of at least one diameter on each side of the pipe shall be removed to the depth directed by the Engineer and replaced with approved granular material properly compacted to provide adequate support for the pipe, unless other special construction methods are called for on the plans."

(GX 11).

³¹The same day, Mr. Archuleta was told by the project inspector that the slope stakes appeared to be off by 25 feet, or more, from station 240+00 to station 243+00 (GX 9 (July 24, 1975)).

³²The report concluded with the following observation:

"The contractor is hauling heavy equipment and loads over the county bridge across the Florida River. This bridge was rated at a safe carrying capacity of 15 tons several years ago by a structural engineer. I told Mr. McGechie prior to his hauling of a 35 ton crane across the bridge that he may wind up building two bridges across the Florida River, one the BIA bridge and the other, rebuilding the existing county bridge. The Agency Roads personnel have told the Central Colorado Contractors, Inc., of this low carrying capacity of the bridge also."

(AF 12).

³³The project inspector's entry for Aug. 20, 1975, states: "Contractor has only two scrapers operating. Mr. Archuleta said they needed another operator when I asked why one was parked" (GX 9).

³⁴GX 9 at 17, 18. Upon cross-examination, Mr. Herrera acknowledged that there had been three significant errors between stations 243 and 246 for which the Government was responsible (Tr. 543).

March 25, 1983

fill.³⁵ An entry in the project inspector's diary for August 13, 1975, reads: "I again had to ask Mr. Archuleta to get the compactor operating" (GX 9 at 21).

18. The project inspector's diary for September 2, 1975, records that on that date Mr. Sharpe again asked Mr. Herrera about a road to the reservoir. After inspecting two sites, Mr. Herrera agreed that the road might be built at station 16+75, provided the contractor agreed (i) to use the maintainer and not the dozer as he had wanted to do and (ii) to not destroy any trees. Mr. Sharpe agreed to the specific conditions and, in addition, stated that the road would be only to get the pump in and out; that it would be reshaped as close to natural as possible after the road was no longer needed; and that the dozer would be used only to "pioneer" the cut section adjacent to where the road to the reservoir would be. Commenting upon what transpired a short time later, Mr. Herrera states:

Not more than 20 minutes later Mr. Norris my assistant and I noticed a D-9 dozer begin to make the road, even though I had explicitly denied this operation to Mr. Sharpe. When Mr. Sharpe returned I told him about this. He told me he didn't know this was going to happen, that he had told the operator just to pioneer the cut area. I told him either his people don't listen to him or somebody was lying.³⁶

Excess vegetation in the fills and repeated failure of density tests,³⁷ were recurring problems for the contractor in September of 1975.³⁸ The amount of vegetation present in and the incorporation of sufficient water into the materials were brought to the contractor's attention by the project inspector on a number of occasions (GX 9 (Sept. 2, 3, 4, 8, and 22, 1975)). The project inspector's diary for September 22, 1975, includes the following item:

Culvert crew again having trouble incorporating water into fill material. Mr. Archuleta feels as I do that Mr. Sharpe should try and get natural ground density ahead of his fill areas instead of waiting till he is ready to begin his fill then rushing in and doing a poor job which only causes a delay.

(GX 9 at 39).

On September 23, 1975, Mr. Herrera discussed slope stakes at station 97+00 with Mr. Archuleta.³⁹ The cut at station 96+50 was a subject of a discussion between Mr. Sharpe and Mr. Herrera on September 25, 1975.⁴⁰

³⁵ GX 9 at 19. Another entry in the project inspector's diary for that date reads: "I told Mr. Archuleta that the large rocks 12' and over will have to be removed from the sub-grade surface * * *"

³⁶ GX 9 (Sept. 2, 1975) at 29-30.

³⁷ An entry in the project engineer's diary for Sept. 11, 1975, reads as follows: "Contractor having trouble with densities on the project. They have to have the right moisture and they don't have it. All week the densities have failed" (GX 9, Master Diary, at 13).

³⁸ Ms. Gibson, Mr. Sharpe, Mr. McGeachie (Silver Peak Corp., bridge subcontractor) met with Messrs. Herrera and Norris on Sept. 5, 1975, to discuss a number of things including where to build the river crossing (GX 9 at 32-33).

³⁹ The diary entry for Sept. 24, 1975, includes the following item: "Again discussed slope stakes with Earl (Archuleta), both of us are in agreement there is no problem * * *" (GX 9 at 40).

⁴⁰ A pertinent portion of the diary for that date reads: "Told Herb the cut at sta. 96+50 looked a little off but nothing serious, he said later we might dress it up" (GX 9 at 41).

19. In a report covering his visit to the site on October 10, 1975, Mr. Holmes of the area office stated that the progress of the contractor and the subcontractor had been slowed as a result of the following factors: (1) The large number of earthmoving equipment inoperable due to mechanical breakdowns; (2) The small number of working personnel on the jobsite; and (3) The large amount of rock requiring drilling and blasting before excavation operations could progress (AF 12).

In a discussion on the site in the vicinity of station 177+00 on October 1, 1975, Mr. Sharpe was told by Mr. Herrera that before proceeding with the cut and backfilling in that area, it would be necessary for the contractor to first rip up the large boulders that had rolled to the right side during the "pioneering process." On October 2, 1975, the project engineer and Mr. Sharpe discussed the channel from station 178+00⁴¹ which would be against the toe of the fill to station 186+60, mainly at stations 179+00 to 180+00 on the right side where there were several large boulders adjacent to the fill. Two alternatives considered involved going around these boulders toward the right side or ripping into the boulders on the left in order to make the channel.

Responding to an inquiry from Mr. Sharpe as to whether the contractor would be paid for this work, Mr. Herrera referred Mr. Sharpe to paragraph 12⁴² on sheet 2 of the plans. On October 2, 1975, Mr. Sharpe was also told by the project inspector that the rocks and boulders used as backfill in the vicinity of station 170+00 would have to be removed and crushed because most of them were over the size permitted by the specifications.

During October the contractor's culvert crew experienced difficulty in getting the proper compaction at stations 123, 125+50, and 127+75. This was attributed mainly to the contractor not mixing the material well enough to compact. The problem of attaining the required amount of compaction in shale materials was diagnosed as the result of not getting enough moisture in such materials.

On October 29, 1975, Mr. Dave Herrera from the Area Office and Mr. Jay Herrera visited the site to discuss Mr. Sharpe's complaint about slope stakes. Although Mr. Sharpe was not available for discussion on that day, the question raised by him was discussed with the grade foreman, Mr. Archuleta.⁴³ Two days later a discussion of the slope stakes at station 162+00 was held in which Mr. Sharpe did

⁴¹After noting in his diary on Oct. 6, 1975, that the D-9 with ripper was still down, the project engineer states: "Mr. Archuleta commented Mr. Sharpe should shoot the rock at 177+00 and 178+00 instead of ripping it and breaking his equipment. I agree with him. The subcontractor is preparing a crossing at the bridge * * *" (GX 9, Master Diary, at 18).

⁴²The cited paragraph reads as follows: "12. No measurement nor direct payment shall be made for yardage excavated for the construction of culvert inlet and outlet ditches, crown or grader ditches, and slope rounding shown on the plans or as directed by the engineer, but shall be incidental to completion of item 203(3)" (GX 1(A)).

⁴³The entry in the project inspector's diary pertaining to their visit is as follows:

"Dave Herrera from Area arrived on project site with Jay, wanted to see Mr. Sharp about complaint made by Mr. Sharp himself about slope stakes. Grade Form. Couldn't (grade) by them or go by the slope stakes. Sharp wasn't on project but they talked with Archuleta, they agree that it wasn't no problem after all, and they all left project * * *"

March 25, 1983

participate along with his grade foreman and Messrs. Dave Herrera and Jay Herrera. From the fact that Mr. Sharpe failed to mention slope stakes at this station thereafter, the project inspector concluded that the slope stakes at station 162+00 were all right.

During October the Silver Peak Construction Co. (subcontractor responsible for building the bridge across the Florida River) worked on the temporary crossing and finished putting the culvert across the river.

20. In early November a number of large boulders were encountered in the vicinity of station 253+50. On November 6, 1975, the contractor dynamited sandstone at station 240+00 and at station 241+00. In mid-November a substantial portion of the contractor's equipment was sabotaged.⁴⁴ One of the problems encountered involved getting the required compaction on the materials used for the installation of the culvert at station 3+50. A major question confronting the parties and the bridge subcontractor was whether to proceed with the pouring of the concrete for the bridge, and, if so, the protective measures required in order to be in compliance with the contract specifications.

The pouring of the concrete for the bridge was the principal activity in December. Except for matters related to the concrete pour, the contractor's activities during that month were almost entirely confined to installing fence, driving steel posts, and installing right-of-way monuments. In January of 1976, the contractor's fence crew continued to install barbed wire fence, began installing braces and strain panels, and commenced clearing right-of-way in some areas. Substantially the same pattern was followed in February, with the contractor's fence crew continuing (i) to work on the fence line, (ii) to install steel posts, and (iii) to work on strain panels.⁴⁵ During February the contractor installed most of the gates and continued to work on the right-of-way monuments (GX 9, Project Inspector's Diary, at 52-81 (reference for Finding 20)).

21. Beginning in March and continuing through May, activities on the project involved a variety of things among which were (i) preparing reference markers and right-of-way monuments;⁴⁶ (ii) excavating and doing other work preliminary to the installation of rip rap and actually installing the rip rap under the bridge; (iii) doing work preparatory to and installing culverts;⁴⁷ (iv) mixing and

⁴⁴ Almost all of the contractor's heavy equipment was sabotaged by an unknown party pouring sand and dirt into each of the heavy equipment's crank case oil, hydraulic fuel, and diesel fuel tanks during a weekend when no work was in progress and no contractor's employees were on the job site (GX 12, trip report (Nov. 24-25, 1975), at 2).

⁴⁵ On Feb. 23, 1976, Mr. Archuleta was informed that the strain panels he had installed were incorrectly set in that the posts on the side of the strain panels were 25 feet apart instead of 12½ feet apart as shown on the plans.

⁴⁶ On Mar. 9, 1976, virtually all the monuments installed up until that time were rejected. They were rejected because all but a few of the monuments were not centered and also because they were poorly made and lopsided (GX 9 at 82).

⁴⁷ An entry in the project inspector's diary for May 27, 1976, reads as follows:

"Earl says * * * he is installing another culvert at 200+00 (which was damage[d] when they blasted). The damage[d] one might not hold up the compaction of backfill; he has change[d] culvert with the one that is at the approach at

Continued

compacting materials for fill; (v) coping with flood conditions; (vi) ripping, excavating, and backfilling; and (vii) blasting where ripping was not considered to be feasible. During this period, the Silver Peak Construction Co. (bridge subcontractor) was active on the project in a number of ways including the destruction of a damaged wing wall and its replacement; the installation of reinforcement rebar and forms for approach slabs; and the installation of guard rails at the bridge site.

The inspector's diary for March 23, 1976, reports the Florida River as rising. On March 27, 1976, the contractor decided to open up the dike, dig culverts out, and let the water run through. A few days later on April 1, the contractor dug a trench to drain the water from the flooded area. On April 5 and 6 the contractor excavated a channel on the southeast side of the bridge to divert water from the rip rap area. Rising water continued to be a problem for the contractor in the succeeding month. On May 19, it was reported (i) that the water was backing up to the old county bridge; (ii) that the culvert installed across the river was not doing the job; (iii) that Mr. Sharpe had a backhoe at the culvert⁴⁸ to excavate a channel alongside of it; (iv) that there was too much water in the channel causing the material around the culvert to erode with the result that the culvert was being washed downstream together with a small amount of rip rap.

Obtaining the degree of compaction required by the specifications was a major problem confronting the contractor in May. While the composition of the materials being used as backfill was an important consideration, the project inspector attributed most of the difficulties experienced by the contractor to the methods it employed in attempting to achieve the required compaction on the materials used. The inspector's diary records (i) that on May 3, 1976, the contractor could not get the right mixture to compact the backfill at station 3+50;⁴⁹ (ii) that on May 10 the material being used around abutment 1 had to be removed because below 6 inches the material was either dry or not compacted at all; (iii) that while inspecting a culvert at station 134+53 on May 14, the inspector found the material around the inlet and outlet not to have been compacted at all; and (iv) that on May 18 the material around the culvert at station 134+53 failed to pass the compaction test because the lift on the backfill was a foot and only the top 6 inches were compacted⁵⁰ (GX 9, Project Inspector's Diary, at 81-108 (reference for Finding 21)).

station 267+00; it's a little large, but won't hurt to install at 200+00, and use damage[d] one at station 267+00

(GX 9 at 104, 105).

⁴⁸In the course of working around the culverts, the contractor damaged some of them, as is evidenced by entries in the inspector's diary on a number of occasions (see, for example, GX 9 (Apr. 28 and May 13, 18, 1976)).

⁴⁹An entry made in the inspector's diary on the following day states: "Culvert crew installe[d] culvert at station 3+50; they have not mix[ed] material * * * the backfill material is dry * * * they have never worked around culverts before. Joe Dau doesn't understand that material has to be mix[ed] well in order to compact * * *" (GX 9 (May 4, 1976) at 94, 95).

⁵⁰Also in May the contractor's crew blasted [dynamited] the inlet and outlet of the foundation for culvert at station 200+00 (GX 9 (May 24, 1976) at 102).

March 25, 1983

22. From June to the completion of the project in August of 1976, the contractor continued to rip,⁵¹ excavate and backfill, to install culverts, and to place rip rap. During that period the contractor cleared ditches and slopes. When deemed necessary or when requested by the contractor to do so, the Government project personnel ran profile centerlines, took elevations, and checked slope stakes.⁵² Throughout a portion of this period, the Silver Peak Construction Co. (bridge subcontractor) was engaged in the work of pouring concrete at the bridge site on an approach slab in the area of abutment 2 (June 4, 1976); preparing and installing forms for cattle guard (June 14, 15, 18, and 22, 1976); and pouring concrete for cattle guard at station 0+00 (June 24, 1976).

In this period there was still some activity in extremely rocky areas of the project. On June 30 the contractor began to excavate and to backfill what the inspector characterized as "all that rock" in the area from station 242+00 to station 258+00. The following day the contractor was still excavating and backfilling in the same area. On July 27 and again on July 28 the contractor's crew was involved in preparing the base for the culvert at station 246+00. Installation of the culvert at station 246+00 was apparently completed on August 6, 1976.

Noted in the project inspector's diary on July 16, 1976, was the fact that on that date Mr. Sharpe had moved all of the contractor's equipment to the yard.⁵³ Also noted was the visit to the site on that date of Messrs. Holmes, Fattor, and Garcia.⁵⁴

On July 28, 1976,⁵⁵ Mr. Sharpe advanced the charge that the Government had changed the grade for the culvert base at station 246+00. After going to that station in the company of Mr. Sharpe, Mr. Archuleta and his assistant (Charlie Cook), the project inspector (Mr. Norris) informed Mr. Sharpe (i) that the grade at station 246 had

⁵¹ Occasionally blasting was necessary, as was the case on June 9 (ditch along road from stations 197+30 through 203+80), June 25 (in area of stations 211+00 through 213+00 on ditch), July 6 (stations 176+00 through 178+50), and July 13 (same area as blasted in previous year).

⁵² The following entry is quoted from the project inspector's diary June 2, 1976: "While we're available Jay, Earl and I checked slope stakes and grade on each stake to be sure that it is correct, I believe that (there) won't be any problems with them * * *." On July 21, 1976 the project inspector confirmed to Earl (Archuleta) that the elevation about which he had inquired had been checked and that it was right on (GX 9 at 109, 118).

⁵³ In the report concerning his trip to the project on July 16, 1976, Mr. Holmes notes (i) that Mr. Jay Herrera stated an error had been made in the setting of the grade stakes at the section of the project north of the Florida River Bridge; (ii) that the contractor stated the error had caused them a day's work in performing rough grading, which they would now have to do again when they excavate the subgrade to the corrected stakes; and (iii) that the BIA agreed to compensate the contractor under the unforeseen work section of the contract for the contractor's equipment and labor used in this 1 day's rough finishing operation; and (iv) that this was acceptable to the contractor (AF 12).

⁵⁴ In the same trip report (note 53 *supra*) Mr. Holmes states:

"It was explained to the contractor, that even though some errors were made in the construction staking, the contractor would be paid for the entire amount of earthwork excavation work performed. The Agency Roads Survey crew plans to recheck section the entire project upon completion of the road construction, and the final excavation quantity will be derived by a computer. The only excavation quantities which would not reflect in these calculations, would be in those areas, if any, where the contractor may have underexcavated, in accordance with the original slope stakes, and later refilled to meet the final bluetop grade stakes."

(AF 12, Report (July 16, 1976), at 2).

⁵⁵ See GX 9, Project Inspector's Diary (July 28, 1976), at 119-21).

not been changed; (ii) that they had set offset stakes 5 feet away from the inlet; (iii) that what had been involved was a cut of a foot to base; and (iv) that they had only had to excavate five-tenths. Mr. Archuleta asserted, however, that he had excavated a foot and that he had laid a foot of new material for base. He also stated that he wanted a test on the base. Mr. Norris responded by stating that the material had a large quantity of rock on the base; that the specs called for rock not larger than 2 inches; and that tests could not be taken until the material was removed.

After disputing Mr. Sharpe's assertion that the requirement for a cam on the culverts had originated with him, Mr. Norris stated (i) that Mr. Archuleta had put in the cam himself because he had on culverts in the past; (ii) that they all had had cams of five-tenths; (iii) that after Mr. Norris had indicated that he was not sure about a cam being required on a culvert, Mr. Archuleta said that he would drop the cam two to three-tenths; and (iv) that he had instructed the maintainer operator to remove excessive material. Immediately following the report made of these exchanges between the parties named, the diary states:

Sharp (then) proceeded to back of his truck and pick up a shovel waving around and "said that we all was going to settle it there." I explain to him about the off set stakes, but he didn't want any part of the (explanation). When he picked up the shovel to hit me, I said to him that I was (leaving); he (then) tried to put his finger on me I just walk by him to the truck. While I was [leaving] Earl called and said that I had been trying to screw them up all this time. Sharp and him said why hasn't Mr. Herrera been on project. Sharp was so upset that he wanted to know who was going to pay for the time [lost] not installing the culvert. I called Jay on the radio and radio was loud enough for Sharp & Earl to hear, that they only had to excavate 5 tenths, but that didn't do them no good. I left.^[56]

(GX 9 at 108-124 (reference for Finding 22)).

23. On September 3, 1976, Mr. Holmes visited the jobsite for the purpose of attending a Federal Highway Administration (FHWA) inspection of the project conducted by Messrs. Bill Dixon and Gary LaPorte. Also in attendance at the inspection were Mr. Jay Herrera, and Ms. J. P. (Joanne) Gibson (president of appellant corporation), Mr. Sharpe, and Mr. Archuleta, Central Colorado Contractor's, Inc.

Mr. Dixon stated (i) that he was not too concerned about the nonuniformity of some of the excavation slopes or the varying widths of some of the roadside ditches⁵⁷ and (ii) that the FHWA would accept the project when the BIA was satisfied that all of the final inspection deficiencies had been corrected.

At the request of the contracting officer and the area road engineer, Mr. Holmes met with the contractor personnel mentioned above to

⁵⁶At the hearing no testimony was elicited from Mr. Sharpe concerning the inspector's report from which we have quoted in the text.

⁵⁷In his report concerning his trip to the project on Aug. 25, 1976, Mr. Holmes states:

"At several areas throughout the project, the contractor did not achieve typical section. The side ditches are narrow and the excavation slopes are not uniform. It is believed this condition resulted from both the contractor's inaccurate construction methods and also some errors in the slope staking of the project."

(AF 12).

March 25, 1983

discuss their various complaints. Ms. Gibson complained that the BIA had required the contractor to furnish twice as many strain panels in the right-of-way fence construction than the plan drawings indicated were needed. In his response, Mr. Holmes stated that the agency's determination that strain panels should be placed every 331 feet was correct as the contractor had elected to use steel fence line posts.⁵⁸

Ms. Gibson also complained about the contractor's construction equipment not having been permitted to travel across the completed Florida River Bridge. Mr. Holmes responded by stating that Mr. Herrera had closed the bridge to all traffic for safety purposes, as the metal beam guardrail installations at the bridge approaches would not be installed until the road is surfaced in future years. He also stated that Mr. Herrera wanted to avoid the possibility of some overloaded heavy scrapers crossing and damaging the bridge, which is designed to carry legal load limits only.

Another complaint made by Ms. Gibson concerned alleged delays in the staking⁵⁹ of some of the right-of-way monument locations. Mr. Holmes told her some of these locations were on embankment slopes and staking could not be done until the contractor completed the dirt work item (AF 12, report of trip of Sept. 3, 1976).⁶⁰

24. Mr. Holmes visited the project site again on September 23 and 24, 1976, for the purpose of representing the contracting officer under the authority of a September 22, 1976, letter and for the further purpose of commencing the final audit of the project.

On the afternoon of September 23, 1976, Ms. Gibson and Messrs. Sharpe, Archuleta, Jay Herrera, and Holmes reviewed the areas of the project where the contractor alleged that it had encountered unforeseen work. As a result of this review, BIA agreed to reimburse the contractor for unforeseen work in the areas (i) between stations 0+00 to 3+00 (refinishing an excavation slope due to the relocation of slope stakes); (ii) between stations 5+00 to 6+00 (reworking of a cut slope at the existing road approach junction with the project); (iii) at station 20+70 (additional work found to be unforeseen was performed at this station); (iv) at station 245+00 (unforeseen work amounting to a quantity of 2,900 cubic yards of excavation was to be added to the final earthwork quantities);

⁵⁸ Immediately thereafter the report states:

"Miss Gibson said the note on the plans could be interpreted another way. I asked her why they did not request, through the Contracting Officer, a decision on this matter before undertaking and building the entire 50,000 linear feet of right-of-way fencing item. She stated she thought the Agency Road Engineer was the final authority on contract matters. I told her she knew government contract procedures better than this."

(AF 12).

⁵⁹ Addressing another complaint in the report of the Sept. 3, 1976, trip to the project, Mr. Holmes states at page 2:

"Mr. Herb Sharp complained about the staking errors they had encountered throughout the job. I told Mr. Sharp he was kicking a dead horse, that the BIA had already agreed [at] a special meeting on June 24, 1976 with the contractor, to compensate for any extra work caused by the problems in the job survey staking."

(AF 12).

⁶⁰ It was on Mr. Holmes' visit to the project on Sept. 3, 1976, that he heard for the first time that one of Mr. Herrera's inspectors had been physically threatened by Mr. Sharpe during the course of the project construction (AF 12).

(v) request for unforeseen work involved in installation of perforated metal pipe culvert as directed by BIA was to be checked against field records (to be paid for in final audit); (vi) work north of Florida River bridge (on July 16, 1976, BIA agreed to pay for additional work performed in this area as a result of a staking error).⁶¹

The contractor withdrew the unforeseen work payment request involving the area between approximately stations 60+00 to 100+00 for alleged cross-hauling through four balance points after Mr. Herrera pointed out that these operations had been done at the contractor's own discretion. The contractor also withdrew the unforeseen payment request pertaining to station 95+00 when Mr. Herrera pointed out that the extra work involved in shaping the cut slope was caused by inaccurate construction methods and not due to any staking problems.

Neither approved nor withdrawn, however, and to be filed as claims with the contracting officer were the following items:

A. Placement of fence strain panels at a spacing of 331 linear feet in lieu of 662 linear feet shown on the plans when timber posts were used.

B. Damages allegedly suffered as a result of the contractor being denied the right to use the Florida River Bridge for his construction equipment traffic.

C. Claim for alleged re-excavation of 2 feet of roadway embankment between station 98+00 to 101+50 (claim denied as agency survey records do not substantiate this claim).

D. Request for extra payment for the excavation of a sandstone rock bluff between stations 239+00 to 249+00⁶² (AF 12, report of trip on Sept. 23 and 24, 1976).

25. The release of claim signed on behalf of Central Colorado Contractors, Inc., by Ms. Gibson on December 21, 1976, acknowledged receipt of final payment under the instant contract in the amount of \$66,006.42 after which it stated:

The undersigned hereby does remise, release, and discharge the Government, its officers, agents and employees of and from any and all claims and demands whatsoever under or arising from the said contract, except specified claims in stated amounts listed as follows:

⁶¹In her letter to BIA of Sept. 28, 1976, Ms. Gibson referred to the meeting on the job site on Sept. 23, 1976; and submitted the following unforeseen work charges or force account charges:

" Station 00 to station 3	\$987.84
Station 5 to 6	403.62
Station 20 + 70	394.36
Station 245 (to be incl. in unclass. excava. yardage)	2,465.00
Station 269 to 282	5,613.27
Station 76 + 40 to 77 + 50 (Perforated Pipe)	4,273.76"

The letter concluded with the statement: "We wish to advise at this time that there will be additional claims filed in connection with the above-referenced project" (GX 16).

⁶²Commenting upon this claim, Mr. Holmes states: "I informed the contractor this quantity would be reflected in the final pay quantity and no other method of payment was necessary. The contractor argued they were told by a representative of the BIA before they bid the project that the sandstone bluff would be left intact" (AF 12, report of trip on Sept. 23 and 24, 1976).

March 25, 1983

Item

206(2) Bridge Excavation

623(1) Right-of-Way Marker

203(3) Unclassified Excavation

Amount of Liquidated Damages Changed

Claim due to not being allowed to use bridge for hauling.

Claim at Stations 98 to 101 + 50 - Filled to slope stakes; then required to cut down to grade stakes given by engineer. Filled back in additional one ft. to get rid of slide. Cut down before slide approximately three feet.

Claim at Stations 227 + 90.20 - 250 + 74.60.

When shown project before bidding advised slope stakes would catch under rock cliff. Due to errors in staking caused additional time and expense to get on top of rock cliff. Dollar amount of claims not available at this date as additional time required to check information from Bureau of Indian Affairs.

26. By letter under date of June 20, 1977,⁶³ the contractor submitted claims under the instant contract totaling \$54,814.81.⁶⁴ Excluding the two claims on which the Government has admitted liability (Finding 1, Claim 9), the remaining claims are described in the letter in the following terms:

Item 203(3) Unclassified Excavation:

Unable to determine whether cross sectioning is or is not correct.

Liquidated Damages \$4,500.00

Do not know basis upon which partial time was figured nor basis of final outcome of project; also due to extra time it required to do project because of errors in staking.

Non-use of Bridge \$21,700.16

From Station 267 + 36 to Station 285 + 1 on print out shows 27,188 c.yd. of cut material hauled to other side of bridge. Average scraper load 25 c.y. or 1,088 trips; waiting time for scraper to return 15 min. per trip or 272 hr.

272 hr. x \$8.15 (Operator)	\$2,216.80
20% Tax Ins., etc.	443.36
272 hr. x \$70.00 (Rental Rate of Scraper)	19,040.00
	<hr/>
	21,700.16

All of this rock material was wasted on the other side of bridge from R-O-W to R.O.W.

⁶³ In the report concerning his trip to the project on June 28, 1977, Mr. Holmes notes that Mr. Herrera and he had researched the Agency Roads Office records regarding each of the allegations contained in the contractor's claim letter of June 20, 1977, and that the two of them accompanied by Mr. Romero had reviewed the various sites of the project mentioned in the contractor's claim letter. Thereafter, the report states: "Although some errors were made in the BIA's surveying and staking of the project, the BIA has met and settled with the contractor last year regarding their previous complaints about these problems" (AF 12).

⁶⁴ In the same report (note 63 *supra*), Mr. Holmes states: "The contractor most likely lost money in the project but not due to the BIA's surveying errors. The contractor's main reason for the probable loss of money was due to an unrealistic low bid, which was approximately \$150,000.00 below the next low bidder" (AF 12).

Station 98 to 101 + 50 \$1,622.65

As explained in the Release of Claims we filled to slope stakes; then required to cut down to grade stakes given by engineer. Filled back in additional one ft. to get rid of slide. Cut down before slide approximately three feet. This was to have been cross sectioned by Project Engineer at time. However, as he says he did not we are using print out figures which show 1,909 c.y. of cut @ 85 per c.y.[65]

(AF 1, Exh. A).

27. In the course of her testimony at the hearing, Ms. Gibson stated: (i) That the record she maintained for the company reflected the total costs on the job; (ii) that such records do not show the actual expenditure of the sums of money shown in the schedules submitted in support of the various claims; 66 (iii) that the schedules do show the amount paid to employees of the contractor; 67 (iv) that the amount claimed for equipment is based upon using the rental rates on equipment for the years 1975 or 1976 as applicable; (v) that included in the contractor's records are receipts for all bills paid on the job; and (vi) that the schedules do reflect actual expenses as recorded in the contractor's books from daily time cards and also the weekly payroll sheets required to be submitted to the Government in connection with the project.

Mr. Thomas Dirk (an auditor for the Office of the Inspector General, Department of the Interior) testified extensively in support of an audit report (GX 10). The report states that the scope of the audit had been limited to those records used by the contractor in preparing its claim and included such records as employees' time cards, payroll summaries, and invoices. Noted in the audit report was the fact that the contractor did not maintain any job diary or progress schedule which would have served as a record of events occurring during the performance of the contract. Responding to a question posed by appellant's counsel as to why he considered the absence of such records to be a deficiency in the contractor's accounting system, Mr. Dirk

65 Also submitted as a claim with the June 20, 1977, letter was the following:

"Station 227 + 90.20 to 250 + 74.60..... \$26,240.00

"Due to having to excavate rock above shale because of errors in slope staking, which Assistant Project Engineer was advised by Contractor before any work performed at this location, it caused us to have to drill, shoot and rip rock which we would not have otherwise encountered adding additional cost of time, men, machinery and materials. Quantities for this location from:

Print out sheets.....	136,552	c.y. cut
Plan Quantity.....	110,312	

(AF 1, Exh. A, at 2).

26,240 c.y. cut at \$1.00"

66 Schedules 1 through 6 were submitted by appellant as attachments to its answers to Government's interrogatories (GX 20). Schedule 1, 2, 4, and 5 were amended by AX 8, 9, 10, and 11 respectively (Tr. 336-41). The amount claimed for boulders (initially included in Schedule 6 (GX 20) was greatly reduced in amount and is now represented by AX 14 (Tr. 395).

67 Mr. Sharpe testified (i) that the only records kept by him or anyone under his supervision were the daily time cards; (ii) that he had not kept a project diary; and (iii) that he did not maintain any kind of an equipment use summary showing when and where the contractor was using the equipment (Tr. 291-92).

March 25, 1983

stated: "From an audit standpoint, there's no evidence to be able to rely upon, that the cost and pricing data used to prepare the claim was current, accurate or complete" (Tr. 665).

The audit report also seriously questioned whether any sound basis existed for prorating costs between regular contract work and unforeseen contract work in the schedules submitted in support of the claims asserted. The following exchange took place between Mr. Dirk and appellant's counsel upon cross-examination:

Q. Okay. Now the cards that you saw the proration on were done at the time that the time cards were turned in, isn't that correct?

A. No.

Q. They were not?

A. No.

Q. Now, where did you obtain this data?

A. The schedules were supporting the contractor's claim and expressed these individual costs between the contract and the claim. If you look at the time cards, there's no evidence on the time cards showing whether this man worked unforeseen work or regular contract work.

(Tr. 671; Tr. 345-52, 653-71, reference for Finding 27).

28. While with respect to the caprock, Mr. Sharpe testified that he protested to the Government people day in and day out, he acknowledged that no written protest was filed with the contracting officer.⁶⁸ According to Mr. Jay Herrera an oral protest involving the caprock was filed with him but not until some time in September or October of 1975 after Mr. Romero's departure from the project (Finding 6). Although not specifically related to the caprock, an entry in the inspector's diary on October 29, 1975, shows that some time prior to that date Mr. Sharpe had complained about slope staking errors and that Mr. Dave Herrera from the area office had come out to the jobsite to investigate the complaint (note 43 *supra*).

Exactly when Mr. Holmes was apprised of the allegations made by Mr. Sharpe about having been told that the caprock would be left intact is not clear from the record. It is clear, however, that he was aware of the allegations by the time of his visit to the project on September 23 and 24, 1976 (note 62 *supra*). During the course of a walk through of the project on September 23, 1976, Mr. Holmes was informed of a number of claims which were also excepted from the terms of a release of claims (AX 7) executed by Ms. Gibson under date of December 21, 1976 (Findings 24 and 25).

Not raised at the time of the September walk through, not excepted from the terms of the release of claims, and not included in the

⁶⁸ In the course of her testimony, Ms. Gibson acknowledged (i) that she was responsible for the correspondence of the company in connection with the job; (ii) that on July 15, 1976, she had sent a telegram to the contracting officer saying that the job was going to be closed down unless a dispute involving stakes north of the bridge was staightened out; (iii) that on July 16 a meeting was held on the jobsite; and (iv) that the dispute with which the meeting was concerned is not presently before the Board (Tr. 355-56).

complaint⁶⁹ were the claims filed for the first time in appellant's answers to Government's interrogatories executed by Ms. Gibson under date of March 28, 1979 (GX 20). These claims⁷⁰ were filed over 2½ years after the job was determined to be substantially complete on August 2, 1976, and over 2 years after the release of claims was submitted in connection with the final payment voucher.

Credibility of Witnesses

Discussion

Questions squarely raised by this record involve the credibility of three of appellant's witnesses and two of the Government's witnesses. At the hearing it was suggested by the hearing member that counsel for the parties should brief the question of the credibility of witnesses who had testified as to prebid visits to the site and whose testimony in some areas was clearly in conflict⁷¹ as to what had transpired during the course of such visits. Appellant's counsel has briefed the questions related to the issue of credibility of witnesses (AOB 3-8; ARB 1-4). Except for a cursory reference to the subject in the Government's posthearing brief,⁷² the Department counsel has not acted upon the Board's suggestion.

Mr. Siegrist (an unsuccessful bidder on the project) testified that in response to a question posed by him during a tour of the site prior to bidding, Mr. Romero (the project engineer) had stated that the slope stakes would be below the solid rock outcrop visible in the vicinity of station 242+50. Mr. Siegrist also testified that some time after work had started on the project he had informed the contractor of the representation made to him by Mr. Romero. Upon cross-examination, the testimony given by Mr. Siegrist was not impugned in any way.

According to Mr. Sharpe, it was on one of his prebid visits to the project site that he was told by Mr. Romero that the contract work would be underneath the caprock and that the bid submitted reflected the contractor's reliance upon the information so received. Mr. Sharpe also testified that on another of his prebid visits to the site he had been told by Mr. Jay Herrera that the required work would be underneath the caprock.

Mr. Sharpe's testimony was corroborated in part by Mr. Snider who testified that during a prebid visit to the site in the company of

⁶⁹ Although the complaint filed in October of 1978 did not include a claim for boulders, it did include the following paragraph under Count III, Item 203(3) - Unclassified Excavation at page 4: "5. Appellant is informed and believes that boulders of nine (9) square feet or more were not measured nor was Appellant compensated for the excavation and removal of said boulders as provided in the contract."

⁷⁰ Included among such claims were the following: (i) Excavation from stations 95+00 to 97+50, and (ii) excavation from station 92+40 to station 93+90; and the boulder excavation claim (GX 20, schedules 4 and 6).

⁷¹ For the legal principles to be applied to the testimony offered generally by a witness whose credibility is in issue and whose testimony has not been accepted in specific areas in dispute, see our discussion in *Meva Corp.*, IBCA-648-6-67 (Aug. 18, 1969), 76 I.D. 205, 222-26, 69-2 BCA par. 7838 at 36,428-30. See also *Scona, Inc.*, IBCA-1094-1-76 (June 16, 1981), 88 I.D. 590, 593-600, 81-2 BCA par. 15,180 at 75,123-28.

⁷² Apropos of this subject the Department counsel states: "There was a suggestion that some comment on the credibility of witnesses would be appropriate in this case. The record cited above is ample documentation of the 'Credibility' or lack thereof of CCC witnesses. The Government does not feel it necessary to belabor the matter" (GPHB 34).

March 25, 1983

Mr. Sharpe and others including Mr. Romero, the latter had responded to a question by stating that the stakes would fall below the bluffs (*i.e.*, caprock). There was no corroboration by Mr. Snider, however, of Mr. Sharpe's testimony that Mr. Jay Herrera had told him that the required work would be beneath the caprock. As to Mr. Snider's testimony concerning what Mr. Herrera may have told Mr. Davis when they left the car and walked up the slope, the Board notes that this testimony is clearly rank hearsay (Findings 6 and 7).

Unequivocally denied by Mr. Romero were the statements attributed to him by Mr. Siegrist or by Messrs. Sharpe and Snider.⁷³ Mr. Jay Herrera testified that he had never told Mr. Sharpe or anyone else that the slope stakes would not go on top of the caprock (Findings 9-11).

All five of the witnesses whose testimony is discussed above were testifying over 4½ years after the prebid site visits to which their testimony relates and without having any contemporaneous documents to which they could refer to refresh their recollections. At least three of the five witnesses had made more than one prebid visit to the site. In these circumstances, the Board attaches little significance to the fact that all of the witnesses had difficulty recalling who their companions were or what had occurred on a particular prebid site visit. With the caprock so prominent and so forbidding a feature of the terrain, however, it seems unlikely that even after so long a time men familiar with construction (as all of the witnesses were) would fail to remember what they had said or what they had heard in reference to where the slope stakes would fall with respect to the caprock.

It is true, of course, that what Mr. Siegrist may have been told by Mr. Romero with respect to where the slope stakes were in reference to the visible outcrop of rock has no direct bearing upon what Mr. Sharpe may have been told on a different site visit.⁷⁴

Mr. Siegrist's testimony does establish, however, that in approximately early April of 1975, he had had a conversation with Mr. Romero in the vicinity of station 242+50 (the midpoint of the caprock area giving effect to the testimony of Government witness Holmes) and that Mr. Romero had advised him that the slope stakes would be below the solid rock outcrop visible in the area. Although Mr. Siegrist did not tour the site with Messrs. Sharpe and Snider, and although it has not been shown that they were even on the site on the

⁷³The Board recognizes that Mr. Snider was in a subordinate position to Mr. Sharpe at the time of the prebid site visit; that he was still in the same subordinate position at the time the Government acknowledges that it received a protest from Mr. Sharpe about the caprock in September or October of 1975 following Mr. Romero's departure from the project; and that this relationship to Mr. Sharpe could have influenced the testimony that Mr. Snider gave. Mr. Snider testified in a forthright manner, however, and no serious effort was made to impugn his testimony upon cross-examination.

⁷⁴It is at least conceivable that Mr. Sharpe did not ask Mr. Romero any questions as to where the slope stakes would fall in relation to the caprock and that the protest the Government acknowledges it received from Mr. Sharpe in September or October of 1975 came after Mr. Siegrist had informed the contractor of the representations made to him by Mr. Romero (*see note 17 supra*). In these circumstances, the corroboration of Mr. Sharpe's testimony by Mr. Snider was of paramount importance to the establishment of appellant's case.

same date, it appears to be virtually certain that all their visits to the jobsite occurred over a relatively short time span.

Decision

[1] Mr. Sharpe having testified that on the occasion of a prebid site visit Mr. Romero told him that the contract work would be beneath the caprock and that testimony having been corroborated by Mr. Snider, the Board accepts Mr. Sharpe's testimony on this disputed question as true. Mr. Sharpe's testimony that Mr. Jay Herrera had told him that the required work would be beneath the caprock is not accepted by the Board, however, since Mr. Herrera's testimony is to the contrary and there is no corroboration of Mr. Sharpe's testimony with respect to this matter by Mr. Snider or any other witness. In this connection the Board notes that appellant clearly has the burden of proving the claim to which this testimony relates.

General Observations

Perhaps the most surprising aspect of this appeal is the protracted delay by the contractor in submitting its claims in writing to the contracting officer for decision. It does not appear that the delay can be attributed to ignorance on the part of those concerned. The Board notes that at the time the instant contract was awarded, Ms. Gibson had had over a quarter of a century's experience in the field of Government contracting in various capacities and Mr. Sharpe had been actively involved in the construction business for about the same length of time.

Protracted delays in presenting claims has always involved the contractor in taking unnecessary risks, even if the denial of the claim was not specifically grounded upon the failure of a contractor to give timely notice of a claim as required by a particular equitable adjustment provision.⁷⁵ The nature of the risk has greatly increased, however, since the principal equitable adjustment provisions included in standard form 23-A were revised in 1967. Commenting upon an important feature of these revisions in *Hartford Accident and Indemnity Co.*, IBCA-1139-1-77 (June 23, 1977), 84 I.D. 296, 300-01, 77-2 BCA par. 12,604 at 61,075, we stated:

The radical revisions, however, were in the "Changes" clause which for the first time included provisions covering constructive changes and which provided that except for claims based on defective specifications no claim involving a constructive change should be allowed for any costs incurred more than 20 days before the contractor gave the contracting officer written notice thereof. The mandatory nature of the 20-day notice requirement was not only reflected in the language of the clause itself but was underscored by the fact that accompanying the revised clause and published at the same

⁷⁵ See *Kent DOT CAB No. 67-35* (Mar. 28, 1969), 69-1 BCA par. 7590 at 35,243-44 in which it was stated:

"There was no contemporaneous objection to the acceleration orders. The appellant and Herkob complied and for a long time submitted no claims. On February 24, 1965, Herkob wrote that it intended to submit a delay claim but made no mention of this acceleration claim. The first time the acceleration claim was made was in Herkob's letter of April 6, 1965, 7 months after the events upon which it was based. The failure to make any contemporaneous objection to the Contracting Officer's orders, and the long period before asserting the claim, raise presumptions against its validity." (Footnote omitted.)

March 25, 1983

time was an Appendix in which it was stated: "* * * The 20-day limitation is not 'waiverable,' and costs may not be recovered contrary to this limitation." [Footnotes omitted.]

According to the Government it was desirous of avoiding any technical defenses and consequently had not insisted on the various time limitations in the contract (GPHB 33). The Board notes the absence of citation to any authority in support of the purported waiver of the mandatory notice provisions of the Changes Clause (note 6 *supra*). It is unnecessary for the Board to address the question in the circumstances of this appeal, however, since except for claims involving defective specifications,⁷⁶ or those involving admission of notice by the Government, none of the remaining claims are considered to be meritorious.⁷⁷

Claim 1 - \$93,441.92

Excavation from station 227+90.20 to station 250+74.60

[2] The principal element of this claim is the claim for caprock. By letter of June 20, 1977 (AF 1, Exh. A), the claim as presented was in the amount of \$26,240. In both the notice of appeal and the complaint, the claim was stated to be in the amount of at least \$50,000. In appellant's answers to the Government's interrogatories, the claim was raised to \$105,456.36 (GX 20, Schedule No. 1). At the hearing the amount of the claim was reduced to \$93,441.92 (Finding 1).

In its complaint appellant asserts that all work performed at the above-cited locations was unforeseen and that it should be compensated in accordance with Clause 3 (Changes) of the General Provisions or Article 11 (Unforeseen Contract Work) of the Special Provisions⁷⁸ or under both (AOB 26). The Government advances a number of defenses to the claim asserted. After noting that paragraph 203(3) of the bid schedule shows unclassified excavation to be in the estimated amount of 397,530 cubic yards adjusted to 394,195 cubic yards and calling attention to the definition of unclassified excavation in paragraph 203.04 (note 5 *supra*), the Government's brief states: "Hence, it is apparent that this contract covered all types of material, caprock, bedrock, surface boulders, whatever was encountered within the construction limits of the project as shown on the plans" (GPHB 14).

Another Government defense is premised upon the relationship between the total additional excavation involved in this area of 26,240 cubic yards to the estimated quantity in the bid schedule

⁷⁶ See *H. M. Byars Construction Co. IBCA-1098-2-76* (June 7, 1977), 84 I.D. 260, 77-2 BCA par. 12,568, in which the Board found the numerous survey errors came within the defective specifications exception to the 20-day notice provision of the Changes Clause.

⁷⁷ The Board is loath to invoke the 20-day notice provision in circumstances such as are present here, *i.e.*, the case was tried and briefed on the supposition that compliance with the notice provision had been waived.

⁷⁸ For work shown to be unforeseeable, appellant will receive an equitable adjustment under the Changes Clause; hence, it is not necessary to consider separately the question of the application of Article 11.

(136,552 cubic yards of actual excavation - 110,312 cubic yards estimated quantity) and the assertion that this additional excavation is covered by section 104.02 and sections 109.02 and 109.03 (GPHB 22-23). Under the cited sections (text, *supra*), the contractor is to be paid the unit prices specified in the contract for the work performed unless the quantity of work to be done or material to be furnished under any major item of the contract is increased or decreased by more than 25 percent of the quantity stated in the bid schedule. In the event of an increase or decrease of more than 25 percent in the bid schedule quantity, the contractor is entitled to an equitable adjustment on the terms stated in section 104.02.

In the preceding section we found that the project engineer had told Mr. Sharpe that the contract work would be beneath the caprock.⁷⁹ Mr. Sharpe has also testified that the bid submitted reflected the contractor's reliance upon the information so received. A question remaining to be resolved is whether the contractor could properly rely upon the representations made to Mr. Sharpe by the project engineer. Both Mr. Siegrist and Mr. Sykes considered that a bidder should be able to rely upon statements made to him by the project engineer as to where the slope stakes would be set in the absence of slope stakes being there or having cross sections or a contour map (Findings 5 and 8).

In the light of the testimony summarized above, the Board finds that Mr. Sharpe properly relied upon the representation made to him by the project engineer that performance of the contract work would not require moving the caprock.

The significance of having to excavate the caprock in order to construct the road as slope staked was another subject to which appellant's witnesses testified. According to Mr. Sykes the caprock would be more expensive to move and a reasonable time for getting through the caprock would range from 20 to 30 days. In the course of his testimony, Mr. Siegrist indicated that removing the caprock would involve considerably more expense and that one of the most difficult problems they had in their work was to try to get up on top of a ledge like that and bring it down (Findings 5 and 8).

The Board finds, therefore, that having to excavate and dispose of the caprock substantially increased the cost of performing the contract work in that area of the project with a corresponding increase in the time required for accomplishing the additional work.

We now turn to an examination of the Government's contention that for excavating the caprock the contractor was entitled to be paid only the unit price specified for all unclassified excavation of 85 cents per

⁷⁹The Department counsel has called our attention to the fact that the project engineer is without any authority to change the contract terms (GPHB 9). Statements by Government officials having no authority to enter into or modify contracts may be used, however, to establish the reasonableness of a contractor's interpretation of an ambiguous contract provision. See *Kraus v. United States*, 177 Ct. Cl. 108, 118 (1966), in which the Court of Claims stated:

"If plaintiff's error was so glaringly obvious or patent that he should have discovered it or made inquiry of the contracting officer, we find it difficult to understand why such a well-qualified representative of the defendant made the same mistake. Even if the inspector had no authority to supply a binding interpretation of the contract, his actions constitute highly persuasive evidence of the reasonableness of plaintiff's interpretation."

March 25, 1983

cubic yard where, as here, no portion of the total excavation was above the percentage limitations contained in the contract (*see* paragraph 104.02, text, *supra*). It has long been recognized that unit prices do not control the amount to be paid the contractor for work performed even where the quantity of additional work falls within the variation in quantity contemplated by the contract when the cost of doing the extra work differs greatly from the stated unit price because of factors not foreseen by either party.

In *J. A. LaPorte, Inc.*, IBCA-1014-12-73 (Sept. 29, 1975), 82 I.D. 459, 75-2 BCA par. 11,486, the Board had occasion to consider an appeal under a beach nourishment contract. The contract construed in that case included an estimated quantity provision under which the Government was authorized to obtain additional quantities of beach fill at the unit price specified in the contract so long as the additional quantities did not exceed 25 percent of the original total contract price. In *LaPorte*, the Board found that the inclusion of such a provision in the contract did not preclude an equitable adjustment under the Changes Clause for clearly unforeseeable costs even though the additional quantities fell within the permissible variation.

Citing and quoting from *Morrison-Knudsen Co., Inc. v. United States*, 184 Ct. Cl. 661 (1968),⁸⁰ and noting that it was not necessary to construe "contract prices" as referring to the unit prices set out in the bid schedule as had been necessary in *Morrison-Knudsen*, the Board stated:

Here we have no similar problem of interpretation for SP-8 and Clause 60 use the terms "contract unit prices" or "contract unit price" in speaking of "adjustment" or "equitable adjustment" in connection with the 25 percent limitation. There is nothing in the two provisions to which we have referred to indicate that either of them was intended (i) to override the Changes clause, (ii) to be the *exclusive means* for obtaining a changes adjustment, or (iii) to prohibit a modification of the contract - separate and apart from a modification of the unit price - for the costs of extra work greatly differing from those compensable through unit-price payments.

82 I.D. 495, 75-2 BCA at 54,786.

As has been previously noted, in submitting its bid on the project work the contractor relied upon the information Mr. Sharpe had received from the project engineer to the effect that the work required by the contract would be beneath the caprock. Appellant's witnesses Messrs. Sharpe, Siegrist, Snider, and Sykes all testified to the great difficulty involved in excavating the caprock and the delays attendant upon this endeavor. Addressing the question as to whether the caprock could be moved for the same unit price as the other unclassified excavation, Mr. Sykes pointed out that when a contractor bids on an

⁸⁰In *James Hamilton Construction Co.*, IBCA-493-5-65 (July 18, 1968), 75 I.D. 207, 242, 68-2 BCA par. 7127 at 33,950, the Board stated:

"The emphasis in MORRISON-KNUDSEN is upon foreseeability. The Court underscored the following quotation from a previous decision: 'But we have held that clauses of this type do not control when the cost of doing the extra work greatly differs from the stated unit price because of factors not foreseen by either party' * * *"

unclassified excavation contract he has to determine how much rock there is, how much common excavation and balance that to his experience and costs and bid accordingly (note 10 *supra*). While the Government's estimate was somewhat lower, Mr. Sykes estimated that approximately 10,000 cubic yards of caprock had to be moved (Findings 5 and 8).

Based upon the above analysis, the Board finds (i) that excavating and moving the caprock involved costs of extra work greatly differing from those compensable through a unit price, and (ii) that for the cost of performing such work appellant is entitled to an equitable adjustment under the Changes Clause.⁸¹

[3] Remaining for consideration is the question of the amount of the equitable adjustment to which appellant is entitled for the type of excavation claimed for between station 227+90.2 and station 250+74.60. We note that all our discussion thus far has involved only the caprock area. The parties are apart on the question of the boundaries of the caprock area with Government witness Holmes testifying that the caprock extended from station 240+00 to station 245+00 (500 feet) and with appellant's witness Mr. Sykes testifying that the caprock area extended generally from station 237+00 to station 245+00 (800 feet) (Finding 5).

The Board notes that the one design error and the three significant errors in slope staking acknowledged by the Government at the hearing were all in the caprock area. Prior to the hearing the Government had agreed to pay the contractor for unforeseen work in a number of areas. None of the areas recognized as involving unforeseen work were located within the noncaprock area involved in this claim which extends from station 227+90.20 to station 237+00 (approximately 910 feet) and from station 247+00 to station 250+74.60 (approximately 375 feet) (Finding 24). While the Government has stipulated that cross sectioning was not done by the BIA at the time of slope staking throughout the whole job (although it should have been done) with the result being more than usual slope staking errors (Finding 4), that stipulation does not relieve appellant from having to show the damages that it suffered⁸² as a result of any staking errors which may have occurred.

According to the testimony offered by appellant's witnesses, the representations made by the project engineer upon which appellant

⁸¹ Based upon the failure of the plans to clearly indicate whether the contract work would entail the excavation and removal of the caprock, the Board considers the specifications to have been defective and the claim therefore cognizable under the Changes Clause. See *WPC Enterprises, Inc. v. United States*, 168 Ct. Cl. 1, 6, 7 (1964), from which the following is quoted:

"The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions—as well as the main risk of a failure to carry that responsibility. If the defendant chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and especially of the specifications. (footnote omitted)."

⁸² See *Jim Challinor*, AGBCA No. 75-133 (June 12, 1978), 78-2 BCA par. 13,278 at 64,924, where the Agriculture Board stated:

"As this Board has frequently pointed out, 'a contractor has the burden of proof to establish by a preponderance of substantial evidence an affirmative claim against the Government.' A. W. Burton, AGBCA No. 431, 77-1 BCA par. 12,307; * * * He 'must meet his 'essential burden of establishing the fundamental facts of liability, causation, and resultant injury' * * *"

March 25, 1983

relied related only to the caprock area. The representation so made, as well as the one design error and three significant staking errors acknowledged by the Government, undoubtedly increased substantially the costs of performing the contract work and the time required for its performance over what the contractor had anticipated at the time of bidding. A review of the record indicates, however, that a significant part of the costs incurred on the project were attributable to contractor inefficiency. As reflected in the project inspector's diary and the master diary (GX 9) to which we have frequently referred in this opinion, items of costs falling into such category include but are not limited to the following: (i) Shortage of operators to man equipment; (ii) improper installation of strain panels; (iii) removal and destruction of improperly made monuments following their installation and the remaking and the reinstallation of the replacement monuments; (iv) damages to culverts by contractor personnel; (v) sustained difficulty in obtaining the required compaction in various areas of the project due to a variety of causes, but principally attributable to the improper size of lifts, failure to properly mix materials being compacted and failure to incorporate sufficient water into such materials; and (vi) removal of nonspecification material improperly placed in fills.

The failure of the contractor to segregate its costs⁸³ between those chargeable to the contract work and the costs considered to be allocable to what it regarded as extra work at the time those costs were incurred greatly complicates the task of determining the amount of the equitable adjustment to which appellant is entitled for the claim with which we are here concerned, as does the failure of the contractor's superintendent to keep a job diary or an equipment use summary (Finding 27).

The Board finds that the contractor has failed to show that it sustained any damages as a result of any staking errors that may have been made by the Government in the area from station 227+90.20 to station 237+00 or from station 247+00 to station 250+74.60. Presuming that staking errors were made in that approximately 1,285 feet of the project, it appears that the Government's cross sectioning of the entire project after the completion of the contract work and the acceptance of the project on an as built basis (Findings 4 and 23) may have eliminated any adverse consequences to the contractor which would otherwise have resulted.

Insofar as the instant claim is based upon the excavation and removal of caprock and the correction of one design error and three significant slope staking errors acknowledged by the Government, the

⁸³ Denying a motion for reconsideration in *H. R. Henderson & Co.*, ASBCA No. 5146 (Sept. 28, 1961), 61-2 BCA par. 3166 at 16,446, the Armed Services Board stated: "Whether there existed a formal change order or not, appellant, acting as a prudent contractor and aware of its potential claim, should have kept records reflecting the extra costs attributable to the de facto change."

Board finds that the damages sustained by appellant in that area of the project were substantial. This was particularly true of the caprock area from station 240+00 to station 246+00 which is also the area in which the above-mentioned design error and slope staking errors occurred.

Noted previously is the testimony given by appellant's witness Mr. Sykes that a reasonable time for getting through the caprock would be from 20 to 30 days as compared with the estimate of Government's witness Mr. Holmes that in 8 working days the contractor had excavated and moved the approximately 10,000 cubic yards of material claimed by the contractor as having been excavated and moved from the caprock area (note 11 *supra*). Mr. Sykes made no effort to relate his estimate to specific dates, however, and the Board finds the estimate by Mr. Sykes to be of a conclusory nature.

While Mr. Holmes did relate his estimate to specific dates the contractor was excavating in the caprock area as shown by the daily construction reports, these reports do not disclose where on the slope the contractor was working on the particular dates selected; nor do any of such dates involve work in the area from station 237+00 to station 240+00 which Mr. Sykes testified was also in the caprock area (Finding 5). Another weakness in Mr. Holmes' estimate is that he has not allowed any time for the contractor getting up on the top of the caprock in order to bring it down. According to the testimony offered by appellant's witnesses Messrs. Siegrist, Sykes, Snider, and Sharpe, however, that was a very formidable challenge to the heavy equipment operator assigned that task or volunteering for it as appears to have been the case here.

Taking into account the disparate views of the parties and the nature of the evidence offered in support of their respective positions, the Board considers that an appropriate figure for excavating and removing the caprock would be somewhere between the 8 working days estimated by Mr. Holmes and the midpoint of the conclusory estimate submitted by Mr. Sykes of from 20 to 30 days. The Board finds that a reasonable time for excavating and removing the caprock and for making the corrections required by the design and staking errors mentioned above would be 18 days.

Finally, before undertaking to determine the amount of the equitable adjustment to be awarded to appellant, the Board notes the great variances in the amounts the appellant has claimed from time to time for the work encompassed in claim 1. The amount initially claimed for this item in the contractor's letter of June 20, 1977, was \$26,240. By the time the notice of appeal and the complaint were filed, the amount of the claim had almost doubled being stated to be in the sum of at least \$50,000. A fourfold increase over the amount initially claimed occurred when in its answers to the Government's interrogatories under date of March 28, 1979, appellant submitted an amended claim for this item in the amount of \$105,456.36 (GX 20, Schedule 1). The amount presently claimed of \$93,441.92 (Finding 1)

March 25, 1982

represents more than a 350 percent increase over the amount claimed initially.

We attribute these startling differences in claimed amounts for the same claim item, all of which were submitted after the contract work was completed, to the fact that the records maintained by the contractor were so deficient that no realistic appraisal of the damages suffered by appellant as a result of the Government's action was possible. Although the Board has benefitted materially from the testimony offered and the exhibits introduced by both parties at the hearing, it is still extremely difficult to find an adequate basis for determining the amount of the equitable adjustment.

Faced with similar difficulties in the past in cases where, as here, the liability of the Government for at least some part of the costs incurred was considered to be clear, the Board has determined the amount of the equitable adjustment to be made by resorting to what has been described as the jury verdict approach. See, for example, *A&J Construction Co.*, IBCA-1142-2-77 (Dec. 28, 1978), 85 I.D. 468, 480-92, 79-1 BCA par. 13,621 at 66,788-94.

Based upon our review of the entire record, as well as our findings made with respect thereto and the inferences to be drawn therefrom, and weighing the evidence in the case as best we can, the Board finds and determines that the equitable adjustment to which the appellant is entitled by reason of defective specifications in the form of ambiguous plans and by reason of design and staking errors is in the amount of \$55,000.

Decision

For the reasons stated and on the basis of the authorities cited, appellant is found to be entitled to an equitable adjustment of the contract price in the amount of \$55,000 for claim 1.

Claim 2 - \$1,025.10

(Excavation from station 98+00 to station 101+50)

Discussion

In the contractor's letter of June 20, 1977 (Finding 26), and in the complaint, this claim is shown to be in the amount of \$1,622.65. The amount so claimed was premised upon the assumption that the contractor has not been paid for 1,909 cubic yards of excavation in this area at the unit price for unclassified excavation specified in the contract of 85 cents per cubic yard. In the appellant's answers to the Government's interrogatories, however, the claim was reduced to the amount presently claimed of \$1,025.10 predicated upon the assertion that the Government had failed to pay the contractor for 1,206 cubic

yards of unclassified excavation at the unit price specified therefor in the contract (GX 20, Answer to Interrogatory #2, at 10-11).

Testifying at the hearing, Mr. Sharpe stated (i) that BIA had made a 3-foot mistake in the original cut stakes; (ii) that the contractor had cut it down to the grade given on the stakes and then had to refill and compact it back to grade; (iii) that the action taken had been at the direction of BIA; and (iv) that it was Mr. Sharpe's recollection that the problem relating to this claim was discussed with Mr. Holmes at the time of the latter's trip to the project on September 23 and 24, 1976 (Finding 24; Tr. 230-31, 300-03).

In his testimony, Mr. Jay Herrera acknowledged that he had required the contractor to perform extra work in this area. He also testified that at the time of the walk through of the project on September 23, 1976 (Finding 24), no indication was given by the contractor that it had a dispute in the vicinity of station 98+00 to station 101+50. This statement by Mr. Herrera is contradicted by what is shown in the report of the trip to the project on September 23 and 24, 1976, however, in which Mr. Holmes lists the alleged reexcavation of 2 feet of roadway embankment between station 98+00 to station 101+50 among the items in dispute for which claims will be filed by the contractor (AF 12, Report of Trip on Sept. 23 and 24, 1976, at 2). The Board notes also that this claim was excepted from the release of claims executed by Ms. Gibson on December 21, 1976 (Finding 25).

Although the Government denies liability for the claim asserted on the ground that it is not substantiated by its records, the Government is not contesting the amount claimed by appellant for this item assuming liability is found to exist.

Decision

Based upon the evidence of record, the Board finds (i) that the contractor was directed to perform additional excavation between station 98+00 to station 101+50; (ii) that the additional excavation so performed totaled 1,206 cubic yards; and (iii) that it is entitled to be compensated therefor at the unit price specified in the contract for unclassified excavation of 85 cents per cubic yard. Accordingly, claim 2 is granted in the amount requested of \$1,025.10.

March 25, 1983

Claim 3 - \$27,805.83

Excavation from Station 95+00 to 97+50

Discussion

The instant claim ⁸⁴ was presented for the first time in appellant's answers to Government interrogatories (GX 20) ⁸⁵ executed by Ms. Gibson on March 28, 1979. Initially the claim submitted was in the amount of \$32,198.45 (GX 20, Schedule 4). At the hearing the claim was reduced to the amount presently claimed of \$27,805.83 (AX 10).

In his testimony with respect to this claim, Mr. Sharpe stated: (i) That the BIA made a 40-foot mistake in elevation for a cut; (ii) that the contractor should have been back another 20 feet in the hillside; (iii) that the contractor had to come back and pioneer it out and bring it down; (iv) that it was harder to redo than it was to do it the first time; (v) that the contractor had to go into the hillside and knife it out; and (vi) that he had been directed by Mr. Herrera to come back to the station and correct the mistake. ⁸⁶ Upon cross-examination, Mr. Sharpe testified that he had brought up the instant claim at the time of the walk-through on the job when Mr. Holmes visited the project site on September 23 and 24, 1976. He acknowledged, however, that no reference to the claim for excavation between stations 95+00 to 97+50 appears in Mr. Holmes' report concerning the September visit cited, and that the claim here in issue was not mentioned in Ms. Gibson's letter to the BIA of September 28, 1976 (GX 16; Tr. 225-30, 30²-11).

Appellant's witness, Mr. Sykes, testified extensively with respect to AX 12 and AX 13. ⁸⁷ According to Mr. Sykes AX 12 indicates to him that at station 97+50 there was a 2- or 3-foot difference at that point

⁸⁴ As part of its response to Interrogatory #3, appellant states:

"Additional unforeseen work claimed by Appellant was between stations 95+00 and 97+50 on the right side and at the slide area between stations 92+40 and 93+90 and the responses to sub-interrogatories (a) through (g) are restricted to these areas. The information requested under these sub-interrogatories is set forth on Schedule 4."

(GX 20 at 12).

⁸⁵ Addressing another question raised in Interrogatory #3 concerning what notice was given to the Government with respect to the unforeseen work claimed for between stations 95+00, and 97+50 and in the slide area between stations 92+40 and 93+90, appellant states:

"The unforeseen work was called to the attention of the Contracting Officer's representatives. This was brought to the attention of said representatives at various times. Exact times are unknown. See the following relevant documents:

"1. Herrera Diary Entry of July 24, 1975.

"2. Holmes trip tickets of May 7, 1976, July 16, 1976 and September 8, 23 and 24, 1976.

"3. Jay Herrera addition to F.H.W.A. Cross Section-Brown Book."

(GX 20 at 12-12A).

⁸⁶ The following testimony was elicited from Mr. Sharpe on direct examination:

"Q. (By Mr. Connelly). 97+50, you were, as I understand it, directed by Mr. Herrera to come back to the station and he said, correct those mistakes, and you were to work—

"A. I don't know if he—we didn't come back there. I don't think that's correct. Yes, we did. Yeah, because we didn't have time to pioneer it out, so we moved a bunch of equipment out and come back and finished it, that's correct. It's been a long time."

(Tr. 230).

⁸⁷ Specifically identified on AX 12 and AX 13 are stations 96+00, 96+45, 97+00, and 97+50. According to counsel what appellant was trying to do was to show about a 200-foot section of the road as to which staking errors had caused the contractor additional work (Tr. 368).

between the ground elevation at the time the FHWA took their section and the original ground and that indicates an error either in the FHWA ground elevation or in the original cross section. Mr. Sykes also noted the testimony of Mr. Sharpe in which he had indicated having had problems in the same area. In response to a question posed by Government counsel, Mr. Sykes conceded that in undertaking to say how Mr. Sharpe had proceeded in this area, he was making a supposition based upon information given to him. After noting what was shown on AX 12 and AX 13, Mr. Sykes gave as his opinion that remedial or correctional work had been performed at stations 97+50, 97+00, 96+45, and 96+00. Mr. Sykes acknowledged, however, that he did not know when such work had been done (Tr. 360-68).

Upon direct examination the attention of Government witness, Mr. Herrera, was called to the testimony that Mr. Sykes had given with respect to AX 12 and AX 13 and particularly that relating to stations 96+00, 96+45, 97+00, and 97+50. Immediately thereafter, the following exchange took place between Mr. Herrera and Government counsel:

Q. All right. Now can you tell me, at those stations, did the contractor complete his excavation while he was on the job there at that time, or was he required to return to the area to redo that position [*sic*], that area after the change in the back slope?

A. He did it while he was on the job.

Examiner: While it was located at those stations.

The Witness: Yes, while he was bringing down the slope.

Q. (By Mr. Ranquist): Did you call him back to redo any work in this area?

A. No. [88]

(Tr. 505-06).

In this case appellant's witness, Mr. Sykes, has shown by his testimony that slope staking errors occurred in the vicinity of stations 96+00, 96+45, 97+00, and 97+50. He has also given as his opinion that remedial or corrective actions were probably taken at such stations with respect to the indicated slope staking errors. The Government has stipulated that slope staking errors occurred throughout the entire project and has acknowledged that some of such errors may have taken place in the vicinity of these stations. The fact that the project was accepted on an "as built" basis resulted in part from a recognition by the Government that slope staking errors had occurred and that for such errors and any design errors the Government was responsible.

What the Government does deny through the testimony of its witness, Mr. Jay Herrera, however, is that the contractor was ever required to come back up and redo work in the vicinity of these stations. It is the Government's position that it is only the correction of slope staking errors in such circumstances which results in additional

⁸⁸ Upon cross-examination, Mr. Herrera testified that the correction of slope staking errors would not necessarily involve more difficulty or be more costly to the contractor than just following the slope stakes. For a contractor to have to come back to an area to redo work that had been finished would involve extra work and would be more expensive for the contractor (Tr. 550, 563-65).

The criteria used by Mr. Herrera for determining unforeseen work is the same as that enunciated by Mr. Holmes (Tr. 201-03).

March 25, 1983

cost to the contractor and which constitutes unforeseen work entitling the contractor to additional compensation over and above that provided for in the specified unit price for unclassified excavation.

In support of its contention that the attention of the Government was called to what it terms unforeseen work between stations 95+00 to 97+50, appellant refers to an entry in the project inspector's diary on July 24, 1975, four reports of visits to the site by Mr. Holmes, and the Jay Herrera addition to "F.H.W.A. Cross Section-Brown Book" (note 85 *supra*). The July 24, 1975, entry in the project inspector's diary is devoid of any reference to this area of the project. Mr. Holmes' report of his May 7, 1976,⁸⁹ visit to the project site contains no reference to the stations involved in claim 3. Mr. Holmes' reports pertaining to his visits to the jobsite on July 16, 1976, and September 3, 1976, and his visit on September 23 and 24, 1976, contain no reference to unresolved slope staking problems in the area between stations 95+00 and 97+50.⁹⁰

The Jay Herrera addition to "F.H.W.A. Cross Section-Brown Book" (GX 6(A)) does refer to stations within the specified area but only in connection with making corrections to the FHWA cross section. To the extent the contractor was found to be entitled to be paid for additional quantities of excavation as a result of such corrections, payment was made for the additional quantities found at the specified unit price for unclassified excavation of 85 cents per cubic yard. The references so made by Mr. Herrera in the cited Brown Book furnish no predicate for notice to the Government by the contractor of a claim for unforeseen work.

A question remaining is whether the contractor considered corrections of slope staking errors in the area between stations 95+00 to 97+50 to constitute unforeseen work at the time the corrections were made. The available evidence strongly suggests that it did not. In this case there is not only a very protracted delay in presenting the claim but there is also a succession of events which should have "triggered" the presentation of the claim if it were regarded as a claim at the time the events occurred. Some of the more important of those events include the following: (i) The walk-through of the project on September 23, 1976, when a number of other claims were, in fact, presented (Finding 24); (ii) the release of claims executed by Ms. Gibson on December 21, 1976, when a number of claims were

⁸⁹The report does refer to a slide area (presumably the area between stations 92+40 and 93+90), however, stating: "Also discussed was the additional quantity of unclassified excavation that needs to be removed at an earth slide at a slope at one of the roadway cut sections. The slide material will be removed and the section will be cut back to a 2:1 slope to provide greater stability. Mr. Herrera will re-cross section this portion of the project before and after this excavation work is done so the additional quantity can be computed and added to the final excavation quantity."

(AF 12, Report on visit (May 7, 1976), at 2).

⁹⁰In the report for the visit to the project on Sept. 23 and 24, 1976, Mr. Holmes stated: "E. At Station 95+00, the contractor's request for unforeseen work payment was withdrawn by the contractor when Mr. Herrera pointed out the extra work of shaping the cut slope was caused by inaccurate construction methods and not due to any staking problems" (AF 12, Report on visit (Sept. 23 and 24, 1976), at 2)).

specifically excepted from the release (Finding 25); (iii) the contractor's letter of June 20, 1977, when a number of specific claims were presented (Finding 26); (iv) the filing of the notice of appeal (July 7, 1978); and the filing of the complaint (October 5, 1978).

The Board finds that over 31 months elapsed between the time the project was substantially completed on August 2, 1976 (note 4 *supra*), and the time the Government was apprised of the existence of the instant claim as a result of the filing of appellant's answers to the Government's interrogatories on March 28, 1979 (GX 20).

Decision

[4] Based upon the evidence offered in this proceeding in support of the claim for excavation between stations 95+00 and 97+50, the Board finds (i) that appellant has failed to affirmatively establish its claim against the Government by showing the fundamental facts of liability, causation, and resultant injury; and (ii) that the failure of appellant to file a contemporaneous objection to the order by which the extra work was allegedly directed and the protracted delay in presenting the instant claim raise presumptions against its validity.⁹¹ For the reasons stated and upon the basis of the authorities cited, claim 3 in the amount of \$27,805.83 is hereby denied.

Claim 4 - \$19,801.86

Excavation from station 92+40 to station 93+90

Discussion

This claim was also presented for the first time in the appellant's answers to the Government's interrogatories⁹² executed by Ms. Gibson on behalf of the contractor on March 28, 1979.⁹³ In schedule 4 to appellant's answers to the Government's interrogatories (GX 20), the instant claim is shown in the amount of \$20,306.34. At the hearing the claim was reduced to the present figure (AX 10).

In his testimony, Mr. Sharpe stated (i) that the excavation for which claim is here made involved an area approximately between stations 92+00 and 93+00; (ii) that after the area had been graded, it was left over the winter; (iii) that it was during that time that a portion of the embankment came down upon the road; (iv) that the contractor was ordered back to the area by Mr. Jay Herrera who told Mr. Sharpe what to do; and (v) that the required work entailed pioneering it out over a weekend after which the contractor sent in scrapers and moved the material out.

Upon cross-examination Mr. Sharpe confirmed that the contractor had built a back slope which later slid out and came down upon the road. He was unable to say, however, where the contractor was

⁹¹ See notes 75 and 82 *supra*.

⁹² See note 84 *supra*.

⁹³ See note 85 *supra*.

March 25, 1983

working at the time the slide occurred. Mr. Sharpe also testified that he took the material in both directions of the slide; that some of the material could have been taken down to the area between stations 98+00 to 101+00; that the material was taken to wherever Mr. Jay Herrera said it was to go; and that the reason he believes that the material from the slide was not included in the amount of material measured in the final cross section⁹⁴ was because Mr. Sykes had not been able to find where it had been cross sectioned and recross sectioned (Tr. 222-25, 296-300).

Government witness Mr. Jay Herrera recalled that the slide occurred in the area of stations 92+00 to 93+00 in the late fall of 1975; that he received an instruction from Mr. Holmes to cross section in the area; that after the job was shut down he did recross section that area; that the contractor came back the next spring and removed the slide;⁹⁵ and that the contractor placed the material in a fill area as directed by Mr. Herrera; and that the material from the slide was placed in the area between stations 98+00 and 110+00 (Tr. 502-07, 553-55).

Mr. Holmes recalled that at the time the slide occurred work had not been completed in the area and that there was work to be done on either side of the slide area. Since the final cross sections were taken after all the work was done, it was Mr. Holmes' opinion (i) that any volume occupied by the slide had been measured,⁹⁶ and (ii) that the contractor had been paid for the amount of material involved in the slide at the rate for unclassified excavation. Mr. Holmes also noted that the job had been accepted "as built" (Tr. 174, 177-79, 801, 831).

While there are factual differences between claim 3 and claim 4, the legal principles and case authorities governing the disposition of the two cases are considered to be the same. In this case there is no evidence that the contractor considered that moving the material from the slide area and placing it in a fill area constituted unforeseen work at the time the work was performed. Here also there is the same protracted delay of over 31 months in presenting the claim and the same succession of events which should have "triggered" the presentation of the claim if it were regarded as a claim at the time the events occurred.

⁹⁴ Mr. Sharpe appeared not to realize that the final cross section was taken months after the work related to the slide had been done, as is evidenced by the following colloquy upon cross-examination:

"Q. But now, at the time you were doing this, the final cross section had not been taken, right?"

"A. No, No.

"Q. The final cross section was taken later on an as-built basis?"

"A. Mr. Ranquist, they told me the final cross section was taken."

(Tr. 299).

⁹⁵ In Mr. Holmes' opinion work involving materials from the slide area could properly be considered unforeseen only if the slide was in an area of the project that had been completed (Tr. 177-78).

⁹⁶ Except for Mr. Sharpe's assertion that Mr. Sykes had not been able to find where the material from the slide had been cross sectioned and recross sectioned, there is no countervailing evidence on this question. Mr. Sykes gave no testimony with respect to claim 4 and the position attributed to Mr. Sykes by Mr. Sharpe is not otherwise supported by the record.

Decision

For the reasons stated in our decision on claim 3 and on the basis of the authorities cited therein, claim 4 for excavation between stations 92+40 and 93+90 is hereby denied.

Claim 5 - \$28,361.17

Nonuse of bridge

Discussion

At the time of the walk through of the project on September 23, 1976, one of the claims presented was for damage allegedly sustained as a result of the contractor being denied the right to use the Florida River Bridge for his construction equipment traffic (Finding 24). The release of claims executed by Ms. Gibson on December 21, 1976, excepted a "[c]laim due to not being allowed to use bridges for hauling" (Finding 25). By letter dated June 20, 1977, the contractor submitted a claim for this item in the amount of \$21,700.16 (Finding 26). In its notice of appeal dated July 7, 1978, and its complaint dated October 5, 1978, the claim is estimated to be in the amount of at least \$40,000. Appellant's answer to Government's interrogatories show the claim to be in the amount of \$28,550.14 (GX 20, Schedule 5). At the time of the hearing, the claim was reduced to the amount presently claimed of \$28,361.17 (AX 11).

In Count VI of the complaint appellant notes the refusal by the Government to permit appellant to use the Florida River Bridge in connection with appellant's construction equipment and support and maintenance vehicles including cars, pickups, an oil truck, and water wagon. Immediately thereafter, appellant alleges, *inter alia*, (i) that there is no provision in the contract authorizing the Government to refuse usage of the bridge by appellant; (ii) that there is no factual basis to support such a refusal on the ground of lack of guardrails creating a safety problem; (iii) that the bridge was structurally sound and sufficiently wide to permit two-way traffic across the bridge by heavy equipment, dump trucks, and maintenance and support vehicles of contractor; (iv) that as a direct and proximate result of the Government's refusal to permit appellant to use the bridge, appellant was required, at its expense, to construct a river crossing for use by its cats and scrapers (which then washed out and was again constructed at appellant's expense); ⁹⁷ and (v) that as a result of such refusal appellant was delayed in the performance of its contract and its costs were substantially increased.

⁹⁷The temporary crossing was initially built by appellant and the bridge subcontractor in October of 1975. When the temporary crossing was about to wash out on or about May 17, 1976, appellant cut through the crossing in order to release backup water behind the crossing. The temporary crossing was not restored to use until July 1, 1976 (GX 20 at 16, 21-22).

March 25, 1983

In its response to Government Interrogatory #8⁹⁸ pertaining to materials moved from the area between station 267+36 and station 285+1,⁹⁹ appellant states that based upon the purported final computer printout prepared by the Government, 24,694 cubic yards had been moved across the river to the south and 2,494 cubic yards had been moved to the north. Appellant also stated (i) that prior to the construction of the bridge its vehicles had used the old county bridge and the temporary river crossing; (ii) that the temporary river crossing was located approximately 30 feet east of the edge of the new bridge when built; (iii) that only appellant's scraper, dozers, backhoes, compactors, and four-wheel drive vehicles could use the temporary crossing because the terrain was too precipitous; (iv) that for appellant's vehicles to use the temporary crossing instead of the bridge it was necessary for them to travel approximately 408 feet further; (v) that the extra time required for each type of vehicle to use the temporary crossing instead of the bridge could not be stated since it would depend on the actual load on each of the vehicles and the actual rate of speed of the vehicles;¹⁰⁰ and (vi) that the temporary crossing was approximately 500 feet long (GX 20 at 15-19).¹⁰¹

⁹⁸In answering the questions posed by the Government in Interrogatory #8 appellant stated (i) that the empty weight of earth moving machines hauling the material was 96,000 pounds each; (ii) that the loaded weight of such earthmoving machines when hauling material was 171,000 pounds average; and (iii) that the safe load limit of the bridge appellant requested to use was unknown but the bridge would have been used within safe load limits (GX 20 at 15).

⁹⁹Included among appellant's answers to Government Interrogatory #8 is the following:

"For each day involved during moving of material from these areas between Station 267+36 to Station 285+1, state how many vehicles were moving material south across the river and how many were moving material north.

"Ans. The days and number of vehicles moving material south across the bridge are as follows:

<i>Days</i>	<i>Number of Vehicles</i>
July 2, 1976.....	3
July 3, 1976.....	3
July 6, 1976.....	3
July 7, 1976.....	3
July 8, 1976.....	3
July 9, 1976.....	3

"Appellant objects to this interrogatory insofar as it pertains to vehicles moving material north since it is irrelevant and immaterial."

(GX 20 at 17-18).

¹⁰⁰Addressing questions posed as to each element which caused delay in the crossing of the temporary crossing and offering an explanation as to why it caused delay and the amount of delay caused for each load moved by earthmoving vehicles, appellant states:

"Ans. The crossing was extremely precipitous and available for use by vehicles capable of using the crossing, one at a time, thus resulting in delays as each vehicle waited for the other to cross. Affiant is unable to state the amount of delay caused for each load moved by the earth moving vehicles."

(GX 20 at 17).

¹⁰¹Appellant answered "unknown" to questions relating to the following:

1. To number of round trips each earthmoving vehicle made each day across the river.
2. The number of times each day each earthmoving vehicle was delayed by another earthmoving vehicle where that delay would not have occurred if the bridge were used.
3. The total period of each delay and the total time of all such delays to all such vehicles.
4. The time it took an earthmoving vehicle to cross the temporary crossing.
5. The speed at which each earthmoving vehicle was moving when it crossed the temporary crossing.

(GX 20 at 18-19).

After referring to what was shown in appellant's letter of June 20, 1977 (Finding 26), with respect to the instant claim, Government Interrogatory #9 asks whether each of the statements made in the referenced letter was accurate as to the time of the delay, the reason for the delay, and the amount of money claimed for the delay. Addressing these inquiries in its response, appellant states:

Ans.: No, the claim was based on the erroneous assumption that 27,188 cubic yards was moved south across the temporary crossing after the bridge was available for use. There should be deducted from this figure 2,494 cubic yards, according to the purported final computer printout, which was moved to the north. Also there should be deducted approximately 10,400 cubic yards which were moved before the bridge was available for use. Since basis for the estimated claim was upon an erroneous assumption, the estimated time of delay and the dollar amount of the claim is also erroneous. The reason for delays encountered i.e., being deprived of the use of the bridge, is correct.

(GX 20 at 19-20).

In his report concerning his trip to the project on May 7, 1976,¹⁰² Mr. Holmes discussed at some length the safety problems resulting from the fact that the metal beam guardrail item for the bridge was shown as "future construction" and not as a part of the contract. Mr. Holmes suggested to Messrs. Mouser (the Acting Superintendent) and Jay Herrera that due to extremely slippery condition of the roadbed during periods of wet weather, it would be wise to barricade the project when it was completed to prevent the traveling public from the possibility of sliding off the road during and after inclement weather at areas of high embankment heights above the natural ground until the guardrail installation was made.

Mr. Jay Herrera stated it would be difficult to close the road as many vehicles belonging to natural gas companies working in the area of the project utilize the road. He also made the observation that the Southern Ute Tribe would not give any consideration to the closing of the road at any time after the contractor completed his work next month.

Mr. Mouser was concerned about serious accidents occurring at the new road when it was completed, noting that the Government might well be liable if such accidents did occur involving vehicles sliding off the road and overturning down high embankment slopes. It was Mr. Mouser's view that everything should be done to incorporate the guardrail prior to the completion of the project.

Thereafter, Mr. Holmes called the Area Road Engineer with respect to this matter. Mr. Fattor agreed that the inclusion of the guardrail installations might be advisable if current funds permit. He asked Mr. Herrera to write a letter to the Area Office as the Agency's

¹⁰² Later in the report Mr. Holmes states:

"Messrs. Herrera, Norris, and I then reviewed the west end of the SU 110(1) project and the damaged wingwall of the Florida River Bridge. The road was very slippery due to the recent rains and it is easy to understand the Agency's request for the guardrail installations at this time. This engineer driving over the old county road and bridge at the Florida River almost slid into river. This old road and bridge are located adjacent to the new BIA road and bridge currently being constructed."

(AF 12, Report of trip (May 7, 1976), at 3).

March 25, 1983

official request regarding this matter (GX 12, Report (May 7, 1976), at 1-2).

Testifying in support of the instant claim appellant's witness, Mr. Sharpe, stated (i) that at the time he looked at the job he had contemplated using the new bridge after it was built to haul material across the river with end dumps, a loader, and a dump truck; (ii) that the contractor had had to use the old county bridge;¹⁰³ (iii) that he had discussed the use of the new bridge with Messrs. Holmes and Jay Herrera; (iv) that Mr. Holmes had stated that he did not see any reason why the contractor could not use the new bridge; (v) that later the same day when Mr. Jay Herrera joined Messrs. Sharpe and Holmes, Mr. Herrera had said that the use of the new bridge by the contractor would not be safe; and (vi) that while there was no provision in the contract authorizing the use of the bridge by the contractor, it was common practice in the construction business¹⁰⁴ to allow its use.

Upon cross-examination, Mr. Sharpe acknowledged that he had requested the right to use the bridge with the contractor's earthmoving equipment. He denied, however, that he had contemplated taking the earthmoving equipment loaded across the new bridge. In this regard Mr. Sharpe stated that if the new bridge could have been used, the contractor would have used legal load zone dump trucks and that the old county bridge would have been used for loaded earthmoving equipment. Mr. Sharpe also stated that he had used the temporary crossing¹⁰⁵ for the contractor's loaded earthmoving equipment. He noted, however, that while the earthmoving equipment used the temporary crossing going in both directions, the crossing was not wide enough to allow the vehicles to pass each other.

In the course of examining Mr. Sharpe, Government counsel noted that schedule 5 to appellant's answers to the Government's interrogatories (GX 20) shows appellant to be claiming damages for being denied the use of the new bridge from January of 1976, to the end of the project, even though the concrete approach aprons to the bridge were not completed until July 2 or 3, 1976, as shown by the daily construction reports. While not disputing the date that the concrete approach aprons to the new bridge were completed, Mr. Sharpe stated that January of 1976 was correct for the claim, since the concrete for the bridge itself had been cured out by then and that the contractor could have used the new bridge from that time.

¹⁰³ Respecting the use of the old county bridge, Mr. Sharpe testified that he had walked D-9 tractors over it, 110,000 pounds of them and that he had run a transport over it that had 149,000 pounds on it (Tr. 240, 242).

¹⁰⁴ Except for this assertion by Mr. Sharpe, no evidence was offered showing the existence of such a practice. See *Eder Electric Co. v. United States*, 205 F. Supp. 305 (1962), in which the court defined a trade custom as one established by evidence "so clear, uncontradictory, and distinct so as to leave no doubt as to its nature."

¹⁰⁵ According to Mr. Sharpe the temporary crossing had been built so that the bridge subcontractor could set his beam on the bridge and that it continued to be required in order for the contractor to get its loaded earthmoving equipment across the river (Tr. 319-20).

Responding to a question from the hearing member, Mr. Sharpe stated that the contractor had been denied the use of the new bridge even after it was all complete. The denial of the request in such circumstances was based upon the bridge being unsafe because the guardrails at the end of the bridge (*i.e.*, the approach guardrails) were not in. Noted by Mr. Sharpe was the fact that the installation of the guardrails was not covered by the instant contract but was to be included in a future contract.

Mr. Sharpe also stated that he had made a request for the use of the bridge for only his light equipment to both Mr. Herrera and Mr. Holmes. No specific time was given for his request to Mr. Herrera but the request to Mr. Holmes was related to his visit to the job site on July 16, 1976. The Board notes that this request to Mr. Holmes was made less than 3 weeks before the contract was accepted as substantially complete on August 2, 1976.

Interrogated by Government counsel as to what provision of the contract required the Government to pay for material used in the temporary crossing, Mr. Sharpe acknowledged that there was none. He asserted, however, that the contractor was entitled to be paid for the work involved as unforeseen work since the contractor had been refused use of the new bridge (Tr. 239-43, 311-34).

In his testimony Government witness, Mr. Jay Herrera, confirmed that he had refused to permit the contractor to use the new bridge on the ground that there was a safety factor for personnel and also for the bridge since the approach slabs had not been poured at the time of the request. After noting that Mr. Sharpe had said that the contractor wanted to use the bridge to haul material across the river, Mr. Herrera states: "I told him no, because I felt that heavy equipment going across the bridge and approaching from either end might damage the bridge that was—that had been poured or placed. Plus the fact that we did not have guard railing on it" (Tr. 513). Mr. Herrera also testified (i) that he had no recollection of a request to use the new bridge having been made after the concrete approach aprons had been poured and cured; (ii) that the contractor used the temporary crossing for his earthmoving equipment, pickups, and other vehicles on a daily basis; and (iii) that there was no reason for the contractor to go down to the old county bridge as long as the temporary crossing was in place.

Upon cross-examination, Mr. Herrera acknowledged that he had a conversation with Mr. Holmes about the use of the new bridge in which Mr. Holmes had said that it would be up to him as to whether the contractor used the bridge or not. He also stated that the conversation in which the contractor had been told the new bridge could not be used had taken place on one of Mr. Holmes' visits to the site (Tr. 512-14, 565-66).

In the course of his testimony Mr. Sharpe evidenced a considerable amount of confusion as to the contractor's responsibility for the performance of a contract. We have long held, however, that a

March 25, 1983

contractor's bid is an unqualified representation that the contractor has the supervision, equipment, skill, and ability to do the work. *Sunset Construction, Inc.*, IBCA-494-9-64 (Oct. 29, 1965), 72 I.D. 440, 447, 65-2 BCA par. 5188 at 24,397. That responsibility is not diminished by the fact that a portion or even all of the work is subcontracted. *American Ligurian Co.*, IBCA-492-4-65 (Jan. 21, 1966), 73 I.D. 15, 22, 66-1 BCA par. 5326 at 25,028.

In this case Mr. Sharpe testified that the temporary crossing was built so that the bridge subcontractor could set his beams on the bridge and that the crossing continued to be required in order for the contractor to get its loaded earthmoving equipment across the river. Some of the costs for which recovery is sought in the instant claim involve the temporary crossing. It has long been held that work required to be performed to carry out the purposes of the contract or performed for the convenience of the contractor cannot qualify as extra work entitling the contractor to additional compensation. See *William A. Smith Contracting Co.*, IBCA-83 (June 16, 1959), 66 I.D. 233, 235-41, 59-1 BCA par. 2223 at 9743-50. That is considered to be the case here.

Remaining for consideration is the balance of the contractor's claim for additional compensation attributed to having been refused permission to use the new bridge for the hauling of material across the Florida River and for its vehicles generally. Appellant concedes that there is no contract provision specifically authorizing the use of the new bridge for such purposes but apparently seeks to bring its claim within the contract's unforeseen work provision. At the time the contract was entered into, however, it was clear that the protective guardrails were to be installed under a future contract. The Board concludes that in such circumstances it was foreseeable that BIA might refuse to permit the contractor to use the new bridge for its construction operations until the protective guardrails were installed. Moreover, in this case it is clear that appellant made no effort to have the project engineer's decision reviewed by the contracting officer at the time or times they were made.

A question still to be decided is whether the project engineer abused his discretion in refusing to allow the contractor to use the new bridge in the circumstances present here. Based on the record made in this proceeding, the Board concludes that no abuse of discretion has been shown. While in his testimony Mr. Sharpe stated that the contractor would have used legal load zone dump trucks, it is noted that neither the bridge subcontractor nor the contractor had evidenced any concern for legal load limits in the use made of the county bridge. As early as July of 1975, Mr. Holmes was noting that the subcontractor was hauling a 35-ton crane across the old county bridge which had a rated safe carrying capacity of 15 tons (note 32 *supra*, and accompanying text). In his testimony, Mr. Sharpe volunteered the information that

he had walked D-9 tractors over the county bridge weighing 110,000 pounds and had run a transport over the same bridge that had 149,000 pounds on it (*i.e.*, over three times the rated capacity of the county bridge in the former case and over four times the rated capacity in the latter).

We also note that the fear expressed for the safety of the personnel using the bridge in the circumstances present were very real as evidenced by the very extensive considerations given to this subject before any controversy appears to have arisen. *See* note 102 *supra*, and accompanying text.

Decision

[5] It is undisputed that the contract here in issue contains no provision authorizing the contractor to use the new bridge for its construction operations. Whatever additional costs may have resulted from the refusal to permit the contractor to use the new bridge have not been shown to be attributable to unforeseen work. Appellant has not shown any custom in the construction business supporting its contentions. The Board has found that the action of the project engineer in refusing the contractor permission to use the new bridge for its construction operations was not an abuse of discretion. Accordingly, for the reasons stated and on the bases of the authorities cited, claim 5 in the amount of \$28,361.17 is hereby denied.

Claim 6 - \$38,000

Boulder excavation claim

Discussion

This is another claim presented for the first time in appellant's answers to Government interrogatories (GX 20)¹⁰⁶ executed by Ms. Gibson on March 28, 1979. The claim submitted initially was in the amount of \$117,804.05 (GX 20, Schedule 6; GX 10, Exh. D). At the hearing the claim was reduced to \$29,074.25 (note 3 *supra*).

The Government has admitted that it did not measure and cross section each boulder separately (Tr. 46, 48).¹⁰⁷ According to appellant, the original cross sections failed to accurately depict the boulders with the result that the contractor was required to excavate additional boulders for which no payment has been made (AX 14; AOB 4). The Government's position is that it measured the surface boulders on the project in accordance with accepted standards of the industry for "unclassified excavation" and that the contractor was compensated for moving a representative amount of surface boulders under the provisions of section 203(a) (GPHB 10-11).

¹⁰⁶The notice of appeal dated July 7, 1978, states at page 3: "The contractor is informed and believes that boulders of nine square feet or more were not computed in the manner required by Section 109.01 of the General Provisions of the Contract."

¹⁰⁷The Government has also stipulated that a claim has been submitted to and considered by the contracting officer and denied (Tr. 49).

March 25, 1983

Government witness Mr. Jay Herrera testified that he had been involved in the original survey crew that did the original cross sections for the project that appear in GX 5. It was his testimony (i) that the information garnered from the cross sectioning was recorded in the original survey books; (ii) that if rock were encountered the notation "rocks" would be put in the book; (iii) that GX 15 is an excerpt showing the places where rocks were mentioned in connection with the original survey books; (iv) that in his opinion the method employed in the original cross sections resulted in crossing a representative number of rocks in the project; and (v) that the method used in the survey does not show the actual yardage of rock included in the excavation portion of the project but in his opinion the method employed equaled the amount of actual rock present.

Upon cross-examination, Mr. Herrera stated (i) that the boulders involved were anywhere from a foot to 10 feet high; (ii) that when the survey party came to a rock on a station one of the party would get up on top of the rock utilizing a rope held by others in the party; (iii) that from this vantage point the rock would be measured using a rod and a hand-held prism; (iv) that the contractor had not been told to move rocks out of the road but had been told to rip rocks and place them in the fill; and (v) that rocks had not been measured individually unless they were caught in the original cross sectioning on the station (Tr. 490-92, 514-15, 522-24, 547-48).

The testimony of the other witnesses for both appellant and Government centered principally on the question of whether the amount of material removed in the excavation and the amount of material placed in the embankment were equal within reasonable limits. If the two were relatively equal that fact would demonstrate that the surface boulders were measured on a reasonably accurate basis.

Appellant's witness, Mr. Sykes, testified that assuming the contract provides that you are to be paid for all excavation, there were several ways that the surface boulders could be handled. The ways specifically mentioned were the following: (i) Measure each one and keep a boulder book in which the measurements for each boulder (height, width, and length converted to cubic yards or feet) and its location are recorded; (ii) designate boulder areas in the contract documents and state therein that a lump sum will be paid for the removal and disposal of boulders giving an estimated quantity of boulders if desired; and (iii) designate that the work is incidental or subsidiary to other bid items.

For the conclusion reached by Mr. Sykes that there were 34,205 cubic yards of boulders for which the contractor had not been paid (AX 14), Mr. Sykes relied to a considerable extent upon tests made by San Juan Testing Laboratory, Inc., "to determine existing densities of materials remaining in borrow areas and sandstone

boulders similar to those reportedly incorporated into the prepared roadway." ¹⁰⁸ After noting the unit weights for the types of material identified in the report (note 108 *supra*), Mr. Sykes gave the following testimony:

[B]ased on that and the total excavation as shown by the computer typeout and their additional excavation and making an assumption that from station 0 to 117, that the materials basically had a unit weight of 92½ pounds per cubic foot from station 171 to 220, that it had an—that it was approximately 50% rock and 50% common or material that weighed 92½ pounds per cubic foot, and then from station 220 to 256, we made the assumption that all that material was shale, and from 256 to 285, we assumed that the material incorporated in the embankment was common excavation, 92½ pounds per cubic foot. With this information, we computed or calculated that there was 34,205 cubic yards of embankment that were unaccounted for and were rock. [¹⁰⁹]

(Tr. 396).

Mr. Sykes also testified that there were 7,124 cubic yards of shaly material considered by him to represent another source of boulder material which was excavated and placed in piles along the side of the road but for which appellant was not paid (Tr. 381-99, 408-17, 421-24). ¹¹⁰

The Government's witness, Mr. Holmes, also testified extensively with respect to the claim for boulders. In concluding that the contractor had been paid for boulders in accordance with the terms of the contract, Mr. Holmes relied to some extent upon test made by the Albuquerque Testing Laboratory engineering services. ¹¹¹ In the course of his testimony Mr. Holmes stated (i) that although he had been on jobs where boulders were present, he had never seen a boulder book; (ii) that normally the method of measurement employed by the Government in establishing final quantities is to use cross sections; (iii) that if the cross sections are representative of the material on the ground, the volume of rock involved is going to be included in the final quantities; (iv) that the contract provides that the material taken out of the excavated areas would be placed in fill areas for the same unit

¹⁰⁸ Immediately thereafter the letter from San Juan Testing Laboratory, Inc., dated Sept. 18, 1979, states:

"Inspection of the roadway indicated that approximately one-third of the subgrade consists of a shale type soil with the balance being primarily sandy in nature. The field dry unit weights of the shale materials in-place in the borrow areas average 113 pcf. The sandy and sandstone derived borrow areas had an average dry unit weight of 92.5 pcf. with the sandstone boulders at 136 pcf."

(AX 3 at 1).

¹⁰⁹ Upon cross-examination Mr. Sykes stated that the method of measuring boulders employed by the Government does not accurately measure boulders. In support of this position, he stated:

"If, and this is the 'if,' your cross section occurred where there were no boulders or a few boulders, and then immediately five feet beyond that point there were a lot of boulders, and there was not a section taken at that five-foot interval, and you went on to the next section and it had a few boulders, but in between the two there were a lot, then you would not have the boulders measured. Now, then, the converse of that could happen."

(Tr. 413).

¹¹⁰ Upon cross-examination Mr. Jay Herrera testified that he considered that the material in the berms had been cross sectioned (Tr. 555). Assuming, *arguendo*, that appellant is making a claim for the berm material (note 3 *supra*), the Board finds that appellant has failed to show by a preponderance of the evidence that the material included in the berms was over and above the quantities included in the final cross sections for which the contractor was paid at the specified unit price for unclassified excavation. See note 82 *supra*.

¹¹¹ Testifying in support of the report made by the Albuquerque Testing Laboratory (GX 17) was Mr. James Clary, a geologist employed by that company. Based upon an examination of the site and tests including laboratory tests made of samples taken from the project, Mr. Clary concluded that six out of the ten tests taken by the San Juan Testing Laboratory, Inc., do not apply to the materials used in the embankments.

(Tr. 453-54).

March 25, 1983

price; (v) that the same cross section and computer run show both embankment and excavation quantities; (vi) that the amount of material excavated is very close to the amount of material placed in the embankment with only 2 percent more embankment than excavation indicating a slight swell in the material as it was in place; and (vii) that the San Juan Testing Laboratory, Inc., results were generally considered representative of the materials taken from the project's cut areas, except the tests called clay tests of which there were four.¹¹²

After establishing that Mr. Holmes was aware of the fact that appellant was claiming that unmeasured rock had been included in the embankment and that he was familiar with the tests taken by the San Juan Testing Laboratory, Inc., and the tests taken by Mr. Clary of Albuquerque Testing Laboratory, as well as with the computer printouts, Government counsel asked Mr. Holmes to state whether he had formed an opinion as to whether there was any amount of rock that had gone into the fill which had not been measured. As to the opinion so formed, Mr. Holmes stated:

A. Well, I used—I went through and made some calculations. Mr. Sykes, for the contractor, had made some assumptions, and he had made—using unit weights from San Juan Testing, he had computed that there were 34,000 yards of rock, boulders, which had not been included in the—included for payment, and I went back and used San Juan's test results after I had seen the area up at the project where those four clay tests were taken, and I didn't feel that they were representative. And after I saw Mr. Bennett'[s] letter, which I think has been submitted as evidence in this case, where he defines sandy materials as having a unit weight of 92.5, I used San Juan Testing Labs' results for sandy materials, which actually averaged 114, used their average, San Juan Testing Labs' average for shale materials and sandstone boulders. Went back and used Mr. Sykes' assumptions that he had given us. It's already submitted. And I came up with 17,000 yards of rock—or, 17,000 yards of material excess. "Excess," in other words instead of having a shortage of 34,000 cubic yards as Mr. Sykes computed, I came up with 17,000 yards over, which would mean, in my opinion, that all the rock—based on that, that all the rock boulders were cross sectioned in that point, even including the final points.^[113]

(Tr. 783-84).

Mr. Holmes also gave as his opinion that if when rock boulders were encountered and the cross sections were taken in the manner described by BIA personnel, he would consider the cross sections themselves were representative.

Upon cross-examination Mr. Holmes acknowledged that if you want an actual count of all the rocks, it would be necessary to go out and

¹¹² Concerning the four clay tests, Mr. Holmes states:

"[T]hey were taken adjacent to fill areas, not cut areas, and some 10 to 20 feet away from our road in isolated areas, I call them in a 'wash,' and the geologist termed them 'eluvial soils.' Those four tests were all in the range of 80 to 90 pounds cubic feet, and we did not think that those four were representative or I did not think they were representative of what came out of the cuts."

(Tr. 780).

¹¹³ The document showing the work Mr. Holmes did with respect to the San Juan Testing Laboratory, Inc., analysis is shown on the top of what is marked GX 15 and attached to the back of that is a copy of the San Juan Testing Laboratory, Inc., results (Tr. 786).

count them and take a tape and go around each particular rock. He stated, however, that "under the terms of the specifications, which outlines the method of measurement, if the BIA cross sections were taken over the rocks and included all the boulders and the cross sections were representative, then he has been paid in accordance with the terms of the contract" (Tr. 820)¹¹⁴ (Tr. 147-48, 779-89, 802, 819-24).

The contract itself provides that in computing volumes of excavation, "the average end area method will be used, unless another method is specified" (Finding 3). Appellant has not called our attention to any other method for computing volumes of excavation being specified in the contract and we have found none. Mr. Jay Herrera has testified to the manner in which the boulders were measured at the time the original cross sections were taken and Mr. Holmes has testified that the rock boulders were measured as prescribed in the contract and in accordance with what he considered to be good engineering practice. In addition, Mr. Holmes testified that the balance between the amount of material excavated and the amount of material placed in embankments was very close indicating that the contractor had been paid for all material placed in the embankment.

If at the time the invitation to bid was received, appellant had an objection to volumes of excavation being computed by the use of "the average end area method," the objection should have been made before the bid was submitted. If the contractor is now contending that a mistake in bid has been made, the Board is without jurisdiction in the matter.¹¹⁵

Decision

[6] Based upon the record made in this proceeding, the Board finds (i) that the contract provided for volumes of excavation to be measured by the "average end area method"; (ii) that all excavation including rock boulders was so measured; and (iii) that appellant has failed to show by a preponderance of the evidence that there were any rock boulders placed in the embankments for which it has not been paid (note 82 *supra*).

For the reasons stated and upon the basis of the authority cited, claim 6 in the amount of \$38,600 is hereby denied.

Claim 7 - \$4,500

Release of Liquidated Damages

By this claim appellant seeks the return of the entire amount of liquidated damages assessed for delayed performance on the instant contract (Tr. 4-5). The \$4,500 assessed was calculated on the basis of

¹¹⁴In response to a question from the hearing member, Mr. Holmes stated: "I think it's accepted engineering practice to cross section, when you take your cross sections, if they're taken of representative areas, that the space in between each cross section is being accounted for by this cross section on each side" (Tr. 821).

¹¹⁵Since this is a pre-Contract Disputes Act case, the Board is without jurisdiction over any mistake-in-bid claim. See *Orndorff Construction Co.*, IBCA-372 (Oct. 25, 1967), 74 I.D. 305, 356, 67-2 BCA par. 6665 at 30,926-27.

March 25, 1983

multiplying the 18 calendar days of delay involved by the rate of liquidated damages specified in the contract of \$250 for each calendar day of delay between the date the contract work was scheduled for completion and the date it was accepted as substantially complete (AX 7, Final Audit, Sheet 2 of 28).

The record does not disclose what time extension, if any, appellant may have been granted by reason of the agreement reached at the hearing that appellant should be paid for an additional 11,268 cubic yards of unclassified excavation (AOB 2-3). In any event, the Board has found that appellant was delayed an additional 18 calendar days by reason of the unforeseen difficulties attributable to having to excavate the caprock and cope with staking errors on the part of the Government (see discussion in claim 1). Accordingly, the Board finds that no liquidated damages are to be assessed for delayed performance of the instant contract and that any amounts presently withheld as liquidated damages are to be released to appellant.

Claim 8 - \$9,577.80

The Board accepts the stipulation of the parties at the hearing that appellant is entitled to be paid for an additional 11,268 cubic yards of unclassified excavation at the unit price specified in the contract of 85 cents per cubic yard. Assuming that appellant has not already been paid the \$9,577.80 covered by the stipulation, any amount remaining unpaid shall be added to sums otherwise due appellant as shown in the portion of this opinion captioned "Summary."

Claim 9 - \$752

Miscellaneous Claims

An amicable settlement of two miscellaneous claims totaling \$752 was confirmed at the hearing (Tr. 4). The only question is whether the claimed amount has already been paid. If the specified sum has not been paid, the amount remaining unpaid shall be added to the sums otherwise found due to appellant as shown in the portion of this opinion captioned "Summary."

Summary

The following claims (Finding 1) have been allowed in the amounts shown below:

Claim 1	\$55,000.00
Claim 2	1,025.10
Claim 7	4,500.00
Claim 8	9,577.80
Claim 9	752.00
	<hr/>
	70,854.90

Claims 3, 4, 5, and 6 are disallowed in their entirety.

Appellant shall be paid the sum of \$56,025.10, plus any portion of claims 7, 8, and 9 remaining unpaid at the time of receipt of this decision, together with interest on the aggregate sum due appellant computed in accordance with Clause 31 of the General Provisions (note 7 *supra*) and payable from June 20, 1977, until the date of mailing to appellant of a supplemental agreement for execution carrying out the Board's decision in this case.

WILLIAM F. MCGRAW
Chief Administrative Judge

WE CONCUR:

DAVID DOANE
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

April 14, 1983

JUANITA MELSHEIMER

v.

ASSISTANT SECRETARY FOR INDIAN AFFAIRS

11 IBIA 155

Decided April 14, 1983

Appeal from a decision of the Assistant Secretary for Indian Affairs holding that an *inter vivos* gift of restricted townsite land from one Alaska Native to another terminated the restrictions.

Reversed and remanded.

1. Board of Indian Appeals: Jurisdiction

Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary for Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

2. Alaska: Townsites--Indian Lands: Restricted Allotment--Statutory Construction: Generally

The repeal of 43 U.S.C. § 733 (1970) (formerly 48 U.S.C. § 355a (1952)) by sec. 703(a) of the Federal Land Policy and Management Act of 1976 was intended to have future effect and not to alter rights or restrictions that had accrued under the provisions of the Alaska Native Townsite Act.

3. Indians: Generally--Statutory Construction: Generally

The fundamental principle of statutory construction that words are to be taken in their ordinary meaning unless they are technical terms or words of art is particularly applicable in the construction of statutes concerning Indians.

4. Alaska: Townsites--Indian Lands: Restricted Allotment--Statutory Construction: Generally

There is no indication of congressional intention that the restrictions upon land acquired under the Alaska Native Townsite Act be terminated upon a gift of that land from one Alaska Native to another.

APPEARANCES: Bruce C. Twomley, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On September 20, 1982, the Acting Director, Office of Trust Responsibilities, Bureau of Indian Affairs (BIA), forwarded to the Board of Indian Appeals (Board) a July 12, 1982, letter from counsel for Juanita Melsheimer (appellant) requesting reconsideration of a February 25, 1982, decision of the Assistant Secretary for Indian Affairs. That decision held that the *inter vivos* gift of restricted townsite land from one Alaska Native to another terminated the restrictions. The administrative record was simultaneously transmitted

to the Board. The Board docketed the appeal on September 29, 1982. For the reasons discussed below, the Board reverses the decision.

Background

Appellant is a 62-year-old Aleut residing in the Village of English Bay, Alaska. The village is a recognized Native village pursuant to section 11(b)(1) of the Alaska Native Claims Settlement Act, 85 Stat. 688, 698 (1971), 43 U.S.C. § 1610(b)(1) (1976). The townsite on which appellant resides, lot 2, block 5, tract A of United States Survey 4901, was patented pursuant to the Alaska Native Townsite Act, 44 Stat. 629, 48 U.S.C. § 355a-355e (1952), and title to the townsite was granted by restricted deed from the townsite trustee on December 12, 1972. By inheritance, the entire interest in this townsite descended to Ben Ukatish, appellant's nephew.

Appellant's home was damaged by fire. In order for her to obtain assistance from a Federal housing program, Ben Ukatish attempted to convey to appellant that portion of the townsite upon which her house sits. He executed a deed to appellant for portion A of the townsite on July 8, 1981. The deed stated that the property was conveyed to appellant subject to the same restrictions as appeared in the original townsite deed. No consideration for the deed was given or promised.

On October 7, 1981, the Juneau Area Director, BIA, refused to give effect to that portion of the conveyance which attempted to continue the restrictions upon the property. This decision stated the BIA's position to be "that *any* conveyance of a restricted townsite lot other than by probate or will removes the restrictions contained in the original deed." (Italics in original.)

The Assistant Secretary for Indian Affairs affirmed the Area Director's decision on February 25, 1982. The present appeal resulted from appellant's request for reconsideration of the Assistant Secretary's decision.

Jurisdiction

[1] The Board does not have general review jurisdiction over decisions of the Assistant Secretary for Indian Affairs. See *Willie v. Commissioner of Indian Affairs*, 10 IBIA 135, 138-39 (1982). However, regulations in 43 CFR 4.330 permit any matter relating to Indians to be referred to the Board by the Secretary, the Assistant Secretary for Indian Affairs, or the Commissioner of Indian Affairs (now Deputy Assistant Secretary-Indian Affairs (Operations)). This clarification of the regulations, made through formal Departmental rulemaking procedures in 1980-81, see 46 FR 7335 (Jan. 23, 1981), is consistent with the longstanding authority of the Board as set forth in 43 CFR 4.1(b)(2) to decide any matter pertaining to Indians that might be referred to it by the Secretary and to ensure that the Assistant Secretary and Deputy Assistant Secretary had the same referral authority.

April 14, 1983

The Assistant Secretary's February 25, 1982, decision concludes: "Since this decision is based on the interpretation of law, it will become final 60 days from receipt hereof unless an appeal is filed with the Board of Indian Appeals." This concluding language is a specific and proper referral of the matter to the Board pursuant to 43 CFR 4.330. The transmittal of the request for reconsideration to the Board constituted recognition that the request should be treated as an appeal under the terms of the Assistant Secretary's decision. The Board holds that this matter is properly before it and that it has jurisdiction to consider it.

Discussion and Conclusions

The Assistant Secretary's decision in this case, like that of the Juneau Area Director, is based upon the construction of section 1 of the Alaska Native Townsite Act, 48 U.S.C. § 355a (1952).¹ This section was transferred to 43 U.S.C. § 733 (1970) and was subsequently repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 703(a), 90 Stat. 2789, effective October 21, 1976. Section 701 of FLPMA contains savings provisions including "(a) Nothing in this Act, * * * or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976]." 43 U.S.C. § 1701 note (1976).

[2] The Department of the Interior, through the Interior Board of Land Appeals, has accepted the construction of this repeal set forth in an opinion of the Alaska Regional Solicitor on February 20, 1979. See *Marko and Yarrow Lewis*, 46 IBLA 257 (1980); *Royal Harris*, 45 IBLA 87 (1980); *Stu Mach*, 43 IBLA 306 (1979). That opinion, quoted in *Lewis*, *supra* at 258, construed the repeal to be of the type "to destroy rights in the future. Existing rights were expressly saved by Section 701(a) * * *. The rights in existence on the date of repeal were the rights of individuals then in occupancy * * *."

The Board finds nothing in FLPMA or its legislative history suggesting a congressional intent to alter rights or restrictions that had accrued under the provisions of the Alaska Native Townsite Act. Therefore, the Assistant Secretary's decision was properly based upon 48 U.S.C. § 355a (1952).

Section 355a (1952) has been the subject of extensive Departmental debate.² The question usually presented has been whether the sale of restricted townsite land from one Alaska Native to another terminates the restrictions. The earliest interpretation seems to have been that the restrictions could be retained in such a conveyance. Later

¹ Section 355a (1952) provides in pertinent part "[t]hat the approval by the Secretary of the Interior of the sale by an Indian or Eskimo of a tract deeded to him under this section * * * shall vest in the purchaser a complete and unrestricted title from the date of such approval."

² See, e.g., 1942 form deed; and memoranda of Mar. 30, 1954; Nov. 19, 1954; Mar. 19, 1959; July 16, 1970; and Apr. 1, 1974.

interpretations have suggested that any sale, whether to another Alaska Native or a non-Native, terminates the restrictions.

The sale of restricted land is the type of conveyance clearly addressed in section 355a (1952). There is no indication in the administrative record or the decisions of the BIA in this case that the Department has ever considered whether or not the section permits the conveyance of land with its restrictions through a gift, the issue raised in the present appeal.

[3] A fundamental principle of statutory construction is that words are to be taken in their ordinary meaning unless they are technical terms or words of art. This canon of construction is particularly applicable in the interpretation of statutes concerning Indians. *Squire v. Capoeman*, 351 U.S. 1, 6-8 (1956).

In both common understanding and legal parlance there is a distinct and important difference between a sale and a gift. According to *Webster's Collegiate Dictionary* (1960) at page 746, a "sale" is "a contract whereby the ownership of property is transferred from one person to another for a sum of money or, loosely, for any consideration." In contrast, "gift" is defined at page 349 as "[a]nything given; a present." Similarly, *Black's Law Dictionary* (4th ed. 1968) at page 1503, defines "sale" as "[a] contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer,' (or purchaser,) by which the former, in consideration of the payment of a certain price in money, transfers to the latter the title and the possession of property." *Black's* defines "gift" at page 817 as "[a] voluntary transfer of personal property without consideration. * * * A parting by owner with property without pecuniary consideration. * * * A voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money."

[4] It is thus clear that both in its ordinary meaning and as a legal term, "sale" does not include "gift." If Congress had meant to cause the termination of the restrictions on Alaska Native townsite lands upon any change of ownership, it could easily have used a term such as "conveyance" that would have been all encompassing. This is not the case. The Board finds no indication that by providing for the termination of restrictions upon the sale of Alaska Native townsite lands, Congress also intended to cause the termination of those restrictions upon a gift of such land from one Alaska Native to another.³

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and the referral of this case to the Board by the Assistant Secretary for Indian Affairs, 43 CFR 4.330, the February 25, 1982, decision of the Assistant

³The most recent congressional enactment dealing with real property held by Indians, the Indian Land Consolidation Act, Act of Jan. 12, 1983, P.L. 97-459, § 203, 96 Stat. 2515, indicates an intention to ease the acquisition and holding of land in trust and restricted status by all Indians regardless of the means through which the land was acquired.

April 19, 1983

Secretary for Indian Affairs is reversed.⁴ This case is remanded to the Bureau of Indian Affairs for appropriate action consistent with this opinion.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

UTE MOUNTAIN UTE TRIBE

v.

ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS

11 IBIA 168

Decided *April 19, 1983*

Appeal from a decision of the Acting Assistant Secretary for Indian Affairs affirming a decision not to approve Ute Mountain Ute Tribal Resolution No. 2916 concerning imposition of an oil and gas severance tax.

Dismissed.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals has no jurisdiction to review decisions of the Acting Assistant Secretary for Indian Affairs except as those decisions may be referred to it on a case-by-case basis or through rulemaking.

APPEARANCES: John J. D'Onofrio, Esq., Denver, Colorado, for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

On April 4, 1983, the Board of Indian Appeals received a notice of appeal from the Ute Mountain Ute Tribe, through counsel, John J. D'Onofrio, Esq., Denver, Colorado, seeking review of a March 1, 1983, decision of the Acting Assistant Secretary for Indian Affairs regarding disapproval of an oil and gas severance tax imposed by Tribal Resolution No. 2916. The appeal is hereby docketed under the above

⁴The Board has not considered the question, addressed in prior Departmental memoranda as noted earlier in this opinion, whether a sale of Alaska Native townsite restricted land from one Alaska Native to another terminates the restrictions on that land. Neither has it considered the application of the Indian Land Consolidation Act to this question. These issues were not raised in the present appeal.

case name and number. For the reasons discussed below, the Board is constrained to dismiss the appeal.

Background

On May 20, 1982, the Ute Mountain Ute Tribal Council passed Resolution No. 2916, enacting a severance tax ordinance. Under the provisions of the tribal constitution, approved by the Secretary of the Interior on May 23, 1940, the resolution was referred to the Superintendent of the Ute Mountain Ute Agency, Bureau of Indian Affairs, for review. Article V, section 3, of the tribe's constitution provides that the Superintendent "shall, within two weeks * * * [after receiving a resolution for approval], approve or disapprove the same." If the resolution is approved, it becomes effective immediately subject to a 90-day period in which the Secretary of the Interior may disapprove the resolution. If the resolution is disapproved, the Superintendent "shall advise the Tribal Council of his reasons. The Tribal Council may by a majority vote refer the ordinance or resolution to the Secretary of the Interior who may within 90 days from its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective."

The Superintendent did not advise the tribe of the disapproval of the resolution within the 2-week period established in the constitution. Therefore, according to accepted custom and practice, the tribe believed that the resolution had been approved. The 90-day period provided for Secretarial review of the resolution expired on August 18, 1982. This period similarly passed without notice to the tribe that the resolution had been disapproved. The tribe therefore again believed that the resolution had been approved by the Department.

On October 8, 1982, the Albuquerque Area Director informed the tribe that the resolution was disapproved. This decision was based upon the determination that the Superintendent had neither approved nor disapproved the resolution and that, therefore, the 90-day period for Secretarial review had never begun to run.

The tribe sought review of this decision through the administrative review channels established in 25 CFR Part 2. Part 2 provides that the Commissioner of Indian Affairs shall review decisions issued by Area Directors. Because the position of Commissioner was vacant, the tribe sent its notice of appeal to the Assistant Secretary for Indian Affairs, expecting that it would be referred to the appropriate office in accordance with the provisions of 25 CFR 2.13.¹

The official currently exercising the review authority delegated to the Commissioner is the Deputy Assistant Secretary--Indian Affairs (Operations).² The decision in the tribe's appeal, issued on March 1, 1983, was signed by John W. Fritz, the current Deputy Assistant Secretary--Indian Affairs (Operations), in the capacity of Acting

¹ Sec. 2.13 states in pertinent part that "[a] notice of appeal and/or appeal received in an office other than that to which it should be properly addressed shall be transmitted to the proper office and the appellant advised."

² See Memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

April 19, 1983

Assistant Secretary for Indian Affairs. That decision was apparently based both on the finding that the Superintendent did not approve the resolution and that the resolution did not meet the requirements of a document entitled "Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities," dated January 18, 1983, and signed by the Assistant Secretary for Indian Affairs. The tribe sought Board review of this decision.

Jurisdiction

The tribe alleges that the decision in its appeal should have been referred to the Deputy Assistant Secretary-Indian Affairs (Operations), under the provisions of 25 CFR 2.13, rather than being retained and decided by the Office of the Assistant Secretary. If the appeal had been so referred, the Board would apparently have jurisdiction over it. The Board has general review authority over decisions of the Deputy Assistant Secretary-Indian Affairs (Operations), which involve the interpretation of law. See 25 CFR 2.19 and 43 CFR 4.330. This appeal raises the legal questions of whether the specific tribal resolution at issue was properly disapproved both procedurally and substantively on the basis of guidelines issued after the passage of the resolution and not published in the *Federal Register*.³

The case also raises broader legal questions concerning the authority of the Bureau of Indian Affairs to disapprove tribal resolutions after the expiration of time periods established in tribal constitutions and apparently through long-established custom and usage,⁴ and therefore in violation of the mutually agreed framework for interaction between two sovereign powers. These questions, as the tribe states, have far-reaching implications, potentially affecting all Indian tribes, concerning the way in which the Bureau of Indian Affairs discharges the government-to-government relationship between the United States of America and the Indian tribes.

[1] However, the decision in this case was not signed by John Fritz as Deputy Assistant Secretary-Indian Affairs (Operations), but rather by him as Acting Assistant Secretary. The Board has held that it does not have review authority over decisions of the Assistant Secretary except as those decisions may be specially referred to it on a case-by-case basis or through rulemaking. *Willie v. Commissioner of Indian Affairs*, 10 IBIA 135, 138-39 (1982).⁵ This holding must also apply when decisions are signed by the Acting Assistant Secretary.

³ See 5 U.S.C. § 552(a)(1) (1976); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Allen v. Navajo Area Director*, 10 IBIA 146, 89 I.D. 508 (1982); *Shoshone and Arapahoe Tribes v. Commissioner of Indian Affairs*, 9 IBIA 263, 89 I.D. 200 (1982).

⁴ Sec. 1.4(A) of the Jan. 18, 1983, guidelines, *supra*, states: "The Superintendent will review the ordinance in accordance with the review authority and time limits, if any, provided for the Superintendent's action in the tribal constitution."

⁵ The referral to the Board of decisions rendered by the Assistant Secretary has occurred on a case-by-case basis in several ways. In *Melsheimer v. Assistant Secretary for Indian Affairs*, 11 IBIA 155, 90 I.D. 165 (1983), the Board acquired jurisdiction when the Assistant Secretary stated in the decision appealed from that the parties could appeal

Continued

Because the decision in this case was issued by the Acting Assistant Secretary for Indian Affairs and was not specially referred to the Board of Indian Appeals, the Board has no jurisdiction to review the decision. Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal must, therefore, be dismissed.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

JERRY MUSKRAT
Administrative Judge

DIANE ZARR

v.

ACTING DEPUTY DIRECTOR, OFFICE OF INDIAN EDUCATION
PROGRAMS

11 IBIA 174

Decided April 21, 1983

Appeal from a decision of the Acting Deputy Director, Office of Indian Education Programs, denying a request for a waiver of an Indian blood quantum requirement for receipt of higher education financial assistance.

Dismissed.

1. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction--Indians: Education

Unless or until the Office of Indian Education Programs promulgates regulations providing for administrative review of its decisions, the Office is adhering to the regulations in 25 CFR Part 2. These regulations include an appeal to the Board of Indian Appeals in those cases in which the decision being appealed is based on an interpretation of law.

2. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction--Indians: Education

Under 25 CFR 2.19, when a decision in an appeal is not issued by the Director of the Office of Indian Education Programs within 30 days from the expiration of the time for the filing of all pleadings, the Board of Indian Appeals acquires jurisdiction over the appeal.

to the Board of Indian Appeals. Recently the Board docketed an appeal filed by the Pueblo of Laguna from action taken by the Assistant Secretary when, following a request by the appellant to the Secretary of the Interior, the Secretary requested that the Board of Indian Appeals review the Assistant Secretary's decision. Docket No. IBIA 83-23-A, predocting notice issued Mar. 29, 1983. For an example of the use of rulemaking by the Assistant Secretary to render certain matters decided by him appealable to the Board, see 25 CFR 13.15.

The Board noted in *Willie, supra* at 138 n.13, that in promulgating the regulations providing for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: "Exercise of the Secretary's review authority by the Board of Indian Appeals will insure impartial review free from organizational conflict in that the Board is a part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs," 40 FR 20819 (May 13, 1975)."

April 21, 1983

3. Constitutional Law: Generally--Regulations: Generally

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid or to declare an act of Congress unconstitutional.

4. Rules of Practice: Appeals: Dismissal

An appeal before the Board of Indian Appeals will be dismissed at the request of the parties when it appears that the Board does not have authority to grant the relief sought.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, Ukiah, California, for appellant; Sandra R. Etheridge, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On August 4, 1982, the Board of Indian Appeals received a letter from Diane Zarr (appellant) seeking review of an appeal filed with the Director of the Office of Indian Education Programs (OIEP), Bureau of Indian Affairs, on September 1, 1981. In that appeal, appellant sought review by the Director of a decision issued by the Acting Deputy Director, OIEP, which denied appellant's request for a waiver of the one-quarter Indian blood quantum requirement for receipt of higher education financial assistance established in 25 CFR 40.1. Appellant sought review by the Board on the grounds that her appeal had been before the Director for more than 30 days without action, in violation of 25 CFR 2.19.

[1] On August 5, 1982, the Board issued an order making a preliminary determination that it had jurisdiction over this appeal. The Board here affirms that holding. Section 4.330(b)(4) of the Board's regulations in 43 CFR states: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * decisions of the Office of Indian Education Programs for which Secretarial review is otherwise provided." To date, regulations otherwise providing for administrative review of decisions of OIEP have not been promulgated. Unless or until such regulations are issued, the OIEP is adhering to the general administrative review procedures established in 25 CFR Part 2. In accordance with those procedures, decisions of the Director, OIEP, that are based upon an interpretation of law are appealable to the Board of Indian Appeals. 25 CFR 2.19(c).

[2] In its order of August 5, 1982, the Board also held that because a decision in appellant's case had not been issued by the Director, OIEP, within 30 days from the expiration of the time for the filing of all

pleadings in the appeal, the Board acquired jurisdiction over the appeal under 25 CFR 2.19(b). See *Allen v. Navajo Area Director*, 10 IBIA 146, 89 I.D. 508 (1982). Although section 2.19 speaks in terms of decisions by the Commissioner of Indian Affairs, since OIEP is utilizing the review procedures in 25 CFR Part 2, the Director, OIEP, is likewise responsible for issuing decisions on appeals within 30 days, or transmitting the appeal to the Board.

On April 18, 1983, following the submission of opening briefs by both appellant and appellee, the Board received a joint motion to dismiss this appeal on the grounds that the Board was without jurisdiction to grant the relief sought by appellant. The motion states that appellant seeks to invalidate the Indian blood quantum requirement of 25 CFR 40.1 as being in excess of statutory authority or, alternatively, to have the statute upon which the requirement is based declared unconstitutional as a violation of equal protection.

[3, 4] The Board agrees that it does not have authority to declare duly promulgated Departmental regulations invalid, *Connovichnah v. Acting Anadarko Area Director*, 9 IBIA 179, 89 I.D. 71 (1982), or to declare an act of Congress unconstitutional, *Estate of Caye*, 9 IBIA 196 (1982); *Estate of Stowhy*, 1 IBIA 269, 70 I.D. 428 (1972). Because it appears that this is the only relief sought by appellant, and because the Board is without jurisdiction to grant this relief, the appeal will be dismissed. Cf. *Lord v. Commissioner of Indian Affairs*, 11 IBIA 51 (1983).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

JERRY MUSKRAT
Administrative Judge

I CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

SAM BLANKENSHIP

5 IBSMA 32

Decided April 26, 1983

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from the May 12, 1981, decision of Administrative Law Judge Tom M. Allen, vacating Notice of Violation No. 80-I-87-25 for lack of jurisdiction by OSM (Docket No. 1-47-R).

Reversed and remanded.

April 26, 1983

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

The 2-acre exemption applies to "operations," not to "operators"; thus, where a coal mining and reclamation operation affects more than 2 acres, an operator who contracts with the permittee is properly charged with violations on the portion of the operation affected by his activities, even if his activities affect less than 2 acres.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

A notice of violation is reasonably specific and satisfies the requirements of sec. 521(a)(5) of the Act where it clearly describes the practices or circumstances alleged to be in violation of the regulations, accurately identifies the particular regulations allegedly violated by these practices or circumstances, and describes the remedial action required to abate each violation. Where, after the OSM inspector explained the violations and remedial actions to the operator, the operator indicated that he understood each of the violations alleged and remedies required, an allegation on appeal that the notice of violation which met the foregoing requirements nevertheless lacked specificity will not be upheld.

APPEARANCES: Emmitt F. Yeary, Esq., and Andrew S. Wright, Esq., Yeary & Tate, Abingdon, Virginia, for Sam Blankenship; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MIRKIN

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from the May 12, 1981, decision of Administrative Law Judge Tom M. Allen, Docket No. CH 1-47-R, that OSM lacked jurisdiction under the Surface Mining Control and Reclamation Act of 1977, August 3, 1977, P.L. 95-87, 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) (Act), and its implementing regulations, 30 CFR Chapter VII (regulations), to issue Notice of Violation (NOV) No. 80-I-87-25, charging Sam Blankenship (Blankenship) with five violations of the Act. We reverse the decision below.

Facts

In the 1970's, Jewell Smokeless Coal Corp. (Jewell) conducted a deep mine operation, known as Oakwood #4 Mine, in Buchanan County, Virginia. Jewell abandoned the mine, leaving scrap equipment, timbers, buildings, a concrete structure, and other materials on the site (I Tr. 7-8). Because of an injunction obtained by the State Water Control Board (I Tr. 14-15) and promises made to the surface owners, Jewell approached Blankenship in 1980 about helping to reclaim the

site (I Tr. 7-8) in return for any coal that might still be there plus \$20,000 (I Tr. 9-11, 16, 135).

OSM Inspector Dewey Brock testified that he became aware of a new disturbance on the site as a result of an aerial photograph taken by him on August 14, 1980 (I Tr. 34-35). He did not visit the site until September 8, when he and Inspector Carroll Blevins went there in response to an inquiry from the surface owner (I Tr. 19). When they arrived at the site, they did not see coal being mined, but overburden was being removed, and a coal seam had been exposed. A loader was in the pit cleaning rash off the coal (I Tr. 20). It seemed to the inspectors that some coal had been removed; about 50 tons were stockpiled on the bench (I Tr. 23). Brock did not take action at that time because "it was questionable on the coal removal and the 2-acre disturbance," but he informed Blankenship, who was at the site, that OSM would keep the operation under surveillance, and if Blankenship exceeded the 2 acres or the tonnage limitations, OSM would take further action (I Tr. 30-31).

No written report of the inspection was made (I Tr. 61-63), but in later examining photographs taken during an aerial inspection of the area on September 25, Brock noticed that another coal pit had been opened (I Tr. 31-34). In fact, he was aware when he took the pictures from the helicopter that there was some mining activity on the site that he needed to check (I Tr. 58). He did not verify the identity of the owner or user of the equipment he saw on the site during his September 25, flight. When he revisited the site on October 16, he found that it had already been reclaimed and abandoned (I Tr. 31, 40-41). Nevertheless, he measured the total amount of recent ground surface disturbance and calculated that it amounted to 3.3 acres. The calculations included disturbed bench areas, outcrops, equipment storage areas, refuse areas that had been graded, and the haul road (I Tr. 40-42). He then served a notice of violation on Blankenship at Blankenship's office (I Tr. 48-49) on October 24, 1980 (OSM Exh. R-1), in which were listed five violations.

During this same period, three Virginia State inspectors independently visited the site, on September 11, 12, and 18, 1980 (I Tr. 73-74, 102, 182-83). In an informal survey taken on September 18, one of the State inspectors calculated that the disturbed area, excluding the road, refuse area, and equipment storage area, amounted to 2.9 acres (I Tr. 87-88). He estimated that the refuse area alone occupied about an acre and a half (I Tr. 126). The State inspectors also testified that they had frequently observed three trucks hauling coal that had to have come from the site in question, and that one truck had been followed to the Jewell loading dock (I Tr. 74-79, 89-100, 102-04).

An environmental engineer for Jewell testified that its agreement with Blankenship was to assist it in reclaiming the area, and that it was well satisfied with the work he did (I Tr. 155-56). It had equipment in the area to maintain roads before he arrived (I Tr. 158),

April 26, 1983

and it had equipment and did work on the site both during the time Blankenship was there and after he left (II Tr. 23-27). In fact, at one time it had two dozers, a track loader, and a grade-all sloping the outcrops on the site (I Tr. 158). Jewell also worked on the refuse pile after Blankenship left, and possibly did all of the work on it (I Tr. 167). In addition, another equipment operator was brought in with a loader to do work on the sedimentation pond while Blankenship was still there (I Tr. 197-200). Blankenship maintains he did not finish the job, but left the site soon after the inspectors came (I Tr. 174).

The Administrative Law Judge vacated the NOV. He concluded that, although more than 2 acres in total had been disturbed, less than 2 acres could be attributed to Blankenship and that, in any event, the relationship of Jewell to Blankenship was probably that of master and servant rather than that of principal and contractor (Decision at 9).

Discussion

The conclusion by the Administrative Law Judge that the total disturbed area is in excess of 2 acres is clearly supported by the evidence. Although the Administrative Law Judge made no determination, there is abundant evidence in the record to show also that more than 250 tons of coal had been removed by Blankenship alone (I Tr. 75-79, 91-100).¹ These determinations are sufficient to render Blankenship responsible for any violations of the performance standards resulting from his activities at the site, without regard to whether his activities affected 2 or more acres of surface lands.²

[1] The relevant portions of the Act and the regulations concerning the 2-acre "exemption" are identical. They make regulable all coal mining and reclamation operations except "the extraction of coal for commercial purposes where the * * * operation affects two acres or less." 30 U.S.C. § 1278(2) (Supp. II 1978); 30 CFR 700.11(b) (italics added). Thus, the exception applies to "operations," not "operators."

¹ The amount of coal removed in the operation is relevant because the regulations of 30 CFR Chapter 7 do not apply to "[t]he extraction of 250 tons of coal or less by a person conducting a surface coal mining and reclamation operation." 30 CFR 700.11(c). It is beyond dispute that well more than 250 tons of coal had been removed by Jewell before Blankenship became involved with the operation. Even had Blankenship's activities been limited to reclamation, rather than including extraction of coal, those activities would not have been excepted by the provision of 30 CFR 700.11(c), because a pure reclamation operation can claim no greater exemption than could the coal removal operation upon which it is based.

² On appeal, Blankenship urged that he was also exempt because he was merely a servant of Jewell. The issue of master-servant was first mentioned in the Administrative Law Judge's decision (Decision at 9). Blankenship understandably reached for it in his brief on appeal. The reach, though, exceeded the grasp. Assuming, *arguendo*, that servanthood would exculpate Blankenship, there is not one scintilla of evidence to even suggest a master-servant relationship. The Restatement of the Law of agency says:

"§ 2. Master; Servant; Independent Contractor

"(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

"(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

"(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent."

Restatement of the Law 2nd, Agency 2nd (1958). Blankenship could have served as its example of an independent contractor.

This reading is strengthened by the legislative history. In adopting the Act, Congress found that coal mining operations could result in environmental damage and that failure to control this damage in the past had imposed social and economic costs on the residents of mining regions and had resulted in a continuing impairment of environmental quality. 30 U.S.C. § 1201(c) and (h) (Supp. IV 1980). Congress said it was enacting corrective legislation to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a) (Supp. IV 1980). It was not a recited purpose of the legislation to exempt less than 2-acre operations or operators from the Act's provisions. In negotiating the various specific provisions, the Senate found that operations (not operators) affecting 2 acres or less "cause very little environmental damage and that regulation of them would place a heavy burden on both the miner and the regulatory authority." S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977).³ The result was 30 U.S.C. § 1278(2) (Supp. IV 1980) which, as we have seen, refers to "operations," not "operators."

In construing the scope of exceptions contained in generally remedial legislation the courts have been firm in applying a strict standard: "[T]o do as appellants urged] would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed," *Spokane Inland Empire R.R. v. United States*, 241 U.S. 344, 350 (1916); "[t]he Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended," *Piedmont & Northern Ry. v. Commission*, 286 U.S. 299, 311, 312 (1932); "[a]ny exemption from * * * remedial legislation must therefore be narrowly construed," *Phillips Co. v. Walling*, 324 U.S. 490, 493 (1945). See also *Roland Electrical Inc. v. Walling*, 326 U.S. 657 (1946). The legislation and regulation we are here construing fall within the same ambit as those in the cases we have cited.

It is clear from the record that the coal mining and reclamation operation in which Blankenship participated affected more than 2 acres of surface area. As explained above, Blankenship could not avoid compliance with the performance standards of 30 CFR Chapter VII merely by limiting the surface area disturbed by his particular activities to less than 2 acres.⁴ This, however, does not mean

³ This legislative history reveals that Congress was exempting those small operations whose regulation would place a burden upon both the miner and the regulatory authority. Where you find such a miner and regulatory authority vis-a-vis a particular operation, you have the exemption that was intended. Where, however, as in this instance, you have a regulable operation due to the scope of the activity of the permittee (Jewell), one-half of the equation, unburdening the regulatory authority, is not present.

⁴ Were we to hold that the exemption applies to operators as well as operations, Blankenship would still have problems. We have continuously held that exemption is a matter of affirmative defense. *Virginia Fuels, Inc.*, 4 IBSMA 185, 89 I.D. 604 (1982); *Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980). The only testimony on acreage was by an OSM inspector, a Virginia State inspector, and Sam Blankenship. The two inspectors both submitted measurements of greater than 2 acres. Mr. Blankenship opined that he did not think it was that much (1 Tr. 178-80). Merely voicing an opinion is not sufficient to carry one's burden of establishing even a prima facie affirmative defense, much less a compelling one in view of the measurements and testimony of the two inspectors.

April 26, 1983

that an operator who is not a permittee is responsible for the entire operation. Such an operator may only be charged with violations on that portion of the entire operation affected by his activities.

[2] As for the particular violations of the performance standards, our review is limited to the nature of the claims raised by Blankenship against OSM's enforcement action. In his application for review, Blankenship claimed that OSM lacked authority to regulate his activities at the minesite. Aside from this general challenge, however, Blankenship's only claim against the enforcement action was not that he had not committed the offenses charged but that "[t]he NOV as issued was invalidly issued in that the Secretary did not properly advise your Applicant with reasonable specificity as is required by the Act of the nature of the violations and the nature of each remedial action required."⁵

This claim implicitly refers to section 521(a)(5) of the Act which requires, *inter alia*, that a notice of violation "shall set forth with reasonable specificity the nature of the violation and the remedial action required." 30 U.S.C. § 1271(a)(5) (Supp. IV 1980). In the NOV issued to Blankenship, OSM described five violations and the corresponding requirements for remedial action in the following language:

Violation 1

The person has conducted coal surface mining operations without first obtaining a permit from the state Regulatory Authority (Virginia Division of Mined Land Reclamation) [in violation of 30 CFR 710.11(a)(2)].

Remedial Action Required: Submit for review and approval to the Regulatory Authority (Virginia Division of Mined Land Reclamation) a permit application to include all disturbed areas used to facilitate mining.

Violation 2

The person has failed to install adequate sedimentation ponds and other structures to control sedimentation prior to disturbance of an area by mining activity [in violation of 30 CFR 715.17(a)].

Remedial Action Required: The person shall pass all surface drainage from the disturbed area through a sedimentation pond or series of ponds prior to leaving the disturbed area.

Violation 3

The person has failed to transport, backfill, compact, and grade all spoil material to eliminate all highwalls, spoil piles and depressions in order to achieve the approximate original contour [in violation of 30 CFR 715.14].

Remedial Action Required: Transport, backfill, compact and grade all spoil material to eliminate all highwalls, spoil piles and depressions in order to achieve the approximate original contour in accordance with 30 CFR 715.14.

Violation 4

⁵ From the opening statement of his counsel, it appears that previous to the review hearing Blankenship determined that he would restrict his challenge against OSM's enforcement action to the contention that OSM lacked authority to regulate his activities at the minesite. Counsel for Blankenship described his position as follows:

"Mr. Yeary: Your Honor, briefly it will be our position, or Mr. Blankenship's position, [that] he did not engage in mining, that he was reclaiming this particular property that's the subject of this hearing, that there was less than two acres disturbed, and that there was not 250 tons of coal removed. And therefore Mr. Blankenship does not come within the purview of the regulations."

(Tr. 5).

The person has allowed spoil, waste material or other debris to be placed or allowed to remain on the downslope [in violation of 30 CFR 716.2(a)].

Remedial Action Required: Pull back all material possible from downslope areas, stabilize and vegetate the slopes by all means necessary such as grading and compacting and applying ample quantities of seed and mulch to the area to establish a vegetative cover capable of stabilizing the slopes and preventing erosion.

Violation 5

The person has failed to display at all points of access to the disturbed area from public roads a mine identification sign showing the company name, address, phone number and identification numbers of current mining permits or other authorizations to operate [in violation of 30 CFR 715.12(b)].

Remedial Action Required: The person shall display at all points of access to the disturbed area from all public roads a mine identification sign showing the company name, address, phone number and identification numbers of all current mining permits or other authorizations to operate.

There is no obvious lack of specificity in this language. Moreover, in his testimony during the review proceeding, Blankenship made no reference to any confusion on his part over the nature of the violations alleged and the remedial action required by OSM (Tr. 172-82).⁶ In contrast, the OSM inspector who issued the NOV testified that he personally served Blankenship with the NOV at Blankenship's office, that he spent at least an hour explaining the alleged violations to Blankenship, and that Blankenship indicated that he understood each of the violations alleged (Tr. 49). Thus, there appears to be no substantiation in the record for Blankenship's claim that the NOV did not satisfy the requirements of section 521(a)(5) for specificity.⁷

For the foregoing reasons we reverse the decision below vacating NOV No. 80-I-87-25, and remand it to the Hearings Division for further proceedings consistent herewith.

MELVIN J. MIRKIN
Administrative Judge

I CONCUR:

NEWTON FRISHBERG
Administrative Judge

I CONCUR IN THE RESULT:

BERNARD V. PARRETTE
Administrative Judge

⁶ See also note 5, *supra*.

⁷ Cf. *Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980) (in which the Board vacated a notice of violation, because it did not meet the requirements of section 521(a)(5), under the circumstances that the evidence adduced at the review hearing demonstrated OSM's concern with a performance standard other than the one cited in the notice).

April 28, 1983

MUD FORK COAL CORP.

5 IBSMA 44

Decided April 28, 1983

Appeal by Mud Fork Coal Corp. and by the Office of Surface Mining Reclamation and Enforcement from the October 20, 1981, decision of Administrative Law Judge Tom M. Allen, upholding OSM jurisdiction and sustaining the validity of Notice of Violation Nos. 80-I-73-30 and 80-I-73-32 but reducing the civil penalty points assigned (Docket Nos. CH 1-68-R, CH 1-69-R, and CH 1-196-P).

Affirmed in part; vacated in part, and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

The area of an access and haul road used for more than one coal mine is properly attributed, at least in part, to each mine in calculating the extent of the surface area affected by each mine for the purpose of determining whether it qualifies for the 2-acre exemption of sec. 528(2) of the Act and 30 CFR 700.11(b). Where only one operator is using the haul road at the time a notice of violation is issued, the entire length of the road that is used for access and hauling may be properly attributed to that operator's mining activities.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Generally

A road used in surface coal mining and reclamation operations is subject to regulation by OSM, unless it is shown to be maintained with public funds.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

The failure of an Administrative Law Judge to impose a civil penalty simply because the total points assigned to a notice of violation are less than 31 may constitute an abuse of discretion if multiple violations are involved.

4. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

An Administrative Law Judge in a civil penalty proceeding must determine whether to impose a civil penalty for more than 1 day whenever he finds that the violation under review has not been abated and that the exceptions set forth in 30 CFR 723.15(b)(1) do not apply.

APPEARANCES: James E. Arrington, Jr., Esq., Lebanon, Virginia, for Mud Fork Coal Corp.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia; Glenda R. Hudson, Esq., Attorney, and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY ADMINISTRATIVE JUDGE PARRETTE**INTERIOR BOARD OF SURFACE MINING AND RECLAMATION
APPEALS*

Mud Fork Coal Corp. (Mud Fork) has appealed from the October 20, 1981, decision of Administrative Law Judge Tom M. Allen, Docket Nos. CH 1-68-R, CH 1-69-R, and CH 1-196-P, in which he held that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation (NOV) No. 80-I-73-30, charging Mud Fork with failure to eliminate the highwall on one site; and to issue NOV No. 80-I-73-32, charging Mud Fork with three violations of the Act for (1) failure to install sedimentation ponds on three sites (3, 4, and 5), in violation of section 715.17(a) of the regulations; (2) failure to eliminate highwalls on four sites (2, 3, 4, and 5), in violation of section 715.14; and (3) failure to adequately maintain the access and haul roads between the sites, in violation of section 715.17 of the regulations. Judge Allen found the evidence sufficient to hold Mud Fork liable for the violations, and it appealed, essentially on the ground that each of the sites was under 2 acres and therefore exempt from the Act, even though the total of all the five sites involved was well over 2 acres. We affirm the Administrative Law Judge's decision as to OSM's jurisdiction over the mining operation but vacate his determination as to penalty points, and remand the case for a new civil penalty hearing.

Facts

In December 1980, OSM Inspector Bill Arnett conducted several inspections of Mud Fork's surface mining operations in Buchanan County, Virginia, and issued NOV Nos. 80-I-73-30 and 80-I-73-32 to Mud Fork, alleging the violations of the regulations set forth above. The facts, as stipulated by the parties at the hearing before the Administrative Law Judge on August 20, 1981, are these: (1) Five sites are involved, and each by itself is less than 2 acres, but the total of all is well over 2 acres; (2) Harman Mining Corp. (Harman), which is the owner of both the mineral and surface rights, deeded the haul road to Buchanan County in 1978, and the county spent \$5,191.06 on its maintenance on October 17, 1980; (3) Harman does the engineering work for Mud Fork in connection with the mining sites; and (4) the sites involved in the violations are located on a preexisting bench created by previous strip mining. All of the pits are separated by distances ranging from 2,000 to 5,000 feet, but the same haul road along the preexisting bench connects all the sites.

The August 20 hearing was initially scheduled just for Docket Nos. CH 1-69-R and CH 1-196-P, which involved, respectively, only the

April 28, 1983

review of NOV No. 80-I-73-32 and the civil penalty subsequently assessed because of it. However, after the hearing and before the issuance of the decision, a notice of hearing was issued for Docket No. CH 1-68-R, and at that point Mud Fork requested that the Administrative Law Judge consider NOV No. 80-I-73-30 simultaneously with NOV No. 80-I-73-32, since the same facts and the same issues were involved in both NOVs. The Administrative Law Judge agreed to do so. Thus, the decision under appeal covers both NOVs, as well as the civil penalty assessment on NOV No. 80-I-73-32.

At the inception of the hearing, after counsel for OSM had outlined the facts of the case, the Administrative Law Judge stated his view that Mud Fork was covered by the Act as a matter of law (Tr. 5-6). However, counsel for Mud Fork urged that this case was distinguishable from earlier cases involving related mining sites connected by the same haul road in that (1) Harman owned not just the mineral rights but also the surface rights, and thus it could legally convey the haul road to the county, which it did; (2) the mining sites were not contiguous and therefore they were not physically related; and (3) no new site had been opened until the previous site was closed and reclaimed. However, the Administrative Law Judge inquired whether any two of the sites had been operated within 12 months, and when counsel for Mud Fork answered in the affirmative, he reiterated his ruling that they were subject to the Act (Tr. 7-8). Mud Fork nevertheless requested an opportunity to present its evidence for the record, and the Administrative Law Judge granted the request. In addition, OSM proceeded to present evidence relating to the civil penalty, which an assessment conference had set at \$600, an amount OSM regarded as inadequate (Tr. 8-9).

Inspector Arnett testified that when he first inspected the Mud Fork operation on October 3, 1980, it had only one site, and that he issued an NOV (No. 80-I-73-22) because the site had no sedimentation pond and the access road needed maintenance (Tr. 14). Both violations were subsequently terminated (Tr. 50). Mud Fork thereafter installed a sedimentation pond at its second site, but it did not do so at any of its other three sites; so OSM took the position that negligence points should have been assigned in connection with the December violation (Tr. 39-40). As to the subsequent highwall and road violations, OSM acknowledged that most of the drainage would stay on the disturbed areas of the bench and that most of the sediment which washed off the bench would not reach the nearest stream because of the intervening woods. However, in heavy rains, some damage would occur (Tr. 38-39); and since Mud Fork had been warned about OSM's requirements in October, OSM asserted that all of the December violations involved negligence (Tr. 40-41). As of the date of the hearing, neither of the December NOVs had been terminated (Tr. 50), mainly because of the

costs involved and because Mud Fork did not think OSM had jurisdiction over any of its five sites (Tr. 78-81).

The findings and conclusions of the Administrative Law Judge were as follows:

At the beginning of the hearing, upon learning of the undisputed facts, I informed the parties that applicant was subject to the Act. I find no reason to change that finding.

The mere fact that no two pits were opened and mined at the same time does not act to relieve the operator of coverage of the Act since the evidence disclosed, conclusively, that the entire operation was continuous and uninterrupted. All of the acreage disturbed is considered, and I find that it amounts to in excess of 2 acres without inclusion of the haul road.

The haul road, however, is subject to the Act as well since the efforts to "deed" it to Buchanan County as a "public" road maintained with "public" funds was nothing more than a sham. Neither Harman Mining nor Buchanan County followed the ordinance since there was no road engineer employed by the county to recommend the road. The method of maintenance illustrated in this case is also a questionable procedure.

Additionally, applicant did not complete their appeal of NOV 80-I-73-22 (CH 1-29-R) and is now estopped to deny coverage of the Act by reason of its failure to pursue the issue when it appealed the first violation.

There being no denial of the violations, Notices of Violation 80-I-73-30 and 80-I-73-32 are affirmed.

In assessing the amount of the civil penalty under section 723.13 of the regulations, however, the Administrative Law Judge addressed only violation 1 of NOV No. 80-I-73-32, assigning 1 point for history of violations, 10 points for probability of occurrence, no points for damage, 13 points for negligence, and no points for good faith, for a total of 24 points and an assessment of \$480. He suspended payment of the civil penalty.¹

The reason the Administrative Law Judge did not assign points for the haul road violation was apparently that, because there was no permit area, he regarded it as unnecessary (or improper) to consider damage that occurred off the disturbed area (citing *West Virginia Energy, Inc.*, 3 IBSMA 301, 309 (1981)) (Decision at 3). Although he gave no reason for not assigning points for the highwall violation, he criticized the OSM inspector's testimony for lack of specificity with respect to negligence and probability of damage (Decision at 4).

Mud Fork appealed the decision of the Administrative Law Judge, alleging that (1) it was entitled to the 2-acre exemption, (2) the haul road was not subject to the Act, and (3) it was not estopped from denying exemption from the Act. OSM also appealed, arguing that (1) the Administrative Law Judge had erred in assigning no points for extent of damage where the damage was caused by an unpermitted mining operation, and (2) the haul road was indeed subject to the Act. Mud Fork then filed a response to OSM's brief, contending that OSM should have petitioned for a review of the civil penalty under 43 CFR 4.1270, specifically listing the errors alleged, rather than appealing the Judge's decision.²

¹ Under 30 CFR 723.12, a civil penalty must be assessed if a violation is assigned 31 points or more. The penalty is discretionary if the violation is assigned 30 points or less.

² This issue was considered by the Board in an earlier decision to deny Mud Fork's motion to dismiss OSM's appeal.

April 28, 1983

Discussion

In its first brief on appeal, Mud Fork described itself as a family-owned business that owns no mineral properties and works only as an independent contractor for Harman. At the time of the first violation, its site consisted only of the first pit and the haul road. Although it applied for review of the October NOV, it went ahead with the remedial action, under protest, while the review was pending. No penalty was assessed, and the parties agreed that an order would be entered whereby Mud Fork would withdraw its application for review but reserve its right to contest jurisdiction. The reason for the order was that by the time it was agreed upon, another pit had been opened and OSM had cited new violations on it. No penalty was assessed on the second NOV (No. 80-I-73-30, issued on December 15), but Mud Fork again applied for review. On December 18, OSM issued a third NOV, alleging the three violations on sites two through five previously described. These allegations were based on the same (December 12) inspection but covered the remaining three sites, except for a new highwall violation on pit No. 2 and the road violations between sites. At that time only pit No. 5 was in operation; the other sites, according to Mud Fork, had already been reclaimed. A civil penalty of \$1,000 was proposed for the third NOV (No. 80-I-73-32), but an assessment conference later reduced the penalty to \$600.

[1, 2] As the decisions we discuss below indicate, far too much water has flowed over the dam for us seriously to entertain Mud Fork's arguments that it is not covered by the Act. This case involves a single operator for all of the five sites, an operator who was clearly mining by previous design along the same bench, using the same haul road, and acting on behalf of the same mineral owner, under some regular contractual arrangement. In fact, as previously noted, Mud Fork's brief expressly acknowledges that it is in business specifically for the purpose of carrying on mining activities for Harman. Apropos of this acknowledgement, it is useful to set out the exception to the 2-acre exemption upon which Mud Fork relies, as contained in section 700.11(b) of the regulations: "(b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, *but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites * * **"³ (Italics added.) Thus, by its own admission, Mud Fork is clearly covered by the Act.

In *Mullins and Bolling Contractors*, 4 IBSMA 156, 89 I.D. 475 (1982), we noted that the Congress was thinking in terms of "pick and shovel" operations rather than commercial operations when it included the 2-

³ This regulation was recently changed to deem surface coal mining operations to be related if they occur within 12 months of each other, flow into the same watershed at any point within 5 miles of either operation, and have common ownership or control. 47 FR 33431 (Aug. 2, 1982).

acre exemption in the Act, "since such operations 'cause very little environmental damage,' and their regulation 'would place a heavy burden on both the miner and the regulatory authority,'" citing S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977). We also stated in that case that "a coal mine operator cannot escape responsibility for compliance with the performance standards and reclamation requirements of the Act by simply limiting its surface site to an area of less than 2 acres and using an unpermitted haul road in common with another operator * * *." 4 IBSMA at 162, 89 I.D. at 478. See also *Gobel Bartley*, 4 IBSMA 219, 89 I.D. 628 (1982), in which we decided that the area of an access and haul road used by a coal mine operator is properly included, at least in part, in the surface area affected by the operation for the purpose of determining whether the operation qualifies for the 2-acre exemption. Here, of course, Mud Fork was the only mine operator using the road, and its operations clearly affected a combined area far in excess of 2 acres. In fact, the Administrative Law Judge found that the total disturbed area, excluding roads, was 4.5 acres, and that if roads were included, approximately 9.9 acres had been disturbed (Decision at 3).

Mud Fork again argues, on appeal, that the facts in this case are distinguishable from earlier cases for the three reasons stated at the hearing and set forth above. However, we have previously held that the test of whether a road is public, for purposes of the Act, is not who owns it, but whether it is regularly maintained with public funds, as required by section 710.5 of the regulations. *Jewell Smokeless Coal Corp.*, 4 IBSMA 51, 89 I.D. 313 (1982). In this case, the parties stipulated that only \$5,191.06 was spent on the road by the county, an amount that apparently took the form of gravel furnished to Harman, which then maintained the road (Tr. 70). However, this particular haul road was more than 23,000 feet long, with a switchback section (apparently used in connection with pits No. 4 and 5) that was an additional 7,000 feet long (OSM Exh. 5), for a total length of some 5 or 6 miles. Obviously, \$5,000 worth of gravel could not go far in maintaining a haul road of such length, and the photographs introduced into the record by OSM show clearly that regular maintenance of the road in any form was substantially lacking. Therefore, we reject Mud Fork's argument that the haul road was a public road and hold that it was properly included as part of the area disturbed by Mud Fork's mining operation, an area for which it was responsible.⁴

In summary, we hold that where five minesites, located along the same nonpublic haul road, are mined within a single 3- or 4-month period by the same operator on behalf of the same owner, the total acreage of both the five sites and the haul road may be considered in

⁴ There is little doubt that, had Harman been cited for the violations instead of, or in addition to, Mud Fork, it could also have been found liable for them. See *Virginia Fuels, Inc.*, 4 IBSMA 185, 89 I.D. 604 (1982). Also compare *United States v. Dix Fork Coal Co.*, No. 81-5125 (6th Cir. Nov. 9, 1982), in which the court imputed an agency relationship to the parties, in a similar situation, in order to find jurisdiction over the one it regarded as more solvent.

April 28, 1983

determining whether the operation qualifies for the 2-acre exemption under the Act. Likewise, the test of a public road is not whether its grantor did or did not own the surface area in fee or convey the road in fee, but whether the road, after its conveyance, was regularly maintained with public funds.

[3] Our most serious concern here, however, is OSM's assertion that the Administrative Law Judge erred in assigning no points for "extent of damage" under section 723.13(b)(2)(ii) of the regulations, having mistakenly relied upon *West Virginia Energy, supra*. We agree with OSM, but we believe that the error of the Administrative Law Judge in interpreting Part 723 goes beyond what OSM has suggested.

It is obvious that an inspector engaged in enforcement procedures under Part 722 of the regulations must be given considerable discretion as to the number and kind of violation notices he issues as a result of a particular inspection, particularly one involving multiple minesites. As a general rule, OSM inspectors issue only one NOV as a result of a single inspection. Yet, there may well be circumstances where some matters are initially in doubt, such as whether OSM has jurisdiction over haul roads between the minesites of a particular operator, or whether various minesites are related, that would cause the inspector to consult his superiors before issuing a NOV alleging a particular violation or type of violation. That is what happened here (Tr. 19-20).

How many NOV's are issued can certainly make a difference in the number of penalty points assigned. In the present case, if the OSM inspector had accepted Mud Fork's allegations that its five minesites were unrelated (given this Board's holdings with respect to the inclusion of haul roads), then the inspector, as a result of his December 12 visit, could have issued separate NOV's for each site, for a total of four rather than two NOV's, each alleging three distinct violations. Under section 723.12 of the regulations, OSM *must* assess a penalty for each NOV assigned 31 points or more, and *may* assess a penalty for each NOV assigned 30 points or less. Section 723.12 clearly contemplates that points will be individually assigned for each specified violation, and the first paragraph of section 723.13(b)(1) states that "[o]ne point shall be assigned for each past violation *contained in a notice of violations.*" (Italics added.) Thus, an operator with 20 past violations contained in a single NOV, that resulted from a single inspection, would be assigned 20 history points at the time of the next assessment, as would an operator with 20 single-violation NOV's that resulted from 20 past inspections. However, it does not appear to be OSM policy in *issuing* NOV's to list each similar deficiency (such as each section of road that is improperly maintained) as a separate violation. Rather, similar violations are generally grouped together, as was done here. Therefore, Mud Fork was charged with only one

violation for failure to install the necessary sedimentation ponds, even though three different locations were involved.

Because it is clear from the photographs accompanying the record⁵ that the road violations in this case were not insignificant, we can only conclude that the reason the Administrative Law Judge assigned no points to them was not so much that he misjudged their seriousness, but rather that he believed that *West Virginia Energy, supra*, precluded him from doing so. In this he was in error. The relevance of *West Virginia Energy* is simply that the assigning of points for environmental damage, under the substantive performance standards of the regulations, is not proper where the violation charged was the essentially procedural one of mining without a permit. Under those circumstances, the Board concluded that it was inappropriate to assign points for extent of damage. That is not the case here, where the NOV was properly based upon performance standards, and where the violation in question is the substantive one of failure to maintain the haul road adequately.

In fact, given the geographic extent of the violations and their obvious seriousness, and OSM's already conservative posture in alleging multiple site violations within one NOV, we seriously question the propriety of the Administrative Law Judge's decision not to impose a civil penalty on Mud Fork, in the exercise of his discretion under section 723.12(c) of the regulations. In dealing with a single violation amounting to 24 points, it might be quite proper for him not to impose a penalty. But where, as here, the evidence reveals a series of related violations—even if, by whatever logic, the total points assigned to them do not exceed 30—it would appear to be an abuse of discretion not to impose the penalty mandated by the formula of 30 CFR 723.14. In cases such as this, any number of points, presumptively, should be translated into the corresponding penalty. If a decision is made not to impose a penalty, an explanation and justification for that decision should be placed on the record.

For the foregoing reasons, we will remand the case to the Hearings Division for a new civil penalty hearing, with instructions that (1) a determination be made of the proper number of points to be assigned under NOV No. 80-I-73-30, regardless of whether a civil penalty results; and that (2) serious consideration be given to the effect of imposing or not imposing a civil penalty in a case of this type in relation to the purposes of the Congress in enacting this legislation.

[4] After the Administrative Law Judge who rehears the case has determined the points to be assigned, it will also be necessary for him to consider whether Mud Fork's failure to have abated the violations, within the times prescribed in the NOV's, is a sufficient basis to subject it to the additional penalties provided by section 723.15(a) and (b) of the regulations. We see no evidence in the record that the abatement

⁵ See particularly OSM Exhs. 4B, 4G, 4H, 4L, 4P, and 4R. The facts in this case, therefore, differ considerably from those in *Consolidation Coal Co.*, 4 IBSMA 227, 89 I.D. 632 (1982), in which there was insufficient evidence of off-road drainage to justify an alleged violation of the sedimentation pond requirement.

April 28, 1983

requirements of the NOV were suspended by either a temporary relief proceeding under section 525(c) of the Act or by a court in a review proceeding under section 526 of the Act, as contemplated by 30 CFR 723.15(b)(1).

Accordingly, the decision of the Administrative Law Judge upholding NOV Nos. 80-I-73-30 and 80-I-73-32 is affirmed; the decision reducing the civil penalty is vacated; and the case is remanded for a new civil penalty hearing utilizing procedures consistent with this opinion. All motions not previously acted upon are hereby denied.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Acting Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

APPROVED:

JOHN N. STAFFORD
Director, Office of Hearings and Appeals

DATE: *May 4, 1983*

IN RE LICK GULCH TIMBER SALE

72 IBLA 261

Decided *April 28, 1983*

Appeal from a decision of the Medford, Oregon, District Manager, Bureau of Land Management, denying a protest to a proposed timber sale. OR 81-10.

Affirmed as modified.

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals--Words and Phrases
"Sustained yield." As used in sec. 1 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181a (1976), the term "sustained yield" means that the level of timber harvesting established should be such that, considering present levels of silviculture techniques, a constant amount of timber will be annually available on an indefinite basis.

2. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals--Rules of Practice: Appeals: Generally

A party challenging a decision to harvest timber on the grounds that the lands involved will not regenerate within the time contemplated by the applicable rules bears the burden of establishing both the factual predicates and the ultimate conclusion.

3. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals--Rules of Practice: Appeals: Generally

A party who challenges a decision to sell timber on the ground that timber harvesting will adversely affect water quality, plant and animal life, recreational values, or the economic stability of surrounding communities must show not only that some adverse effect will result because of timber harvesting, but that these effects are of sufficient magnitude so as to render the decision to harvest contrary to the applicable laws and regulations.

4. Act of October 15, 1966--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales

Where the evidence establishes that BLM failed to conduct a cultural resource inventory in conformity with the applicable rules and regulations prior to offering timber for sale, BLM will be required to conduct a complete and proper cultural resource inventory before entry onto the land for harvesting is permitted.

APPEARANCES: Diane Albrechtsen, president, Threatened and Endangered Little Applegate Valley; John L. Smith, secretary-manager for Southern Oregon Timber Industries Association, intervenor; Don Lawton, Esq., Assistant Regional Solicitor, Pacific Northwest Region, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Diane Albrechtsen, president of the Threatened and Endangered Little Applegate Valley (TELAV), has appealed from a decision of the Medford District Manager, Bureau of Land Management (BLM), dated January 28, 1981, denying a protest to the proposed sale of timber in Lick Gulch, sale OR 81-10. The proposed Lick Gulch sale is a Small Business Administration (SBA) set-aside sale, involving 12 separate units, 8 of which were to be partial cuts and the remaining 4, totaling 58 acres, were to be clearcut. The estimated recoverable volume from the sale was 2,317 Mbf (thousand board feet). Notice of the proposed sale was dated on November 19, 1980, with the actual sale to occur on December 18, 1980.

On December 16, 1980, however, appellant filed a protest to the sale. Pursuant to established procedures relating to timber sales (*see Elaine Mikels*, 41 IBLA 305, 307 (1979)), the District Office proceeded to receive the bids, giving due notice to prospective bidders, however, that no contract could be awarded until the protest had been adjudicated. The high bidder was the Robert Dollar Lumber Co. of Glendale, Oregon, with a high bid of \$291,935.

By decision of January 28, 1981, the District Manager denied appellant's protest. Appellant timely filed a notice of appeal.

April 28, 1983

Subsequently, Southern Oregon Timber Industries Association was granted leave to intervene in this appeal in support of the timber sale.

The parties to this appeal have filed extensive briefs with the Board. These documents consist of a statement of reasons (SR) in support of the appeal together with an appendix (AP), an answer (AN) filed by BLM, a reply brief (RP) filed by appellant, a rebuttal (RB) filed by BLM, and a surrebuttal (SB) by appellant. The total amount of briefing involved is well in excess of 500 pages, not counting hundreds of pages in appendices and charts. In addition, the Final Timber Management Environmental Impact Statement (EIS) for the Jackson-Klamath Sustained Yield Units (JKSYU), was submitted as an attachment to BLM's answer.

We will discuss the major issues pressed on this appeal individually, but first we wish to establish the principles which will guide our review of the decision on appeal.

The areas involved are within the revested grant lands of the Oregon and California Railroad, generally referred to as O&C lands. Because of its bearing on some of the contentions made on appeal, we will set forth, at some length, the history of these lands.

[1] By the Act of July 25, 1866, 14 Stat. 239, and the Act of May 4, 1870, 16 Stat. 94, Congress granted various lands in the State of Oregon to aid in the construction of a railroad between Sacramento, California, and Portland, Oregon. The 1870 Act expressly provided that the land granted by that Act could only be sold to "actual settlers" at a maximum price of \$2.50 per acre in units not to exceed 160 acres.

In approximately 1894, however, the Southern Pacific Railroad (Southern Pacific), which had acquired the Oregon and California grant, commenced selling the grant lands in units in excess of 1,000 acres for prices ranging from \$5 to \$40 per acre. After Edward H. Harriman gained control of the Southern Pacific in 1901, an announcement was published that, effective January 1, 1903, the O&C grant lands would be closed to further sales, and would be held by Southern Pacific for their stumpage value.

As a result of these clear violations of the terms of the O&C grant, and the resultant outcry of the citizens of Oregon, the Federal Government brought suit in 1908 to recover the unsold lands, pursuant to a joint resolution of Congress. See Act of April 30, 1908, 35 Stat. 571. This suit culminated in the Supreme Court decision in *Oregon & California R.R. v. United States*, 238 U.S. 393 (1915). In that decision, the Court held that the proviso limiting sales to actual settlers for \$2.50 per acre was an enforceable covenant which the railroad had clearly violated, and the Court afforded Congress a reasonable time to deal with the matter by legislation.

Congress responded with the adoption of the Revestment Act, also known as the Ferris-Chamberlain Act, Act of June 9, 1916, 39 Stat.

218, in which it declared all unsold lands revested in the United States and provided for a payment to the Oregon and California Railroad at the rate of \$2.50 per acre for each acre earned by actual construction, less monies already received by sale of the lands. Section 2 of the Act provided for classification of the revested lands as either powersite lands, timberlands, or agricultural lands. Of subsequent importance to this appeal was section 4 of that Act. With reference to timberlands, that section provided:

That [timberlands] shall not be disposed of until the Secretary of the Interior has determined and announced that the merchantable timber thereon has been removed, and thereupon said lands shall fall into class three [agricultural lands] and be disposed of in the manner hereinafter provided for the disposal of lands of that class.

The effect of this section was that once timber had been removed from a parcel of land in class two (timberland), such cutover land was properly classified as class three (agricultural lands) and subject to entry and settlement under the general homestead laws. See Circular No. 892, 51 L.D. 631 (1926). Thus, while under the Revestment Act the Government would receive the value of the timber growing thereon, no attempt was made to retain the land in Federal ownership for future growing and harvesting of timber.

As a consequence of this policy, lands which had historically been capable of supporting timber growth were being removed from permanent forest production. Eventually, concern was engendered that future shortages of timber and other forest products would inevitably result as more and more timberland was lost from the permanent forest base. See H.R. Rep. No. 1119, 75th Cong., 2d Sess. 2 (1937). Accordingly, in 1937, Congress adopted the Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. §§ 1181a-1181f (1976), commonly known as the O&C Act. Section 1 of the Act provided, *inter alia*:

Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 1181c of this title, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [*sic*] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities. *Provided*, That nothing in this section shall be construed to interfere with the use and development of power sites as may be authorized by law.

Thus, timberlands, as well as powersite lands valuable for timber, were set aside to be managed "for permanent forest production" under the principle of "sustained yield." Such management is, of course, to be carried out in a way consistent with the goals not only of providing a permanent source of timber, but also so as to maximize protection of watersheds, regulation of streamflow, and to provide recreational facilities, all in such a manner so as to contribute to the economic stability of local communities.

April 28, 1983

The O&C Act did not, itself, define the term "sustained yield." Its meaning, however, was not particularly arcane. In Circular No. 1448, 3 FR 1796 (July 7, 1938), the Department noted that the O&C Act

laid the foundation and framework of a new forest policy for the revested and reconveyed Oregon grant lands. This measure provides for the conservation of land, water, forest, and forage on a permanent basis; the prudent utilization of these resources for the purposes to which they are best adapted; and the realization of the highest current values consistent with undiminished future returns. It seeks, through the application of the policy of sustained-yield management, to provide perpetual forests which will serve as a foundation for continuing industries and permanent communities.

Thus, lands to which the O&C Act properly applies (timberlands and powersite lands valuable for timber) are managed for the dominant purpose of timber production while recognizing that complementary values such as watershed protection and economic stability for local communities will necessarily result through proper implementation of the concept of sustained yield.

"Sustained yield" in essence means that the level of harvesting established should be such that, considering present levels of silviculture techniques, a constant amount of timber will be annually available on an indefinite basis. This does not, of course, mean either that the same amount of timber must be harvested each year or that each specific parcel of land must exhibit the exact regenerative powers which the modular norm contemplates. Rather, in the first instance, recognition that present conditions do not represent the optimum model on which ultimate productivity is based (as where an excess of old growth timber exists) may authorize an initial level of harvesting above the final sustained yield capacity level. *See Cascade Holistic Economic Consultants*, 60 IBLA 293 (1981). Then, too, consideration of future increases in yield due to present or proposed management techniques can also permit a temporary increase in the present allowable cut.¹

Insofar as the regenerative qualities of each specific parcel is concerned, the cycle of the sustained yield period (be it 80 or 800 years) merely assumes the norm of growth for the entire sustained yield unit. In other words, the mere fact that one parcel may regenerate more slowly than another is inconsequential *provided* ultimate reforestation occurs in conformity with the sustained yield expectations.

It is important here to note that BLM has adopted a Timber Production Capability Classification (TPCC) System which classifies all land managed by BLM in western Oregon into various categories. The two prime categories are forest land and nonforest land. Forest land is land which is now, or is capable of becoming, at least 10 percent stocked with forest trees and which has not been developed for nontimber use. The category of forest land is, itself, subdivided into noncommercial forest lands and commercial forest lands. This later

¹ This is referred to as the allowable cut effect (ACE).

category consists of all forest land that "is capable of yielding at least 20 cubic feet of wood per acre per year of commercial coniferous tree species." BLM Manual 5250.05C2. Commercial forest lands are themselves subdivided into problem and nonproblem sites.

Lands are classified as problem sites because of (1) adverse location, (2) the existence of fragile areas, or (3) the existence of areas where reforestation presents problems. Such problem sites may be included in the timber production base subject to restrictions which necessitate or prohibit certain management practices.

In addition, the EIS noted that analysis of TPCC data had disclosed wide variations in the productive capacities of commercial forest lands. As a result, three management classes for these lands were established: (1) High intensity forest management lands, (2) low intensity forest management lands, and (3) limited forest management lands. The latter two categories consist of lands where the regeneration period is expected to be in excess of at least 5 years, with category 3 lands being deemed to be considerably in excess of 5 years with ultimate successful reforestation uncertain. See EIS at 1-8 to 1-10. Only high intensity lands are included in the permanent forest base for purposes of determining the allowable cut for maintenance of sustained yield. All lands included in this appeal have been classified as high intensity lands though, as we will discuss, *infra*, TELAV takes great exception to this classification.

In reforestation terminology, regeneration refers to the renewal of the tree crop, whether by natural or artificial means (EIS at G-7). The "regeneration period" is simply "the time it takes for a new coniferous timber stand to become established following the final harvest cut" (EIS at G-8). For land classified as high intensity forest management lands, such as those in the instant appeal, the regeneration period is basically 5 years (EIS at 1-8).

Thus, all lands involved are expected to regenerate in 5 years. In addition, however, we note that all of the sites involved have been classified as problem sites because of difficulties associated with reforestation due to inadequate moisture. Thus, as BLM itself recognizes, special reforestation techniques are required. TELAV questions whether any special reforestation techniques are contemplated and suggests that, even if they are, the techniques will prove inadequate to establish regeneration, particularly in light of past experiences in the area.

[2] The bulk of TELAV's argument is directed to its contention that the land embraced by the sale is incapable of regeneration for a variety of reasons, chief of which include deficient soils, extreme temperatures, steepness of slopes, and inadequate rainfall. It has submitted extensive documentation of its claims both in the form of prepared studies as well as analysis of past BLM practices in the Little Applegate Valley area. We will examine these contentions separately.

In its statement of reasons, TELAV argued that the soils which were indicated to be present, viz., Manzanita or Manita (716),

April 28, 1983

Beekman (718), Vannoy (776), and Colestine (781), all possess high regeneration hazard. TELAV also contended that soils in the 701 series are present in the sale area, and that the major soil components of the sale site (the 701 series, 718 Beekman, and 781 Colestine) are best characterized as shallow soils. See SR at 12-17.

In its answer, BLM insisted that 701 soils are not a major component of the sites, making up less than 5 percent of the sale area and occurring primarily as inclusions on ridge tops and finger ridge noses.² In addition, BLM noted that, by definition, Colestine (781), Vannoy (776), and Beekman (718) are classified as moderately deep, i.e., 20 to 40 inches in depth, while Manzanita is classified as deep, i.e., 40 to 60 inches.³

In response to these arguments by BLM, TELAV submitted a report entitled "On Site Investigation of Soil Depths in the Lick Gulch Timber Sale Area," dated August 1981, and prepared by C. B. Thomas of Northwest Biological Consulting. A total of 23 test holes were drilled on 9 units. Nine holes encountered gravel, rock, or hardpan soil at a depth of 0 to 8 inches, an additional 10 holes were drilled to a depth of 9 to 16 inches before encountering gravel or hardpan, while only 4 holes bottomed out between 17 to 24 inches of depth. See RP, Appendix AA. Noting that this report also indicated that some areas indicated gravel content of up to 50 percent, TELAV argued that insofar as moisture retention ability was concerned the soils were the equivalent of only one quarter as deep as they were technically defined (RP at 29). TELAV reiterated its belief that the soils in the area were, in fact, both shallow and rocky (RP at 44).

Apparently as a result of the soil analysis presented by TELAV in its reply brief, BLM submitted a report on the results of an intensive soil investigation of the Lick Gulch Timber Sale area.⁴ A total of 45 random samples were taken. The tabulated results indicated that soil in excess of 20 inches should exist on 97.8 percent of the total acreage. Included in this submission was a letter from the leader of the Soil Survey Party of the Soil Conservation Service, Department of Agriculture, attesting that "the soil survey of the Lick Gulch Timber Sale, which was made by your staff, is accurate and complete."

In its surrebuttal, TELAV suggested that the variance in results reached by the studies might be explained by the fact that BLM had studied the soils after the rainy season had begun and further suggested that the BLM sampling plots favored areas close to the ridge

² BLM noted that the general soils map for the JKSYU had indicated that the area contained 701 series soils (see EIS at 2-8), but argued that the detailed soil map prepared for this sale made no mention of the 701 series, and, in effect, superseded the general map found in the EIS.

³ For some unexplained reason, BLM, having discussed the Vannoy 776 soils, then proceeded to contend that "776 soils were never identified in the area." See AN at 13. While it may be true that the EIS did not mention the 776 series, the soils report for the timber sale clearly showed the presence of Vannoy soils throughout the area to be cut.

⁴ This report noted that its purpose was to supplement the soil survey undertaken during the preparatory stages of the sale, which had been the basis of the soil map included in the timber sale file.

tops. TELAV argued that its study had avoided ridge tops and stated "because the deepest soils are located just below the ridge tops" that sampling of those areas would give readings of deeper soils than if the study had avoided them. See SB, Appendix C at 1.⁵ In any event, while noting its disagreement with the BLM studies, TELAV stated "it is useless to argue these points when the reason for the studies is an attempt to predict if the area will successfully regenerate--and the proof that it will not is available for all to see" (SB at 2).

We recognize, of course, that the vast majority of the contentions of the parties relate to the question of regeneration. Regeneration, however, is dependent on a number of variables. TELAV has contended that virtually every one of these relevant components, including the soils present on the sites, militates against successful regeneration. One of the methods by which the ultimate question of regenerative capacity can be approached is by incremental analysis. We will, therefore, examine each variable to determine how it will affect the final outcome. To the extent that TELAV has contended that the sale sites contain shallow or deficient soils which will retard or foreclose regeneration, we find that they have failed to overcome the Government's showings. Considering the entire record submitted with this appeal, we find that the soils are as the Government described them.⁶

We next turn to the question of the impact of extreme temperatures together with limited rainfall. There is no argument that the area of the Little Applegate drainage lies in the rain shadow of the Coast Range. There is, however, some dispute as to the amount of rainfall received at the site. Thus, TELAV argues that the annual rainfall could not be expected to exceed 22 inches based on readings taken at the nearby Buncom NOAA Weather Station. See AP, Appendix D at 1. BLM, on the other hand, based on a map by the Oregon State Water Resources Board, contends that the mean annual precipitation for the Lick Gulch sites is between 25 to 30 inches. See RB, Attachment 5.⁷

With its surrebuttal brief, TELAV submitted a report prepared by Philip Williams and Associates, entitled "An Evaluation of the Impacts of Future Land Use on the Hydrology of the Little Applegate River

⁵ We are constrained to point out to appellant that, according to its own submissions, ridge tops were avoided in its samplings because they "commonly have unusually *thin* soils" (RP, Appendix AA) (italics supplied).

⁶ We would emphasize a point made in our order of Nov. 6, 1981. By letter of Oct. 29, 1981, appellant had filed an objection to a request by BLM for an extension of time to respond to appellant's reply brief. BLM had requested such an extension because of its desire to perform the soil survey discussed in the text. TELAV objected on the ground that BLM should have performed the survey earlier and argued that "it is unreasonable for BLM to attempt to present this information at this time." We overruled this objection noting that "it is the Board's duty to make sure that it has as complete record as possible in deciding appeals to it." We wish to reiterate this point.

The entire purpose of the appellate system in this Department is to afford aggrieved parties a forum in which their grievances can be adjudicated at the Departmental level. The filing of a proper appeal stays the effect of the decision appealed (43 CFR 4.21(a)) until the Board determines the matter brought to it. The Board, in essence, makes the determination for the Secretary of the Interior. As his direct delegate, the Board, no less than the Secretary, himself, is required to consider all relevant information tendered both by an appellant and by BLM. Just as an appellant can submit studies to support its prior assertions, so, too, can the Bureau submit data to support its contentions. The time frame in which the data is generated is irrelevant to appeals such as the instant one, since, until the Board acts, there is no decision for the Department. In rendering decisions for the Department the Board has the right to expect as complete a record as the parties can provide.

⁷ In its rebuttal brief, BLM also submitted a precipitation map prepared by the Army Corps of Engineers which indicated that the mean annual precipitation for the site area ran from 34 to 38 inches (RP, Attachment 5).

April 28, 1983

Watershed, Oregon" (*Williams Report*). We note that the precipitation map provided therein indicates that the average annual rainfall for the Lick Creek timber sites is between 30 to 35 inches. See SB, Appendix B at 10. Based on all the submissions, we feel that the evidence is overwhelming that rainfall can be expected to average between 25 to 30 inches over the area involved in this appeal, as contended by BLM.

We realize that this level of rainfall is in the low range. BLM has itself recognized this in classifying the land as RMR, which indicates not only that reforestation difficulties due to inadequate moisture are expected to occur, but also that these areas are "restricted," which means that special techniques are required to ensure adequate reforestation. See BLM Manual 5250.05E, and 5250, Appendix 6. We will discuss, *infra*, TELAV's criticisms directed to the "special techniques" which BLM has indicated will be utilized. We wish merely to note, here, that the record supports BLM's argument as to the amount of rainfall in the sale areas.

In reference to other climatic conditions, TELAV argued in its statement of reasons that the "summer climate is desertlike, with weeks of temperatures above 100 degrees F, with low humidity and 50 to 60 degree F temperature differentials each day" (SR at 17). A more moderate description was provided in the *Williams Report*. The report notes that almost all of BLM's lands are in the lower middle elevations, and characterizes the lower elevation as "Mediterranean." See also EIS at 3-1. The *Williams Report* described this land as experiencing "dry summers and winter rains, with average winter temperatures above freezing," and also noted that at the Medford airport the average high for August was more than 90 degrees in 21 of the last 31 years. *Williams Report* at 8, 11.

While TELAV's statement of reasons may have exaggerated the climate conditions to a certain extent, there is no question that the high summer temperatures contribute to certain regeneration problems particularly on southerly and westerly aspects. This is because soil temperatures in excess of 125 to 150 degrees Fahrenheit will normally prove lethal to emergent seedlings. In recognition of this, BLM has limited clearcutting to those units having northerly or northeasterly exposures, and provided for a two stage shelterwood cut for those units with a more westerly or southerly exposure.⁸ TELAV, however, suggests that while the northern aspects may be cooler than those with a southerly exposure, the northern regions are still "hot." See RP at 27, 32.

We note that BLM submitted with its answer a copy of a report prepared by employees of the Forest Service, Department of Agriculture, under the direction of Don Minore, Principal Plant

⁸These clearcut units are Nos. 6, 10, 11, and 12.

Ecologist at Corvallis, Oregon, entitled "Environment, Vegetation, and Regeneration After Timber Harvest in the Applegate Area of Southwestern Oregon [*Minore Report*]." Table 2 of this report consists of a chart which shows the correlation between aspect, soil depth, slope, and elevation as they relate to clearcut regeneration in the Little Applegate area, based on 40 sample clearcut plots. This chart, according to BLM, indicates that all four sale sites scheduled to be clearcut might be expected to achieve stocking at 60 percent or better.¹⁰ *Minore Report* at 15.

In its Reply brief, TELAV took issue with some of the conclusions of the *Minore Report*. In regard to the areas to be clearcut, TELAV noted that the only clearcut plot in the Little Applegate drainage showed an average stocking of 32 percent, and took particular note that the report stated "our relative stocking percentages indicates the relative severity of clearcut environments, *not the potential stocking rates that would be obtained if current reforestation technology were properly applied*"¹¹ (RP at 18 (italics supplied by TELAV)). To the extent that TELAV suggests that the data generated by the *Minore Report* does not support BLM's decision to clearcut four units in Lick Gulch, we disagree.

Of the 40 sample clearcut units studied in the *Minore Report*, the sole clearcut unit which TELAV argues was in the Little Applegate watershed was No. 35. However, our review of the map suggests that clearcut unit No. 46, which showed a stocking rate of 87 percent, is also in the Little Applegate drainage.¹² In any event, even were we to agree that the only unit in the Little Applegate watershed was No. 35, it scarcely undermines BLM's conclusions. The *Minore Report* used existing data to develop a correlation between various factors and successful regeneration. Unit No. 35 had an aspect azimuth of 100 degrees and a slope of 67 percent. Table 2, which correlated such factors, indicated that clearcutting should not be attempted on such a site, without regard to other variables such as elevations or soil depth. Thus, the results obtained on unit No. 35 are actually consistent with the premise of the *Minore Report*, and the unit's failure to regenerate in no way calls into question BLM's decision to clearcut the four units in the Lick Gulch timber sale.

⁹ It is not surprising, inasmuch as virtually every statement made by either party to this appeal is controverted someplace in the record, that there exists two slightly differing copies of this report in the record before us. The *Minore Report* submitted by BLM is Attachment 2A of its answer. TELAV's copy appears as an attachment to its reply brief at pages 6 through 42. While we have noticed no substantive differences, a review of both convinces us that TELAV's version, even though TELAV termed it the "original" version, is a later, more complete copy. Accordingly, references in the text of this decision will be to TELAV's version. The TELAV version is also paginated and references will be to internal pagination of the report rather than to the attachment page number.

¹⁰ As we shall show, the notations found on the BLM copy of the *Minore Report*, which purportedly indicate where the four clearcut units fall on the chart, are simply wrong.

¹¹ This statement does not appear in the copy of the *Minore Report* submitted by TELAV.

¹² Admittedly, the small size of the map provided in the *Minore Report* (Figure 1 at 3) makes it difficult to determine whether unit No. 46 is in the Little Applegate or Bear Creek drainage, though it appears to us that it is properly in the Little Applegate. We would note that Appendix 1 of the *Minore Report* contains handwritten notations, apparently placed thereon by appellant, relating to four watersheds. The notation "LA" stands for Little Applegate, while "BC" stands for Bear Creek. The "BC" next to unit No. 46 was clearly written on top of a "LA" notation. Thus, TELAV, itself, was apparently uncertain of the proper designation of this unit.

April 28, 1983

Secondly, as we interpret the quotation from the *Minore Report*, the study actually suggests that potential stocking rates would be *greater* than that indicated in the report if modern techniques "were properly applied." Assuming the recommendations in the report are adhered to *and* modern techniques are applied, the potential restocking rate would, in fact, be the probable minimum of the actual restocking percentage achieved. Insofar as the areas that are to be clearcut are concerned, we find that the temperatures and moisture levels at the sites are not likely to prohibit regeneration.

Concerning the partial cuts, the *Minore Report* did recognize a positive correlation between aspect and lower temperatures with respect to release of trees at 35 to 45 years (breast height age) after a partial cut, and also noted a negative correlation with respect to the radiation index. It concluded, however, that all three correlations were weak, and did not include either aspect or radiation in its computations for estimating regeneration success on partial cuts. See *Minore Report* at 15-16, 20-21. The report noted, instead, that regeneration estimates for partial cuts were best derived by correlating percentages of rock cover with a table for indicator species at assigned values. See *Minore Report* at 27. This correlation, however, merely establishes relative success of *natural* post harvest regeneration. A low figure does not preclude successful regeneration. Rather, as the report notes, "if the calculated stocking percent derived from figure 2 is low, immediate post harvest underplanting will be necessary." *Id.* at 33. In any event, our review of the documentation in this record fails to establish that climatic conditions are present within the Lick Gulch area which would, by itself, preclude successful regeneration in either the clearcut or partial cut areas.

Finally, the last major individual component in controversy is the percentage of slope on the timber sale sites. TELAV did not really argue that the various slopes were so great as to, by themselves, prohibit the harvesting of timber. Rather, it was TELAV's contention that the steep slopes, when combined with other factors, in particular the shallow soils which TELAV alleged were present (*but see* discussion, *supra*), aggravated all of the other regeneration problems (SR at 22-24). TELAV expressly objected to tractor logging on units Nos. 1 and 8, both of which, TELAV contended, contain slopes in excess of 35 percent. See AP, Appendix F.

In its answer, BLM disputed TELAV's argument that the slope was severe, and pointed out that tractor logging in units Nos. 1 and 8 was to be confined to benched areas with slopes under 35 percent (AN at 18). In its rebuttal, BLM submitted, in conjunction with its soil survey, information concerning slope gradients which indicated that the mean slope for the timber sales areas was 55.6 percent and noted

that this was "normal for the Medford District and Western Oregon forest sites" (RB at 3 and Attachment 2).¹³

Our review of the submissions leads us to the conclusion that the slope gradients are not so severe as to, by themselves, militate against the regeneration of the cut areas. Thus, neither the soils, nor the climate, nor the steepness of slope, in and of themselves, justify the conclusion that successful regeneration will not occur. The ultimate question, however, is whether a combination of the factors of aspect, soil depth, slope gradient, and elevation make regeneration feasible in the clearcut areas.

In its rebuttal, BLM submitted a table purportedly showing the comparative relative stocking which could be expected from the Lick Gulch sites. See RB, Attachment 3. The tabulated results, however, predicted relative stocking would be *below* 60 percent for every unit to be clearcut. By unit, the estimated clearcut relative stocking was 52 percent for unit 6, 54 percent for unit 10, 51 percent for unit 11, and 48 percent for unit 12. Inasmuch as one of the premises of the *Minore Report* was that clearcutting should not be attempted unless relative stocking could be estimated to exceed 60 percent, these tabulations scarcely supported BLM's decision to clearcut.

In transmitting this data to the Oregon State Director, the Medford District Manager attempted to justify this disparity by arguing that "these predictions are based on past management, which included less efficient practices (such as seeding), poor off-site planting stock, time gaps which allowed competing vegetation to take command of the units, or dependence on natural regeneration." RB, Attachment 1. He argued, therefore, that more modern silviculture practices would "significantly" increase relative stocking. *Id.*

The simple fact, however, is that BLM made a crucial mathematical error in tabulating its results in Attachment 3. The *Minore Report* provided two separate regression equations, one in terms of inches and feet, and the other in terms of centimeters and meters.¹⁴ The field data was generated in inches and feet. In computing relative stocking, BLM decided to convert the inches and feet into centimeters and meters. There are 2.54 centimeters in each inch. Thus, BLM should have *multiplied* the number of inches in its soil depth computation by 2.54. Instead, for some inexplicable reason, BLM *divided* the number of inches by 2.54. As a result, the value of soil depth (which is positively

¹³ We also note that the maximum gradient on any specific sample site was 75 percent, occurring on two sample sites, in unit No. 4 out of a total of 45 readings taken on all 12 units. See RB, Attachment 2. This survey can be contrasted with an earlier BLM submission which indicated slopes of approximately 70 percent on units 6, 10, and 11. See AN, Attachment 4. The specific gradients for these units in the later submission were: 66 percent for unit 6, 65 percent for unit 10, and 62 percent for unit 11.

These estimates contrast with 13 readings in excess of 80 percent in the report prepared by Northwest Biological Consulting and submitted by TELAV. See RP, Appendix AA. However, the *Williams Report*, also submitted by TELAV, noted that, for the entire Little Applegate watershed, the average slope is between 50 percent and 70 percent. While an exact comparison of plate 4 of the *Williams Report*, which shows slope gradients, to the specific units of the timber sale is impossible, due to the small scale of the plate map, our analysis convinces us that the plate tends to corroborate the BLM slope readings. See *Williams Report* at 14.

¹⁴ The two equations are: (1) Stocking percent = $33.7623 + 31.1419$ (clearcut aspect code) + $.54355$ (soil depth, in.) - $.000186056$ (elevation in feet x slope percent). $r^2 = .515$; (2) stocking percent = $33.7623 + 31.1419$ (clearcut aspect code) + $.213996$ (soil depth, cm) - $.000610418$ (elevation in meters x slope percent). $r^2 = .515$.

April 28, 1983

correlated to regeneration) was markedly distorted on the downside. When the computation is correctly made the unit values become 66.69 percent for unit 6, 72.72 percent for unit 10, 67.97 percent for unit 11, and 68.27 percent for unit 12. All of these figures are above the 60 percent relative restocking level the *Minore Report* maintains is the minimum necessary to justify clearcutting. Therefore, we find that the site specific data of Attachment 3 does, in fact, support BLM's determination to clearcut the four units.¹⁵

Both parties have supplied this Board with voluminous documentation relating to past success, or lack thereof, in regeneration of prior timber harvests in the Little Applegate watershed and nearby environs. In addition, both parties have addressed the silvicultural prescriptions for the areas to be cut as to their effectiveness in aiding regeneration. Before discussing these submissions, however, we wish to examine the relevancy of such documentation.

That evidence of past regeneration is of some relevance is clear. To the extent that past cuts have failed to regenerate where the harvesting occurred in conditions similar to the specific physical circumstances of the instant sale sites, when those sites were treated in a manner similar to that presently contemplated by the silvicultural prescription for the sale sites in Lick Gulch, the success or failure of reforestation attempts is of particular import. But to the extent that each former site varies more and more from the Lick Gulch sites, or where past treatment cannot be considered comparable with that proposed herein, the relevance of regeneration success or failure becomes increasingly attenuated. For example, the fact that a clearcut site with an aspect of 180 degrees, an elevation of 4,000 feet, a slope in excess of 60 percent, and soil depth below 25 inches, did not regenerate is simply not probative in any way as to the question of whether the sites in the Lick Gulch sale will regenerate. Only comparable sites treated by comparable methods have any real relevance to the ultimate question of regeneration. With this in mind, we will examine the documentation submitted by the parties on this issue.

As we have indicated, the relevance of past reforestation experience in determining the likelihood of successful regeneration at the instant sites is directly related to the extent to which the physical characteristics of the past sale sites, as well as subsequent silviculture prescriptions, coincide with the physical characteristics and prescriptions for the instant sites. Both BLM, in its rebuttal (RB,

¹⁵ Not only were BLM's tabulations in Attachment 3 totally wrong, the data used therein contradicts the relative placement of the clearcut units on BLM's copy of the *Minore Report*. AN, Attachment 2A. Thus, BLM placed units 6 and 10 in the elevation range of 2,200 to 3,100 feet, when the actual samples in Attachment 3 of the rebuttal show elevations of 3,560 and 3,720, respectively. The slope for units 11 and 12 was shown to be less than 56 percent, but the actual slope readings for these two units were 62 percent, thereby placing them in a different category. We would suggest that, if BLM is not willing to take sufficient time and care to assure that its tabulations and submissions are accurate, it, at least, refrain from submitting erroneous ones which serve only to clutter up the record and confuse the adjudication of appeals.

Attachment 3), and appellant, in its surrebuttal brief (SB, Appendix A), have provided this Board with an analysis of past success in regeneration. While BLM provided a list of 38 sites, TELAV has submitted a total of 83 sites for our consideration.¹⁶ Since TELAV's submission is the more complete of the two, we will generally refer to its numbering system.¹⁷

Initially, however, with respect to the clearcut areas (43 in all), we wish to point out certain difficulties in correlating the data submitted on these past harvests with other submissions tendered relating to the instant sales, particularly the *Minore Report*. Thus, there is no information on soil depth in these regeneration studies. Moreover, both aspect and slope data are given on a different basis than used in the *Minore Report*. Aspect is given only in terms of cardinal points (north, south, etc.). While the breakdown in the *Minore Report* for slope percentages were between 30 to 55 percent and 56 percent to 80 percent, the data of these submissions is quantified as "gentle" (10 to 34 percent), "moderate" (35 to 64 percent), and "steep" (65+). It is therefore impossible to determine precise comparability between any site in the past studies with the *Minore Report* predictions as to success in regeneration of clearcut areas.

Nevertheless, certain sites are clearly *not* similar to those in Lick Gulch. Thus, we have eliminated from consideration all sites which do not have a north aspect, a total of 13.¹⁸ Data from five additional sites were discarded because of a combination of excessive slope gradient (65 percent or greater) together with high elevation levels (ranging from 3,800 to 4,300 feet to 4,700 to 5,000 feet).¹⁹ Finally, site No. 37 was eliminated since, even though its slope was deemed "moderate" its elevation was between 4,400 to 5,200 feet, and, thus, beyond the *Minore Report* top limit of 4,800 feet.²⁰

Of the remaining 23 sites, fully 16 have questionable components. Thus, site Nos. 6, 7, 9, 19A, 19B, 20, 21, T-5, T-6, T-7, T-16, and T-17 all have slopes in excess of 65 percent at elevations above 3,000 feet and thus regenerative success could only be predicted to occur *if* soil depth was greater than 25 inches. Similarly, site Nos. 25, 26A, 26B, and 38, while possessed of "moderate" slopes have elevations in excess of 4,000 feet which makes the specific aspect of critical importance in determining likelihood of regeneration, if soil depth is under 25 inches. Because of the absence of soil depth information we can afford these results only limited weight.

¹⁶ TELAV contends that it has supplied data on 44 sites omitted by BLM. Actually, it has added only 41 new sites, since it has subdivided four BLM sites into eight sites. These subdivided sites are 3, 19, 26, and 27. In addition, TELAV misnumbered BLM site 12 as 39-2-04-002 when it was actually 39-2-04-102. Thus, TELAV's site T-12 is not a new site, but is the BLM site 12 correctly identified.

¹⁷ A number prefixed by the letter "T" indicates a site submitted by TELAV and not contained in BLM's submission. Those numbers without a prefix were contained in both submissions.

¹⁸ These sites are Nos. 22, 27a, 27b, 29, 31, 33, 34, 35, 36, T-4, T-23, T-26, and T-31.

¹⁹ These sites are Nos. 15, 16, 28, 32, and T-25. In addition, we have been forced to eliminate No. T-15, since no data was submitted relating to the elevation of this site.

²⁰ We recognize that 4,800 feet was the top limit of the *Minore Report* simply because it examined no data from above that elevation. However, it is also clear from that report that as relative elevation increased, chances of regeneration decreased.

April 28, 1983

We will, therefore, concentrate our analysis on the following sites: 3A, 3B, 4, 5, 18, 24, and 30. All of these sites appear both in BLM and TELAV's submissions. BLM considers all of these sites to have met target stocking standards. TELAV disputes this contention.

TE LAV's attack is two-pronged. First, it suggests that BLM is attempting to mislead the Board through its use of terminology such as "target" stocking levels. Secondly, it suggests that the vast majority of these sites should have been considered backlogged because of the time it took to reach "stocked-established" status. Because of the stress TELAV has placed on the precise terminology relating to reforestation, it is necessary to define the relevant terms prior to discussing TELAV's contentions.

A stand of timber is said to be "established" if it consists of suitable growing trees, having survived at least one growing season, and "which are past the time when considerable juvenile mortality occurs." BLM Manual 5705.05H (Oregon State Office Supplement).²¹ "Stocking" is an expression of the number of uniformly spaced, suitable trees per acre. Depending on the site class (which can vary from I to V in a decreasing level of presumed productivity) different stocking rates are established for either "target" or "minimum" goals. All parcels in the sale, and, indeed, in the general submissions of both parties, are site class IV or V (the lower end of the scale). We will concentrate on these two site classes. The target stocking standard for class IV is 245 trees per acre, and for class V is 200 trees per acre. Minimum stocking standards are 150 and 100 trees per acre, respectively. Before examining the specific data, however, we wish to make a few general observations.

Much has been submitted related to the question of whether most of these sites are or should have been classified as "backlog." Under present standards, units are considered "backlogged" if the reforestation units are understocked and had been denuded more than 6 years earlier. See BLM Manual 5705.12B3 (OSO). TELAV suggests that every one of the seven sites we are intensively examining should have been "backlogged." BLM, on the other hand, notes that the 5-year standard for the regeneration period was not developed until 1972. All of the clearcut sites under analysis (in fact, every clearcut site submitted except one)²² were cut prior to 1970. When the 5-year standard was adopted, BLM states:

Older cutting units, where established regeneration had not been successfully achieved in the last 5 years were not summarily withdrawn, but classified according to the judgment of the area manager. Usually there was strong evidence the reforestation treatments were not carried out in the most effective manner. Seasonal, biological and

²¹ All of the citations to the BLM Manual in the discussion on reforestation will be to the Supplement prepared by the Oregon State Office. The BLM Manual number will be followed by the notation "(OSO)."

²² This was site No. T-34, which was not cut until October 1980, and had not yet been planted. Site No. 34 was also listed by both BLM and TELAV as having been clearcut in October 1975. Actually, however, a review of the reforestation record card (RRC) for this site shows that it was cut in October 1965.

administrative delays and constraints often render reforestation treatments ineffective. These failures do not diminish the reforestation potential of the areas.

(RB at 1). Thus, BLM did not automatically apply the new standards to the old cuts, but, rather, determined by other factors whether or not to withdraw the individual units.

We wish to point out that while the term "backlogged" and "withdrawn" may seem interchangeable they do not mean the same thing. "Backlog" is a stocking category, not an indication of whether or not the stand is established. This is clear from the Solution to Operations and Reforestation Monitoring Systems Manual (*STORMS*). As *STORMS* notes, the four basic classifications are: (1) Understocked current categories, (2) understocked backlog categories, (3) stocked unestablished, and (4) stocked established. As we shall show, many of the study sites which TELAV has suggested should have been classified as "backlogged" were properly classified as stocked-unestablished during the period in question.

"Withdrawn," on the other hand, is a management category which removes the land from the permanent forest base. Land which is properly in the understocked backlog categories may eventually be "withdrawn" because of a failure to meet minimum *stocking* standards, but land can be withdrawn for other reasons as well, such as a failure to become *established*. TELAV's contention that all of the study units should have been "backlogged" is technically not correct.

We do recognize, however, that the failure of a past site to regenerate within 5 years, quite independent of whether the site should or should not be considered "backlogged," does bear on the likelihood of successful regeneration at the Lick Gulch sites. But a problem develops in time computation, which can best be explained by an illustration. Parcel 3A, consisting of 12 acres, was clearcut in 1960. The initial survey was conducted in March 1961 and showed the unit as understocked carrying only 34 trees per acre. The unit was then planted with bare root Douglas fir seedlings in fiscal year 1962. A preestablishment survey in October 1962 classified the acreage as stocked-unestablished with 456 trees per acre. Subsequent surveys in 1964, 1966, and 1971, all continued the classification as stocked-unestablished with stocking rates variously of 354, 422, and 476 trees per acre. In January 1976, a survey returned the 12 acres as stocked-established with 210 trees per acre. TELAV suggests that this unit required 16 years to finally establish. See SB, Appendix A at 21.

TE LAV's figure, of course, represents the entire period of time from the clearcut to the 1976 survey. We believe, however, that this total may distort the real picture. Inasmuch as we are only concerned with plantation regeneration, we feel the starting date should be the date of the first planting. Second, when a survey classifies land as stocked-established it is declaring what presently exists; the date of the survey is thus not coterminous with the date the stand became stocked-established. Regeneration, however, is concerned with when the stand will become stocked-established, not when BLM will discover this fact.

April 23, 1983

Accordingly, we believe the fairest system of time allocation possible is to split the difference in time between the date of the survey which classified the land as stocked-established and the survey immediately prior in time. We also will begin our time computations as of the initial date of planting. The results of this computation are shown on the following chart:

Unit No.	Year Cut	Year First Planted	Year of Penultimate Survey	Year Classified as Stocked-Established	Computed Time
3A	1960	1962	1971	1976	10½
3B	1960	1962	1971	1976	10½
4	1960	1962	1971	1976	10½
5*	1965	1966	1973	1975	7
18	1964	1964	1967	1974	6½
24	1964	1965	1970	1976	8
30	1959	1961	1972	1975	12½

* In 1979 this unit was reclassified as stocked-unestablished pending release treatment.

This chart, while substantially lowering the total time of the regeneration period from that calculated by TELAV, nevertheless shows a regeneration period in excess of 5 years for every single sample. The question becomes the extent to which we can rely on the assurances of BLM that the failures of the past were occasioned by past management practices which were "less efficient" than those contemplated today. In addition, BLM suggests that its silviculture prescriptions will result in regeneration results greater than that shown in the past.

TELAV strongly disputes these contentions. Thus, TELAV argues:

BLM Medford is charging previous BLM Medford administrations with mismanagement. The removal of area and district managers from areas of controversy, allowing new administrations to admit that previous administrations did a bad job, while promising to do better themselves, is a technique with which the public is all too familiar. BLM Medford's former District Manager, George Francis, complained that the administration which preceded him did a bad job. The administration which has replaced Mr. Francis apparently feels that Mr. Francis did a bad job. There is little consolation in this for the public. The fact is, it is left with a bad job.

(SB at 7).

We are not unsympathetic with TELAV's concerns. We recognize that it can become all too easy to blame the mistakes of the past on prior management practices and to suggest that none of the negative results that characterized such activities will recur simply because more enlightened management policies will be pursued in the future.

On the other hand, we cannot blind ourselves to the fact that knowledge concerning silviculture regimens has increased over the years, based, in part, on lessons gleaned from the very management activities of the past which are presently decried. Indeed, a number of the units of our sample exhibit precisely the type of management activities which BLM has suggested led to poor regeneration results.

A number of the units show a 2-year period between clearcutting and replanting, a period of time which would permit encroachment of competing vegetation. On only three of the units (18, 24, and 30) did any site preparation occur prior to planting, and on one unit seeding rather than planting was originally used.²³ All in all, the specified criticisms of the District Manager are disclosed on the study sites. In light of this, we cannot say that the mere fact that past clearcuts have not regenerated within a 5-year period automatically forecloses any clearcutting in the Little Applegate watershed. Indeed, the past should never be viewed as a fixed, absolute guide since such an approach necessarily concretizes any former mistakes for all time, and cannot make allowance for subsequent technical advances.

Another factor which BLM contends supports its decision is the special silviculture prescription which will be applicable on these sites.²⁴ Specifically, the silviculture prescription for the clearcut units provides for gross yarding of unmerchantable material for site scarification purposes and restrictive burning of residual slash²⁵ (AN at 16).

TELAV suggests that the only advantage of gross yarding would be to make any subsequent burn cooler, and takes particular exception to the proposed burning of 91 percent of the sales area, noting that inasmuch as the area is already classified as restricted because of inadequate moisture, burning can only exacerbate the general problems encountered in the area. See RP at 33-45.²⁶ TELAV, in fact, questions whether burning of the slash is a useful technique for site preparation any place in the Little Applegate watershed.

Insofar as the utility of burning is concerned, this is an area in which reasonable minds may differ. Clearly, burning will have some incremental effect on increasing soil temperatures and reciprocally decreasing the amount of available moisture, in addition to increasing sedimentation in adjacent water bodies (an issue examined *infra*). BLM has attempted to mitigate this result by mandating gross yarding to "cool" the burn and placing limitations on the time periods in which

²³ This unit was No. 5. The seeding proved unsuccessful and was followed the next year by planting.

²⁴ We would point out here that the silviculture prescription units have a different numbering system than that used on the sale sites. Thus, silviculture prescription (SP) unit 1 consists of sale sites (SS) 1 and 9, SP unit 2 consists of SS units 2 and 8, SP unit 4 consists of SS units 3 and 4, SP unit 6 consists of SS units 6 and 10, SP unit 10 is SS unit 5, SP unit 15 is SS unit 7, SP unit 16 is SS unit 12, and SP unit 17 is SS unit 11. In order to minimize confusion, all subsequent references to silviculture prescription will be made in terms of sale sites.

²⁵ While the Answer actually said that gross yarding would be of "merchantable" material, this is clearly a mistake. "Gross yarding" is, by definition, the "yarding of unmerchantable logging residue to the concentration points" (EIS, G-4). The individual silviculture prescriptions indicate that yarding was to take place of all *unmerchantable* material down to 8 feet by 8 inches. See AN, Attachment 8.

²⁶ While BLM subsequently alleged that the silviculture prescription called for multiple species planting (see RB at 3), TELAV correctly pointed out that only 4 units (2, 3, 4, and 8) would be planted with anything other than Douglas fir seedlings. All clearcut units were to be planted only with Douglas fir.

April 28, 1983

burning may be accomplished. Appellant has simply not convinced us that BLM's silviculture prescriptions are inadequate to ensure the likelihood of regeneration. *See generally, A.C.O.T.S., 61 IBLA 396 (1982).*

TELAV also argued that various of the mitigating measures provided for in the Environmental Analysis Record (EAR) were not replicated in the actual sales contract. *See SR at 117-18.* TELAV originally listed seven separate measures not provided for in the contract which had been required in the EAR. BLM generally countered these allegations by pointing out specific contract provisions which arguably covered the EAR recommendations.²⁷

The real crux of this disagreement lies in the reliance by BLM on general contract provisions, such as 41(F)(8), which provides that "slash shall be disposed of in accordance with the written instructions of the Authorized Officer," in lieu of specific provisions delineating the requirements of the EAR. While we recognize that inclusion of the specific mitigating provisions recommended by the EAR might be more time consuming, we agree with TELAV that, as a general rule, it should nevertheless be done. Explicit provisions serve the purpose of both notifying the purchaser of the specific requirements and of assuring that the authorized officer is cognizant of the same.

But while we hold that this is the better procedure, failure to spell out these requirements, herein, is not fatal. The requirements relating to mitigation are in the case file and, after this appeal, it is scarcely credible that either the purchaser or the authorized officer could be ignorant of what was required. We have seen no indication that these measures will not be scrupulously undertaken and hereby expressly so direct.

While our analysis has concentrated thus far on the clearcut sites, much of it is equally applicable to the partial cuts. We do wish, however, to directly address the documentation submitted in relation to past reforestation success as it relates to partial cuts.

A total of 30 separate partial cuts were represented in TELAV's Second Reply. An analysis of these cuts, however, discloses that they are of little probative assistance in predicting success in the Lick Gulch

²⁷ In one notable regard, however, there was a disagreement over whether a mitigating measure had, in fact, been adopted by the EAR. Thus, TELAV argued that the EAR had provided that "in units 1 and 13 tractor yarding would be restricted to conditions when the average soil moisture content of the surface six inches is below 20% by weight" but that no such provision appeared in the sales contract (SR at 118). In response, BLM pointed out that not only had unit 13 been dropped from the sale, but the mitigating measure (measure "I") had not been accepted as a recommended mitigating measure (AN at 48-49). In its Reply, TELAV argued: "mitigating measure i) in the EAR was accepted as a Recommended Mitigating Measure. The EAR states 'All of the above mitigating measures would be recommended except for the following: j), n), and dd).'"

(RP at 65). While literally true, this statement by TELAV is grossly misleading.

A review of the EAR shows that the Recommended Mitigating measures are found at IV.A.3. That section reads, in relevant part: "All of the above mitigating measures would be recommended except for the following: (j) Tractor yarding would be restricted to 20% or less soil moisture conditions and it is felt that this would be sufficient to reduce compaction." While the letter identification used is "j," the substance of the restriction described is clearly "I" in the "Possible Mitigating Measures," as BLM contended. Just as the submission of erroneous data tabulations by BLM scarcely aids in the adjudication of appeals (*see n.15, supra*), so, too, grossly misleading arguments presented by an appellant do nothing to advance decisionmaking.

sites. Nine of the sites were not planted until 1981, and no usable data concerning their regeneration is available.²⁸ An additional eight sites were surveyed the same year they were planted and were deemed stocked-unestablished, but have not been surveyed since.²⁹ The absence of subsequent surveys makes it impossible to ascertain their present status, and the fact that they were originally classified "unestablished" is not relevant since in less than a year they could scarcely be deemed "established." See, e.g., BLM Manual 5705.12B2 (OSO).

The remaining sites disclose equally inconclusive results. Three are classified as stocked-established (T-24, T-32, and T-33), though TELAV emphasizes that they are not within the Little Applegate watershed. Three other sites, all cut in 1975 and planted in 1978 (12, T-9, and T-11) were classified as of 1980 as stocked-unestablished. Two sites cut in 1972 and planted in 1975 (T-18 and T-19) were classified as understocked in 1977. And six sites cut in 1958 were classified as understocked when last surveyed in 1973. We find nothing in this data which impels a conclusion one way or the other.

The *Minore Report* also developed a multiple regression equation to predict relative success on regeneration of partial cuts. Unlike the clear-cut equation where the relevant variables were aspect, soil depth, elevation, and slope, the *Minore Report* based its predicted stocking rates on rock cover and the presence of specific vegetation on the partial cut sites.³⁰

BLM's rebuttal contained computed estimated stocking percentages for six of the eight sites designated for partial cutting. See RB, Attachment 3. The predicted relative stocking rate varied from 39 percent on unit 3 to 78 percent on unit 5, with an overall predicted stocking percentage of 60.33 percent. We do note that the predicted relative stocking rate for units 1 and 3 are relatively low, 45 and 39 percent, respectively. However, two things must be kept in mind. The *Minore Report* data on partial cuts was developed based on studies of stands which had undergone *natural* regeneration. See *Minore Report* at 14. All units in the Lick Gulch sale will be planted after the harvest, with the exception of units 1 and 9, which are undergoing an overstory removal, not a regeneration cut.

Second, while the *Minore Report* suggested an absolute proscription on clearcutting sites where less than 60 percent relative stocking could be predicted, low figures obtained on proposed partial cut sites were to be interpreted as requiring "immediate post-harvest underplanting." *Minore Report* at 33. Such planting is proposed for all units undergoing a regeneration cut. Considering all relevant data, we are unable to find that TELAV has established that the proposed partial

²⁸ These sites are Nos. 1, 10, T-1, T-2, T-3, T-8, T-13, and T-14.

²⁹ These sites are Nos. 13, 14, 17, 20, T-20, T-21, T-22, and T-37.

³⁰ Rock cover was broken down into six classes and accorded numerical values of zero to five. Since rock cover was negatively correlated to regeneration success, the greater the number assigned to the class, the more likely regeneration difficulties would arise. A vegetation indices table was developed (Table 6) to assign relative value to indicator species. The equation derived was "Stocking % = 17.744 - 5.5548 (rock cover class) + .475793 (vegetation index)². r²=.636."

April 28, 1983

cuts will not have established regeneration within 5 years. In sum, therefore, we conclude that the units involved in the Lick Gulch sale are likely to achieve regeneration within the 5-year period contemplated in the EIS.

[3] While the bulk of TELAV's submissions centered on regeneration, other issues received considerable attention. Among these were watershed protection, streamflow and water quality, the economic stability of surrounding communities, recreational values, whether the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 (1976), were followed, impacts on animals and plant species and the adequacy of the cultural resource inventory. We will address each of these concerns, though necessarily in less detail than we have examined the issue of regeneration.

We shall deal with TELAV's arguments concerning watershed protection together with the issue of streamflow and water quality. TELAV argues that various operations prescribed by BLM, in particular burning of the slash and tractor yarding, will necessarily increase erosion and result in elevated sedimentation levels in Lick Creek. See generally SR at 33-59. In addition, TELAV argued that the EAR indicated that the proposed action would increase water temperatures and was therefore not allowable (RP at 41-42).

BLM responded by noting that Lick Creek was classified as a class II stream, *i.e.*, "any headwater streams or minor drainages that generally have limited or no direct value for angling or other recreation" (AN at 28). The Medford District has subdivided this category into "Important Class II" and "Other Class II." Lick Creek has been placed in the "Other Class II" category which "includes ephemerally intermittent and perennial streams that have no direct fisheries value but have an important impact on downstream water quality." *Id.*³¹

The multiple use recommendations for "Other Class II" streams require provision for a riparian zone of variable width on both sides of streams that exhibit a significant amount of riparian vegetation. As BLM notes, specific practices are recommended:

Whenever possible protect all hardwoods, brush, non-commercial conifers, non-merchantable conifers. If necessary, leave merchantable conifers to meet long-term goals of aquatic and terrestrial wildlife and water quality. Priority merchantable "leave" trees should be those in the streambottom and on slopes immediately adjacent to the stream.

When necessary and practical use directional felling within a tree length [*sic*] of all intermittent and perennial streams to protect stream-bank stability and vegetation on streambanks.

Provide complete suspension across all intermittent and perennial streams whenever practical. If complete suspension cannot be attained, yarding corridors will be designated.

(AN at 29-30).

³¹ BLM alleges that the purpose of this bifurcation is to afford *greater* protection to streams that can support resident fish populations.

BLM suggests that it has followed these guidelines in the instant sale. Thus, one end suspension of logs is mandated on all sites to be cable yarded and a limitation on the period of the year in which tractor yarding can occur is provided for the two units (1 and 8) where tractor yarding is prescribed. See Contract, sections 41(B)(6) and 41(B)(8). The sales contract forbids yarding across Lick Creek in units 2, 3, and 4, and provides that in unit 4 a temporary crossing shall be installed, which must be removed upon completion of the cut of unit 8 (Contract sections 41(B)(6) and 41(D)(2)). In addition, in units 1, 2, 3, 4, 8, and 9, through which Lick Creek flows or is immediately adjacent, and which have established riparian habitat, all trees designated for cutting within 150 feet of the stream are to be felled away from the stream (Contract section 41(B)(15)). Finally, all of Lick Creek within the sales sites is to be cleared of all debris 1-inch in diameter and 1-foot long or greater (Contract section 41(D)(1)).

While recognizing that these measures are provided for, TELAV suggests that, given the steepness of the slopes and the erosive qualities of the soils,³² they will simply not work. In particular, it argued that only 37 percent of trees in unit 2 in the creek or on the adjacent banks were to be left (see AP, Appendix M), and that the BLM wildlife report recognized that trees between the stream and road would most probably roll into the alder and streambed when they are bucked.³³

TELAV has not expressly stated that trees growing in the drainage bottom are marked for harvesting. Such trees may not be felled consistent with the EAR. See EAR at 7 (mitigating measure IV.2.U.1). Indeed the EAR expressly mandated that "all trees growing in the drainage bottom or on the adjacent cutbank would be left." *Id.* We suspect that the source of contention relates to the areal extent of the cutbank. On the basis of the record before us, it is simply impossible to independently establish the physical limits of the cutbanks. Appellant has not shown that any of the trees designated for removal have been so designated in violation of the EAR.

Nor has TELAV established that soil erosion and the consequential increase in sedimentation is of such a level as to prohibit timber harvesting. Admittedly, an inevitable consequence of the harvesting of timber will be a residual increase in erosion as well as an increase in streamflow. But the measures proposed by BLM will, we believe, substantially mitigate adverse effects generated by timber harvesting.

³² The EAR classified the surface erosion hazard of the Colestine, Manzanita, and Vannoy soils as moderate and the Beekman soils as low to moderate (EAR at 4).

³³ TELAV also argued that the Wildlife Report stated "taking timber on steep side slopes will degrade 30' no entry buffer," but argued that no mention of this was made in the EAR (SR at 49). This is simply not true. The preliminary wildlife report did suggest that a 25- to 30-foot buffer be established on some portions of drainages with *extremely* steep banks, but in the addendum to the report the author expressly stated "The areas I was going to identify for buffers (as mentioned in the preliminary report) where slope was excessive were in Unit 5a and this unit has been omitted from the present sale plan."

Moreover, the EAR *did* mention the 30-foot buffer as a "possible mitigating measure." See IV.2.(U)(4) "A 30 foot buffer would be maintained where extremely steep banks exist (shown on Attachment B)" (EAR at 8). This became a recommended mitigating measure. See SR at 118. TELAV's contention on this point is clearly without merit. Indeed, TELAV expressly alluded to this provision subsequently in its statement of reasons.

April 28, 1983

We do not find that the proposed sale will have significant long term impacts on either the Little Applegate water quality generally or the Lick Creek streamflow in particular.

TELAV contends that the sale will result in an elevation of the temperature of Lick Creek and is, therefore, contrary to Oregon water quality standards. TELAV alleges that temperature elevation will result because of damage to riparian vegetation caused by falling trees or during yarding which will result in reduced shade (RP at 41-42, citing the EAR). Increased stream temperature "decreases the water's ability to hold dissolved oxygen, and therefore the ability of the stream to support fish." *Williams Report* at 48. TELAV argues that, based on its sampling, the water temperature of Lick Creek was 67.2 degrees on August 10, 1981, and, therefore, under the Oregon State Water Quality Standards, Department of Environmental Quality (DEQ), Chapter 340, no elevation of temperatures can be allowed. See SB at 15.

The cited provision of Chapter 340 reads as follows:

No measurable increases shall be allowed outside of the assigned mixing zone, as measured relative to a control point immediately upstream from a discharge when stream temperatures are 58 degrees F. or greater; or more than 0.5 degrees F. increase due to a single-source discharge when receiving water temperatures are 57.5 degrees F. or less; or more than 2 degrees F. increase due to all sources combined when stream temperatures are 56 degrees F., or less, except for specifically limited duration activities which may be authorized by DEQ under such conditions as DEQ and the Department of Fish and Wildlife may prescribe and which are necessary to accommodate legitimate uses or activities where temperatures in excess of this standard are unavoidable and all practical preventive techniques have been applied to minimize temperature rises. The Director shall hold a public hearing when a request for an exception to the temperature standard for a planned activity or discharge will in all probability adversely affect the beneficial use.

340-41-365(2)(b)(A). TELAV points out that no public hearing has been held and, thus, the timber sale is contrary to these guidelines.

The problem with TELAV's analysis, however, is that this provision is not applicable to timber harvesting. Rather, it is directed to point source discharges.³⁴ This is expressly recognized in an earlier provision of the DEQ standards which provides that "programs for control of pollution from nonpoint sources *when developed* by the Department * * * shall, as applicable, be incorporated into this plan via the same process used to adopt the plan unless other procedures are established by law" (340-41-120(5)) (italics supplied). In the absence of specific programs for nonpoint sources of pollution, the only relevant provision is 340-41-026(7) which states "logging and forest management activities shall be conducted in accordance with the Oregon Forest Practices Act so as to minimize adverse effects on water quality." The efforts

³⁴ A "point source" is defined in the Federal Water Pollution Control Act as follows: "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." Act of Oct. 18, 1972, 86 Stat. 886, 33 U.S.C. § 1362(14) (1976).

undertaken by BLM show that it has, indeed, attempted to minimize adverse effects on water quality and we reject TELAV's argument based thereon.

In criticizing the economic basis of these sales, TELAV makes two interdependent arguments. First, it contends that timber production is declining in relative economic importance in the area while, at the same time, tourism and other related activities, including fishing and hunting, are increasing.³⁵ As noted earlier, among the goals to be achieved under the O&C Act is provision for recreational facilities as well as contributions to economic stability. BLM recognizes the relevance of these goals in its policy statement on multiple use management of the O&C grant lands. See RB, Attachment 4. Thus, its general policy is:

Lands classified as nonsuitable for timber production on a sustainable basis will be used to the fullest extent possible to meet nontimber needs. Where nonsuitable lands are inadequate to accommodate authorized nontimber needs, suitable lands will be substituted where a reduced level of timber production will serve with nontimber needs. Only when authorized nontimber needs cannot be met by a combination of the above will suitable lands be excluded from timber harvest.

(RB, Attachment 4 at 1-4).

BLM notes that its land use allocation process identified land where timber production was to be limited or totally avoided in order to preserve or enhance recreational or scenic values, but contends that Lick Gulch was not so identified because it is scattered with cutting units and logging roads and possesses no special scenic values (AN at 37). Moreover, BLM notes that the view from Little Applegate Road of the sites designated for harvesting is oblique and the resulting visual degradation will be minimal (AN at 38).

Lick Gulch is presently classified as Visual Resource Management (VRM) classes III and IV.³⁶ The Visual Contrast Rating Worksheet which was prepared for this sale showed a maximum element contrast of 2 (moderate) with a maximum total feature contrast rating of 13, three points below the permissible contrast rating of 16 for class III and seven points below the level permissible for class IV.

Nevertheless, TELAV contends that sales activities will impair user enjoyment of three BLM recreational sites in the area and also intrude upon the view from neighboring hiking trails. While BLM admits that noise associated with timber harvesting will probably diminish recreational enjoyment in nearby lands, BLM argues that such diminution will be of relatively short duration. Insofar as the longer lasting visual impacts are concerned, BLM merely noted that they are within the acceptable ranges for the VRM rating of the land.

³⁵ We discuss the specific arguments relating to the effect of the proposed timber sale on fish and wildlife *infra*.

³⁶ VRM class III is described as an area where "contrast to the basic elements (form, line, color, texture) caused by management activity may be evident and begin to attract attention in the characteristic landscape. However, the changes should remain subordinate to the existing characteristic landscape." BLM Manual 8411.61C4.

Class IV is described as an area where "contrasts may attract attention and be a dominant feature of the landscape in terms of scale; however, the change should repeat the basic elements (form, line, color, texture) inherent in the characteristic landscape." BLM Manual 8411.61C5.

April 28, 1983

We find ourselves in substantial agreement with BLM. The entire purpose of the VRM classification system is to establish different categories of lands in terms of scenic values in order to differentiate between lands with high scenic value from those with lesser scenic values, since *all* BLM lands are presumed to have some scenic value. VRM classes III and IV represent that lowest possible permanent ratings on the visual index. If the proposed activities are not permissible on this land, they would be impermissible on any land, which, of course, would terminate timber harvesting, or at least clearcutting, on all Federal land. Contrary to TELAV's argument, BLM has employed a specific management tool, the contrast worksheet, to measure the visual impact and found it to be within the acceptable range for this class of land. TELAV has failed to persuade us that the harvesting of this timber will have significant adverse effects on the recreational values presently available in Lick Gulch.³⁷

TELAV also criticized the proposed sale on a more traditional economic basis. Thus, it contended that the timber in Lick Gulch could not be harvested *and* regenerated at a profit to the Government. In addition, it argued that, insofar as the return to Jackson County was concerned, the \$87,600 which it received (assuming a subsequent overstory removal on the partial cut unit) would be prorated out, over the 80 years of the sustained yield cycle, as \$1,095 per year or .011 percent per year of Jackson County's annual O&C income.³⁸

BLM, on the other hand, notes that under the allowable cut plan, each acre of the permanent forest base is presumed to be supporting an output of 445 bf per year. Therefore, BLM contends that, at current stumpage prices, the acreage in the Lick Gulch sale is providing an annuity of approximately \$20,000.

In essence, BLM is employing a macroeconomic analysis which looks to the acreage in Lick Gulch as merely a constituent component of the entire timber management program. TELAV is using a microeconomic analysis limiting its focus to the specific cash flow generated by the Lick Gulch sale. We are unable to determine how either approach is particularly relevant to this appeal.

The fact that overall the timber management program may be premised on sound economic principles, the point argued by BLM, does not really address the question whether the harvesting of the particular areas at issue is economically viable. Insofar as the microeconomic analysis used by TELAV is concerned, the percentage of income that this sale provides to Jackson County is equally

³⁷ In any event, even if a proposed activity exceeds the degree of contrast prescribed for an area, it is not automatically prohibited. Rather, a decision may be made by the District Manager to proceed with the proposal while attempting to reduce the impacts as much as possible. See BLM Manual 8431.33A.

³⁸ We are unable to ascertain the basis for appellant's assertion that Jackson County receives 40 percent of 50 percent of the total revenues. Without making a foray into the relatively complicated procedure and history of O&C disbursements (*but see Skoko v. Andrus*, 638 F.2d 1154 (9th Cir. 1979)), we note that section 201 of the O&C Act clearly provides that the counties receive 50 percent of all revenues. See sec. 201 of the Act of Aug. 28, 1937, as amended, 43 U.S.C. § 1181f (1976).

irrelevant to the ultimate question of whether this harvest is economic. Total income is always derived from smaller increments. If the mere fact that each individual component was miniscule in relation to the total was sufficient to justify the exclusion of that component, the end result might well be a total of zero.³⁹

We are aware that TELAV has attempted to question the economics of cutting the specific land involved in the sale by arguing that reforestation attempts will prove so costly that BLM will expend far more money than it will receive from the sale. This argument, of course, is premised on assumptions relating to regeneration which we have already rejected.

We also note that TELAV has submitted various studies criticizing any timber harvesting on lands with a stocking site class of III, IV, or V as uneconomic. See AP, Appendix K; SB, Appendix D. We do not wish to denigrate these studies. They are, we feel, probative of the ultimate question of whether the decision made by BLM to harvest the instant sites is economically justifiable. They represent, however, a judgment with which BLM's experts obviously disagree. While we are not unwilling to overturn a decision of BLM, even where such a decision is based on the admitted expertise of the Bureau, we must, as a practical matter, give great deference to its collective judgment. Thus, only where we are clearly convinced that an error has been made will we proceed to overturn the judgment of BLM. While the documentation provided by TELAV as it relates to the economics of the policy of harvesting lands in classes IV or V may engender doubts as to the correctness of that policy, it has failed to convince us that the policy is clearly wrong.⁴⁰ We thus must reject its contentions on this point.

TE LAV contends that the provisions of NEPA were not followed. See SR at 101-125. While recognizing the general adequacy of the EIS for JKSYU, TELAV contends that the EAR prepared for the Lick Gulch sale was deficient in a number of ways, including a lack of an interdisciplinary approach, insufficient public involvement, and an inadequate consideration of alternatives. We disagree.

The record clearly establishes that an interdisciplinary approach *was* utilized. TELAV's only specific allegation on this point was that the three Upper Carnegie units (units 7, 11, and 12) were not surveyed by

³⁹ Indeed, the essential fallacy of TELAV's approach can be seen in the fact that, by merely increasing the amount of timber to be cut in this sale, the percentage return to Jackson County is also increased. This result, however, hardly means that the timber harvest is therefore more economic.

⁴⁰ As an example of the difficulties inherent in attempting to quantify economic returns, we note that a study commissioned by appellant and prepared by the Cascade Holistic Economic Consultants (CHEC) analyzed the economic viability of managing the land in the Grouse Creek sale for sustained yield of timber. The CHEC study is found at AP, Appendix K. The conclusion of the report was that at a level of return above 5 percent, sustained yield could not economically be maintained, and that even at 5 percent the benefit-cost ratio would be low. While the study was prepared for the Grouse Creek sale, the economic principles and conclusions would, of course, have a wider applicability.

The problem we perceive with the CHEC study lies not in its internal computations but rather in its initial premises. Thus, the CHEC study presupposes that the land has already been harvested and analyzes merely subsequent regeneration costs and ultimate returns from post-harvest regeneration. If, however, one looks at the Lick Gulch sites and seeks to determine whether it would be economic to harvest *and* regenerate, the answer would be positive at all levels of return presupposed in the CHEC study. In effect, the CHEC study eliminates all present value of timber on the land.

April 23, 1983

anyone except a forester (SR at 103). This is factually untrue. See AN at 43. TELAV's general assertions that the fieldwork conducted by BLM did not constitute a "true" interdisciplinary approach cannot be given credence.

The question of the adequacy of public involvement is raised primarily over the inclusion of the three Upper Carnegie units in the Lick Gulch sale. As originally proposed, the sale did not include these units, but did include a proposed unit 13. As even BLM has recognized, the inclusion of unit 13 in the proposed sale, which had been classified as low intensity forest land and was a critical deer winter range, was a mistake. See AN at 42. The EAR also recommended, as a possible alternative, inclusion of the three Upper Carnegie units. It is to these units that TELAV addresses its contention of inadequate public participation.

A review of the various contentions of the parties shows that TELAV is essentially correct in its assertion that, for the purposes of site specific comments, there was no opportunity for public comment on the three Upper Carnegie units until after the EAR was made available. However, the EAR was made available for review, pursuant to public notice, for a period between June 23 and 27, 1980. See AN, Attachment 6. Views of the public were solicited. In point of fact, the decisions to select alternative A (deletion of unit 13), and alternative B (addition of the Upper Carnegie units) were not made until September 22, 1980, more than 3 months after the EAR was made available. Moreover, as BLM notes, interested parties are able to submit comments up until the actual sales date, in this case December 18, 1980. We feel that more than adequate provision was made for public comments.

TELAV suggests that there was an inadequate consideration of alternatives. The alternatives to the sale as proposed were the elimination of unit 13 (alternative A), and the addition of the Upper Carnegie units (alternative B). In addition, in his decision selecting alternatives, the area manager expressly considered a "no action" alternative and rejected it.

Appellant suggests that deletion of unit 13, given the fact that it was low intensity land and a crucial winter deer range was scarcely an alternative; rather, it was required. Alternative B, TELAV argues, was simply not an "alternative," but an "addition" to the proposed harvest. TELAV also contends that the EAR failed to consider "a proposal to selectively log the area for uneven aged stands" (SR at 120).

Insofar as unit 13 is concerned, BLM admits that as low intensity land containing a crucial winter deer range it could not properly be harvested and thus adoption of alternative A was required. This fact, however, does not necessarily invalidate the EAR process. Indeed, the whole purpose of site specific EARs is to examine individual parcels to determine their suitability for harvesting. The generation of

information which resulted in the exclusion of unit 13 is consistent with the real purposes behind the formulation of the EAR.

Alternative B is, indeed, an addition to the proposed action rather than an alternative thereto. But on both this point and in its allegation relating to the failure of BLM to consider selective logging, TELAV's complaint is misdirected.

The Lick Gulch EAR cannot be read as an isolated document. Rather, it must be reviewed in conjunction with the EIS prepared for the JKSYU. The EIS is the controlling document insofar as *policy* choices are concerned. The EAR is merely a site specific appendage which develops data to which the general policy of the EIS is applied.

The EIS, itself, discussed single tree selection in its description of the proposed action. Thus, it stated: "Single tree selection would average 90 acres annually on high intensity lands during the proposal period. Maintenance of a multi-storied stand is a major objective of this harvest method. It would be applied primarily to frost pockets and areas of heavy gopher infestation" (EIS at 1-29). Appellant does not allege the existence of either frost pockets or heavy gopher infestation. To the extent that TELAV disagrees with this policy determination which, in effect, limits use of single tree selection, its disagreement resides not with the EAR but with the EIS.

Moreover, a review of TELAV's statements concerning NEPA discloses a misinterpretation of the scope of the law. NEPA is not intended to prohibit actions which result in environmental degradation. Rather, its purpose is to ensure that decisionmakers are aware of the full range of consequences which may result from proposed activities. See *James River Flood Control Association v. Watt*, 553 F. Supp. 1284, 1295 (D.S.D. 1982). As the Supreme Court has noted "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. * * * It is to insure a fully informed and well-considered decision * * *." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (citations omitted.) See also *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

When the EAR and the EIS are considered with the addition of the admittedly voluminous submissions made in this appeal, it is clear that all environmental considerations have been exhaustively explored. NEPA requires no more.

TELAV suggests that the sale will adversely affect wildlife in the area, specifically deer and anadromous fish. In addition, TELAV argues that the sale violates the Endangered Species Act, 16 U.S.C. § 1536 (1976), pointing primarily to the presence of two "rare" plants, both *cypridium fasciculatum*.

Insofar as anadromous fish are concerned, there is absolutely no evidence that Lick Creek is now, or has ever been, a spawning ground for such fish (TELAV's speculation to the contrary, notwithstanding). To the extent that TELAV's argument is directed to possible damage to anadromous fish spawning grounds in the Little Applegate River,

April 28, 1983

such damage is, itself, dependent upon the extent of sedimentation increases in Lick Creek occasioned by timber harvesting activities. We have noted above that there will, inevitably, be an elevation in the sedimentation in Lick Creek as a result of the proposed sale. But, as we also noted, the mitigating measures proposed by BLM will substantially lessen the level of increased sedimentation which will result. We reiterate our earlier finding that, based upon the evidence presented in the appeal, this timber sale will not have a significant adverse impact on the water quality of the Little Applegate River.

With respect to deer habitat, certain areas in the proposed sale (units 1, 2, 3, 4, 8, and 9) are crucial deer winter range. The EAR noted that the sale "would decrease thermal cover now existing for wildlife and the number of snags available for cavity nesters would also decrease" (EAR at 6). While various mitigating measures were adopted (see EAR at IV.2.W, IV.2.X, IV.2.Y), it was recognized that "thermal and protective cover for wildlife * * * would be reduced but impacts would not be long-term." See EAR at 9. This admission of short-term impacts, however, can scarcely be said to require BLM to forego the timber sale.

Any sale of standing timber, by definition, will dissipate thermal cover, though the extent of the dissipation will be dependent upon the methods to be used in harvesting the timber. Thus, the mere fact that thermal cover will be lessened cannot, *ipso facto*, invalidate a timber sale. The timber sale as proposed herein is consistent with the Medford District's management framework plan-wildlife recommendations. See AN, Attachment 5. While certain adverse effects may be anticipated, TELAV has failed to establish that the proposed timber sale will have impacts on wildlife sufficient to require that the sale be canceled.

TELAV's argument relating to the Endangered Species Act, *supra*, is based both on what TELAV alleges was an inadequate reconnaissance of the timber sale area together with the admitted existence of two *cypripedium fasciculatum* which were uncovered during the field work. TELAV's position on the inadequacy of the reconnaissance seems to be that since a number of threatened and endangered plants are known to exist in the JKSYU, the failure to find any in the Lick Gulch sites shows that the biological survey was inadequate. This is classically circular reasoning, the end result being that threatened and endangered species will always be presumed to exist on any given site since if they are found, they are obviously present, whereas if they are not discovered, it is because a proper survey was not conducted. We reject this analysis.

The issues revolving around the admitted presence of *cypripedium fasciculatum*, a member of the orchid family, are even more convoluted. A great deal of argument has gone back and forth over whether the plant had ever been proposed for threatened or endangered status, with BLM strenuously arguing that it was not,

while TELAV, pointing to such documents as the EIS (EIS at 2-18), equally vigorously arguing the opposing view. Our research has proven inconclusive on this point. We have been unable to find any publication by the Department which proposed *cyripedium fasciculatum* for threatened or endangered status. On the other hand, in a notice published in the *Federal Register* on December 15, 1980, *cyripedium fasciculatum* is listed as a taxon "no longer being considered as Endangered or Threatened." 45 FR 82480-81, 82548 (italics supplied). This clearly implies that, at one time, it was being considered for threatened or endangered status. In any event, we consider the emphasis placed on this question fundamentally misdirected.

There is no question that, as of now, *cyripedium fasciculatum* is not listed or proposed for listing as a threatened or endangered plant. The reason it was dropped from consideration was that it was proved to be more abundant or widespread than had previously been thought. Thus, the procedural consultations which TELAV argues should have been undertaken, are clearly not required now. While we recognize that *cyripedium fasciculatum* is protected under the Oregon wildflower law, BLM has, in fact, provided for a 100-foot buffer around these plants to protect them. We fail to see, nor has TELAV suggested, what further steps, relating to the timber harvest, BLM should take in relation to these two plants.

[4] The last issue which we will examine relates to the cultural resource inventory which took place on the Lick Gulch sites. TELAV argues that only a "token" survey was conducted on these sites (SR at 137). It also notes that the 1-page cultural resource report failed to disclose any search of literature or inquiry to the National Register for Historic Places or relevant state historical societies.⁴¹

BLM's response is as follows:

Protestors complain "only 40% of area was surveyed." In western Oregon, especially in timbered areas we have found that a 100% survey is impracticable; that is, very few if any additional sites are found and the time involved is totally beyond our constraints of funding. The following points are made regarding cultural surveys in Western Oregon forested areas:

1) archeological sites will not be found, even if they exist, in areas where the ground is covered by duff and leaf litter, when the usual pedestrian survey is employed. In these areas we can find sites only after some disturbance has occurred.

2) Our broad knowledge of the area and the resource, allow us to predict where significant sites will occur.

Therefore, on all timber sales both BLM and USFS personnel are conducting surveys based on an "initiative" and "opportunistic" approach. That is, special attention is paid to areas where sites may occur such as near springs, streams, terraces, or good natural

⁴¹ TELAV also challenged the qualifications of the individual who conducted the survey. BLM has not shown that the individual who conducted the survey was qualified as a "professional cultural resource employee" within the meaning of BLM Manual 8111.41A. While we recognize that experience may well qualify an individual employee, there was no showing that the specific employee herein was qualified. If, in fact, he was not a qualified cultural resource professional the mere fact that the district cultural resource specialist reviewed the work is insufficient under the manual to satisfy inventory requirements. Such an employee must be under the "direct supervision" of a professionally qualified cultural resource specialist. See BLM Manual 8111.42A.

April 28, 1983

travel routes; and also areas where some previous disturbance such as a footpath or vehicular traffic has revealed the mineral surface of the soil.

* * * * *

A cultural resources overview based on a comprehensive literature search was completed in 1978. We are routinely advised of all new nominations to the National Register. The districts cultural resource specialists are in frequent contact with the State Historic Preservation office and those individuals doing research in this area. Formal inquiries of the sort mentioned, on each sale, would serve no purpose and generate a vast amount of paperwork.

(AN at 56-57). Leaving aside BLM's rather remarkable assertion that it can "predict" where significant sites will be found, the fact remains that the survey described by BLM does *not* comport with the requirements of the law or the BLM Manual.

As we noted in *Western Slope Gas Co.*, 40 IBLA 280 (1979), the effect of the 1976 amendments to the National Historic Preservation Act, Act of October 15, 1966, 80 Stat. 915, 16 U.S.C. §§ 470-70m (1970), was to require the Secretary to consider the effect of any action licensed by the Department upon any site or object "eligible for inclusion in the National Register." See Act of September 28, 1976, 90 Stat. 1320, 16 U.S.C. § 470f (1976). Prior to this time, in order to determine whether any proposed action would impact a site listed on the National Register, a simple inquiry would have sufficed. But by adding the phrase "or eligible for inclusion" it became necessary to establish a procedure by which such potential sites could be discovered *before* they were injured by licensed activities. Thus evolved the cultural resources inventory.

Three separate types of inventory of varying degrees of intensity are provided for in the BLM Manual (classes I, II, and III). Thus, a class I inventory, which normally covers an entire district, is an "Existing Data Inventory," which merely entails a review and compilation of known cultural resource data. Its purpose is to provide a general overview of the cultural resources of the district.

A class II inventory consists of a field inventory on a sample basis. Its objectives "are to identify and record, from surface and exposed profile indications, all cultural resources sites within a portion of a defined area." BLM Manual 8111.13A1. While the manual notes that "under constraints of time, manpower, and funding, a sampling approach is cost effective," the manual also expressly states that "since the method is not designed to completely inventory an area, it cannot be used for site-specific cultural resource clearance unless the site-specific area coincides with previous intensively inventoried sampling units." BLM Manual 8111.13A2.

The class III inventory is the intensive field inventory, *i.e.*, a *complete* surface inventory of a specific area. Such an inventory requires actual ground coverage of the entire area. Indeed, the manual

is quite explicit as to the methods to be followed in the survey. See BLM Manual 8111.14B3.

At best, BLM conducted a class II survey, though the report submitted is woefully inadequate even for that purpose.⁴² But, as we noted above, a class II survey is insufficient to provide site-specific cultural resource clearance. Moreover, the EIS expressly provided "[e]ach proposed ground-disturbing activity * * * would be preceded by a complete field survey for cultural resources as part of the environmental assessment reports which precede each site specific timber sale" (EIS at 3-51 (citing BLM Manual 8100)). We find that TELAV's objections to the cultural resource survey which occurred herein are well-taken, and that BLM did not fulfill its obligations under the relevant laws and manual provisions.

While we are not unmindful of the economics of the matter, the cost of compliance is not sufficient to justify a failure to comply. We must point out, however, that an intensive survey is a one-shot event. Once having established that no sites eligible for inclusion in the National Register exist in the area no further cultural inventory work will usually be needed. See BLM Manual 8111.14A. In addition, we note that in many other fields, such as oil and gas leasing, it is a common practice for BLM to require the applicant to pay for the cost of the necessary survey. BLM Medford may, indeed, choose to pass this cost along to future timber sale applicants.⁴³ But not having done so in the instant case, it falls to BLM to absorb the costs of the cultural resource survey. BLM is directed, prior to any entry by the timber purchaser, to make a complete class III survey of lands involved in the timber sale in accordance with the procedures outlined in the manual. Should any cultural resource sites or artifacts be discovered BLM shall fully comply with the applicable procedures relating thereto, including, if necessary, the entering of negotiations with the timber purchaser to modify the contract.

Appellant has raised various other contentions in the course of this appeal.⁴⁴ We have considered all of these arguments and have rejected them.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

⁴² Thus, a class II survey report is *required* to contain an abstract outlining the report, a brief discussion of the cultural history of the area, a statement of the sampling technique. BLM Manual 8111.13D8. None of this appears in the report.

⁴³ This is *not* accomplished by section 41(D)(2)(EO-2) of the timber sale contract. This section merely relates to the discovery of a cultural resource site or prehistoric artifacts during operations on the land. It does not entail an initial cultural resources survey.

⁴⁴ An inordinate emphasis was placed in the briefs on the question of whether the Little Applegate area should have been designated as an area of critical environmental concern (ACEC). See generally 43 CFR Part 1600. There is no question, however, that it has not been so designated. We would point out that ACEC designation is part of land use classification under 43 CFR Part 2400. As such, questions relating to designation of ACEC's are not properly subject to review by this Board, either directly or collaterally. See 43 CFR 4.410.

April 23, 1983

appealed from is affirmed as modified to require a complete class III cultural resource inventory of the subject lands.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

April 25, 1983

OREM DEVELOPMENT COMPANY

v.

LEO CALDER (On Reconsideration)¹

A-26604

April 25, 1983

Petition for reconsideration granted.

1. Appeals--Mining Claims: Lode Claims--Mining Claims: Placer Claims--Tar Sands

Where a decision on appeal is based on a factual issue not raised at the hearing, where no opportunity for argument on appeal was provided and where the facts on which the decision was based were incorrect due to a faulty hearing transcript, the decision will be set aside.

2. Mining Claims: Determination of Validity--Tar Sands

The validity of mining claims located for deposits of tar sand must be established under the general principles of the mining laws, including those related to abandonment and performance of annual assessment work. Congress provided no special recognition of tar sand as a valuable mineral deposit. If tar sand mining claims are found to be placer locations for lode deposits, the owner may apply for conversion to a combined hydrocarbon lease under 30 U.S.C. §§ 226(k) if the claims are otherwise valid.

Orem Development Co. v. Leo Calder, A-26604 (Dec. 18, 1953), decision set aside and case remanded.

OPINION BY THE UNDER SECRETARY

Sohio Shale Oil Corp. (Sohio) seeks to obtain reversal of a decision by the Solicitor, *Orem Development Co. v. Leo Calder*, A-26604 (Dec. 18, 1953), which declared 28 placer mining claims null and void. Sohio originally filed this petition with the Solicitor in 1963, but no dispositive action was taken. Recently, Sohio revived the petition. In 1970, authority over appeals related to the public lands was transferred from the Office of the Solicitor to the Office of Hearings and Appeals. 43 CFR 4.1. I have exercised the Secretary's supervisory authority over matters pending within the Department and taken jurisdiction over this petition. 43 CFR 4.5.

The mining claims were located as petroleum placer claims for land containing asphaltic material commonly called tar sands. The history of the prior proceedings is set out in the *Orem Development Co. v. Calder*, A-26604 (Dec. 18, 1953) decision. In brief, upon private contest by an oil and gas lease applicant, a Land Office Manager found the claims invalid following a hearing for, among other reasons, abandonment and lack of discovery of a valuable mineral deposit. On appeal to the Director, Bureau of Land Management, under the then-existing procedures, this decision was upheld solely on the ground of lack of discovery. Upon further appeal, the Solicitor did not review any

¹ Not in chronological order.

of these holdings in his decision but affirmed the invalidity determination on the ground that the claims were erroneous placer locations for lode deposits. Sohio seeks reconsideration of the Solicitor's decision and that it be vacated.

In 1956, Sohio purchased the disputed claims from Orem Development Co. and initiated discussions with the Department to reconsider the *Orem* decision. Apparently, the Department agreed to review the lode or placer location issue in the context of a contest proceeding for the Enterprise No. 6 claim, a tar sand claim situated in the vicinity of the disputed claims. Following the dismissal of the contest against the issuance of patent for the Enterprise No. 6 claim, Sohio petitioned for reconsideration of the *Orem* decision. Sohio also filed patent applications for nine of the disputed claims in 1963 and 1964 which have been held in suspense.

In both 1960 and 1981, Congress provided relief from the *Orem* decision by allowing owners of valid claims to convert the claims to leases: first, in 1960, to tar sand leases (Mineral Leasing Act Revision of 1960, 30 U.S.C. § 241(b) (1976)); and now, since 1981, to combined hydrocarbon leases (Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C.A. § 226(k)(1) (1982 Supp)). In both conversion provisions, Congress provided that "no claim shall be deemed invalid solely because it was located as a placer location rather than a lode location or vice versa, notwithstanding any previous adjudication on that issue."

[1] I have reviewed the record of this case solely to determine whether the Solicitor had a sufficient basis to reach his conclusion in the *Orem* decision. I find that he did not.

Three issues were raised at the contest hearing on the disputed claims: (1) the availability of the lands for location and entry at the time of location; (2) the existence of a discovery on each claim; and (3) whether any claims had been abandoned. All testimony and evidence at the hearing were directed to these issues. No party raised the placer or lode location issue during the hearing or on appeal. The Solicitor provided no opportunity for the parties to file arguments or evidence on this issue. Although he quoted testimony from the hearing describing the geology of the mineral deposit, this testimony was not directed at showing whether the deposit was properly a placer or a lode. The Solicitor then compared this deposit, described as "asphaltic impregnated beds, sandstone," to gilsonite, a vein-type hydrocarbon, although no such comparison occurred at the hearing, and concluded that the impregnated sandstone also occurs in veins.

In 1962, Sohio successfully obtained a patent for the Enterprise No. 6 claim following a contest hearing on a Bureau of Land Management contest limited to the lode or placer location issue. In his decision dated September 14, 1962, the hearing examiner in the Enterprise contest questioned the viability of the Solicitor's *Orem* decision. He noted that the Solicitor relied in part on a quotation from the *Orem* hearing transcript which refers to the exposure of "workable

April 25, 1983

fissures" for his conclusion that the deposits occur in veins subject to lode location. The hearing examiner then stated that the word "fissures" was an incorrect transcription of the word 'measures', which may have misled the Solicitor. The hearing examiner concluded, based on the evidence before him in the Enterprise contest, that deposits of this type are clearly placers.

The Solicitor's *Orem* decision is thus flawed in several respects. First, it is based on a factual issue which was not raised in the contest complaint or at the contest hearing, on which no direct evidence or testimony was introduced, and thus on which no cross-examination or rebuttal occurred. Second, no arguments were presented to the Solicitor on this issue nor was any opportunity provided to present such arguments. Finally, the facts on which the Solicitor based his conclusion were incorrect due to a faulty hearing transcript. Although the Solicitor suggested that whether the deposits originated by fissuring or sedimentation was immaterial, the mistranscription of "fissures" creates a sufficient implication that the deposits are lodes to cast doubt on the basis for the Solicitor's conclusion. For these reasons, the decision of the Solicitor must be set aside. Further, because the private contestant no longer has an interest in pursuing the matter (at least in part because of the Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521-531), the decisions that gave rise to the Solicitor's decision on appeal are also set aside.

[2] Sohio currently has pending at the Utah State Office, Bureau of Land Management, the following patent applications for mining claims declared null and void in the *Orem* decision:

- U 0126873 - Enterprise No. 2 Placer Mining Claim
- U 0126874 - Enterprise No. 1 Placer Mining Claim
- U 0133378 - Enterprise No. 5 Placer Mining Claim - Lucky Strike Placer Mining Claim
- U 0142287 - Cameron No. 5 Placer Mining Claim
- U 0142288 - Cameron No. 6 Placer Mining Claim - Cameron No. 8 Placer Mining Claim
- U 0142289 - Cameron No. 7 Placer Mining Claim
- U 0143734 - Cameron No. 1 Placer Mining Claim

These applications should now be processed. However, I expressly make no finding on whether these patent applications should be granted.

The validity of each claim must be established under the general principles of the mining laws. The 1950 and 1951 decisions of the Bureau of Land Management in this case raise serious questions concerning the validity of these claims, particularly with regard to abandonment and performance of annual assessment work. Before patents may be issued, these issues must be closely examined when the submissions accompanying the patent applications are reviewed in light of the record underlying the 1950 and 1951 BLM decisions.

Further, unlike oil shale, there is nothing in either the Mineral Leasing Act Revision of 1960 or the Combined Hydrocarbon Leasing Act of 1981 which suggests Congress considered that deposits of tar sand are in any way exempt from the discovery standard generally applicable to establish that a mineral deposit is valuable within the meaning of the mining laws. *Cf. Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980). If Sohio cannot demonstrate the discovery of a valuable mineral deposit within the boundaries of a particular mining claim, that claim must be declared null and void and the patent application denied.

Finally, I do not decide whether the tar sands found within these claims are placer deposits. This is a factual question which the Bureau of Land Management must consider in adjudicating the patent applications. If the facts demonstrate to the Bureau that any or all of these deposits are lodes, the patent applications for the claims containing such deposits must be contested. If the patent applications are rejected or contested for this reason, Sohio may still obtain conversion of the claims to combined hydrocarbon leases under 30 U.S.C. § 226(k) if the claims are otherwise valid.

Therefore, the petition to reconsider the decision in *Orem Development Co. v. Leo Calder*, A-26604 (Dec. 18, 1953), is hereby granted, that decision is set aside and this matter is remanded to the Bureau of Land Management for further consideration consistent with this decision.

J. J. SIMMONS
Under Secretary

APPEAL OF B & B CONTRACTORS

IBCA 1646-1-83

Decided *May 13, 1983*

Contract No. YA-552-CT2-23, Bureau of Land Management.

Government Motion to Dismiss Granted.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Rules of Practice: Appeals: Timely Filing

An appeal under the Contract Disputes Act filed more than 90 days after a contractor's receipt of a final decision was dismissed with prejudice as untimely.

APPEARANCES: Mr. James A. Barrett, Jr., B & B Contractors, Red Lodge, Montana, for Appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal with prejudice on the ground that the Board lacks jurisdiction under the

May 13, 1983

Contract Disputes Act of 1978¹ when the appellant fails to perfect the appeal within 90 days from the date of receipt of the contracting officer's decision.²

Findings of Fact

1. Contract No. YA-552-CT2-23 was awarded to appellant on June 4, 1982 (Appeal File Exhibit 5; hereinafter AF followed by reference to the particular exhibit number).

2. The contracting officer issued a final decision on September 23, 1982 (AF 16), on the claims submitted by the contractor in a letter dated August 16, 1982 (AF 15). The claims so submitted were granted, granted in part, or denied by the contracting officer in the decision from which the instant appeal was taken.

3. The contracting officer's final decision was received by the appellant on September 25, 1982, as evidenced by the return receipt attached to the affidavit of Connie Knittle³ as exhibit A. In that decision the contractor was informed that if he decided to take an appeal, it would be necessary for him to mail or otherwise furnish written notice to the Board of Contract Appeals within ninety (90) days from the date the decision was received.

4. The appellant's notice of appeal is dated December 26, 1982. The envelope which contained the notice of appeal bears a postmark date of January 5, 1983. See exhibit B to affidavit of Connie Knittle.

5. The Government's motion to dismiss for lack of jurisdiction is dated March 17, 1983. The appellant was given until April 29, 1983, to respond to the motion to dismiss. Appellant has made no response.

Decision

Under the Contract Disputes Act of 1978 the Board has no jurisdiction over an appeal unless it is taken within 90 days of the receipt of the final decision. *Cosmic Construction Co.*, ASBCA No. 26537 (Dec. 30, 1981), 82-1 BCA par. 15,541, *aff'd*, (Appeal No. 23-82), 697 F.2d 1389, (Fed. Cir. 1983).⁴

Appellant has not filed a timely notice of appeal within the 90-day period specified in the Contract Disputes Act of 1978.

¹Sec. 7 of the Contract Disputes Act of 1978 (41 U.S.C. § 606) reads as follows: "Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title."

²Cited in support of the motion to dismiss are the decisions of the Armed Services Board of Contract Appeals in *Western Pacific Enterprises*, ASBCA No. 25822 (June 17, 1981), 81-2 BCA par. 15,217 and in *Capt. Joe's Surplus Stores*, ASBCA No. 26315 (Nov. 30, 1981), 82-1 BCA par. 15,523.

³In an affidavit executed under date of Mar. 17, 1983, Ms. Connie Knittle states, (i) that she is a contract specialist employed by the Bureau of Land Management; (ii) that she was assigned to administer the contract under which the instant appeal was taken from the date of award to the date of her affidavit, and (iii) that the facts stated in the affidavit are within her personal knowledge.

⁴*Cf.*, *Riverside General Construction Co.*, IBCA-1603-7-82 (Nov. 12, 1982), 89 I.D. 583, 82-2 BCA par. 16,127.

The Government's motion to dismiss for lack of jurisdiction is granted. The appeal is dismissed with prejudice to any further proceedings before this Board.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

**APPEAL OF CONFEDERATED TRIBES OF THE CHEHALIS
RESERVATION**

IBCA-1640-12-82

Decided *May 20, 1983*

Grant No. P10G14208023, Bureau of Indian Affairs.

Government Motion to Dismiss Granted.

**Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts:
Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals:
Dismissal**

An appeal taken under a grant is dismissed where the Board finds that it is without jurisdiction over the claim asserted under either the terms of the grant or under the provisions of the Contract Disputes Act of 1978.

**APPEARANCES: Virginia Canales, Chairwoman, Confederated Tribes
of the Chehalis Reservation, Oakville, Washington, for Appellant;
Lawrence E. Cox, Department Counsel, Portland, Oregon, for the
Government.**

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW
INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal on the ground that the Board has no jurisdiction over the claim asserted.¹ The arguments advanced in support of the motion are twofold, namely:

1. The grant under which the appeal was taken contains no disputes clause or other clause under which the Board has jurisdiction; and,
2. the Contract Disputes Act of 1978 (41 U.S.C. § 602) does not confer jurisdiction on the Board for the claim here in issue.

The appeal with which we are here concerned was taken from a decision under date of November 9, 1982. That decision relates to audit exceptions taken to costs claimed under Grant No. P10G14208023 issued pursuant to the authority contained in P.L. 93-638. The Office of the Inspector General, Department of the Interior, reviewed the

¹The motion to dismiss states at page 2: "Appellants have an appropriate appeal route available to them pursuant to 25 C.F.R. Subpart A."

May 20, 1983

application of indirect cost rates to contracts with Indian tribes and tribal organizations within the Portland Area, Bureau of Indian Affairs. Based upon such review it concluded in audit report No. W-BIA-10-80 (C) that an erroneous indirect cost payment had been made to the appellant in the amount of \$3,871.09. The decision from which the instant appeal was taken adopted the findings of the audit report and found the appellant was indebted to the Government in the stated amount. A timely appeal from that decision was taken to this Board.

The Government's motion to dismiss for lack of jurisdiction is dated January 14, 1983. The appellant was given until February 10, 1983, to respond to the Government's motion to dismiss. Appellant has made no response.

Discussion

In a given case our jurisdiction may be derived from the Disputes clause or it may be predicated upon the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613).

In this case the grant under which the appeal was taken does not include a Disputes clause. In the absence of a Disputes clause, the Board is without authority to assume jurisdiction over the claim here asserted on the basis of a consensual arrangement between the parties. See *Brent L. Sellick*, GSBGA No. 4879 (Apr. 21, 1978), 78-1 BCA par. 13,196 at 64,541, in which the General Services Board stated:

Our jurisdiction is solely contractual and arises out of the Disputes clause. It is well-established that in the absence of a Disputes clause in the contract we lack jurisdiction. The Disputes clause is physically absent from this contract. Since no regulation or statute mandates the inclusion of the Disputes clause in this contract, we cannot insert it by operation of law. [Citation and footnote omitted.]

Since the passage of the Contract Disputes Act of 1978, our jurisdiction is no longer primarily contractual in nature.² Under the Act the Board has jurisdiction "to decide any appeal from a decision of a contracting officer * * * relative to a contract made by its agency." 41 U.S.C. § 607(d). It is undisputed that the instrument under which the instant appeal has been taken is a grant and not a contract. Moreover, the grant is not a contract entered into by an executive agency for any of the following: "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property." See 41 U.S.C. § 602(a). Therefore, the grant here in issue is not included within any of the categories of contracts, either express or implied, to which the Contract Disputes Act of 1978 is applicable.

² See concurring opinion in *Amdata Systems, Inc.*, ASBCA No. 27211 (Nov. 11, 1982), 83-1 BCA par. 16,197 at 80,471:

"The jurisdictional question presented by this appeal is: whether the Contract Disputes Act applies to the aforementioned Guaranty Agreement? If the Act does apply, then the absence of a Disputes provision in the agreement is irrelevant, since the inclusion of such a provision is permissive only. See 41 U.S.C. 605(b)."

Decision

For the reasons stated and on the basis of the authorities cited, the Board finds that it is without jurisdiction over the instant appeal under either the terms of the grant or the provisions of the Contract Disputes Act of 1978. So finding, the Government's motion to dismiss is granted and the appeal is dismissed with prejudice to any further proceedings before this Board.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

APPEAL OF POWELL A. CASEY

IBCA-1638-11-82

Decided *May 23, 1983*

Contract No. (Not applicable), National Park Service.

Government Motion to Dismiss Denied.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction

In an appeal, subject to the provisions of the Contract Disputes Act of 1978, the Board finds that proceedings under the Act are de novo as they have been for appeals governed by the "Disputes" clause.

**2. Contracts: Construction and Operation: Contracting Officer--
Contracts: Construction and Operation: Waiver and Estoppel--
Contracts: Formation and Validity: Authority to Make--Rules of
Practice: Appeals--Dismissal**

A Government motion to dismiss an appeal predicated upon an oral contract is denied when the available evidence indicates that the Government official named was without authority to enter into a contract such as had been alleged but where assuming appellant's material allegations to be true for the purpose of the motion, it appears that a question exists as to whether the Government may be estopped to reply upon the defense of a lack of actual authority to contract if affirmative misconduct of the Government official concerned were shown to exist.

APPEARANCES: Mr. Powell A. Casey, Baton Rouge, Louisiana, Appellant; John H. Harrington, Department Counsel, Santa Fe, New Mexico, for the Government.

May 23, 1983

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW
INTERIOR BOARD OF CONTRACT APPEALS

Alleging an oral contract, the appellant has timely appealed the contracting officer's decision of October 4, 1982, in which it was found that "a contract was not issued or authorized."¹

Asserting an absence of jurisdiction in the Board over the claims asserted, the Government has filed a motion to dismiss the instant appeal on the grounds (i) that appellant's complaint admits that an express, written contract was not executed by and between the parties; (ii) that contracts implied in law are not cognizable by the Board; (iii) that the evidence of record shows that there was no meeting of the minds between appellant and the National Park Service thereby negating a contract implied in fact; and (iv) that the Superintendent, Jean Lafitte National Historical Park (hereinafter generally referred to as JELA), with whom appellant dealt at all material times, did not possess authority to engage in a contract, either written or oral, with appellant to purchase the items which are the subject of the instant appeal.

In the response to the motion to dismiss, appellant states, *inter alia*, (i) that the Government's motion is almost entirely directed to implied contracts when the issue here involves an oral contract of sale-purchase; (ii) that evidence of the oral sale-purchase agreement is contained in two so-called requisition forms bearing the initials of Mr. Bienvenu and Ms. Swann; (iii) that appellant's rights may not be protected by having a person under the supervision and direction of the Superintendent of JELA investigate and decide the claims of appellant when the veracity of appellant and Superintendent Isenogle are juxtaposed and at issue;² (iv) that on several occasions appellant was told by Superintendent Isenogle that he had the authority to make the purchase so long as the price did not reach the amount of \$10,000;³ and (v) that the Government's claim that the delegated

¹ Appeal File Exhibit A-14. Hereafter all references to appeal file exhibits furnished by the Government shall be preceded by the letters AF followed by the letter and number reference used by the contracting officer in submitting the appeal file. What the Department counsel has described in an enclosure to his memorandum to the Board of Feb. 15, 1983, as "two draft unexecuted purchase orders" are considered to be additions to the appeal file and have been marked as D-1 and D-2. The documents included in the package of materials furnished by appellant to the contracting officer on Dec. 14, 1982, are regarded as supplements to the appeal file. The documents have been arranged in chronological order and numbered in sequence beginning with arabic 1. All of such exhibits shall be identified by the letters AFS (Appeal File Supplement) followed by reference to the number of the particular exhibit.

² At paragraph XX of the Complaint, appellant states:

"That considering the supervision of Superintendent Isenogle over the Contracting Officer, the repeated statements of Superintendent Isenogle to Complainant that as superintendent he had the authority to purchase a copy of the manuscript without having to refer the matter to his higher headquarters if the price was below \$10,000.00, the long time JELA held the manuscript to the knowledge of Superintendent Isenogle and the senior supervisors, and the apparent authority of the superintendent, JELA is now estopped to claim lack of authority on the part of Superintendent Isenogle to enter into the verbal purchase agreement for the manuscript made on January 4, 1982."

³ Paragraph V of the Complaint states:

"That in his office on or about December 4, 1981 and on December 14, 1981 and several days later by telephone Superintendent Isenogle assured Complainant that he had full authority to purchase such manuscript as long as the price was less than \$10,000.00 without having to obtain the consent of his higher headquarters and as a result

Continued

authority of the Superintendent on January 4, 1982, to make purchases was limited to \$2,500 under AF C-1 does not take into account the fact that the document in question refers to the procurement of supplies, equipment, and services, none of which categories include the purchase of a completed manuscript. Appellant concludes its response⁴ by stating: "IN THE ALTERNATIVE Appellant respectfully asks that this motion to dismiss be overruled and dismissed, that Mover be required to answer this complaint and that the matter proceed to trial on the merits" (Response by Appellant to the National Park Service Motion to Dismiss the Appeal at 3).

Findings of Fact

1. In a letter to Mr. James Isenogle, Superintendent, JELA, under date of August 19, 1981 (AFS 1), appellant (Mr. Powell A. Casey) states: "[W]e met briefly several months ago [5] and I showed to you at the Prince Murat Motel my manuscript on forts, posts, named camps and military installations in Louisiana since the year 1700 together with the annex covering plans, maps and photographs. It includes research here in this State and in Washington during the past fifteen years. Over 800 sites are covered and the annex has 150 plans, etc."

2. Addressing questions raised in the August 19, 1981, letter, Mr. Isenogle wrote Mr. Casey on September 24, 1981 (AF A-2), to say (i) that the only research then in progress on fortifications was being performed by Mr. Jerome A. Greene (a historian in the National Park Service's Service Center in Denver) who was working on a history of forts and fortifications in the Mississippi Delta region; (ii) that Mr. Greene had completed a draft which was being reviewed in-house; (iii) that the principal purpose of this initial effort was to develop some process for selecting those fortifications with which the National Park Service should seek an affiliation; (iv) that all but three research projects funded by JELA had been accomplished by Louisianians or Louisiana institutions; and (v) that contracts with individuals or consultants are awarded through a response to a request for proposals.

3. According to Mr. Casey, he left almost his entire manuscript with Mr. Isenogle on December 14, 1981,⁶ to allow him to make a further examination of its contents. Notice of Mr. Casey's copyright was in the

Complainant in the telephone conversation a few days after December 14, 1981 offered to sell a copy of the manuscript to JELA for the price of \$9,900.00."

During a visit to JELA's office in November of 1981, Mr. Casey was reportedly told by Mr. Isenogle that JELA would like to obtain a copy of the manuscript and that he was authorized to pay up to \$10,000 for the manuscript without having to go to a higher headquarters (AF A-8).

⁴ Immediately prior to the passage quoted in the text, appellant had stated:

"Appellant respectfully suggests * * * that this Board order that a new and complete investigation and decision be made by someone who is not under the control of Superintendent Isenogle and that the full statements of Superintendent Isenogle, Mr. Lionel Bienvenu and Ms. J. Shannon Swann be taken and used in arriving at a decision on this claim; that a complete examination of the records of the Jean Lafitte National Historical Park be made for items related to this claim and to determine the manner in which such purchases are actually handled in such headquarters." (Response by Appellant to the National Park Service Motion to Dismiss the Appeal at 3).

⁵ The initial meeting appears to have taken place in Baton Rouge in April 1981 at which time Mr. Isenogle was shown a copy of Mr. Casey's manuscript covering over 800 military installations in Louisiana (AF A-8).

⁶ In his letter of July 9, 1982 (AF A-5), Mr. Isenogle states that he had not realized that Mr. Casey had left a copy of some of his material with Lionel (Bienvenue).

May 23, 1983

manuscript and Mr. Isenogle agreed that no one would be allowed to copy or extract any part of the manuscript. Two days later, the remaining part of the manuscript was mailed. The manuscript was not returned to Mr. Casey until November 4, 1982 (AF A-8, A-31; AFS 4).

4. The most succinct statement of the claims at issue here is contained in appellant's letter of May 9, 1982 (AF A-3), to the Superintendent, JELA, from which the following is quoted:

Following earlier discussions on January 4, 1982 I entered into an agreement with you as Superintendent of the Jean Lafitte National Historical Park whereby the Park purchased from me the copy of my manuscript entitled "Encyclopedia of Forts, Posts, Named Camps and Other Military Installations in Louisiana 1700-1980" as left with you in your office.

Mr. Emile Bienvenue of the Park Service was present and the terms agreed upon were as follows:

(1). I reserved full and complete copyright to the manuscript. I was to be paid \$7000.00 for the copy of the manuscript two-thirds of which amount was to be paid to me immediately and the one-third balance not later than the end of February 1983. The Park was to get title to two-thirds of the copy of the manuscript left in your possession immediately and one-third upon the payment of the balance in 1983. Employees of the Park Service were to have access to the entire manuscript at once for Park needs subject to my copyright. Also subject to my copyright the public would have access immediately to the two-thirds of the manuscript copy to which the Park received title immediately and would have access to the remaining one third when the balance of the money was paid in 1983 but still subject to my copyright.

(2). I also agreed to furnish to the Park expanded monographs covering (a) Battery Bienvenu, (b) The U.S. Navy Yard on the Tchefuncte river and (c) the British-Spanish fort and Pentagon Barracks area of the Capitol grounds at Baton Rouge to include the General Taylor house. I was to be paid \$1500.00 each for these three monographs when they were delivered. When I left your office you stated that you would promptly send me purchase orders.

Since Mr. Bienvenue has retired if you were to be transferred there would be no one in the New Orleans office available who would know the details of our agreement although I believe that you had discussed the information in my manuscript with your Denver office. I understand that both fulltime and part time historians employed by the Park are currently working on the matters in my manuscript and the information has been available to them.

5. In his response of July 9, 1982 (AF A-5), Mr. Isenogle states:

First, relative to our purchase of copies of the material you have gathered pertaining to fortification and other military installations in Louisiana. As I indicated to you earlier, [7] I do not have the authority to make that kind of purchase without review and approval by higher authority. To date we do not have that approval and the prospects of obtaining it are diminishing rather than improving as we approach the end of the fiscal year.

Second, the immediacy of our need for data pertaining to Battery Bienvenu, the Navy Yard on the Tchefuncte River, and the Pentagon Barracks in Baton Rouge (fades?) in the current fiscal climate. * * *

⁷ The earlier indication may have reference to an Apr. 13, 1982, telephone conversation between Mr. Casey and Superintendent Isenogle. In his July 17, 1982, letter (AF A-8, A-9) concerning a visit to New Orleans on Apr. 13, 1982, Mr. Casey states: "I stopped at your office to find out why I had not been paid but you were out. I did talk to you over the telephone and you said something about the regulations covering your authority had been changed and you were awaiting approval which you expected shortly."

Your May 9 letter makes reference to park employees working with your manuscript. That is not the case, and has not been the case. [8]

I did not realize that you had left a copy of some of your material with Lionel. We should not have it until you have been paid for it. Rather than trust its return to the mail, I can drop it off while I am in Baton Rouge on the 23rd of this month if that is alright with you. [9]

6. Following receipt of the decision of October 4, 1982 (AF A-14), denying his claims, Mr. Casey wrote the contracting officer on October 10, 1982 (AF A-15, A-16), and asked a number of questions in order to "clarify the matter and perhaps outline the scope of the appeal." The contracting officer responded by letter of October 25, 1982 (AF A-22, A-23). Appellant found the contracting officer's response to be inadequate in a number of respects and wrote the contracting officer again on November 6, 1982 (AF A-31, A-32), raising questions that he did not consider had been satisfactorily answered. Included among the questions so raised were the following:

a. Did the contracting officer work under the supervision of Mr. Isenogle?

b. Upon what date did the contracting officer first learn of Mr. Casey's manuscript?¹⁰

c. Did Mr. Isenogle approve the contracting officer's decision before it was mailed?

d. Had the contracting officer obtained a written statement from Mr. Isenogle?¹¹

e. Was Mr. Isenogle asked whether several times in December of 1981 and on January 4, 1982, he had told Mr. Casey that he had the authority to purchase a copy of the manuscript for a price under \$10,000 without having to refer the matter to a higher headquarters?¹²

f. What regulations or directives, if any, prohibited Mr. Isenogle from contracting with the appellant in the manner which appellant says he did?¹³

⁸ In his letter of July 17, 1982 (note 7 *supra*), Mr. Casey states:

"The Park employees have had the right of access to this entire manuscript since January 4, 1982 and the public has had the right to look at the two-thirds of the manuscript owned by the Park since that date. All of this is of course subject to my copyright rights. To what extent the material in the copy of the manuscript left with you has been used I have no way of knowing."

⁹ Responding to this suggestion in his letter of July 17, 1982 (AF A-9), Mr. Casey states: "[I]n order to protect my years of research I will take possession of the manuscript next Friday at a place and time to be indicated by you and hold it for the Park until we get this matter settled. You stated that you would be in Baton Rouge on the 23rd." According to the contracting officer's decision of Oct. 4, 1982 (AF A-14), an effort was made to return the Casey materials on July 23 but the parties failed to make connections. In a letter dated Oct. 10, 1982 (AF A-15, A-16), however, Mr. Casey states that either his wife or he were at home all day on July 23 and no JELA representative called at their house or telephoned. The return of the material was accomplished by the contracting officer on Nov. 4, 1982 (AF A-31).

¹⁰ The contracting officer's letter of Oct. 25, 1982 (AF A-22), states: "I learned of your Manuscript at the time the Jerry Greene study was submitted in final form to Jean Lafitte NHP. The three monographs I had no knowledge of until your letter of October 10, 1982."

¹¹ No written statement had been obtained from Mr. Isenogle (AF A-22). In his letter to the contracting officer of Nov. 6, 1982 (AF A-32), Mr. Casey states:

"Unfortunately you did not get Mr. Isenogle's statements to you in writing but if you correctly quoted him in your letter of October 4, 1982 to me it raises the very strong suspicion in my mind that there was a plan to 'string me along' until the Jerome Greene study was completed and if the latter was considered adequate that an attempt be made to repudiate the agreement of January 4, 1982 with me."

¹² In her response (note 10 *supra*), the contracting officer states that Mr. Isenogle was told that under the "new Contracting Officer's Warrant System" she was the only person in JELA authorized to expend Government funds.

¹³ The following is quoted from the contracting officer's letter of Oct. 25, 1982 (AF A-22): "6. As mentioned in (5) above the 'Warrant System.' Effective for my position. November 12, 1982."

May 23, 1983

g. Was Mr. Isenogle asked whether he had discussed the Casey manuscript with a person or persons in his headquarters supervisory region or other place before Mr. Casey made the agreement with Mr. Isenogle on January 4, 1982?¹⁴

h. Was there any change made in Mr. Isenogle's authority to enter into a contract with Mr. Casey between January 4, 1982, and April 13, 1982?¹⁵

i. Was Mr. Isenogle questioned about whether the manuscript was left with Mr. Isenogle personally as contended by appellant and not with Mr. Bienvenue as stated by Mr. Isenogle in his letter of July 9, 1982?

j. Was the quote attributed to Mr. Isenogle ("Shortly thereafter, Jerry Green's study began to show signs of progress. Rather than risk paying twice for the same material from two sources he decided to wait until the Green study was complete.") the only explanation for holding the manuscript for over seven months before notifying Mr. Casey that he had no authority to make the contract?¹⁶

7. One of the documents included in the appeal record is a copy of Requisition No. J7530-1002-180-2600N (1/15/82). The requisition shows the vendor to be Powell A. Casey, 1945 Columbine Street, Baton Rouge, Louisiana 70808, and that the items covered thereby are to be delivered to Jean Lafitte NHP, 400 Royal Street, New Orleans, Louisiana 70130. In the lower right-hand corner under "Requisitioned by (Signature)," there is typed, "LJ Bienvenu," below which is typed opposite the word "Title" the words "Chief, I&VS." On the "Approved by (Signature)" line, immediately below there is typed the initials "JSS" and opposite the word "Title" on the line below is typed "Bud. An."

The items covered by the requisition and the justification offered for procuring them as they appear on the requisition form are given below:

Item or Form No.	Description	Qty.	Unit	Unit Price	Amount
1.....	Studies, notes, calendars and references identifying fortifications throughout the State of Louisiana, including all wars & periods of military history and occupation.....	1	box	\$4,666.67	\$4,666.67

¹⁴ Mr. Isenogle did not discuss the manuscript with the contracting officer and she disclaimed any knowledge of him discussing the manuscript with anyone in the regional office (AF A-22).

¹⁵ Addressing this question in her letter of Oct. 25, 1982 (AF A-22), the contracting officer states: "8. Yes, there was a change in Mr. Isenogle's authority; as mentioned in items 5 and 6 the Contract 'Warrant System' came into effect."

¹⁶ Commenting in her letter of Oct. 25, 1982 (AF A-22), upon the questions reflected in items (i) and (j) (Finding 6, *supra*), the contracting officer states:

"I'm not aware of any agreement between yourself and Mr. Isenogle pertaining to the use, or restrictions of the material you left in the office. Neither am I knowledgeable about with whom you left the material. The quoted response is the extent of Mr. Isenogle's explanation when I questioned him."

<i>Item or Form No.</i>	<i>Description</i>	<i>Qty.</i>	<i>Unit</i>	<i>Unit Price</i>	<i>Amount</i>
2.....	Photos, maps, index, drawings & duplicates to accompany the above.....	1	box	\$2,333.33	\$2,333.33

Mr. Casey is probably the most eminent historian for the 1770-1815 period now in the state. He is a Military, Fort, Personnel & Fortifications specialist. He has been working on the project for more than 50 yrs. His original material, sources and copyrights are invaluable. Jean Lafitte Park needs the material to better plan the future development of the park and its outreach program. Some additional studies may be published [sic] for universities, libraries and for the park archives. Much of this work was carried on at the National & State Archives, so will save the cost of an NPS researcher going there.

(AF D-1).

8. Another document included in the appeal record is a copy of a requisition bearing the same number as given in Finding 7 but dated January 31, 1982. The information as to vendor and party to whom property is to be delivered as shown thereon are the same as given in Finding 7.¹⁷ The items covered by the requisition as they appear on the requisition form are shown below:

<i>Item or Form No.</i>	<i>Description</i>	<i>Qty.</i>	<i>Unit</i>	<i>Unit Price</i>	<i>Amount</i>
1.....	Historical Article— Madisonville Navy Yard and USS <i>Tchefuncte.</i>	1	1500	1500
2.....	Historical Article— Battery Bienville.....	1	1500	1500
3.....	Historical Article— Pentagon Barracks, Baton Rouge, La..	1	1500	1500

(AF D-2).

9. Included among the appeal file exhibits is a memorandum dated November 7, 1980, from the Associate Regional Director, Administration, SWR to James Isenogle, Superintendent, Jean Lafitte, subject: Delegation of Contracting Authority (Acting or Restricted). In especially pertinent part the memorandum reads as follows: "Effective November 13, 1980, you are hereby delegated the authority to exercise the function, powers, and duties of a contracting officer for the procurement of supplies, equipment and services. The exercise of this signature authority is limited to \$2,500" (AF C-1).

¹⁷On the "Requisitioned by (Signature)" line, there is typed the initials "LJB," below which opposite "Title" there is typed "Chief, I&VS." Immediately below on the "Approved by (Signature)" line, there is typed the initials "JSS" and below that on the line for "Title" there is typed "Bud. An" (AF D-2).

May 23, 1983

10. Also included among the appeal file exhibits is a memorandum dated November 22, 1981, from Superintendent, JELA, to Associate Regional Director, Administration, SWRO, subject: "Authority to obligate funds and designate receiving officials." In especially pertinent part the memorandum states: "*Reply due*: November 23, 1981.

J. Shannon Swann, Budget Analyst, has Level II Contracting Authority up to \$100,000. James L. Isenogle, Superintendent, has delegated purchasing authority up to \$1,500" (AF C-2).

11. Cited by the Government in support of its motion to dismiss is 41 CFR 14-3.650-1. This regulation permits the oral ordering of supplies by authorized procurement personnel if certain conditions are met among which are that the number of line items be small and that the total amount of the purchase not exceed \$5,000.

12. Also cited by the Government as support for its motion to dismiss is 43 CFR 1810.3(b) which is quoted below: "(b) The United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

13. In a sworn statement under date of March 11, 1983, Mr. Powell A. Casey states at pages 3-4:

On the morning of January 4, 1982 I called at Mr. Isenogle's office in New Orleans and he said that he wanted to get a further evaluation of the manuscript before coming to a decision. The manuscript was still in Mr. Isenogle's possession and I left the office but returned about an hour and a half later and went into a conference with Mr. Isenogle and Mr. Lionel Bienvenu who was then an employee of the Park.

They then told me that the Park was willing to pay me \$7,000 for a copy of the manuscript and when I demurred added that they would also pay me \$1900 each for a monograph on Battery Bienvenu, the U.S. Navy Station or Camp on the Tchefuncte river near Madisonville, and the Pentagon Barracks-Gen. Zachary Taylor House at Baton Rouge. I was particularly interested in my copyright rights and in splitting my income from the sale between 1982 and 1983. Mr. Isenogle said that what the Park owned the public had a right to see but that he would put in the one page purchase order or requisition form a provision that the copyright was reserved by me. In order to protect as much of my material as I could until I could get the manuscript published I proposed that I be paid two-thirds of the \$7000 in 1982 with the Park taking title to two-thirds of the manuscript at once but with the right of any Park employee to use any part of it at once and with the Park paying the remaining one-third and getting title to the remaining one-third of the manuscript in 1983 on January 1st. This and the agreement for the Park to pay me \$1500 each for the three abovementioned monographs was the agreement made by and between me Appellant and Mr. Isenogle for the Park on January 4, 1982. I told Mr. Isenogle that I would complete my part of the deal on the manuscript by leaving it in his possession and it was in his possession in his office when I left the offices of the Park.

14. In an affidavit executed on February 23, 1983, Mr. James L. Isenogle notes that since February 1979, he had been serving as the Superintendent, JELA, after which, in especially pertinent part, he states:

2. During 1981, I became familiar with the research and work of Powell A. Casey in identifying and cataloging the numerous historic military installations in the State of Louisiana.

3. I had several occasions to meet with Mr. Casey in 1981 and I discussed with him the possibility that the Park might contract with him to acquire his unpublished manuscript on the above-referenced subject.

4. On January 4, 1982, I met with Mr. Casey and Park Service Employee at the Park, Lionel Bienvenue, to discuss this possible acquisition further. At no time during this meeting did I engage in a contract with Mr. Casey. I did request Mr. Casey and Mr. Bienvenue to work together on the details of acquisition.

5. After meeting with Mr. Casey, Mr. Bienvenue prepared a draft purchase order for my review. After securing the contracting officer's comments on the draft purchase order, I laid it aside for further consideration. At no time did I sign the purchase order or direct the contracting officer to sign it. After full consideration of the matter, I determined that there was not adequate justification for acquisition of the manuscript.

6. In August, 1982, the offices of the Park were removed to another building. In the process of cleaning out the office of Lionel Bienvenue, who retired in April 1982, it was discovered for the first time that Mr. Bienvenue had taken possession of Mr. Casey's manuscript.

7. Prior to returning the manuscript to Mr. Casey, I did not authorize any employee under my supervision to use the manuscript in any way. Nor, to my knowledge, did any employee use it.

15. In an affidavit executed under date of February 16, 1983, Mr. Lionel Bienvenue, identifies himself as a former employee of the National Park Service whose last duty station was at JELA from which he retired in April 1982, after which he states:

2. While still employed by the National Park Service, I had occasion to meet with Mr. Powell A. Casey regarding his unpublished manuscript on Louisiana military installations.

3. On December 14, 1981, Mr. Casey delivered into my possession the above-mentioned manuscript for my inspection.

4. I kept the manuscript in my office until my retirement in April 1982. During that time, the manuscript to my knowledge was not used in any way by National Park Service employees.

Discussion

A number of questions are raised by this record which may have a bearing on the decision ultimately rendered in this case. Some of the statements made by Mr. Isenogle and by the contracting officer appear to be contrary to other evidence of record.

For example, the contracting officer states that she did not learn of the Casey manuscript until the time the Jerome Greene study was submitted in final form to JELA and that she had no knowledge of the three monographs until Mr. Casey's letter of October 10, 1982 (note 10 *supra*). Documents on file indicate, however, that the contracting officer may have been aware of the existence of the Casey manuscript on or about January 15, 1982 (Finding 7), and may have come to know of the three monographs on or about January 31, 1982 (Finding 8). The affidavit submitted by Superintendent Isenogle indicates that the contracting officer did know of the existence of the Casey manuscript and of the plans for the three monographs on or about the dates shown on the requisition forms (Findings 7, 8). In an affidavit Mr. Isenogle states that "[a]fter securing the contracting officer's comments on the draft purchase order, I laid it aside for further consideration" (Finding 14).

May 23, 1983

We assume that the effective date for the "new Contracting Officer's Warrant System," effective for the contracting officer's position, was not November 12, 1982, as stated in her letter of October 25, 1982 (note 13 *supra*), but that the new system was in existence prior to the dispatch of the Superintendent's memorandum of November 22, 1981 (Finding 10). Query: If the "new Contracting Officer's Warrant System" became effective for the contracting officer in November of 1981, how could that action have affected Superintendent Isenogle's authority between January 4, 1982, and April 13, 1982, as indicated by the contracting officer in an answer given to a question posed by appellant? (note 15 *supra*, and accompanying text).

The contracting officer has not answered the question posed by appellant as to whether she was under the direct supervision of Superintendent Isenogle. Inferentially it appears that she was, however, for in an affidavit filed in this case, Mr. Isenogle states: "At no time did I sign the purchase order or direct the contracting officer to sign it" (Finding 14).

The contracting officer has said that she told Mr. Isenogle that she was the only person in JELA authorized to expend Government funds (note 12 *supra*). The contracting officer has not stated the time when she informed Mr. Isenogle of the extent of her authority but it is presumed that it occurred prior to the time Superintendent Isenogle wrote his memorandum of November 22, 1981, in which he acknowledged that his delegated purchase authority was only up to \$1,500 (Finding 10).

In his affidavit, Mr. Isenogle states that in August of 1982 "it was discovered for the first time that Mr. Bienvenue had taken possession of Mr. Casey's manuscript" (Finding 14). According to Mr. Isenogle's letter of July 9, 1982, however, he knew by then that a copy of some of Mr. Casey's materials had been left with Mr. Bienvenu. In fact, the letter contains an offer by Mr. Isenogle to return the materials to Mr. Casey in Baton Rouge on July 23, 1982 (Finding 5).

Before proceeding further we wish to briefly note some of the positions advanced by the parties or some of the inferences we have drawn from the record as presently constituted. Commenting with respect to the monographs in its memorandum in support of the motion to dismiss, the Government states at page 1: "Initially, it should be noted that appellant has not submitted the \$1,800.00 claim to the contracting officer for decision. Rather than remand the matter to the contracting officer for a decision, the complaint should be dismissed in toto for lack of jurisdiction."

The \$1,800 claim,¹⁸ however, is simply the amount sought by the appellant for breach of the oral contract allegedly made with the National Park Service under which he was to furnish three

¹⁸ The total amount claimed is \$8,800 (manuscript - \$7,000 and monographs - \$1,800).

monographs to the Government and for which he was to be paid \$1,500 for each of them or a total sum of \$4,500. This claim was before the contracting officer for decision (Finding 4). The fact that the contracting officer may not have actually considered the monograph claims¹⁹ is not a bar to the Board assuming jurisdiction. See *VTN Colorado*, IBCA-1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542.²⁰

Another question raised by this record is the extent to which the preparation of two "draft unexecuted purchase orders," dated over 2 weeks apart (Findings 7, 8) indicate that the parties considered the manuscript, and the monographs were covered by separate oral contracts. The matter is considered to be of some importance since with respect to the monographs, the total dollar amount involved would be below the maximum amount authorized by the regulations for an oral contract and within the contracting officer's authority. If the contracting officer could have entered into such a contract in the first place,²¹ she can ratify the action taken by someone else. *Centre Manufacturing Co. v. United States*, 183 Ct. Cl. 115, 126-130 (1968); *Branch Banking & Trust Co. v. United States*, 120 Ct. Cl. 72 (1951).

[1] The appellant seeks to have the Board order a new and complete investigation, direct the issuance of a new decision by someone not under the control of Superintendent Isenogle and undertake to marshal the evidence related to the claims asserted (note 4 *supra*). None of these matters, however, are proper subjects for action by the Board.²² The principal function of the Board is to adjudicate disputes between the parties by applying established legal principles to the evidence presented by them in support of their respective positions.

In its response to the motion to dismiss, the appellant asks that the Government be directed to answer the complaint and that the matter proceed to trial on the merits (text accompanying note 4 *supra*). From the language employed, it is not clear to the Board whether the appellant is requesting that it be granted an oral hearing.

¹⁹ The decision of Oct. 4, 1982 (AF A-14) only makes reference to the manuscript claim.

²⁰ See *Imperator Carpet & Interiors, Inc.*, GSBGA No. 6167 (July 31, 1981), 81-2 BCA par. 15,266 at 75,595.

²¹ "The Contract Disputes Act of 1978 is largely a statutory restatement of former agency board practice and procedure under the contractual 'Disputes' clause * * *. That Act, therefore, is to be taken as intended to fit into the existing system and to be given a conforming effect unless a different purpose is plainly shown * * *." (Citations omitted.) *Accord, Prime Roofing, Inc.*, ASBCA No. 25836 (Dec. 17, 1981), 82-1 BCA par. 15,667 at 77,477 n.2.

²² If securing competition would be impracticable (see Findings 7, 8), it appears that the contracting officer would have the authority to issue purchase orders to the appellant covering the manuscript and the monographs provided the appellant submitted a written offer or offers for these items and presupposing that a Government need for one the other of these items, or both, presently exists.

²³ In calling upon the Board to take these actions, the appellant may not have realized that proceedings before the Board are de novo. Addressing the question of whether the de novo nature of such proceedings had been affected by the passage of the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613), the Armed Services Board recently stated in the case of *Space Age Engineering*, ASBCA No. 26028 (Apr. 22, 1982), 82-1 BCA par. 15,766 at 78,032:

"We are not bound by what the contracting officer found to be the facts or the law. For example, we may find that a claim has been denied for the wrong reason but still affirm the denial of the claim on the basis of the correct reason. We may deny in total, in the proper circumstances, a claim which has been granted by the contracting officer in part."

May 23, 1983

Decision

[2] Squarely raised by the appellant in this case is the question of whether by reason of the circumstances alleged by him, the Government is now estopped to claim lack of authority on the part of Superintendent Isenogle to enter into the verbal purchase agreements allegedly made on January 4, 1982. In *Emeco Industries, Inc. v. United States*, 202 Ct. Cl. 1006 (1973), the Court of Claims found the defendant was estopped to deny the existence of a contract where it had found earlier that all four elements essential to establishing an estoppel²³ were present. Prior to making the finding that the Government was estopped from denying the existence of a contract, however, the Court of Claims had stated at page 1015 of its opinion: "Of course, it is essential to a holding of estoppel against the United States that the course of conduct or representations be made by officers or agents of the United States who are acting within the scope of their authority." (Citations omitted.)

The principle that the United States will not be estopped to deny the acts of its agents who have acted beyond the scope of their actual authority was recently reasserted by the Supreme Court in *Schweiker v. Hansen*, 450 U.S. 785 (1981). Commenting upon this decision in *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1154 N.7 (1983), the Court of Appeals for the Federal Circuit states: "7. The Court suggested that evidence of 'affirmative misconduct' by a Government agent might be sufficient to estop the Government from insisting upon compliance with otherwise valid statutes or regulations, 450 U.S. at 788, 101 S. Ct. at 1471. The record here supports no claim of affirmative misconduct by the Government."

Turning to the case at bar, the Board notes that for the purpose of ruling upon the motion to dismiss, it must be assumed that the material facts are as stated by the appellant. The facts so assumed include the following: (i) That in November and December of 1981, Superintendent Isenogle assured Mr. Casey that he had full authority to purchase a copy of the Casey manuscript without having to refer the matter to his higher headquarters if the price were less than \$10,000 (note 3 *supra*); (ii) that on January 4, 1982, Mr. Isenogle as Superintendent, JELA, did purport to enter into an oral contract with Mr. Casey for the purchase of the latter's manuscript; (iii) that on the same date and in the same capacity, Mr. Isenogle did purport to enter into an oral contract for the purchase of three monographs; and

²³ The Court of Claims stated:

"The court in *Georgia-Pacific, supra*, at 96, indicated that the following four elements must be present in order to establish an estoppel:

"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." (202 Ct. Cl. 1015).

(iv) that the oral contracts so made were to be promptly confirmed by purchase orders (Finding 4).

For the purpose of the motion to dismiss, the Board finds on the basis of the record as presently constituted that the only authority Superintendent Isenogle had to contract on behalf of JELA during November and December of 1981, and on January 4, 1982, was restricted to purchases up to \$1,500 (Finding 10).

So proceeding, the Board finds that in November and December of 1981, and again on January 4, 1982, Superintendent Isenogle represented to appellant that he had the authority to enter into contracts in an amount up to \$10,000 without having to secure approval from higher authority and that on January 4, 1982, Mr. Isenogle did purport to enter into oral contracts with the appellant for the purchase of Mr. Casey's manuscript and for the preparation by Mr. Casey of three monographs to be furnished to the Government, even though Mr. Isenogle knew or is presumed to have known, that his contractual authority was limited to purchases not exceeding \$1,500.

One of the questions presented by this record as presently constituted is whether the actions taken by Superintendent Isenogle can be said to constitute "affirmative misconduct"²⁴ as that term was used by the Supreme Court in *Schweiker v. Hansen, supra*. Even if based upon an augmented record, we were to so find, a question remaining to be addressed would be whether the "affirmative misconduct" rule is for application where, as here, the Government agent whose actions are relied upon was clearly without authority to enter into the contract allegedly made by reason of the dollar limitation in his delegated authority. These are serious questions which the Board considers should be answered only after the issues involved in this appeal have been framed by responsive pleadings and the parties have been accorded the opportunity to submit additional evidence in support of their respective positions.

For the reasons stated and on the basis of the authorities cited, the Government's motion to dismiss the appeal is denied. Within 20 days from the date of receipt of this decision, the Government shall file the Answer with the Board. Within 10 days from the date of receipt of a copy of the Government's Answer, the appellant shall advise the Board as to whether it desires an oral hearing.²⁵

WILLIAM F. MCGRAW
Chief Administrative Judge

²⁴ Cited by the Government in support of its motion to dismiss are our decisions in *Dean Prosser & Crew*, IBCA 1471-6-81 (Aug. 28, 1981), 88 I.D. 809, 812 n.7, 81-2 BCA par. 15,294 at 75,721-722, and in *Shafco Industries, Inc.*, IBCA 1447-3-81 (Mar. 16, 1982), 89 I.D. 92, 99-100, 82-1 BCA par. 15,683 at 77,535. Those cases are readily distinguishable from the instant case, however, since in neither case was there any need to seriously consider the question of affirmative misconduct by the Government.

²⁵ If an oral hearing is not desired, an order settling record will be promptly issued under which the parties will be afforded an opportunity to supplement the record with additional evidence and to file briefs with the Board in support of their respective positions.

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

**RACQUET DRIVE ESTATES, INC. v. DEPUTY ASSISTANT
 SECRETARY-INDIAN AFFAIRS (OPERATIONS)**

11 IBIA 184

Decided May 24, 1983

Appeal from decision of Deputy Assistant Secretary--Indian Affairs (Operations) affirming cancellation of business lease PSL-225, Contract No. J53C1420-3552, in Palm Springs, California, for failure to complete construction of residences on the leased tract in violation of the lease terms.

Vacated and remanded.

1. Indian Lands: Leases and Permits: Revocation or Cancellation

The Secretary of the Interior has authority to cancel a lease of Indian trust land and to review administratively a decision of a subordinate official that such a lease should be canceled.

2. Indian Lands: Leases and Permits: Revocation or Cancellation

Departmental regulations in 25 CFR Part 2 and 43 CFR Part 4, Subpart D, ensure that due process is accorded to all parties to a lease of Indian trust land before such a lease is canceled.

3. Indian Lands: Leases and Permits: Arbitration

In the absence of extenuating circumstances, the Board of Indian Appeals will uphold an arbitration clause in a lease involving Indian trust land.

4. Indian Lands: Leases and Permits: Arbitration--Indian Lands: Leases and Permits: Revocation or Cancellation

Cancellation of a lease of Indian trust land is improper if arbitration procedures required by the lease have not been followed.

APPEARANCES: Erwin and Anderholt, Palm Desert, California, for appellant; Chedville L. Martin, Esq., Office of the Solicitor, Division of Indian Affairs, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

Background

On December 29, 1977, the Acting Sacramento Area Director, Bureau of Indian Affairs (Bureau, BIA), approved business lease PSL-225 between Ambuco Enterprises, Inc., as lessee, and Jeane Marie

Chormicle Balzano (Kapp), Agua Caliente (Palm Springs) allottee PS-94, as lessor (Exh. 1).¹ The Director, Palm Springs Office, BIA (Director), approved the substitution of Racquet Drive Estates, Inc. (RDEI, appellant), as lessee on February 5, 1980. (Exh. 2).

Under the terms of the lease, RDEI leased approximately 20 contiguous acres in Palm Springs, California, for a period of 65 years. According to Article 4 of the lease, the lessee was to construct on the property a minimum of 55 single family residences, with a market value of approximately \$3 million, by December 29, 1980. Article 5 of the lease provided that the lessor was to receive rental payments of \$8,000 the first year of the lease, \$16,000 the second year, and \$24,000 per year every year thereafter. As RDEI sold its interest in the improved residential lots, the yearly rental payment would be proportionately reduced and the lessor would receive a rental payment according to a schedule of annual rent which was to provide not less than \$38 per month for each lot (Appellant's Brief at 3).

On July 17, 1980, RDEI wrote the Director explaining:

As you are aware, economic conditions during the first half of this year have severely impaired all development efforts throughout the country. While the developers of PSL-225 have been processing their development plans through the City of Palm Springs and have expended substantial sums on pre-development costs, the fact remains that economic conditions do not favor commencing construction at this time.

Accordingly, it is hereby requested, on behalf of Racquet Drive Estates, Inc., that the provisions of Article 4 of the subject lease be extended for an additional two year period within which time it is fully expected that the subject property will be developed as required.

Because no reply was received after more than a month, appellant again wrote the Director on August 18, 1980, repeating the request for an extension. On August 20, 1980, the Director replied:

At this time we do not have a definitive response from the Lessor, but we can state that Lessor is not pleased with the prospect of delay in development.

As the lease is structured Lessor contemplates an increase in rentals when development is completed and sales commence. The ultimate increase at completion of sales is expected to be several thousand dollars per year with additional periodic rental adjustments based on inflation. As you can see a delay in completion of development is also a delay in realizing the full rental potential of the property. A two year delay in achieving full rental coupled with a similar delay in adjustment for inflation can result in a sizeable loss of income to Lessor. We suggest that Racquet Drive Estates Inc. amend its request for additional time to develop and offer either increased guaranteed minimum rental as amendments to Articles 5 and 17 of the lease or a one time cash payment to offset the rental loss Lessor would suffer by the delay in development to make the requested additional time more palatable to Lessor.

As soon as we receive your further consideration of the above we will communicate same to Lessor for her determination.

After a further exchange of correspondence, representatives of RDEI met with the Director to discuss the proposed extension and amendments to the lease. In accordance with the Director's earlier suggestions, on October 8, 1980, RDEI proposed that, in return for the

¹ All references to exhibit numbers refer to exhibits attached to appellant's June 29, 1981, brief submitted to the Deputy Assistant Secretary-Indian Affairs (Operations).

requested 2-year extension, it would increase the number of single family residences constructed from a minimum of 55 to a minimum of 60, increase the rental for the fourth and fifth years from \$24,000 to \$30,000 per year, and increase the rental for each lot in the annual rent schedule from a minimum of \$38 to a minimum of \$45 per month (Appellant's Brief at 4). RDEI emphasized the approaching construction deadline and expressed its desire to "complete these negotiations as quickly as possible" and its willingness "to meet with the Lessor and/or the Bureau at any time as necessary" (Exh. 5).

When it received no reply, RDEI wrote to the Director on November 1, 1980, requesting the Director's immediate attention to the matter. On November 19, 1980, RDEI again wrote the Director reporting its progress toward fulfilling its construction commitment, noting that resolution of the extension question was imperative, and requesting a response to its earlier letters of October 8 and November 1 (Appellant's Brief at 5).

The December 29, 1980, construction deadline passed without a reply to RDEI's October 8 proposal from either the lessor or the Director. Finally, on January 22, 1981, RDEI received the Director's reply: "This matter has been discussed with Mrs. Jeane Kapp, the lessor. Mrs. Kapp is not favorably disposed to the granting of the time extension. Pending a resolution of the question, the rental payment of \$12,000 which was received on December 31, 1980, has been transferred to a Special Deposit Account" (Exh. 8).

On February 6, 1981, RDEI wrote directly to the lessor to inform her of the progress in the development of the leased property² and to request a meeting. On March 6, 1981, after 2 hours notice from the lessor, RDEI finally met with the lessor and the Director. At the meeting, the lessor declared the lessee was in default and demanded an increase in the annual rent schedule to \$83,000 per year (a 370-percent increase over the existing rate) (Appellant's Brief at 7). Further discussion revealed that the lessor was primarily concerned with the long-range rent schedule and that she was willing to consider additional proposals regarding the matter. A subsequent meeting of RDEI representatives and the lessor's agent proved fruitless and on March 21, 1981, RDEI by letter to the Director reported the apparent inability of the parties to negotiate a solution and therefore "formally demanded Arbitration pursuant to Article 26 of the lease" (Appellant's Brief at 8).

On April 10, 1981, RDEI received notice, in accordance with 25 CFR 131.14 (1981) (redesignated without substantive change as section 162.14 at 47 FR 13327 (Mar. 30, 1982)), from the Sacramento Area Director that it was in violation of Article 4 of lease PSL-225 and would be allowed 10 days to show cause why the lease should not be

² At this point, appellant stated it had "incurred over \$100,000 in predevelopment obligations and commitments in a good faith effort to proceed with construction of improvements under the lease" (Exh. 9).

canceled (Exh. 13). Four days later, on April 14, 1981, RDEI's March 21 request for arbitration was denied by the Director (Exh. 12):

Your request for arbitration has been reviewed with the Area Director. It is his position that it would be inappropriate to consider such a request at a time that the lease is in default. In fact the Area Director has written [RDEI] requesting that [it] show cause why the lease should not be cancelled.

On April 22, 1981, RDEI filed a timely response to the show cause order. Appellant admitted failure to comply with the construction deadline but detailed reasons why the lease should not be canceled, requested a reasonable period of time pursuant to section 131.14 to take any necessary corrective measures, and renewed its request for an extension (Appellant's Brief at 8).

The Area Director replied in a letter dated May 1, 1981 (Exh. 15). He acknowledged receipt of the reasons why the lease should not be canceled and the request for a 2-year extension, but ignored RDEI's request for a reasonable time to correct the breach:

As stated in previous letters from our Palm Springs Office * * *, the lessor, Jeane Marie Chormicle Kapp, is not in favor of an extension under the terms offered by your corporation, therefore, the request that an extension be approved is denied.

In accordance with Section 25 CFR 131.14, "Violation of Lease", Lease Number PSL-225 is cancelled effective the date of this letter and you are hereby notified that payment of all obligations are now due and payable together with possession of the premises.

You have thirty (30) days from date of receipt of this letter to appeal this decision per Section 25 CFR Part 2, "Appeals from Administrative Actions".

On May 27, 1981, RDEI, filed a notice of appeal from the cancellation decision with the Area Director. On June 29, 1981, the appeal was forwarded to the Deputy Assistant Secretary--Indian Affairs (Operations). On April 6, 1982, the Deputy Assistant Secretary affirmed the lease cancellation. Appellant's notice of appeal to the Board of Indian Appeals was received on May 6, 1982. On June 7, 1982, after receiving the administrative record in the case, the Board issued a notice of docketing including a briefing schedule. Appellant relied on its appeal brief to the Deputy Assistant Secretary. Neither BIA nor Mrs. Kapp filed a brief.

Issues on Appeal

Appellant asserts the following in support of its appeal: (1) The Secretary and his subordinates lack jurisdiction to cancel the lease or to review administratively the validity of the purported cancellation; (2) the cancellation of the lease violated the provisions of 25 CFR 131.14 (1981); (3) under California law, which governs in this case, appellant's failure to complete construction by December 29, 1980, does not justify the cancellation of the lease; (4) the cancellation of the lease without a hearing constitutes a denial of due process; (5) the cancellation constitutes a denial of equal protection; (6) the Director's refusal to submit the dispute to arbitration pursuant to Article 41 of the lease invalidated the subsequent purported cancellation; (7) the lessor is estopped to assert a default under Article 4 of the agreement;

and (8) the acceptance of rent checks after the occurrence of the alleged default constitutes a waiver of any such default.

Jurisdiction

Appellant initially challenges the jurisdiction of the Secretary to cancel this lease or to review a decision of a subordinate official that the lease should be canceled. This argument is based upon appellant's reading of *Sessions, Inc. v. Morton*, 348 F. Supp. 694 (C.D. Cal. 1972), *aff'd*, 491 F.2d 854 (9th Cir. 1974). Appellant contends that *Sessions* holds that the Secretary, as a party to an Indian lease, cannot unilaterally cancel a lease or review a decision that a lease should be canceled. Instead, according to appellant, *Sessions* requires that the cancellation of an Indian lease be effected only through court order.

The discussion to which appellant cites, found in 348 F. Supp. at 698-99, relates to whether the action of the Secretary in canceling or attempting to cancel an Indian lease, effectuated under authority of 25 U.S.C. § 415 (1976), was committed to agency discretion within the meaning of 5 U.S.C. § 701(a)(2) (1976). If it were, the court would not consider the Secretarial action subject to judicial review. The court noted that the issue before it was not the grant or denial of a lease, which it said would constitute "nonreviewable discretion," but rather, the extinguishment of the rights and obligations of the parties. Such a judicial-type action, which must abide a determination of facts showing a breach of the contractual terms of the lease, was, according to the court, "not entrusted to the Secretary but rather is reserved to court action." 348 F. Supp. at 699.

[1] Although this holding was not appealed (*Sessions*, 491 F.2d at 856 n.3), the district court's characterization of the nature of the Secretary's action is inconsistent with other Federal court rulings and has not been accepted by the Department. The Secretary's interpretation of his authority to cancel an Indian lease as being a binding determination of rights between the parties, subject to judicial review as permitted under 5 U.S.C. § 702 (1976), is consistent with the court's statement in *Yavapai-Prescott Indian Tribe v. Watt*, 528 F. Supp. 695, 698 (D. Ariz. 1981).³ There the court recognized the authority of the Secretary to cancel leases involving Indian trust lands and described in detail the Secretary's powers. Generally, the court observed:

There is nothing in the Federal Statutes which authorizes the Secretary to terminate a lease of Indian land. However that power is inherent in the powers delegated to him by Congress to supervise the public business of Indian tribes, 43 U.S.C. 1457, and to manage all Indian affairs, 25 U.S.C. § 2. * * * [T]hat power is necessary to enable him to carry out the duties with which he is charged by law * * *. [Citations omitted.]

³ See also *Smith v. United States*, 113 F.2d 191 (10th Cir. 1940) (upholding administrative cancellation of a lease of Indian trust property). Cf. *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007, *rehearing denied*, 386 U.S. 939 (1967) (involving Secretarial cancellation of an attorney's contract with an Indian tribe).

More specifically, the court noted:

The statute authorizing leases of restricted Indian lands for business purposes, 25 U.S.C. § 415, specifically requires that any lease have the approval of the Secretary and that it "shall be made under such terms and regulations as may be prescribed by the Secretary." In this case the Secretary gave his approval, and the lease recited that it was under the provisions of the Act as implemented by Part 131 of the Code of Federal Regulations, Title 25.

* * * Part 131 of Title 25 of the Code of Federal Regulations does not purport to specify in detail the provisions to be included in any lease of Indian lands, and CFR § 131.14 does not purport to specify an exclusive method for cancelling leases. It simply establishes a procedure whereby the Secretary *may* cancel a lease upon a showing satisfactory to him that there has been a violation of the lease. [Emphasis in original.] [¶]

The Board therefore holds, in accordance with these decisions, that the Secretary and his delegates have jurisdiction to consider and, if appropriate, power to cancel an Indian lease under the provisions of that lease and any applicable regulations, statutes, or judicial precedents.⁵

[2] Furthermore, the means through which the Secretary reviews decisions to cancel Indian leases, embodied in regulations found in 25 CFR Part 2 and 43 CFR Part 4, Subpart D, ensures that due process is accorded to the parties before the termination of any legal rights. See *Coomes v. Adkinson*, 414 F. Supp. 975 (D.S.D. 1976); 25 CFR 2.3(b); 43 CFR 4.21(b). Under 25 CFR Part 2, any interested party adversely affected by a decision of an official of the Bureau of Indian Affairs may appeal that decision to the Deputy Assistant Secretary--Indian Affairs (Operations).⁶ In cases in which the decision is based upon an interpretation of law, 25 CFR 2.19(c)(2) gives the Board of Indian Appeals jurisdiction to review the Deputy Assistant Secretary's decision. In appropriate cases the Board can order an evidentiary hearing before an Administrative Law Judge under 43 CFR 4.337(a). As the Department noted when it promulgated these administrative review regulations:

Exercise of the Secretary's review authority by the Board of Indian Appeals will insure impartial review free from organizational conflict in that the Board is a part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs.

40 FR 20819 (May 13, 1975). See *Willie v. Commissioner of Indian Affairs*, 10 IBIA 135, 138 (1982).⁷

⁴ The Secretary's authority to cancel leases is not limited to Indian affairs, for which, as noted above, he has broad supervisory authority, but extends as well to his management of the public lands. See, e.g., 43 CFR 3108.3; *Boesche v. Udall*, 373 U.S. 472 (1963). In *Boesche*, the Court acknowledged the power of the Secretary to cancel mineral leases administratively "under his general powers of management over the public lands," except where this authority has been withdrawn by Congress. *Boesche*, *supra* at 476.

⁵ In addition, the record in the present case indicates that the appellant acknowledged and agreed to the Secretary's authority to cancel the lease or to review an agency cancellation decision by its acceptance of the lease. Article 27(B)(2) of the lease provides that "should Lessee breach any * * * covenant of this lease, * * * the Secretary may * * * [t]erminate this lease at any time." Furthermore, the initial paragraph of the lease incorporates the cancellation authority and procedures included in 25 CFR 131.14 (1981), which in turn provides that "[t]he notice of cancellation shall inform the lessee of his right to appeal pursuant to Part 2 of this chapter."

⁶ The Deputy Assistant Secretary--Indian Affairs (Operations) was designated the official to fulfill the administrative review functions of the vacant office of Commissioner of Indian Affairs. See memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

⁷ This independent review also ensures that the BIA does not overlook the legal rights of other parties in discharging its trust responsibilities to Indians.

The Board has consistently acted to maintain its independence from the BIA and to ensure that parties before it receive impartial and fair administrative review of legal disputes arising from the exercise of the Department's Indian affairs responsibilities. To this end, the Board has defined the difference between decisions issued under discretionary authority vested in the BIA and those rendered after an interpretation of law,⁸ and has held that the characterization of a decision by the BIA as discretionary is a legal conclusion subject to Board review.⁹ These decisions ensure that parties whose legal rights are adjudicated by the Department are accorded all due process protections.¹⁰

The Board holds that the requirements of due process in administrative appeals are met through the review mechanisms provided by Departmental regulations and the decisions of this Board.¹¹

Discussions and Conclusions

Appellant asserts, among its other contentions, that the Secretary's refusal to accept its request for arbitration pursuant to Articles 41 and 26 of the lease invalidates the subsequent cancellation. We agree and remand this matter to the Bureau for arbitration.

Article 41 of the lease¹² provides that where a delay in construction is caused by an event beyond the lessee's power to control, the period of delay so caused shall be added to the period originally allowed for completion, and furthermore, that any questions of fact and/or any disputes under said article which cannot be resolved by the parties, would be arbitrated in accordance with Article 26 of the lease.¹³ Article 4, as previously discussed, established a construction deadline

⁸ See, e.g., *Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 146 (1983); *Billings American Indian Council v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 142 (1983); *Wishkeno v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982).

⁹ See, e.g., *Urban Indian Council, supra*; *Billings American Indian Council, supra*.

¹⁰ Furthermore, Board decisions are subject to judicial review in accordance with the provisions of 5 U.S.C. § 702 (1976). Thus, the Federal courts are available for the correction of any error that might occur in the administrative review process.

¹¹ For this reason the Board finds that appellant's argument that cancellation of the lease without a hearing constitutes a denial of due process is without merit. The requirements of due process are met by this hearing before the Board. The Board has had no reluctance to overturn BIA lease cancellations where warranted. See, e.g., *Bonaparte v. Commissioner of Indian Affairs*, 9 IBIA 115 (1981).

¹² Article 41 of lease PSL-225 reads:

"41. FORCE MAJEURE

"Whenever under this instrument a time is stated within which or by which original construction, repairs or reconstruction of said improvements shall be completed, and if during such period a general or sympathetic strike or lockout, war or rebellion or some other event occurs beyond Lessee's power to control, the period of delay so caused shall be added to the period allowed herein for the completion of such work. Any questions of fact arising hereunder shall be arbitrated under Article 26, 'Arbitration,' hereof.

"Any disputes arising under this Article which cannot be resolved by the parties, shall be arbitrated pursuant to Article 26 hereof."

¹³ Article 26 of lease PSL-225 reads:

"26. ARBITRATION

"Whenever the terms of this lease require that a dispute be settled by arbitration, an Arbitration Board shall be established, consisting of three members, one each to be selected by the Lessor and the Lessee, and such members to select the third member. The costs of such Arbitration Board shall be shared equally by the Lessee and the Lessor. The Secretary shall be expected to accept decisions reached by said Arbitration Board, but he shall not be bound by any decision which might be in conflict with the interests of the Indians or the United States."

of December 29, 1980.¹⁴ On July 17, 1980, appellant initiated the present controversy by writing to the Director requesting a 2-year extension of the construction deadline on grounds that the prevailing economic conditions did not favor commencing construction at that time. Following the failure of months of negotiation regarding the proposed extension, appellant requested arbitration in accordance with Article 26 of the lease on March 21, 1981. That request was denied by the Director on April 14, 1981, on grounds that it would be inappropriate to consider such a request because the lease was then in default and section 131.14 cancellation procedures had already been invoked.

In affirming the cancellation of the lease, the Deputy Assistant Secretary's decision of April 6, 1982, at page 5, found that arbitration was not required:

The lessor is not obligated under Article 26 to submit a question to arbitration in every instance simply because the lessee requests it. In order to be entitled to have a matter submitted to arbitration, the party requesting arbitration must show there is an arbitratable dispute within the scope of the arbitration clause. It is my view that no such showing has ever been attempted by the appellant. The record shows only that the appellant claimed in July 1980 that "economic conditions do not favor commencing construction at this time." There is nothing in the record to indicate that the appellant presented or offered to present substantiating evidence to prove that such economic conditions constituted an "event" (within the meaning of Article 41) which prevented it from completing the required construction on time. No demand for arbitration under Article 41 was made until March 21, 1981, well after the December 28, 1980 [sic], deadline had passed. Even then, the letter from counsel for the appellant requesting arbitration did not assert that arbitration was demanded as a matter of right under Article 41; instead counsel stated that inasmuch as RDEI had been unable to reason with either Mrs. Kapp or Mr. Pierce, it had no alternative but to seek a resolution of this problem through arbitration.

It is my conclusion that any application at this late date to submit the matter of extension to arbitration is neither required nor in the best interest of the Indian lessor. (Decision at 5).

We disagree with this reasoning and the conclusion reached by the Deputy Assistant Secretary. As the court stated in *San Tan Ranches v. United States*, No. CIV 80-359 PHX VAC, slip op. at 2-4 (D. Ariz. July 12, 1982), another case involving the application of an arbitration clause in a dispute under an Indian lease:

[T]here is a general federal policy favoring arbitration, and * * * in cases of doubt, the doubt is to be resolved in favor of arbitration. See, e.g., Federal Arbitration Act, 9 U.S.C. § 1 et seq.; *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 240 (3rd Cir. 1979). * * * [There is no] statute which indicates that Congress intended to exclude Indian-related matters from its policy favoring arbitration. Cf. *United States v. Electronic Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir.), cert. denied, 385 U.S. 924 * * * (1966) (Miller Act case). Furthermore, there is no special body of federal contract law governing the commercial relations of Indians, *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714-15 (9th Cir. 1980), neither is there anything in the nature of the instant dispute which suggests that the matter falls peculiarly within

¹⁴ Article 4 of lease PSL-225 reads:

"4. PURPOSE OF THE LEASE

"Lessee shall use the leased premises for the following purposes: Single family residences. Lessee covenants and agrees that within 3 years from the date upon which this lease is approved, it shall construct at least 55 single family residences having a market value of approximately \$3,000,000.00."

May 24, 1983

the realm of expertise of the Department of Interior. *Compare Bache Halsey Stuart, Inc. v. French*, 425 F. Supp. 1231 (D.D.C. 1977).

The court therefore ordered that the dispute be submitted to arbitration.

[3] In reviewing the Deputy Assistant Secretary's decision, we find that appellant has shown a dispute with the lessor involving the proper interpretation of a lease provision in regard to whether adverse economic conditions constitute an "event" within the meaning of Article 41. Under Article 41, any questions of fact or disputes that cannot be resolved by the parties are required to be submitted to arbitration. Were the Board to accept the BIA decision on this issue, a party to an Indian lease containing an arbitration clause would be required to persuade the BIA of the merits of its arguments before it would be entitled to invoke the arbitration provisions. The Board declines to so hold. In the absence of extenuating circumstances, this lease clearly requires that any disputes not resolved by the parties must be submitted to arbitration before consideration by the Secretary.

The decision of the Deputy Assistant Secretary suggests three reasons why the BIA is not required to submit this dispute to arbitration. First, BIA implies that appellant forfeited its right to request arbitration by not demanding it before the passage of the construction deadline. Although appellant may technically have been in violation of the lease when this deadline passed, the BIA had issued no formal declaration of breach. Therefore, the lease and all of its provisions, including the arbitration clause, were still in effect and available to both the lessor and the lessee.¹⁵

Furthermore, the BIA is not without some degree of fault in the delay in resolution of this case. As the court noted in *Sessions*, 348 F. Supp. at 703:

The delays of the Department of Interior through its Bureau of Indian Affairs, joined by * * * [the Indian lessor] raise serious questions of concern for Indian affairs * * *. The Department is charged with the responsibility of the management of its trust obligations in the best interest of Indian beneficiaries. This fiduciary duty carries with it—if not express—at least an implied requirement of diligence.

The fact that appellant did not request arbitration until after the construction deadline had passed resulted at least in part from the BIA's failure to respond diligently to appellant's earlier requests for an extension of time and its repeated representations that a resolution might still be reached with the Indian lessor through informal means. The BIA will not be permitted to use delays, which it in part caused, as an excuse for refusing to abide by the dispute resolution mechanisms established in a lease.

For the same reasons, BIA will not be heard to argue that the best interests of the Indian lessor demand that the issue not be arbitrated

¹⁵ The Board does not here consider whether a party to an Indian lease may invoke an arbitration clause after it has been formally declared to be in breach.

at this time. The lessor's best interests require resolution of this matter expeditiously and in accordance with the mutually agreed mechanisms for such resolution established in the lease.

Finally, the BIA states that appellant did not characterize its request for arbitration as an assertion of a right granted under Article 41. The Board has previously noted that decisions of the BIA, although constituting determinations in an administrative appellate proceeding, do not always employ legal or judicial terminology. See *Walch Logging Co. v. Portland Assistant Area Director (Economic Development)*, 11 IBIA 85, 91 n.5., 90 I.D. 88, 91 n.5 (1983); *United States v. Acting Aberdeen Area Director and Celina Young Bear Mossette*, 9 IBIA 151, 153 n.1, 89 I.D. 49, 50-51 n.1 (1982). Nevertheless, the Board has upheld the procedures followed, regardless of the way in which BIA characterized them, when they were proper. *Id.*

The same right to employ proper procedures without regard to the words used to invoke or describe those procedures will be accorded to all parties in proceedings before the Board, so long as the mischaracterization is not misleading to other parties. Appellant's lease contained a provision granting a right to the arbitration of certain issues. Any notice reasonably calculated to inform the BIA and other interested parties that the right was being invoked is sufficient.¹⁶

Consequently, we find that although a violation of the lease occurred on December 29, 1980, section 131.14 cancellation procedures were not then invoked and that consequently the lease remained in effect. As of March 21, 1981, the lease provisions still governed the relationships between the parties and accordingly arbitration was required under the terms of the lease.

[4] Therefore, the April 10, 1981, invocation of section 131.14 cancellation procedures, prior to arbitration as required by the lease, was improper. Although appellant's right to arbitration vested as of its request of March 21, 1981, the Bureau nevertheless subsequently initiated cancellation proceedings under section 131.14. The Bureau's decision to ignore the appellant's request for arbitration and instead to initiate cancellation procedures was in error. Because the subject required to be arbitrated was the alleged violation of the lease, which also served as the grounds for initiating section 131.14 procedures, BIA should have deferred cancellation under section 131.14 until arbitration was complete.

¹⁶ Appellee, in response to appellant's arbitration argument, maintains that the July 17, 1980, letter from appellant did not claim economic conditions necessitated a delay beyond the Dec. 29, 1980, construction deadline; rather the letter specifically stated "economic conditions do not favor commencing construction at this time," and that appellant's request for arbitration was untimely in that a specific request for arbitration under Article 41 was not raised until after the initial filing of this appeal (May 1, 1981, Decision of the Deputy Assistant Secretary-Indian Affairs (Operations) at 4-5).

Appellant's letter of Mar. 21, 1981, is a definite request for arbitration under the terms of the lease. Because the lease mentions arbitration in connection with only three articles (#11 - "Improvements"; #25 - "Eminent Domain"; and #41 - "Force Majeure"), aside from the arbitration provisions of Article 26 itself, it would not be difficult to ascertain what appellant was requesting in the context of appellant's dealings with the BIA. In any event, BIA denied appellant's request not on grounds of vagueness, but rather on grounds that the lease was in default. This is precisely the issue which arbitration would resolve.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is vacated and the case is remanded to the Bureau of Indian Affairs for submission to arbitration in accordance with Articles 41 and 26 of the lease.¹⁷

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

¹⁷ Because of this disposition we do not reach appellant's remaining arguments. We note, however, that prior decisions of Federal courts and this Board have considered some of those arguments. See *Sessions, supra*; *Sessions, Inc. v. Miguel*, 4 IBIA 84, 82 I.D. 331 (1975); *Sessions, Inc. v. Ortnier*, 3 IBIA 145, 81 I.D. 651 (1974); *Sunny Cove Development Corp. v. Cruz*, 3 IBIA 33, 81 I.D. 465 (1974); *Villa Vallerto v. Patencio*, 2 IBIA 140, 81 I.D. 9 (1974).

June 2, 1983

**FEDERAL WATER POLLUTION CONTROL ACT -- SEC. 404
COMPLIANCE FOR PROJECTS FUNDED IN PART BY STATE
AND LOCAL ENTITIES**

M-36915 (Supp. I)

June 2, 1983

**Bureau of Reclamation: Environment--Navigable Waters--Water
Pollution Control: Federal Water Pollution Control Act**

The exemption under sec. 404(r) for an otherwise Federal project is available for projects receiving contributory financing from state or local entities, provided that the other conditions for the exemption are met and the project remains in Federal control.

OPINION BY SOLICITOR COLDIRON

OFFICE OF THE SOLICITOR

MEMORANDUM

TO: SECRETARY

FROM: SOLICITOR

**SUBJECT: FEDERAL WATER POLLUTION CONTROL ACT--SEC.
404 COMPLIANCE FOR PROJECTS FUNDED IN PART BY STATE
AND LOCAL ENTITIES**

I. Introduction

On August 27, 1979, the Solicitor issued opinion M-36915, 86 I.D. 400 (1979), providing a general analysis and overview of the applicability to the Bureau of Reclamation of section 404, 33 U.S.C. § 1344, of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, 33 U.S.C. § 1251 *et seq.* (the Act). Section IV of opinion M-36915 pertains to section 404(r) of the Act, which establishes an exemption to the permit requirements under section 404(a) of the Act.

This opinion addresses the applicability of this exemption to a water resource project planned, constructed and operated by the Federal government, but which receives contributory financing from state or local entities. Section IV of Solicitor's Opinion, M-36915 is hereby modified to the extent that it is inconsistent with this opinion.

II. The Section 404(r) Exemption

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311, as amended, prohibits the discharge of any pollutant by any person except in accordance with other relevant statutory provisions.¹ One such exception is provided in section 404, 33 U.S.C. § 1344 which allows the Secretary of the Army to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Section 404(r), in turn, exempts from this permit requirement

¹Sec. 301(a) reads as follows: "Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

any "Federal project specifically authorized by Congress, . . . if information on the effects of such discharge . . . is included in an environmental impact statement . . . submitted to Congress before the actual discharge . . . and prior to either authorization of such project or an appropriation of funds for such construction." 33 U.S.C. § 1344(r). The question examined here is whether a Federally authorized and constructed project which otherwise meets the requirements of section 404(r) but receives contributory state financing qualifies for the exemption as a "Federal project." For the reasons discussed below, I conclude that it does.

III. Analysis

The legislative history of the Act demonstrates that Congress created the section 404(r) exemption to eliminate duplication of environmental analysis and consequent delay on those projects which Congress had already reviewed and approved:

The Conferees have * * * limited the exemption [under section 404(r), which refers specifically to "Federal projects"] so as to ensure that the Congress will have full information on the impacts of the discharge of dredged or fill material associated with a project when it determines whether or not to authorize the project or to appropriate funds for its construction. *Only those projects which have received an analysis of the effects of a discharge equivalent to that provided under the guidelines promulgated under section 404(b)(1) prior to authorization or specific funding for activities which would result in the discharge of dredged and fill material are exempt.* An environmental impact statement addressing the impact of the discharge, with particular reference to the guidelines promulgated pursuant to subsection 404(b)(1), must have been submitted to Congress prior to either the authorization or the appropriation of funds.

Thus Congress is to have the benefit of all the necessary information when it makes its decision. It is emphasized that the failure of a project to meet these requirements will result in the project having to obtain a section 404 permit. It would not require a reauthorization or additional appropriation action. H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 104, reprinted in 3 U.S. Code Cong. & Ad. News, 4326, 4479 (1977). (Italics added).

Accordingly, the conference committee intended the exemption to apply to Federal projects Congress had had the opportunity to evaluate prior to authorization. State and local financial participation does not alter the underlying intent of Congress. The section 404(r) exemption, encompasses "those projects which have received an analysis of the effects of a discharge equivalent to that provided . . . under section 404(b)(1) prior to authorization or specific funding . . ." H. R. Rep. No. 95-830, 95th Cong., 1st Sess. 104, reprinted in 3 U.S. Code Cong. & Ad. News, 4326, 4479 (1977).

Explanatory comments from the legislative history confirm this intent of the section 404(r) exemption. Senator Baker, a member of the conference committee, emphasized:

The purpose of this narrow exemption is not to relieve certain Federal projects from substantive compliance with the Clean Water Act, but rather the intention is to avoid costly delays for Federal construction of environmentally sound projects after they have been authorized by Congress. 123 Cong. Rec. S19,676 (daily ed., Dec. 15, 1977).

Likewise, Senator Wallop explained:

June 2, 1983

In order to qualify for the exemption, an adequate environmental impact statement on the project must have been submitted to Congress prior to authorization of the project or appropriation of construction funds and, in all cases, prior to the action [sic] discharge of dredged or fill material at any particular site. The statement must satisfy the requirements of NEPA and include complete information on the effects of the proposed discharge. Moreover, the guidelines developed by the administrator under section 404(b)(1) must be fully complied with in developing and assessing such information. 123 Cong. Rec. S19,677 (daily ed., Dec. 15, 1977).

Senator Wallop also gave examples of types of projects that would and would not qualify for the section 404(r) exemption. He stated that the conference committee "did not intend to exempt *federally assisted* projects from the section 404 review." *Ibid.* (Italics added). Yet he also stated that "[f]ederal projects include only those *conducted by a Federal agency* and by such contractors as the agency may employ." *Ibid.* (Italics added). The key distinction between these two examples is in determining what constitutes a "Federal project" and thus is subject to the EIS process. Accordingly, federal financial assistance to a state water project does not qualify the project for the section 404(r) exemption as state projects do not have to fulfill the Federal EIS requirement. Similarly, state and local funding does not disqualify a federal project from exemption upon which an EIS has been prepared and submitted to Congress.²

V. Conclusion

Within the meaning of section 404(r) of the Act, a Federal project is one for which, prior to its authorization or appropriation of funds, an EIS was prepared and submitted to Congress which set forth the environmental impacts of the project. The preparation of an EIS will generally denote a Federal project subject to the section 404(r) exemption. Financial participation by state or local governments does not disqualify a project from being a "Federal project" qualifying for the section 404(r) exemption. Solicitor's Opinion No. M-36915 of August 27, 1979, is hereby modified to the extent that it is inconsistent with this opinion.

WILLIAM H. COLDIRON
Solicitor

² Solicitor's Opinion No. M-36915 concluded that to be a "Federal project" the "project must be fully Federal, including planning, finance and construction, although the use of outside contractors is permissible." This statement is taken from the remarks of Senator Stafford (who served on the conference committee), that, "[f]or the purposes of this act, Federal projects are those which are entirely planned, financed, and constructed by a Federal agency in every respect." 123 Cong. Rec. S19,959 (daily ed., Dec. 15, 1977). However, Senator Stafford's remarks appear to have been overly broad. Otherwise, his remarks would conflict with those of Senator Wallop, above, and would go beyond the stated purpose of the exemption as described in the conference committee report, *supra*. In any event, committee reports are entitled to greater weight than less formal indicia of congressional intent such as floor comments. *International Tel. & Tel. Corp. v. Gen. Tel. Electronics Corp.*, 518 F.2d 913 (D.C. Cir. 1975), *American Airlines, Inc. v. C.A.B.*, 565 F.2d 939 (9th Cir. 1966).

CHARLES R. TICKEL

73 IBLA 360

Decided *June 15, 1983*

Appeal from the decision of the Colorado State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application, C-36205.

Affirmed.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents--Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Applications: Filing

Under 43 CFR 3112.2-1(b), an automated simultaneous oil and gas lease application, Form 3112-6a (June 1981), must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship. Where an application is executed by a filing service on behalf of an applicant, the signatory must reveal on the face of the application his or her identity and the fact that the signatory is acting for the filing service on behalf of the applicant.

APPEARANCES: Marla J. Williams, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Charles R. Tickel has appealed the decision of the Colorado State Office, Bureau of Land Management (BLM), dated January 17, 1983, rejecting his simultaneous oil and gas lease application, C-36205, selected with first priority for parcel 162 of the July 1982 simultaneous drawing relating to lands located in Colorado.¹ BLM found that appellant's application lists First Petroleum Corp. of America (First Petroleum) in the space on the form for filing service and that the signature on the application is illegible with no reference to the signing authority. BLM concluded that the application must be rejected because it failed to show the relationship between the applicant and the party signing the application as required by 43 CFR 3102.4² and 43 CFR 3112.2-1(b).

Both of these regulations express the same requirement. 43 CFR 3112.2-1(b), specifically applicable to simultaneous lease applications, provides:

(b) The application shall be holographically (manually) signed in ink by the applicant or holographically (manually) signed in ink by anyone authorized to sign on behalf of the applicant. Applications signed by anyone other than the applicant shall be rendered in a manner to reveal the name of the applicant, the name of the signatory and their relationship. (Example: Smith, agent for Jones; or Jones, principal, by Smith, agent.)

¹ The Colorado State Office simultaneous oil and gas leasing program was incorporated into BLM's automated leasing system beginning with the May 1982 drawing. Under the automated system all applications for parcels in any state must be filed on an Automated Simultaneous Oil and Gas Lease Application (Form 3112-6 and 3112-6a) with the Wyoming State Office, BLM. 47 FR 14487, 14488 (Apr. 5, 1982).

² The BLM decision actually refers to 43 CFR 3102.2. That reference is in error.

June 15, 1983

In his statement of reasons, appellant argues that the regulations and decisions of this Board require that the application, not the signature, be "rendered" in a manner to reveal the name of the applicant, the name of the person signing, and their relationship. He contends that it is clear from the face of his application that he used a filing service and notice of such use in effect reveals the relationship between the signatory and the applicant because the nature of a filing service's business is well known. He points to two Board decisions, *Hercules (A Partnership)*, 67 IBLA 151 (1982),³ and *Liberty Petroleum Corp.*, 68 IBLA 387 (1982), in which the identity of the signatory or the relationship between the applicant and signatory were not apparent on the face of an application and the Board held that the application had been rendered consistent with the regulations where BLM could refer to the applicant's qualifications files to ascertain the information. Although appellant maintains that the nature of his relationship with the signatory is apparent from the reference to his filing service, First Petroleum, he reports that the application was transmitted to BLM with a cover letter referring to First Petroleum's corporate qualifications file.

Appellant also argues that the requirements for signature are ambiguous because it is not clear whether it is intended that all the information be included in the signature box. He suggests that the ambiguity is compounded by new form 3112-6a which adds a space for identifying a filing service and eliminates the "Agent's Signature" box as appeared on the previous form 3112-1. He urges that the differences could reasonably be interpreted by an applicant to mean that inclusion of information about a filing service was intended to satisfy the requirement of identifying the relationship between the applicant and the signatory.

Finally, appellant argues that, in *Liberty Petroleum Corp.*, *supra*, the Board found that an application should not be rejected on the basis of whether a signature is legible because that is too subjective a basis for fair adjudication. He adds, however, that as in the *Liberty Petroleum* case, the identity of the signatory of his application could have been learned by examining First Petroleum's corporate qualifications file.

There are important differences between the circumstances and applications reviewed in *Hercules*, *supra*, and *Liberty Petroleum*, *supra*, and appellant's circumstances and application. Unlike appellant, the applicants in those cases listed the relevant qualifications file number on the application itself. What we found in *Hercules* at page 153 was that "by completing their applications with a reference to that file, the respective applications clearly were 'rendered in a manner' to provide the necessary information." (Italics added.) In appellant's case, even

³ Appeal filed sub nom. *Groom v. Watt*, Civ. No. 82-2179 (D. Colo. Dec. 17, 1982).

though application form 3112-6a contains a space for identifying qualifications files, the space is blank.

Appellant's arguments raise the different question of whether "rendered in a manner" encompasses reference to First Petroleum's qualifications file in a transmittal letter for a group of applications. We think not in this case for two reasons. The first reason is the filing procedure for the automated simultaneous leasing system. All simultaneous oil and gas lease applications for every state are now filed at the Wyoming State Office and the priority selections are made by the automated system at that office. The priority applications are adjudicated and the leases issued from the appropriate state office, however, not the Wyoming State Office. First Petroleum's single transmittal letter covered 868 applications for Colorado parcels and was sent with the applications to the Wyoming State Office. Appellant cannot expect that the Wyoming State Office would have saved, copied, and retransmitted to Colorado the transmittal letter with each of First Petroleum's filings that received priority. For each drawing for each state there are thousands of filings on hundreds of parcels. Even though there are fewer applications under the new automated filing system because an applicant may file on more than one parcel on the same application, processing of the applications remains a substantial administrative task. As we have stated before, where such a burden is involved, and where the rights of other applicants are involved, it is not unreasonable for the Department to demand strict compliance with filing requirements, and it is not required to take extra steps to protect those who do not carefully comply from the foreseeable consequences of their deficiencies. *Fred L. Engle*, 66 IBLA 94 (1982).

The second reason is a change in the requirements for qualifications filings. At the time that the Hercules and Liberty Petroleum applications were filed, BLM required evidence of qualifications to be submitted with all applications or a reference to a qualifications file to be made. See 43 CFR Subpart 3102 (1981); *Pirindel Investment Research*, 65 IBLA 111 (1982). In February 1982, however, BLM revised its oil and gas leasing regulations to eliminate the required filing of evidence of qualifications. See generally 43 CFR Subpart 3102; 47 FR 8545 (Feb. 26, 1982). Since there was no reason for the Colorado State Office to need the information concerning First Petroleum's qualifications file, there was no reason for the Wyoming State Office to forward its transmittal letter.

[1] Thus, we return to the application itself to determine whether it was rendered in a manner so as to reveal the name of the applicant, the name of the signatory, and their relationship. On the application, the name and address of appellant was typed in the box labeled "Applicant's Full Name, Address and Zip Code," thus clearly revealing (although misspelling) the name of the applicant. First Petroleum's full name and address is typed in a similar box labeled "Filing Service's Full Name, Address and Zip Code (If Applicable)." The instructions on form 3112-6a for completing this box state: "FILING SERVICE-If a

June 15, 1983

filing service was used by the applicant in the preparation of this application, enter the name and address of that filing service." Thus, when an applicant fills in the filing service information on form 3112-6a it must be presumed that he has used that filing service with respect to this application. Contrary to appellant's argument, however, that information alone does not reveal the exact nature of an applicant's agreement with the filing service or the name of the signatory and the relationship between the signatory and the applicant. It is not necessarily true that if an applicant employs a filing service, an officer of the filing service filled out or signed the application. See, e.g., *Bernard S. Storper*, 60 IBLA 67 (1981).

We also do not agree that the regulations and the form are ambiguous as to signature requirements. Both the regulations and the instructions on the form provide examples illustrating the required information. Those in 43 CFR 3112.2-1(b) have already been quoted. The examples provided in 43 CFR 3102.4 are: "John Smith, agent for Mary Jones; or ABC Corporation, agent for Mary Jones by John Smith." The instructions for filling out the form read in part:

SIGNATURE AND DATE—Application must be personally signed (in ink) and dated by the applicant, or anyone authorized to sign on behalf of the applicant, * * *. If anyone other than the applicant signs Part B that person must set forth, along with their [sic] own signature, the name of the applicant and the relationship between them (Example: John Jones, by Oil Filing Company, agent, by William Budd; or John Jones, by Tom Smith, attorney in fact).

In *Vincent M. D'Amico*, 55 IBLA 116, 122-23 (1981), we concluded that the term "signatory" in 43 CFR 3112.2-1(b) referred to "the person signing on behalf of a corporate agent" and suggested that an appropriate signature for a corporate filing service on behalf of applicant Robert Jones would have been to place in the "Agent's Signature" box of form 3112-1: "John Brown, Vice President, Acme, Inc., agent for Robert Jones." The guidance provided by the regulations, the *D'Amico* decision, and the instructions on the form leave little doubt that something more than a simple signature is required when someone other than the applicant signs the form.⁴ Contrary to appellant's view, we find that the absence of a separate "Agent's Signature" box reinforces this conclusion. The signatory must indicate that he or she is acting for the filing service on behalf of the applicant.

Finally, the signature box on appellant's application contains an illegible handwritten signature, in our opinion. Our concern about legibility and the problems of fair adjudication as expressed in *Liberty Petroleum*, *supra*, remains. However, in the absence of a qualifications file from which a name may be referenced and in view of the regulatory requirement that the name of the signatory be revealed, it

⁴ We have held that it is not necessary for the signatory to sign the applicant's name holographically as well as his own. See *Henry A. Alker*, 62 IBLA 211 (1982).

is incumbent upon a signatory to in some fashion reveal his or her identity.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Office is affirmed.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

UNITED STATES
v.
J. GARY FEEZOR *ET AL.*

74 IBLA 56

Decided *June 29, 1983*

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring 11 lode mining claims null and void for lack of discovery. CA-4800.

Affirmed as modified.

1. Mining Claims: Contests--Rules of Practice: Generally

Where a stipulation as to the admissibility of various assay results is made by the Government and a mineral contestee, and the contestee clearly asserts his view as to the scope of the stipulation, it is the obligation of the attorney for the Government, if his interpretation differs, to clearly state his view so as to put the contestee on notice as to this conflict. Where this is not done, the stipulation will be enforced in accordance with the contestee's understanding.

2. Mining Claims: Discovery: Geologic Inference

While geologic inference cannot be used to show the existence of a mineral deposit, where an exposure exists which shows high and relatively consistent values, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man would be justified in expending labor and means with a reasonable prospect of success in developing a paying mine.

3. Mining Claims: Discovery: Geologic Inference

Where the evidence of record shows that the results obtained by surface sampling are unreliable as a basis upon which to predicate estimates of a value at depth, such sample cannot serve as a factual predicate for inferring an extension beyond the exposed area.

United States v. Edeline, 39 IBLA 236 (1979), overruled to extent inconsistent.

APPEARANCES: Kenneth L. Allen, Esq., Patricia G. Munger, Esq., and Leo N. Smith, Esq., Tucson, Arizona, for contestees; John

June 29, 1983

McMunn, Esq., Office of the Solicitor, Department of the Interior,
San Francisco, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

J. Gary Feezor, Elladene Feezor, John W. Hogle, Sr., and Nedra L. Hogle appeal from a decision of Administrative Law Judge E. Kendall Clarke, dated April 16, 1979, which held various lode mining claims located in the Death Valley National Monument null and void for lack of discovery of a valuable mineral deposit.

Appellants were the owners of 32 lode mining claims, known as the Copper Lodes Nos. 1 through 32, located in protracted secs. 32 and 33, T. 28 N., R. 3 E., and protracted sec. 5, T. 27 N., R. 3 E., San Bernardino meridian, Inyo County, California. These claims had been located between 1965 and 1969 by contestees' predecessors in interest. At the time that the claims were located the land was open to mineral entry. However, pursuant to the provisions of the Mining in the Parks Act, Act of September 28, 1976, 90 Stat. 1342, 16 U.S.C. § 1901 (1976), lands within the Death Valley National Monument were closed to further mineral entry and location.¹ The claims in issue herein were recorded pursuant to section 8 of that Act. See 16 U.S.C. § 1907 (1976).

Pursuant to a request of the National Park Service (NPS), the California State Office, Bureau of Land Management (BLM), filed a contest complaint on January 11, 1978, alleging that "[t]here are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery." Contestees timely denied this charge, and a 3-day hearing was held before Judge Clarke.

In his decision, Judge Clarke noted that at the hearing the contestees had stipulated that the only claims with which they were concerned were the Copper Lodes Nos. 1, 2, 3, 5, 7, 8, 9, 10, 13, 14, and 28 (Decision at 2; see Tr. 485). Thus, all discussion was directed to the existence of a discovery within the limits of these claims. Judge Clarke held all of these claims to be null and void for want of a discovery of a valuable mineral deposit because of insufficient showings as to quantity and quality of copper ore, noting that contestees were attempting to use geological inference in order to project copper ore onto those claims which had not been drilled. Judge Clarke rejected this, expressly holding that "[u]nder the mining laws of the United States geological inference may not be used to establish the existence of a valuable mineral deposit" (Decision at 10). Contestees timely pursued an appeal to this Board.

¹ Sec. 3(d) of the Mining in the Parks Act, *supra*, repealed the Act of June 13, 1933, 48 Stat. 139, 16 U.S.C. § 447 (1976), which had extended the mining laws to the Death Valley National Monument.

In their statement of reasons for appeal, contestees basically argue that Judge Clarke improperly limited the use of geologic inference and contend that the preponderance of the record evidence establishes a discovery on all of the claims; that Judge Clarke erroneously refused to consider geologic inference for the purpose of delimiting the quantity and quality of the ore bodies shown to exist on the claims; and that Judge Clarke improperly discounted the value of various chip surface samples taken by Occidental Minerals Corp. (OXY), in derogation of a stipulation entered into by the parties. Because we deem this latter question to be of considerable importance as to the ultimate conclusion, we will examine it first.

In order to understand the contentions of the parties, it will be necessary to set forth some of the factual bases of this appeal at length. While a number of claims are involved in this appeal, there are three distinct mineralized areas under consideration: Area A (also referred to as the South body), clearly located in claim Nos. 1 and 2, and which appellants argues continues into claim Nos. 3, 13, and 14; Area B (also referred to as the North body), located in claim Nos. 5, 7, 8, and 9; and Area C (also referred to as the Middle body), located in claim Nos. 10 and 28.

Different degrees of exploration have occurred in these areas. Area A has had by far the most extensive amount of data developed. This consists of 6 holes drilled in 1968 by Tom Beard, 65 holes drilled in 1969 under the supervision of Richard E. Mieritz, and 5 holes drilled by Norandex, Inc., in 1970. In addition, OXY conducted a surface sampling program for the areas embraced by the claims in 1975. While these samples were primarily chip samples, some soil samples were taken in Area C. While data was available from nearly all of these samples, no one who took them actually testified or was present at the hearing. In order that this data might be admissible without problems relating to proper foundation, a stipulation by the parties as to the admissibility of the data was made. Because of the importance which the scope of the stipulation now has, we set forth the hearing colloquy related thereto in its entirety.

[1] Initially, the stipulation was not the subject of great discussion. After the Government moved to introduce various of these reports, the following exchange occurred:

JUDGE: It's my understanding, Counsel, that there is a stipulation to the admission of these reports.

MR. ALLEN: There is, Your Honor, provided that there is an understanding. And I want the understanding clear because I'm not ready at this time to put in ours. But Mr. McMunn and I discussed this, that all factual data which are being used were used by these men in forming their opinion, which are not included in those reports, are going to be by stipulation admissible as we proceed again for time-saving and also to get the facts before Your Honor.

I have no objection to stipulating any of those as long as that understanding - so it doesn't change down the road is my concern.

MR. McMUNN: That's my understanding.

JUDGE: Then by stipulation, Contestant's Exhibits 1, 2, 3, and 4 are received.

June 29, 1983

(Tr. 6-7).

Subsequently, however, in the course of examining Walter Gould, a witness for the Government, counsel for the Government elicited testimony from Gould that he could find no evidence of any channel samples taken by OXY. This testimony led to a lengthy exchange between counsel.

MR. ALLEN: Excuse me, Mr. McMunn. Your Honor, I have a little bit of problem with Mr. McMunn's line of questioning. I thought we had an agreement that this factual data that was used by the respective people was stipulated and going to be as they came into evidence.

And it seems to me he's now in derogation of that stipulation and agreement and questioning whether some of the factual data was done.

MR. McMUNN: I think we stipulated that the items, themselves, the reports, to go in. We didn't stipulate that every item in the report was exactly correct because, of course, there is some contradiction between the different reports. As you know, the greatest example being O'Brien and Fletcher.

So we've just stipulated that we could put those items into the record without having to lay a foundation and so forth on them.

JUDGE: That's not your understanding of the stipulation?

MR. ALLEN: As to factual data, it wasn't. As to this gentleman's interpretation, I understand everybody is going to go 180 degrees possibly.

MR. McMUNN: This is Gould's interpretation of this data, and he disagreed with some of it.

MR. ALLEN: If I can, Your Honor, what I'm pointing out, first of all, I don't object in an administrative hearing like this to Mr. McMunn leading the witness and making testimony and having him answer yes or no.

But I do when he seems to be questioning the validity of the factual data, which I understood we had an agreement on, was taken in, was going to be admitted as factual data as other people's interpretations.

He seems to be in an area of questioning whether that factual data was even done.

MR. McMUNN: I might note that we do not have in the record a report from Occidental specifically on this surface sample that we're discussing. There are mentions of it in reports by Fletcher and by O'Brien. But we don't have reports from Occidental Company telling exactly what, how, and where they did sampling. Although we do have people secondarily drawing upon sample results that they got from somewhere that purportedly are from Occidental.

Those results are what we're talking about. We're not actually talking in this line of testimony with Mr. Gould about any of items 1 through 4 or A explicitly.

MR. ALLEN: Your Honor, I'm a little concerned and I'll tell you why. It's because I didn't sit here and take all the time this morning to put all of our evidence in because I thought we had our understanding clear.

Mr. McMunn has put in as an exhibit two of the Occidental test results with a cover letter, which includes a certain sample map and assay report, both of which I, as counsel for the Contestees, furnished that gentleman who is on the witness stand at the time he visited the field. He's had them available.

Those are factual data that people use.

JUDGE: That's Exhibit 3.

MR. ALLEN: Exhibit 3, except that Mr. McMunn said, I don't have those now here. And I said, I'll put them in later and save time and let's press on.

Now he's questioning whether those samples were done or done right or the assays were done or done right.

JUDGE: Wait a minute. I'm a little confused. Apparently Exhibit 3 did not contain all the background data. Is that correct.

MR. McMUNN: That's right. I don't have it.

JUDGE: You've never seen it, nor has your witness seen it.

MR. McMUNN: That's right. Well, he may have seen it. I haven't. I don't dispute that Mr. Allen may have given him a copy of it, but I personally haven't seen it and it hasn't been given to me.

If Mr. Allen would like to introduce it for use in cross examining Mr. Gould, I would have no objection to that. But it's not in the record at this time.

JUDGE: Mr. Allen, I -

MR. McMUNN: There are references to it, though, in some of those reports.

MR. ALLEN: That's not my problem, Your Honor. I realize he's probably not going to object if I put it in.

But that whole line of questioning is raising in derogation of our stipulation, that those samples were not done either correctly and that they were done wrong, or something.

Now, I'm not saying Mr. Gould disagreed basically with Mr. McMunn's statements that you couldn't find this, you couldn't find that. That factual data, which that is, and the maps therefrom, were a part of our stipulation as I understood it. And whether they interpret them differently, fine. He can interpret them anyway and testify anyway.

But that was not the problem.

JUDGE: All right, has he ever seen this other document that we're talking about?

MR. ALLEN: Mr. Gould?

JUDGE: Yes.

MR. ALLEN: Unless he's going to say he didn't, I gave it to him.

MR. McMUNN: Let's ask Mr. Gould. Do you recall seeing these items he's referring to?

THE WITNESS: Yes.

JUDGE: Now, basically I understand Mr. McMunn's questioning is that in certain of these areas, you didn't see any evidence of channel samples or drill holes or other things being taken. You won't say that there weren't some. You did not see any.

THE WITNESS: I've seen the drill holes. However, the channel samples, the surface samples, I didn't see where any of those were taken.

I don't know how they took them. I don't know if they took one rock and said, this will represent ten feet. I don't know how they took the samples.

JUDGE: But you're not saying they didn't take some sort of samples.

THE WITNESS: No, I'm not.

JUDGE: You just didn't see any evidence of channels having been cut.

THE WITNESS: That's true.

JUDGE: I think that's within the agreement.

MR. ALLEN: I just wanted you to understand what my problem was.

(Tr. 58-62).

It seems clear to us that contestees understood the stipulation to mean that the Government admitted that both the taking and assaying of the samples had been performed correctly, though the relevance of the individual samples and the conclusions to be drawn from the assay results were clearly matters of possible dispute.

In their statement of reasons for appeal, contestees suggest that Judge Clarke discounted the chip sampling performed by OXY because of the inability of the Government's witness to ascertain when or how the chip sampling was conducted. This, contestees argue, was in violation of the terms of the agreed stipulation.

Counsel for the Government disagrees with contestees on the scope of the stipulation, expressly arguing that:

No one agreed that all the data contained in the reports stipulated into evidence was correct and unimpeachable. The data did not itself agree. It was simply stipulated in to spare having to lay a foundation for it item by item.

June 29, 1983

(Answer at 18).

Our review of the record supports contestees' view of the scope of the stipulation. First of all, as we have indicated above, the construction that contestees were placing on the stipulation was clear from the record. If the Government's counsel was of a contrary mind, it was his obligation to expressly place his interpretation in the record at that time, so as to put contestees clearly on notice of this differing construction. This the Government's counsel did not do. We believe that the hoary legal maxim "qui tacet, consentire videtur" is properly applied.

Moreover, insofar as counsel for the Government alleges that "the data did not itself agree," we find that the record does not support this broad assertion of fact. Thus, in reference to the drilled section of Area A, James B. Fletcher, one of contestees' experts, testified that results based on extrapolations from the chip sampling data were "compatible" with results derived from the drilling hole data (Tr. 38). While it is true that Robert Mitcham, one of the Government's experts, testified that the chip sampling in Area A showed surface value in areas where the drilling had established a lack of values at depth, the thrust of his statement was that this supported prior testimony by Gould that surface sampling was unreliable because of the possibility of anomalies (Tr. 175).² Thus, this testimony properly relates to the question of the efficacy of surface sampling, not whether the sampling was correctly done.

We hold, therefore, that the parties stipulated that all sampling, including the surface chip sampling performed by OXY, was correctly done, and that the Government is bound by this stipulation. A review of Judge Clarke's decision, however, fails to convince us that Judge Clarke violated the terms of the stipulation. While Judge Clarke did, in fact, recount the testimony of both Gould and Mitcham relating to their inability to determine how the surface samples were taken (Decision at 5), Judge Clarke did not premise his conclusions on the unreliability of the sampling *technique*. Rather, he held that since surface sampling might yield anomalous results because of the possibility of either enrichment or leaching, he did not accord them probative weight, and further, he rejected any attempt to project ore reserves on the claims other than Nos. 1 and 2, because it required use of geologic inference. Regardless of the validity of these ultimate conclusions, we do not find that Judge Clarke misapplied the terms of the stipulation.³

² Appellants have also attacked Mitcham's testimony on this point, arguing that the Government's Exhibit 6, on which Mitcham was basing his argument, incorrectly located various drilling holes. The question concerning which exhibits correctly show the loci of the drilling holes will be examined, *infra*.

³ However, we do wish to make it clear that, to the extent contestees argue the testimony of Government experts that chip sampling was an unreliable method by which to determine the quantity and quality of reserves was also beyond the scope of the stipulation (see Statement of Reasons at 9), their argument is similarly rejected. As we read the stipulation, challenges to the efficacy of chip sampling to determine quantity and quality of the deposit were clearly *not* foreclosed.

Judge Clarke's summary of the testimony adduced at the hearing has not been challenged by either party. We set it forth here in order to provide a focus for the substantive contentions of the appellants:

At the Hearing, evidence was introduced through witnesses and exhibits. The Contestant's witnesses are all employees of the National Park Service, David Jones, a mining engineer, Walter Gould, a geologist, Robert Mitcham, a mining engineer, and Robert D. O'Brien, a mining engineer. The Contestees' witnesses consisted of James B. Fletcher, a mining engineer (employed as a consultant on behalf of the Contestees), Thomas A. Clary, a geologist (employed as a consultant on behalf of the Contestees), and James Gary Feezor, one of the Contestees.

Prior to introduction of any evidence, it was stipulated by counsel for the Contestant and for the Contestees that certain reports be entered into evidence. These reports had been made available to the various witnesses. The stipulation specifically encompassed Contestant's Exhibits 1-4 and Contestee's Exhibits A-F.

* * * * *

The data used by the various witnesses was from past drilling on the claims by Tom Beard, who engaged in an exploration drilling program in 1968, Richard E. Mieritz, a one time claimant who drilled them in 1969-71, and Norandex, Inc., which drilled the claims in 1970. (See, Exhibits 1, 2, 4, 10, and A; Tr. 49, at 6; 50, at 15; 155, at 22; 162, at 8; 173, at 24; 176, at 12; 189, at 11; 194, at 22; 248, at 21; 271; 377, at 10; 381, at 22.)

Each of the witnesses who analyzed the available drilling data related to the claims agreed that it established the existence of a copper deposit lying on claims 1 and 2. Other areas in the claim group which were drilled yielded no or poor value.

The copper deposit drilled on claims 1 and 2 contains approximately 400,000 tons, at a grade of approximately .50 copper. Tonnages and grades derived on the deposit varied somewhat between the witnesses who computed them due to their use of different cut-off grades in their respective analysis of the existing data (Tr. 50, at 9-10; 173, at 15-23; 273, at 5-6; 380, at 14-25). All agreed, however, that a deposit of the size and grade established by the available drilling data would not be economic to mine, as it would not justify the capital investment necessary to remove it from the ground (Tr. 51, at 22-24; 63, at 14-19; 177, at 2-12; 291, at 3-5; 417, at 18; 418, at 6).

The locations of drill holes could be established on the ground. The drilling programs were mapped. Samples were taken at uniform intervals on the drill cuttings. Assay results on the samples so taken were available (Tr. 158-176; 181, at 9; 198, at 1). Some questions of interpretation arose concerning the bottoms of some of the holes, but the parties implicitly stipulated to the admissibility and use of the available drilling data.

The Occidental Minerals Corporation engaged in a surface sampling program on the claims at issue in 1975. Results from Occidental's sampling were relied upon by the Contestees in their presentation, but not by the Contestant.

Witnesses for the Contestant were unable to determine with precision where or how the Occidental surface samples were taken when they investigated the claims.

Mr. Gould testified:

"I've seen the drill holes. However, the channel samples, the surface samples, I didn't see where any of those were taken. I don't know how they took them."

Mr. Mitcham, who testified to having been over all the property covered by the claims (Tr. 174, at 1), was unable to find evidence of such trenching as would have allowed Occidental to get down to bedrock and properly sample the claims.

In contrast to the testimony of Mr. Gould and Mr. Mitcham, Mr. Fletcher testified that the surface samples taken by Occidental were generally chip samples taken at exposures and projected down dip, although some were soil samples taken in areas with poor exposures (Tr. 395, at 5; 401, at 6). Mr. Fletcher admitted that areas which he projected to have ore bodies were cut-off by faulting, as had earlier been pointed out by Mr. Jones. (See, Exhibit 5; Tr. 17, at 10; 27, at 7; 36, at 7-18; 395, at 13-15; 396, at 19-22; 398, at 2-8; 399, at 1-8, 14-20.)

* * * * *

June 29, 1983

Mr. Gould testified that in Area A the ore was outlined by barren drill holes which fenced off the dimensions of the deposit, Tr. 133, and that none of the holes bottomed in increasing copper values outside of the mineralized area. Tr. 135. In Area B, Mr. O'Brien did not believe that the testing could be taken to show any extensive copper mineralization. He found two holes that had been drilled in the area which he believed to be either barren or low because it was his opinion a lot more drilling would have been done if they were not barren. Tr. 56. He did not find any trenches where channel samples could have been taken and it was his opinion that it would be necessary to dig trenches in order to take adequate channel samples. Tr. 57.

Mr. O'Brien testified that the major mineralization was on claims 1 and 2 with a small pod of mineralization on claim No. 7, with minor outcrops on claim No. 13. Tr. 296. In regard to the outcrop on claim 7, he stated that "Looking at it from the surface of what I could see, it was barren. And breaking the rock, it was barren." Tr. 300. He could not find any extension of the mineralization. Tr. 302.

Mr. Mitcham testified that in his investigation of area B that the Mieritz drill holes obtained values in the area of .0 percentage, Tr. 174, and that in his opinion this proved that the surface outcrop in the area had no extension. Concerning Area C, Mr. Gould testified that he could find no evidence of mineralization in the area at all. Tr. 55. In the middle area he found just dolomite, that is on claims 8, 10, and 28. No indication of copper. Tr. 138, 139. Mr. Mitcham testified that he looked for outcrops in Area C, but was unable to locate any. Tr. 174, 175. Mr. O'Brien, who spent some seven days on the property in 1974 found only mineralization on claim 7, with some minor outcrops on claim 13. Tr. 296.

None of the witnesses for the Contestant believed that in determining the extent of mineralization, one could reasonably use the surface samples, used by Mr. Fletcher, to project ore reserves, and all of the witnesses for the National Park Service, who were all well qualified mining engineers or geologists, stated that a prudent man would not be justified in spending his time and means with a reasonable prospect of developing a paying mine on any or all of the claims. Mr. Gould testified that he didn't think anyone would use surface samplings to compute reserves but that you could only use surface sampling as an indication of what you have.

The Contestees employed Mr. Fletcher to make an economic feasibility study of the Copper Lode Claims. Mr. Fletcher is a consulting mining engineer with many years of experience, particularly in the area of in-situ leaching. Tr. 360-367. Mr. Fletcher testified his evaluation was essentially a two-stage process. First, he ascertained the nature and configuration of the mineral deposit. Second, he combined his evaluation of the deposit with his calculation of all the various capital and operating costs involved in order to determine the return on investment and the discounted cash flow at a given price per pound of copper.

The Contestees also employed Mr. Clary, a geologist with many years of experience which included in-situ leach operations. Tr. 444-448. Mr. Clary made a short visit to the Copper Lode claims, appraised Mr. Fletcher's Report and attended the Hearing for purposes of appraising the testimony from a geologist's standpoint. Tr. 450.

Mr. Fletcher's Report and conclusions are set forth in Contestees' Exhibit A. In his report and in his testimony, Mr. Fletcher expressed the opinion that there existed three ore deposits within the boundaries of the eleven contested claims, consisting of (Area A), (Area B), and the Middle (Area C), these in his opinion, would justify a prudent man in expending his time and his efforts with the reasonable prospect of developing a valuable paying mine within the boundaries of each of the eleven claims. Tr. 403-405.

Mr. Fletcher testified that in determining the nature and configuration of the mineral deposits, he first compared the results obtained from the chip samples taken by Occidental from within the "drilled out" area of the South Ore Body to the drilling results to see if the chip sampling results correlated with the drilling results. Mr. Fletcher testified that the chip samples within the "drilled out" area were taken at various intervals from the top to the bottom of the strata-bound mineralized zone, not only as a further check of the drilling results but also to ascertain whether or not a chip

sampling program could be used to fairly evaluate that portion of the mineralized zone within which no significant drilling had been done. Tr. 377-379. Having determined that the chip sample results compared favorably with the drill results (Tr. 389-381, 389), Mr. Fletcher then considered the chip sample results obtained beyond the "drilled out" area in computing the total reserves. He testified that the chip samples were taken from sampling points throughout the thickness (as well as the lateral extent) of the mineralized zone, thus giving the "third dimension" necessary to establish the validity of the geologic projections. Tr. 383, 392-396, 398-401. Both Mr. Fletcher and Mr. Clary described the method and manner of measuring the thickness of the mineralized sections and both testified as to the validity and usage within the industry of this method of reserve computation. Tr. 390, 460, 466, 481.

Based upon his evaluation of the nature and configuration of each of the mineral deposits, Mr. Fletcher concluded that ore reserves exist as follows:

<i>Deposit</i>	<i>Tons</i>	<i>% of Copper</i>	<i>Within COPPER LODGE Claims</i>
South Ore Body (A)	2,480,000	0.55	1, 2, 3, 13, and 14.
North Ore Body (B)	700,000	0.77	5, 7, 8, and 9.
Middle Ore Body (C)	1,030,000	0.30	10 and 28.
	4,210,000	0.53	

See *Contestees' Exhibit A*, p. 1. Mr. Fletcher stated in his Report that his reserve estimates are conservative and in arriving at the estimates he used a 0.30% copper cutoff grade.

Mr. Clary, based on his review of information, data and reports and his examinations of the Copper Lode properties also expressed an opinion that minerals had been found of such character that a person of ordinary prudence would be justified in the further prospect of success in developing a valuable mine within the boundaries of the eleven contested claims. Tr. 471-472, 474-476.

(Decision at 2, 4-8).

As is clear from a review of the evidence, there exist two major areas of contention: (1) to what extent can geologic inference be used to establish the quantity and quality of a mineralized deposit; and (2) assuming that geologic inference can be so utilized, what inferences are properly drawn from the evidence of record. We will proceed to a consideration of these two questions.

[2] Two general statements have repeatedly been made with reference to use of geologic inference. First, geologic inference may not be relied upon to establish the existence of a mineral deposit. See *Henault Mining Co. v. Tysk*, 419 F.2d 766 (9th Cir. 1969); *United States v. Watkins*, A-30659 (Oct. 19, 1967), *aff'd sub nom. Barton v. Morton*, 498 F.2d 288 (9th Cir. 1974); *United States v. Reylea*, A-30909 (June 25, 1968), *aff'd, Reylea v. Udall*, Civ. No. 3-58-20 (D. Idaho 1970); *United States v. Edeline*, 39 IBLA 236 (1979); *United States v. Hines Gilbert Gold Mines Co.*, 1 IBLA 296 (1971). Second, it has also been the consistent view of the Department that "[w]hile geologic inference may not be relied upon to establish the existence of a mineral deposit, it may be accepted as evidence of the extent of a deposit." *United States v. Hooker*, 48 IBLA 22, 30 (1980) quoting *United States v. Larsen*, 9 IBLA 247, 262 (1973), *aff'd, Larsen v. Morton*, Civ. No. 73-119 TUC-

June 29, 1983

JAW (D. Ariz. Oct. 24, 1974). While these two general principles are not necessarily inconsistent, a review of the case law shows that a tension has developed over the nature of the mineral deposit which must be exposed in order to permit use of geologic inference.

Thus, on the one extreme are cases such as *United States v. Edeline supra*, which have arguably held that geologic inference "cannot be used as a substitute for evidence sufficiently showing the existence of an ore body or bodies *necessary to warrant a prudent man to develop a valuable mine.*" *Id.* at 241 (italics supplied). These decisions imply that a discovery of a valuable mineral deposit must be shown to exist *before* recourse may be made to geologic inference. This, of course, begs the question of why one would be concerned with geologic inference when a discovery had already been established.⁴

The opposing view is best seen in *United States v. Larsen, supra*. In that decision, the Board expressly denied that the Department had held "geologic inference to be without value as evidence of a discovery." *Id.* at 262. The Board, per Administrative Judge Ritvo, then went on to say:

While geologic inference may not be relied upon to establish the existence of a mineral deposit, it may be accepted as evidence of the extent of a deposit. That is, where ore had been found, the opinions of experts, based upon knowledge of the geology of the area, the successful development of similar deposits on adjacent mining claims, deductions from established facts—in short, all of the factors which the Department has refused to accept singly or in combination as constituting the equivalent of a discovery—may properly be considered in determining whether ore of the quality found, or of any mineable quality, exists in sufficient quantity to justify a prudent man in the expenditure of his means with a reasonable anticipation of developing a valuable mine.

Id. Accord, United States v. Hooker, supra.

The source of this conflict can be discerned from a review of the early Departmental and judicial pronouncements on this question. *United States v. Henault Mining Co.*, 73 I.D. 184 (1966), involved a contest initiated under section 5 of the Surface Resources Act, Act of July 23, 1955, 69 Stat. 369, 30 U.S.C. § 613 (1976). The mineral claimant in that case had alleged that high mineral values in the area were consistently found in the Homestake formation. Though the claimant believed that the formation dipped beneath his property, the Homestake formation had not been exposed thereon. Appellant suggested, however, that a number of tertiary dikes which did outcrop on the claims had originated beneath the Homestake formation and thus it could be geologically inferred that the Homestake formation underlay the claims.

In its decision rejecting this contention, the Department expressly noted that there was no contention "that the Tertiary dikes or

⁴It would seem that, under this approach, the only possible relevance of geologic inference would be that it might be used to establish the existence of a valuable mineral deposit on adjacent claims. This, however, runs into the oft repeated principle that each claim must have an exposure of a valuable mineral deposit within its boundaries. See, e.g., *United States v. Weber Oil Co.*, 68 IBLA 37, 43, 89 I.D. 538, 540-41 (1982).

intrusions carry valuable mineral deposits." 73 I.D. at 193. Responding to an argument that the claimant had met the threefold test established in *Jefferson-Montana Copper Mines Co.*, 41 L.D. 320 (1912), for establishing a discovery on a lode claim,⁵ the Assistant Solicitor adverted to the language immediately following the test, that, among the many factors relevant to the prudent man determination were "[t]he size of the vein, as far as disclosed, the quality and quantity of mineral it carries, * * * the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts." 41 L.D. at 323-24.

This language clearly refers only to the vein or lode which has been discovered and "disclosed" and sets forth the factors for determining whether *that* vein or lode contains mineral values worth exploiting. In the case here, the only veins or lodes which have been exposed on the claims are the Tertiary dikes or intrusions which are not claimed to be [a] source of valuable mineralization. The discovery upon which the appellant relies is of the Homestake formation which has not been exposed on the claims. [Italics in original.]

73 I.D. at 195. Thus, the *Henault* case merely reaffirmed the traditional view of the Department that an exposure of the vein or lode allegedly carrying the mineral values is a necessary precondition to the validity of a lode claim, and that geologic inference could not be substituted for such an exposure. See, e.g., *East Tintic Consolidated Mining Claim*, 40 L.D. 271 (1911), on rehearing, 41 L.D. 255 (1912). The Department's decision was affirmed in *Henault Mining Co. v. Tysk*, *supra*.

In *United States v. Watkins*, *supra*, the Department examined a slightly different question. The issue, therein, was:

[W]hether there is a difference between the use of inference to establish the existence of a mineral-bearing vein where the vein itself has not been found and the use of inference to establish the existence of a valuable mineral deposit within a vein where the vein itself has been found but the mineral deposit which it is supposed to contain has not.

This question was answered in the negative. While this decision and the Ninth Circuit decision in *Barton v. Morton*, *supra*, which affirmed it, have occasionally been cited as supporting the proposition that geologic inference cannot be utilized until after a showing that a *valuable* mineral deposit has been "discovered," an analysis of the case does not support this broad proposition.

We believe that the key distinction to keep in mind is the difference between "a mineral deposit," and "a valuable mineral deposit." As modern adjudications have developed, the latter phrase has come to mean a mineral deposit of sufficient quantity and quality so as to justify a prudent man in expending both labor and money in

⁵ In *Jefferson-Montana Copper Mines Co.*, *supra*, the First Assistant Secretary stated:

"[I]t is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

"1. There must be a vein or lode of quartz or other rock in place; 5

"2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;

"3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine."

Id. at 323.

June 29, 1983

developing a paying mine. Where the term "mineral deposit" is used, it merely means, in the context of a lode claim, that a mineralized area in a vein or lode has been disclosed. It does not necessarily mean that a *valuable* mineral deposit has been exposed. It is important, therefore, to clearly focus on the specific language of the decision in *Watkins*. What it exactly holds is that geologic inference may not be used to establish the existence of a *valuable* mineral deposit where *no* mineral deposit has been exposed within the claim.

In *Watkins*, the claimants' experts had expressly testified that the vein showed no economic mineral values in the shallow depth of its exposure. That values existed at depth was presumed from the fact that claims in nearby areas showed little values on the surface, but substantial percentages of minerals below. In analyzing the claimants' showings, the Department noted:

But what is the real significance of the evidence of mineralization that has been found here? It is nowhere suggested that any quantity of material of the quality of the vein matter thus far disclosed would constitute a minable body of ore. The evidence does not, in fact, establish any mineral quality of any consistent extent. Although appellants have found ore *samples* with indicated values exceeding \$70 per ton, the record does not support a finding that they have found a *deposit* yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated. The evidence of record indicates that the values thus far found are spotty, and appellants do not argue otherwise.

Nor does the evidence relating to the geology of the area establish a basis for concluding that there has been a discovery. While it is true that the fact that similar veins in the particular locality have been explored with success is an element to be considered in evaluating the mining potential of a vein, yet it is only one of a number of elements to be considered, and, in this instance, it seems clear that it is far from a conclusive factor.

* * * * *

The most that can be said from [the] evidence, and all that the appellants have asserted, is, as observed by the hearing examiner, that the values of the minerals which have been found are sufficient to induce further exploration. Thus, when appellants assert that "a prudent man would be justified in expending further time and effort with a reasonable prospect to develop a paying mine," it is clear that they mean that a prudent man would be justified in expending further time and effort in *exploring* for minerals with a reasonable prospect of *finding* a mineral deposit which could be expected to lead to the development of a paying mine. [Italics in original.]

United States v. Watkins, supra.

In discussing this decision, and the rationale thereof, this Board has had occasion to note that in the *Watkins* case as well as *United States v. Coston*, A-30835 (Feb. 23, 1968):

[T]he mining claimants failed to establish a basis for even an estimate of the quantity of ore of any particular quality that might be found on the claims, and, *in the absence of such a foundation*, it was found that the attempt to infer the existence of a valuable mineral deposit from the sampling of exposed areas of mineralization was unacceptable evidence of the discovery of such a deposit. [Italics supplied.]

United States v. Larsen, supra at 262 n.12. Correctly understood, *Watkins* stands for the proposition that the mere exposure of isolated

mineralization in a vein structure, which mineralization is not, itself, the mineral deposit on which the claim's validity is predicated, affords an inadequate *factual* basis for the utilization of geologic inference.⁶ Thus, as a practical matter, these cases do not support the view that geologic inference may not be used absent a discovery; rather, they merely reemphasize the fact that geologic inference is but one of many factors that go into the ascertainment of the existence of a valuable mineral deposit.

In a number of subsequent decisions, the Department examined problems relating to showings of isolated mineralization. See, e.g., *United States v. Gunsight Mining Co.*, 5 IBLA 62 (1972), *aff'd*, *Gunsight Mining Co. v. Morton*, Civ. No. 72-92 Tux-JAW (D. Ariz. Sept. 12, 1973); *United States v. Hines Gilbert Gold Mines Co.*, *supra*. *Gunsight Mining* involved claims located primarily for fluorite. Because, however, the fluorite deposit could not be economically mined alone, validity of the claims depended on the presence of associated metallic minerals which could be mined with the fluorite. While a few of the 400 samples taken showed high values for various minerals, hundreds of other samples showed clearly submarginal values. No deposits of such associated minerals were shown to exist. The Board, in rejecting attempts to apply geologic inference in this fact situation, noted:

While the Department requires no showing of commercial ore sufficient to assure the economic success of a mining venture, there must be a physical disclosure of a mineral deposit of sufficient value to indicate that it would be reasonable to expect that an economic success would result from the development of a mine. Otherwise the venture would constitute rank speculation, a pure gamble.

5 IBLA at 69. To similar effect is the decision in *Hines Gilbert*.⁷

While these cases might be read as holding that geologic inference could not be used in situations involving isolated high mineralization, they are better understood as holding that geologic inference, standing alone, is insufficient to establish the existence of a valuable mineral deposit where it is necessary to infer continuity of values at depth where such values have not yet been disclosed. In other words, while geologic inference is, in fact, applicable, isolated and erratic high values are simply incapable of giving rise to an inference that better values exist someplace on the claim. In essence, and in practice, geologic inference is primarily applicable as a basis upon which to show continuity of values. Thus, where values have been high and

⁶ This analysis, perforce, applies to *United States v. Reylea*, *supra*, since that decision is, by and large, merely one long quotation from *United States v. Watkins*, *supra*.

⁷ While the substance of the decision is, indeed, in accord with that of *Gunsight Mining*, the Board decision in *Hines Gilbert* did state:

"[I]f the claimant has failed to expose sufficient mineralization within the claims to constitute a discovery of a valuable mineral deposit, it is irrelevant that the land may be considered mineral in character on the basis of geologic inferences drawn from the geologic indicia on the claims themselves and on other nearby lands." ✧

1 IBLA at 298. This statement can only be understood in the context in which it was made. Appellant had alleged that the fact that the land was mineral in character established the validity of its claim. The statement quoted above merely indicated that geologic inference could not establish the validity of a claim in the absence of an exposure of a mineral deposit. The reference therein was not intended to imply that geologic inference could not be used, *once an exposure existed*, to aid in establishing the extent of the deposit.

June 29, 1983

relatively consistent, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man would be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. See *United States v. Harenberg*, 9 IBLA 77, 83 (1973). The vast majority of decisions have followed this analysis. See, e.g., *United States v. Hooker*, *supra*; *United States v. Kinsley Ranch Resort, Inc.*, 20 IBLA 14 (1975); *United States v. Clifton*, 14 IBLA 146 (1974).

Admittedly, both *United States v. Walls*, 30 IBLA 333 (1977), and *United States v. Vaux*, 24 IBLA 289 (1976), contain headnotes which, after noting that geologic inference alone cannot support a discovery, state that "[t]he claimant must actually expose a valuable mineral deposit physically within the limits of the claim." 30 IBLA at 334; 24 IBLA at 291. Neither case, however, actually supports the proposition that a *valuable* mineral deposit must be shown before geologic inference can be used.

In *Vaux*, there were no exposures of any value in the claims. In *Walls*, which involved three claims, the only mineralized exposure was a remnant lens of ore on the Dreamland mining claim admittedly representing a quantity of ore not in excess of 15.47 tons. The Administrative Law Judge had determined that, based on reliable assays and cost factors, this lens could not be mined at a profit. The geologic inference which appellants therein sought to apply was the likelihood that another enriched zone, structurally unconnected to the exposed lens, *might* exist within the claim. *Id.* at 341-43. The Board properly rejected the attempt to substitute geologic inference for the necessary exposure. Thus, while the statements made in the headnotes of *Vaux* and *Walls* might lend themselves to misinterpretation, these cases do not support the view that a discovery must be shown to exist before recourse may be made to geologic inference.

The decision in *United States v. Edeline*, *supra*, holding that geologic inference "cannot be used as a substitute for evidence sufficiently showing the existence of an ore body or bodies necessary to warrant a prudent man to develop a valuable mine" stands in stark isolation as the only case in which such a standard was even arguably applied. Thus, that decision noted that "[w]hile appellants contend that an immediate profit can be realized by mining bodies of exposed ore, the exposed deposits are of such limited extent and their removal such a short-term matter that it would not constitute the development of a mine." 39 IBLA at 241, 247-48. It is precisely on this point we believe the *Edeline* majority erred by refusing to even consider what might be geologically inferred. Unlike the situation in *United States v. Walls*, *supra*, appellants in *Edeline* were seeking to show continuity of high values in a specific vein based on high values, though of limited extent, on exposed portions of that vein. Quite apart from the question of whether geologic factors would support an inference of continuing high

values, the refusal to even consider what might be geologically inferred was in error. To the extent that anything in *United States v. Edeline, supra*, is inconsistent with our above analysis, it is hereby expressly overruled.

Returning to the instant case, it is obvious in light of our above discussion that, to the extent exposures and samples exist which show high values of relative consistency, geologic inference is properly used to determine the reasonable likelihood of the persistence of similar mineralization beyond the areas actually sampled or exposed. With this in mind, we will proceed to evaluate the evidence of record.

We will discuss the three mineralized areas (A, B, and C) separately. The testimony was unanimous that an ore body was disclosed in Area A. What was disputed, however, was whether there was a sufficient deposit of the quality of ore exposed to warrant further expenditures in the reasonable prospect of developing a paying mine. This difference of opinion was largely occasioned by differing views by the experts as to whether there was an extension of the deposit delineated in claim Nos. 1 and 2, onto claim Nos. 3, 13, and 14, that is, in a southeasterly direction. We feel that geologic inference could clearly be used to show the extent of the deposit disclosed on claim Nos. 1 and 2. The question, however, is what such inference properly establishes.

Contestees analyzed the deposit in Area A in four segments: Parts I, II, III, and IV. Parts I and II comprised most of the area drilled by Mieritz, with a slight extension to the east. Part III abutted Part II on the southeast and trended in a southeast direction crossing from claim No. 2 to claim No. 3. Part IV abutted Part III basically on its south line and continued to the northern part of claim Nos. 13 and 14. It is contestees' contention that the surface sampling performed by OXY, when correlated with the various drill holes in Parts I and II and the topography of the area, established that the deposit extended onto Parts III and IV. In order to establish whether such an inference can be supported, it will be necessary to examine what, precisely, the drill holes showed.

As mentioned above, virtually all of the drill holes in Area A were drilled by Mieritz. While he did not testify, the report which he prepared was submitted at the hearing as Exhibit 2. In this report, Mieritz stated that his drilling program "developed 324,000 tons of 0.77% oxide copper ore, *but did not delimit the ore body completely, extensions being possible in three directions; namely, northward, northeasterly and mainly southeasterly—toward a second known area of mineralization*" (Exh. 2 at 4-5 (italics in original)).

Insofar as potential ore was concerned Mieritz suggested that "[t]he strong mineralized area southeast of the present ore body is a good target and must be drilled in a grid pattern similar to that used on the present ore body" (Exh. 2 at 6). He also suggested that the "North deposit" (Area B) might, if properly explored, add a substantial ore reserve.

June 29, 1933

Since the OXY surface sampling program did not occur until 1975, Mieritz' failure to consider that data cannot be used to discount its utility. On the other hand, while Mieritz clearly recognized the potential of a southeast extension, he also clearly expected that it would be tested by drilling, as he had tested the ore body in Parts I and II.

The only report which utilized the OXY surface samples as a basis for computing reserves was that prepared by Fletcher. See Exhibit A. Using reserve terminology of probable and possible, Fletcher estimated total "probable" reserves of 3,180,000 tons at .60 percent copper on Areas A and B, together with 1,030,000 tons at .30 percent copper on Area C as a "possible" reserve.⁸

The various Government witnesses did not use the surface samples. This omission was justified on two discrete grounds. First, Gould testified that only proven reserves could be used to establish the quantity and quality of a mineral deposit for purposes of establishing a discovery. See Tr. 75, 96, 107-08. While both Mitcham and O'Brien may also have been of the belief that only proven reserves were relevant to the question of discovery, the major thrust of their testimony was that the drill holes had established the limits of the ore body in Area A and that surface sampling produced results too anomalous to permit geologic projections. See Tr. 175, 206-07, 217, 285, 308-11. Thus, we are presented with both a question of law, *i.e.*, can other than "proven" reserves be utilized to show necessary quantity and quality, and a question of fact, *i.e.*, what inferences are properly drawn from the evidence.

Insofar as the question of law is concerned, the answer is relatively clear. In *United States v. Hooker, supra*, this Board examined the type of reserves necessary to support a discovery of uranium. *Id.* at 35. The definitions set forth were those used by the Atomic Energy Commission, and thus specifically applicable only to uranium. They are, however, virtually verbatim replications of the definitions jointly used by the Geological Survey and the Bureau of Mines for general use in classifying reserves. The relevant Survey definitions are as follows:

Measured.—Reserves or resources for which tonnage is computed from dimensions revealed in outcrops, trenches, workings, and drill holes and for which the grade is computed from the results of detailed sampling. The sites for inspection, sampling, and measurement are spaced so closely and the geologic character is so well defined that size, shape, and mineral content are well established. The computed tonnage and grade are judged to be accurate within limits which are stated, and no such limit is judged to be different from the computed tonnage or grade by more than 20 percent.

Indicated.—Reserves or resources for which tonnage and grade are computed partly from specific measurements, samples, or production data and partly from projection for a

⁸ Fletcher's report and testimony were couched in terms of proven, probable, and possible reserves. The Government witnesses generally testified in accordance with the resource classification system delineated in Geological Survey Bulletin 1450-A, *i.e.*, measured, indicated, and inferred. While "measured" is comparable to "proven," there is no precise compatibility between "probable" and "indicated" or "possible" and "inferred." As the Bulletin notes, depending upon the amount of sampling both "probable" and "possible" might be classified as "indicated."

reasonable distance on geologic evidence. The sites available for inspection, measurement, and sampling are too widely or otherwise inappropriately spaced to permit the mineral bodies to be outlined completely or the grade established throughout.

Demonstrated.—A collective term for the sum of measured and indicated reserves or resources.

Inferred.—Reserves or resources for which quantitative estimates are based largely on broad knowledge of the geologic character of the deposit and for which there are few, if any, samples or measurements. The estimates are based on an assumed continuity or repetition, of which there is geologic evidence; this evidence may include comparison with deposits of similar type. Bodies that are completely concealed may be included if there is specific geologic evidence of their presence. Estimates of inferred reserves or resources should include a statement of specific limits within which the inferred material may lie.

Principles of the Mineral Resources Classification System, Geological Survey Bulletin 1450-A at A3–A4.

In *United States v. Hooker*, *supra*, the Board directly held that “indicated” reserves could be used to establish quantity and quality. *Id.* at 35-36; *accord*, *United States v. Larsen*, *supra* at 262-63. The Board noted, however, that the question of whether “inferred” reserves could be utilized had yet to be determined. *But see United States v. Wells*, 11 IBLA 253, 258 (1973).

As noted above, demonstrated reserves (*i.e.*, measured and indicated) can clearly be used to show the quantity necessary to establish a discovery. We do not, however, believe that any such broad ruling can be made insofar as inferred reserves are concerned. To the extent that such an estimate is based on assumed continuity or repetition *for which there is geologic evidence*, we feel such a reserve base can properly be considered. Where, however, a body is completely concealed, so that its actual existence must be predicated on geologic inference, use of geologic inference would, in effect, substitute for the exposure of the mineral. Such an exposure, however, is a necessary precondition to a discovery. Therefore, an “inferred” reserve whose existence is dependent solely on geologic inference cannot serve as a predicate for finding quantity and quality sufficient to support a discovery.

There was, indeed, a conflict in the testimony whether the mineralized showings in Parts III and IV of Area A constituted either an indicated or inferred reserve. *See* Tr. 112, 205-06. Mitcham testified that, inasmuch as the drilling in Parts I and II completely delineated the ore body, it would be impossible to infer an extension, though it might be possible to infer another deposit (Tr. 204). O'Brien also questioned whether you could call the mineralized area in Parts III and IV an extension of the ore body delineated in Parts I and II (Tr. 312).

Contestees' witnesses, on the other hand, argued that the projected tonnage in Parts III and IV were properly inferred from the chip samples taken across the face of a 40-foot ore zone (Tr. 418-23). Indeed, Clary indicated that taking “chip samples in an ore body is an

June 29, 1983

accepted method of determining the grade of it for calculating measured reserves" (Tr. 466).⁹

[3] It is obvious that the key question involved in this appeal is the reliability of the OXY surface samples as a method upon which to premise reserve calculations. In cross-examining Gould, contestees' attorney briefly summarized contestees' theory:

Q [By Allen] I don't want to belabor or whip a dead horse here or anything, Mr. Gould. But my point is, if you do surface sampling on the grid of the drill area - okay?

A Yes.

Q And you compare that surface sampling with the drilling results - okay?

A Yes.

Q They are compatible - the surface sample on the drilled area and the drill results.

A Yes.

Q And then you do surface sampling in the remaining areas of the known mineralized zone, and those surface samples compared to the surface samples and drill results are compatible, can you not soundly geologically make projections as to what lies between those areas in projecting your ore body just as you do between drill holes?

A No.

Q And it is something that in your opinion is not used in the industry to determine what amount of ore and grade of ore is present?

A I wouldn't use it. You see, copper goes into solution and it can [move] a great distance. You can have a surface sample, an anomalie, that is very high which will have nothing under it.

Q But isn't that the same truth as various parts of a drill hole, that you will have very high parts and maybe barren parts as you -

A Yes, that's true.

Q And do not the surface samples taken in a sound geological method go through the strata and indicate the strata just as a drill hole does?

A I wouldn't rely on it.

(Tr. 70-71).

The Government, on the other hand, contends that not only would such surface sampling yield inherently unreliable results, but that comparisons of the surface samples with the drilling results in Areas A and B showed that there was no identifiable correlation. Thus, Mitcham testified that the chip samples showed good values in Area A even where drilling had failed to disclose similar values at depth (Tr. 175). Similarly, Mitcham argued that the Mieritz drilling showed little value at depth for the north body, while the surface samples indicated a greater grade of copper than was found in Area A (Tr. 174).

⁹ It is evident, however, that while this form of sampling might show the grade of the deposit, quantity must be dependent upon other factors, including reasonable geologic inference.

Appellants have strongly attacked this argument. In their statement of reasons, they refer to Mitcham's testimony, note that Mitcham based his conclusions on Exhibit 6, and contend that Exhibit 6 erroneously placed the surface samples as extending beyond certain drill holes when they were, in fact, within these holes. Appellants suggest that this error can be seen by comparing the Mieritz map (Subexh. 5 to Exh. 4)¹⁰ with Fletcher's map (Exh. G). Our independent review of the various exhibits, however, leads us to the opposite conclusion, that contestees' Exhibit G misplaced the drill holes.

One of the problems in a cross comparison is the varying scale of the relevant maps. Thus, Exhibit 6, and Subexhibit 5 are on a scale of 1 inch to 100 feet. The OXY map (Exh. C and Subexh. 6 of Exh. 4) and the Fletcher map (Exh. G) are both one-half inch to 100 feet. It is impossible, therefore, to visually correlate all of the maps. When actually measured, however, a clear conclusion results.

A key question is whether drill hole H-61, which showed minimal values throughout its 60-foot depth, is located north or south of chip samples 53 and 108. Chip samples 53 and 108 showed copper values of .62 and .76 percent copper, respectively. Government Exhibit 6 placed both of these chip samples northeasterly of drill hole H-61, outside the defined ore body which had been delineated by drilling. Contestees' Exhibit G showed these two surface samples considerably south of drill hole H-61. In fact, chip sample 108 is shown as being south of drill hole H-60, which showed .78 percent copper at a depth of 30 feet. Thus, the contestees' map would tend to corroborate their theory that the drilling and surface sampling yielded consistent values, whereas the Government map supports the view that the surface sampling gave results unsupported by actual drilling. The question, then, is which map is correct.

When measured, the maps show that they actually agree on the placement of the OXY chip samples. Thus, Government Exhibit 6 shows chip sample 52 at approximately 1,050 feet from the south endline of claim 2, chip sample 53 immediately adjacent to chip sample 52 on the north side, and chip sample 108 almost directly south of the junction of samples 52 and 53. Contestees' Exhibit G shows virtually the identical position for these samples. A great difference exists, however, in the placement of drill hole H-61. The Government's map places this hole at approximately 1,025 feet north of the claim's south endline and 50 feet east of its west sideline. Contestees' map, however, places the hole at approximately 1,150 feet north of the endline and 150 feet east of the sideline. The correct placement of this drill hole is controlled by the Mieritz map (Subexh. 5 of Exh. 4).

The Mieritz map places H-61 approximately 980 feet north of the endline and 50 feet east of the sideline. Not only does the Mieritz map support the Government's exhibit, it lends greater weight to its

¹⁰ Contestees indicated that the Mieritz map was Subexhibit 3 of Exhibit 4. Subexhibit 3, however, consists of the assay sample returns for the drill holes and the chip samples. The Mieritz map is actually Subexhibit 5.

June 29, 1983

conclusions, since it actually places the drill hole further south of the surface samples than the Government has indicated. Thus, chip samples 53 and 108, which showed good values, are beyond the limits of the ore body as defined by the Mieritz drilling. We have come to the conclusion, therefore, that the chip samples taken in the instant case do not give results sufficiently reliable so as to permit estimates of values at depth on the sole basis of favorable surface showings.

Our conclusion is fortified by comparison of the holes drilled on the north body with the surface samples also taken there. Mieritz drilled five holes in the outcrop. While one showed a value of .41 percent copper at a depth of 10 feet (A 4), none showed any other values throughout their depth. In contradistinction, the surface samples taken from claim No. 7 showed widely varying values. One, in fact, assayed at 2.32 percent copper. While the Mieritz drilling in the north body was admittedly not as structured as the drilling program in the south body, a number of surface samples show values for which there is absolutely no reason to presume continuance at depth. In short, while the surface sampling results might encourage a prospector to continue his search for a valuable deposit, such sampling, in this case, cannot provide sufficient information which would warrant a prudent man to expend time and money in the reasonable expectation of *developing* a paying mine. See *Barton v. Morton, supra*.

This, however, does not necessarily end our analysis since, insofar as Area A is concerned, a mineral deposit has clearly been disclosed and geologic inference, quite independent of the efficacy of the surface sampling, can properly be used to show continuity of values in extensions beyond the disclosed ore body. Mieritz had suggested that extensions were possible, particularly southeasterly. The Government, contrariwise, has suggested that the drilling totally defined the ore body in Area A.

A review of the drilling data does show that the mineralized zone on Area A was virtually bracketed by holes which showed merely waste values. Insofar as a possible southeasterly extension is concerned drill holes H-36 and H-37 averaged values of .05 percent copper over 50 feet and .18 percent copper over 30 feet, respectively. Other drill holes skirting the southeastern perimeter such as H-16, 17A, and 22 show equally minimal values. Considering the topography of the area, in which the drill holes showing value are higher in elevation than those in the southeast which show waste, we see little factual basis for geologically projecting the defined body in Area A beyond the areas delimited by the drill holes. See *United States v. Larsen, supra*.

Inasmuch as it was conceded by all parties that the 400,000 tons of copper shown to exist on claim Nos. 1 and 2 were insufficient to justify the capital expenditures necessary to successfully mine the deposit,¹¹ it

¹¹ Such was the testimony not only of the Government witnesses but of Fletcher as well. See Tr. 418.

is clear that appellants have failed to show by a preponderance of the evidence the existence of a discovery in Area A (embracing claim Nos. 1, 2, 3, 13, and 14). A similar finding necessarily follows for Area B (claim Nos. 5, 7, 8, and 9) since the scattered drilling which was done there gave absolutely no indication that values continue at depths. No other information was tendered which could serve as a factual basis for geologically inferring values sufficient to justify development. With reference to Area C, there was virtually no showing, whatsoever, that mineralization in a vein structure even existed. Thus, we find that Judge Clarke correctly found that these claims are null and void.

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 for the reasons stated herein.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

July 1, 1983

NATIVE AMERICANS FOR COMMUNITY ACTION
v.
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS)

11 IBIA 214

Decided July 1, 1983

Appeal from denial of fiscal year 1983 grant funding under the Indian Child Welfare Act.

Affirmed.

1. Estoppel

Estoppel against the Government is an extraordinary remedy. In order to establish estoppel, it must be shown that the party to be estopped knew the facts and either intended that its conduct be relied upon or acted so as to cause reliance upon its conduct, and that the party asserting estoppel was ignorant of the true facts and detrimentally relied upon the other party's conduct. Estoppel will not be found where there was no affirmative misrepresentation or misconduct by a Government official.

2. Constitutional Law: Due Process--Indian Child Welfare Act of 1978: Financial Grant Applications: Funding--Indians: Welfare

An organization which received funding under the Indian Child Welfare Act during one fiscal year has no right to continued funding during a subsequent fiscal year. There is no analogy between the termination of welfare benefits without a hearing and the expiration of a grant under its own terms.

3. Administrative Procedure: Decisions--Freedom of Information Act (Act of June 5, 1967)

Final decisions and orders of the Department of the Interior made in the adjudication of cases, including Indian Child Welfare Act cases, are both available to the public and indexed in accordance with the requirements of 5 U.S.C. § 552(a)(2) (1976).

4. Federal Employees and Officers: Authority to Bind Government

The erroneous action of a Departmental employee cannot create rights not authorized by law or excuse compliance with a regulation.

5. Regulations: Generally

The Board of Indian Appeals has no authority to declare duly promulgated Departmental regulations invalid.

6. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding--Regulations: Publication

The Bureau of Indian Affairs has promulgated regulations in 25 CFR Part 23 setting forth criteria for the allocation of limited grant funds under the Indian Child Welfare Act. These regulations, including the requirement that tribes be responsible for seeking funding for those tribal members living off the reservation but within areas designated "near reservation" by publication in the *Federal Register*, are reasonable attempts to conserve limited funds and ensure that duplication of benefits does not occur.

APPEARANCES: Martha Blue, Esq., Ward, Blue & Itschner, P. A., Flagstaff, Arizona, for appellant; Penny Coleman, Esq., Office of the

Solicitor, United States Department of the Interior, Washington, D.C.,
for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On December 27, 1982, the Board of Indian Appeals (Board) received a notice of appeal from Native Americans for Community Action (appellant) seeking review of an October 19, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) denying appellant's application for fiscal year 1983 grant funding under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (1976). The appeal was forwarded to the Board by appellee, with whom it was filed. For the reasons discussed below, the Board affirms the decision.

Background

Appellant operates the Native American Family Guidance and Counseling Center, serving an estimated 2,524 Indian clients in Flagstaff and Coconino County, Arizona. The Center focuses its efforts on "counseling and treatment of Indian families, guidance and support services in child welfare matters, education and skill development of Indian families, and family support and administrative services" (Appellant's opening brief at 2).

Appellant submitted an application for a fiscal year 1982 grant under ICWA. That application was approved and funded. On or about February 16, 1982, appellant submitted an application for fiscal year 1983 funds. By April 9, 1982, appellant had been notified that its application met the minimum requirements of the Act and had received a composite score of 98 during the review process. However, the application was neither approved nor disapproved because appellant was located in an area designated "near reservation" by three tribes, the Hopi, Havasupai, and Navajo. According to appellee's April 9, 1982, letter to appellant,

a Navajo appeal concerning "on or near" reservation designations [is pending] before the Board of Indian Appeals.[¹] Funding to your organization cannot be made until this appeal is resolved. Since your organization is located in more than one tribe's "on or near" reservation designation, the decision on this appeal could affect your status as an eligible applicant.

¹The referenced appeal is *Navajo Tribe v. Commissioner of Indian Affairs*, 10 IBIA 78, 89 I.D. 424 (1982). In that case, the Board affirmed a decision of the Commissioner denying funding as a consortium to the Navajo Tribe and a social services organization operating in Farmington, New Mexico, an area designated "near reservation" by the Navajo Tribe. 44 FR 2693 (Jan. 12, 1979). Appellant Navajo Tribe argued that although the service population of the Farmington Inter-Tribal Indian Organization (ITIO) was predominantly Navajo, it nevertheless should be recognized as an independently eligible grant applicant because ITIO also served Indians not members of the Navajo Tribe. The Board held that "[i]t is the character of the client population to be served . . . that is crucial to a determination under the [ICWA] regarding funding of Indian social services." 10 IBIA at 86, 89 I.D. at 428. Consequently, because ITIO serviced essentially the same client population as the tribe, the two could not join to form a consortium to provide duplicate services.

July 1, 1983

On August 24, 1982, appellee again wrote appellant, stating that "[w]e regret the position we have left you in as a result of our inaction pending the Navajo appeal." The letter further noted that, although the Bureau of Indian Affairs (BIA) was attempting to keep the possibility of funding appellant alive, a question existed as to whether the regulations in 25 CFR Part 23, issued pursuant to ICWA, covered appellant's situation because it was located in an area designated "on or near reservation" by more than one tribe. Appellee stated that a legal opinion had been requested from the Solicitor concerning appellant's status.

Finally, on October 19, 1982, appellee advised appellant that its application was disapproved. This action was taken after the Board's August 30, 1982, decision in *Navajo Tribe v. Commissioner of Indian Affairs*, 10 IBIA 78, 89 I.D. 424 (1982), which held that an Indian organization providing child welfare services in an area designated "near reservation" by a tribe cannot join in a consortium with that tribe to service the same client population. The Assistant Solicitor, Division of Indian Affairs, subsequently advised appellee that appellant did not meet the eligibility requirements of 25 CFR 23.26(a) in that it was located in an area designated "on or near reservation" by three tribes, but had not sought funding through a tribal governing body.

Appellant appealed this decision to the Board. Briefs on appeal have been filed by both parties.

Discussion and Conclusions

Appellant first argues that BIA should be estopped from disapproving its application because it permitted regulatory deadlines established in 25 CFR 23.34 to expire without decision or meaningful feedback on the application. Appellant states that this situation "smacks of due process violations and is analogous to situations where a welfare recipient is terminated without a right to continued receipt of benefits. See the landmark cases of *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Homer v. Hickel*, No. 69-83-Tucson (D. Ariz. May 14, 1969)" (Appellant's opening brief at 3).

[1] Estoppel against the Government is an extraordinary remedy. In order to establish estoppel, it must be shown that the party to be estopped knew the facts and either intended that its conduct be relied upon or acted so as to cause reliance upon its conduct, and that the party asserting estoppel was ignorant of the true facts and detrimentally relied upon the other party's conduct. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *Estate of Victor Young Bear*, 8 IBIA 254, 270-71, 88 I.D. 410, 419-20 (1981); *Coronado Oil Co.*, 52 IBLA 308 (1981). Estoppel will not be found where there was no affirmative misrepresentation or misconduct by a Government official. See *Arpee Jones*, 61 IBLA 149 (1982).

The mere passage of a deadline for decision, the existence of which was fully known to both parties, will not support a claim of estoppel. Under the circumstances of this case, in which appellee fully advised appellant of the reason for the delay, appellee in no way misled appellant by failing to issue a decision within the period established in the regulations.

Appellant apparently also contends that estoppel should be found because BIA led it to believe that a favorable decision would be issued in the *Navajo Tribe* case and its application would subsequently be funded. There is no basis in the record for finding affirmative misrepresentation of the situation by BIA. Appellant was informed that a similar appeal was pending before the Board and that BIA would attempt to keep funds available for appellant in case the Board held that organizations in "near reservation" areas could be separately funded. The BIA made no statements concerning the likelihood of such a decision. Far from misrepresenting the situation to appellant, BIA was objectively keeping appellant apprised of the status of its application and the nature of the problems encountered. Appellant's decision to await a final decision in another case, apparently without seeking other funding, was made with full knowledge of the facts. The Board does not find estoppel under these circumstances.

[2] In suggesting that due process was violated in disapproving its application, appellant incorrectly assumes that it had a right to continued funding of its program. Appellant's fiscal year 1982 grant carried with it no assurance that a similar grant would be approved in fiscal year 1983. Appellant knew that its fiscal year 1982 funding was for a definite term and that in order to receive additional funding it would have to submit a new application and again survive the rigors of the review process. It is a false analogy to compare the termination of welfare benefits of a continuing nature without a hearing and the expiration of a grant under its own terms.

Appellant's second argument is that BIA has no "Index-Digest of the more important decisions, opinions and orders in Appeals from decisions of officials dealing with ICWA and who is eligible for funding of grant applications" as required by 5 U.S.C. § 552(a)(2) (1976) (Appellant's opening brief at 4). Under section 552(a)(2), each agency of the Federal Government is required to make available for public inspection and copying final opinions and orders made in the adjudication of cases; statements of policy and interpretation which have been adopted by the agency, but not published in the *Federal Register*; and administrative staff manuals and instructions that affect members of the public. These materials are further required to be indexed at least quarterly. No matter covered by section 552(a)(2) can be cited as precedent against a party unless it was indexed and made available to the public or the party had actual notice of the material.

July 1, 1983

[3] Although the Board is not aware of any index to decisions of officials of the BIA,² no BIA decision was cited as precedent against appellant. The only decision of the Department of the Interior which has been cited in this case is the Board's decision in *Navajo Tribe*. This decision is published in Volume 10 of the Board's decisions at page 78 (10 IBIA 78) and in Volume 89 of the bound decisions of the Department of the Interior at page 424 (89 I.D. 424). Either of these publications is available to the public through subscription or upon request. The publications or copies of decisions can be obtained through any office of the Department of the Interior, including field offices. The *Navajo Tribe* case is indexed in the Department's quarterly Index-Digest under "Indian Child Welfare Act of 1978: Financial Grant Applications: Funding." The Index-Digest to final decisions of the Department of the Interior is currently available without charge from the Department's Office of Hearings and Appeals. The Board rejects appellant's contention that Departmental decisions are not indexed and made available to the public as required by 5 U.S.C § 552(a)(2) (1976).

Appellant next contends that because BIA funded the Phoenix Indian Center (Center), which is also located in an area designated "near reservation," without requiring that the Center apply through a tribal governing body, it must similarly fund appellant's program. Appellee acknowledges that the Center was funded, but asserts that the decision granting funding was erroneous and violated its regulations. Appellee further states that measures are being developed to prevent this situation from recurring (Appellee's brief at 4).

[4] The propriety of funding for the Center is not before the Board. Neither is the question of what steps should be taken if funding were improper. For the purposes of this discussion only, the Board will assume that the Center should not have been funded. The question then raised is whether an improper action taken by a Departmental official prevents the Department from correctly applying its regulations to other parties so that all parties will be treated equally. The Board holds that the erroneous action of a Departmental employee cannot create rights not authorized by law or excuse compliance with a regulation. *Cf. Robert Wright*, 61 IBLA 158 (1982); *Fred S. Ghelarducci*, 41 IBLA 277 (1979).³ The Board will not order a violation of Departmental regulations.

² The Board need not reach the question whether BIA should or is required by section 552(a)(2) to index some or all of its decisions. We note, however, that decisions of the BIA which involve the interpretation of law are not final for the Department, but are appealable to the Board of Indian Appeals. 25 CFR 2.19(c)(2). The Board exercises the final review authority of the Secretary over these cases and any other matters pertaining to Indians that may be referred to it. 43 CFR 4.1. Final decisions of the Board are indexed and made available to the public as described in the text of this opinion. Those BIA decisions which are based on the exercise of discretionary authority may be made final for the Department without Board review. If these decisions are not indexed, section 552(a)(2) prevents them from being cited as precedent in subsequent cases unless the parties in those subsequent cases are given actual and timely notice of the terms of the prior decisions.

³ See also *Corinne Mae Howell v. United States*, 9 IBIA 70, 72 n.2, 88 I.D. 822, 823 n.2 (1981):

Continued

Finally, although appellant acknowledges that some criteria must be used to determine who is to receive limited available funds, it argues that the use of "near reservation" designations violates the scheme established by Congress, which does not contain any restrictions on funding to organizations located near reservations. Appellant, citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974), apparently contends that BIA failed to promulgate proper regulations and therefore no eligibility criteria have been made generally known "so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."

The use of "near reservation" designations is required by regulations set forth in 25 CFR 23.25(b), .26(a), and .28(a). "Near reservation" areas are defined at 25 CFR 20.1(r), referenced through 25 CFR 23.2(n). These areas, determined through consultation with the governing bodies of the various tribes, are published in the *Federal Register*. Flagstaff was designated as a "near reservation" area by the Hopi, Havasupai, and Navajo Tribes, and notice of this designation was published in 44 FR 2693 (Jan. 12, 1979).

[5] To the extent that appellant seeks a determination that these regulations exceed statutory authority, this Board does not have the power to declare duly promulgated regulations of the Department of the Interior invalid. *Diane Zarr v. Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174, 90 I.D. 172 (1983).

[6] The Board addressed the use of "near reservation" designations in *Navajo Tribe*. The regulations designating "near reservation" areas were promulgated in response to the Supreme Court's decision in *Ruiz*, *supra*, in an attempt to ensure that Indians not residing within the confines of a reservation would still receive benefits legislated by Congress. In declaring areas to be "near" the reservation, an Indian tribe acknowledges that tribal members living in these areas have maintained close personal and cultural ties with the reservation, and that it is administratively feasible for the tribe to provide services to these people. The Board affirms its holding in *Navajo Tribe* that the use of these designations in grant funding under the Act is a reasonable attempt to conserve limited funds and ensure that duplication of benefits does not result from the same client populations being served by the tribe and by independent social services organizations.⁴

⁴Appellants argue that they will be treated differently from the similarly situated contestees in [*United States v. Anderson* [Interior Hearings Division Docket No. AL 77-57D, decided Nov. 30, 1977]] as a result of this decision. To the extent that disparate treatment results, it is the consequence of an earlier erroneous interpretation of the law [by an Administrative Law Judge]. Prior error, however, cannot be raised as a bar to the correction of that error. Furthermore, the Board cannot assume that the prior erroneous determination in the *Anderson* case will go uncorrected."

The Board notes that on June 27, 1983, it received a notice of appeal from the Phoenix Indian Center seeking review of the denial of fiscal year 1983 funding under ICWA on the grounds that the Phoenix Indian Center was located in a "near reservation" area. The appeal has been assigned docket No. IBIA 83-35-A. The decision under appeal was rendered on Apr. 29, 1983.

⁴Appellant raises a further argument based on the "current practice requires" wording of 25 CFR 23.26(a). The argument apparently is that the Navajo Tribe, in its appeal in *Navajo Tribe*, officially recognized that appellant, in addition to ITO, was independently eligible for funding. The Board will not treat this argument as equivalent to an

July 6, 1983

The BIA classified appellant's application as that of a "near reservation" program, rather than an off-reservation program. Appellant knew of this classification and did not challenge it. Consequently, BIA applied regulations relevant to "near reservation" programs in considering appellant's application. These regulations included the provisions of 25 CFR 23.26(a) which require "near reservation" programs to secure an official funding request from the governing body of the tribe designating the applicant's service area as "near reservation."

Therefore, appellee was precluded from approving appellant's application by 25 CFR 23.25(b), which restricts selection for grants for "near reservation" programs to the governing body of the tribe served by the grant.⁵ Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision disapproving appellant's grant application is affirmed.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

DOYON, LIMITED

74 IBLA 139

Decided July 6, 1983

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving conveyance of Native regional land selection. F-19155-16.

Affirmed.

official request by the Navajo tribal governing body under 25 CFR 23.26(a). The "current practice requires" language in the regulation relates to the manner in which a tribal governing body may request funding for an organization located in a "near reservation" area. It does not bestow any additional rights upon appellant.

⁵ The Board does not decide whether funding may be denied to an organization providing services to Indians living in an area designated "near reservation," on the grounds that it did not seek funding through the governing body of the tribe designating the area as "near reservation," if the organization shows that its client population, or the percentage of its client population for which funding is sought, has no affiliation with the tribe designating the area as "near" and which would otherwise be responsible for providing services in the area. Neither does the Board decide the manner in which an application for grant funding from an organization located in an area designated "near reservation" by more than one tribe must be presented. This case does not raise these issues because appellant did not attempt either to request funding only for the alleged 14 percent of its clients which were not Navajo, Havasupai, or Hopi, or to seek funding through the governing body of one or more of those tribes. Although these are serious questions, the development of rules or clarifications, unless and until specifically raised in the context of a case in controversy before the Board, should be addressed through rulemaking.

**1. Alaska Native Claims Settlement Act: Conveyances: Easements--
Alaska Native Claims Settlement Act: Easements: Access**

A regional land selection conveyance must reserve access easements to any isolated tract of publicly owned land and public access easements may be terminated only after an opportunity for public hearing or comment. Therefore, it is not proper to provide in a conveyance for the automatic termination of such easements.

**2. Alaska: Mining Claims--Alaska Native Claims Settlement Act:
Conveyances: Regional Conveyances--Alaska Native Claims
Settlement Act: Conveyances: Village Conveyances**

Where an application for a regional land selection does not exclude unpatented mining claims as provided in 43 CFR 2651.4(e), the Bureau of Land Management is not required to identify or to adjudicate unpatented mining claims on the lands to be conveyed if no contest has been filed by the applicant pursuant to 43 CFR 4.450 as provided in 43 CFR 2650.3-2(a).

**3. Alaska: Mining Claims--Alaska Native Claims Settlement Act:
Conveyances: Regional Conveyances--Federal Land Policy and
Management Act of 1976: Recordation of Mining Claims and
Abandonment**

The Bureau of Land Management is not required to search state record offices for mining claims which have not been recorded with the Bureau of Land Management on behalf of an applicant for an Alaska regional conveyance. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), failure to record such a claim shall be deemed conclusively to constitute abandonment of the claim, and obviates the need for the Bureau of Land Management to search state records.

**4. Administrative Procedure: Generally--Alaska Native Claims
Settlement Act: Administrative Procedure: Generally--Appeals--Rules
of Practice: Appeals: Generally**

The Board of Land Appeals will not consider a general protest against a regulation where appellant has not shown how the appealed decision applied or implemented the regulation.

**APPEARANCES: James Q. Mery, Esq., Fairbanks, Alaska, for
appellant; Robert Charles Babson, Esq., Office of the Regional
Solicitor, Anchorage, Alaska, for Bureau of Land Management.**

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Doyon, Limited (Doyon), appeals from the December 10, 1979, decision of the Alaska State Office, Bureau of Land Management (BLM), approving for conveyance to appellant the surface and subsurface estates in the land selected by appellant in regional land selection F-19155-16, pursuant to section 14 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613 (1976). By partial decision dated February 24, 1982, the Alaska Native Claims Appeals Board (ANCAB) rejected appellant's argument that BLM erred in approving for conveyance to appellant submerged lands to which the State of Alaska claimed title, and affirmed the decision of BLM on that issue. *Doyon, Limited*, 6 ANCAB 364 (1982). ANCAB's decision

July 6, 1983

provided, however, that the portion of the appeal relating to unpatented mining claims and to public easement EIN la, L would be resolved by future action. This decision resolves these remaining issues.¹

Public easement EIN la, L is an easement for an existing access trail, 50 feet wide, from section 2, T. 10 S., R. 9 E., Kateel River meridian, to public lands in sections 14 and 23, T. 9 S., R. 9 E., Kateel River meridian. Appellant contends that the easement provides access to lands that may be described as "public lands" only in the most technical sense, since sections 14 and 23 are overselections and will be "public lands" only until they are conveyed either to the village or regional corporation. Appellant contends that although BLM rejected appellant's request to terminate the easement because the land is no longer used by the public, BLM did agree that when sections 14 and 23 were conveyed, the easement would terminate. On appeal, Doyon requests that the easement be amended by adding the following sentence: "The easement shall terminate at such time as secs. 14 and 23 are conveyed out of the public domain" (Statement of Reasons at 14).

[1] When a party appeals a BLM easement determination made pursuant to ANCSA, the burden of proof is upon the party challenging the determination to show that the decision is erroneous. In its response to appellant's statement of reasons, BLM disagrees with appellant's characterization of the status of sections 14 and 23, stating that "the most that can be said at this time is that the lands have been selected and may be conveyed at some future date." BLM opposes including language providing for the automatic termination of easements and conveyances to Native corporations, contending that it can create potential title search problems in the future, and that the easement regulations provide for a specific method of terminating easements. BLM points out that access easements must be reserved to any isolated tract of publicly owned Federal, State, or municipal lands. 43 CFR 2650.0-5(r). Thus, while lands may be conveyed out of the Federally owned public domain at some time in the future, some may still remain an isolated tract of publicly owned land within the meaning of the easement regulations. As there may be doubt when an automatic termination provision becomes effective, BLM contends that appellant's title to its lands would be more clearly ascertainable if BLM issues a document relinquishing the easement when the tract is, in fact, conveyed to an ANCSA corporation.

In support of its contention, BLM refers to Departmental regulation 43 CFR 2650.4-7(a)(13), which provides as follows:

¹ ANCAB was abolished by Secretarial Order No. 3078 dated Apr. 29, 1982, effective June 30, 1982, which transferred all responsibilities delegated to ANCAB to the Interior Board of Land Appeals (IBLA). An interim rule published June 18, 1982, enlarged IBLA's scope of authority to include jurisdiction to make final Departmental decisions in appeals relating to land selections arising under ANCSA. 43 CFR 4.1(b)(3)(i), 47 FR 26392 (June 18, 1982).

(13) The Director shall terminate a public easement if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001, whichever occurs first. He may terminate an easement at any time if he finds that conditions are such that its retention is no longer needed for public use or governmental function. However, the Director shall not terminate an access easement to isolated tracts of publicly owned land solely because of the absence of proof of public use. Public easements which have been reserved to guarantee international treaty obligations shall not be terminated unless the Secretary determines that the reasons for such easements no longer justify the reservation. *No public easement shall be terminated without proper notice and an opportunity for submission of written comments or for a hearing if a hearing is deemed to be necessary by either the Director or the Secretary.* [Italics added.]

This regulation establishes a policy favoring public comment before terminating public easements. The provision for automatic termination of easements would contravene this policy. Thus, appellant's request to provide for such automatic termination is properly denied.

In its first statement of reasons submitted in this appeal before AN CAB, appellant alleged that BLM erred in failing to identify, exclude, or to adjudicate the validity of unpatented mining claims located upon the lands approved for interim conveyance. To show that some claims do exist on the selected lands, appellant has identified two known unpatented mining claims located in selection F-19155-16, together with approximately 16 other unpatented claims which may possibly lie within the land selection made by Doyon.² However, BLM cannot be made to bear the responsibility for appellant's dissatisfaction. The Department's regulations expressly provided appellant the opportunity to exclude mining claims from the land described in its application or have those claims adjudicated. Under 43 CFR 2651.4(e), village or regional corporations were not required to select lands within an unpatented mining claim or millsite, and village or regional corporations were permitted to omit such mining claims from their applications. Since appellant chose not to have the claims excluded when it filed its application, appellant cannot fault BLM for failing to exclude them.

One regulation in the part concerning Native selections, 43 CFR 2650.3-2(a), provides: "[T]he validity of any unpatented mining claim may be contested by the United States, the grantee of the United States or its successor in interest, or by any person who may initiate a private contest." The regulations governing such contests are set forth at 43 CFR 4.450. Appellant did not take advantage of these procedures before BLM issued its decision. Appellant's own failure to take advantage of the procedures provided for seeking adjudication of these mining claims makes it unnecessary for BLM to do so.

Section 22(c) of ANCSA, 43 U.S.C. § 1621(c) (1976), permits the conveyance of land that is subject to unpatented mining claims located prior to August 31, 1971, to a regional Native corporation. *Theodore J. Almasy*, 69 IBLA 160, 89 I.D. 619 (1982). In a suit brought by owners of such unpatented mining claims seeking a declaratory judgment and

² See appellant's brief dated Feb. 22, 1980, at pages 7 and 8 for a description of 18 or more claims owned by Joseph C. Manga.

July 6, 1983

injunctive protection against BLM's conveyance of their alleged vested property rights in the claims, the court examined section 22(c) of ANCSA and the Department's regulations and held that ANCSA permits the Federal Government to convey lands subject to validly located mining claims and that the 5-year time limitation on the ability to patent placed on such claims by ANCSA is constitutional. *Alaska Miners v. Andrus*, 662 F.2d 577 (9th Cir. 1981); accord, *United States Steel Corp.*, 7 ANCAB 106, 89 I.D. 293 (1982); *Oregon Portland Cement Co.*, 6 ANCAB 65, 88 I.D. 760 (1981). *Theodore J. Almasy*, *supra* at 165 n.5, 89 I.D. at 621 n.5, specifically rejected Doyon's argument that BLM is required to adjudicate the validity of such claims, noting that it is now well established that BLM is not required to adjudicate mining claims before conveyance, citing *United States Steel Corp.*, *supra*; *Oregon Portland Cement Co.*, *supra*; and *Alaska Miners v. Andrus*, *supra* at 580, in which the court described Doyon's arguments as "groundless."³

In light of the *Alaska Miners* decision, appellant is no longer contending that the Department must adjudicate every claim. Appellant suggests, however, that the court only meant that BLM did not have to determine whether a discovery has been made. Appellant maintains that the Department still has a duty to void certain claims such as those located after the land was withdrawn or in those cases where there is failure to make the filings required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). Appellant concedes that BLM is adjudicating such claims for the most part (Briefing on Mining Claim Issues at 4). Yet, appellant identifies several types of claims that should be declared void that may not be so adjudicated.⁴ This appeal provides no basis for requiring BLM to make any such adjudication because appellant has not challenged the validity of any particular claim.

Doyon now raises four other issues: (1) Whether BLM has a duty to identify in the conveyance instruments by location and Bureau file number all "facially valid" unpatented mining claims which encumber land being conveyed to Doyon; (2) whether BLM has a duty to exclude

³ The court also noted: "We have considered their other suggestions and fail to find anything which requires further discussion." The nature of the "other suggestions" is not explained by the court. In argument advanced in this appeal, counsel for BLM has suggested the "other suggestions" by Doyon made in the *Alaska Miners* appeal are the same arguments now urged upon this Board by Doyon. The Board expresses no opinion concerning this argument.

Doyon argues that the holding in *United States Steel Corp.*, *supra*, is inconsistent with the result in another ANCAB decision, *State of Alaska and Seldovia Native Ass'n*, 2 ANCAB 1, 71-72, 84 I.D. 349, 382 (1977), modified by Secretarial Order No. 3016, 85 I.D. 1 (1977), and explained by *State of Alaska, Department of Transportation and Public Facilities (On Reconsideration)*, 7 ANCAB 188, 89 I.D. 346 (1982). As the Secretarial order points out at 85 I.D. 1, there is no requirement upon the Department to adjudicate all third party interests in conveyances to Native corporations. The *Seldovia* appeal did not concern mining claims, but was, rather, concerned with those preexisting rights other than unpatented claims described in other sections of ANCSA.

⁴ Both parties on appeal have categorized several types of mining claim adjudications which may become the subject of analysis by BLM. Claims are cataloged variously by the parties according to the manner in which they may be affected by the provisions of section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and arguments are advanced whether certain claims ought to be subject to adjudication under the current statutory framework for recording mining claims. These arguments are beside the point in view of our decision that unpatented mining claims need not be adjudicated by BLM prior to conveyance to Native corporations under ANCSA.

from conveyance to Doyon lands containing unpatented claims upon which BLM has suspended review pending reconsideration of the Montana District Court's decision in *Rogers v. United States*, CV-80-114-H (D. Mont. June 28, 1982) (petition for reconsideration filed July 8, 1982); (3) whether BLM has a duty to search state records for mining claim filings not recorded pursuant to section 314 of the FLPMA, 43 U.S.C. § 1744 (1976), and to include findings based upon the search of state records in the conveyance documents furnished to Doyon; and (4) whether the provision of 43 CFR 2650.3-2(c) which allows a miner to apply for patent to land within Native selections after December 18, 1976, under certain circumstances, is invalid for lack of a statutory basis.

After the court in *Alaska Miners v. Andrus*, *supra*, rejected Doyon's contention that BLM must adjudicate unpatented mining claims on lands to be conveyed, Doyon has modified its argument, contending that there is only a duty on the part of BLM to identify unpatented mining claims in the conveyance documents. Appellant now characterizes the action it seeks from BLM to be in the nature of a "preadjudication" or "adjudication of legal sufficiency" which appellant distinguishes from an "adjudication" or "adjudication of validity," which would involve a determination whether a discovery has been made.⁵ While, as appellant contends, it has consistently tried to distinguish between adjudication of, and identification of, unpatented mining claims in an effort to obtain a determination by BLM concerning mining claims on selected land, it is clear that the distinction sought to be made has previously been rejected by the Department. *Oregon Portland Cement Co.*, *supra*; *United States Steel Corp.*, *supra*.

Appellant bases its contention that BLM is required to individually identify each mining claim on the requirement that valid existing rights be identified pursuant to section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1976). The Department's position with respect to this contention is set forth in a Solicitor's memorandum approved by the Secretary which states: "Congress, in section 22(c) of ANCSA, specifically treated unpatented mining claims differently from other types of possible pre-existing rights." 45 FR 1693 (Jan. 8, 1980). Since section 14(g) does not concern mining claims, it cannot serve as a basis for requiring the Department to identify mining claims. Even if section 14(g) were applicable, it would be improper to identify a mining claim whose validity had not been determined. In order for a mining claim to constitute a valid existing right, it must be established that a mining claim not only was located prior to the date of the withdrawal and maintained in accordance with the requirements of the mining laws, it must also be established that a valuable mineral deposit had been discovered on the claim prior to the withdrawal. *See United States v. Beckley*, 66 IBLA 357 (1982). It would be improper to identify

⁵ See appellant's reply brief dated Feb. 23, 1983, at page 2, and appellant's brief dated Nov. 10, 1982, at page 3.

July 6, 1983

a mining claim as a valid existing right unless the issue of discovery of a valuable mineral deposit is fully adjudicated. Since the court in *Alaska Miners, supra*, held that the Department is not required to adjudicate the validity of mining claims, it necessarily follows that the Department cannot be required to identify them as valid existing rights in the absence of proof of a discovery of a valuable mineral deposit.

Appellant's contention that section 22(c) requires identification of unpatented mining claims is incorrect for the same reasons. That section protects possessory rights arising only from *valid* mining claims initiated before August 31, 1971, so a claim cannot be identified as protected by section 22(c) without adjudication of its validity. Since the Department is not required to adjudicate the validity of mining claims on lands conveyed to a regional corporation, there is no basis for identifying them in a conveyance.

[2] The only other argument appellant makes in support of such identification is the need to convey clear title. Appellant's concern about this is belied by its failure to exclude claims from its selection application or seek adjudication of those claims by the procedures provided by Departmental regulations. We hold that BLM is not required to identify or adjudicate unpatented mining claims on the land conveyed since no contest has been filed by appellant.

The second issue raised by appellant Doyon concerns whether the action pending in *Rogers v. United States, supra*, is cause for excluding from conveyance to Doyon certain claims identified to fall into the same category of unpatented mining claim as was considered by the *Rogers* decision. The Montana court found section 314(c) of FLPMA to be an unconstitutional violation of due process insofar as it creates a conclusive presumption of abandonment of an unpatented mining claim located before the enactment of FLPMA for which no notice of location was filed with BLM prior to October 22, 1979.⁶ The ultimate resolution of the *Rogers* case can have no effect upon this appeal. If the court adheres to its original decision and holds that the Department improperly declared the claims abandoned and void, the claims will have the same status as other unpatented claims and would be subject to exclusion from appellant's conveyance only if appellant had excluded the claims in its conveyance application or if a patent application has been filed. On the other hand, if the court reconsiders and finds such claims to be properly declared abandoned, there would be no basis for identifying or excluding such abandoned claims from appellant's conveyance.

⁶ The Board notes the United States Supreme Court has recently approved a state statute having similar provision and effect in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (provision permitting extinguishment of mineral interests without notice for failure to use or file notice of claim under Indiana Dormant Minerals Act held constitutional). The Department has consistently held that failure to file a notice of location with the Department on or before Oct. 22, 1979, establishes a conclusive presumption of abandonment under section 314(c) of FLPMA. *John Walter Chaney*, 46 IBLA 229 (1980), and cases cited. See also *Topaz Beryllium Co. v. United States*, 649 F.2d 775 (10th Cir. 1981); *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981).

[3] Appellant's contention that BLM has a duty to search the State of Alaska records for mining claims affecting selection F-19155-16 is groundless. Section 314 of FLPMA, 43 U.S.C. § 1744 (1976), provides that failure to record such a claim with BLM "shall be deemed conclusively to constitute an abandonment" of the claim. A principal purpose of this statute was to obviate the need for BLM to make the search appellant would require of it.

Appellant's final argument is that 43 CFR 2650.3-2(c) unlawfully extends the period within which a miner may apply for patent, contrary to the provisions of section 22(c) of ANCSA. The regulation states:

Any mineral patent application filed after December 18, 1976, on land conveyed to any village or regional corporation pursuant to this act, will be rejected for lack of departmental jurisdiction. *After that date, patent applications may continue to be filed on land not conveyed to village or regional corporations until such land is conveyed.* [Italics supplied.]

Section 22(c) of ANCSA, provides:

On any lands conveyed to Village and Regional Corporations, any person who prior to August 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 requirements of the general mining laws are complied with, proceed to patent.* [Italics supplied.]

Doyon perceives a conflict between the emphasized portions of the statute and the Department's regulation. Appellant contends this question was not decided by the *Alaska Miner's* decision, and avers the clear intent of Congress was to establish a 5-year statute of limitations which had the effect of terminating, on December 18, 1976, the rights of miners to apply for mineral patent on public lands selected by Native corporations.

[4] Appellant has not established the relevance of this argument to this appeal. Neither appellant's statement of reasons nor the record submitted on appeal establish whether the patent applications for the claims BLM excluded from appellant's conveyance were filed during the period which appellant contends to be an unlawful extension of the statutory period. Appellant's argument appears to be in the nature of a general protest against the regulation rather than an allegation of error in the decision appealed. In the absence of a decision implementing the regulation, there is no action by BLM that is subject to review by this Board. *See Tenneco Oil Co.*, 36 IBLA 1 (1978).

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.

FRANKLIN D. ARNESS
Administrative Judge Alternate Member

July 8, 1982

WE CONCUR:

ANNE POINDEXTER LEWIS
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

APPEAL OF HIGHLAND REFORESTATION, INC.

IBCA-1563-3-82

Decided July 8, 1982

Contract No. MOOC14203471, Bureau of Indian Affairs.

Granted.

Contracts: Construction and Operation: Construction Against Drafter--Contracts: Disputes and Remedies: Termination for Default: Generally--Contracts: Formation and Validity: Authority to Make

A termination for default of a contract awarded under a small business set-aside program is converted to a termination for the convenience of the Government where the Board finds (i) that the Government failed to set forth in the solicitation the applicable size standard for the small business set-aside or to specify the classification for the procurement; (ii) that the appellant's interpretation of the solicitation requirements was reasonable; and (iii) that appellant's representation of itself as a small business concern had been made in good faith.

APPEARANCES: Joseph A. Yazbeck, Jr., Attorney at Law, Allen & Yazbeck, Portland, Oregon, for Appellant; Thomas O'Hare, Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

This appeal presents the question of the rights of the parties under a contract awarded as part of the small business set-aside program where it appears that the appellant may not have qualified as a small business concern either at the time of bid submission or at the time of award.

Findings of Fact

1. Contract No. MOOC14203471 in the amount of \$38,275.50, was awarded to the appellant on August 20, 1981. The contract was for "Reforestation Projects—Summer/Fall Plant, Ponderosa Pine Seedlings on the Southern Ute Indian Reservation, Ignacio, Colorado." The invitation for bids called for the planting of Government-furnished containerized tree seedlings on two planting units, Vega-Sandoval and Sandoval Road, for 127,500 seedlings and 34,000 seedlings,

respectively. The appellant bid \$237 per thousand planted seedlings, for a total bid of \$38,275.50 (Appeal File (AF) 1).

2. Prepared on standard form 33 (Solicitation, Offer, and Award), the contract incorporated by reference the provisions of standard form 33-A (1/78) and the general provisions of standard form 32 (4/75), as well as changes and additions to such provisions. Among the especially pertinent provisions included in the contract or incorporated therein by reference were the following:

Standard Form 33

The offeror represents as part of his offer that:

1. SMALL BUSINESS (See par. 14 on SF 33A)

He ⊗ is * * * a small business concern. If offeror is a small business concern and is not the manufacturer of the supplies offered he also represents that all supplies to be furnished hereunder ⊗ will * * * be manufactured [sic] or produced by a small business concern * * *.

Schedule

Bids must set forth full, accurate, and complete information as required by this invitation for bids (including attachments). The penalty for making false statements in bids is prescribed in 18 USC 1001.

Standard Form 33-A

14. SMALL BUSINESS CONCERN

A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is submitting offers on Government contracts, and can further qualify under the criteria concerning number of employees, average annual receipts, or other criteria, as prescribed by the Small Business Administration. (See Code of Federal Regulations, Title 13, Part 121, as amended, which contains detailed industry definitions and related procedures.) [1]

PART 300 - GENERAL PROVISIONS

(Fixed Price - Services)

313 - *DEFAULT.*

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

* * * * *

(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

* * * * *

(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions

¹The quoted provision is identical to that submitted by appellant with its letter of Dec. 8, 1981, as enclosure 1 (AF 10).

*
July 8, 1982

of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. [2]

**324 - UTILIZATION OF SMALL BUSINESS AND SMALL DISADVANTAGED
 BUSINESS CONCERNS (OVER \$10,000)** (Ref 45 FR 31028, May 9, 1980)

* * * * *

(c) (1) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

3. In September of 1981 appellant commenced performance of the contract. On November 6, 1981, appellant was directed to temporarily suspend performance of the contract work because of inadequate soil moisture on at least 85 percent of the contract site. By letter dated November 30, 1981 (AF 9), appellant submitted a payment request in the amount of \$16,638.35 for the number of trees it had planted under the contract prior to the temporary shutdown on November 6, 1981. The contract was terminated for default by letter dated January 19, 1982 (AF 12).³ On March 24, 1982, appellant received a check from the Government in the amount of \$9,548.68. Based upon the difference between the amount requested in the complaint of \$16,638.15 and the amount paid of \$9,541.68, appellant claims an additional \$7,096.47 for trees planted prior to the temporary shutdown on November 6, 1981 (Complaint, pars. 14, 15; AF 13).⁴

4. By letter to the contracting officer under date of November 3, 1981, the Northwest Forest Workers Association raised a serious question as to whether Highland Reforestation was entitled to participate in Small Business Administration Set-Aside Programs. Enclosed with the letter was a copy of a letter from the Small Business Administration (hereinafter SBA) to a Bureau of Land Management (BLM) contract specialist dated June 11, 1981, in which it was stated (i) that SBA had completed size determinations on Bonner's Ferry Reforestation, Inc., as requested in BLM's letter of May 5, 1981; (ii) that it had been found that Bonner's Ferry Reforestation, Inc., was affiliated with JMNI, its parent company, and Highland Reforestation, Inc., Pinney Leasing and Advanced Automatic Transmission, Inc., because of an identity of interest between James E. Holt and J. Dana Pinney, principals of all those concerns; (iii) that it had been determined that Bonner's Ferry Reforestation, Inc., together with its affiliates, was a small business concern under the size standard of average annual receipts not to exceed \$2 million for bidding on the

² The contract does contain a clause providing for termination for convenience of the Government (General Provision 311; AF 1).

³ There is nothing in the record to indicate that any work was performed by appellant following receipt of the suspension of work notice of Nov. 6, 1981.

⁴ This claim (Second Claim for Relief in appellant's complaint) was dismissed by order dated July 22, 1982, on the ground that it had never been presented to the contracting officer for decision.

procurement under IFB No. YA-554-PFBI-35; Glendale R. A. tree planting (Medford) as of January 7, 1981, the date of its self-certification as a small business concern in that connection; but (iv) that together with its affiliates it was other than a small business concern under the same size standard as of May 5, 1981, the date of BLM's request for a size determination (AF 6).⁵

5. On November 6, 1981,⁶ the SBA regional office in Seattle, Washington, forwarded to the contracting officer a copy of a letter dated June 11, 1981, to Mr. James E. Holt, president of Bonner's Ferry Reforestation, Inc. In that letter SBA noted (i) that it had completed size determinations on Bonner's Ferry Reforestation, Inc., as had been requested by BLM in a letter dated May 5, 1981; (ii) that it had been determined that Bonner's Ferry Reforestation, Inc., together with its affiliates, was other than a small business under the applicable size standard (average annual receipts not to exceed \$2 million for the preceding 3 fiscal years) as of May 5, 1981, the date of the request for a size determination under the provisions of section 121.3-4(e), SBA Rules and Regulations; (iii) that as provided in section 121.3-4(d), Bonner's Ferry Reforestation, Inc., and its affiliates, including but not limited to Highland Reforestation, Inc., would not be deemed eligible within the \$2 million or lower size standard and may not self-certify themselves as such unless recertified by SBA as small businesses; and (iv) that if Bonner's Ferry Reforestation or any other interested party had reason to disagree with the size determination made, an appeal⁷ may be submitted in accordance with Section 121.3-6 (AF 7).

6. The contracting officer addressed a letter to the contractor on December 3, 1981, in which he stated:

According to a review of your representation on Standard Form 33, Page 2, Item No. One (1), you have indicated that your company, Highland Reforestation, Inc., as being a small business concern which are the qualifying factors under this solicitation for award consideration. However, after a Small Business Administration inquiry your company is found to be in essence other than a small business concern dating back to May 5, 1981, one and a half months before the release of Solicitation BIA-MOO-81-24.

(AF 8).

In the same letter (AF 8) the contractor was told (i) that it had been found to be in violation of contractual requirements under IFB BIA-MOO-81-24; (ii) that the misrepresentation of the company for

⁵ Immediately thereafter the letter states:

"Bonner's Ferry Reforestation, Inc., has been notified of these determinations and the rationales upon which they were based. It has also been informed that it and its affiliates may not self-certify as small businesses under the \$2 million or less size standard unless recertified by SBA, and has been advised that should it have reason to disagree with this size determination, it may submit an appeal in accordance with Section 121.3-6, SBA Rules and Regulations."

(AF 6).

⁶ In its letter to the contracting officer of Nov. 6, 1981, SBA states:

"This office has not received an application for recertification as a small business from any of those concerns, consequently, none of those concerns have been eligible to bid on procurements under the \$2 million size standard since May 5, 1981, and may not self-certify themselves as such until they are recertified by SBA."

(AF 7).

⁷ The letter of Nov. 6, 1981 (note 6 *supra*), states that neither Bonner's Ferry Reforestation, Inc., nor any of its affiliates had appealed the determination that they were other than a small business as of May 5, 1981, under the size standard of average annual receipts not to exceed \$2 million for the preceding three (3) fiscal years (AF 7).

July 8, 1982

qualification purposes under the solicitation was in direct violation of 18 U.S.C. § 1001; and (iii) that the written comments of the contractor concerning the violation would provide BIA with the documentation required for a determination to be made as to whether or not to terminate the contract. After requesting that such written comments be provided, the contractor was advised to review Part 300, General Provisions, Clause No. 313 "Default" (Finding 2, *supra*).

7. By letter to the contracting officer of December 8, 1981, the contractor denied that there had been any misrepresentation. In support of the denial, the contractor attached a page from the contract asserting that it states the requirement of number of employees.⁸

In the contracting officer's telegraphic response of December 16, 1981, he stated that contractor's certification as a small business had been withdrawn as of May 5, 1981; that the company could not self-certify itself as a small business concern without SBA conducting the recertification; and that any disagreement as to size determination could be appealed in accordance with section 121.3-6 of the Small Business Rules and Regulations (AF 10).

8. The most complete statement of appellant's position is contained in its letter of December 29, 1981, to the contracting officer from which the following is quoted:

Before bidding on the above contract, we reviewed the invitation for bids and noticed that in section 14 of "solicitation instructions and conditions" the invitation did not state that the \$6,000,000 three year gross income limitation applied. We know that in some sections of the country the forest service applies an employee limitation in determining whether or not a company is small business.

Since your contract did not state that the \$6,000,000 limitation applied, we construed it to mean that the employee limitation applied.⁹ As a result, we did not believe that the previous ruling by the SBA was applicable.

(AF 12).

9. In a letter to appellant dated March 12, 1982, the Seattle Regional Office of SBA noted (i) that it had made a size determination on Highland Reforestation, Inc., as requested in its application for recertification; (ii) that it had determined that the appellant was no longer affiliated with Pappy Johnston Contracting, JMNI, Inc. (and its wholly owned subsidiaries: Bonner's Ferry Reforestation, Inc.; XXX Construction Co., Inc.; and Donner Pass Construction Co., Inc.); Pinney Leasing; and Advanced Automatic Transmission, Inc.; and (iii) that "Highland Reforestation, Inc., together with its affiliates, Aspen Reforestation, Inc., and Antonio Avila, a sole proprietorship, was a

⁸ In the Dec. 8, 1981, letter (AF 10), the appellant had stated: "From other contracts on which we have bid this requirement is less than 500 employees. We also attach a copy from another contract to this effect. Inasmuch as we are seeing this in a number of tree planting contracts we assumed this had been changed."

⁹ This was apparently the case in another contract from which appellant included excerpts as an enclosure to its letter of Dec. 8, 1981. The pertinent excerpt (Clause 14-Small Business Concern) is quoted as follows: "*SIZE STANDARD*. Under this solicitation a concern is considered to be small business, if, including its affiliates, it is independently owned and operated, is not dominant in the field of operations in which it is bidding on Government contracts and 500 employees or less for forestry projects" (AF 10, letter of Dec. 8, 1981, enclosure 2).

small business concern as of February 23, 1982, under the size standard of average annual receipts not to exceed \$2 million for its preceding three (3) fiscal years" (Appellant's Brief, Exh. C).

10. Set forth below are provisions from the Small Business Administration Regulations and from the Federal Procurement Regulations, a number of which are cited by the parties in support of their positions:

The determination of the appropriate classification of a product or service shall be made by the contracting officer. Both classification and the applicable size standard (number of employees, average annual receipts, etc.) shall be set forth in the solicitation and such determination of the contracting officer shall be final unless appealed in the manner provided in § 121.3-6; *Provided, however*, That an unclear or incomplete classification action by the contracting officer may be supplied by the SBA field office or the Size Appeals Board or its Chairperson insofar a[s] necessary in connection with a size determination or size appeal. If no standard for an industry, field of operation or activity [examples omitted] has been set forth in this section, a concern bidding on a Government contract is a small business if, including its affiliates, it is independently owned and operated, is not dominant in the field of operation in which it is bidding on the Government contracts, and has 500 employees or less.

* * * * *

(e) *Services*. Any concern bidding on a contract for services (including but not limited to services set forth in Division I, Services, of the Standard Industrial Classification Manual), not elsewhere defined in this section is classified as small if its average annual receipts for its preceding 3 fiscal years do not exceed \$2 million.

13 CFR 121.3-8 (1981).

In the absence of a written protest or other information which would cause him to question the veracity of the self-certification, the contracting officer shall accept the self-certification at face value for the particular procurement involved.

13 CFR 121.3-8 (1981).

Any bidder or offeror or other interested party may challenge the small business status of any other bidder or offeror on a particular Government procurement or sale. Such challenge shall be made by delivering a protest to the contracting officer responsible for the particular procurement or sale involved. In order to apply to the procurement or sale in question, such protest must be filed prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening, except that in the case of negotiated procurements, a protest may be filed within 5 days exclusive of Saturdays, Sundays, and legal holidays after receipt from the contracting officer of notification of the identity of the offeror being protested. Such filing must be delivered to the contracting officer by hand, telegram, or mail within the 5-day period allotted * * * A contracting officer may at any time after bid opening question the small business status of any bidder or offeror for the purpose of a particular procurement or sale by filing a protest with the SBA district office serving the area in which the principal office of the protested concern, not including its affiliates, is located. A protest by a contracting officer shall be timely for the purpose of the procurement or sale in question whether filed before or after award. A protest received after the time limits set forth herein shall not apply to the procurement or sale in question.

13 CFR 121.3-5 (1981).

Section 1-1.703 of Title 41 of the *Code of Federal Regulations* states:

§ 1-1.703-1 Representation by bidder or offeror.

July 8, 1982

(a) A concern must be a small business concern at the time of the opening of bids or the closing date for the submission of initial offers and at the time of award in order to be eligible for a preference which requires status as a small business concern.

(b) A representation by a bidder or offeror that he is a small business concern shall be accepted as conclusive by the contracting officer regarding the status of the concern with respect to a specific solicitation, except as provided in paragraphs (c), (d), and (e) of this section.

(c)(1) A bidder or offeror which meets the criteria in § 1-1.701 and has not been determined by the SBA to be ineligible may represent that he is a small business concern in the submission of a bid or offer in connection with a specific solicitation.

* * * * *

(3) A bidder or offeror shall not be eligible for an award as a small business concern unless he represented in good faith that he was a small business concern at the time of the opening of bids or the closing date for the submission of initial offers (see sec. 1-2.405(b) regarding minor informalities and irregularities in bids).

Discussion

The principal question presented by this appeal is whether the appellant's representation that it was a small business concern was made in good faith. In support of its position that the representation was made in good faith, appellant asserts (i) that section 14 "Solicitation Instructions and Conditions" (AF 1) did not set forth the applicable size standards: average annual receipts or number of employees, as required by 13 CFR sec. 121.3-8;¹⁰ (ii) that since the invitation for bids did not state a size standard, Mr. Holt believed that the employee limitation applied, as he was seeing this size standard on other tree planting solicitations;¹¹ (iii) that appellant's certification of itself as a small business concern for the purposes of the contract was based upon the number of employees in the firm; (iv) that Mr. Holt's interpretation of the IFB was not unreasonable since the SBA regulations also set forth the employee size standard in cases where an industry, field of operation, or activity is not otherwise specified; (v) that at the time of bid submission and at the time of award, there was no written protest or other information which would cause the contracting officer to question appellant's self-certification; and (vi) that the protest of award to the appellant by the Northwest Forest Workers Association is untimely (Appellant's brief at 4-7).¹²

¹⁰ The regulation cited requires the contracting officer to determine classification and the applicable size standard (number of employees, average annual receipts, etc.) and that both classification and applicable size standard shall be set forth in the solicitation (13 CFR 121.3-8; Finding 10).

¹¹ Accompanying appellant's brief was an affidavit of James E. Holt, president, Highland Reforestation, Inc., to which was attached a supplement to standard form 33-A, as set forth in a Forest Service solicitation. The following is quoted therefrom:

"Clause 14 - Small Business Concern

"Size Standard: Under this solicitation a concern is considered to be small business, if, including its affiliates, it is independently owned and operated, is not dominant in the field of operation in which it is bidding on Government contracts and has less than 500 employees."

¹² Under the SBA regulations, a protest by a contracting officer is to be considered timely for the purpose of the procurement in question whether it is filed before or after award (13 CFR 121.3-5; Finding 10). Because of the rationale for the decision reached, there is no need for the Board to determine the legal significance to be attached to the apparent failure of the contracting officer to file a written protest with the SBA as contemplated by 41 CFR 1-1.703-2.

Denying that appellant's certification of itself as a small business concern could have been made in good faith, the Government inquires as to how the appellant could have interpreted the failure of section 14 (quoted in text accompanying footnote 1) to state that "the \$6,000,000 three year gross income limitation applied" could have been construed to mean that the employee limitation applied (Finding 8). In this regard, the Government notes that section 14 not only refers to the number of employees but also to the average annual receipts and other criteria prescribed in 13 CFR Part 121 as well. Not addressed by the Government, however, are the arguments raised by the appellant to bolster its contention that it considered the number of employees to be the proper size standard because (i) on other contracts on which it had bid the requirement was less than 500 employees (note 8 *supra*) and (ii) that in some sections of the country the Forest Service applies an employee limitation standard in determining whether or not a company is a small business (Finding 8).

Another major argument advanced by the Government is that by letter of June 11, 1981, the SBA had informed Mr. James E. Holt, president of Bonner's Ferry Reforestation, Inc., that Highland Reforestation, Inc., could not self-certify itself as a small business concern and that no exceptions were included in the letter (Government brief at 1-4). An examination of the referenced letter discloses, however, that the ruling was that Bonner's Ferry Reforestation, Inc., together with its affiliate, was other than a small business under the applicable size standard (average annual receipt not to exceed \$2 million for the preceding 3 fiscal years) as of May 5, 1981 (Finding 5).¹³

Still another argument made by the Government is that the contractor failed in its duty to bring the SBA ruling of June 11, 1981, to the attention of the contracting officer in order to determine its effect on its ability to bid. Immediately thereafter the Government brief states at page 8: "Such failure enabled the contractor to gain the contract. The contractor failed to disclose the information solely to gain the contract. Such are grounds for termination by default."¹⁴

Lastly, the Government asserts that the termination of the contract for default was proper pursuant to 41 CFR 1-8.602-1, which gives the Government the right to terminate the contract because the appellant failed to perform any other provision of the contract. In his letter to the contractor of December 3, 1981, the contracting officer characterized the misrepresentation said to be involved as a direct

¹³ The SBA letter of June 11, 1981, (AF 7) states at page 2:

"Bonner's Ferry Reforestation, Inc. and its affiliates, including, but not limited to, JMNI, Inc., Highland Reforestation, Inc., Pinney Leasing and Advanced Automatic Transmission, Inc., will not be deemed eligible within the \$2 million or lower size standard and may not self-certify themselves as such unless recertified by SBA as small businesses."

¹⁴ Cited in support is the decision of the Court of Claims in *Otis Steel Products Corp. v. United States*, 161 Ct. Cl. 694 (1963). The opinion in *Otis* indicates that the failure of the company to disclose that it was not a small business at the time of award was due to inadvertence. The termination for default and the resulting excess costs assessment involved in that case were sustained not because of any finding of lack of good faith on the part of the plaintiff but because the plaintiff had refused to perform the contract on the ground that at the time of award it was no longer an eligible small business concern.

July 8, 1982

violation of 18 U.S.C. § 1001 (1976) (Finding 6). Since 18 U.S.C. § 1001 involves a criminal statute, it is clear that the Board is without any authority to make the determinations required thereunder before a violation could be found to exist. The Government appears to recognize the absence of any such jurisdiction in the Board at page 5 of its brief.

After advertng to the fact that in the letter to the contracting officer of December 29, 1981, the appellant had stated that it did not believe that the ruling of the SBA of June 11, 1981, applied to this contract, Government counsel notes that appellant made no attempt to find out whether it did or did not. Also noted was the fact that the appellant failed to contact the contracting officer or the SBA about the effect of the June 11, 1981, decision on its right to bid the contract. The Government asserts that the appellant acted with reckless disregard of the truthfulness or falsity of its statement of self-certification as a small business made to the contracting officer. It also offers the judgment that since the appellant did not inquire concerning the effect of the June 11, 1981, letter, it made a conscious effort to avoid learning the truth and validity of its self-certification as a small business. Thereafter, the Government states: "Such actions are a deliberate attempt to hide the material facts from the Contracting Officer and are fraudulent in nature" (Government brief at 1-5).

To the extent that the language quoted in the preceding paragraph can be considered to involve a charge of fraud, the Board is without jurisdiction in the matter. Whether a person or concern is guilty of fraud is a question of law and is therefore beyond the competence of an administrative officer or agency to decide. *International Potato Corp. v. United States*, 142 Ct. Cl. 604 (1958). The agency boards of contract appeals are clearly without jurisdiction in this area irrespective of whether their authority derives from the standard disputes clause¹⁵ or from the Contract Disputes Act of 1978.¹⁶

Decision

In arriving at the decision reached in this case, the Board has given great weight to the fact that the solicitation with which we are here concerned failed to apprise prospective bidders of the applicable size standard, even though the governing SBA regulations are explicit in

¹⁵ See *Aywon Wire & Metal Corp.*, ASBCA No. 4966 (Sept. 27, 1963), 1963 BCA par. 3912 at 19,395, where the Armed Services Board stated:

"[T]he Board concludes that it is not within its jurisdiction to find that all or a portion of appellant's claim or of the testimony or documentary evidence presented in support thereof, is, in this case, false or fraudulent and to deny or forfeit the claim, in whole or in part, upon the basis of such a finding. Cf. *Atlas Can Corp.*, ASBCA No. 3381, 6 June 1960, 60-1 BCA par. 2651, pages 13,165 and 13,177-8."

¹⁶ See *Fidelity Construction Co., Inc.*, DOT CAB Nos. 1113, 1123 (Dec. 10, 1980), 80-2 BCA par. 14,819 at 73,140, where the Transportation Board stated:

"This Board does not have jurisdiction to render a determination as to whether or not fraud exists. This was true before the Contract Disputes Act of 1978. *Aywon Wire and Metal Corp.*, supra. This lack of jurisdiction has not been altered by the Act. See Section 6(a) of the Act, 41 U.S.C. 605(a); Senate Report No. 1118, 95th Congress, 2d session (1978) at pages 8, 19-20, reprinted 1978 U.S. Code Cong. & Ad. News 5235. Accordingly, it would be beyond the jurisdiction of this Board to enter a 'Judgment and Order of Forfeiture' as alternatively requested in the counterclaim by respondent."

requiring that both the classification of the procurement and the applicable size standard be set forth in the solicitation (13 CFR 121.3-8; Finding 10).¹⁷ Another significant provision relating to representation made by a bidder or offeror concerning his small business status states: "A bidder or offeror shall not be eligible for an award as a small business concern unless he represented in good faith that he was a small business concern at the time of the opening of bids * * *" (41 CFR 1-1.703-1(c)(3); Finding 10).

The significance of apprising the bidders of the applicable size standard was emphasized by the Comptroller General in 51 C.G. 595. There, in the course of finding that a bidder had failed to certify itself as a small business concern in good faith, the Comptroller General stated:

[W]here, as here, a bidder is fully apprised in an IFB, and referenced regulations, of an applicable small business size standard but fails to take the necessary steps to ascertain its size status under the referenced guidelines, it may be concluded that it has not certified itself to be a small business concern in good faith.

(51 C.G. 597).

In the instant case it appears that the Government not only failed to inform bidders of the applicable size standard but it also failed to apprise them of the classification for the procurement.

The Government says that the appellant knew or should have known that the applicable size standard was average annual receipts not to exceed \$2 million for the preceding 3 fiscal years because Mr. Holt had been so advised by the SBA in a letter dated June 11, 1981. It is undisputed, however, that neither the letter to Mr. Holt nor the letter written on the same date to the BLM contract specialist represent a specific SBA ruling on the solicitation with which we are here concerned. Examining the language employed in such letters (note 13 *supra*, and accompanying text; Finding 4), it appears that the only determination made by SBA relevant to the present dispute was that Bonner's Ferry Reforestation, Inc., together with its affiliates including appellant, were other than small business as of May 5, 1981, under the applicable size standard of average annual receipts not to exceed \$2 million for the preceding 3 fiscal years. A question not addressed in either letter is whether Bonner's Ferry Reforestation, Inc., together with its affiliates including appellant, could qualify as a small business if the applicable size standard for a particular procurement was less than 500 employees for a company and its affiliates.

As previously noted, the solicitation under which the instant contract was awarded failed to specify an applicable size standard or even to cite the classification for the product or service. It was in these circumstances and in the absence of a protest by anyone that the appellant's bid was submitted and accepted. In support of the bid

¹⁷ Compliance with this requirement would appear to be rather simple. In a comparatively recent case another agency of the Government included the following provision in its solicitation: "This procurement is a 100% total set aside for Small Business in accordance with the SBA Act of 1969. The applicable size standard requires that the average annual receipts for the preceding 3 fiscal years do not exceed \$4.5 million (FPR 1-1.701-1(f)(4))."

July 8, 1982

submitted, the appellant states that it considered itself qualified to bid on the instant contract since (i) other contracts on which it had bid had the requirement of less than 500 employees (note 8 *supra*), and (ii) in some sections of the country the Forest Service was applying an employee limitation in determining whether or not a company was a small business (Finding 8). Neither of these statements has been controverted by the Government.

While the Government has been highly critical of the appellant for its failure to raise a question concerning its eligibility to bid on the instant contract, it has nowhere recognized its failure to have discharged its own grave responsibility by including in the solicitation the applicable size standard and classification for the procurement.

Given the circumstances involved in this case and particularly the failure of the Government to provide bidders with an applicable size standard or classification of the product or service for this small business set-aside program, the Board finds that the appellant's interpretation of the solicitation requirements here in issue was reasonable.¹⁸ So finding, the Board further finds (i) that appellant's representation of itself as a small business concern was made in good faith; (ii) that the contract awarded to the appellant based upon such representation was binding upon the parties, even if at the time of bid submission and at the time of award the appellant did not qualify as a small business concern under the applicable size standard and classification for the procurement in question;¹⁹ (iii) that the termination of the contract for default because the appellant had represented itself as a small business concern was therefore improper; and (iv) that the termination for default is hereby converted into a termination for the convenience of the Government with the rights and obligation of the parties to be determined in accordance with General Provision 311-Termination for Convenience of the Government (AF 1).

¹⁸ For the standard to be applied in cases not involving patent ambiguity, see *WPC Enterprises, Inc. v. United States*, 163 Ct. Cl. 1, 6-7 (1963), in which the Court of Claims stated:

"The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions—as well as the main risk of a failure to carry that responsibility. If the defendant chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and especially of the specifications." (Footnote omitted.)

¹⁹ See *Mid-West Construction, Ltd. v. United States*, 181 Ct. Cl. 774, 782 (1967), where the Court of Claims stated:

"Nothing in *Prestex*, however, precludes the possibility that a contracting officer may be granted the authority to make an award to an otherwise unqualified bidder in certain situations. In *Otis Steel Products Corp. v. United States*, 161 Ct. Cl. 694, 699-700, 316 F.2d 937, 940 (1963), we held that the SBA and Armed Services Procurement Regulations on awarding small business set-asides in the absence of a protest contemplated a binding award to the bidder 'whether it was one [a small business] in fact or not.' *Cf. Coastal Cargo Co. v. United States*, 173 Ct. Cl. 259, 351 F.2d 1004 (1965)." (Footnotes omitted.)

For the reasons stated and on the basis of the authorities cited, the appeal is granted.²⁰

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF INDUSTRIAL MACHINE & WELDING, INC.

IBCA-1322-12-79

Decided *July 11, 1983*

Contract No. 14-16-0005-77-031, Fish and Wildlife Service.

Sustained in Part.

1. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)

Under a contract which required the reconstruction of an earthen dike, where, in the course of performance, the contractor was confronted with unusually large boulders, the Board held the contractor entitled to category (2) or, alternatively, category (1) differing site conditions relief for extra costs incurred based upon the following findings: (a) That a site inspection did not disclose the existence of the boulders in the dike; (b) that the Government failed to communicate to bidders available information concerning the existence of the boulders; (c) that the contract documents gave no indication of their existence; (d) that the Government inspector carelessly miscommunicated a prohibition against blasting to protect nesting osprey despite no prohibition against blasting in the contract documents; and (e) that the term "unclassified excavation" in the circumstances does not include "rock excavation" when blasting is prohibited.

2. Contracts: Performance or Default: Suspension of Work

Where a work suspension of less than 3 days was neither unreasonable on its merits nor of unreasonably long duration, a claim for additional expenses incurred as a result of the suspension is denied.

3. Contracts: Performance or Default: Generally--Contracts: Performance or Default: Inspection

Where the final product of a contract is defective, the fault will be with the Government and not the contractor when the evidence establishes that the contractor complied with the specifications and it is inferable that the Government design and specifications and its administration of the contract are defective.

4. Contracts: Performance or Default: Generally

Upon finding that: (1) There were no contract specifications regarding seepage in a conduit pipe; (2) any seepage was minimal as late as 2 years after the original project completion; (3) a second installation was accepted despite greater seepage; and (4) the Government failed to show how part of the pipe being out of round adversely affected

²⁰ Concerning the appellant's request for attorney's fees pursuant to the Equal Access to Justice Act, P.L. 96-481, 94 Stat. 2325, 28 U.S.C. § 2412 (Supp. V 1981), the Board notes that in *Fidelity Construction Co. v. United States*, Appeal No. 27-82, decided Feb. 18, 1983, the United States Court of Appeals for the Federal Circuit held that the Equal Access to Justice Act does not authorize Boards of Contract Appeals to award attorney's fees and expenses against the United States.

July 11, 1983

the intended functioning of the installation, the Board holds the contractor entitled to an equitable adjustment having established that its performance was acceptable when first performed, despite some seepage in the pipe and a portion of the pipe being out of round.

APPEARANCES: Henry Steinfeld and Thomas P. Wilson, Attorneys at Law, Portland, Maine, for Appellant; James E. Epstein, Department Counsel, Newton Corner, Massachusetts, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the decision of the contracting officer (CO) dated May 27, 1981, denying the request of Industrial Machine & Welding, Inc. (appellant), for additional compensation under a construction contract performed at the Moosehorn National Wildlife Refuge in Washington County, Maine.

Appellant was awarded the contract in 1977. Because the site is remote and the project particularly affected by the vagaries of weather, appellant sought and was granted an extension of time until June 1, 1978, to begin the project. The contract called for completion of the project in 90 days with a fixed price of \$24,700 and \$25 per day liquidated damages for late performance.

The nature of the work to be performed was demolition of a concrete structure in an existing earthen "water control facility"; removal of a 48-inch metal pipe culvert in the dike; reconstruction of a new concrete structure; replacement of the pipe with 66-inch pipe; excavation of the dike on both sides of the pipe transverse to the pipe; installation of an impervious clay core in the transverse excavation; regrading of the dike to make it significantly wider; and other relatively incidental undertakings including restoration of a spillway and construction of rip-rap at the outlet of the pipe. The purpose of the project was to replace the existing, increasingly ineffective facility with a new facility, the function of which was to control more effectively the flow of water from Cranberry Lake and its associated wetlands upstream of the inlet structure to streams and water passages downstream from the outlet structure.

Appellant arrived at the jobsite on June 8, 1978, and began construction in earnest on June 12. Because the contract provided no specific schedule for project progress, appellant determined that it would replace the concrete structures and pipe first and then see to the impervious core placement and the minor parts of the job thereafter.

Thus, appellant excavated the pipe and old concrete, destroyed the latter, and replaced it. The new pipe's foundation was prepared and the appropriate grade, per the project plans, was accomplished. Appellant then installed the pipe in three 20-foot sections with hugger

bands at the two joints.¹ Appellant also installed a metal antiseep diaphragm simultaneously with the pipe and hugger bands, as required by the specifications, around the pipe a short distance on the downstream side of the planned convergence of the impervious core with the pipe.

The next step was to backfill and compact around the new concrete structures and the pipe. Appellant then turned its attention to the excavation for the clay core and ran into its first significant problem with the project. Early on in its excavation efforts, indeed during the excavation of the pipe and concrete structures, appellant discovered the existence under the dike's earthen surface of unusually large boulders, some over 4 cubic yards in size. The equipment appellant had on hand was not designed to handle such large boulders and broke down in the effort. Appellant then had to hire much heavier equipment which also had difficulty removing the boulders. In fact, in at least one instance, appellant, with the Government inspector's blessing, dug out an area to the side of the projected clay core emplacement site and slid a large boulder into it rather than remove it. Because the sides of the trench dug for the clay core were very unstable and because appellant enlarged the trench in some places to accommodate the movement of large rocks, the clay core installed was generally significantly in excess of the 4-foot minimum width required by the contract specifications and drawings.

As the far side of the dike (beyond the pipe placement) was otherwise inaccessible, it was necessary for appellant to move its equipment over the pipe installation to facilitate excavation for the other portion of the clay core. Since appellant was then using much heavier equipment than it had originally anticipated (because it encountered the large boulders), appellant's foreman shored up the inside of the center pipe section to eliminate the danger of significant pipe damage from passage of the equipment.

After full emplacement of the clay core and removal of the extra heavy equipment, appellant removed the interior shoring on or about September 10 and proceeded with the regrading of the dike. On September 15 (a Friday), after appellant's crew had left for the day, the Government inspector, Douglas Mullen, who was also the full-time Refuge Manager, visited the site and found a breach in the coffer dam constructed upstream of the project to allow water-free operations by appellant. He also discovered that as a result of the flow of water through the breach, there was infiltration in the pipe at the first pipe joint, *i.e.*, where the upstream section met the center section. He also detected that the center section was out of round. On the following Monday, September 18, the inspector told appellant's foreman that the job was shut down and summoned appellant's president and the Fish and Wildlife Service (FWS) engineer. The latter arrived on September 19 and the former the following day. Apparently, no

¹ Hugger bands are used to align joints of butt-joined pipe sections and consist of two essentially hemispherical metal pieces to be bolted to one another at the joint, one below and one above the pipe.

July 11, 1983

definitive agreement was reached about how to resolve the problem nor even whether there was a significant problem and the crew was allowed to resume regrading work.

The Government informed appellant that it would not accept the project as complete and would accept it only if the center pipe section was replaced. Appellant's president, Roger Lessard, undertook to weld the first joint approximately 240 degrees around on October 13, and, declaring that the job was acceptable and that he would have nothing more to do with the project, left the site on that date. (Appellant's contention that its performance was acceptable is tempered by its admission that the spillway renewal was incomplete. Appellant apparently had some operational problems on how to proceed with that portion of the project, but, despite repeated requests, was unable to secure Government assistance on resolving them. Accordingly, appellant "rounded off the best" it could and left the site (Tr. 48).)

Subsequently, the Government made efforts to induce appellant to return to the site to replace the center pipe. There were a number of meetings and an exchange of correspondence over the ensuing 2 years, aimed at settlement, although, apparently, at times somewhat acrimonious. In May of 1979, Mr. Lessard met with the chief of construction for FWS, Michael Urbanek, at the jobsite. At that time, Mr. Urbanek promised to secure \$8,000 for appellant's extra work, resulting from the unexpectedly large rock excavation, in exchange for appellant's promise to return to the site and replace the center section. Mr. Urbanek also represented that he would contact the pipe manufacturer, secure the information necessary for a successful reinstallation, and transmit it to appellant. When he did that, the information transmitted included details for appellant to order materials. The materials were shipped and received by appellant in late summer 1979 at which time appellant contacted Mr. Urbanek regarding payment of the \$8,000. The latter replied that his representation on the \$8,000 payment had been overruled, so appellant again refused to return to the site. Ultimately, FWS issued a notice of termination for default and notified appellant's bonding company of that issuance. Appellant then returned to Moosehorn, undertook the pipe replacement, and completed the job to the Government's satisfaction on November 14, 1980.

Thereafter, appellant filed claims for additional compensation discussed in detail below. Because FWS had advanced only \$15,000 of the contract price, one of the claims advanced was for the remainder of the original contract figure. In the decision appealed from, the CO denied all of appellant's other claims and, after calculating the number of days by which accepted performance was allegedly late, asserted that the amount of liquidated damages exceeded the unpaid portion of the contract price amount by \$575, and that appellant owed the Government that amount.

The foregoing background statement is based upon items the parties apparently agree upon or upon items asserted by one party and left undisputed by the other. There are a number of disputed factual matters in the case with respect to which we will make findings in the appropriate context of the following discussion.

Discussion

On appeal, appellant advances three claims for compensation additional to that for the unpaid portion of the contract price just mentioned: (1) \$6,332.50 for additional rock excavation occasioned by the encountering of unusually large boulders in the dike beyond what was represented in the contract; (2) \$1,012.50 for labor and labor-related expenses incurred when the Government shut down the project in mid-September 1978; and (3) \$1,180 and \$20,026.54 for the cost of new material replaced in 1980 plus labor expenses associated with that effort, respectively. Appellant relies on two theories for recovery: (1) to the extent that performance was insufficient, the blame therefor can be located in the contract deficiencies of design or specifications in theory and in practice and (2) in any event, appellant satisfactorily performed the contract as of October 13, 1978. Appellant also contends that liquidated damages for the period beyond October 13, 1978, should not be allowed.

The Government disputes that the project was acceptable at any time prior to November 1980 and that its plans and specifications were in any manner deficient. The Government contends that the asserted unacceptability of the work was occasioned by appellant's poor workmanship. Following that line, it claims liquidated damages through November 1980 discounting impossibility of performance because of bad weather.

The Additional Rock Excavation

Appellant contends that the contract failed, without reason, to warn appellant of the unusual rock conditions in the earthen dike and that FWS should therefore be liable for the extra work appellant undertook to deal with those conditions. FWS contends that the contract gives ample warning of the conditions and that appellant's failure to prepare for them either in preparing its bid or rebuilding the dike caused appellant the problem of which it complains.

The main features of the Government's argument are that appellant failed to make a prebid site inspection which would have disclosed that there were large rocks in the area and that the contract indicated that excavation was to be of the "unclassified" type.

Indeed, appellant did fail to make a prebid inspection (Tr. 146), but ultimately that failure did not lead to the problem at hand. Appellant's contracts administrator, Michael Lane, made a postaward/preconstruction inspection of the site in October 1977 (Tr. 247). He testified that he observed no rocks larger than 1 foot in diameter on

July 11, 1983

the existing structure as well as anywhere in the vicinity (Tr. 247-48). Nevertheless, because in his experience Government contracts specified the limit of rock size for excavation beyond which the Government took cost responsibility, he asked about such a limit but received no answer (Tr. 248-49). Regardless of Mr. Lane's observation, other witnesses testified that around the area there were some rocks of considerable size. Although Refuge Manager Mullen, for instance, testified that among the many rocks in the the area, some were as large as a cubic yard, he, like the other witnesses, said that none were visible in the dike (Tr. 350). Thus, we conclude that even if appellant had made a prebid inspection, it would have had no greater knowledge about projected rock excavation than it acquired by the postaward inspection. It would have found that there were large rocks in the vicinity but it found that later anyway and that knowledge was hardly conclusive regarding the composition of the dike. Appellant contends that, since the existing dike belonged to FWS, the latter had the responsibility to apprise appellant in the bid documents of the nature of the work and that if it did not, then the Government should pay for any extra work beyond what was reasonably expectable. The FWS regional engineer testified, however, that the reason no information about the existing dike was disclosed in the bid documents is that he did not believe that FWS had any records on file regarding the old structure. He speculated that refuge personnel had constructed it (Tr. 503). Nevertheless, Mr. Mullen testified that he had talked to the man who built the dike and the latter told him that there was rock in it (Tr. 346-47, 350-51). Thus, FWS had at least one source of information about the old dike but did not attempt to utilize it either for the benefit of Government personnel who prepared the design and specifications or for the benefit of the contractor's knowledge.

FWS maintains that, regardless of the quality of its research effort on the old construction, the contract indicated that excavation was to be "unclassified." According to FWS, "unclassified" means any kind of excavation, even including large boulders and solid rock. The authority for FWS's position is the Maine Standard Specifications for Highways and Bridges.² Appellant has a somewhat different view of the meaning of "unclassified." Mr. Lane testified to a radically different understanding (Tr. 251-52), and appellant's expert witness, Larry Cole, while agreeing basically with the Maine Specifications, clarified the term significantly. He testified that "unclassified excavation" includes "rock excavation," which is the FWS position, but that "rock excavation" involves rocks too big to handle with construction

² We note that FWS uses the Maine highway specifications to bolster its case but argued vigorously against appellant's doing the same. Although the contract does refer to the State specifications for compaction of structural backfill, it does not refer to them in regard to excavation. When appellant attempted to cite the Maine standards as support for the proposition that the contract should have included a requirement for shop-strutting the pipe, FWS objected strenuously because the contract did not refer to the Maine specifications in regard to that operation. FWS nevertheless has no problem using similar unreferenced specifications for its own purposes.

equipment and requires blasting (Tr. 268). We find that "unclassified excavation" has a meaning consistent with Mr. Cole's testimony; it was the only expert testimony on the subject and it does no injustice to the definition upon which the Government relies.

Therefore, if we accept the Government's argument that by using the "unclassified" term the contract put appellant on notice that it may encounter all kinds of conditions including rock excavation, then we would conclude that if appellant encountered rocks so large that blasting was required to allow construction equipment to move it, then appellant would have to conduct "rock excavation" which is covered by the contract. We know that appellant did encounter rocks too big to excavate with its equipment, indeed even too big to move with the extra heavy equipment it hired. However, appellant wished to blast the large rock to be able to move it with its equipment but was told by the inspector, Mr. Mullen, that no blasting was allowed (Tr. 174). Mr. Mullen, on the other hand, testified that he indeed did tell appellant that no blasting would be allowed but that that restriction applied only when the osprey were nesting. He went on to say that he later informed appellant's foreman, Mr. Bunker, that "there was no problem in driving the trucks or anything else because the osprey was no longer nesting" (Tr. 377). We find that if Mr. Mullen indeed meant to limit blasting rather than to ban it, he failed adequately to communicate that to appellant. Our finding, which essentially accepts appellant's version, is based on two factors: (1) the doubtful credibility displayed in Mr. Mullen's testimony in other areas, one of which will be reviewed in detail later, and (2) the circumstances at the site which make it unlikely that such a communication was delivered. Those circumstances are (a) the apparent unlikelihood that appellant would go to the expense of hiring larger equipment on a lump sum contract, (especially where there was no guarantee that it would be reimbursed for the extra cost), if it believed that the less expensive alternative of blasting were available to it, and (b) Mr. Mullen's failure to inquire why appellant was not blasting when he was aware of the large rock problem and appellant's extraordinary efforts at dealing with it.

[1] To sum up then, what we have is the following: (1) The Government had or could have had information about the composition of the existing dike; (2) despite that, the contract called for "unclassified excavation"; (3) a prebid inspection would not have disclosed whether there were excessive sized rocks in the dike (indeed, it may have been reasonable for appellant to have concluded that the old dike, being manmade and with no apparent rocks in it, contained no large rocks despite the presence of large rocks in the area and perhaps because of that very presence given the apparent absence of rocks in the dike); (4) appellant encountered a situation calling for "rock excavation," *i.e.*, large boulders far exceeding the size of even those apparent in the area at the surface; and (5) FWS prohibited appellant from blasting, despite a lack of such limitation in the contract.

July 11, 1983

In these circumstances, we hold that appellant is entitled to compensation for a differing site condition. Paragraph 4 of the contract's General Provisions allows compensation when the contractor encounters "(1) subsurface or latent physical conditions * * * differing materially from those indicated in this contract or (2) unknown physical conditions * * * of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering" in the contract work. We believe that appellant has made out a changed condition either under the second alternative because the excavation required was beyond that reasonably expectable despite the contract's inclusion of the "unclassified excavation" term or under the first alternative because by prohibiting blasting, FWS effectively represented that "unclassified excavation," as used in this contract, did not include "rock excavation." Thus, under either view, FWS should pay extra for the rock excavation.³

Appellant claimed \$6,332.50 for the additional rock excavation. The Government's audit disallowed \$3,150 of charges for labor because hand labor was not required in addition to charges for two backhoe rentals which included labor. The audit representation is reasonable on its face and is accepted since appellant failed to present sufficient evidence to support the charge for the additional labor. Accordingly, we hold that appellant is entitled to \$3,182.50 for the rock excavation.

The Shutdown

[2] Appellant claims \$1,012.50 for additional expenses incurred as a result of the alleged suspension of work for 2 plus days in mid-September 1978. Paragraph 17 of the General Provisions allows an adjustment for such costs whenever the CO orders a suspension for an "unreasonable period of time." The same provision also refers to costs caused "by such unreasonable suspension." Regardless of the other problems with this claim (largely procedural ones, including whether

³ We are not unmindful of the Government's contention that the claim for compensation for a differing site condition under Paragraph 4 of the General Provisions should be denied for appellant's failure to comply strictly with the notice procedures of that paragraph. The Government contends that since appellant failed to notify the CO that it was having trouble with rock excavation until its Sept. 21, 1978, letter, it did not provide the CO with the prompt ("before such conditions are disturbed"), written notice required before a claim may be allowed (Govt. Br. at 57-60). It is obvious, however, that the inspector, Mr. Mullen, knew about the problem essentially contemporaneously with appellant's encountering it. In such circumstances, the Court of Claims has held that the notice requirement has been satisfied. *General Casualty Co. v. United States*, 130 Ct. Cl. 520 (1955). Similarly, other tribunals have held that written notice is not required when the Government is fully aware of the conditions and of the appellant's difficulties, and where there is no inability of the Government to investigate, and no other prejudice is shown. *Lyburn Construction Co.*, ASBCA 9576 (Jan. 26, 1965), 65-1 BCA par. 4645, and cases there cited; *Human Advancement, Inc.*, HUDBCA 77-215-C15 (June 30, 1981), 81-2 BCA par. 15,317. Even assuming that the inspector in this case was unaware of the excavation problem and prevented the FWS from investigating the alleged change in condition, that factor could result in prejudice to the Government but would not establish it conclusively. *Human Advancement, Inc.*, *supra*. It would leave intact the requirement that the prejudice be proved. *Parcoa, Inc.*, AGBCA 76-30 (July 19, 1977), 77-2 BCA par. 12,658. In this case, the Government essentially admits that the conditions existed as appellant said they do. It obviously was not prejudiced then by an inability to investigate. It argues only on the legal fronts that the conditions did not amount to a changed site condition within the meaning of General Provisions, Paragraph 4, and that the appellant failed strictly to follow the procedural guidelines of that paragraph. Since the Government was aware of the conditions and since it otherwise failed to show any prejudice, we believe that appellant sufficiently complied with the notice provisions and thus reject the Government's contention.

technically a suspension of the type contemplated in Paragraph 17 was even ordered), we can clearly see that any suspension was neither unreasonable nor for an unreasonable period of time. Mr. Mullen found what appeared to him at the time to be a serious problem with the project (regardless of how we may characterize it years later). In those circumstances, it was not unreasonable to order a shutdown until more experienced and responsible hands could determine the full extent of the problem and work on a solution. Since appellant's president's presence was desirable and could not be accomplished until the third day of the "suspension" (which was also the day work was resumed), the period was also not unreasonable. The claim is denied.

The Material and Labor for the Second Pipe Installation

Whenever a contract final product is defective for the use intended and there is no certain reason for it, inferentially it will have been caused either by poor workmanship or by poor design in theory or practice or by some combination of the two. Obviously, in this case, appellant is saying that since its work was good and conformed to the specifications, then to the extent that there was any defect, the fault lay with the contract specifications. FWS says that since there was nothing wrong with the contract plans and specifications, the defect must have been caused by the contractor's deficient performance.

Our task is to go through the evidence, most of it necessarily circumstantial, and determine which of these competing arguments is the correct one. We have done that and conclude, on balance, that the facts favor appellant's position, either because the performance was acceptable in October 1978 or because if it were defective, that resulted from the Government's deficient specifications or inadequate oversight.

[3] The Government has advanced several theories upon which it wants us to infer that appellant's performance was deficient. Upon our review of the evidence in relation to each of these theories, we find and conclude that for each it is more likely that the Government was the party at fault either because of deficiency of design or specifications or because of inadequate oversight. Those theories and our findings and conclusions thereon follow:

1. The center pipe failed because the structural backfill was improperly compacted.

Given the evidence produced, we cannot infer that the compaction techniques were other than adequate. (a) Appellant's foreman testified that he followed the contract specifications for compacting, warned his men not to allow oversized rocks in the structural backfill area, and saw that the crew followed his instructions (Tr. 206-08). (b) Mr. Mullen testified that although he was physically present at the site very infrequently (about a one-half hour per day, about 4 days a week usually in the evening after the crew had quit for the day), he observed good practices whenever he was present and had no problems with appellant's efforts or progress (Tr. 373, 375). (c) The contract contained no compaction standards to be met and required appellant to use for

July 11, 1983

structural backfill certain gravel from a designated borrow area (AF. 1). This gravel could not be compacted beyond 50 percent, according to the opinion of Mr. Bunker (albeit not that of a qualified expert) (Tr. 237) while proper compaction should be at least 85 percent according to the expert, Mr. Cole (Tr. 309). Mr. Mullen also testified that this fine material allows water to pour through it "as a sieve" (Tr. 383). (d) Although normal industry practice requires the contracting agency to conduct compaction tests according to Mr. Cole (Tr. 278-79) the Government failed to do that. (e) Compaction of any material around it is strong enough to hold it in place according to the FWS regional engineer, Mr. Petrick, but the Government took no preconstruction tests to determine the stability of the existing dike (Tr. 520-21); we know that appellant encountered serious stability problems in both the 1978 and the 1980 efforts and that the Government was aware of it. (f) The Government's argument that the original compaction efforts were inadequate and the gravel adequate because the Government accepted the second installation which used the same gravel is bootstrapping, especially considering the fact that the 1980 installation performed more poorly than the 1978 installation (discussed in detail below), despite the Government's acceptance of the later job.

Thus, we conclude that the Government did not carry its burden of showing that appellant's compaction efforts were inadequate and that appellant's evidence was sufficient to show that it followed the contract specifications on compaction. We further conclude that it is inferable that if there were inadequate compaction, it resulted from the Government's failure to inspect adequately, including taking compaction tests during construction, its failure to conduct tests to determine stability prior to soliciting bids, its requirement that the contractor use inferior gravel for backfill, or some combination of those three factors.

2. The center pipe failed because appellant installed a clay core of more than 4 feet in width at the pipe intersection.

We cannot accept that theory for the following reasons: (a) The contract allowed the core to be more than 4 feet in width. The contract drawing depicted, among other things, two different vertical cross-sections of the dike, one called a "Typical Embankment Section" and the other identified as "Section A.1.1" (App. Exh. 23). The former shows what the finished dike should look like and includes a representation of the clay core, drawn to scale to be 4 feet wide with a notation that the width was to be "4'-0" MIN" (meaning "minimum 4 feet wide," according to both parties). The latter shows the pipe installation, the anti-seep diaphragm, the concrete structures and associated slab, etc., with the core represented as being 4 feet wide, according to scale, but with *no* notation about the width of the core.

(b) Appellant's expert Mr. Cole testified that additional width of clay core would have no effect on the integrity of the finished project (Tr. 290-92). (c) The Government failed to show how a greater width of clay core would affect the integrity of the finished structure.

Thus, we conclude that the Government did not carry its burden of showing that appellant's installation of the clay core was in any way inadequate. We have already seen that the instability of the dike around the core caused appellant to install a clay core in excess of 4 feet wide and we can find nothing in the contract that would prohibit such a practice. Indeed, we find that the most reasonable interpretation of the drawing is that it allowed a width of core greater than 4 feet anywhere in the dike, including at the intersection with the pipe. Insofar as the Government also failed to establish a connection between excessive core width and any failure of performance, we must reject this theory as establishing appellant's fault.

3. By performing the project components in a backwards order, the contractor caused heavy equipment to cross over the new pipe installation, and that pressure caused the pipe to deflect and to leak.

We cannot accept that theory for the following reasons: (a) There is no practicable way of conducting the project without some passage of equipment over the newly installed pipe, because the pipe had to be in place when the intersecting portion of the clay core was installed; this meant that some core trench excavation and core placement had to await installation of the pipe and passage of equipment afterwards; appellant's preferred order of completion was not unreasonable since it avoided disruptive piecemeal construction and the contract failed to specify a component completion sequence. (b) Appellant had no reasonable expectation that it would need to use the extra heavy equipment it ultimately hired. See detailed discussion of this issue below. (c) Appellant took reasonable precautions against deflection because of the passage of heavy equipment by filling the structure above the pipe nearly to grade (Tr. 214, 221) and shoring the inside of the pipe (Tr. 213) before allowing the passage of the heavy equipment. (d) There was no deflection during the period when the pipe was shored and heavy equipment was passing over nor was there any for at least 5 days after the heavy traffic ceased and the shoring was removed (Tr. 223). (e) The expert testified that the shoring up in these circumstances should constitute adequate security to allow the passage of heavy equipment without damage (Tr. 295).

Thus, we cannot conclude that the Government carried its burden of showing that appellant's choice of operating sequence was unreasonable and led to any defect in performance. Therefore, we conclude that appellant's sequence was reasonable in the circumstances and that it took reasonable precautions to assure that no untoward consequences would result from the operation of equipment over the pipe.

July 11, 1983

4. The final Government theory appears *passim* throughout its trial of the case and its briefing and can be expressed this way: The Government is entitled to expect reasonable, workmanlike performance within industry standards from its contractor even where it is found that Government inspection efforts are not what they could have been and where the contract plans and specifications are not as complete and detailed as they might have been. Another way of saying that would be that if the Government gives the contractor the general design and the contractor knows the purpose of the project, then the Government ought to be able to count on the contractor's expertise in the area and its application of good industry practices and standards to the satisfactory completion of the task. While this proposition is not without some logical appeal, we must reject it, at least as applied to this case, for the following reasons: (a) This was "unique," a "special" project according to the FWS regional engineer, because it was not the construction of a new dam or dike but the reconstruction of an old one (Tr. 501). This means that there could not be much contractor expertise on which the Government could rely. (b) The industry standards, at least for dam construction projects, besides determining good practices by the contractor, also require considerable involvement by the paying party. This includes design by and strict supervision of the project by a design engineer, according to the expert, Mr. Cole (Tr. 271), who drew upon a publication by this Department's Bureau of Reclamation as partial support for his testimony on this subject. Although the FWS employee who designed the project was not present, there is testimony to the effect that he is a registered engineer (Tr. 523), but neither the employee who committed the design to plans paper nor the employee ultimately responsible for the design is (Tr. 418, 501). The FWS Regional Engineer testified that an inspector would not be necessary on this project continuously, because it would be too expensive, so FWS relies heavily on the local manager to supervise and inspect on jobs of this nature (Tr. 499). (c) FWS expected to receive bids from small companies on this job and, in fact, has a policy favoring making awards to small businesses (Tr. 511). (d) Mr. Cole testified that small contractors, like appellant, normally would not have an engineer on staff (Tr. 276-77) and the FWS Regional Engineer agreed (Tr. 511). (e) The Government did not have a good and adequate inspection program for a job of this nature, according to the expert, Mr. Cole (Tr. 280). See subparagraph 1(b) above. (f) The Government's approach on this project was to "have a fairly loose set of specifications and shoot for acceptable practice in the field" (Tr. 510).

We conclude, on the basis of the foregoing, that at least in these circumstances, we cannot accept the Government's theory. It is unreasonable to count on a contractor's expertise when the project is a "unique" one and to depend on "good practice in the field" when the

contractor complies with what specifications are present and (1) the Government knows that the contractor will not have an engineer in the field to identify problem areas and monitor progress of the project, and (2) the only Government employee at the site was not shown to possess the experience or knowledge normally expectable in an inspector, conducted inspections on a barely minimal basis, and expressed that appellant's work was fully adequate whenever he was able to review it. We are mindful that if we accepted the Government's proposition, we would be telling every small contractor that it could find itself in a "Catch-22" whenever it embarked on such a project, that even if it followed the contract's specifications and satisfied the Government inspector, it would nevertheless shoulder the blame, and not the Government, because of inadequate design, specifications, or inspection whenever the final product is not accepted by the Government. We refuse to countenance that inevitable result from our acceptance of the Government position and thus reject it.

The foregoing establishes the basis for our conclusion that to the extent that there was something wrong with the installation in 1978, the far greater part of the blame lies with the Government. To be material, of course, it assumes that the project was defective when completed in October of 1978. Because of our following analysis of the evidence, however, we conclude that such assumption has little validity.

[4] After the leakage problem was discovered in September 1978, appellant undertook to solve that problem by welding the first joint for 240 degrees (Tr. 45, 65). According to Mr. Lessard, the leakage after that was mere "drizzle" (Tr. 65). The only evidence advanced to oppose that assertion is the report of the project engineer (AF-23), which indicated that appellant's welding efforts slowed the leak but that water continued to flow at approximately 3 gallons per minute.⁴

Mr. Lessard's testimony is entitled to more weight because it was given under oath and subject to cross-examination. Relatively speaking, even if we accepted the 3 gallons per minute rate in the project engineer's report, that would not persuade us that the seepage at that point was significant (*see note 4*). Insofar as the contract contained no seepage specifications anyway, we find that there was no deficiency in performance as a result of seepage. Moreover, Michael Lochiatto, who was the inspector for FWS on the 1980 reinstallation, testified that when he arrived at the site in November 1980, after appellant had installed a damming device on the concrete inlet structure and the lake "was a little low," the leakage at the welded joint was "very minor" (Tr. 424-25).

We make this finding despite Mr. Mullen's testimony that there was an indentation in the pipe in October 1978 (Tr. 380). Mr. Lessard

⁴ Even this rate is not very much out of line with Mr. Lessard's description of "drizzle." Mr. Mullen testified that the area to be controlled by the dike was several hundred acres. If the lake were 200 acres, a 3-gallon per minute seep (Tr. 33) would drain 1 foot of water from the lake in something around 35 years. Naturally, this calculation doesn't account for possibly greater pressure if the lake had a higher head than it did in October 1978, but it does illustrate the relative insignificance of a 3-gallon per minute leak even if such a rate is higher than Mr. Lessard's "drizzle."

July 11, 1983

admitted that he saw a bulge in the pipe near the joint in May 1979 (Tr. 172), but Mr. Mullen's 1978 observation stretches credibility. Not only did two engineers' reports in 1978 fail to mention it (AF-14 and AF-23) as certainly would be expected if the reporting engineers observed it, but also Mr. Lessard was able to weld the joint in October 1978 so that seepage was minimal, a condition which continued into late 1980. See reference to Mr. Lochiatto's testimony above. It ultimately proved that the bulge was caused by a rock of a size greater than that allowed by the specifications for structural backfill near the pipe, but because of appellant's foreman's testimony about the backfill operation's consistency with the specifications and good practice (described in more detail above), we are inclined to credit appellant's expert's opinion that there were at least two reasons consistent with good workmanship that could have accounted for the position of the bulge-creating rock more than a half year later: crustal movement (seismologic) typical in that portion of Maine (Tr. 295-97, 314) and seasonal frost and water movement through the fill material (Tr. 298). Though we find that the bulge was not apparent until 1979, we note that it apparently had no effect on whether appellant's performance was acceptable. See the treatment of Mr. Lochiatto's testimony above. Further, it appears that the 1980 installation of the replacement center section resulted in leaking in greater flow than that experienced after the first installation and weld in 1978. Appellant's employee, Michael Lessard, testified to that effect (Tr. 340) as did FWS's inspector Mr. Lochiatto (Tr. 434).

The only remaining question about appellant's performance in 1978 concerns the deflection of the center pipe. The Government has failed to show how the pipe's being out-of-round has affected the project's ability to perform as it was intended. It has argued that the deflection is an indication of appellant's poor workmanship but simply has not shown how it harmed performance. In the circumstances, we conclude that appellant substantially complied with his contract obligations by October 1978, the project should have been accepted at that time, and appellant is thus entitled to his costs for materials and labor involved in the 1980 "corrective" work.⁵

Therefore, appellant is entitled to compensation for the 1980 work either because the fault for any deficiencies in the 1978 installation was the Government's or because the 1978 installation should have been accepted. The figure for additional materials, \$1,180, is undisputed. The figure for labor and labor related expenses, \$20,026.54, was subjected to Government audit, however. The audit took several exceptions to several items claimed. The exceptions are reasonable and sensible on their face, and appellant advanced no evidence at the

⁵ Although, as noted, appellant admitted to failing to complete the spillway in 1978, that failure does not stand in the way of substantial compliance. The Government has not claimed harm specifically resulting from it, and appellant successfully finished it in 1980.

hearing such as would overcome them.⁶ We therefore accept the audit exceptions as proper qualifications on the amount due under the claim. The total for the Government adjustments is \$8,646.83, by which we will reduce the amount claimed, making the proper amount due under this section of the claim \$11,379.71. To this must be added \$1,180 for material costs for a 1980 reinstallation costs total of \$12,559.71. Naturally, appellant is also entitled to recovery of that portion of the original contract price not previously paid, with an adjustment for liquidated damages. That amounts to \$8,675, being \$9,700 originally due, reduced by \$1,025 liquidated damages (\$25 per day by 41 days, being the number of days from August 30, 1978, to October 13, less 3 days for the Government-ordered "shutdown").

Therefore, appellant's claims for additional rock excavation in 1978 and for labor and material costs incurred in 1980 are granted and the Government is directed to pay appellant the sum of \$24,417.21. That figure represents the total of (1) \$3,182.50 for the 1978 claim, (2) \$12,559.71 for the 1980 claim, and (3) \$8,675 for the unpaid portion of the original contract price as adjusted. Appellant's claim for compensation for expenses incurred as a result of the alleged September 1978 "shutdown" is denied.

DAVID DOANE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF L. A. MELKA MARINE CONSTRUCTION AND
DIVING CO., INC.

IBCA-1511-9-81

Decided July 28, 1983

Contract No. CX-3000-9-0160, National Park Service.

Sustained in part.

1. Contracts: Construction and Operation: Contract Clauses

⁶ At the time of the hearing, it became apparent that appellant had not theretofore submitted invoices and payroll records covering the 1980 effort. The reasons for that failure are unimportant, because it was agreed by the parties that appellant would make a posthearing submission of those documents for the purpose of quantum proof as long as the Government would have the opportunity to advance argument against them or their particulars in its brief (Tr. 556-58). Appellant made that submission and the Government took the exceptions to them noted in the text. (The exceptions pertained to overtime hours charged for days when the inspector's log indicated no overtime work took place, fewer man days expended than claimed as that affected room and board charges, and excessive service charges for appellant connected to its rental of equipment from local suppliers.) See Govt. Br. at 64-66. Obviously, appellant had no opportunity to counter the argument with testimony or other evidence at the hearing because the Government's position on these items was first announced in its posthearing brief. We have accepted the Government position nonetheless because we have assumed that appellant would have submitted additional material once apprised of the Government's arguments if it found them unreasonable. Since appellant also has had ample opportunity for such additional submission, we further assume that it did not find the Government arguments unreasonable and that it thus accedes to them.

July 28, 1983

A contract for dredging a lake is found not to be a lump sum contract despite a fixed amount appearing on the face page under the term "Contract price" where a contract provision for measurement and payment expressly provides for payment at unit prices per cubic yard of dredged material.

2. Contracts: Construction and Operation: Changes and Extras

A dredging contract for the dredging of silt and sediment providing for the removal of undredgable materials by others is found to have been constructively changed when the Government fails to provide for the removal of undredgable materials after notice and the contractor is required to remove such materials in order to timely perform his dredging.

APPEARANCES: Peter Paul Mitrano, Attorney at Law, Alexandria, Virginia, for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C. for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Appellant was awarded a contract for dredging a portion of a recreation lake at Prince William Forest Park in Virginia. Awarded on September 27, 1979, in the amount of \$72,941, the contract amount was increased to \$77,069 by modification as a result of a delay in commencement of the work because the National Park Service did not timely procure the necessary permits. In this appeal, L. A. Melka Marine Construction & Diving Co., Inc. (Melka), claims a total of \$78,843.20. The amount of \$52,652.60 is claimed for differing site conditions and/or changes based upon allegations that debris found in the lake interfered with normal dredging operations and could not reasonably be anticipated from the contract indications of site conditions. The amount of \$22,608 is claimed as a contract payment due under a fixed lump price contract, whereas the Government contends that dredging payments were due only on a cubic yard basis. Melka also claims \$3,582.60 for additional profit on the mobilization and demobilization line item of the contract. Primarily, the issues in this appeal involve differences in the interpretation of the contract and specifications, with little disagreement between the parties on the factual evolvment of the disputed claims. The parties stipulated to the following:

1. The allowable and acceptable rate of overhead and L. A. Melka Construction & Diving Co., Inc. (hereinafter sometimes referred to as "Melka"), incurred on work performed on this project is 43.2 percent.
2. Melka completed the work required by said contract in a satisfactorily and acceptable manner.
3. The slides provided by the Government are admitted only for the purpose of showing that there were trees in the work area.
4. The Mudcat is adequate to remove silt and sediment, which is exactly the type of material the Mudcat is designed to remove.

5. Melka's estimate for mobilization and demobilization and for lake dredging is reasonable.

Background

The contract was entered into after issuance of an invitation for bids by a notice of award to Melka as the low bidder and the acceptance of the Melka bid by the contracting officer signing the Standard Form 23 for construction contracts furnished with the bid. The face page of Standard Form 23 showed the amount of the contract in words and figures in the block entitled "Contract Price." The bid form called for a lump sum price for mobilization and demobilization, and a unit price for 12,000 cubic yards of dredged material. Beneath the bid amounts was the statement: "Above quantities are estimated and will be used to canvass bids, but payment will be made only for actual quantities of work completed." Part 4: Measurement and payment of the specifications for mobilization and demobilization provided: "Mobilization and demobilization will be measured as one lump sum for all included work. Payment will be 60 percent of the contract price after satisfactory completion of the mobilization and the remaining 40 percent upon satisfactory completion of demobilization." Under the "Lake Dredging" portion of the specifications, the payment provisions was set forth as follows: "Part 4: Measurement of Payment. Dredging will be measured in place at the disposal site * * *. Payment will be made at the contract unit price per cubic yard." Other relevant contract provisions are set forth below:

SP-1 *Description*: The principal feature of the work includes subaqueous dredging of materials from designated portions of a recreation lake and transporting and disposing of the dredged material.

SP-7 *Site Access*: Access to the lake will be on existing roads and trails only. Existing trees will not be removed to provide wider access. The Government may trim limbs from overhanging trees to provide a clear opening if required.

Lake Dredging

1-1 *Description of Work*: The work of this section consists of furnishing and operating equipment to hydraulically remove silt and sediment from designated portions of a recreation lake and transport by pipeline the spoil to a designated site.

The lake will remain at normal water level during the work.

1-2 *Work by Others*: Prince William Forest Park will locate, construct and satisfactorily maintain a dewatering and disposal site for the dredge material.

The contractor will not be required to remove objects uncovered which are too large to be removed by dredging. The contractor shall locate such objects and cooperate and assist in their removal.

1-3 *Methods*: * * * Size of equipment shall be limited to that which can be transported to the site over existing access roads.

3-4 The deposit site will be modified and maintained suitably by the Government.

On the last of three unnumbered drawings attached to the contract, the following notation appears: "Mechanical analysis of a sample of material indicates the *sample* to be: 48% sand, 37% silt, 15% clay."

Mr. Leonard Melka, appellant's president, testified that he made several site visits before bidding for the contract and that probing of the lake with a pole did not reveal any debris (Tr. 76-78). He testified

July 28, 1983

to the repeated clogging of the dredging machine by undredgable material, such as rocks and tree limbs or sticks, with a resulting shutdown of the Mudcat dredger and the booster pump (Tr. 22). On May 1, 1980, the dike of the spoils disposal area broke, releasing water and spoils, and shutting down the project the remainder of that day and the two following days. Included in the claim is \$5,630 for costs due to the break in the dike (Tr. 24-33). He sent a letter dated May 2, 1980, to advise the Park Service that undredgable material was being encountered and requested they make arrangements to remove the debris (AF N). He stated that his crew removed large quantities of sticks, rocks, and logs from the lake and that the Park Service assisted only for 2 or 3 days. This assistance consisted of furnishing a winch truck to remove large logs and to haul away the debris removed by Melka and piled on the shore (Tr. 46-50). He considered that the Mudcat dredging machine was the proper choice of equipment within the limits of access to the site permitted by the contract (Tr. 39-42).

Mr. William R. Wheaton, president of Cranes Unlimited, testified to the reason for the selection of the Mudcat dredger under conditions of limited access and the necessity to use a spoils pipeline that could be laid by hand. He stated that pipeline for an alternate dredger required equipment to place the 300 pound sections, which could not be done because of the environmental protection provisions of the contract. He checked with various sources for a small dredging machine for this project before the contract award and made a more comprehensive survey afterwards. He concluded that the 15-foot Mudcat was adequate and the most appropriate available dredging machine for this project (Tr. 88-99).

Melka's foreman on the job was Mr. Jack Miller. He described the area as a small reservoir above a dam, with two swimming areas about 100 feet apart. The dredge pumped the material through a pipeline about 1,000 feet to a booster pump, which then moved the material another 2,000 feet to the spoils area. Mr. Miller usually was on the site while dredging was taking place because he worked on both shifts unless relieved by Mr. Melka. He testified extensively to the frequent stoppages of work occasioned by the dredge taking up grapefruit sized rocks and sticks. Each stoppage took 20 to 30 minutes because the booster pump had to be shut down each time, with a resulting loss of pumping pressure. He stated that the clogging often resulted in the need to dismantle and repair the pump, and to frequent need to replace the shear pins and packing on the pump. The Melka personnel would recover the debris, load it in a boat, and take it to shore where park personnel would dispose of it after it was loaded in their trucks by a Melka backhoe. He testified that he requested the Park Service to assist in removing the debris which amounted to five or six truckloads, but that the actual removal from the lake was done by Melka (Tr. 102-26).

The principal witness for the Government was Mr. George Valvoort, a civil engineer for the Park Service. He testified that he wrote the specifications, but had done no probing of the lake before estimating the job for the Government and did not know what was under the lake. He interpreted the word "sediment" to include leaves, rocks, and sticks (Tr. 127-38).

Discussion and Findings

Claim for balance of contract amount. Appellant claims there is a balance of \$22,608 due and unpaid under a lump sum fixed price contract. The Government claims that only the mobilization and demobilization item was a lump sum, and that the dredging was to be paid for on the basis of the unit price for each cubic yard of material removed by dredging. Melka was paid \$20,549 for the mobilization and demobilization and \$33,912 for dredging of 7,200 cubic yards at the unit price of \$4.71 for a total of \$54,461 (AF X, payment voucher 6). Appellant relies on the fact that the face page of the contract included amount in the block entitled "Contract Price" and cases in which contracts were held to be lump sum contracts even though unit prices were included. The cases relied on did not involve contracts in which the express language for payment was included as in the instant case to require payment to be made on the basis of the unit price per cubic yard. Appellant claims that the payment language refers only to a method of calculating estimates for progress or partial payments. The only support for this is the testimony of Mr. Melka that this was his understanding. Appellant does not cite any contract provision, and we cannot find any, that supports the understanding that provision for payment at the unit price per cubic yard was only for progress payment estimates.

[1] Regardless of this interpretation by appellant, we are confronted with clear and unambiguous language in the contract providing that payment for dredging will be at the unit price. In face of clear contract language concerning the method of payment, it is unnecessary to consider the strained and unsupported contrary meaning appellant gives to the payment provision. We find that the contract provided that dredging would be paid for at the specified unit price per cubic yard.

Claim for additional profit on mobilization and demobilization work. Melka's actual cost for mobilization and demobilization was \$16,966.40. The contract amount for this item was \$20,549, a sum that appellant was paid. Appellant contends that the difference, *i.e.*, \$3,582.60 would have been recovered as profit had it not been penalized by its claim for differing site conditions. Appellant has been paid the contract lump sum for this item, which exceeded the actual cost by the amount claimed. Therefore, Melka has been paid the expected profit on the mobilization and demobilization item. Nothing in the record supports a contention that the costs of this item were affected by the difficulties encompassed by the differing site condition/changes claim. Therefore,

July 28, 1933

we find no entitlement to additional profit for mobilization and demobilization. This question is made moot by our findings below.

Differing Site Conditions/Changes claim. Appellant claims \$52,652.60 for the costs attributable to delays and difficulties in removing large quantities of debris as well as the silt and sediment. Apart from the brief testimony of Mr. Valvoort, who defined sediment to include leaves, rocks, and sticks, the Government did not introduce evidence to dispute appellant's version of the difficulties encountered. The Government argues that the quantities of debris encountered in dredging the lake did not constitute a differing site condition and that such materials could be expected to be found at the bottom of a lake surrounded by trees. Our findings below make it unnecessary to determine whether a differing site condition was encountered.

[2] What is left unexplained and unanswered by the Government is why the Government failed to provide for the removal of nondredgable material encountered in the lake. The contract states that the dredging effort is to remove silt and sediment from the lake and that the contractor will not be required to remove objects uncovered which are too large to be removed by dredging. The parties have stipulated that the Mudcat is adequate to remove silt and sediment. This stipulation by the Government is at odds with Mr. Valvoort's inclusion of rocks and sticks in the definition of sediment, since the Mudcat's operation was continually interrupted by encounters with such material. In any event, Melka undertook to dredge the lake bottom of the silt and sediment and quickly found that many undredgable materials were being encountered. Notice was given orally and in writing to the Government that such materials required removal to permit the dredging to continue on a timely basis. The Government did not take action to remove the undredgable materials from the lake so that Melka's dredging could continue, but left that task to be performed by Melka. In so doing, the Government constructively changed the contract to require Melka to remove the debris so that it could do the dredging work. Having changed the contract by failing to remove the impediments it had agreed to remove and thereby increasing Melka's work, the Government became liable to pay for the changed work.

Quantum

Melka's calculation of its claim is as follows:

Total direct costs	\$68,000.00
Overhead at 43.2 percent	29,376.00
Subtotal	\$97,376.00
Profit at 10 percent	9,737.60
Subtotal	\$107,113.60
Less payments for mobilization and demobilization	20,549.00

Subtotal	\$86,565.60
Less payment or less cost of what the removal of the material should have been	33,912.00
Total	\$52,652.60

The Government does not challenge Melka's cost figures despite various presentations of the costs claimed to have been encountered. Therefore, we make only a technical adjustment in the calculation to arrive at the amount to properly compensate appellant for the change. Appellant's calculation includes the costs for mobilization and demobilization which were not affected by the change. Therefore, we exclude the actual cost of this item (\$16,966.40) from the direct costs. Inasmuch as appellant's claim for added profit on this item showed the actual cost to be \$16,966.40, the inclusion of such costs in the direct costs would double the overhead provision for this item. Our calculation follows:

Total direct costs claimed	\$68,000.00
Less costs of Mobilization and Demobilization	16,966.40
	51,033.60
Overhead at 43.2 percent	22,046.52
	73,080.22
Profit at 10 percent	7,308.01
	80,388.13
Less payments per contract	33,912.00
	\$46,476.13

Conclusion

Appellant's claims for payment of the balance of the contract price and for added profit on the mobilization and demobilization item are denied. Appellant's claim for compensation for the changed work is sustained in the amount of \$46,476.13, plus interest to be computed in accordance with the provisions of the Contract Disputes Act of 1978.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge.

*July 29, 1983***IDAHO MINING CORP. v. DEPUTY ASSISTANT SECRETARY--
INDIAN AFFAIRS (OPERATIONS)**

11 IBIA 249

Decided *July 29, 1983*

Appeal from a May 21, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying a request for the issuance of mining leases pursuant to the provisions of Mineral Prospecting Permit Contract No. 14-20-H53-313 on the Walker River Indian Reservation, Nevada.

Affirmed.**1. State Laws**

The status and rights of a dissolved corporation are to be determined with reference to the law of the state of incorporation.

2. Board of Indian Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal

An appeal before the Board of Indian Appeals will not be dismissed on the grounds that the Board lacks authority to grant the relief requested when the appeal seeks review of legal prerequisites to the exercise of discretionary authority vested in the Bureau of Indian Affairs.

3. Indian Lands: Leases and Permits: Minerals

Although an application for a mining lease may result from exploration under a mineral prospecting permit, the application does not seek a continuation of existing rights within the meaning of 5 U.S.C. § 558(c) (1976).

4. Indian Lands: Leases and Permits: Minerals

The expiration of a mineral prospecting permit does not affect the right of the permittee to receive a mining lease for which timely application was made. The term of the prospecting permit is not extended by the filing of an application for a mining lease.

5. Indian Lands: Leases and Permits: Revocation or Cancellation

Cancellation procedures established in a prospecting permit of Indian trust land are not applicable when the permit expires by its own terms.

6. Indian Lands: Leases and Permits: Secretarial Approval

Regardless of expectations existing at the time a prospecting permit covering trust lands is approved, by approving the permit the Secretary does not relinquish his responsibility to review any subsequent mining lease application in order to determine whether the proposed lease is in the best interest of the Indians involved.

7. Indian Lands: Leases and Permits: Secretarial Approval

The Bureau of Indian Affairs properly disapproved a mining lease application when the applicant had failed, without explanation, to comply with a significant provision of its prospecting permit.

APPEARANCES: William G. Waldeck, Esq., and Amanda D. Bailey, Esq., Dufford, Waldeck, Ruland, Wise & Milburn, Grand Junction, Colorado, for appellant; Chedville L. Martin, Esq., Department of the

Interior, Office of the Solicitor, Washington, D.C., for appellee.
Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Idaho Mining Corp. (appellant) has sought review by the Board of Indian Appeals (Board) of a May 21, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) affirming a September 27, 1979, decision of the Assistant Area Director, Phoenix Area Office, Bureau of Indian Affairs (BIA). The decision denied appellant's request for approval of mining leases pursuant to the provisions of Mineral Prospecting Permit Contract No. 14-20-H53-313 (permit), on the Walker River Indian Reservation, Nevada. For the following reasons the Board affirms the Deputy Assistant Secretary's decision.

Background

On February 13, 1974, the Acting Superintendent, Nevada Indian Agency, BIA, approved the permit at issue in this case. The permit was between appellant and the Walker River Paiute Indian Tribe. In broad, uncontested outline, the permit granted appellant the right to prospect for certain minerals on most of the tribal reservation lands for 1 year for a consideration of \$5,000. The permit could be extended upon payment of a \$7,500 bonus (paragraph 1). Appellant could file an application for a mining lease or leases on any lands covered by the permit at any time during the term of the permit (paragraph 2a). Appellant was required to expend at least \$25,000 in prospecting and exploration work during the 1 year term of the permit (paragraph 2b).

Appellant received two extensions of the permit. The second extension provided that the permit would expire on or about February 13, 1978.¹ By letter dated February 10, 1978, and received on February 13, 1978, appellant requested several mining leases pursuant to the permit. Appellee does not dispute that this request was timely filed during the term of the permit.

The Area Director, to whom the Superintendent referred the request for mining leases, wrote appellant on March 31, 1978. As pertinent to the issues raised in this appeal, that letter stated:

The second matter concerns former Mineral Prospecting Permit, Contract No. 14-20-H53-313, which expired on February 12, 1978. Paragraph 2q of the former permit details the various reports required to be filed by your company in order to keep the Permittee, Superintendent, and Supervisor informed of your operations. Our records do not show that you have complied with the reporting requirements.

¹ There is apparently confusion within BIA as to whether the permit expired on Feb. 12, 13, or 14, 1978. The original permit was approved on Feb. 13, 1974. The extensions are not part of the record submitted to the Board. BIA's failure to determine the precise expiration date is, however, harmless error under the circumstances of this case. BIA has conceded that the lease applications were timely filed. Although the due date for written reports required under paragraph 2q was established by the expiration date, the reports were submitted more than a year and a half late. Under such circumstances, the difference of a day or two becomes irrelevant.

July 29, 1983

We request that you comply immediately with the provisions of the permit which require reports, and particularly with the requirement for "detailed and complete written reports of the prospecting done and all information concerning the nature and value of the minerals, including, but not limited to aerial photographs, geological and geophysical maps, drill cores, logs, assays, charts, or sections prepared on which the detailed and complete written reports are based," which were due on March 11, 1978.

Following receipt of the above information and after conducting field inspections of the premises we will respond appropriately to your request for leases.

On May 22, 1978, appellant replied to the Area Director's letter. Appellant informed the Area Director that it was "in the process of writing final reports on the prospecting done on the reservation which will make the data generated more meaningful to the Tribe for future use. We will be forwarding copies of the data and reports as soon as these reports are completed."

By letter dated September 27, 1979, more than a year later, the Assistant Area Director again wrote appellant. The letter stated that the reports required by paragraph 2q had still not been furnished and concluded:

This office has determined that the failure of Idaho Mining Company to comply with the reporting requirements of Mineral Prospecting Permit Contract No. 14-20-H53-313 during the term of the permit and a reasonable period of time after its expiration constitutes a breach of that contract and that Idaho Mining Company has no residual rights under the terms of the permit, including the right to apply for leases on the former permitted area. Accordingly, we hereby deny Idaho Mining Company's request for such leases.

The letter further informed appellant of its right to appeal the determination.

On October 23, 1979, appellant wrote the Assistant Area Director, expressing astonishment that the lease applications were being denied and referring to paragraph 2t of the permit which provided for a 30-day notice period of any alleged default during which the permittee might correct the default and/or request a hearing. Appellant further stated that it and its predecessors had expended over \$1,250,000 under the permit and that it was "inequitable to attempt to cancel our applications for leases without due process and just cause." In the event that the Assistant Area Director declined to reinstate the lease applications, appellant informed him that the letter was to be considered an appeal.

Appellant furnished certain materials required by paragraph 2q of the permit to the BIA on October 26, 1979.

In accordance with instructions contained in a November 2, 1979, letter from the Assistant Area Director, appellant filed an appeal with the Commissioner of Indian Affairs on November 16, 1979.

In January 1981, while its appeal was pending, appellant was dissolved under the laws of Nevada, the State of its incorporation. All of the assets of the corporation, including any lease and permit rights on the Walker River Indian Reservation, were assigned to its stockholders. The permit assignment was submitted to the BIA for

approval on January 2, 1981. The letter transmitting the assignment stated that "[t]he Assignment was necessitated as a matter of law because of the liquidation and dissolution of Idaho Mining Corporation." By letter dated February 11, 1981, the Assistant Area Director neither approved nor disapproved the assignment, but instead stated "that the above permit expired on February 14, 1978, and is no longer in force or effect."

The Deputy Assistant Secretary-Indian Affairs (Operations)² issued a decision in the appeal on May 21, 1982.³ That decision, after a recitation of the facts of the case, stated at page 3:

On October 26, 1979, a year and seven months after the BIA had requested the Appellant to comply "immediately" with the terms of the permit by submitting the required reports, and a year and eight months after the permit expired by its own terms, the Appellant submitted some data to the Phoenix Area Office.

In its appeal the Appellant offers no explanation for the extended delay in submitting the required reports after being informed that the BIA would take no action on its request for leases until the reports were received. Instead, the Appellant contends that he is entitled to the leases as a matter of right, and the Area Director's decision should be reversed because that officer failed to comply with certain procedural requirements of the permit. I am not persuaded by the Appellant's arguments.

The decision then found that paragraph 2a of the permit did not grant appellant a "right" to a lease; paragraph 2a did not limit the Secretary's right to refuse to approve a proposed lease to the one circumstance where the environmental impact as shown by an environmental assessment was so great as to outweigh all other considerations; the Area Director did not fail to follow the permit cancellation procedures because the permit was not canceled, but rather expired by its own terms on February 13, 1978; and the right of first refusal for a 10-year period following disapproval of a proposed lease, found in paragraph 2a, applied only when the proposed lease was not approved because of environmental concerns.

Pursuant to the appeals procedure outlined in the Deputy Assistant Secretary's decision, appellant filed a notice of appeal with the Board. Briefs were filed by both parties. On December 27, 1982, the Board received a supplemental answer from appellee indicating that he had just become aware that appellant had been dissolved. The answer moved that the appeal be dismissed on the grounds that the appeal could not be maintained in the name of a nonexistent corporation and the stockholders should not be substituted. Furthermore, appellee moved for dismissal on the grounds that the Board was without

² The administrative review functions of the vacant office of Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary-Indian Affairs (Operations) by memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

³ The Board notes that this appeal was pending before the Deputy Assistant Secretary from November 1979 until May 1982. Under 25 CFR 2.19, the Deputy Assistant Secretary is required either to issue a decision in cases appealed to him within 30 days from the date they are ready for decision, or to refer the case to the Board. The Board, in discussing this provision, has held that when an appellant acquiesces in BIA's failure to render a timely decision, the decision ultimately issued will not be held void. *Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 146 (1983). However, the effect on the Indians involved of BIA's failure to comply with this requirement by either rendering a decision or referring the case to the Board with due diligence should be considered. Such dilatoriness does not comport well with BIA's trust responsibilities. *Sessions, Inc. v. Morton*, 348 F. Supp. 694, 703 (C.D. Cal. 1972).

July 29, 1983

authority to grant the relief requested, *i.e.*, an order directing the Walker River Paiute Tribe to issue a lease of tribal lands and a directive that the lease be approved by BIA. Appellant opposed both motions to dismiss.

Appellee's Motions to Dismiss

Appellee first moves that the case be dismissed on the grounds that appellant is a nonexistent corporation and the appeal cannot be continued in its name. Appellant responds that under the laws of Nevada, dissolved corporations "continue as bodies corporate for the purpose of prosecuting and defending suits, actions, proceedings and claims of any kind or character by or against them, * * * but not for the purpose of continuing the business for which the corporation shall have been established." Nev. Rev. Stat. § 78.585 (1979).

[1] Appellee correctly states the general common law rule that the dissolution of a corporation ends its existence for all purposes, including maintenance of suits in its name. *See* 19 Am. Jur. 2d *Corporations* §§ 1646, 1662, 1673 (1965); 19 C.J.S. *Corporations* §§ 1727, 1736 (1940). However, in most jurisdictions the common law rule has been changed by legislation intended to permit the corporation to wind up its affairs in an orderly manner. Appellant asserts that Nevada law provides for the continuation of corporate existence after dissolution for, *inter alia*, "the purpose of prosecuting * * * claims of any kind or character." Appellee has not suggested that appellant has misstated or misrepresented Nevada law. The Board has no independent knowledge that Nevada law is different than cited by appellant. *Cf. Estate of Robert R. Monroe*, 9 IBIA 67, 69 n.3 (1981).

Therefore, the Board finds that under Nevada law appellant retains the right to prosecute the present appeal in its own name following dissolution. Appellee's first ground for dismissal is denied.⁴

Appellee's second ground for dismissal is that the Board lacks authority to grant the relief requested. The Board has previously dismissed cases for this reason. *See Zarr v. Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174, 90 I.D. 172 (1983) (dismissal sought by joint motion of parties; seeking declaration that Departmental regulations exceeded statutory authority and that statute was unconstitutional); *Lord v. Commissioner of Indian Affairs*, 11 IBIA 51 (1983) (seeking money damages against BIA).

[2] In this case, appellee argues that the Board lacks authority because appellant asks the Board to order BIA to undertake an allegedly discretionary action. The Board has held that it has the authority and the responsibility to review BIA actions for legal sufficiency even though the ultimate decision in a case might be

⁴ Because of this holding the Board does not reach the issue of whether appellant's stockholders should be substituted for appellant.

discretionary. See *Urban Indian Council, Inc., supra*; *Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982); *Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 9 IBIA 254, 89 I.D. 196 (1982). In such cases, the Board will set forth the proper legal standard to be followed in reaching the decision and remand the case to BIA under 43 CFR 4.337(b) for the exercise of discretion.

Therefore, appellee's second ground for dismissal is also denied. If the Board finds that the resolution of any issue raised in this case requires the exercise of discretion vested in BIA, the case will be remanded.

Issues on Appeal

Appellant raises the following issues in this appeal: (1) Whether BIA erred in finding that the prospecting permit expired by its own terms on or about February 13, 1978; (2) whether BIA erred in failing to follow the cancellation procedures set forth in paragraphs 2k and 2t of the permit; (3) whether appellant has an absolute right to mining leases or to reconsideration of its lease applications; and (4) whether, even if appellant has no absolute right to a lease, it has a 10-year right of first refusal of any lease offered to another person.

Discussion and Conclusions

[3] Appellant first argues that its prospecting permit did not expire by its own terms on or about February 13, 1978, but rather was continued by 5 U.S.C. § 558(c) (1976). Section 558(c) states in its entirety:

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or 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.

The Board acknowledges that appellant is an applicant for a license within the meaning of the first sentence of section 558(c). Therefore, it is entitled to proper consideration of that application. Appellant further argues that it "made timely and sufficient application for a renewal or a license in accordance with agency rules" and that, consequently, its application for a mining lease extended the term of

July 29, 1983

its prospecting permit, because the permit applied "to an activity of a continuing nature."⁵

Had appellant applied for an extension of its prospecting permit, this argument might have merit. In such case, it appears that section 558(c) would require that the expiring permit continue in force until the extension request could be considered.⁶ Appellant, however, applied not for a mere license but a mining lease. Although the lease application was an outgrowth of the prospecting permit, the application sought new rights such as the right to take the profits of land, rather than a continuation of existing prospecting privileges.

[4] In a similar situation, the Interior Board of Land Appeals, in discussing coal prospecting permits issued under 30 U.S.C. § 201 (1970), refused "to indulge in the fiction that the [prospecting] permits survived beyond their expiration dates in order to maintain the right to receive any leases earned by virtue of work done and mineral discoveries made during the viable terms of the permits." Instead, the Land Board found that "[t]he expiration of a prospecting permit has no effect on the right of the permittee to receive a preference right lease for which timely application was made." *Utah Power & Light Co.*, 14 IBLA 372, 374 (1974). Although in *Utah Power*, the prospecting permits expired at the end of a period prescribed by statute, the Board does not find this to be a substantive distinction from a permit which expires by its own terms. The Board agrees with the reasoning in the *Utah Power* case and finds no justification for departing from this agency precedent.

The Board affirms that part of appellee's decision finding that appellant's prospecting permit expired by its own terms on or about February 13, 1978. The expiration of this permit in no way affected appellant's right to due consideration of its lease applications. Because the lease applications did not seek extension or preservation of continuing rights arising from the prospecting permit, 5 U.S.C. § 558(c) (1976) does not apply.

[5] Because of this conclusion, the Board also affirms appellee's finding that the prospecting permit was not canceled in violation of procedures set forth in paragraphs 2k and 2t of the permit. Because the permit expired by its own terms, BIA was not required to take any action under these procedures.

Appellant's third argument is that, regardless of the current status of the permit, that permit gave it an absolute right to a mining lease if the lease was requested during the term of the permit. In support of this argument, appellant furnished affidavits from various individuals,

⁵ Appellant correctly does not allege that its prospecting permit was withdrawn, suspended, revoked, or annulled.

⁶ See, e.g., *Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R.*, 353 U.S. 436 (1957).

"Section 9(b) of the Administrative Procedure Act is a direction to the various agencies. By its terms there must be a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined." 353 U.S. at 439.

including BIA personnel and a tribal official, indicating that all parties expected that a lease would follow from the permit.

In particular, appellant's affidavits suggest that the language of paragraph 2a of the permit, relating to a "privilege * * * to apply * * * for a lease," and suggesting that disapproval of a lease application was possible, was added in response to the decision in *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), which held that leases of Indian trust land were subject to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976). Appellant argues that all present language in paragraph 2a indicating that BIA might not approve a lease relates to the sole situation so severe that mining could not be justified under NEPA.⁷

The essence of appellant's argument is that the Secretary retained no authority under this prospecting permit to decline to approve a mining lease on any except environmental grounds. The record does suggest that the parties to the permit anticipated that the permit would mature into a lease. Anticipations, however, can be defeated by changed circumstances. Appellant's argument would require that, even if appellant had seriously breached the conditions of the permit and BIA had initiated procedures to cancel the permit, BIA would still be required to issue appellant a mining lease so long as the application was filed before the cancellation became final. The Board will not adopt this argument.

[6] The Board holds that, although the parties to this permit expected that a mining lease would eventually be issued to appellant, the Secretary did not relinquish his authority to review the lease application and to make an independent determination at the time the application was filed as to whether the proposed lease was in the best interests of the Walker River Paiute Indian Tribe. Accordingly, the Board affirms appellee's decision that appellant's prospecting permit did not give it an absolute right to a mining lease.

[7] Furthermore, BIA appears to have acted in the best interests of the Indian tribe when it declined to approve appellant's lease applications. Appellant was informed on March 31, 1978, that its prospecting permit had expired⁸ and that the reports required by paragraph 2q were past due. Appellant delayed more than 18 months in providing the required reports and raw data to BIA and the tribe. In

⁷ Appellant further argues that the \$25,000 required annual expenditure for exploration indicates the intent of the parties to permit it to recoup this outlay through eventual mining.

⁸ Appellant's allegation that BIA gave it no indication in its Mar. 31, 1978, letter that the permit had expired is incorrect (see Appellant's opening brief at 5). The letter, quoted, *supra*, in the background section of this opinion, clearly referred to "former Mineral Prospecting Permit, Contract No. 14-20-H53-313, which expired on February 12, 1978." Furthermore, the major purpose of the March letter was to inform appellant that specific reports should be submitted immediately because they were already past due under the terms of the permit. The letter quoted the language of paragraph 2q of the permit requiring the submission of reports and raw data compiled during the term of the permit. The permit provides that the specific information requested by BIA was due "within thirty (30) days after the termination of the permit." BIA stated that the information had been due on Mar. 11, 1978. Appellant was thus on notice that BIA considered the permit to have expired 30 days prior to Mar. 11, 1978. Appellant did not question BIA's assertion that the reports were due as would be expected if appellant felt that the permit was still in force.

Similarly, the Board rejects appellant's contention that BIA gave it no date when this information was due (see Appellant's opening brief at 8). The permit told appellant that the reports were due within 30 days from the termination of the permit. On Mar. 31, 1978, BIA told appellant that the submission was past due and should be provided "immediately."

July 29, 1983

fact, the information was only submitted after BIA informed appellant that its lease applications were being denied because of its failure to comply with this requirement.

Whether or not these reports and data were necessary to BIA's consideration of appellant's lease applications, they were, nevertheless, an extremely important requirement under the prospecting permit. The information required was intended to provide the tribe with knowledge of the extent and location of any mineral deposits on tribal reservation lands. Failure to provide this information constituted serious harm to the tribe. The permit clearly stated that in applying for mining leases, "time [was] of the essence" (paragraph 2a). Appellant's unreasonable and unexplained delay of over a year and a half in providing this information showed total disregard of its contractual obligations and constituted sufficient grounds for a BIA determination that the issuance of mining leases to appellant would not be in the tribe's best interests.

The Board finds that appellee acted properly in upholding the denial of mining leases to appellant. Therefore, the Board will not order BIA to reconsider this decision. Finally, appellant argues that, even if the prospecting permit did not give it an absolute right to a mining lease, it provided a 10-year right of first refusal on any mining lease offered to any other person. Appellant bases this argument on paragraph 2a of the permit which states:

If the Secretary refuses to approve a proposed lease or leases as provided above, he shall not subsequently for a period of ten (10) years approve a lease or leases to any other person or entity for mining on any of the land covered by the lease application unless a lease or leases containing the identical terms and conditions as those to be given to any other person or entity is first offered to and rejected by the Permittee.

Appellee held that this right of first refusal applied only in the case where a lease application was not approved on the grounds of environmental concerns. Appellant argues that it applies in any case of a refusal to approve an application.

The Board first notes that appellant's argument on this issue is inconsistent with its argument that the Secretary had the authority to disapprove a lease application only on the ground of environmental concerns. Furthermore, appellant's own affidavits indicate that this paragraph was one of those added to the permit as a result of *Davis*, *supra*, a fact which supports appellee's decision.

Regardless of these considerations, the Board finds that the language quoted, although not without some ambiguity if read without reference to the development of the permit terms, can and should be interpreted in the manner held by the Deputy Assistant Secretary. Any other reading of the language would again require BIA to approve a lease to appellant even though such a lease might not be in the best interests of the tribe. Under appellant's argument, even if a lease proposed by appellant had been disapproved on the grounds of failure to comply

with the terms of the permit or demonstrated disregard for the rights of the tribe or tribal members, BIA would still be required to give appellant a right of first refusal on any subsequently negotiated lease of the land. The Board will not hold that the Secretary's authority to supervise the administration of Indian leases can be so limited.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 21, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) in this case is affirmed in total.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

JERRY MUSKRAT
Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

JESSIE L. WINEGEART v. GLENN W. PRICE

74 IBLA 373

Decided July 29, 1983

Appeal from decision of Alaska State Office, Bureau of Land Management, summarily dismissing private contest complaint against homestead entry application. AA-8196.

Affirmed as modified.

**1. Contests and Protests: Generally--Homesteads (Ordinary):
Contests--Rules of Practice: Appeals: Service on Adverse Party--Rules
of Practice: Private Contests**

BLM may not summarily dismiss a private contest complaint against a homestead entry for failure to file with BLM proof of service on the contestee within 30 days of service, as required by 43 CFR 4.450-3, where the evidence indicates that the contestant actually served the complaint and the contestant files proof of such service on appeal.

**2. Contests and Protests: Generally--Homesteads (Ordinary):
Contests--Rules of Practice: Private Contests**

BLM may not dismiss a private contest complaint against a homestead entry for failure to offer reasons, not a matter of public record, in accordance with 43 CFR 4.450-1, where the complaint alleges failure to establish a residence within 6 months after the date of entry, as required by 43 CFR 2567.5(a), and the BLM land report, which concluded that there was such failure, was based on an examination of the land prior to the last day on which a residence could be established.

**3. Contests and Protests: Generally--Homesteads (Ordinary):
Contests--Rules of Practice: Private Contests**

July 29, 1983

BLM must dismiss a private contest complaint against a homestead entry where it is not supported by the affidavit of a corroborating witness which alleges facts which, if proved, would subject the homestead entry to cancellation as required by 43 CFR 4.450-4(c).

APPEARANCES: Jessie L. Winegeart, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

INTERIOR BOARD OF LAND APPEALS

Jessie L. Winegeart has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 16, 1982, summarily dismissing his private contest complaint against the homestead entry application of Glenn W. Price, AA-8196.

On October 24, 1972, Price filed a homestead entry application for 160 acres of land situated in the N 1/2 NW 1/4 sec. 28 and the E 1/2 NE 1/4 sec. 29, T. 20 N., R. 9 E., Seward meridian, Alaska, pursuant to the Act of May 14, 1898, *as amended*, 43 U.S.C. § 270 (1976).¹ By decision dated October 1, 1981, BLM allowed the homestead entry application.² On April 1, 1982, Janet Sosnowski, a BLM realty specialist, prepared a land report, based on a March 31, 1982, examination of the subject lands. Sosnowski concluded that "[t]he entryman has not established residence on the parcel within the required time period," *i.e.*, within 6 months of the date of entry, as required by 43 CFR 2567.5(a) (Land Report at 2). She stated that a residence must be established "before April 1, 1982." *Id.* at 1. The land report was concurred in by the district manager on April 1, 1982.

On April 2, 1982, appellant filed a private contest complaint against homestead entry application AA-8196. The complaint charged that Price had never occupied, built a habitable house on, or cleared the subject lands and that the time for moving and occupying the lands had expired. The complaint was supported by two affidavits. In addition, appellant requested a "preference right" for a homestead on the subject lands. Appellant submitted a homestead entry application (AA-47638) for the subject lands with his complaint.

In its July 1982 decision, BLM summarily dismissed appellant's contest complaint because appellant had not filed proof of service of the complaint on Price. In addition, BLM stated that the complaint did not meet the requirements of 43 CFR 4.450-4(a) and (c) and that the filing fee, required by 43 CFR 4.450-4(d), had not been paid. Finally, BLM concluded that the failure to establish a residence within the required time period was not a proper basis for a private contest under 43 CFR 4.450-1 because it was a matter of public record in the April 1,

¹ Sec. 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2739, provided that some parts of 43 U.S.C. § 270 were repealed effective on Oct. 21, 1976, and that other parts were repealed effective on the 10th anniversary of the date of approval of FLPMA, Oct. 21, 1976.

² By notice dated Sept. 1, 1981, Price was informed by BLM that, due to the filing of protests by the State of Alaska and Cook Inlet Region, Inc., his application was not subject to automatic approval under sec. 1322 of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2489 (1980), but, rather, had to be adjudicated under the applicable statute.

1982, land report, and that there was no requirement that the homestead entry applicant build a habitable house on or clear the subject lands at that time.³

In his statement of reasons for appeal, appellant contends that he "caused to be mailed to Glenn W. Price by certified letter, return receipt requested, on April 12, 1982, a copy of said Contest Complaint with attached exhibits which was duly delivered on April 26, 1982." Appellant states that he did not submit proof of service or the filing fee because he was told by a BLM employee that filing the complaint was all that was required to initiate a private contest. Appellant submits with his appeal a copy of a return receipt card, dated April 26, 1982, and signed by Coreen R. Price,⁴ and a United States postal money order in the amount of the filing fee. Finally, appellant argues that the lack of residence within the required time period was not a matter of public record because BLM examined the subject lands on March 31, 1982, "before the expiration of the six month period from the date of the allowance of the entry of Glenn W. Price."

[1] The first question in this case is whether BLM was entitled to summarily dismiss appellant's complaint because appellant did not submit proof of service of the complaint upon the homestead entry applicant, Price. The applicable regulation, 43 CFR 4.450-5, provides that: "The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in § 4.422(c)."⁵

The applicable regulation, 43 CFR 4.450-3, requires filing proof of service with the appropriate BLM office in addition to service on the contestee: "The contestant must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint *and must file proof of such service*, as required by § 4.422(c), in the office where the complaint was filed within 30 days after service." (Italics added.) Finally, 43 CFR 4.450-5(a) provides for summary dismissal: "[I]f the complaint is not served upon each contestee *as required by this section*, the complaint will be summarily dismissed by the manager and no answer need be filed." (Italics added.) There is no evidence that appellant filed proof of service of his complaint with BLM "within 30 days after service," as required by 43 CFR 4.450-3, and appellant does not maintain that he did. However, 43 CFR 4.450-5(a) provides for summary dismissal only where a complaint "is not served upon each contestee," in accordance with that section. There is nothing in that particular section which mandates dismissal of a complaint for failure

³ By memorandum dated July 16, 1982, BLM transmitted a proposed Government contest complaint against homestead entry application AA-8196 to the Regional Solicitor. The complaint charges that Price "failed to establish residence upon the contested claim within six months after the allowance of the entry on October 1, 1981." By memorandum dated July 22, 1982, the Regional Solicitor found the complaint to be "legally sufficient."

⁴ Appellant explains in an attached affidavit, dated Aug. 23, 1982, that he learned after filing his complaint that Price did not reside at his address of record with BLM. He also learned Price's new address and sent a copy of the complaint to that address, where it was received on Apr. 26, 1982.

⁵ 43 CFR 4.422(c) provides that service may be made by sending a document by registered or certified mail, return receipt requested, to a person's address of record with BLM and that the post office return receipt will constitute proof of service.

July 29, 1983

to file proof of service with BLM. Moreover, we cannot discern any prejudice to the entryman where appellant has provided evidence that he served the entryman as required by the regulation. Cf. *Phillips Petroleum Co. v. Bradshaw*, 66 IBLA 234, 237 (1982) (Burski, AJ, dissenting). Accordingly, BLM may not properly dismiss the complaint for that reason.

Appellant's argument that his failure to file with BLM was based on the alleged statement of a BLM employee is not dispositive on this question. In his August 1982 affidavit, appellant states: "I asked Jenice Weigle what else I needed to do with regard to my contest of the Glenn W. Price Homestead Entry and she informed me that filing the Complaint was all I needed to do." Even if such a statement were true, appellant cannot be considered ignorant of the true facts. All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Accordingly, appellant is deemed to have known that proof of service was required to be filed in accordance with 43 CFR 4.450-3. However, as stated above, the failure to file with BLM may not be considered a proper basis for summary dismissal of the complaint.

[2] The next question is whether appellant's complaint was properly dismissed because it alleged facts which were either a matter of public record or not relevant at the time the complaint was filed. Regulation 43 CFR 4.450-1 provides for the initiation of a private contest in order to have an adverse claim of title or interest "invalidated for any reason not shown by the records of the Bureau of Land Management."

The reason for this provision is based on the fact that a successful contestant of a homestead entry gains a preference right pursuant to section 2 of the Act of May 14, 1880, as amended, 43 U.S.C. § 185 (1976).⁶ As we said in *Wright v. Guiffre*, 68 IBLA 279, 284 (1982), *appeal pending*: "[T]he legislative purpose of the preference right would hardly be served by a contestant's informing BLM of what it is already aware." A private contest complaint which offers reasons in opposition to an adverse claim which are a matter of public record is properly dismissed on that basis. *Imco Services*, 73 IBLA 374 (1983); *Gold Depository and Loan Co. v. Brock*, 69 IBLA 194 (1982); *Christie v. O'Glesbee*, 23 IBLA 155 (1975).

When appellant's complaint was filed, the official records of BLM, in the form of a land report dated April 1, 1982, showed that the entryman had failed to establish a residence on the subject lands as of March 31, 1982. Appellant argues that this fact is not conclusive as to the failure to establish a residence within the 6-month period required by 43 CFR 2567.5(a). We agree. The 6-month period began on October 1, 1981, the date the entry was allowed. *Albert A. Howe*,

⁶ Sec. 702 of FLPMA, 90 Stat. 2787, repealed this section effective Oct. 21, 1976, except as it applied to public lands in Alaska where repeal is to become effective on the 10th anniversary of FLPMA.

26 IBLA 386 (1976). It, therefore, ended on April 1, 1982, and was inclusive of that date. *Bennett v. Baxley*, 2 L.D. 151 (1884).⁷ In *Bennett v. Baxley*, *supra* at 151, the Acting Secretary stated: "The six months within which he was required to commence residence on the tract would therefore commence November 21, 1880, and expire May 21, 1881, and he had the whole of the latter day for that purpose." Secretary Teller stated in *Humble v. McMurtrie*, 2 L.D. 161 (1884), that "[a]s to residence, a settler legally establishes a residence the instant he goes on the land for the purpose of establishing it." Further, it has been held that "a homestead entryman has six months from the date of his entry in which to establish his actual, personal residence on the land, and if he establishes residence within that time, such act relates back to the date of his entry." *Stewart v. Provence*, 24 L.D. 522, 524 (1897). Accordingly, in the present case, the entryman could have established a residence on April 1, 1982, and whether he did or not was plainly not reflected in the April 1, 1982, land report. It was thus not a matter of public record within the meaning of 43 CFR 4.450-1.⁸

[3] Appellant's private contest complaint, however, is fatally defective for another reason not specifically addressed by BLM. 43 CFR 4.450-4(c) provides with respect to the corroboration of allegations of fact in the complaint "which, if proved, would invalidate the adverse interest," that: "Each such allegation of fact must be corroborated by the statement of at least one witness having personal knowledge of the alleged fact and *such fact must be set forth in the statement.*" (Italics added.) Appellant submitted with his contest complaint two affidavits, one signed by appellant and the other signed by Conrad Winegeart. The latter affidavit is the only affidavit which can be said to corroborate the allegations made by appellant in his contest complaint. In that affidavit, dated April 1, 1982, and notarized that same date, the affiant states that he personally inspected the subject lands and concluded that "said premises are unoccupied by Glenn W. Price." However, the affidavit does not support the conclusion that Price failed to establish a residence within the 6-month period required by 43 CFR 2567.5(a) because, as previously set forth, the entryman "had the whole of the latter day [April 1, 1982] for that purpose [i.e., to establish a residence]." *Bennett v. Baxley*, *supra* at 151.

In *William Dittman*, A-27312 (June 25, 1956), at page 2, the Deputy Solicitor held that a private contest against a homestead entryman will be dismissed where the application to contest is not corroborated by the affidavit of a witness stating that he has personal knowledge of

⁷ The required 6-month time period is taken from R.S. § 2297, *as amended*, codified at 43 U.S.C. § 169 (1976), which was applied to public lands in Alaska by the Act of May 14, 1898, *supra*. The former statute provides that land shall revert to the Government if the entryman "has failed to establish residence within six months after the date of entry." 43 U.S.C. § 169 (1976) (repealed by sec. 702, FLPMA, 90 Stat. 2787).

⁸ With respect to appellant's other contentions, regarding clearing the land and building a habitable house, these contentions were premature. The entryman was not required to cultivate the land until the second year of the entry, 43 CFR 2567.5(b), and was not required to have built a habitable house until the time for submitting final proof, 43 CFR 2567.5(c). These allegations could, therefore, not form the basis for a contest complaint at the time the complaint was filed, and the complaint would properly have been dismissed if these were the only grounds. *Wright v. Guiffre*, *supra*; *De Haven v. Gott*, 18 L.D. 144 (1894).

July 29, 1983

facts set forth in his affidavit "which, if proved, warrant cancellation of the entry."⁹ The Deputy Solicitor stated that "the requirement of corroboration by one having personal knowledge of the facts, and the requirement that the facts must be stated in the corroborating affidavit, are jurisdictional." *Id.* The Deputy Solicitor relied on the case of *Nemnich v. Colyar*, 47 L.D. 5, 7 (1919), where it is stated that the requirement of corroboration "was adopted to prevent the allowance of unjustifiable attacks against entries, thus relieving the Land Department of the consideration of speculative and unwarranted contests and entymen from the trouble and expense attendant on the defense thereof." The *Dittman* case rested on the fact that the affidavit of the corroborating witness had not set forth any facts. The rationale of that case, however, is applicable to the present case which turns on the fact that although the affidavit of Conrad Winegeart sets forth certain facts, those facts would not, if proved, warrant cancellation of the entry because they do not establish a failure to comply with 43 CFR 2567.5(a). BLM should have dismissed appellant's private contest complaint on that 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 affirmed as modified.

GAIL M. FRAZIER

Administrative Judge

WE CONCUR:

JAMES L. BURSKI

Administrative Judge

BRUCE R. HARRIS

Administrative Judge

⁹ The regulation in effect at the time of the filing of the application to contest in *Dittman*, 43 CFR 221.3 (1953), is similar to the current regulation, 43 CFR 4.450-4(c): "The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit."

June 27, 1983

**EFFECT OF THE FEDERAL LAND POLICY AND
MANAGEMENT ACT ON THE RIGHT-OF-WAY APPLICATION
FOR THE MIDDLE FORK OF THE POWDER RIVER
RESERVOIR ***

M-36900 (Supp. I)

June 27, 1983

**Rights-of-Way: Federal Land Policy and Management Act of 1976--
Rights-of-Way: Applications**

The Secretary has broad discretion regarding the amount of information he may require from the applicant for a right-of-way grant prior to accepting the application for consideration. The primary intended use of the right-of-way grant – the use of the public lands – must be disclosed. The applicant's inability to disclose a secondary use – a use resulting from the primary use – does not preclude the Secretary from considering the application. He must decide whether he is informed adequately of necessary facts to apply the relevant statutory criteria based upon the available information. If so, he may proceed to decide whether to grant or deny the interest that is sought based upon the statutory criteria for FLPMA.

Where an applicant for a right-of-way grant seeks to use the public lands as the site for a reservoir but is unable to disclose the ultimate use of approximately 82 percent of the water, the Secretary may decide to proceed to consider the application.

**Rights-of-Way: Federal Land Policy and Management Act of 1976--
Rights-of-Way: Nature of Decision**

When the Secretary receives a right-of-way application, he must make two decisions: a preliminary decision to determine whether the information submitted in the application is adequate for him to begin his evaluation and a final decision on whether to grant the right-of-way. As part of the final decision he must define the nature and character of the grant, including particulars concerning costs to be imposed, location, and terms and conditions. 43 U.S.C. §§ 1762, 1763, 1764 and 1765 (1976).

OPINION BY SOLICITOR COLDIRON

OFFICE OF THE SOLICITOR

MEMORANDUM

TO: ASSISTANT SECRETARY, LAND AND WATER RESOURCES

FROM: SOLICITOR

**SUBJECT: EFFECT OF THE FEDERAL LAND POLICY AND
MANAGEMENT ACT ON THE RIGHT-OF-WAY APPLICATION FOR
THE MIDDLE FORK OF THE POWDER RIVER RESERVOIR**

You have asked whether the Secretary may proceed to consider an application for a right-of-way to store water on the public lands under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 *et seq.* (1976) (FLPMA) where the applicant can provide only partial information regarding the ultimate use of the water. This question was addressed in Solicitor's Opinion, M-36900,

* Not in chronological order.

86 I.D. 293 (1979), which held an application to be unacceptable where agricultural uses were intended for ten to thirty percent of the water and the intended use of the remainder of the water was unknown. I reverse.

Conclusion

The Secretary has broad discretion regarding the amount of information he may require from the applicant for a right-of-way grant prior to accepting the application for consideration. The primary intended use of the right-of-way grant, the use of the public lands, must be disclosed. The applicant's inability to disclose a secondary use does not preclude the Secretary from considering the application as a matter of law. He must decide whether he is informed adequately of necessary facts to apply the relevant statutory criteria based upon the available information. If so, he may proceed to decide whether to grant or deny the interest that is sought based upon the statutory criteria of FLPMA.

Background

By letter dated August 10, 1979, this Department refused to consider a right-of-way application filed July 16, 1973, by the Powder River Reservoir Corp. (Reservoir Corp.). Reservoir Corp., a corporation composed of 22 ranchers, sought to construct an earthfill dam which would have created a 50,000-acre-foot reservoir on the Middle Fork of the Powder River. The proposed reservoir would have generated approximately 25,000-acre-feet of water for use, and would have inundated 1,160 acres of land, including 141 acres of public lands. Through a contract with Carter Oil Co. (Carter), a subsidiary of Exxon, Carter would have had complete control of 25,000 acre feet, or a minimum of 71%, of the designated water use. In the original plan, Carter had contracted to sell half its water entitlement to Atlantic Richfield Co. (ARCO).

Under the terms of the contract, Reservoir Corp. would have used the balance of the water, 6,640 acre feet or 18% of the designated water use, for agricultural purposes.¹ In connection with the application, the Department specifically requested ARCO and Carter to provide information on the ultimate use of the remainder of the stored water, approximately 82% of the total. Carter responded: "As we have consistently advised you, we have no firm and definite plans [for use of the water] to disclose."² Similarly, ARCO informed BLM: "Atlantic Richfield cannot commit to an immediate use of water from the Middle Fork Reservoir. . . ."³

¹ The permitted contract range was 3,700 acre feet (10.57%) to 10,000 acre feet (28.57%).

² July 26, 1977, letter to BLM Wyoming, Wyoming State Director from Carter's President. Carter justified its lack of specific plans for the use of the Middle Fork Reservoir water by explaining that Middle Fork was simply a prudent business investment. Its July 26 letter states: "[We consider] the purchase of the water from the Middle Fork Reservoir on a take-or-pay basis as desirable and prudent from a business standpoint for the same reason that we had for acquiring coal reserves and for our increasingly large commitments to coal synthetics research. Specifically, it is part of our plan to be in position with the necessary raw materials and technology for entry into coal synthetics whenever entry is, in our opinion, commercially desirable."

³ July 21, 1977, letter to BLM Wyoming State Director from ARCO's division manager. ARCO's letter also speaks of possible use of the water in plants to make synthetic fuels from coal.

June 27, 1983

A draft Environmental Impact Statement (EIS), pursuant to the National Environmental Policy Act of 1979, 42 U.S.C. § 4321 *et seq.* (1970) (NEPA), was prepared on the right-of-way application, but no final EIS was issued. The proposed agricultural use and a hypothetical coal gasification plant as a possible industrial use, were examined for environmental effects.⁴

The inability of Carter or ARCO to provide information on the intended use of approximately 82% of the water was the basis for the denial of Reservoir Corp.'s application by the Assistant Secretary, Land and Water Resources. He was acting on the basis of Solicitor's Opinion, M-36900, *supra*, which concluded that

given the specific facts presented by this application, the conceded unknowns prevent the Secretary from making an "informed decision" on the application and therefore he may not proceed to consider it.

Id. at 306.

We understand that Reservoir Corp. intends to reapply for a right-of-way.⁵ A new application would be submitted supplying the same facts as the previous one except that Exxon would assume the interest in the approximate 82% of the water. Exxon also may be unable to identify the intended water use. Reservoir Corp. has asked the Department, which now has four years more experience in the administration of FLPMA, to reconsider its opinion. I conclude that the January 12, 1979, opinion takes an overly restrictive view of the Secretary's authority and should be reversed.⁶

⁴ Solicitor's Opinion, M-36900, *supra* at 296, concluded that knowledge of the ultimate use of the water was not required for preparation of an adequate EIS. That conclusion was correct. NEPA does not require knowledge of all possible environmental consequences; it requires that gaps in knowledge be pointed out. See *Scientist's Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973); *Alaska v. Kleppe*, 9 E.R.C. 1497, 1502 (D.D.C. 1976).

⁵ Alternatively, Reservoir Corp. would like to buy the land. The possibility of a sale was not considered in Solicitor's Opinion, M-36900, *supra*. The land sought by Reservoir Corp. may be sold to it if, as a result of land use planning, one of the following three criteria is satisfied:

"(1) such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency; or

"(2) such tract was acquired for a specific purpose and the tract is no longer required for that or any other Federal purpose; or

"(3) disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership."

43 U.S.C. § 1713.

⁶ The Department's experience and practice in the administration of FLPMA have led to a material change of circumstance from that which existed in Jan. 1979 when Solicitor's Opinion, M-36900 was drafted. Much of that opinion was grounded in speculation regarding terms and conditions that the Secretary might wish to impose on a right-of-way grant pursuant to 43 U.S.C. §§ 1764 and 1765. That speculation is no longer germane. Final regulations setting forth in detail the terms and conditions applicable to rights-of-way were promulgated on July 1, 1980, and further refinements were published on Sept. 2, 1982. These regulations were required pursuant to 43 U.S.C. § 1764(e) and appear at 43 CFR 2801. Accordingly, it is no longer necessary to speculate what information might be needed by the Secretary to impose those terms and conditions that he might deem necessary. Instead, since the terms and conditions are known, it may be left to his expertise to decide whether he has adequate information to determine whether the terms and conditions can be imposed.

Discussion

Section 501 of FLPMA authorizes the Secretary to "grant, issue, or renew rights-of-way over, upon, under or through" the public lands for--

reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water. . . .

43 U.S.C. § 1761(a).⁷

In its application pursuant to section 501, Reservoir Corp. plans to provide information concerning its proposed use of a right-of-way on the public lands -- maintenance of a reservoir for the storage of water. In evaluating the application the Secretary's decision would be based, in part, upon the information submitted by Reservoir Corp. in its application. FLPMA addresses the Secretary's need for the information that will enable him to evaluate an application. Under section 501(b)(1), he must

require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit and disclose those plans, contracts, agreements, or other information reasonably related to the use or intended use, of the right-of-way, including its effect on competition, *which he deems necessary to a determination*, in accordance with the provisions of this act, as to whether a right-of-way shall be granted, issued or renewed. (Italics supplied.)

43 U.S.C § 1761(b)(1).

When he receives a right-of-way application, the Secretary makes two decisions: a preliminary decision to determine whether the information submitted in the application is adequate for him to begin his evaluation and a final decision on whether to grant the right-of-way. As part of the final decision he must define the nature and character of the grant, including particulars concerning costs to be imposed, location, and terms and conditions. 43 U.S.C. §§ 1762, 1763, 1764, and 1765.

The nature of the preliminary decision, whether there is adequate information to proceed to the final decision, is described in the discretionary language of section 501(b)(1) instructing the Secretary to seek that information "which he deems necessary to a determination." This broad language provides no guidance concerning the means by which the Secretary is to make his determination, nor does it specify the type of information that he must seek. However, guidance may be found in the law by which his decision is to be structured and made.

The range of the Secretary's discretion would be analyzed by a court in the following terms:

He is bound by the statutory framework of the program administered by the agency. Thus, a court can review an administrator's decision to insure that he neither included in his analysis factors irrelevant to the congressional purpose of the program he administers, nor ignored factors which Congress has indicated are highly significant. See Sapherstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968).

⁷ Sec. 501 also authorizes the Secretary to grant rights-of-way for six other categories of uses. 43 U.S.C. § 1761. The reasoning in this opinion is applicable to all these categories.

June 27, 1983

Starr v. Federal Aviation Administration, 589 F.2d 307 (7th Cir. 1978). See also, *Keating v. Federal Aviation Administration*, 610 F.2d 611, 613 (9th Cir. 1979) [adopting the analysis in *Starr*, *supra* as correct and dispositive]; *City of New York v. United States Environmental Protection Agency*, 543 F. Supp. 1084, 1099 (S.D.N.Y. 1981), *Monier v. United States Department of Transportation*, 465 F. Supp. 718, 721 (E.D. Wis. 1979).

In the context of the present case, when the Secretary of Interior grants a right-of-way across public lands, the "statutory framework of the program administered by the agency" is Title V of FLPMA. The factors that he must consider are those elements of fact set forth in the statutory framework of FLPMA. In reviewing an application, the Secretary cannot ignore those factors that FLPMA denotes as being highly significant. The crucial question and the one Solicitor's Opinion, M-36900, *supra*, misinterpreted concerns which factors are sufficiently relevant that they must be made known to the Secretary and evaluated by him before he can make his preliminary decision to proceed with evaluating an application on its merits.⁸

There is no controversy that the Secretary must be informed of the factors pertaining to the primary use of the right-of-way, *i.e.*, the proposed use of the public lands such as use for a pipeline or a reservoir site, before he can make a preliminary decision to accept the application for further processing and evaluation. See 43 U.S.C. § 1761, *et seq.* Whether he must also be fully informed of another class of factors -- those pertaining to secondary uses resulting from the issuance of the right-of-way -- before making his preliminary decision is more problematical. A secondary use is an activity made possible by or resulting from the granting of the right-of-way but which is not the actual use of the public lands themselves. For example, when a right-of-way is granted for the construction and operation of an oil pipeline through the public lands, the primary use of the right-of-way is the location on the public lands of an oil pipeline. The secondary use is the use of the oil after it has been transported through the pipeline. Likewise, when the primary use of a right-of-way is as the site for a reservoir for the storage of water, the use of the water after storage is a secondary use.⁹

There are four interpretive sources of guidance available to determine whether consideration of factors pertaining to secondary

⁸ It is important to note that simple acceptance of an application is unreviewable by the Federal courts because acceptance is not a final agency action. After consideration, when the right-of-way is granted or denied, the preliminary decision would merge with the final decision and both would ultimately be subject to judicial review. See 5 U.S.C. § 704.

⁹ Solicitor's Opinion, M-36900, *supra*, employed dubious logic to conclude that applicants were required to disclose secondary uses. The opinion reasoned that where a proposed project has a significant environmental impact, a plan of operation must be submitted. That a plan of operation included offsite operations was remarked to be "obvious" because it was directly in the "logical chain of storage, supply and use." *Id.* at 297. Inconsistently, the opinion later reasoned that the applicant was required to disclose information as to secondary uses only on the given facts. If FLPMA requires disclosure of secondary uses, there is no basis for limiting that requirement to any particular set of facts.

uses of the right-of-way is highly significant in the statutory scheme of FLPMA: (1) administrative practice, (2) judicial decisions, (3) the legislative history of the statute and (4) the interrelationship of the statutory provisions.

The administrative practice of this Department in processing a right-of-way application is to have the authorized officer evaluate the application for completeness according to the standards of 43 CFR 2802.3 and 2802.4.¹⁰ The judgment, whether to seek more information or to proceed to consider the application, is left to the authorized officer's discretion. Rights-of-way are routinely processed where disclosure of secondary uses is not sought by the authorized officer. For example, the TransAlaska Pipeline carries petroleum to Valdez where it is loaded onto ships for further distribution. Information as to the ultimate use of the oil (e.g., industrial, agricultural or residential use) was not required of the the applicant prior to the Secretary's acceptance of the application. Similarly, Sohio has a right-of-way for an oil pipeline that extends from San Pedro, California, to Midland, Texas; there, the oil is transferred to a number of undisclosed secondary distribution sources. Its ultimate destination or consumption method is unknown to the government.¹¹

Judicial decisions provide no useful guidance. FLPMA is a relatively new statute; currently there are few cases pertaining to the propriety of granting or denying a right-of-way application. None pertain to the acceptance of an application for consideration.

The legislative history of section 501(b)(1) discusses the authorization for the Secretary to seek that information which he "deems necessary." The Secretary is guided by the Congressional admonition that "for the sake of economical operations and avoidance of undue burdens on applicants," he be

cautious in [his] demands for information. [He is] expected to seek only the minimum amount of information essential for making *the determinations required by law*. (Italics supplied.)

H. R. Rep. No. 1163, 94th Cong., 2d Sess. 20 (1976).

Since the meaning of concepts such as "essential" or "undue burdens" may vary with the facts, this admonition provides no definitive guidance regarding the necessity for particular information. However, it does establish one specific criterion, that is, information must be sought that is essential for making "the determination required by law." This leads directly to the fourth element cited *supra*, namely the interrelationship of the statutory provisions of FLPMA.

One specific purpose for which information is needed under FLPMA is to evaluate whether the applicant is capable, technically and financially, of constructing the project. The statute states:

¹⁰ "Authorized Officer" means any employee of the Bureau of Land Management to whom has been delegated the authority to perform the duties relating to granting of rights-of-way. 43 CFR 2800.0-5.

¹¹ These are examples of rights-of-way granted pursuant to the Minerals Leasing Act, 30 U.S.C. § 185 (1973). That Act provides the authority to grant rights-of-way for oil and gas pipelines; its requirements are similar to those of FLPMA. Administratively, to the extent relevant to this discussion, applications are evaluated for completeness by use of the same criteria as are applied to applications under FLPMA. See 43 CFR 2882.2 and 2882.3.

June 27, 1983

The Secretary concerned shall grant, issue, or renew a right-of-way under this subchapter only *when he is satisfied that the applicant has the technical and financial capability to construct a project for which the right-of-way is requested* and in accord with the requirements of this title. (Italics supplied.)

43 U.S.C. § 1764(j).

Where the Senate Report addresses this information requirement, it discusses the extent to which the Secretary needs to apply this information in evaluating the application:

The information required is to be set forth in regulations or stipulations and must include information in certain specified areas. It is not intended that this plan of construction, operation, or rehabilitation be a detailed final plan since all details and conditions cannot be known at the time of the application. However, *the plan should be a description in as much detail as the state of planning for the particular project will permit* and must be adequate enough for the Secretary or agency head to make an informed judgment on the application and on the need for imposing any special terms and conditions which the public interest may require. (Italics supplied.)

S. Rep. No. 583, 94th Cong., 1st Sess. 72 (1975).

This passage demonstrates that the Secretary need not know every conceivable consequence such as secondary uses of the right-of-way. An application may satisfy the requirements of 43 U.S.C. § 1764(j) if it discloses the intended use of the right-of-way in as much detail as the state of planning for the project will permit. Unless the information concerning the secondary use of the right-of-way will aid the Secretary in evaluating the applicant's capability to build the proposed facility, this section is no basis for requiring such information.

FLPMA authorizes or requires terms and conditions under 43 U.S.C. § 1765, and the Secretary needs information to determine which terms and conditions he will attach to the project. This Department was required under 43 U.S.C. § 1764(e) to develop detailed regulations concerning the terms and conditions to be imposed on grantees; these appear at 43 CFR 2801. The Secretary must consider which of the terms and conditions are to be imposed as part of his final decision. This involves a technical judgment analyzing the detailed provisions of the regulations as they apply to particular cases. Applying the facts given to him by the applicant, he will need to determine whether he can affix appropriate terms and conditions to a right-of-way grant without knowing the secondary uses.

The Secretary must therefore be informed of relevant factors in accordance with the FLPMA criteria before he can evaluate an application. These factors include specific items such as information concerning the applicant's technical and financial capability. They also include a description of the primary use. Secondary uses need not ordinarily be disclosed but disclosure may be desirable or necessary when needed to apply the statutory criteria. For instance, the intended secondary use may illuminate the applicant's potential financial condition. The secondary use may also affect the Secretary's ability to impose terms and conditions. If the Secretary concludes that he can

apply the statutory criteria of FLPMA absent disclosure of a secondary use, he may proceed to evaluate the application.¹²

This memorandum addresses a potential application that may be filed by Reservoir Corp. The applicant would provide the information that the primary use of the right-of-way would be as the site for a reservoir in which to store water, and one secondary use, use of approximately 18% of the water in agriculture would be disclosed. Another secondary use, ultimate use of approximately 82% of the water, would be undisclosed because unknown. The Secretary must consider whether he can apply the relevant statutory criteria for granting a right-of-way absent this information. Based upon the preceding analysis, no legal obstacle prevents him from making this technical judgment. If he concludes that he can apply the statutory criteria, he may proceed to consider the application.

Conclusion

In deciding whether to proceed to consider an application for a right-of-way, the Secretary may require whatever information he deems necessary to a determination under FLPMA. Should Powder River Reservoir Corp. reapply, I conclude that the applicant must provide the information specifically required to complete an application under the regulations and must describe the intended primary use of the public lands as the site for the storage of water in a reservoir. The Secretary need not summarily reject the application as incomplete because a secondary use, use of approximately 82% of the water, is unknown.

WILLIAM H. COLDIRON
Solicitor

IN RE PACIFIC COAST MOLYBDENUM CO.

75 IBLA 16

Decided August 5, 1983

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing protests to issuance of mineral patent for certain mining claims.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Patent--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Protests

Where protests to a mineral patent application are denied and an appeal is taken, protestants have the burden of affirmatively establishing that patent should not issue and that BLM's decision was in error.

¹²This opinion does not address the extent to which secondary uses, or lack of knowledge thereof, may be used in making the final decision, determining whether to grant the right-of-way. The statute specifies that the Secretary may seek information "reasonably related to the use, or intended use, of the right-of-way." 43 U.S.C. § 1761(b). Information concerning the secondary use may be considered as part of the final decision where the Secretary deems it appropriate.

August 5, 1983

2. Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Patent

The quantum of evidence necessary to prove a discovery does not change because the land on which the claim is located may have other values. Bad faith in locating a claim, however, where proved, requires invalidation of a claim even where it is supported by a discovery.

4. Mining Claims: Generally--Patents of Public Lands: Generally

Where a corporation seeking a mineral patent files a certificate showing incorporation under the laws of a state, such corporation has established its citizenship within the meaning of the Mining Law of 1872, and a conclusive presumption thereby arises that all stockholders of the corporation are citizens of the United States, regardless of whether this is true or not.

APPEARANCES: Durwood J. Zaelke, Esq., Juneau, Alaska, for appellants; F. O. Eastaugh, Esq., Juneau, Alaska, Brian T. Donlan, Esq., and Charles L. Kaiser, Esq., Denver, Colorado, for appellee Pacific Coast Molybdenum Co.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

United Southeast Alaska Gillnetters (USAG) and the Southeast Alaska Conservation Council (SEACC) have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 3, 1981, denying their protests to an application for mineral patent filed by Pacific Coast Molybdenum Co. (PCM).¹ The application for patent involved a total of 32 lode claims (the JES 34-41, 55-62, 76-83, and 97-104, inclusive) located in unsurveyed secs. 34 and 35, T. 74 S., R. 98 E., and secs. 2 and 3, T. 75 S., R. 98 E., Copper River meridian, Alaska, within the exterior boundaries of the Tongass National Forest.

The claims in issue were located on October 24, 25, 28, and 30, 1974, by United States Borax and Chemical Corp., and were subsequently conveyed by deed on November 26, 1975, to Pacific Coast Mines, Inc. On December 21, 1977, Pacific Coast Mines, Inc., quitclaimed the

¹ In a decision styled *In Re Pacific Coast Molybdenum Co.*, 68 IBLA 325 (1982), this Board ruled that USAG and SEACC had standing to appeal from a denial of their protests. In that same decision, we held that the Sierra Club (Alaska Chapter) having failed to file a protest, was not a party to the case under 43 CFR 4.410 and thus lacked standing to appeal.

claims to PCM.² Pacific Coast Mines, Inc., had filed an application for mineral survey in April 1976, and mineral survey No. 2267 was approved by the Chief, Division of Cadastral Survey, on January 19, 1978. In its application for patent, PCM alleged a discovery of molybdenum had been made within the 647.118 acres claimed.

While the lands embraced by PCM's claims were open to mineral entry when they were located, the lands were subsequently set apart and reserved as part of the Misty Fjords National Monument on December 1, 1978, by Presidential Proclamation No. 4623 (93 Stat. 1466), pursuant to section 2 of the Antiquities Act, Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. § 431 (1976). In addition, on December 5, 1978, notice was published in the *Federal Register* of an application filed by the United States Department of Agriculture, AA-23139, seeking a withdrawal of various lands, including the lands embraced by PCM's claims, from location and entry under the general mining laws. See 43 FR 57134 (Dec. 5, 1978). Under the provisions of section 204(b)(1) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2751, 43 U.S.C. § 1714(b)(1) (1976), the publication of this notice also served to segregate the lands involved for a period of 2 years or until such time as the application was either approved or disapproved, whichever came first.

Subsequent to publication of notice of PCM's patent application, as required by 30 U.S.C. § 29 (1976), various organizations, including appellants, protested issuance of patent with respect to these claims. These protests were denied by the State Office in a number of separate decisions, dated August 3, 1981. Appellants timely pursued an appeal to this Board.

Before commencing an analysis of the issues raised by appellants, however, we wish to make two preliminary points. First, notice must be taken of the relevant provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, Act of December 2, 1980 (codified variously in titles of the *United States Code*). Of particular relevance are the provisions found in sections 503 and 504 concerning the establishment of the Misty Fjords National Monument.³ Section 503(f)(1) withdrew the lands within the monument from the operation of the general mining laws. However, section 503(f)(2) provided:

(A) After the date of enactment of this Act, any person who is the holder of any valid mining claim on public lands located within the boundaries of the Monuments, shall be permitted to carry out activities related to the exercise of rights under such claim in accordance with reasonable regulations promulgated by the Secretary to assure that

² We note that PCM (formerly Quartz Hill Mining Co.) is a wholly owned subsidiary of Quartz Hill Holding Co. which, in turn, is a wholly owned subsidiary of Pacific Coast Mines, Inc., which is wholly owned by Rio Holding Corp., which is wholly owned by RTZ Borax, Ltd., which is wholly owned by Rio Tinto-Zinc Corp., Ltd., a United Kingdom Corp.

³ While section 503(a) of ANILCA, 94 Stat. 2399, established the Misty Fjords National Monument containing approximately 2,285,000 acres, the Misty Fjords National Monument Wilderness, established by section 703(a)(5), 94 Stat. 2419, embraced 2,136,000 acres. The remaining 149,000 acres surrounding the Quartz Hill area were not placed in the Misty Fjords National Monument Wilderness.

August 5, 1983

such activities are compatible, to the maximum extent feasible, with the purposes for which the Monuments were established.

(B) For purposes of determining the validity of a mining claim containing a sufficient quantity and quality of mineral as of November 30, 1978, to establish a valuable deposit within the meaning of the mining laws of the United States within the Monuments, the requirements of the mining laws of the United States shall be construed as if access and mill site rights associated with such claim allow the present use of the Monuments' land as such land could have been used on November 30, 1978.

In addition, section 503(i)(1) provided for the leasing of lands for mining and milling purposes to holders "of valid mining claims."

Section 504, 94 Stat. 2403, provided a mechanism whereby any holder of an "unperfected mining claim" might obtain an exploration permit, and, upon a subsequent discovery of a valuable mineral deposit, a patent limited to the discovered mineral estate. An "unperfected mining claim" was differentiated from a "core claim." A "core claim" was defined as either a patented mining claim or an unpatented mining claim which was properly located, recorded, and maintained and which was, as of November 30, 1978, supported by a discovery of a valuable mineral deposit. The question before the Board is whether the 32 lode claims in issue were supported by a discovery as of November 30, 1978, and thereby constitute a "valid mining claim" under section 503(f) and attain the status of core claims under section 504(a).

[1] We also think it appropriate at the outset to clearly delineate the scope of our review and the concomitant burden placed on appellants. Normally, where the Government challenges the validity of a mining claim it bears the initial burden of presenting a prima facie case showing the claim's invalidity; the burden then devolves upon the claimant to overcome that showing by a preponderance of the evidence. See generally *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States v. Strauss*, 59 I.D. 129 (1945). This approach results from recognition of the fact that when the Government contests the validity of a mining claim it has, under its plenary authority, determined to examine the status of a claim to land. In the context of a patent application, such a challenge is premised on the implicit finding by BLM that the evidence submitted with the patent application is insufficient to establish entitlement to a patent. *United States Steel Corp.*, 52 IBLA 319 (1981). As a precondition to the issuance of patent, a mineral examination of the claim by Government mineral examiners is necessary. See *Brattain Contractors, Inc.*, 37 IBLA 233 (1978). Where the totality of the evidence indicates that a discovery of a valuable mineral deposit within the meaning of the mining laws has not been made, BLM must issue a contest complaint. In such a proceeding, therefore, the claimant is the ultimate proponent of the rule, i.e., the validity of the claim. See *Foster v. Seaton*, *supra*.

This procedure, however, must be contrasted with the one before us in the instant case. Here, based both on the submissions of the patent

applicant and the Government's own mineral examination, the appropriate officers of BLM, who are vested with the obligation to safeguard the public domain "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved" (*Cameron v. United States*, 252 U.S. 450, 460 (1920)), have determined that the mineral applicant has shown its entitlement to patent. Appellants have protested this decision. The State Office, having duly considered these protests, has rejected them. Decisions issued by state offices, pursuant to their delegated authority, are presumptively valid. It is appellants who are the proponent of the rule in this case, viz., that the decision appealed from is in error. The mineral claimant is not required in this case to affirmatively show his entitlement to patent. BLM has already determined that matter in favor of the claimant. Appellants must establish that this decision was wrong.⁴

Turning to the substance of the appeal, appellants have alleged, in essence, three separate grounds for appeal: (1) PCM has failed to show a discovery of a valuable mineral deposit existed prior to December 1, 1978; (2) an environmental impact statement (EIS) is required prior to issuance of any patent to PCM; and (3) BLM should have investigated whether PCM is a citizen of the United States.⁵

In their challenge relating to discovery, appellants argue at considerable length that PCM's patent application failed to delineate, with sufficient particularity, the costs associated with mining and milling with special emphasis on environmental considerations. In order to place their argument in perspective, we shall briefly review both PCM's application and the mineral examination report prepared by the Forest Service, United States Department of Agriculture.

PCM's mineral patent application, as amended by two separate supplements, dated January 4 and March 18, 1980, alleged discoveries of substantial deposits of molybdenum at an average grade of fifteen-hundredths percent MoS₂.⁶ PCM stated that each claim contained either an outcrop or one or more drill holes. Open pit operations were envisaged, which would include drilling and blasting on benches, the loading of the broken rock on trucks for haulage to a primary crusher and, after crushing, the lean ore to stockpiles and the waste back to dumps. The milling process, described in the first supplement, would involve secondary and possible tertiary crushing with the fine ore placed in storage bins. Subsequently, the fine ore would be conveyed to rod and ball mills to be ground in a slurry to sufficiently small

⁴This is analogous to private contest proceedings. While, as we have noted above, the Government merely bears the burden of presenting a prima facie case upon which occurrence the ultimate burden of preponderation devolves upon the mineral claimant, where a private contest is initiated, the private contestant, *not the claimant*, has the ultimate burden of proof. See *State of California v. Doria Mining & Engineering Corp.*, 17 IBLA 380, 389 (1974); *Marvel Mining Co. v. Sinclair Oil & Gas Co.*, 75 I.D. 407, 423 (1968).

⁵To the extent appellants are continuing to assert that they possess the requisite standing to initiate a private contest, we note that our prior decision *In Re Pacific Coast Molybdenum*, *supra*, decided this issue adversely to them.

⁶PCM provided no specific tonnage of enriched material insofar as the 32 claims at issue were concerned. It merely noted that the claims embraced a portion "of a large cohesive body of molybdenite mineralization, which is estimated to contain, from current drill results, a geologic reserve of 700 million tons" (patent application at 8).

August 5, 1983

particles to liberate the molybdenite from the country rock. The ore in the slurry would then be pumped to flotation cells where molybdenite concentrates would be floated. Then, the concentrates would be filtered, dried and placed in containers for shipment to market. While the milling facilities would be located adjacent to the mine, the concentrates would be trucked approximately 10 miles to a dock at tidewater and would be barged from there to a port for shipment to ultimate domestic and foreign consumers.

Total costs (in 1979 dollars) were estimated by PCM to run \$5.31 per ton.⁷ At an average grade of sixteen-hundredths percent MoS_2 , assuming 83 percent mill recovery and that sales would be equally divided between domestic and foreign markets, gross returns were expected to be \$12.82 per ton, thereby leaving a net profit of \$7.51 per ton.⁸ According to the first supplement, included in the production costs estimate was \$5,563,000 to defray the anticipated costs of meeting Federal, state, and local environmental and reclamation permitting requirements. Included in this \$5.5 million figure were the costs necessary to generate baseline environmental data. An additional \$400,000 was allocated to environmental monitoring (see Second Supplement at Item 11). Costs of reclamation after mining were estimated to be \$4,675,000. Special note must be made of the fact that, while PCM asserted that costs of specialized equipment needed to meet environmental standards were included in the cost per ton figure under the mining or milling costs, where appropriate, no specific figures relating to these costs were included in any of its submissions.

As noted above, prerequisite to the issuance of patent is a physical examination of the claims by a Government mineral examiner. An examination of these claims was conducted by two Government mineral examiners, Wesley G. Moulton and Don E. Williams.⁹ A

⁷ The cost breakdown was as follows:

	Dollars per Ton
<i>Operating Costs</i>	
Mining	\$1.72
Milling	2.13
Transportation	0.07
	\$3.92
<i>Depreciation</i>	
Environmental	0.02
Facilities	1.37
	\$1.39
	\$5.31

⁸ For some unexplained reason, PCM, having stated in its original patent application that the average grade of the deposit was 0.15 percent MoS_2 (see Patent Application at 8), used an average grade of 0.16 percent MoS_2 in calculating its return in the Second supplement. If the deposit does have an average grade of 0.15 percent as originally contended (and which is also the figure used by the Forest Service), PCM would receive gross returns of \$12.02 per ton, with a net profit of \$6.71 per ton, assuming the correctness of its other assumptions.

⁹ The examination actually encompassed a total of 49 claims, 17 of which are not involved in this patent application.

report of their findings (hereinafter the Moulton-Williams Report) was prepared for the Forest Service which transmitted the report to BLM.

The Moulton-Williams Report estimated total tonnage at 776,830,000 tons of proven reserves at fifteen-hundredths percent MoS₂. Preproduction costs were estimated to amount to \$400,000,000. The production costs were determined to be \$3.585 a ton with mining and milling costs determined to be \$2.13 per ton. At an annual production of 14,600,000 tons per year this amounted to annualized costs of \$52,341,000. We note, however, that an examination of Exhibit F, which contained the Report's costs computations shows that the authors made two transpositional and one arithmetical error in calculating mining costs. On page 26, they show haulage costs of \$1,668,000. The actual figure which they developed was \$1,168,000. Additionally, cleanup costs should have been \$262,800 rather than \$292,000. Finally, an addition error of this column amounting to \$500 was also made. Thus, the total given for annual operating expenses overstated the costs by \$530,500 assuming the correctness of the Moulton-Williams Report's assumptions. Correcting their final figures to reflect this fact, production costs would be \$3.565 per ton and total annual production costs would be \$52,049,000.

These corrections are relatively minor compared to the noticeable differences between the figures used by the Moulton-Williams Report as to per ton production costs and selling price per pound of Mo, compared to those used by PCM in its application. Thus, PCM had estimated production costs of \$5.31 per ton and a selling price of \$8.05 per pound of Mo. The Moulton-Williams Report, on the other hand estimated production costs of \$3.565 per ton and a selling price of \$5.86 per pound of Mo. We will return to the discrepancy, *infra*. For our purposes at this time, it is enough to note that, based on the Moulton-Williams Report, the Regional Forester recommended clearlisting of the mineral patent application. Upon receipt of the Forest Service recommendation, BLM requested the Bureau of Mines to run a cash flow analysis. In its report, dated May 4, 1981, the Bureau of Mines noted that the breakeven point over a 20-year life at a zero rate of return was \$4.05 per pound of molybdenum, a price which, at the time of the Moulton-Williams Report, was less than half the going price of molybdenum. The Bureau of Mines assumed mining costs of \$2.17 per ton and milling costs of \$2.71 per ton.

Appellants suggest that PCM's patent application was deficient in that it did not adequately assess development costs, including those of environmental protection and reclamation. To the extent that appellants are contending that PCM's application must be viewed in isolation from the Government's subsequent studies, appellants are in error. Regardless of whether BLM might have rejected the patent application because of informational deficiencies (*but see United States Steel Corp., supra*), the fact is that BLM did not so act. Rather, it processed the application and caused its own studies to be made. These studies corroborated PCM's discovery. These studies are part of the

August 5, 1983

record before this Board and must be considered in determining whether or not appellants have established error in the denial of their protests. In other words, the studies done by the Government may be used to supply any informational gaps that might exist in the patent application standing alone. See *In Re Lick Gulch Timber Sale*, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983).

Appellants suggest that there are unexplained discrepancies in the cost figures used by PCM, Moulton-Williams, and the Bureau of Mines in their respective analyses. We have already indicated above that these variances do exist on both cost and sale sides. Insofar as the sale price of molybdenum concentrate is concerned, part of the problem has been the extreme volatility of the molybdenum market in recent years. As charted by the Engineering and Mining Journal over the past few years, the price for molybdenum concentrates has been on a virtual roller coaster. Using figures posted at the Climax mine in Colorado, in January 1978, the price of a one lb. cont. Mo, 95 percent MoS₂, was \$4.01, in January 1979, the price had risen to \$5.86, by January 1980 it had jumped to \$8.84, in January 1981 it was \$9.20, in January 1982 it was back down to \$8.75, and in January 1983, during the height of the recession, pricing was suspended by Climax, though there was no question that prices had fallen precipitously.

PCM used the price of molybdenum concentrates as of December 1, 1979. The Moulton-Williams Report used the December 1978 price. The Bureau of Mines analysis merely noted that \$4.05 was the breakeven point and that, at then present prices (May 1981), the price for molybdenum concentrates was nearly double this. Appellants suggest that the market price for molybdenum was artificially high from 1973-1980 (Affidavit of Stephen O. Anderson at 5), and argue that the December 1978 price was elevated because of low inventories due to a strike at one mine and lower production of copper, which often produces molybdenum as a by-product.¹⁰ They suggest that at the January 1983 price, PCM could not make a profit even using its cost figures.

[2] Appellants' argument crystallizes a problem inherent in the application of the marketability rule. While no prudent man would expend time and money to develop a mine where it is clear that there is no market for the mineral or the price that could be obtained is obviously less than the cost of production, the question of prudence becomes more difficult when the mineral involved is subject to great price volatility. Many minerals, including molybdenum, show marked price elasticity for both demand and supply fluctuations. Thus, either increased demand or decreased supply in the short term can often result in elevated prices which cannot be sustained over a long period of time. The same, however, is true on the downside.

¹⁰In 1981, for example, 34 percent of molybdenum mined constituted a by-product of copper mining. See generally *Minerals Yearbook*, 1981 at 604.

Molybdenum, which is primarily used in steel production, is particularly price sensitive to developments in the steel industry. The sharp 1981-83 recession, with its attendant massive decline in steel production, necessarily depressed molybdenum prices on a world-wide scale.

"Present marketability" has never encompassed the examination of either cost or price factors as of a specific, finite moment of time, without reference to other economic factors. Rather, the question of whether something is "presently marketable at a profit" simply means that a mining claimant must show that, as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed. For example, if a claimant has located a deposit of gold which can be mined at a profit, if the price of gold is \$500 an ounce, and the evidence is such that there is a reasonable likelihood of sufficient quantity and quality to justify development, that claim can be deemed valid despite the fact that on any specific day gold may be selling at \$420 an ounce. This is so because a selling price of \$500 an ounce for gold is both within the historic range and expectations of it reaching that level again can be justified as a present matter. On the other hand, if the deposit, because of expenses associated with mining and beneficiation, requires a selling price of \$1,500 an ounce, such a claim does not exhibit present marketability. So elevated a price for gold does not represent any relevant historic range and is essentially based on speculation or unsupported hope. It may be an expectation, but it is an unreasonable one given present facts. See *United States v. Denison*, 76 I.D. 233, 239 (1969).

We recognize that situations can occur in which structural economic changes or technological breakthroughs invalidate historical conditions as a guide to present marketability. Thus, in *United States v. Denison*, *supra*, cessation of a Government stockpiling program which had greatly elevated manganese prices, served to render these past prices irrelevant to the question of present marketability. It was, of course, not beyond the realm of possibility that a future stockpiling program might some day be initiated. Such a possibility, however, was essentially speculative and could not serve as a predicate upon which a prudent man would have proceeded to expend time and money with a reasonable hope of success.

The question, then, is whether the presently depressed state of molybdenum prices represent merely a sharp swing in normal market fluctuations or, in fact, is an indication of a major structural alteration in the market which renders irrelevant past economic experience. Appellants have tendered nothing which would justify a conclusion that a permanent structural alteration in the molybdenum market has occurred. Thus, the question of the present marketability is properly determined by reference to the historic range of values. We feel that, on the basis of the record before us, the January 1979 value used by

August 5, 1983

PCM to show marketability as of the date of the withdrawal can be used to show present marketability as of today.

Appellants focus on the admitted failure of PCM to expressly delineate the individual costs attendant to compliance with specific environmental standards, e.g., the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1976). Appellants do not suggest that PCM will be technologically unable to comply with applicable environmental constraints. Nor have they even provided estimates of what they believe the costs will be. Rather, they have contented themselves with postulations that "it cannot be substantiated that economic viability in fact either existed in 1978 or exists today" and that "environmental costs may be as much as five to ten times larger than those estimated by the company (approximately \$1 million per year) on the basis of comparable deposits" (Affidavit of Arnold J. Silverman at 3, 4). These statements, however, miss the point that appellants bear the burden of showing that the cost figures used by PCM and BLM are so understated that a reasonable likelihood of success in developing a paying mine does not exist. It is not enough to merely suggest that such *might be* the case. Appellants are required to show that such *is* the case.

Admittedly, PCM's application did not attempt to isolate individual cost factors beyond those associated with licensing and ultimate reclamation. The Moulton-Williams Report, which also showed the claims' profitability, noted that "due to the environmental problems unique to the Quartz Hill area, \$0.045 per ton was allowed to cover additional protection, mitigation, and rehabilitation measures." Moulton-Williams Report, Exhibit F, at 28. We have noted above that there are great areas of disparity among the three studies of profitability. They all, however, agreed that a discovery existed.

Appellants have not submitted cost analyses which would show that the claims could not be mined profitably. Indeed, they do not even argue that these claims could not, *as a fact*, be profitably developed. Rather, they merely argue that they *might* not be capable of profitable development. They proffer no figures to support this conclusion beyond bare assertions that environmental protection might cost on the order of five to ten times more than estimated. However, even if this is the case, the three studies indicate that the instant claims could still be mined at a profit. Appellants bore the burden of showing that these claims could not be economically developed. This burden they did not discharge.

[3] Appellants also suggest that because of ANILCA the prudent man marketability test must be "strictly" applied. Thus, they suggest "a stronger showing of marketability is required for important recreation areas, such as Misty Fjords, than for other public lands" (Reply Brief at 19). It is true that a number of cases in the past have indicated that a higher standard of proof is required for claims located in national

forests than for other public lands. In actual practice, the Board has long since abandoned this position. We take this opportunity to expressly repudiate it.

The genesis of this rule in the Department lies in cases such as *United States v. Dawson*, 58 I.D. 670 (1944), and *United States v. Langmade*, 52 L.D. 700 (1929). All of these early cases, as well as the Federal court decisions on which they were based (*United States v. Lillibridge*, 4 F. Supp. 204 (S.D. Cal. 1932); *United States v. Lavenson*, 206 F. 755 (W.D. Wash. 1913)), involved fact situations which called into question the *bona fides* of the mineral claimant. In *Dawson* and *Langmade* millsites and mining claims had been located on lands valuable for recreation sites and there were specific indications that the claims were a mere subterfuge to acquire title to these sites for purposes not associated with mining. *Lillibridge* involved the same problem, whereas *Lavenson* involved allegations that land valuable for water power was being acquired under the general mining laws. Particularly instructive is the following language from the *Lavenson* opinion, which involved a Government suit to cancel a patent:

The land must not only be located for valuable deposits, but claimed for such deposits, when patent is asked. *If the sole purpose of location, or making claim to the land, when patent is sought, is to secure valuable water power or timber, a claimant is not entitled to it under the mineral land law.* [Italics supplied]. The decision of the Supreme Court by Justice Field, in the last-mentioned cause, does not justify any other assumption, for therein it is said:

"If the land contains gold * * * which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the *incidental* advantages it may offer to the applicant for a patent." [Italics in original.]

If the claimant represents that he claims the land for its valuable deposits, when in fact he does not, and if, but for such representation, he would not receive a patent, but, relying on it, he is granted one, this is fraud.

206 F. at 763.

Subsequent decisions, however, ignored the clear basis of this rule and blindly applied the standard to all lands in national forests. Indeed, in *United States v. Gray*, A-28710 (Supp.) (May 7, 1964), the Deputy Solicitor attempted to premise the rule on a totally different basis. Thus, he stated that "[w]hile it is also clear that valid mining claims may be perfected within the limits of forest reservations, it is also clear that the validity of such mining claims is to be determined by a comparison of the relative value of the lands in question for forest or mineral purposes." No citation accompanied this statement, as the law did not support it. Indeed, in *Cataract Gold Mining Co.*, 43 L.D. 248 (1914), the Department expressly held:

[I]f a mineral claimant is able to show that the land contains mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money thereupon, in the reasonable expectation of success in developing a paying mine, such lands are disposable only under the mineral laws, notwithstanding the fact that they may possess a possible or probable greater value for agriculture or other purposes.

August 5, 1983

Id. at 254. This holding was reaffirmed in *United States v. Langmade*, *supra* at 705 (a case actually cited subsequently in *United States v. Gray*, *supra*, for a different proposition), and more recently in this Board's decision in *United States v. Kosanke Sand Corp. (On Reconsideration)*, 12 IBLA 282, 299-302, 80 I.D. 538, 547-48 (1973).

Having invoked the comparative value test in *Gray*, however, the Deputy Solicitor then proceeded to state that "I think it is reasonable, and entirely in accordance with prior Departmental and judicial decisions, to apply a higher standard and more rigid compliance with the requirements of the mining law where the claim is located within a National Forest." Thus was the standard separated from its moorings in considerations of bona fides.

As a conceptual matter, the theory that the situs of the land alters the nature of the test applied is untenable. Where the mining laws apply, they necessarily apply with equal force and effect, regardless of the characteristics of the land involved. The test of discovery is the same whether the land be unreserved public domain, land in a national forest, or even land in a national park.¹¹

This does not mean that questions of good faith are irrelevant. On the contrary, even if a discovery can be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are *incidental* to the purpose for which the land is claimed. See *United States v. Lavenson*, *supra*. But this is, essentially, an independent question from that involved in determining the existence of a discovery. The Board has noted that where the issue of bad faith is raised, the Government bears the ultimate burden of proof. See *United States v. Prowell*, 52 IBLA 256 (1981); *United States v. Dillman*, 36 IBLA 358 (1978). Imposing a higher standard of discovery by relying on the situs of the land embraced by the claim is, in effect, an attempt to shift the burden of proof *sub rosa*. In any event, appellants have failed to submit any credible evidence that these claims are not held in good faith. Thus, even were a different test for discovery applicable where bona fides is in question, which we expressly hold is not the case, it would not be applicable herein.¹²

Appellants also suggest that an EIS is required to be prepared prior to issuance of the mineral patent. In *United States v. Kosanke Sand Corp. (On Reconsideration)*, *supra*, we considered this contention at some length. We will not repeat that analysis here. We will simply

¹¹ This discussion assumes the validity of the location. Thus, where land is closed to mineral entry, a subsequent discovery is irrelevant as the mining laws no longer apply so as to permit a discovery.

¹² Appellants also suggest a more rigid standard is applicable because of the language of section 503(f)(2)(A) which requires that activities on the claims should be regulated "to assure that such activities are compatible to the maximum extent feasible, with the purposes for which the monuments were established." We disagree. First of all, nothing in this section arguably relates to the test for validity, since the section presupposes valid claims. But secondly, and more importantly, this section actually provides that if there is an irrevocable conflict between mining any valid claims and the purposes for which the monument was established, the latter must give way, where regulations to ensure compatibility are not "feasible." As we read the Ninth Circuit's decision in *SEACC v. Watson*, 697 F.2d 1305 (1983), the Court merely found that preparation of an EIS for either bulk sampling or a road was not infeasible and indeed had been expressly provided for by section 503(h)(3).

note that the Board, en banc, unanimously held issuance of a mineral patent was not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1976), as such action was not discretionary nor did the act of issuing the patent result in significant effects on the quality of the human environment. This holding was reaffirmed in *United States v. Pittsburgh Pacific Co.*, 30 IBLA 388, 84 I.D. 282 (1977). This latter decision was, itself, affirmed by the Eighth Circuit Court of Appeals *sub nom. South Dakota v. Andrus*, 614 F.2d 1190, *cert. denied*, 449 U.S. 822 (1980). We adhere to our position.

[4] The last issue pressed in the appeal is whether PCM is qualified to receive patent for these claims. Section 1 of the Mining Law of 1872 states that "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States." Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1976). Section 7 of the 1872 Act further provides that "[p]roof of citizenship * * * may consist * * * in the case of a corporation organized under the laws of the United States, or any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation." Act of May 10, 1872, 17 Stat. 94, 30 U.S.C. § 24 (1976).

Appellants argue that, while PCM is a corporation organized under the laws of the State of Nevada, it is, in point of fact, a wholly owned subsidiary, through a web of corporate holdings, of Rio Tinto-Zinc Corp., Limited, a United Kingdom corporation. *See note 2, infra*. Both PCM and the Solicitor's Office contend that proof of incorporation under the laws of a state gives rise to a conclusive presumption of citizenship in that state.

The question of the authority of a corporation to locate mining claims was first examined in *McKinley v. Wheeler*, 130 U.S. 630 (1889). Justice Field, speaking for a unanimous court, stated that the provisions of section 1 of the Mining Law of 1872 "must be held not to preclude a private corporation formed under the laws of a State, *whose members are citizens of the United States*, from locating a mining claim on the public lands of the United States." (Italics supplied.) *Id.* at 636. While the underlined language in this decision might be read as an implicit holding that all of the members of a corporation must, themselves, be citizens of the United States, it actually was merely a restatement of the averments of the appellant therein, that all of the stockholders of the corporation were, in fact, citizens of the United States.

The first case to directly examine the question of the subsidiary citizenship requirements of stockholders of a domestic corporation was *Doe v. Waterloo Mining Co.*, 70 F. 455 (9th Cir. 1895). That case involved the question whether, having alleged domestic incorporation, it was also necessary to allege that the stockholders were citizens of the United States. The Court's response was guided by two factors.

August 5, 1983

First, it noted that section 7 of the Mining Law of 1872 provided that proof of citizenship could be established for a corporation by the filing of a certificate of incorporation. As the Court noted:

The question might arise, why would the certificate of incorporation establish the citizenship of the stockholders? In considering the question of jurisdiction in the federal courts, it is an established rule that, when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. *Muller v. Dows*, 94 U.S. 445. Congress was familiar with this rule, and it seems probable intended to establish a similar rule under the mineral land act of 1872.

70 F. at 463.

The Court's second line of analysis proceeded from the actual practice of the Department of the Interior. Thus, the decision stated:

The practice in the United States land office has been, I think, universal, not to require of a corporation seeking to patent mining ground proof of the citizenship of its stockholders, other than by the production of a certified copy of articles of incorporation. * * * The practice in the land department of the United States under this statute should have great weight in construing it. *Hahn v. U.S.*, 107 U.S. 402, 2 Sup. Ct. 494; *U.S. v. Moore*, 95 U.S. 760; *Brown v. U.S.*, 113 U.S. 568, 5 Sup. Ct. 648. Considering the statute and the practice thereunder, I think the citizenship of the stockholders of the Waterloo Mining Company was sufficiently established. It was not necessary to allege in the answer what was conclusively presumed from the facts alleged.

Id.

Practice in the Department was, indeed, as indicated by the Court. Thus, Secretary Hitchcock stated "a corporation organized under the laws of the United States or of any State or Territory thereof may * * * occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations or associations not citizens of the United States." *Opinion*, 28 L.D. 178, 180 (1899). This was reiterated in the *Instructions* published at 51 L.D. 62 (1925) relating to the right of United States Borax Co., having been acquired by Borax Consolidated, Ltd., to hold and patent mining claims. This interpretation has continued to the present day. See 43 CFR 3862.2-1; *Alien Ownership of Shares in a Corporate Mining Location*, M-36738 (July 16, 1968). Appellants have failed to show why this consistent interpretation, stretching over nearly a century of adjudication, should be abandoned at this late date. See *State of Wyoming*, 27 IBLA 137, 83 I.D. 364 (1976), *aff'd sub nom. Wyoming v. Andrus*, 602 F.2d 1379 (10th Cir. 1979). We decline to alter the rule that proof of incorporation in a state is conclusive proof of citizenship by the stockholders.

In summation, we hold that appellants have failed to show error in the denial of their protests, that issuance of a mineral patent is not a major Federal action requiring the preparation of an EIS, and that proof of incorporation under the laws of a state establishes the citizenship of a corporation for the purposes of the Mining Law of 1872.

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.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

**APPEAL OF CHARLEY O. ESTES, d.b.a. PHOENIX
REFORESTATION CO.**

IBCA-1198-7-78

Decided August 11, 1983

Contract No. YA-514-CT8-50, Bureau of Land Management.

Sustained in Part.

1. Contracts: Disputes and Remedies: Burden of Proof--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Evidence

Where the Board found that the Government failed to produce documentation for its claimed actual costs resulting from the contractor's failure to complete the contract, it held that the general statements in the testimony of the Government witnesses became nothing more than reassertions of the disputed allegations of its claim and insufficient to sustain the burden of proof.

2. Contracts: Disputes and Remedies: Liquidated Damages--Contracts: Formation and Validity: Legality--Contracts: Disputes and Remedies: Equitable Adjustments

Upon finding that a contract clause in a tree planting contract provided that a contractor would receive no pay for any planting unit where the contractor failed to properly plant less than approximately 80 to 85 percent of the unit, the Board held the clause to constitute an unenforceable penalty because of no reasonable relationship to the degree of noncompliance with planting requirements and awarded an equitable adjustment for that portion of the planting units satisfactorily performed.

3. Contracts: Disputes and Remedies: Jurisdiction--Contracts: Performance or Default: Release and Settlement--Rules of Practice: Appeals: Dismissal

Where the exceptions to a "Release" specifically designate particular claims as being excluded from the effect of the release, a further claim, that cannot reasonably be considered to be within the claims asserted in the exceptions is barred by the release provisions and will be dismissed.

APPEARANCES: Joseph A. Yazbeck, Jr., Allen and Yazbeck, Attorneys at Law, Portland, Oregon, for Appellant; Edward F.

August 11, 1983

**Bartlett, Gerald D. O'Nan, Department Counsel, Denver, Colorado,
for the Government.**

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

By this appeal appellant, Charley O. Estes, d.b.a. Phoenix Reforestation Co., submits three claims for resolution by the Board all arising out of a hand tree planting contract with the Bureau of Land Management (BLM). The performance site was in the Coos Bay area of the State of Oregon. The contract award to appellant came about by subcontract procedure pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(i), *as amended*, through the Small Business Administration.

For his first claim, appellant asks to be relieved from liability for actual damages in the amount of \$7,914.65 charged by the Government for appellant's failure to complete the contract. By his second claim, appellant requests that the Board hold a payment clause of the contract to be a penalty, and therefore, invalid and unenforceable, and as a consequence that appellant be awarded an equitable adjustment consisting of payment in full for two planted units totaling 65 acres for which appellant received no pay. His third claim entails allegations that Government inspector personnel fomented labor strife among appellant's employees which hindered and delayed the performance of the contract and constituted the real cause of appellant's failure to timely complete performance of the contract. For relief appellant seeks entitlement to an equitable adjustment as well as a contract time extension.

As more specifically hereinafter discussed, we sustain the first claim because we find that the Government failed to prove the alleged actual damages; we sustain the second claim in part because we conclude that the payment clause providing for no pay to the contractor, even though he properly plants 80 percent or more of a given unit, constitutes an unenforceable penalty; and we dismiss the third claim because it was not included in the exceptions to a release signed by appellant releasing the Government from all claims, and is, therefore, barred from consideration by the Board.

Discussion

Claim for Relief from Alleged Actual Damages

By letter of April 14, 1978, the contracting officer informed appellant of the assessment of \$7,914.65 in costs for failure to complete the planting contract within the specified time frame of 69 days (Appeal File (AF)-38). The assessment was broken down into administrative costs, consisting of wages of inspectors totaling \$491.09 and vehicle

costs of \$73.56, allegedly incurred during the period of March 25-27, 1978; and seedling cost, totaling \$7,350 for seedlings not planted and to be transplanted or discarded. These assessed costs were also referred to in the contracting officer's decision of June 12, 1978 (AF-43), as "actual damages."

In his posthearing brief, counsel for appellant contends that the evidence adduced at the hearing conclusively established: That a substantial portion of the alleged actual damages did not, in fact, occur; that the estimated alleged actual damages should not be allowed because the Government made no effort to mitigate its damages; and that the Government totally failed to sustain its burden of proof in establishing the *amount* of the claimed damages. Appellant also asserts that Government inspectors wrongfully interfered with appellant's performance by misrepresenting to appellant's employees that they were being underpaid which resulted in poor employee morale, high turnover of personnel, and work slow-downs. Appellant further contends that such Government interference was the real cause of appellant's reduced efficiency and failure to complete the contract. The Government response is that the actual damages deducted are totally supported by both oral and documentary evidence (Govt. Brief at 19).

Although the record shows that the Government did incur some damage as a result of appellant's failure to complete and satisfactorily perform the contract, we find the evidence to be conflicting and inconclusive with respect to the issues of whether the Government wrongfully interfered with performance or mitigated the damages. However, we need not and do not decide those issues here, since our analysis of the evidence results in the finding that the Government did indeed fail to adduce any substantial evidence in support of the *amount* of claimed actual damages.

The law is well settled that the Government is held to the same standard of proof as is the contractor; that if the Government cannot prove its damages it cannot recover; and that a withholding by the Government to cover damage allegedly caused by the contractor must be justified by reasonable proof of the costs involved, and this proof must be more than a mere guess. *See, e.g., Brown & Root, Inc. v. United States*, 126 Ct. Cl. 684 (1953); *Appeal of Norair Engineering Corp.*, GSBCA 3593 (Jan. 16, 1975), 75-1 BCA par. 11,062; *Whitlock Corp. v. United States*, 141 Ct. Cl. 758 (1958); and *Soledad Enterprises*, ASBCA Nos. 20376, 20423, 20424, 20425, 20426 (Apr. 19, 1977), 77-2 BCA par. 12,552.

The only documentary evidence presented on the claimed damages was the unsigned sheet itemizing the claimed costs attached to the contracting officer's letter of April 14, 1978 (AF-38).¹ Earl Burke, one of the Government inspectors, did not know how the actual damage calculation was made (Tr. 244). Suzanne Murley, contract specialist, acted as the contracting officer for the purpose of preparing and

¹ References to the record in this opinion are typically abbreviated as follows: Appeal File, Exhibit No. 38 (AF-38); Transcript, page 226 (Tr. 226); and Appellant's Exhibit A (AX-A).

August 11, 1983

signing the contracting officer's decision of June 12, 1978, from which this appeal was taken. She testified, with respect to the alleged damages listed on the unsigned sheet (AF-38), that: She simply asked the people in the District if they worked the hours shown and that the charges seemed very reasonable; that she did not see any time records and did not ask for them; that she did not see any mileage records for vehicular costs; that she saw no records at all that would reflect that 30,021 trees were destroyed, or any records that would show whatever number of thousand trees were sent somewhere to be transplanted (Tr. 246-49).

The Government brief states that at Tr. 274-75 Dave Sherman, one of the primary inspectors, testified that the "District Office prepared the amounts of damages and explained how they were computed." We find, however, that this testimony admits that the computations were based on mere estimates of the seedlings not planted. No reference was made by this witness, or by any other witness, to a specific inventory of seedlings planted or not planted. No detailed records of any kind, such as vouchers, receipts, or canceled checks, were offered to verify the numbers of seedlings involved in the calculation of damages. Neither were any such records offered to show what the Government paid, or to whom, for the seedlings. It is true that the contracting officer, Bob Leonard, testified (Tr. 37, 38), as pointed out in the Government brief, that: 30,000 3-year old seedlings had to be destroyed because they were not planted and the Government up to that time had an investment in them of \$2,940; that the \$49 per thousand charged to appellant for the cost of transplanting 2-year old trees was a figure "used from previous transplanting costs that we had"; and that "those trees were actually transplanted at a cost of \$65 a thousand." No explanation was given as to how the \$2,940 was calculated or why \$65 per thousand was not charged if that was the actual cost, but again, no detailed records of any kind were offered in support of this testimony.

[1] Without supporting documentation of incurred costs, the general statements in the testimony of the Government witnesses become nothing more than reassertions of the disputed allegations of the claimed damages.² They do not constitute proof and are insufficient to sustain the Government's burden. *See Wickes Engineering and Construction Co.*, IBCA-191 (Nov. 30, 1960), 61-1 BCA par. 2872; *Oakland Construction Co.*, IBCA-871-9-70 (Mar. 23, 1971), 71-1 BCA par. 8766 at 40,686; *H. W. Caldwell and Son, Inc.*, IBCA-824-2-70 (May 30, 1973), 80 I.D. 345, 73-2 BCA par. 10,069; and *C.I.C.*

² We do not mean to imply that detailed documentation is the only way to support general statements that amount to mere reassertions of the allegations. In the proper case, for instance, a witness may be able to support such a statement from personal observations of supportive underlying facts, and, in the absence of credible contradictory evidence, such testimonial support may be sufficient. In this case, however, the Government witnesses most likely to provide supportive evidence consistently admitted that they were unfamiliar with records that would support their general statements and otherwise were unable to provide the kind of personal observation testimony or other evidence to prove the worth of their statements. In these circumstances, we are unwilling to credit these statements as probative of the conclusion for which they were made.

Construction Co., IBCA-1190-4-78 (Sept. 25, 1979), 86 I.D. 475, 79-2 BCA par. 14,057.

Since there is no dispute between the parties that appellant failed to complete the contract or that considerable portions of the planting performance were unsatisfactory, it might be argued that the Government is, at least, entitled to a jury verdict for damages. However, the circumstances here appear to be analogous to the situation in *Soledad Enterprises, supra*. In that case, the ASBCA Board said, at page 60,871:

In view of the substantial evidence concerning excessive unsatisfactory performance by the contractor, it could be argued that the Government is, at the least, entitled to a jury verdict recovery for unsatisfactory work. In two recent decisions we and the Court of Claims have held that jury verdict awards are inappropriate where contractors should and could have maintained accurate records of the amounts claimed but failed to do so. *Joseph Pickard's Sons Company v. United States* [22 CCF ¶ 80,210], 209 Ct. Cl. 643 (1976); *Baifield Industries, Division of A-T-O, Inc.*, ASBCA Nos. 13418, 13555, 17241, 77-1 BCA ¶ 12,308 (at p. 59,466). Here the Government could and should have maintained detailed records to support the amounts it was deducting from the contractor's monthly invoices and provided them to the contractor at the time the deductions were taken in order to afford the contractor an opportunity to verify or challenge their accuracy and reasonableness. Cf. *United States Building Maintenance*, ASBCA No. 20887, 77-1 BCA ¶ 12,497 (decided 15 April 1977). The Government failed to do so and we perceive no reason why the Government should receive treatment more favorable than that contractors receive under similar circumstances. Accordingly, we conclude that the Government is not entitled to retain the deductions it withheld because of unsatisfactory work.

It appears, in this case, that the Government did not maintain detailed records of its costs. If it did not, it should have. If it did, they were not produced at the hearing. In any event, we adopt the above reasoning in *Soledad* as sound and applicable here.

Decision

On the basis of the foregoing discussion, we find that the Government failed to sustain its burden of proof with respect to its claimed actual damages and hold appellant entitled to relief from liability for the payment thereof.

Claim That No-pay Clause in the Contract is a Penalty, and Therefore, Invalid and Unenforceable

The specific clause involved in this claim is paragraph C of the Payment provisions under Section I of the contract (AF-1). The payment section provides, in part, as follows:

A. If the payment adjustment factor (Step 8 of Form OSO 5700-2) is found to be 2% or less, 100% payment will be made.

B. If the payment adjustment factor (Step 8 of Form OSO 5700-2) is from 3% to 15%, this will be the percent equitable adjustment to be deducted from the bid price for the planting unit.

C. If the payment adjustment factor (Step 8 of Form OSO 5700-2) is greater than 15%, no payment will be made for the unit.

August 11, 1933

The eight steps of form OSO 5700-2 used to determine the payment adjustment factor referred to in the payment provisions of the contract were listed in the contract documents (AF-1) as follows:

Step 1 - Record the number of plantable, unplantable, and total plots from column (a) of Form OSO 5700-4.

Step 2 - Record the number of plantable plots with no trees (either natural or planted) from columns (b) and (c).

Step 3 - Record the number of plantable plots with three or more trees (natural or planted) closer than the specific spacing as shown on the bid information sheet from columns (b) and (c).

Step 4 - Record the number of planted trees inspected from column (b).

Step 5 - Record from columns (d), (e), and (f), the number of trees rejected because of improper planting.

Step 6 - Divide total number of improperly planted trees by total number inspected. Interpolate lower confidence limit from table in Section 11. (Use Step 4 for "N" and the quotient of Step 5d ÷ Step 4 for "p").

Step 7A - Divide the total number of underplanted plots by total number examined. Subtract six (6) percent. (This represents the chance of a plot falling between four perfectly spaced trees on a perfectly spaced plantation, without encompassing a tree). Using this percentage for "p" and Step 1(a) for "N", interpolate lower confidence limit from table in Section 11.

Step 7B - Divide the total number of overplanted plots by total number examined. Using this percentage for "p", and Step 1(a) for "N", interpolate lower confidence limit from table in Section 11.

Step 8 - To determine the payment adjustment factor, add results of Step 6, Step 7A, and Step 7B.

It is undisputed that for 2 planted units out of some 24 units to be planted under the contract, the appellant received no pay because the payment adjustment factor, as determined by the inspectors upon application of the eight-step formula set forth above, was greater than 15 percent. The two no-pay units were identified as the Slater Creek unit, consisting of 35 acres, and the Johns Weekly unit, consisting of 30 acres. The payment adjustment factor for the Slater Creek unit was determined to be 25 percent, and the Johns Weekly unit, 19 percent. These units were both initial plants for which the bid price per acre was \$78.62. Thus, had the contractor been paid in full for the Slater Creek unit he would have received \$2,751.70, and for the Johns Weekly unit, \$2,358.60.

The arguments, pertinent to this claim, as presented by appellant in its posthearing briefs may be summarized as follows:

1. Both Government contracting personnel and contractor personnel engaged in the tree planting business have commonly referred to the reductions in price prescribed in the payment provisions as "assessed penalties."

2. The authors of clause C, the no-pay provision, inserted it into the contract without the authority of any specific Federal Procurement Regulations (FPR's).

3. The no-pay clause violates the guidelines of sections 1-14.206 and 1-1.315-2 of the FPR's.

4. The Board has the authority to declare, and should declare, the no-pay provisions to be a penalty and unenforceable.

The Government, on the other hand, argues in substance that:

1. Although it was not successful in finding any cases applicable to the factual circumstances of this appeal, "it appears that the issue of whether the acceptance and payment provisions of subject contract are valid and enforceable is a question of law beyond the Board's jurisdiction" (Govt. Brief at 19).

2. The Government should not be required to accept substandard work when, using its stated measurement procedure, the measure falls below the minimum contract requirements.

3. When the inspection results reflect a payment adjustment factor greater than 15 percent, the Government does not benefit from the work performance.

We are not certain whether the Government is arguing that the Board lacks jurisdiction to determine *any* question of law or to determine whether specific contract provisions are valid and enforceable. Nevertheless, there is more than ample legal precedent to support the Board's jurisdiction to rule on the validity and enforceability of the no-pay provision. For example, in *Graybar Electric Co.*, IBCA-773-4-69 (Feb. 12, 1970), 70-1 BCA par. 8121, this Board held that a flat rate liquidated damages clause which makes no allowance for partial deliveries is an unenforceable penalty. The Board noted that it was well settled that provisions for liquidated damages will be upheld as valid where: (1) the harm that would be caused by a breach is very difficult to estimate accurately, and (2) the amount fixed is a reasonable forecast of just compensation for the harm caused by the breach. The holding was in favor of the appellant because the Board could not find that the liquidated damage provision met the second requirement. It was further observed by the Board that provisions for liquidated damages at flat rates which make no allowance for partial deliveries, of the contract value of undelivered quantities, *or for the degree of nonconformance to specifications*, have been repeatedly struck down as unenforceable penalties by the Comptroller General and by other Boards. (See the authorities cited in that case at footnotes 5, 7, 8, and 9).

Marathon Battery Co., ASBCA No. 9464 (July 14, 1964), 1964 BCA par. 4337, one of the authorities cited in *Graybar*, *supra*, involved contracts to furnish various types of dry cell batteries in accordance with specific orders issued from time to time by the Government. A formula in the contracts called for a downward price adjustment based on whether the battery failed to meet the test, not on the degree to which it failed. By this formula, a battery which was 95 percent effective would not be differentiated from one that was only 10 percent effective. The contractor's contention that such a formula created a penalty rather than liquidated damages was sustained over the Government's contention that the inequity of the formula was immaterial because of the mutual agreement of the parties to the

August 11, 1983

contract. In sum, the Armed Services Board held: That the contract price adjustment formula for liquidated damages, resulting in the same dollar amounts whether the defect was .1 percent or 100 percent, was a penalty because it did not vary with the extent of the breach; that the sum arrived at as liquidated damages must bear "some relationship to the probable actual damages"; and that such a penalty was unenforceable as a contract provision.

The United States Supreme Court, in *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947), at page 413, among other things, said:

But under this procurement program delays of the contractors which did not interfere with prompt deliveries plainly would not occasion damage. That was as certain when the contract was made as it later proved to be. Yet that was the only situation to which the provision in question could ever apply. Under these circumstances this provision for "liquidated damages" could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests, have an *in terrorem* effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that *the provision was included not to make a fair estimate of damages to be suffered but to serve only as a spur to performance*. It is well-settled contract law that courts do not give their imprimatur to such arrangements. [Italics supplied.]

In this case, the Government attempted to show by the testimony of Robert Lewis (Tr. 434-67), a well-qualified silviculturist employed by BLM in the south resource area at the Roseburg District, Oregon, that the Government receives no benefit from any planting unit where the payment adjustment factor exceeds 15 percent. However, we find that this testimony fell short of meeting that objective. It was clear from the Lewis testimony that certain minimum standards adopted by BLM for stocking its forests must be met in order to achieve an anticipated yield of board-feet of lumber when the planted trees reach maturity. Our analysis of the crux of this testimony, we believe, is confirmed by the Department counsel's own characterization of the testimony of Mr. Lewis, at page 13 of his brief, where he stated: "Although he testified at length about replanting and interplanting, the substance of his testimony is that once a planting unit fails to meet the minimum stocking standards, the yield that the Government (or any other owner) might have received from it is irreparably lowered." Furthermore, on cross-examination Mr. Lewis acknowledged that there would be some merchantable timber in a unit having a payment adjustment factor greater than 15 percent if BLM elected not to destroy the stand of seedlings (Tr. 469).

Mr. Bernard Mayer, Chief of the Forest Development Section, at the BLM District Office in Portland, Oregon, among other things, testified (Tr. 418-32) that the Forest Development Program includes all intensive forest management practices that support the harvesting program, such as site preparation, tree planting, and seedling protection; that the goal is to manage the forests for optimum growth to achieve a high annual harvest of timber which cannot exceed the annual growth; that at an annual meeting of BLM forest development

personnel in 1973, discussions regarding the need to re-treat planted areas for the second and third time, which were not accomplishing the objective of fully stocked forests, led to the conclusion that a new set of standards were needed in the Acceptance and Inspection section of the tree planting contract provisions; that the result was the development of the no-pay provision; that the basis for this provision was, "we felt strongly that we weren't getting the trees planted correctly initially, was one of our problems for replants, and the second was quality, that we had poor survival because we should have better quality planting."

We find this circumstance analogous to the situation related by the Supreme Court in *Priebe & Sons, supra*, where the court found a tacit admission that "the provision was included not to make a fair estimate of damages to be suffered but to serve only as a spur to performance."

Our review of the record also confirms the allegation of appellant that the no-pay and price reduction provisions for poor planting were commonly referred to by personnel of both parties as penalties (see AF-12, AF-13, AF-15, AF-20, AF-22, AF-24, AF-25, AF-26, AF-32, AX-A, AX-B, AX-G; Tr. 62, 63).

[2] In light of the foregoing discussion, and our understanding of the above-stated case authority, we are constrained to hold, and do hold, that clause C, under Section I of the contract, is an unenforceable penalty clause providing for a forfeiture, or no pay to the contractor, without reasonable relationship to his degree of nonconformance to the planting requirements.³ Even though we have determined the questioned clause to be a penalty, we are not, however, willing to hold the contractor entitled to payment for work he did not properly perform. Since we find, and appellant agrees (at page 16 of Appellant's Initial Post-hearing Brief), that down to the point of no pay after 15 percent, the Government's method for computing the adjusted payment factor is reasonable, we further conclude that appellant's compensation should be limited to the payment factor percentages established for satisfactory performance in the no-pay units, together with interest as provided by the contract.

Decision

Therefore, we find appellant entitled to 75 percent of \$2,751.70, or \$2,063.78 for the 35-acre Slater Creek unit, and 81 percent of \$2,358.60, or \$1,910.47 for the 30-acre Johns Weekly unit, for a total of \$3,974.25, together with interest thereon as provided by Clause 12, General Provisions, of the contract.

Claim of Hindrance, Delay, and Interference - Effect of Release

For his third claim, appellant requests an equitable adjustment for Government inspector-caused labor strife among appellant's employees

³ Our determination that the 15 percent adjusted payment factor clause constitutes a penalty should not be construed to mean that there may not be some point at which the lack of benefit to the Government would become a legitimate measure of liquidated damages. The record here, however, is insufficient to support a finding that the 15 percent payment factor is a reasonable forecast of the damages to the Government.

August 11, 1983

which appellant alleges hindered, delayed, and interfered with the performance of the contract and constituted the real cause of the failure to complete the contract. As a second form of relief based upon the alleged hindrance and interference, appellant also claims entitlement to a contract time extension. Appellant asserts in general that unrest and discontent of its laborers and a virtual labor strike resulted from acts of inspector personnel wrongfully and incorrectly telling the planters that they were not being paid fairly or sufficiently. The Government inspectors denied the allegations and testified that they merely answered questions about the wages asked of them by appellant's crew and that they were required to interview the laborers to determine if the minimum wage scale was being paid by the contractor.

However, we need not reach the merits or make specific findings on the issue of whether there was culpable hindrance, because, whether claiming an equitable adjustment in terms of dollars and cents or claiming entitlement to an extension of time, the fact is that appellant is making a claim for relief which was not excepted from the terms of a release executed by appellant on April 25, 1978 (AF-37). In substance, by that document appellant acknowledged payment from the Government in the amount of \$8,617.86 and in consideration thereof released the Government and its agents of and from *all* debts, liabilities, accounts, claims, and demands, arising out of the subject contract, except: "[F]orthcoming appeal on actual damages charged and total of 65 acres non-paid due to percentage below 85%."

[3] The release was signed by Charley O. Estes himself as owner of Phoenix Reforestation Co. By the language of the release it is clear, and we find, that appellant excepted from the terms of the release only the two claims discussed above which challenged the actual damages charged by the Government and the validity of the contract clause prohibiting any pay for the two units totaling 65 acres. Thus, this third claim of hindrance, delay, and interference, not having been excepted from the terms of the release, is barred from consideration by the Board and must be dismissed. This question of law was settled by our decisions in *R. A. Heintz Construction Co.*, IBCA-403 (June 30, 1966), 73 I.D. 196, 66-1 BCA par. 5663; and *Halvorson-Lents, A Joint Venture*, IBCA-1059-2-75 (Mar. 3, 1977), 77-1 BCA par. 12,382.

DAVID DOANE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

UNITED INDIANS OF ALL TRIBES FOUNDATION

v.

**ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS) (ON RECONSIDERATION)**

11 IBIA 276

Decided August 15, 1983

Reconsideration of 11 IBIA 226 (1983), dealing with denial of grant funding under the Indian Child Welfare Act, sought by Bureau of Indian Affairs.

11 IBIA 226 vacated in part; BIA decision reversed and remanded.

1. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

Geographic location alone does not determine whether a program seeking funding under the Indian Child Welfare Act is to be characterized as "off" or "near" reservation; rather the client population served by the program is the determinative factor.

2. Regulations: Interpretation

The Bureau of Indian Affairs will be presumed to have knowledge of decisions of the Board of Indian Appeals interpreting its regulations, and when regulations are revised without specific change in response to such a Board decision, the Bureau of Indian Affairs will further be presumed to have accepted that interpretation.

3. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

The definition of "Indian" in 25 CFR 23.2(d)(2) specifies the type of proof of Indian ancestry necessary to qualify for receipt of services funded under the Indian Child Welfare Act. It does not purport to define the client population of "near reservation" programs.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On July 29, 1983, the Bureau of Indian Affairs (BIA) sought reconsideration of the July 5, 1983, decision in this case, 11 IBIA 226 (1983), on the grounds that the regulation cited as a basis for remand in that decision, 25 CFR 23.29(b)(4), had been deleted through notice published in the *Federal Register*. See 47 FR 39978 (Sept. 10, 1982). The Board of Indian Appeals (Board) acknowledged that it overlooked this rule change and granted reconsideration limited to that part of the decision which remanded the case to BIA for implementation of that regulation. Order Granting and Expediting Reconsideration, August 1, 1983. The Board now vacates that part of its original decision interpreting 25 CFR 23.29(b)(4) (1982).

The background of this case was fully set forth in 11 IBIA at 228-30. That discussion is here incorporated by reference.

August 15, 1983

Appellant United Indians of All Tribes Foundation is located in Seattle, Washington, and provides social services to Indians in the Seattle/King County area. It has previously received funding under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (Supp. II 1978). Appellant's application for fiscal year 1983 ICWA funds was denied by BIA on the grounds that the Seattle/King County area had been designated "near reservation" by the Puyallup Tribe and appellant did not seek funding through the governing body of that tribe as required by 25 CFR 23.25(c), .26(a), and .28(a).

"Near reservation" designations were developed in response to the Supreme Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974). The designations are intended to ensure that Indians living off, but in close proximity to, their reservations receive services provided by Congress. The use of those designations under ICWA is further intended to conserve limited appropriations by preventing duplication of funding to tribal organizations serving their members living off the reservation and to independent Indian organizations, located in areas near reservations, that serve essentially the same people as the tribal organizations. *Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 214, 90 I.D. 283 (1983); *Navajo Tribe v. Commissioner of Indian Affairs*, 10 IBIA 78, 89 I.D. 424 (1982).

The essential question before the Board is whether BIA may use "near reservation" designations to deny funding to Indian organizations located in areas so designated, but serving Indians not members of the tribes making the designation. This problem arises especially in those urban areas which have large Indian populations, including large percentages of Indians from tribes not in the immediate vicinity.

Appellant in this case is such an organization. There is no dispute that appellant is located in an area that has been designated "near reservation" by the Puyallup Tribe.¹ The record shows, however, that of the 12,437 Indians residing in the Seattle/King County area, only about 1,300 are members of the Puyallup Tribe.² Thus, approximately 11,000 Indians within appellant's service area are not members of the tribe designating the area as "near reservation."

Appellee's position is that the regulations establish that a program providing ICWA services and located in an area designated "near reservation" must seek funding through the governing body of the tribe making the designation. This argument is apparently based on the phrase "'on or near' reservation program" used throughout 25 CFR Part 23 and on 25 CFR 23.2(d)(2), which defines "Indian" for

¹ Appellant's contention that the designation of the Seattle/King County area as "near reservation" violated regulatory criteria set forth in 25 CFR 20.1(r) was disposed of in 11 IBIA at 233.

² An additional 610 Indians are members of the Muckleshoot Tribe and 570 are members of the Suquamish Tribe. Each of these tribes has proposed the Seattle/King County area as "near reservation," but final approval of the designations has not been published in the *Federal Register*.

the purpose of receiving ICWA benefits under a "near reservation" program.

[1] The assertion that mere location is the ultimate determinative factor in distinguishing between a "near reservation" and an off-reservation program is inconsistent with the Board's decision in *Navajo Tribe, supra*. *Navajo Tribe* involved the question of whether the Navajo Tribe and an Indian organization located in an area designated "near reservation" by that tribe were independently eligible applicants for grants under ICWA. In finding that they were not because the Indian organization was located in an area designated "near reservation" by the tribe and served essentially the same client population as the tribe, the Board held that "[i]t is the character of the client population to be served, rather than the composition of the servicing organization, that is crucial to a determination under the Act [ICWA] regarding funding of Indian social services." 10 IBIA at 86, 89 I.D. at 428.

Therefore, a finding that an Indian organization providing ICWA services is located in an area designated "near reservation" may suggest the organization provides services that duplicate services furnished by a tribe. However, the law does not provide that location alone determines whether a program is properly characterized as "off" or "near" reservation. The BIA must instead ascertain whether the client population of the program, in fact, duplicates the population for which the tribe would ordinarily be expected to provide services.

[2] The decision in *Navajo Tribe*, issued on August 30, 1982, was rendered before BIA's revision of its ICWA regulations, which were published in the *Federal Register* on September 10, 1982. The Board presumes that BIA was aware of this decision when it was preparing its regulatory revision.³ The BIA made no attempt to alter the Board's holding that client population is the determinative factor, or to add a new definition of "on or near" reservation program."

[3] Furthermore, the Board again rejects BIA's argument that 25 CFR 23.2(d)(2) defines client population for purposes of "near reservation" programs. As was discussed in footnote 2 of the Board's original decision in this case, 11 IBIA at 231, this definition, which must be read in context with section 23.2(d)(3), regarding off-reservation programs, merely specifies the type of proof of Indian ancestry necessary to qualify for receipt of services funded under ICWA. A person meeting those definitions may seek assistance through the appropriate program or programs. The regulation does not purport to define the client population of "near" or off-reservation programs.

The record in the present case indicates that appellant's client population duplicates only in very small part the individuals for whom the Puyallup Tribe has responsibility. As the Board noted at 11 IBIA

³ A similar presumption exists that the legislature is aware of prior and contemporaneous administrative interpretations of statutes, so that when a statute is reenacted without change, it will be presumed that the legislature intended to adopt the administrative interpretation. See *Walker v. United States*, 83 F.2d 103 (8th Cir. 1936), and cases cited therein; *Conn v. United States*, 68 F. Supp. 966 (Ct. Cl. 1946).

August 17, 1983

at 231 n.2, there are several possible ways to address the problem presented in this case. The BIA may choose to count nonmember Indians in calculating a tribe's service population for purposes of determining maximum ICWA funding levels, thus making the tribe administratively responsible for providing services to nontribal members living in areas designated "near reservation." Alternatively, BIA might decide to fund programs, such as appellant's, separately under the off-reservation provisions of section 202 of ICWA, 25 U.S.C. § 1932 (Supp. II 1978). This procedure might result in partial independent funding of such organizations for services to nonmember Indians and partial funding through a tribal governing body for services to off-reservation tribal members. The BIA may be able to develop other methods for ensuring that eligible individuals receive the benefits which Congress has provided for them. In any case, the determination of how to address this issue should be made by BIA rather than by this Board.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 16, 1983, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is reversed and the case is remanded to the Bureau of Indian Affairs for reconsideration of appellant's application in accordance with this decision.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

**APPLICATION FOR COSTS (CENTRAL COLORADO
CONTRACTORS, INC.)**

IBCA-1672-4-83

Decided August 17, 1983

Contract No. MOOC14201837, Bureau of Indian Affairs.

Dismissed.

1. Contracts: Disputes and Remedies: Jurisdiction

The Board has no jurisdiction under the Equal Access to Justice Act to award attorney fees and costs to a contractor as the prevailing party in a proceeding against the United States, since the U.S. Court of Appeals for the Federal Circuit has ruled that Congress in

August 17, 1983

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JERRY MUSKRAT
Administrative Judge

WE CONCUR:

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that Act did not expressly waive sovereign immunity from liability for such an award with respect to contract dispute proceedings before Boards of Contract Appeals.

2. Contracts: Disputes and Remedies: Jurisdiction

The Board holds that it has no authority, pursuant to the CDA, EAJA, or any other statute, to order an agency to pay attorney fees and costs or to comply with any particular law, and further, if the Board were to order the BIA to pay the requested fees and cost, it would be attempting to do indirectly what it has determined it cannot do directly.

APPEARANCES: Harry S. Connelly, Attorney at Law, Santa Fe, New Mexico, for Appellant; Barry K. Berkson, Department Counsel, Santa Fe, New Mexico, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

On April 22, 1983, counsel for Central Colorado Contractors, Inc. (CCC), transmitted to this Board an application for "Award of Costs and Fees and Other Expenses" arising out of the appeal of CCC docketed as IBCA-1203-8-78. That appeal resulted in a decision by this Board awarding CCC \$70,854.90 plus interest. *Central Colorado Contractors, Inc.*, IBCA-1203-8-78 (Mar. 25, 1983), 90 I.D. 109, 83-1 BCA par. 16,405.

Appellant seeks an order of the Board:

1. Allowing attorneys fees and expenses in the sum of \$41,582.98, and expert witness fees and expenses in the sum of \$9,127.14 for a total of \$50,710.12, plus the costs of the transcript; or
2. Ordering the Bureau of Indian Affairs (BIA), to pay such fees and expenses and cost of transcript; or
3. Ordering the BIA to comply with 5 U.S.C. § 504(a)(3) (Supp. IV 1980), the Equal Access to Justice Act (EAJA).

By its order of April 25, 1983, the Board designated the application a separate proceeding, assigned to it the above docket number, and established a briefing schedule permitting both parties full opportunity to file briefs with respect to the issues raised by the application. The final brief, entitled, "Applicant's Reply Brief", was filed with the Board on July 11, 1983. By its letter, dated July 6, 1983, transmitting the reply brief, applicant requested that the parties be allowed to orally argue the content of the briefs filed.

Ruling on Request for Oral Argument

Since the parties were given full opportunity to argue their respective positions by brief, and it appears that little, if any, further enlightenment of the Board would be accomplished by oral argument, and to avoid needless additional expense, the request for oral argument is denied.

August 17, 1983

Discussion

In its initial brief, appellant concedes its awareness of our ruling in Application for Attorneys' Fees (*Eyring Research Institute*), IBCA-1604-7-82 (Feb. 25, 1983), where we cited *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (1983), as authority for the proposition that we have no jurisdiction under the EAJA to award attorney fees and expenses. Nevertheless, applicant argues extensively and in detail that the Court of Appeals for the Federal Circuit overlooked in the *Fidelity* opinion that the Congress drastically changed the law, pertaining to application of the doctrine of sovereign immunity in cases arising from claims for fees and expenses against the United States, by passage of the EAJA, and provided that agencies of the United States must pay certain fees and expenses in certain agency actions.

Applicant also argues in its initial brief that if this Board cannot award attorneys' fees because of *Fidelity*, then it can order the agency conducting the adversary proceeding to pay the same by application of 41 U.S.C. § 609(d) (1976), a section of the Contracts Disputes Act of 1978, providing in part: "In exercising this jurisdiction an agency Board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." In its reply brief, appellant also argues that 5 U.S.C. § 504(a)(1) (Supp. IV 1980) of the EAJA requires that an agency conducting an adversary adjudication *shall* award to a prevailing party fees and other expenses, and, therefore, applicant is simply asking this Board to order BIA (an agency) to comply with the law of the United States Congress.

The Government in its brief relied primarily on the *Fidelity* case as an authoritative bar to the award of fees and expenses under the EAJA by Boards of Contract Appeals. It also argued that even if the Board did have the necessary jurisdiction, it could not award the requested fees and expenses under the Act because the position of the agency was substantially justified.

[1] For our decision on the subject application, we need not consider the question of whether the agency's position was substantially justified unless we determine that we have jurisdiction to grant attorney fees and expenses as requested. We are not persuaded by appellant's arguments that we have such jurisdiction. The holding in *Fidelity* is explained in the words: "In construing a statute waiving the sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress." Neither the CDA nor the EAJA contains explicit language authorizing Boards of Contract Appeals to award attorney fees and expenses, and the court negates any grant of such authority by implication or inference.

The Court of Appeals for the Federal Circuit has the responsibility to review the decisions of the Boards of Contract Appeals and we are

bound to follow its decisions. That court unequivocally ruled in the *Fidelity* case that "the EAJA does not authorize boards of contract appeals to award attorney fees and expenses against the United States." In so ruling, the court observed that, in an early version (later deleted) of what eventually passed as the EAJA, an award of attorney fees and costs was clearly permitted in agency adjudications under both the Administrative Procedure Act and the Contract Disputes Act; that the only pertinent amendment to the bill, that was finally passed by Congress as the EAJA, allowed a *court* to award attorney fees and expenses in reviewing Contract Disputes Act proceedings; and that proposed amendments expressly allowing a Board of Contract Appeals independently to award attorney fees were defeated.

[2] Applicant has suggested that if we cannot make the requested award because of *Fidelity*, then, as an alternative, we have the authority, pursuant to the Contract Disputes Act and EAJA, to order an agency of the United States to comply with the law of the United States by paying the fees and expenses to the prevailing party. We know of no authority in either of those Acts or in any other Federal statute, and applicant was cited none, permitting this Board to order an agency to comply with any particular law. Furthermore, if we were to order the BIA to pay the requested fees and expenses, we would be attempting to do indirectly what we have just determined we have no authority to do directly. We are not willing to follow that course.

Decision

Accordingly, we hold that we lack jurisdiction to award the attorney fees, costs, and expenses requested by applicant in this proceeding. Therefore, the application is dismissed.

DAVID DOANE
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

MOSCH MINING CO.

75 IBLA 153

Decided August 18, 1983

Appeal from decision of the Canon City District Office, Colorado Bureau of Land Management, offering right-of-way grant and requiring payment of fair market value. C-34657.

Set aside and remanded.

August 18, 1983

1. Federal Land Policy and Management Act of 1976: Generally-- Federal Land Policy and Management Act of 1976: Surface Management

Sec. 302 of the Federal Land Policy and Management Act of 1976 vests in the Secretary the responsibility to prevent unnecessary or undue degradation of the public lands. It also preserves a mining claimant's right of ingress and egress. Consequently, the grant of a right-of-way, which is directionary under the Act, is not the proper method of regulating a mining claimant's access in conjunction with surface management to prevent undue degradation. Rather, questions of access to mining claims are properly resolved under the surface management regulations at 43 CFR Subpart 3809 which were promulgated pursuant to sec. 302 and specifically address mineral entry, access, and operations.

APPEARANCES: Alvin Mosch for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Mosch Mining Co. (Mosch) has appealed from a decision dated January 4, 1983, by the Canon City District Office, Colorado, Bureau of Land Management (BLM), offering right-of-way grant C-34657 and requiring payment of fair market value therefor.

In response to a trespass action filed by BLM, on December 17, 1981, appellant Mosch filed an application requesting a right-of-way for an access road 26.5 feet wide and 1,100 feet long across unpatented lode mining claims owned by it, approximately 6 miles west of Idaho Springs, Colorado: T. 3 S., R. 73 W., sixth principal meridian, sec. 31, SW 1/4 SW 1/4. The surface area disturbed by the road comprises 0.67 acre.

In its letter of application, appellant explained its purposes as follows:

The project consists of repairing a pre-existing dead-end road located in the West 1/2 of Section 31, T3S, R73W of the 6th P.M. in Clear Creek County. The road provides access to the Poorman and Brazil mines, owned by the applicant. These mines are currently being worked by the applicant, and valuable equipment is being stored at these sites. The pre-existing road was graded for passage of service vehicles to and from the mine. The road was not and is not maintained by the county. The applicant provides road maintenance.

A gate was installed at the junction of the mine access road with the county maintained road. The gate was erected to provide protection for the mine and equipment. Clear Creek County has had a rash of mine theft and vandalism in the past years. An example, a \$10,000 slusher engine was riddled with bullets from a high powered rifle while located on the mine site, where the only access was through the pre-existing road located on BLM land. The gate site was chosen as the best possible location for security functions. The Clear Creek County Sheriff's department and the BLM have keys to the gate.

The roadway provides additional benefits to the area (Sec. 2803.1-2 c3). The clearing around the road serves as a firebreak and the rehabilitation of the road provides fire fighting vehicles access to an area they were not able to reach before. The applicant has also provided a 30 foot deep water hole at the crossing of the creek at the county road, to serve as a reservoir for fire fighting vehicles. The roadway also provides vehicle access

for forest maintenance by the U.S. Department of Agriculture and the Bureau of Land Management.

BLM's environmental assessment explains the application as follows:

The proposed right-of-way joins an existing road which provides access to the Poorman and Brazil mines owned by the applicant. There is a road approximately 75 feet to the north, on public land, which in the past provided access to the county road (See Map B). *This road is fairly steep making it impassable to trucks and other equipment.* Mr. Mosch bulldozed this road closed during construction of the new road. The road was constructed in 1980 without BLM authorization constituting an unauthorized use of public land. In addition, at the junction with the county road, Mr. Mosch installed two metal posts set in concrete and cabled-off the road, thereby denying access to the public.

A Notice of Trespass was served on October 8, 1981 to which Mr. Mosch responded and subsequently filed the right-of-way application. *The purpose of this right-of-way is, therefore, twofold: To resolve the existing unauthorized use and to ensure continued access to both the applicant's claims and the public lands.* [Italics added.]

The report also states that the only environmental problem resulting from road construction was one of inadequate drainage, that water runoff was eroding the centerline of the road.

On January 4, 1983, the Canon City District Manager issued his decision entitled "Right-of-Way Grant Offered, Payment of Fair Market Value Required."

In the statement of reasons, appellant takes exception to several conditions in the proposed grant, including fair market rental value and an assessment of \$87 as back rent for previous unauthorized use. Appellant further objects to an assessment of \$40 for removed timber. In addition, appellant objects to several special stipulations, including nonexclusivity of use, attached to the proposed grant. Appellant contends that an exclusive right-of-way is needed to prevent vandalism. In order to reduce vandalism appellant had previously installed a cable gate on its own patented land some 900 feet west of the boundary with BLM land. Appellant had also installed a cable gate on the unpatented claims where the road for which the right-of-way was sought joins a county road. See Statement of Reasons at 2 and map (Exh. A).

This case raises an issue concerning the extent to which BLM may regulate or authorize access to mining claims. In *Alfred E. Koenig*, 4 IBLA 19 (1971), the appellant contended that an existing road afforded the only access to his mining claim. In reaching the conclusion that no authorization from BLM was required where such a road was not exclusive of the general public, the Board quoted from *Solicitor's Opinion*, M-36584, 66 I.D. 361 (1959), which reads in part:

The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work creditable to the claims as assessment and patent work. *Emily Lode*, 6 L.D. 220 (1887). In *Douglas and Other Lodes*, 34 L.D. 556 (1906), it held that such roadways were not applicable. But in *Tacoma and Roche Harbor Lime Co.*, 43 L.D. 128 (1914), after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed credit toward patent expenditures to a trail subject only to proof of the applicability of the trail work to specific locations. The principle was applied on an aerial tramway in *United States v. El Portal Mining Co.*, 55 I.D. 348 (1935), citing the *Tacoma* case, *supra*. These cases

August 18, 1983

obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of public lands.

We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under the 1895 act, *supra*, [43 U.S.C. § 956 (1952)] the Department, for more than 20 years, has charged an annual rental. But that charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the past have vested an exclusive right of user in the mining claimant. A road constructed by a mining claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.

66 I.D. 364-65.

In the case before us, the facts show that the claimant constructed and/or maintained an access road, restricted access to that road, and requested an exclusive right-of-way to approve the status quo. Although the necessity for the road appears to be clear and appellant's right to construct an access road is also clear, the exclusive access requested is difficult to reconcile with the policies expressed in the various statutes and regulations which vest surface management, including multiple use, as well as the responsibility to prevent undue degradation and to assure reclamation of disturbed areas in the BLM.¹ For example, 30 U.S.C. § 612(b) (1976) deals specifically with the use of the surface area of unpatented mining claims. In *United States v. Curtis-Nevada Mines, Inc.*, 415 F. Supp. 1373 (E.D. Cal. 1976), the court construed that section and held that any member of the public who possesses a license or permit from any state or agency allowing that person to engage in any form of recreation on public land, including national forest land, can enter onto the surface of unpatented mining claims in order to engage in that recreation or to gain access to another area to engage in that recreation so long as there is no interference with ongoing mining operations. The court further held that holders of unpatented mining claims could not erect unmanned gates or barricades which would effectively block entrance to the land or access to adjoining land.²

[1] Responsibility for surface management in those cases where claims have been located under the Mining Law of 1872 is specifically

¹ Where national forest lands are involved, the Forest Service of the Department of Agriculture has these responsibilities.

² The United States Court of Appeals for the Ninth Circuit subsequently reversed the portion of the district court's opinion that required a member of the public to have a license or permit to use the surface resources of unpatented mining claims. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980). With respect to unpatented mining claims located on national forest lands, the district court held that claimants were required to file plans of operations pursuant to 36 CFR 252 (1981) prior to commencing operations. See *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981). At the time of the decision, no such regulations had yet been promulgated for BLM administered lands. Those regulations now appear at 43 CFR Part 3800.

recognized in section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1976). The last portion of section 1732(b) provides:

Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress or egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

The following policy statements can be found in 43 CFR Subpart 3809, promulgated under the authority of FLPMA with respect to surface management of claims located under the 1872 mining law:

§ 3809.0-1 Purpose.

The purpose of this subpart is to establish procedures to prevent unnecessary or undue degradation of federal lands which may result from operations authorized by the mining laws.

§ 3809.0-2 Objectives.

The objectives of this regulation are to:

- (a) Provide for mineral entry, exploration, location, operations, and purchase pursuant to the mining laws in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of nonmineral resources of the federal lands;
- (b) Provide for reclamation of disturbed areas; and
- (c) Coordinate, to the greatest extent possible, with appropriate State agencies, procedures for prevention of unnecessary or undue degradation with respect to mineral operations.

These regulations also restate an operator's right of access to his operations consistent with provisions of the mining laws and reasonable reclamation. See 43 CFR 3809.0-6 and 3809.3-3.

43 CFR 3809.1-3 would appear to be applicable to this case.³ It provides, in pertinent part:

§ 3809.1-3 Notice—disturbance of 5 acres or less.

(a) All operators on project areas whose operations, including access across federal lands to the project area, cause a cumulative surface disturbance of 5 acres or less during any calendar year shall notify the authorized officer in the District office of the Bureau of Land Management having jurisdiction over the land in which the claim(s) or project area is located. Prior to conducting additional operations under a subsequent notice, the operator shall have completed reclamation of operations which were conducted under any previous notice. Notification of such activities, by the operator, shall be made at least 15 calendar days before commencing operations under this subpart by a written notice or letter.

(b) Approval of a notice, by the authorized officer, is not required. Consultation with the authorized officer may be required under § 3809.1-3(c)(3) of this title when the construction of access routes are involved.

(c) The notice or letter shall include:

* * * * *

(3) A statement describing the activities proposed and their location in sufficient detail to locate the activities on the ground, and giving the approximate date when operations will start. The statement shall include a description and location of access routes to be

³ The basis for this assumption is the provision of the proposed right-of-way showing 0.67 acre having been disturbed. We assume that the disturbance of the land subject to the BLM jurisdiction did not exceed 5 acres.

August 18, 1983

constructed and the type of equipment to be used in their construction. Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable, to minimize cut and fill. When the construction of access routes involves slopes which require cuts on the inside edge in excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations;

(4) A statement that reclamation of all areas disturbed will be completed to the standard described in § 3809.1-3(d) of this title and that reasonable measures will be taken to prevent unnecessary or undue degradation of the federal lands during operations.

* * * * *

[45 FR 78909, Nov. 26, 1980; 45 FR 82934, Dec. 17, 1980]

Subparagraphs (d) through (f) describe the standards and conditions applicable to activities conducted under a notice.

These regulations should have been utilized to resolve the question of appellant's access. Accordingly, it would have been incumbent on appellant to communicate with an authorized officer prior to closing one road, constructing another, and restricting access over the public land. Appellant would have been required to file with BLM a notice or letter describing his proposed road work. 43 CFR 3809.3-2 provides that where no notice is filed, the authorized officer may either issue a notice of noncompliance or obtain a court order enjoining ongoing operations until the operator files a notice.

In light of the foregoing discussion, we conclude that appellant is not entitled to *exclusivity* of access.⁴ We conclude further that grant of right-of-way was not the appropriate means of resolving the question of appellant's access over and to his mining claims.⁵ BLM has no discretion to abridge such access and the matter should have been resolved under the surface management regulations of 43 CFR 3809. If appellant's construction disturbed less than 5 acres, appellant can now comply with the Act by filing appropriate notice, explaining steps appellant will take to provide adequate drainage and mitigate the centerline erosion.⁶ Our disposition of the appeal dispels the necessity for considering the individual objections to the right-of-way in the statement of reasons.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

⁴ See also 45 FR 78908 (Nov. 26, 1980). We note that the procedure for barring public access while affording access to a claimant by installing a gate with multiple locks is proper in those cases where BLM determines that the *public* interest is best served by road closure. This practice is often invoked in cases where surface management is best served by limiting vehicular access.

⁵ The comments on the regulations promulgated in 43 CFR Part 3800 include the following: "Another comment was concerned whether rights-of-way for access to mining claims would require approval under Title V of the Federal Land Policy and Management Act. Access for all purposes of ingress and egress to unpatented mining claims will not be regulated under the provisions of Title V." 45 FR 78908 (Nov. 26, 1980).

⁶ In the environmental assessment prepared by BLM with respect to the right-of-way application, under the heading "Environmental Consequences," the following determination was noted: "The only problem encountered as a result of road construction is one of inadequate drainage. Water is presently flowing down the centerline, creating an erosion problem. This will be mitigated by placing water diversion structures, where needed, along the right-of-way." Based upon this report we find no other "unnecessary or undue degradation" caused by the construction of the road.

appealed from is set aside and the case file is remanded to the Canon City District Office for further processing consistent with this opinion.

R. W. MULLEN
Administrative Judge

WE CONCUR:

WILL A. IRWIN
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

September 9, 1983

IN RE ATTORNEY'S FEES REQUEST OF DNA-PEOPLE'S LEGAL SERVICES, INC.

11 IBIA 285

Decided *September 9, 1983*

Application for attorney's fees under the Equal Access to Justice Act.

Application denied.

1. Equal Access to Justice Act: Application

When a decision disposing of the issues on appeal is entered, but the Board retains jurisdiction to review the response to its decision, an application for attorney's fees under the Equal Access to Justice Act, filed before the entrance of a decision or order finally concluding the litigation, may be (1) dismissed without prejudice as premature, (2) stayed until the completion of all proceedings, or (3) decided with an opportunity for additional action in accordance with the decision following completion of all proceedings.

2. Equal Access to Justice Act: Adversary Adjudication

The Equal Access to Justice Act clearly provides that the position of the United States in an adversary adjudication need not be presented by legal counsel. The Government's position is represented if other Government employees take an active adversarial role in the case.

3. Attorney's Fees: Equal Access to Justice Act--Equal Access to Justice Act: Awards

Pro bono representation and representation by a legal services organization do not constitute "special circumstances" within the meaning of 5 U.S.C. § 504(a)(1) (Supp. V 1981) so as to make an award of attorney's fees under the Equal Access to Justice Act unjust.

4. Attorney's Fees: Equal Access to Justice Act--Equal Access to Justice Act: Awards

An award of attorney's fees under the Equal Access to Justice Act may include compensation for work performed before Oct. 1, 1981, the effective date of the Act.

5. Equal Access to Justice Act: Adversary Adjudication

Under 43 CFR 4.603(a) (48 FR 17596 (Apr. 25, 1983)), the Department of the Interior has excluded from coverage under the Equal Access to Justice Act all adversary adjudications conducted by the Department except those that are specifically required by a statute.

6. Regulations: Generally

The Board of Indian Appeals does not have the authority to declare duly promulgated Departmental regulations invalid.

APPEARANCES: Stephen T. LeCuyer, Esq., DNA--People's Legal Services, Inc., Shiprock, New Mexico, for applicants; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for respondent. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON
INTERIOR BOARD OF INDIAN APPEALS

On November 15, 1982, the Board of Indian Appeals (Board) received an application for an award of attorney's fees under the Equal Access to Justice Act (EAJA), P.L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 (Supp. V 1981). The application was filed by 19 appellants in cases before the Board¹ (applicants) on behalf of their counsel, DNA—People's Legal Services, Inc. (DNA). The application is opposed by the Department of the Interior (Department, respondent). Under the regulations promulgated by the Department to implement the EAJA, the Board must deny the application.

Background

Applicants were each receiving care and training at Toyei Industries, Toyei, Arizona, under a contract with the Bureau of Indian Affairs (BIA) pursuant to the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. §§ 450-450n (1976). Each applicant was terminated from the program. Each appealed the termination and was represented by DNA. The appeal process involved hearings before BIA officials and eventually decisions by this Board. In each case, the Board found that the applicant's benefits had been improperly terminated. See 10 IBIA 146-463, 89 I.D. 508 (1982). The Board remanded the cases to BIA for the development of a plan to implement its holdings, and retained jurisdiction to review the plan. Final consideration of the plan for each applicant has not been completed.

On November 15, 1982, the Board received the present application. Respondent filed a motion to dismiss or to stay proceedings on December 29, 1982. Briefing was concluded on February 15, 1983.

Respondent's Motion to Dismiss

Respondent argues that this application must be dismissed because DNA was not a prevailing party in an adjudicatory proceeding before the Department. In making this contention, respondent cites to the Board's November 16, 1982, order docketing the application, apparently as proof that the application was filed by DNA, rather than by the appellants in the previous cases. Such "proof" appears only in the style of the case. For docketing purposes, the Board has found that less confusion results from styling an application for attorney's fees under the name of the attorney involved rather than under the name of the case giving rise to the application. The application itself clearly demonstrates that it was filed by the original appellants.²

¹ The 19 appellants are Matthew Allen, Wilbur Barton, Henry W. Begay, Johnny Begay, Bessie Benally, Arletta Bischoff, Irving Clark, Pearlene Dayzie, Janet Gordon, Leo Green, Francis Harvey, June James, Thomas Kee, Lester Kelwood, Juanita Paddock, Irma Shirley, Charity Tsosie, Leo Willie, and Francis Yazzie.

² The Board notes that in *Kinne v. Schweiker*, Civ. No. 80-81 (D. Vt. Dec. 29, 1982), a case seeking an award of attorney's fees under the EAJA from the Department of Health and Human Services, the Government apparently

September 9, 1983

Respondent's motion to dismiss is denied.

Respondent's Motions to Stay Proceedings

Respondent moved for a stay of consideration of this application on two grounds. First, respondent requested a stay until Departmental regulations implementing the EAJA could be promulgated. The Board need not consider this motion because such regulations were published while the case was pending. *See* 48 FR 17595 (Apr. 25, 1983).

Respondent next seeks a stay on the grounds that no final agency decision has been rendered in the cases giving rise to the application. This fact has resulted from the Board's retention of jurisdiction over the cases pending the development of plans for each applicant.

[1] The Board finds that counsel for applicants, in the absence of guiding regulations or decisions under the EAJA, properly filed an application within 30 days from the date of the decisions in the underlying cases.³ Without exact guidance, counsel acted prudently to ensure that any rights granted under the EAJA would be preserved. Under the circumstances of these cases, the Board finds that an application filed after the issuance of a decision disposing of the original issues raised, but retaining jurisdiction to review BIA's response to the decision, may be (1) dismissed without prejudice as premature, (2) stayed until the completion of all proceedings, or (3) decided with an opportunity for additional action in accordance with the decision following completion of all proceedings.

Based on its review of the filings in this case, the Board finds that it is appropriate to decide the issues raised at this time. Respondent's motion to stay is therefore denied.

Discussion and Conclusions

The EAJA was enacted primarily to diminish the economic deterrent to litigation by private parties contesting Governmental action. *See, e.g.,* Conf. Rep. No. 96-1434 at 21, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5003, 5010. Congress believed that many individuals who had legitimate grievances about Governmental actions were not pursuing their cases because they were unable to afford legal counsel. The EAJA, therefore, provided for the recoupment of legal expenses in certain cases challenging Governmental action. A second purpose of the EAJA was to deter unreasonable Governmental conduct by providing an avenue for effective opposition to such actions. *See, e.g.,* H. R. Rep. No. 1418, 96th Cong., 2nd Sess. 9-10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988.

Specifically, under section 504(a)(1):

argued that the application should have been made in the name of the legal clinic performing the work, rather than in the name of the party represented. *See slip op.* at 8.

³ An application is required to be filed within 30 days of final disposition by sec. 504(a)(2) of the Act.

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

The rest of the section provides standards for carrying out the congressional mandate. As previously mentioned, Departmental regulations implementing the EAJA have been published in the *Federal Register* and will be incorporated into 43 CFR Part 4, Subpart F. 48 FR 17595 (Apr. 25, 1983).

Initially, there is no dispute in this case that the 19 applicants meet the economic eligibility criteria for an award set forth in section 504(b)(1)(B). Neither can there be any dispute that applicants prevailed over the Department or that respondent's position in these cases was not substantially justified within the meaning of section 504(a)(1). See, e.g., *Allen v. Navajo Area Director*, 10 IBIA 146, 89 I.D. 508 (1982). Respondent, however, finds several other grounds for attacking the application.

Respondent argues that the requirement of section 504(b)(1)(C), that "the position of the United States [be] represented by counsel or otherwise" in the proceeding for which fees are sought, was not met. Presumably, respondent thus argues that it is unfair to award fees against the United States when it has not had an opportunity to defend its position, as discussed in the House floor debates on the bill. See 126 Cong. Rec. H10223 (daily ed. Oct. 1, 1980) (remarks of Rep. Kastenmeier).

Social Security hearings are consistently cited in the legislative history of the EAJA as the type of adjudications in which the Government is not represented. In these hearings, only the claimant and his or her attorney appear before the Administrative Law Judge. There is no appearance, nominal or otherwise, by any person on behalf of the Government. See Conf. Rep. No. 96-1434 at 23, reprinted in 1980 U.S. Code Cong. & Ad. News, *supra* at 5012. See also *Berman v. Schweiker*, 531 F. Supp. 1149 (N.D. Ill. 1982).

[2] Although it is apparently true that no representative of the Solicitor's Office of the Department appeared in these cases until present counsel entered her appearance before the Board on May 6, 1982, it is not true that the Government was previously unrepresented. The statute makes it clear that representation need not be by legal counsel. The records of the initial hearings before BIA in these cases demonstrate without question that BIA employees appearing there were not mere disinterested witnesses, but instead took active adversarial roles in opposition to applicants' claims. See discussion in Applicants' Reply to Memorandum in Opposition to Application for Attorneys' Fees ("Reply Brief") at 14-18.

Whether or not these employees were acting within the scope of their authority in thus presenting the position of BIA, the Board must

September 9, 1983

reject respondent's contention that the position of the United States was not represented in these proceedings.

Respondent next argues that "special circumstances make an award unjust" in this case. This argument, which refers to language found in section 504(a)(1) limiting the award of fees, states that because counsel for applicants is a legal aid organization which represented applicants *pro bono* and which received some amount of Federal support through the Legal Services Corporation, an award under the EAJA is inappropriate. Respondent argues that the purpose of the EAJA is to diminish the deterrent effect of bringing a case against the vast resources of the Federal Government. The argument concludes that because applicants were not deterred from bringing their cases because their legal costs were already being paid, an award does not further the purpose of the EAJA. Respondent cites *Kinne v. Schweiker*, Civ. No. 80-81 (D. Vt. June 30, 1982), in support of this argument.

In opposition, applicants cite several cases, including a recent Supreme Court case, *Washington v. Seattle School Dist. No. 1*, _____ U.S. _____, 102 S. Ct. 3187 (1982), for the proposition that attorney's fees are properly awarded for *pro bono* work and to legal services organizations, even when such organizations receive funds from the same governmental entity as the one against which a fees award is sought. The cited cases include awards sought under the EAJA as well as under other statutes allowing the recovery of attorney's fees.

Applicants further show that the one case cited by respondent in support of its position was reversed upon rehearing by the Federal district court rendering it. See *Kinne v. Schweiker*, Civ. No. 80-81 (D. Vt. Dec. 29, 1982). In the slip opinion of its December 29 decision at pages 3-4, the court stated:

The primary purpose of the EAJA is to diminish the economic deterrent to litigation by private parties contesting governmental action. * * * In our earlier opinion we noted that an award of fees to *pro bono* organizations does nothing to advance this purpose. * * * Upon reflection this is not strictly true * * *.

* * * It is uncontroverted and obvious that the Legal Clinic's budget is limited and that this limits the number of clients it may accept. * * * While it is true that an individual with a patently strong case could probably retain counsel with the incentive of an EAJA award at the successful conclusion, not every strong case appears that way on first inspection and the contingent nature of EAJA awards, combined with the ambiguity of the substantial justification standard, poses an obstacle to individuals seeking representation. Because of its *pro bono* character, the Legal Clinic may employ a less rigorous calculus and serve the useful function of advancing those cases which although meritorious, do not at first appear to be strong enough to warrant an EAJA fee award. To the extent it does so, and receives such an award, the primary purpose of the EAJA is served by enhancing the Clinic's capability to serve financially needy individuals with claims against the government.

See also *Filippo v. Secretary of Health and Human Services*, _____ F. Supp. _____, 51 U.S.L.W. 2705 (E.D.N.Y. May 4, 1983).

[3] The Board agrees with the reasoning of the Vermont District Court. It further finds that the weight of judicial construction of

attorney's fees statutes, including the EAJA, is "that publicly-funded legal services organizations may be awarded fees." *Seattle School Dist. No. 1, supra* at 3204 n.31. Respondent has presented no arguments showing that these constructions should be ignored by the Department. Therefore, the Board finds that the facts that applicants' counsel were from a legal services organization and performed work *pro bono* do not constitute "special circumstances" making an award of fees unjust within the meaning of section 504(a)(1). *Cf. New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980) (award sought under the Civil Rights Attorney's Fees Award Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988 (1976)).

Respondent next argues that, even if some award is found due to applicants, an award for work performed before October 1, 1981, the effective date of the EAJA, is inappropriate because sovereign immunity was not waived for such expenses and because the cost estimates for implementation of the bill presented to Congress clearly did not envision such a potentially large Federal liability. Under this argument, respondent contends that, although the EAJA applies to any case pending before the Department on October 1, 1981, the statute did not clearly and unequivocally waive sovereign immunity as to costs incurred before that date. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Brookfield Construction Co. v. United States*, 661 F.2d 159 (Ct. Cl. 1981) (interpreting the interest provision of the Contract Disputes Act of 1978, 41 U.S.C. § 611 (Supp. II 1978)).

[4] The Board adopts applicants' response to this contention:

The Department argues that no award under the Act may be made for work performed prior to October 01, 1981. This contention has been rejected by nearly every court addressing the question. * * * [4] *Nunes-Correia v. Haig*, 543 F. Supp. 812 (D.D.C. 1982); *Photo Data, Inc. v. Sawyer*, 533 F. Supp. 348 (D.D.C. 1982); *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Calif. 1982); *Wolverton v. Schweiker*, 533 F. Supp. 420 (D. Id. 1982); *National Lawyers Guild v. Attorney General*, 94 F.R.D. 616 (S.D.N.Y. 1982). Other cases have allowed fees for work done prior to October 01, 1981 without discussion of the retroactivity question. *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 679 F.2d 64 (5th Cir. 1982); [rehearing denied, 691 F.2d 502 (5th Cir. 1982);] *Berman v. Schweiker*, 531 F. Supp. 1149 (N.D. Ill. 1982); *Constantino v. United States*, 536 F. Supp. 60 (E.D.Pa. 1982).

The specific arguments put forth by the Department have been raised by the government in earlier cases and have been rejected. The Department's reading of the Act has been found "so strained" that the plain language of the Act was held to authorize fees for work prior to October 01, 1981. *Nunes-Correia v. Haig*, 543 F. Supp. at 815. By applying the Act to cases pending on October 01, 1981, it was held that "Congress waived the sovereign immunity bar for work performed on those pending cases before the Act's effective date." *Underwood v. Pierce*, 547 F. Supp. 261 n.7. The Department's argument based on the Congressional Budget Office cost estimates for the Act has been rejected because "[t]he statistical reasoning underlying this argument is flawed." *Nunes-Correia v. Haig*, 543 F. Supp. at 815. The courts have been aware of *Brookfield Construction Co., Inc. v. United States*, 661 F.2d 159 (Ct. Cl. 1981), but have declined to

⁴ Applicants cite *Commodity Futures Trading Comm'n v. Rosenthal & Co.*, 537 F. Supp. 1094 (N.D. Ill. 1982), as the only case that had not granted attorney's fees for work performed prior to Oct. 1, 1981. In that case, the court deferred decision on the question. Attorney's fees were eventually denied on the grounds that the applicant was not a "prevailing party" within the meaning of the EAJA. *Commodity Futures Trading Comm'n v. Rosenthal & Co.*, 545 F. Supp. 1017 (N.D. Ill. 1982).

September 9, 1983

follow it. *Nunes-Correia v. Haig*, 543 F. Supp. at 816; *National Lawyers Guild v. Attorney General*, 94 F.R.D. at 620. The Court of Claims has itself considered the Act and gave no indication that it would distinguish between work done before or after October 01, 1981. *Kinzley v. United States*, 661 F.2d 187 (Ct. Cl. 1981).⁵ Finally, courts have relied on a number of decisions—including two Supreme Court cases—allowing fees under other fee statutes for work performed prior to the effective date of the act in question. *Underwood v. Pierce*, 547 F. Supp. at 260-261; *Nunes-Correia v. Haig*, 543 F. Supp. at 816.

Reply Brief at 22-23.

The Board finds that if an award is proper under the EAJA, all attorneys fees, including those for work performed prior to October 1, 1981, may be included in the determination of the final award.

Respondent's remaining argument is that no award is appropriate because the Departmental review in applicants' cases was not "required by statute to be conducted by the Secretary under 5 U.S.C. 554." 43 CFR 4.603(a) (48 FR 17596 (Apr. 25, 1983)). This regulatory requirement is based on the Secretary's interpretation of section 504(b)(2), as it incorporates 5 U.S.C. §§ 551 and 554(a) (1976). Section 4.603(a) states:

These rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554. Specifically, these rules apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing. *These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554.* [Italics added.]

Applicants concede that their appeals were not required by statute to be conducted under section 554. Instead, they argue that the due process provisions of the United States Constitution, as interpreted by the Supreme Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, modified, 339 U.S. 908 (1950), require such a hearing. In *Wong Yang Sung*, the Supreme Court stated:

We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. * * * They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it [Congress] as a matter of expediency.

339 U.S. at 50.

[5] It is clear that under section 4.603(a), and especially the highlighted portions of that regulation, the Department intended to exclude all adversary adjudications conducted by the Department except those that are specifically required by a statute. In the absence of an express Departmental intention to include any other proceedings,

⁵ *Kinzley* and *Brookfield* were decided on the same day.

including, as argued here, one necessitated by the Constitution, the Board is bound by the parameters set by the Department.⁶

[6] Applicants' argument seeks a determination that section 4.603(a) violates the statute it attempts to implement. The Board is not the proper forum to consider this argument because it does not have the authority to declare a duly promulgated Departmental regulation invalid. See *Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 214, 90 I.D. 283 (1983); *Zarr v. Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174, 90 I.D. 172 (1983).⁷

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this application for the award of attorney's fees under the Equal Access of Justice Act must be denied.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

WHITE SANDS FOREST PRODUCTS, INC. v. ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

11 IBIA 299

Decided *September 12, 1983*

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) finding that White Sands Forest Products, Inc., owes \$24,166.98 to the Mescalero Apache Tribe for breach of Cooley Canyon-Dripping Springs Timber Contract No. MOOC-1420-3110.

Affirmed.

1. Contracts: Construction and Operation: General Rules of Construction--Indian Lands: Contracts: Generally--Indian Lands: Forestry: Timber Sales Contract: Generally

Contracts entered into by an Indian tribe and approved by the Bureau of Indian Affairs are generally subject to the same rules of construction as contracts between private parties. In construing an Indian timber sale contract, the Board of Indian Appeals will presume that the parties intended for all of its provisions to have meaning, and will, therefore, attempt to give effect to all of those provisions.

⁶ Although the Board reversed the BIA decision terminating applicants' welfare benefits on due process grounds, it has never held that the cases were required to be conducted under the procedures set forth in section 554.

⁷ Because of this disposition, the Board does not reach the question of whether the amount of fees sought in this case is reasonable.

September 12, 1983

2. Indian Lands: Forestry: Timber Sales Contract: Generally--Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

The Board of Indian Appeals finds that the particular Indian timber sale contract before it imposes separate obligations upon the purchaser to meet a minimum annual cutting requirement and to make a minimum annual payment.

3. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Under the circumstances of this case, provision B6.12 of the standard Bureau of Indian Affairs timber contract does not apply to the calculation of liquidated damages resulting from failure to make the minimum annual payment required by the negotiated sections of the contract and does not provide a right to "cure" the failure to make the full payment.

APPEARANCES: S. Thomas Overstreet, Esq., Alamogordo, New Mexico, for appellant; Darrell N. Brantley, Esq., Alamogordo, New Mexico, for the tribe. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

White Sands Forest Products, Inc. (appellant), has sought review of an October 22, 1982, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee), finding that appellant owes \$24,166.98 to the Mescalero Apache Tribe (tribe) for breach of Cooley Canyon-Dripping Springs Timber Contract No. MOOC-1420-3110. For the reasons discussed below, the Board affirms the decision.

Background

Contract No. MOOC-1420-3110, between appellant and the tribe, was approved by the Bureau of Indian Affairs (BIA) on May 8, 1980. The contract provided for appellant to log approximately 13,770 acres of tribal land by December 31, 1983. Specifically, contract provision A13(a) required appellant to log at least 7,349,000 feet, B.M., in 1980; 13,500,000 feet, B.M., in 1981; and 12,500,000 feet, B.M., in 1982. Under provision A17(h), appellant was further required to make a minimum annual stumpage payment of \$404,195 in 1980; \$742,500 in 1981; and \$687,500 in 1982.

Appellant requested relief from the minimum annual cutting requirement for contract year 1981. The request was denied and appellant ended the year in a deficit status. The BIA assessed appellant \$7,433.67 under contract provision A17(b) as liquidated damages for the failure to meet the minimum cutting requirement of contract provision A13(a). Appellant did not dispute this damage calculation and has paid the total amount assessed.

In addition, BIA billed appellant for \$24,166.98 for breach of provision A17(h). This amount represents the difference between the stumpage payment actually made to the tribe by appellant in 1981 and

the minimum stumpage payment required for that year under provision A17(h). Appellant disputes this bill.

The separate assessment under provision A17(h) was upheld by the Albuquerque Area Director on May 18, 1982, and by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) on October 22, 1982. On appeal to the Board, briefs have been filed by appellant and the tribe.

Discussion and Conclusions

This case requires the Board to construe four provisions of the contract. Two of the provisions, as previously discussed, set forth appellant's obligations. Contract provision A13(a) requires a minimum cut of 13,500,000 feet, B.M., in 1981. Provision A17(h) requires a minimum stumpage payment of \$742,500 in 1981.

The remaining two contract provisions concern breach. Standard provision B6.12¹ states, in pertinent part:

If the Purchaser fails to meet the minimum cutting requirements and no relief is granted, the Purchaser shall pay, as liquidated damages, an amount for losses to the Seller arising from deterioration of deficient volume, a delay or loss of growth in the residual stand, delay in establishing a new stand, and from delay in receipt of planned income or other causes, if provided for in the contract. The volume of timber scaled during the following contract year shall not be applied to the minimum requirements for that year until the existing deficiency has been made up.

Provision A17(b) implements the liquidated damage provision:

Liquidated damages specified in Section B6.12, Standard Provisions shall amount to five percent per month of the stumpage value of the remaining deficient volume. Such liquidated damage payments shall be due at the close of a logging year as defined herein with an unrelieved deficiency in minimum cut, and at the close of each succeeding month while the deficiency exists. This payment will be based on stumpage rates calculated each such month and shall be based on the proportionate species composition shown in Section A7 (a) herein. The Purchaser agrees that liquidated damage payments shall be made by withdrawal of the appropriate amount from his advance stumpage deposits.

[1] Contracts entered into by an Indian tribe and approved by the BIA are generally subject to the same rules of construction as contracts between private parties. *See Walch Logging Co. v. Assistant Portland Area Director (Economic Development)*, 11 IBIA 85, 90 I.D. 88 (1983), *reconsideration pending*. *Cf. Tomco, Inc.*, 29 IBLA 298 (1977); *St. Joe Minerals Corp.*, 20 IBLA 272 (1975) (both construing Federal contracts). In construing an Indian contract, the Board will presume that the parties intended for all of its provisions to have meaning. It will, therefore, attempt to give effect to all of those provisions. *Cf. A & J Construction Co.*, IBCA-1142-2-77, 85 I.D. 468 (1978) (contractor's interpretation of contract clause accepted when it gave effect to all of the language of the provision).

¹ The contract between appellant and the tribe includes both standard provisions incorporated into virtually all BIA timber contracts, designated by a "B," and negotiated provisions peculiar to this particular contract, designated with an "A."

September 12, 1983

In reading the entire contract, it is readily apparent that its negotiated sections include a requirement for a minimum annual payment that is not a part of all BIA timber contracts. This payment is in addition to the more usual requirement that the purchaser harvest a specified amount of timber each contract year. The addition of a minimum annual payment requirement strongly suggests that the tribe was not satisfied with an agreement that merely provided a cutting schedule. The tribe apparently wanted to ensure a steady annual flow of income from the sale. It, therefore, sought and obtained a contract under which it was entitled to a minimum payment each year.² In attempting to give meaning to the minimum cut and minimum payment provisions from the perspective of both contracting parties, it appears that they must have anticipated that if the minimum annual cut were met, the proceeds from the sale of that timber would approximate the amount specified as the minimum annual payment.

[2] The Board, therefore, finds that the minimum annual cutting requirement of provision A13(a) and the minimum annual payment requirement of provision A17(h) impose separate obligations upon appellant. Failure to meet either or both requirements constitutes breach of the contract for which damages may be recovered.³

In regard to the failure to make the minimum annual payment, appellant argues both that the liquidated damages payment already made "includes the loss of planned income," (Appellant's Brief at 6), and that "any loss in * * * planned income for the year 1981 was made up by the Purchaser in January of 1982 as provided in Paragraph B6.12" (Appellant's Brief at 3). Appellant's first argument suggests that damages for any breach of the contract were intended to be covered by the liquidated damages provision. The second argument refers to the language in provision B6.12 stating that any deficiency in one contract year resulting from the failure to meet the minimum annual cutting requirement will be made up from timber logged during the next contract year before any cutting is attributed to the new year.

[3] In order to accept either of these arguments, the Board would have to find that the failure to meet the minimum annual payment requirement was covered by provision B6.12. Such coverage could be accomplished in either of two ways: the specific language of provision B6.12 might apply to the minimum annual payment, or provision B6.12 might have been referenced within the negotiated

² This fact clearly distinguishes the present contract from the one interpreted in *Walch Logging, supra*.

³ The Board, therefore, rejects appellant's contention that the assessment for failure to make the minimum annual payment constitutes a penalty. For similar conclusions, see *Gunnell v. Nello L. Teer Co.*, 205 Va. 28, 135 S.E.2d 104 (1964); *Johnson v. Cowan*, 59 Pa. 275 (1868) (A contract providing for the right to remove clay and requiring a minimum semi-annual payment should the specified amount of clay not be removed was found to be for "a fixed and certain sum; not contingent or conditional, and if the agreement be good for anything, it is extinguishable only in money. * * * It is highly improper to call the fixed sums to be paid in the event of the minimum of clay not being taken, liquidated damages. It is an alternative price to be paid in an event which was foreseen might happen, not as damages, but in payment for the privilege. However this may be, it is certain it is nothing like a penalty." (59 Pa. at 273, 280).

sections of the contract in regard to a breach of provision A17(h). The Board does not find that either of these situations exists.

Provision B6.12 is a standard clause appearing in all BIA timber sales contracts. By its specific terms, the provision concerns liquidated damages and the methodology for curing a cutting deficiency should a timber purchaser fail to meet the minimum annual cutting requirement established in the negotiated sections of the contract. The liquidated damages portion of the provision is not applicable unless it is specifically incorporated into the negotiated sections of the contract. It was so incorporated into the present contract through provision A17(b), as previously discussed.

Provision B6.12 was not written in anticipation of a contractual requirement to make a minimum annual payment such as is found in provision A17(h) of this contract. Therefore, on its face, the provision does not apply to the present situation.

The Board finds nothing in the negotiated sections of the contract which indicates that the parties intended provision B6.12 to be activated by appellant's failure to make the minimum annual payment.⁴ Provision A17(b), which implements the liquidated damages portion of provision B6.12, does not include failure to make the annual payment. The parties were aware that the provision requiring a minimum annual payment had been added to the contract. If they so chose, they could have provided for damages for failure to make the annual payment in provision A17(b), or some other negotiated section. They did not. The Board thus finds that damages for appellant's failure to make the required minimum annual payment were not included in the liquidated damages assessment paid to the tribe.

Furthermore, the parties did not reference the cure procedure set forth in provision B6.12 as a means by which the failure to make a required minimum annual payment could be remedied. Because of this fact, the Board must reject appellant's argument that failure to meet the required minimum payment in 1981 was merely a "delay" in payment, which was cured with payments made for logging conducted in 1982. The failure to make this minimum payment resulted in a loss to the tribe of \$24,166.98, which it had contracted to receive in that year, regardless of other circumstances.⁵

The Board finds that damages for failure to make the required annual minimum payment for 1981 were not included in the liquidated damages payment made under provisions B6.12 and A17(b) of this contract and were not subject to the cure procedure established in

⁴ The parties were aware that changes could be made to the standard BIA contract provisions. See provision A17(d), modifying standard provision B7.4, and provision A17(e), which states: "In the event of a conflict between the Standard Timber Contract Provisions which form a part of this contract, and the Special Provisions set forth in this Section 17, the Special Provisions set forth in Section 17 will control." This provision is consistent with the general rule of contract construction that written or typed provisions control over printed provisions. *St. Joe Minerals Corp., supra*.

⁵ Appellant argues that the tribe received full value by logging conducted in 1982 because it still retained the resource at the end of 1981. This argument overlooks the fact that although the tribe physically possessed the resource, it had given control of that resource to appellant under this contract and had bargained for cash payments in consideration thereof.

September 14, 1983

provision B6.12. Therefore, the BIA's assessment of \$24,166.98, the undisputed difference between the minimum payment for 1981 required under provision A17(h) and the amount actually paid to the tribe, is affirmed.⁶

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the October 22, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations), finding that appellant owes the Mescalero Apache Tribe \$24,166.98 in damages for breach of contract, is affirmed.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

ROGER J. AU & SON, INC.

IBCA 1303-9-79

Decided *September 14, 1983*

Contract No. CX-6000-7-9003, National Park Service.

Sustained in part.

1. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)--Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Drawings and Specifications

Provisions in the specifications requiring rock excavation of a seawall foundation coupled with the prohibition against blasting, cannot be interpreted as the intention of the parties that the contractor be required to utilize every possible mechanical means to excavate any and every type of rock condition encountered at the site. The Government's argument that a proper site visit would have disclosed outcroppings of massive rock and thus put the contractor on notice that similar type rock would exist below the surface making excavation difficult, is unpersuasive as a contractor may rely on the indications contained in the contract.

⁶The tribe asserts that in order to be made whole because of appellant's breach of this contract, it should also recover "damages for delay in making the minimum payment" in 1981 (Tribe's Brief at 10). Although it is possible that the tribe is here suggesting that it should receive interest on \$24,166.98, it provides no legal support for the argument and no total interest figure or reasonable interest percentage from which the Board could calculate interest. There is also no evidence that the tribe sought interest before BIA. The tribe had the opportunity to present its legal arguments to both BIA and the Board. Under these circumstances, the Board declines to consider the possible claim for interest. Cf. *Burns v. Anadarko Area Director*, 11 BIA 133 (1983) (denying claim raised in petition for reconsideration that had not been raised below).

2. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)--Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Notices

A contractor's claim for an equitable adjustment based upon an alleged differing site condition was not barred by its failure to give formal written notice of the differing site condition since the Government had actual knowledge of such condition from the contractor's submission of alternative designs for anchoring the seawall. The contractor's designs were based on the actual rock conditions disclosed by partial excavation and not upon subsurface investigation by drilling, as were the Government's designs.

3. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Disputes and Remedies: Equitable Adjustments

Excavation costs incurred during removal of rock for a seawall foundation were compensable as a category one differing site condition because the actual conditions encountered were materially different from those indicated in the contract documents. The boring logs, drawings and specifications contained in the solicitation indicated the presence of poor quality, soft rock in the excavation area which gave the contractor a reasonable expectation that the rock could be excavated by conventional mechanical means. During excavation, however, the contractor encountered rock which the evidence established was much harder than was anticipated, and which required the use of massive equipment to complete the project.

4. Contracts: Disputes and Remedies: Equitable Adjustments

Upon a finding of liability, where the quantum evidence adduced by the parties is not satisfactory, the Board will determine the amount of equitable adjustment by utilizing the jury verdict approach.

APPEARANCES: Edward C. Baran, Baran and Baran, Mansfield, Ohio, for Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

Appellant, Roger J. Au & Son, Inc., has timely appealed under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613 (Supp. II 1978)) (Act), the final decision of the contracting officer denying appellant's claim for an equitable adjustment in the amount of \$262,650.87.¹ As grounds for entitlement, appellant alleges that such costs were reasonably incurred as the result of work performed under a differing site condition with respect to the competency of foundation bedrock during subsurface excavation of a seawall keyway. For the reasons discussed below, we sustain, in part, appellant's request for an equitable adjustment.

¹ Appellant originally made a series of four claims, three of which were settled by the parties prior to hearing. The claim giving rise to this proceeding was certified, in accordance with sec. 6(c)(1) of the Act, in the amount of \$262,650.87.

September 14, 1983

Findings of Fact

On June 30, 1977, appellant was awarded Contract No. CX-6000-7-9003 by the National Park Service, United States Department of the Interior (Government), at an original contract price of \$3,415,500. The purpose of the contract was to construct and rehabilitate the north and south seawalls and grounds at Perry's Victory and International Peace Memorial at Put-In-Bay, Ohio.² The contract required completion of all work within 458 calendar days after the Notice to Proceed, issued July 7, 1977 (Contracting Officer's Findings of Fact and Decision at 1, Appeal File Volume III, Exh. H).³

The specifications required that a 3-foot deep continuous keyway be excavated and installed in the foundation in order to prevent horizontal movement of the seawalls (Tr. 10, 11, 198; AF Vol. I, Exh. B). The keyway was to be excavated on the south seawall between stations 4+00 to 11+00, and on the north seawall between stations 1+25 to 3+73 (Tr. 11, 12; AF Vol. I, Exh. A).

The contract documents also contained a series of 16 test borings, an engineering report, and a soils report⁴ which were furnished to appellant, prior to bidding (AF Vol. I, Exh. C; AX-21, 22). The boring logs contained various rock quality designators (RQD's) which are used as an indication of the effects of discontinuities in the rock and serve as a framework for classifying rocks for engineering purposes.⁵

As the contract prohibited blasting for excavation of the keyway due to the close proximity of the work to the monument structure (Specification Section 02211, AF-Vol. I, Exh. B), appellant was required to remove the limestone by mechanical means. Appellant thus proposed in its revised bid schedule to excavate the rock by drilling numerous holes into the rock, then using a clam shell off of a crane to remove the material (Tr. 29-30, 439-41; GX-E at 13-15).

Subsequent to receipt of the notice to proceed, but prior to having undertaken any work at the site, appellant submitted for review and approval of the Government an alternative proposal for the design of the keyway foundation (Tr. 292). In the proposal appellant sought a change in the specifications in order to substitute a drilled caisson

² The memorial occupies approximately 29 acres of land on South Bass Island in Lake Erie. Because the isthmus of the island is located on very low lying ground, storms from two directions attack the monument area, resulting in overtopping of the existing seawall structure, erosion of the shoreline, and flooding along the state route crossing the property. In an effort to preserve the grounds of the memorial, the Government solicited bids for the rehabilitation of the existing seawalls, giving rise to the instant contract dispute (Engineering Report, Appeal File Volume I, Exhibit C).

³ Hereafter, references to the record will be abbreviated as follows: Appeal File "AF" followed by the particular volume and exhibit being cited; Appellant's Exhibit 1 (AX-1); Government's Exhibit A (GX-A); and Hearing Transcript, page 39 (Tr. 39).

⁴ The engineering report dated May 1, 1975, was prepared by Dalton-Dalton-Little and Newport of Cleveland, Ohio. At Dalton's request a soils investigation report was similarly prepared by the David V. Lewin Corp. for the Government. In conjunction with this effort, the Lewin Corp. conducted the aforesaid test borings, the results of which were published as laboratory logs at pages 7-22 of the soils report (AF Vol. I, Exh. C; AX-21, 22).

⁵ The percentage of RQD is a mathematical term referring to modified core recovery which is computed by counting only the pieces of rock which are 4 inches or more long and which are hard and sound. The RQD is indicative of the quality of the rock (AF Vol. I, Exh. C; AX-25; Tr. 200).

anchorage rather than excavate the keyway (AF Vol. II, Exh. D, Submittal No. 1, Drawing C-10; Tr. 291-93). The Government rejected appellant's initial submittal on the basis that it failed to adequately provide for the weak horizontal bearing capacity of the limestone (AF Vols. I, II, Exhs. A, D; AX-6; Tr. 298-99). Thereafter appellant retained the Toledo Testing Laboratory of Toledo, Ohio, to conduct various tests in order to determine the actual strength and competency of the rock (AX-8, 9, 10, 11). As a result of these tests, appellant furnished a second proposal for a drilled caisson alternate which was rejected by the Government on August 11, 1977 (AF Vol. II, Exh. E; Submittal No. 1A, Drawing C-10; AX-13).

In October 1977, appellant conducted tests with a large capacity Hydro Ram Demolition Breaker Tool on exposed bedrock at the far end of the seawall (Station 12+00) (AF Vol. VII; Daily Diary for Oct. 29, 1977; Tr. 31-33). As a result of sustained equipment damage, appellant determined that the Hydro Ram would be insufficient for bedrock excavation work (Tr. 33). With the onset of winter weather, the project was shutdown as planned (Tr. 34). In the spring of 1978, appellant engaged the services of Conmaco, Inc., a specialty heavy equipment firm in the field of underwater rock excavation and began excavation on the keyway using a 120-ton crane with a specially devised underwater pile hammer (Tr. 35-40; AX-29).

As a result of excavation activities, appellant experienced numerous equipment breakdowns which resulted in substantial downtime, thus causing appellant to fall behind his planned work schedule (Tr. 45-49, 106; AF Vol. V, Exh. WW). After failing to obtain the Government's approval for alternative construction methods appellant engaged in June 1978, the services of Triggs and Associates, independent geotechnical consultants, to review the proposed drilled caissons (Tr. 197-98). A meeting was held at the jobsite on June 7, 1978, between Triggs and representatives of appellant and the Government to discuss the drilled caisson anchorage alternate (AF Vol. V, Exh. WW).

Thereafter, appellant presented a third drilled caisson anchorage alternate with supporting engineering data for Government approval. A visit to the site was made by Government representatives for the purpose of evaluating appellant's proposed alternate method of construction (AF Vol. V, Exhs. WW, ZZ). By Change Order No. 1, dated July 6, 1978, appellant was notified of the Government's approval of the alternate drilled caisson anchorage system (AF Vol. V, Exh. XX). Change Order No. 1 was executed by the parties with no additional time or costs allowed to appellant (AF Vol. III, Exh. H).

After approval for the caisson alternate was made appellant nevertheless chose to complete excavation of the keyway by continuing to employ the underwater pile hammer, as it was not feasible to change construction methods given the fact that half of the construction season had passed, and equipment and manpower allocations had been made.

September 14, 1983

Upon completion of the keyway, appellant, on December 4, 1978, filed *inter alia*, a claim in the amount of \$262,650.87 for additional costs incurred for keyway excavation (AF Vol. V, Exh. WW). The basis of the claim was an alleged differing site condition by virtue of appellant having encountered a subsurface rock condition differing materially from that depicted in the contract documents. By decision dated August 21, 1979 (AF Vol. III, Exh. H), the contracting officer denied appellant's claim in its entirety on the ground that appellant failed to establish a differing site condition as the contract documents accurately represented the foundation conditions encountered at the time of construction. Thereafter, appellant took a timely appeal from the contracting officer's final decision.

Discussion

I. Entitlement

The issues raised in connection with this appeal center on whether appellant has established facts sufficient to warrant price adjustments under the Differing Site Conditions clause of the contract. The Differing Site Conditions clause provides for an equitable adjustment in time and contract cost in the event the contractor encounters subsurface or latent physical conditions differing materially from those indicated in the contract ("category one"), or from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract ("category 2") (AF Vol. I, Exh. B). Although appellant's theory of relief is based on the Differing Site Conditions clause generally, a review of the evidence indicates that resolution of the case may be founded on consideration of the dispute as a category one claim (Tr. 14).

As such, appellant, as claimant, bears the burden of proving that the condition of the rock excavated during construction of the keyway, was different than that represented in the contract. *Saturn Construction Co., Inc.*, ASBCA No. 22653 (Mar. 22, 1982), 82-1 BCA par. 15,704. If the actual conditions found during rock excavation are determined to differ materially from those indicated, the cost of meeting such conditions is borne by the Government. In order to reach such a determination, we consider first the relevant contract provisions.

A. The Contract Documents

The contract specifications on rock removal are found at section 02211 which provides in pertinent part:

SECTION 02211 Rock, Sand And Clay Removal
PART I: GENERAL

* * * * *

1-2 JOB CONDITIONS:

A. Site Information: Data on subsurface tests are available from the Contracting Officer for the convenience of Contractor. Such data are not intended as representations or warrants of continuity of conditions between soil borings. *It is expressly understood that the Government shall not be responsible for interpretations or conclusions drawn therefrom by the Contractor.*

1. Additional test borings and other exploratory operations may be made by Contractor at no additional cost to the Government.

* * * * *

PART 3: EXECUTION

3-1 ROCK REMOVAL:

A. Rock removal consists of removal and disposal of rock encountered when establishing indicated anchorage for new seawalls.

1. Excavations are indicated to be into the rock. No blasting is permitted. [Italics supplied.]

(AF Vol. I, Exh. B).

The specifications further provided with respect to "Sheet Piling," section 02410, paragraph 3-2(G): "Steel sheet piling shall be driven to the penetration into rock indicated on drawings" (AF Vol. I, Exh. B). The bid documents also contained Drawings Nos. 370/41,009A (four sheets) and 370/41,008A (six sheets) which set forth the various construction plans for rehabilitation of the seawalls and grounds (AF Vol. I, Exh. A; Tr. 56-57, 126).

Pages 7 through 22 of the Soils Investigation report entitled "Laboratory Log of Boring" consisted of 16 borings, B-1 through B-16, shown on Drawing No. 2618-1, at page 5, which were drilled by the Lake Drilling Co. between August 29 and September 12, 1974, under the direction of the Lewin Corp. (AF Vol. I, Exh. C; AX-21-22). The boring logs indicated the materials encountered as well as the tests performed.

The Instructions to Bidders (SF-22, Rev. 9-73) included a paragraph entitled "Conditions Affecting the Work" which advised bidders that they should visit the site and take other steps as might be reasonably necessary to ascertain the nature and location of the work, and general and local conditions which could affect the work or the cost thereof. This paragraph contained the warning that failure to take the measures recommended would not relieve bidders "from responsibility for estimating properly the difficulty or cost of successfully performing the work" (AF Vol. I, Exh. B).

Clause 4 of the General Provisions (SF-23-A (Rev. 4-75)) is the Differing Site Conditions clause (AF Vol. I, Exh. B).

Appellant contends that the conditions actually encountered in the excavation of the keyway differed materially from those indicated in the above provisions. It asserts that its bid did not include a price for excavating rock foundation by means of employing the heavy duty pneumatic powered underwater pile hammer used to complete the project. It is the Government's position that the available prebid data and site visits made by appellant indicated that excavation would be difficult, particularly in view of the Government's prohibition in the specifications against blasting (Tr. 16-17). As support for its position,

September 14, 1983

the Government offered into evidence Government exhibit A (Tr. 8, 219, 505), a series of photographs depicting rock outcrops at various locations on the island where the memorial was located. The Government contends through testimony of its expert witness, that such photographs indicate the presence of large, massive, thickly bedded limestone throughout the island generally. Therefore, it suggests that inspection of the site would lead to the only reasonable conclusion that similar type rock would exist below the surface and would be difficult to excavate by mechanical means.

For the following reasons, we find the Government's position unpersuasive.

[1] First, the provisions in the specifications requiring rock excavation of the keyway, coupled with the prohibition against blasting, cannot be interpreted as the intention of the parties that appellant be required to utilize every possible mechanical means to excavate any and every type of rock condition at the keyway site. So construed, such provisions would lead to the conclusion that a differing site condition could not occur under the all inclusive description of rock excavation and the overall prohibition against blasting. It has long been recognized that other contract provisions (such as paragraph 1-2(A) of section 02211 of the specifications, and paragraph 2, "Conditions Affecting the Work," of the Instructions to Bidders (AF Vol. I, Exh. B)), however broad, cannot be used to completely nullify the purpose of the parties in providing for differing site conditions. *Fehlhaber Corp. v. United States*, 138 Ct. Cl. 571 (1957); *John K. Ruff v. United States*, 96 Ct. Cl. 148 (1942).⁶ Furthermore, the law is clear that a contractor may rely on the indications of subsurface conditions contained in the contract and is not required to make additional investigations of his own. *Foster Construction C.A. v. United States*, 193 Ct. Cl. 613-15 (1970).

There is no convincing evidence to show that either a careful examination of the contract documents or an inspection of surface rock outcrops on South Bass Island (depicted by GX-A), would have apprised appellant of the condition of subsurface rock to be excavated for the keyway. To the contrary, Mr. J. Fred Triggs, the consulting geotechnical engineer engaged by appellant in June 1978, testified in response to Government testimony that the rock depicted in the Government's photographs was not the same as that encountered in the keyway:

⁶ In contracts involving excavation, the Differing Site Conditions clause is used, as stated by the Court of Claims, to "take at least some of the gamble on subsurface conditions out of the bidding." *J. F. Shea Co., Inc.*, IBCA No. 1191-4-78 (Mar. 30, 1982), 89 I.D. 153, 82-1 BCA par. 15,705, citing *Foster Construction C.A. v. United States*, 193 Ct. Cl. 587 (1970). Insertion of the clause to avoid inclusion of contingency allowances in the pricing of bids is intended to benefit both contractors and the Government. Contractors are afforded a guarantee against the risk of bearing cost burdens attendant to meeting unusual subsurface conditions and the Government is insured against receiving high bids resulting from pricing to cover contingencies which may not arise. If, after award, conditions within the terms of the clause are encountered which were not indicated in the logs, the Government bears the cost. *Foster Construction C.A. v. United States*, *supra* at 614.

We're dealing with rock that remains below the ground; and by our initial thought; as I look at these [photographs], is that the rocks that are left above the ground are the more — most tough rocks, the harder ones; the ones that erode the least.

The ones that remain below the ground are not necessarily that hard and certainly softer rock initially had been above them and had been eroded from them by the lake, glaciers, whatever forces have been working on this area.

So I think of these pictures of aboveground rocks as being pictures of anomalies; the exceptions rather than the rules.

(Tr. 219-20).

The evidence establishes that appellant based its bid for rock removal on its expectation of using a hydraulic backhoe with a ripper to excavate the keyway, as it had previously employed such methods with great success on similar projects around the Great Lakes (Tr. 257-58). From experiments with the Hydro-Ram, it was clear that appellant's originally anticipated method of rock removal was not feasible (Tr. 33), and that other extremely heavy and much more expensive equipment was necessary to complete the work (Tr. 34-35, 41-42, 51). Short of blasting, appellant's project manager testified that he knew of no other way of excavating the keyway (Tr. 49-50). We therefore find that neither the specifications, which set forth the excavation requirements and prohibited blasting of the keyway, nor an investigation of the site conditions would have served to forewarn appellant that it would be required to use such unusual mechanical means to complete the excavation work. We further find that while the Government strictly enforced the specifications, appellant, throughout the course of completing the project, employed good workmanship and used reasonable and prudent construction methods (Tr. 50).

B. Notice

The Government next raises the question of notice and would have us dismiss the appeal on the ground that appellant did not comply with the requirement of the Differing Site Conditions clause with regards to giving timely written notice of its claim.⁷ In stating its position, appellant alleges that its letter of September 30, 1977 (AF Vol. IV, Exh. SS), which dealt with a differing site condition claim resulting from having encountered high density overburden material,⁸ constituted proper notice of a differing site condition with regard to keyway excavation as well.

In support of its position that the September 30, 1977, letter did not give notice of a differing site conditions claim with respect to keyway rock excavation, the Government refers to appellant's letter of October 3, 1977 (AF Vol. IV, Exh. QQ), which identified the problem

⁷ Clause 4 of the General Provisions of the Contract provides that:

"(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing" of conditions differing materially from those indicated in the contract (category 1), and that "[t]he Contracting Officer shall promptly investigate the conditions" to determine whether "an equitable adjustment shall be made * * *." Clause 4 further provides that "(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required." (AF Vol. I, Exh. B).

⁸ Appellant's original overburden excavation claim dated Nov. 10, 1978 (AF Vol. IV, Exh. MM), was subsequently settled by the parties as a result of pretrial negotiation in this appeal.

September 14, 1983

set forth in the September 30, 1977, letter as involving "Hard Pan over the rock," and that "[d]ue to the extreme hardness and difficulty of removing the layers material immediately *above* the bedrock, our progress has been retarded." (Italics supplied). Despite appellant's contention that the September 30, and October 3 letters were meant to put the Government on notice of differing site conditions existing in *all* areas of excavation, *i.e.*, both the overburden and keyway excavation, a reading of these documents, taken together, fails to indicate such an intention. We therefore conclude that the aforesaid letters did not constitute written notice of appellant's rock excavation claim pursuant to the requirements of the Differing Site Conditions clause of the contract.

[2] Nevertheless, we decline to bar a claim on the technical ground of lack of written notice where there has been no showing of prejudice to the Government.⁹ In the instant case the Government was aware of the facts giving rise to the overburden differing site conditions claim, yet did not conduct an investigation as required by Clause 4 of the General Provisions. Given the opportunity to verify and determine the extent of the actual subsurface conditions before they were disturbed, the Government simply chose not to do so. With respect to the separate differing site condition claim resulting from the subsurface condition of the rock excavated for the keyway, the Government had actual knowledge, from Au's submission of alternate designs for anchoring the seawall, that Au considered the rock conditions actually encountered in excavating the keyway to be different from those indicated in the test borings and in the design of the sheet piling. The Government was well aware that any method of construction used to overcome the subsurface rock conditions actually encountered would be more expensive than using a hydraulic backhoe with a ripper, as Au originally intended. According to the Park Service's contract specialist, the Park Service continued to study the alternate designs after the exact nature of the foundation conditions became evident, and it was both logical and reasonable to approve the alternate design in the light of the conditions actually encountered (AX 20). The Government did not allege prejudice or act in any manner which would demonstrate that timely written notice would have resulted in any different action on the part of the Government. Under these circumstances, we conclude that there has been no showing of prejudice to the Government by appellant's failure to provide a formal written notice of its claim. We therefore, reject the Government's argument that the claim be dismissed for lack of proper notice.

⁹ There are several well recognized exceptions to the written notice requirement of the Differing Site Conditions clause. If the Government has actual knowledge, is not prejudiced by lack of written notice, or if the contracting officer considers the claim on its merits, the requirement for a written notice is considered waived. *Roy I. Strate*, ASBCA No. 19914 (Mar. 29, 1978) 78-1 BCA par. 13,128, citing *De Mauro Construction Corp.*, ASBCA No. 17029 (Apr. 28, 1977) 77-1 BCA par. 12,511.

C. Existence of Differing Site Condition

Having addressed these preliminary questions we next focus on the central issue of appellant's claim, *i.e.*, whether a differing site condition was actually encountered during appellant's construction of the keyway. In order to resolve the entitlement question, it is necessary to extend our consideration not only to evidence of the actual conditions encountered during excavation, but to an analysis of the representations made to appellant by the Government in the contract documents, and whether appellant's interpretation of such data was reasonable.

As noted earlier, the contract documents included a soils investigation report prepared by the David V. Lewin Corp., the purpose of which was to "determine the general subsurface stratification, establish the properties of the materials encountered and to observe any conditions peculiar to the site which might influence design or construction procedures" (AF Vol. I, Exh. C). The soils investigation report, including pages 7 through 22, entitled "Laboratory Log of Boring," which consisted of 16 borings, was considered the relevant information to be used by bidders in analyzing the subsurface conditions at the site (Tr. 141-43, 256, 264). The boring logs indicated the existence of limestone rock, variously described in the logs as "jointed" and containing many "small cavities" (AF Vol. I, Exh. C; AX-21, 22). An analysis of the RQD values for the 16 borings revealed percentages ranging from a low of 0 percent (Boring No. B-1) to a high of 67 percent (Boring No. B-12).

In interpreting the boring logs, appellant presented Mr. J. Fred Triggs, Jr., as its expert witness. Mr. Triggs' area of specialization is the analysis of soil and rock materials as they affect construction projects involving soil. He is a registered professional engineer with long experience designing foundation structures. He was retained by appellant to evaluate and design a series of drilled caissons as an alternative to the planned trenched keyway. In conjunction with this assignment Triggs visited the site, studied the borings and specifications, and made personal observations of the existing conditions (Tr. 195-98).

In reviewing and evaluating the contract documents, Triggs concluded that appellant encountered a changed condition from that indicated in the plans and specifications for the project (Tr. 209-10). His testimony on the subject is set forth as follows:

Q. In conjunction with your work, Mr. Triggs, have I asked you to review the contract documents and the plans and specifications and Exhibit Number 22 and the various discovery materials with an eye toward attempting to determine whether or not a contractor could expect soft rock prior to the inception of the work?

A. Yes, you have.

Q. And have you found any such indications?

A. Yes, I have found —

September 14, 1983

Q. Would you tell the Court, please?

A. -- several indications.

Q. What are they, please?

A. Well, the percent recoveries of the rock in the test boring logs are generally low; an indication of soft rock. The RQD values are generally low, an indication of soft rock.

The description of the soils -- of the rock, excuse me, was as being thinly bedded with cavities, jointed. That indicates soft rock in terms of excavation.

The drawings that show the sheet piling being driven six inches into the rock at the bottom of the keyway indicates soft rock.

The Government's estimate for Rock excavation being a relatively low number indicates soft rock.

(Tr. 209-10).

Triggs based his conclusions on the fact that the low RQD values in the boring logs indicated soft, poor rock quality with frequent jointings and fractures (Tr. 202-04),¹⁰ and that the profile of the test borings (as shown by GX-I), indicated that the actual RQD values were even lower than that depicted by the test borings (Tr. 204-09). He further concluded that from an examination of the boring logs and specifications that a contractor would expect to encounter soft rock which could be excavated by conventional means, i.e., large backhoes, hydraulic impact tools, etc., due to: (1) the description of the rock in the soils report as being thinly bedded, jointed with cavities (AF Vol. I, Exh. C); (2) the contract drawings and specifications which show the sheet piling being driven into the rock at the bottom of the keyway (Tr. 53-58, 126; AF Vol. I, Exhs. A, B); and, (3) the relatively low Government estimate (Tr. 202, 203, 210).¹¹ After the project had been worked, Triggs enumerated several reasons for drawing the conclusion that the rock actually encountered was considerably harder than was expected. First, was the fact that very powerful, high energy equipment was required to excavate the material. Second, the test boring log taken by the Toledo Testing Laboratory indicated a RQD value for the rock of 75 percent, which was higher than any of the RQD percentages listed in the contract borings (Tr. 211), and third, the fact that sheet piling could not be driven into the rock as required by the specifications (Tr. 55-57, 90, 94; AX-7).

¹⁰ As indicated in the Soils Investigation report, the following correlation may be assumed between the RQD values and a general description of rock quality:

RQD-%	Description of Rock Quality
0-25.....	very poor
25-50.....	poor
50-75.....	fair
75-90.....	good
90-100.....	excellent

(AF Vol. I, Exh. C; AX-21, 22; Tr. 201-02).

¹¹ The abstract of bids (AX-1) indicates the Government's estimate for bid item 3, rock excavation, to be \$47,250 (Tr. 128).

Mr. Ronald Donald, appellant's project superintendent, and Mr. K. Don Statler, appellant's chief engineer, were also called to testify regarding the existence of a differing site condition. Donald, a man with 23 years construction experience, was in charge of day-to-day operations at the Put-In-Bay project (Tr. 28), and personally supervised the work from the project site (Tr. 29). He testified that appellant anticipated that the rock excavation could be accomplished by employing a standard drill and clam operation, but from the time of his first involvement with the project in the fall of 1977, he began to believe rock conditions would be different than anticipated (Tr. 29).

A review of the daily diaries of the contracting officer's representative (COR), indicates appellant had begun setting sheet piles on the south wall as early as August 1, 1977 (AF Vol. VII at 30) in accordance with Drawing No. 370/41,008A and section 02410 of the specifications (AF Vol. I, Exhs. A, B; Tr. 54, 210-11), and was down to bedrock on August 29, 1977 (AF Vol. VII at 57). In describing appellant's attempt to comply with the contract requirements, Donald testified:

A. * * * we were into the problem at the very start of the coffer dam work in the overburden * * *

* * * when we made a decision to pre-excavate the overburden with a backhoe prior to setting the coffer dam. We dug down to the rock * * * you can tell by the way the machine feels and sounds and everything else when you're on something hard.

* * * * * * * * *

* * * The steel sheeting was not going to go into the rock * * *

Q. And in doing this work, it is your testimony that you believed that the rock was what?

A. Well, it was harder than anticipated.

(Tr. 30, 31).

Mr. Statler, a certified civil engineer with 25 years background in the construction industry, was responsible for review of the plans and specifications and in the preparation of bids for appellant (Tr. 125, 127, 129). In his experience of having participated in bid estimates for 150 to 200 projects per year (Tr. 129-30), Statler testified with respect to the steel sheeting requirements:

A. * * * [The configuration of rock and steel sheets in the plan] shows steel sheet piling driven six inches minimum below the bottom of the foundation. That is typical.

Q. What are the indications to you, Mr. Statler, that the plans show the steel sheets driven?

A. They do not show the rock removed around them, which means they had to go into the rock.

* * * * * * * * *

Q. What if anything does * * * [the] specification imply about the rock?

September 14, 1983

A. It indicates it would be of such characteristic you could drive sheet piling into it, which would indicate soft rock or rock with the characteristic to enable sheet piling to penetrate.

(Tr. 126-27).

Finally, appellant's president, Charles H. Au, a civil engineer employed by the company since 1953, in the field of heavy underground and marine construction, and who was personally experienced in rock excavation and sheet driving (Tr. 249-51), testified as to the conditions encountered on the project. When asked to describe the basis upon which he intended to perform the work, Au stated:

A. * * * The borings indicated to me that the rock was very soft. It was going to be -- you could dig it very well, but that there was a section splice in the plans that showed you could drive sheeting three foot into it; and if I had thought it was hard, I would have -- I mean if somebody had thought it was hard, they certainly wouldn't have designed the project to drive sheeting three foot into solid rock.

Q. How did it turn out?

A. It turned out to be an impossible task to do that in that fashion. It was quite hard.

(Tr. 258-59).

The Government presented as its expert witness, Dr. Edward J. Cording, Professor of Civil Engineering at the University of Illinois, at Urbana-Champaign. Professor Cording is a geotechnical engineer, with long experience in the field of underground construction, rock stability, limestone excavation, and foundation work (Tr. 399-402). In reviewing the specifications and drill logs (Tr. 403), Dr. Cording concluded that in most areas of the site the drill logs indicated the rock to be massive, with widely spaced joints (Tr. 425). He further observed that the boring logs did not show any evidence of shale, the factor which tends to cause limestone to be thin and slabby. In addition, he testified that there was no evidence on site to indicate the rock had any shale seam within it (Tr. 425-26). He therefore concluded that such rock would be difficult to excavate mechanically (Tr. 426, 428). Despite appellant's position to the contrary (Tr. 200), it was Dr. Cording's opinion that there is no good correlation between RQD percentage and the relative ease or difficulty of excavation, due to the fact that the RQD refers not so much to the hardness of the rock as to the presence of jointing (Tr. 431-32). For such reasons, he indicated that it would be possible in some cases to have a high RQD value in soft rock such as clay stone, which could be easily mechanically excavated (Tr. 432).¹² Based on his review of the soils report and understanding of RQD values, Cording ultimately concluded that in classifying the ease of excavation on this project the appellant ran a very high risk of having difficult construction in terms of being able to easily excavate the material mechanically (Tr. 433-35).

¹² Appellant's expert, Mr. Triggs, testified that it was "unlikely" that clay stone would have a high RQD, and that he would not expect to encounter such a situation (Tr. 237).

The Government next called as a witness, Mr. Henry William Eimer, a registered geotechnical engineer, with the David V. Lewin Corp., which prepared the Soil Investigation report for the Government (Tr. 338-39). In Eimer's 17 years' of experience he has been involved in many subsurface investigations where test borings were taken, and has made numerous recommendations for design parameters based on such investigations for different types of structures (Tr. 339-40). He testified that the rock tested in the boring logs contained short, discontinuous joints, which indicated that portions of the material were thus hard and sound (Tr. 345-46). An analysis of rock excavated from the keyway, Eimer stated, further revealed the existence of hard, gray limestone which was what he would have expected from a review of the borings (Tr. 348).

Appellant next asserts that the Government's ultimate approval of its caisson design alternate supports its position that a differing site condition was encountered. As grounds for its contention, appellant alleges that (1) the Government's comments with respect to its initial rejection of the caisson proposal in July 1977, indicates the Government's expectation that the rock would be soft and easily excavated; and (2) that the Government changed the design parameters as a result of the rock being harder than originally anticipated.

In rejecting appellant's original proposal contained in transmittal No. 1 and Sheet C-10, which included the sketch for the caisson alternate, the Government indicated:

5. Sheet C-10.

The limestone in the area of the keyway is expected to be very poor and highly jointed, resulting in poor strength in the horizontal direction. Due to the poor condition of the rock in this area the key area cannot be reduced.

(AX-5; Tr. 130-31).

In rebuttal, the Government asserts that such a statement did not indicate its belief that the keyway rock would be easily excavated. Rather, it contends that appellant so interpreted the above comment without distinguishing between the horizontal bearing capacity and the vertical capacity of the limestone.¹³ In this regard, the Government adduced the testimony of its structural engineer on the project, Mr. Robert E. Whissen, who testified that the above comment related merely to the horizontal strength of the limestone, which is normally quite low, but in no way reflected the quality of the rock in the vertical direction, the strength of which is normally quite high (Tr. 298-99, 301). Paragraph 5, he therefore concluded, had nothing to do with the ease of excavation of the rock, but was used only as an explanation of the denial of the submittal by appellant (Tr. 299).

¹³ The Government's structural engineer defined horizontal bearing capacity as the ability of the limestone to withstand the horizontal pressure that's put on the wall by the backfill. Vertical capacity is the vertical pressure that's imposed on the limestone from the weight of the wall itself (Tr. 291).

September 14, 1983

With respect to appellant's second assertion, the Government acknowledges that the design parameters did in fact change but not because of the presence of a differing site condition as appellant alleges.

The original design parameters for the horizontal bearing capacity of the keyway were 1,000 pounds per square foot, for the top foot of rock, and 3,000 pounds per square foot, for penetration of rock below the top foot (Lewin Report, Aug. 3, 1977, AX-7, AX-13; Tr. 296, 299, 304). The Government contends that in the original design the keyway was shown at the leading edge of the seaward face of the foundation for the seawall. During its review of appellant's designs for the caisson alternative, it noticed the caissons had been moved from the seaward face of the foundation, thereby creating a dissipating pressure effect. Mr. Whissen testified that in order to provide the same pressure results for the caisson as in the original design, it was therefore necessary to change the design parameters to 2,000 pounds per square foot, for the top foot of rock and 6,000 pounds per square foot for penetration of rock below the top foot (Tr. 305-06; AX-16, GX-K). Because of the different points at which the pressure is applied to the limestone, Whissen stated the caisson alternate design allowed consideration of a higher pressure despite the fact that at its face the pressure was essentially the same as provided in the original keyway design (Tr. 305-06). Whissen further testified that there were several important variations in the final caisson design (AX-18) versus the originally submitted caisson proposal (AX-5) which ultimately led to the former's approval. Specifically, he indicated that the increased diameter of the caisson from 16 inches to 24 inches, the decrease in spacing from 7 feet to 5 feet 9 inches, and the difference in the caisson location to 7 feet from the lake face of the foundation unit were all significant modifications which allowed the Government to approve appellant's final submittal (Tr. 301-02).

Appellant's evidence on this point however, contradicts that of the Government. Appellant's expert, Mr. Triggs, testified that the design modifications with respect to the diameter, shape, and distance differences were of very little significance due to the fact that a great many assumptions, approximations, and estimations are employed and a safety factor is applied in order to design sufficient alternatives (Tr. 245-46). He further stated that the transfer of the sheer load at intermittent points to the rock, over a short distance is "equivalent of a line load, and a line load is the keyway" (Tr. 214). Thus, despite the configuration difference noted by the Government, Triggs concluded that the four caisson alternatives were so similar as to be "virtually equal" (Tr. 247), and all were suitable alternates to the keyway (Tr. 213-14). Moreover, as proof that the Government changed the design parameters in recognition of the changed condition, appellant offered the Government's minutes of the March 1, 1979, meeting

between officials of both appellant and the Government convened to discuss the various claims submitted by appellant. With respect to appellant's final submittal of the caisson alternate design, the minutes stated:

4. Subsequent approval of the contractor's proposal after a significant amount of Keyway excavation had been accomplished was both logical and reasonable from A&E and National Park Service points of view. *They were no longer working from subsurface investigation information but with actual known conditions.* [Italics supplied.]

(AX-20).

For these reasons, appellant submits that the evidence demonstrates the existence of a differing site condition for which it is entitled to an equitable adjustment. Having considered all relevant documentary and testamentary evidence, as well as the propositions and arguments advanced by the parties, it is our opinion that the facts in this case justify such a finding.

As in any proceeding where the evidence contains such divergent views and interpretations, we are called upon in the final analysis to determine whether appellant has met its burden of proof with respect to the relief claimed. In the instant case we find that it has. In so finding, we conclude that appellant's explanation as to the cause of its problems in excavating the keyway was more reasonable than the Government's and more convincing.

We find persuasive the testimony of appellant's witnesses who had considerable experience with rock conditions and who personally observed the rock that was being excavated from the trench (Tr. 28-29, 52, 211-12). The Government's witnesses, however, testified for the most part, without benefit of first hand knowledge of actual site conditions. Mr. Whissen testified that his work experience consisted largely of office design work, that he had no previous experience with similar projects, and that he had never visited the site prior to reviewing the geotechnical engineers' report from which he gathered his information about soil conditions at the site (Tr. 318-20). Similarly, Dr. Cording testified without having visited the site until well after construction had been completed, and without ever having conducted any borings or RQD tests on the rock outcroppings from which he based his conclusions regarding the type of rock which appellant should have expected to encounter (Tr. 403, 478). Mr. Eimer, after stressing the importance of examining core samples to determine the extent of rock fracture and jointing, testified as to such conditions at the project site, from an analysis of the boring logs, without ever reviewing the actual core samples from which the logs were taken (Tr. 347, 354-56, 362-63).

Thus, the Government's position in this proceeding, that a differing site condition did not exist, would have been much more tenable had it been supported by testimony of individuals with more immediate knowledge of the circumstances of the case. The failure of the Government to call as witnesses, for example, the COR, who visited the site daily and prepared progress diaries on the work (AF Vol. VII;

September 14, 1983

Deposition of Robert Blankenfeld at 9), the Lewin employee responsible for preparation of the soils investigation report (Tr. 353), or any employee from the Dalton-Dalton-Little and Newport Co., which prepared the engineering report, the availability of whom were indicated by the record, detracts, to some extent, from the persuasiveness of the Government's case. Similarly, the Government's failure to conduct an investigation of the site at least with respect to appellant's overburden claim, left it in no better position to draw a conclusion as to the actual site conditions than appellant, whose evidence on the issue of entitlement we find as having preponderated.

[3] From a review of the evidence, we are convinced that the contract documents, by virtue of the low percentage of rock recovery and RQD values in the boring logs (AF Vol. I, Exh. C; AX-21; Tr. 202-09, 222-23); the rock description in the soils report (AF Vol. I, Exh. C); the drawings showing steel sheeting driven into rock (AF Vol. I, Exhs. A, B; Tr. 53-58, 126); the the specifications at section 02410, paragraph 3G, requiring steel sheeting to be driven into rock (AF Vol. I, Exh. B; Tr. 54, 56, 57, 127, 210-11); and the relatively low Government estimate (Tr. 210), contemplated the presence of poor quality, soft rock in the area of the keyway (Tr. 202). We further find that such indications gave appellant, at the time of bidding, a reasonable expectation that the keyway work could be excavated by conventional mechanical means (Tr. 203). The record similarly demonstrates that during such excavation, appellant encountered rock much harder than was anticipated, as evidenced by the excessive damage to appellant's equipment (Tr. 45-49); the testimony of various witnesses that the sheet piling could not be driven into the rock as required by the contract (Tr. 55-57, 90, 94; AX-7); the Toledo Testing Laboratory's boring log which indicated a higher RQD value than shown in the boring logs of the soils report (Tr. 211), and the tacit recognition by the Government, that a differing site condition did exist, at least with respect to settlement of appellant's overburden claim.

In accord with the above, the Board finds that the subsurface conditions at the site of the keyway differed materially from those indicated in the contract and that a category one differing site condition existed with respect to appellant's claim for rock excavation. The appeal is therefore sustained on the issue of entitlement.

II. Equitable Adjustment

The principal evidence adduced by appellant toward showing the costs which it asserted were increased due to the differing site condition, is (1) appellant's bid price for rock removal of \$25,000, based upon its estimate of 1,000 cubic yards of excavation, at a cost of \$25 per cubic yard (Tr. 257); and (2) the stipulation of the parties that appellant expended \$375,000 including overhead and profit as the total cost of the construction work related to this claim (Tr. 9, 370).

As support for its position, appellant argues that its bid of \$25,000 was reasonable and compares favorably with the Government's estimate of \$47,250, and with that of another project bidder (Tr. 128, 384; AX-1, Abstract of Bids). It further states that its bid figure of \$25,000 was based upon historical data (Tr. 257-58) and the soils information available to appellant at the time of the bid (Tr. 263-64).

The Government challenged appellant's bid estimate as being unsupported by documentary evidence (Tr. 378). The successor contracting officer testified that he did not believe that \$25,000 represented appellant's balanced bid for the work (Tr. 381, 393), and that the Government's estimate did not consider the actual equipment to be used, site conditions, or methods of excavation (Tr. 150, 384). The Government also notes that the \$40,000 bid by another bidder, has not been established as a balanced bid (AX 1).

It is the Government's position that appellant's balanced bid for rock removal was, in fact, \$206,193, as indicated by appellant's working papers exhibit, GX-C (Tr. 377). The Government had originally argued that an analysis of other bid documents prepared by appellant (GX-E), and obtained during the discovery process in March of 1981 (Tr. 484), showed appellant's balanced bid for rock removal to be \$323,200 (GX-E at 9; Tr. 373). However, during discussions with the contracting officer, Mr. Robert Laubenheim, appellant, in January 1982, provided exhibit GX-C in response to an inquiry why the original number of \$323,200 should not be used as a debit from actual costs in order to calculate appellant's claim (Tr. 374). A review of exhibit GX-C, dated December 28, 1981, reveals a balanced bid of \$206,193, and a column entitled "unbalanced amount" with the figure \$181,193. Another column indicates "bid as submitted" to be \$25,000.

In addition to the evidence contained in exhibit GX-C, the audit report found in exhibit GX-D addresses appellant's alleged costs with respect to seawall construction. On page 2 of the audit report, appellant reported the amount of the original estimate for rock removal as \$171,503 (Tr. 371). Appellant computed overhead and profit at 10 percent each which the Government states when applied to the \$171,503 estimate yields approximately \$208,000 (Tr. 371). The direct cost number contained in the audit report, the Government argues, is substantially the same as that in exhibit GX-E at page 13, which shows an "as bid" line with a total direct cost of \$171,563 (Tr. 379-80). In light of such evidence, Mr. Laubenheim concluded that the figures contained in GX's-C, D and E provided clear and convincing evidence that appellant's intended balanced bid was \$206,193, and not \$25,000 as argued throughout the hearing (Tr. 377-78).

Finally, the Government questioned appellant's bid of \$25,000 on the basis that appellant offered no evidence other than the testimony of Mr. Au (Tr. 257), to support its position that it had intended to remove 1,000 cubic yards of rock. It submits that exhibit GX-E at pages 13-15, indicates appellant's estimate of 2,710 cubic yards of rock excavation. As evidenced by exhibit GX-E, the Government argues

September 14, 1983

that appellant intended to obtain an average depth of 4 feet over the length of the keyway, with an average width of 8 feet, which would indicate that appellant included overbreak in the 2,710 cubic yard estimate. The Government contends that the evidence shows that appellant's prebid estimate of 2,710 cubic yards was a reasonable estimate of the amount of rock to be removed even considering the fact that appellant subsequently reduced its prebid estimate for excavation to a total of 2,073 cubic yards (Tr. 148).

Appellant argues that the figure \$323,000 asserted by the Government as appellant's original balanced bid is erroneous. Such a figure does not take into account, various adjustments made by Robert W. Denny, an Au employee who reviewed the plans and specifications and prepared an estimate to be reviewed by management of appellant (Tr. 145-46). Rather, appellant maintains that the net cost figure of \$150,759 as shown in exhibit GX-C is the number the Government states as \$323,000, with the proper adjustments from the Denny estimate for labor, materials and equipment (Tr. 155-56).

Appellant argues that the Government erroneously adopted the Denny materials as appellant's estimate, which did not form the basis for appellant's bid. What was used, it asserts, was the estimate of Charles Au, appellant's president, who bid \$25,000 for rock removal at \$25 per cubic yard for an estimated 1,000 yards of rock. Denny's original estimate of \$150,759 was based on his revised calculation that approximately 2,000 cubic yards of material would be excavated (Tr. 148), whereas, Au's bid estimated 1,000 cubic yards would be excavated. Appellant argues that the total costs must therefore be divided by two because only 1,000 cubic yards of rock needed to be removed. Thus, appellant contends that the Denny net estimate of \$150,759 would have to be reduced to \$75,385.

These adjustments, appellant submits, were contained in estimate book pages of exhibit GX-E, which were furnished by appellant (and copied in exhibit GX-C), but which the Government omitted from the documents it chose to have copied during discovery (Tr. 494-95). For that reason the Government was able to track the component parts of the Denny estimate to arrive at a suggested bid price of \$206,193 based upon removal of 2,070 cubic yards of rock, a figure conceded to require no audit by Government witness Laubenheim (Tr. 374-78). Thus, by applying the factors contained in the omitted adjustment sheets, the alleged \$206,000 bid should be reduced to \$103,000 based upon the 1,000 cubic yards of materials actually excavated. Appellant contends that it is fundamentally unfair to hold it to an estimate which did not permit a comparison to estimated costs and those costs actually incurred.

Lastly, appellant asserts that the figures contained in GX-C, from which the Government took the position that appellant's balanced bid was \$206,193, was information compiled and furnished by appellant,

through its chief engineer, Statler, solely for the purpose of attempting to negotiate a compromise and settlement of this claim during discussions by the parties in January 1982 (Tr. 375). For these reasons, appellant submits that such evidence cannot be considered by the Board in determining the quantum issue. We agree. Evidence of conduct or statements made in an effort to compromise a claim which is disputed as to either validity or amount, is not admissible to prove the subsequent liability or invalidity of the claim. *Federal Rules of Evidence, Rule 408* (P.L. 93-595, 89 Stat. 1926 (Jan. 2, 1975)).

Having so concluded, we are left to determine the quantum issue with little credible evidence. The original contracting officer who issued the final decision on appellant's claim was unavailable as a witness to explain his analysis, although Mr. Laubenheim testified to show what factors were considered or excluded in making the audit report (Tr. 368-72). The audit report (GX-D), the contracting officer's findings and decision (AF Vol. III, Exh. H), appellant's prebid worksheets (GX-E), and the testimony of Messers. Statler, Au, and Laubenheim constitute essentially the only admissible evidence of record referred to by the parties as supporting their respective positions.

These documents, along with the aforesaid testimony, by themselves, are inconclusive toward furnishing a reliable basis for our determination of this quantum issue. Although the audit report questions numerous cost items submitted by appellant, it fails to provide sufficient analysis in order to base a true assessment of such costs. Nor did the audit report review appellant's bid data, an essential element of its claim (GX-D at 2). Appellant has the burden of proof but relies almost entirely on the Denny and Au estimates to support its claims. Its lack of comparative bid data evidencing the original estimated costs has provided little support for its allegation that its balanced bid was \$25,000. Similarly, the Government's position rested on the admissibility of exhibit GX-C, the exclusion of which left the Government without support for its argument. We therefore find that the Government presented no evidence to establish that appellant misrepresented the facts with respect to supporting any part of its claim in this proceeding, and is therefore not liable to the Government for any amount of the alleged unsupported claim.¹⁴

Appellant's method of presenting its claim in this case is essentially that of the total cost approach where it attempts to compare the total contract cost with its bid estimate. Appellant assumes, without proving, however, that its estimate was reasonable and that it was not responsible for any increase in cost.

[4] Where, as here, the contractor has failed to segregate costs and its method of presenting costs has proven to be unacceptable, the Board has determined the amount of the equitable adjustment by

¹⁴ See Contract Disputes Act of 1978 (41 U.S.C. § 604, Supp. II 1978).

September 21, 1983

resorting to the jury verdict approach. *J. F. Shea Co., Inc.*, IBCA No. 1191-4-78 (Mar. 30, 1982), 89 I.D. 153, 82-1 BCA par. 15,705.

Decision

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 and concludes that appellant is entitled to an equitable adjustment in the sum \$175,000, plus interest thereon computed, in accordance with the Contract Disputes Act of 1978, from March 1, 1979, until payment thereof.¹⁵

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

BRENTWOOD, INC.

76 IBLA 73

Decided *September 21, 1983*

Appeal from the decision of the Eastern States Office, Bureau of Land Management, rejecting coal lease application ES 30788.

Affirmed.

1. Coal Leases and Permits: Applications--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Dredging." Dredging to recover coal from a lake or river is a surface coal mining operation as defined in the Surface Mining Control and Reclamation Act of 1977. A coal lease application to dredge a river and lake in a national forest is properly rejected where it does not meet the criteria set out in sec. 522(e) of that Act and 43 CFR 3461.1(a)(2)(i).

APPEARANCES: Rudy Yessin, Esq., Frankfort, Kentucky, for appellant; Mark K. Seifert, Division of Energy and Resources, Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

¹⁵ As noted by the record, appellant's claim in this case was submitted by letter dated Dec. 4, 1978 (AF Vol. V, Exh. WW), based on its election and certification to proceed under the Act. A contractor which has elected to proceed under the Contract Disputes Act of 1978 is not allowed to recover interest on its subsequently allowed claims for periods of time prior to the effective date of the Act. *Brookfield Construction Co. v. United States*, 661 F.2d 159 (Sept. 23, 1981, Ct. Cl. No. 555-79C).

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Brentwood, Inc., has appealed the decision of the Eastern States Office, Bureau of Land Management (BLM), dated March 24, 1983, rejecting its application for a coal lease, ES 30788. Appellant proposed to dredge coal from the bottom of the Cumberland River and Lake Cumberland within the boundaries of the Daniel Boone National Forest in Kentucky.

BLM found that the legislative history of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (Supp. I 1977) reveals a clear intention that dredging to recover coal should be treated as a surface coal mining operation and that, under section 522(e) of SMCRA, 30 U.S.C. § 1272(e) (Supp. I 1977), and Departmental regulation 43 CFR 3461.1(a)(2)(i) a coal lease application to surface mine within a national forest east of the 100th meridian must be rejected unless the operations are incident to an underground coal mine.

Under the Department of the Interior's coal management regulations, 43 CFR Part 3400, Federal lands within the national forest system are generally available for leasing, subject to the consent of the surface management agency, the Department of Agriculture. See 43 CFR 3400.2 and 3400.3-1. The Secretary of the Interior may issue leases authorizing surface coal mining operations within a national forest, however, only under the criteria spelled out in section 522(e) of SMCRA and 43 CFR 3461.1(a)(2)(i). As stated in the regulation:

A lease may be issued within the boundaries of any National Forest if the Secretary finds no significant recreational, timber, economic or other values which may be incompatible with the lease; and (A) surface operations and impacts are incident to an underground coal mine, or (B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those National Forests west of the 100th Meridian, that surface mining may be in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1976 and the Surface Mining Control and Reclamation Act of 1977.

In its statement of reasons, appellant argues that its proposed dredging operation is not surface coal mining. Appellant seeks to recover coal that has been carried through waterways, creeks, and rivers and deposited on the bottom of the lake and river. Appellant urges that it intends to use a "clean process," whereby the coal in the water will be pumped to the surface, separated from the water, and the water returned to the lake or river, without disturbing the environment. He points out that there will be no mine facilities, roads, trenches, overburden, or waste storage areas, only a floating tippie.

[1] The issue whether dredging to recover coal is a surface coal mining operation under SMCRA may be examined in two ways: as a question of definition and a question of the intention of Congress.

The term "dredging" has been defined most simply as "[a] form of excavation conducted under water." *A Dictionary of Mining, Mineral,*

September 21, 1983

and Related Terms at 349, Bureau of Mines, Department of the Interior (1968). A "dredge" is a "[l]arge floating contrivance utilized in underwater excavation for the purpose of * * * removing overburden from submerged ore bodies prior to open-pit mining; or to recover subaqueous deposits having commercial value." *Id.* at 348.

Appellant distinguishes his proposed dredging operation from surface mining by noting that there will be "no mine facilities, road, trenches, overburden or waste storage areas," yet he plans to extract 1,600 to 1,800 tons of coal a week from the bed of the river and lake. The coal will be separated from the water by a separating machine on a floating tiple and then towed by barge to a power plant.

Section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (Supp. I 1977), defines "surface coal mining operations" broadly to mean

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16% per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 1262 of this title; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities[.]

The dredging proposed by appellant is an underwater method of excavation to obtain coal. It is an accepted principle of statutory construction that the word "including," as used in the above definition to identify methods of coal excavation, indicates that the list that follows is illustrative, not inclusive. It is a term of enlargement. *Argosy Limited v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968); 2A *Sutherland Statutory Construction*, § 47.07 (4th ed. 1973). Thus the absence of the word dredging from the list of excavation methods does not operate to place dredging activities outside the scope of SMCRA.

What distinguishes dredging from the other excavation methods is that it occurs on water, not hard earth. A recent court decision, however, disposed of that distinction by finding that the phrase "surface of lands" as used in SMCRA "clearly means the surface of the earth, including the waters thereon," and likened dredging to placer

mining as a form of surface mining. *United States v. H.G.D. & J. Mining Co.*, 561 F. Supp. 315 (S.D. W.Va. 1983) (operation of dredging coal from river was covered by SMCRA, obligating operator to pay reclamation fees).

Further, it appears that dredging was contemplated by Congress to be one of the activities to which SMCRA was directed even though the term dredging was not stated in the definition. The discussion of the definition of "surface mining operations" in the 1977 Senate Report which preceded passage of SMCRA states in part:

"Surface mining operations" is so defined to include not only traditionally regarded coal surface mining activities but also surface operations incident to underground coal mining, and exploration activities. The effect of this definition is that coal surface mining and surface impacts of underground coal mining are subject to regulation under the Act. Activities included are excavation to obtain coal by contour, strip, augur, dredging, * * *.

S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977). Reports from previous sessions of Congress contain similar language. *E.g.*, S. Rep. No. 28, 94th Cong., 1st Sess. 224 (1975); S. Rep. No. 402, 93rd Cong., 1st Sess. 74 (1973).

Moreover, in *Argosy Limited v. Hennigan, supra* at 20, the court noted that

statutory construction must not occur in a vacuum. Statutes are contextual as well as textual. *Securities & Exchange Commission v. C. M. Joiner Leasing Corp.*, 1943, 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88. Their proper interpretation requires more than mere linguistic seriation. Courts must also look to the logic of Congress and to the broad national policy which prompted the legislation. *Miller v. Amusement Enterprises, Inc.*, 5 Cir. 1968, 394 F.2d 342, 353.

We find that the type of activity that appellant proposes is surface mining within the context of SMCRA. The removal of 1,600 to 1,800 tons of coal a week from the bed of a river or lake is not insignificant and simply because appellant projects that the impacts to the environment will be minimal does not mean that the activity is excluded from the coverage of SMCRA. BLM properly characterized appellant's proposed dredging operation as a surface coal mining operation not falling within the exception to the prohibition on leasing in a national forest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Eastern States Office is affirmed.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

September 26, 1983

FRANKLIN D. ARNESS

Administrative Judge, Alternate Member

RIVER PROCESSING, INC. v.
OFFICE OF SURFACE MINING RECLAMATION AND
ENFORCEMENT

76 IBLA 129

Decided September 26, 1983

Appeal by the Office of Surface Mining Reclamation and Enforcement from the June 8, 1982, decision of Administrative Law Judge David Torbett, Docket No. NX 1-52-R, vacating the requirement in Notice of Violation No. 80-2-56-106 that River Processing, Inc., cover the exposed highwall at its Abes Branch surface coal mine in Perry County, Kentucky.

Affirmed in part, as modified, and reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

The complete elimination of highwalls is an absolute requirement of the Surface Mining Control and Reclamation Act and its implementing regulations and neither that Act nor those regulations provide authority for an evaluation of comparative environmental harm from eliminating highwall exposures or allowing such exposures to remain.

2. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Highwall." Where a rock face is shown to be the result of a slope failure and is not an open cut through overburden made to expose coal in a mining operation, the face is not properly considered as "highwall," as this term is defined in 30 CFR 710.5, for the purposes of the requirement in 30 CFR 715.14 that all highwalls created in the course of a mining operation must be completely eliminated during reclamation of the minesite.

3. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

The responsibility of a surface coal mine operator to ensure that highwalls created during its mining operations remain covered after backfilling and grading in accordance with 30 CFR 715.14 continues at least for a sufficient period of time to allow the regulatory authority to determine that the highwall has in fact been covered and that the backfill material has been placed and compacted in a manner that properly takes into account the expected settling.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and John C. Martin, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor, Enforcement, Division of Surface Mining, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement; George L. Seay, Jr., Esq., Zaluski & Seay, Frankfort, Kentucky, for River Processing, Inc.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed the June 8, 1982, decision of Administrative Law Judge David Torbett (Decision) concerning Notice of Violation (NOV) No. 80-2-56-106, wherein OSM charged River Processing, Inc. (River Processing), with a violation of 30 CFR 715.14 for the company's alleged failure to eliminate completely the highwall at its Abes Branch surface coal mining operation in Perry County, Kentucky. The Administrative Law Judge upheld the violation as alleged, but vacated the remedial requirement in the NOV that River Processing take action to eliminate the remaining highwall exposures. Our decision requires River Processing to take some, but not all, of the remedial action specified in the NOV.

Findings of Fact

For its decision the Board adopts the following findings rendered by the Administrative Law Judge.¹

1. The Applicant holds Permit No. 297-0422 from the Kentucky Department of Natural Resources and Environmental Protection Agency for the mine involved in this case, which is a contour mine. (Ex. R-2; Hall, 22)

2. All mining and reclamation work on the area which is the subject of this litigation was concluded in the latter part of 1979, and a grading bond release has been obtained by the Applicant for the area. (Asher, 188)

3. Throughout the time of the mining operation only two inspections were conducted by the Respondent; one being made in September of 1979, and the final inspection which resulted in this litigation having been made on November 5, 1980. (Campbell, 291)

4. Regular inspections were conducted by the Kentucky Department for Natural Resources and Environmental Protection. (Asher, 183)

5. No inspection by the Department for Natural Resources and Environmental Protection, nor the inspection by the Respondent on September 24, 1979 ever reflected any deficiency in backfilling and grading of the subject permit, except as set out herein in the paragraph immediately following. (Asher, 184; Campbell, 296)

6. During the inspection by the Respondent in September 1979, the Respondent issued a Notice of Violation to the Applicant for placing woody material in the backfill. The Applicant was required to remove the woody material before completing the backfilling. (Campbell, 291, 305-6)

7. Craig Campbell, the Applicant's Safety Director, accompanied the Respondent's Inspector, Marvin Rice, on the inspection on September 24, 1979. During that inspection,

¹ The terms "applicant" and "respondent" in these findings refer to River Processing and OSM respectively. The citations are to exhibits ("Ex:") introduced during the hearing and to the testimony of named witnesses as reported in the transcript of the hearing.

In these findings we reject the use of the term "highwall" to describe the rock exposures identified in findings Nos. 13, 17, and 19.

September 26, 1983

Mr. Campbell did not ask Mr. Rice any questions about the adequacy of the backfilling and grading which had been done by the Applicant before that date. (Campbell, 307)

8. Between September 1979 and November 1980, the Applicant did not ask the Respondent to check the adequacy of its backfilling and grading at this mine. (Campbell, 307)

9. The next inspection of this mine by the Respondent was made on November 5, 1980 by Gary Hall. He was accompanied by Craig Campbell for the Applicant during the inspection. (Hall, 21)

10. During his November 5, 19[80] inspection, Mr. Hall observed that the highwall had not been eliminated on portions of this mine. He issued Notice of Violation No. 80-2-56-106 for failure to eliminate the highwall on several portions of the permit area disturbed after May 3, 1978. (Hall, 23-4; Ex. R-1)

11. The initial abatement date for this violation was December 5, 1980. The Applicant requested an extension of time to correct the violation, and the Respondent modified the Notice of Violation to extend the abatement date to January 5, 1981. (Hall, 32-4; Ex. R-3)

12. Mr. Hall used a copy of the Applicant's permit map to pinpoint the location of the areas where the highwall has not been eliminated. The map is Exhibit R-17. (Hall, 24-6) Mr. Hall took a series of photographs on January 19, 1981, which depict these areas. Each of these photographs has a circled number on the back of the photograph in the upper right-hand corner, which corresponds with the circled red number on Exhibit R-17. (Hall, 40, 57-8; Ex. R-18 - R-31)

13. The first area to which the Notice of Violation pertains is marked as point 3 on Exhibit R-17 and is portrayed in the photographs marked R-6, R-13, R-20, and A-1 through A-4. (Hall, 26-7, 36, 43-4; Campbell, 298-9) Just above the top of the highwall, and protruding out over it in some areas, is the soil and timberline. (Hall, 44) Winford Smith admitted there is 6 inches of soil covering the rock in this area. (Smith, 262-3)

14. Mr. Smith testified that at point 3 the "whole mountain just broke down." (Smith, 226) At the time this event occurred, the Applicant had already "blasted from [its] drill bench to a rider seam which lays over the Number 8 coal." (Smith, 226) The Applicant was removing coal from the rider seam in the area where the mountain broke down. (Smith, 226, 265) The mountain "broke down" because "the little rider seam of coal gave way" as a result of "too much pressure." (Smith, 266)

15. The second area to which the Notice of Violation pertains includes the exposed portions of the highwall behind Hollow Fill No. 2. These areas are found between points 5 and 9 on exhibit R-17 and are portrayed in the photographs R-7, R-8, R-9, R-10, R-14, R-15, R-22, R-23, R-24, R-25, and R-26. (Hall, 27-8, 37-8, 45-9) In most of these areas, the height of the exposed portion of the highwall averages 2-3 feet. (Hall, 45-8) At point 9; however, the highwall averages 6-8 feet. (Hall, 48-9; Ex. R-26) In most of these areas, the highwall is composed mainly of dirt rather than rock. (Hall, 47-8).

16. In some portions of the area behind Hollow Fill No. 2, there is no exposed highwall in that some of the disturbed area has been completely restored to its approximate original contour. (Hall, 45-6; Ex. R-17, R-22, R-24, R-26; Vaughan, 104)

17. The third area to which the Notice of Violation pertains is marked as point 10 on Exhibit R-17 and is portrayed in the photographs marked R-11, R-16, R-27, A-23, and A-24. (Hall, 29, 38, 49-53; Smith, 243-5) The height of the exposed portion of the highwall averages 4-5 feet in this area. (Hall, 49-50) Although there was a lot of rock on this point, the photographs shows soil and trees mixed with rock and protruding therefrom. (Hall, 29; Vaughan, 111; Ex. R-11)

18. The last area to which the Notice of Violation pertains is found at points 12 and 13 on Exhibit R-17 and is portrayed in the photographs R-12, R-29, R-30. (Hall, 31-2, 55-6)

19. Points 11, 12, and 13 are found at the end of the Applicant's permit, beyond a gap in the mountain. (Hall, 53-6) Although there is exposed highwall at points 12 and 13, the highwall has been eliminated at point 11. (Hall, 53-6; Ex. R-28)

20. According to Mr. Vaughan's testimony, it is possible for backfilled material to settle a small distance (less than 5 percent of the original height of the highwall). (Vaughan, 167) However, since the bench of the mined area was level (Smith, 237); Mr. Vaughan testified that the settling should be uniform along the contour. Exhibit R-22 reveals that the height of the backfilled material is not uniform along the contour; therefore, the exposed highwall is probably not due [entirely] to settling. (Vaughan, 176-7)

21. The photographs show a rocky cliffline in the area of violation, but the cliffline is 25-30 feet above the top of the highwall created by the Applicant's mining operation. (Hall, 71; Ex. R-14, A-6, A-7, A-11, A-15, A-20)

22. The Respondent testified that some areas could be eliminated by regrading the area as they exist. Additional material would have to be hauled in to some locations. The Applicant testified that in order to feasibly eliminate all the area alleged to be in noncompliance by the Respondent, it would be necessary to create a road near the top of the highwall. The material cut out to create the roadway would be put on the outslope "in order to widen out your base or your horizontal distance on the bench. Then material would have to be hauled in along this road and this road filled in. And then the entire slope resloped with a dozer." (Skaggs, 383)

23. Either of the above methods would result in all the present vegetation being destroyed. (Skaggs, 387)

24. No additional topsoil exists in the event additional fill material is placed on the present fill. (Smith, 243)

* * * * *

28. All the witnesses swore truthfully, and are entitled to be believed.

29. There are no irreconcilable questions of fact contained in the record of this case.

(Decision at 2-5.)

The Administrative Law Judge also rendered the following findings, which the Board does not adopt for its decision. As will be apparent from the discussion, *infra*, we consider these findings to be ultimately irrelevant to the proper application of the regulatory requirement with which we are concerned in this case; additionally, we consider elements of these findings to be overly speculative in light of the record evidence.

25. The area in question is presently stable, and has substantial vegetation on all areas which have been regraded and upon which topsoil has been spread. If the proposed remedial measure were implemented the road which presently exists would be completely eliminated at several points by the need to extend the base of the present fill area. The elimination of the road would create a hazard for dozer operators since there would be no area on which they could rely as a safety barrier in grading the slope. (Skaggs, 381 - 415)

26. The proposed remedial measures sought to be enforced by the Respondent would result in substantial environmental degradation, the destruction of existing topsoil; the destruction of all vegetation which is currently in place on the site; create an unstable area of presently stabilized area; and would generally result in environmental degradation. (Skaggs, 387) If the proposed plan to eliminate all the highwalls was implemented, there would be an increase in the sedimentation to the streams, or additional silt structures would have to be constructed which would themselves create additional sedimentation and environmental degradation. (Skaggs, 414 - 419)

27. If the area remains in its present stable condition no environmental harm will result. (Skaggs, 390)

(Decision at 5.)

These last findings, in combination with his opinion that "the overriding requirement of the [Surface Mining] Act is that strip mining

September 26, 1983

be performed in such a manner that the least damage will be done to the overall environment" (Decision at 7), led the Administrative Law Judge to relieve River Processing from OSM's requirement that the company completely eliminate the remaining highwall at its Abes Branch coal mining operation.

Discussion

The issue addressed by the parties in this appeal is whether the requirement in 30 CFR 715.14, that all highwalls created in the course of a surface coal mining operation must be eliminated, can be avoided upon a finding by an Administrative Law Judge that the environmental consequences of eliminating particular highwall exposures would be worse than the environmental consequences of allowing the highwall exposures to remain after backfilling and grading have otherwise been completed in a mining operation. For the reasons stated below, we hold that the regulatory requirement cannot be so avoided; however, our review of the Decision goes beyond the issue addressed by the parties.

[1] Turning first to the issue presented, we find of special relevance the decision of the Board of Surface Mining and Reclamation Appeals (IBSMA) in *Tollage Creek Elkhorn Mining Co.*, 2 IBSMA 341, 87 I.D. 570 (1980), *aff'd mem.*, *Tollage Creek Elkhorn Mining Co. v. Watt*, No. 80-230 (E.D. Ky., Sept. 1, 1982). In that case IBSMA addressed the question whether a portion of a highwall could be retained after reclamation in connection with an access road constructed for postmining use at the request of the surface owner. Upon an exhaustive analysis of the requirement to eliminate all highwalls, IBSMA concluded that the requirement could not be avoided even though the State regulatory authority had approved the highwall retention and the record contained convincing evidence that the location of the requested access road along the top portion of the highwall was sensible from engineering and environmental standpoints. *See also Grafton Coal Co.*, 3 IBSMA 175, 88 I.D. 613 (1981). Moreover, IBSMA declined to follow the dissenter's suggestion that the Board could exercise its authority to modify enforcement actions by deleting the remedial action required in the NOV issued in *Tollage Creek*. Compare 2 IBSMA at 356-57, 87 I.D. at 578-79 (Administrative Judge Mirkin partially dissenting) with 2 IBSMA at 354, 87 I.D. at 577 (Administrative Judge Irwin concurring). There has been no amendment of the language of 30 CFR 715.14 since the issuance of the *Tollage Creek* decision.

This Board finds to be controlling in this case the construction in *Tollage Creek* that the requirement for complete highwall elimination is an inflexible element of the reclamation prescribed in 30 CFR 715.14 for the return of land disturbed by surface coal mining to its "approximate original contour." We are persuaded to this viewpoint

especially by the fact that none of the several provisions for variances from the "approximate original contour" standard allow retention of highwalls. 30 U.S.C. § 1265(b)(3), (d)(2), and (e) (Supp. V 1981); 30 CFR 715.14(c) through (f) and 716.3; 2 IBSMA at 347-49, 87 I.D. at 574-75 (which includes references to legislative history of the AOC requirement). This circumstance evinces a preemptive legislative finding that the risk of environmental harm from unreclaimed highwalls outweighs the potential for benefits from a less than absolute requirement for highwall elimination. *See especially* H.R. Rep. No. 493, 95th Cong., 1st Sess. 108-09 (1977). Thus, we conclude that there is no authority either expressed or implied in the Act or regulations for the evaluation of comparative harms undertaken by the Administrative Law Judge in this case. And it is the actual provisions of the Act and regulations, not the intuitively appealing proposition that "the overriding requirement of the Act is that strip mining be performed in such a manner that the least damage will be done to the overall environment" (Decision at 6-7), that govern the review of this case.

Notwithstanding our disagreement with the basis of the Decision, we affirm in part the result reached in it because our review of the record has persuaded us that not all of the areas identified by OSM in the NOV are "highwall" exposures.

[2] The term "highwall" is defined in the regulations as "the face of exposed overburden and coal in an open cut of a surface or for entry to an underground coal mine." 30 CFR 710.5. Witnesses for River Processing testified that the rock faces in the areas located by the numbers 3, 10, 12, and 13 on OSM's Exhibit 17 are the result of "natural" slope failures above portions of the highwall cut by River Processing and are not parts of the highwalls cut by the company (Asher Tr. 203-06, 209-10, 211; Smith Tr. 226-30, 235-40, 245-51, 264-68; Fugate Tr. 315-20, 323-26 (*but see* Tr. 326-27); Noble Tr. 338-43, 348-54; and Neace Tr. 359-71). There is nothing substantial in the evidence adduced by OSM to contradict this testimony (*see* Hall Tr. 28-32, 36-38, 41-58, 65-73, 91-94; Vaughan Tr. 120-22, 140-42, 427-29). We are not unmindful that the slope failures described by River Processing may very well have been triggered by the company's mining activities and, if so, that the company is responsible for returning these disturbed areas to their approximate original contours. *See* 30 CFR 715.14. It does not necessarily follow, however, that the rock faces would have to be completely eliminated to meet this performance standard. That would depend on whether the existing rock exposures closely resemble the premining conditions. 30 U.S.C. § 1291(2) (Supp. V 1981); 30 CFR 710.5 (definition of "approximate original contour") and 715.14. In any event, OSM has not charged River Processing with a failure to return the portions of the permit area identified above to their approximate original contours, except upon the erroneous presumption that the rock faces are highwall exposures.

September 26, 1983

We need not determine in this decision whether the record reveals a violation other than that charged by OSM.²

Turning to the remaining area of violation identified in the NOV, the area of backfill behind Hollow Fill No. 2,³ we reverse the result reached in the Decision in this regard.

The evidence is clear that there is highwall exposed in portions of the area behind Hollow Fill No. 2 (e.g., Smith Tr. 240-41, 252-53, 268-69; Noble Tr. 336-37); however, witnesses for River Processing testified that the company completely eliminated the highwall in this area but that the backfill material has since settled to expose the top portion of the highwall (Smith Tr. 240-41; Noble Tr. 336-37; Neace Tr. 357-58). In reaching his decision to relieve River Processing from the remedial requirement to eliminate this remaining highwall, the Administrative Law Judge nevertheless rules "that the settling of material placed against the highwall by the applicant does not relieve the applicant of the responsibility for complying with 30 CFR 715.14" (Decision at 6).

[3] While the settling of backfill material is not mentioned in 30 CFR 715.14, there is certainly a mandate for an operator to take it into account implied in the language of that section: "In order to achieve the approximate original contour, the permittee shall * * * transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls." (Italics added.) Subparagraph (j)(2) of 30 CFR 715.14 specifies more particularly that "[b]ackfilled materials shall be selectively placed and compacted wherever necessary * * * to ensure the stability of the backfilled materials." It is evident from the record that River Processing failed to place and compact backfilled materials adequately to ensure that the highwall behind Hollow Fill No. 2 would remain completely covered. Thus, while we do not reject the company's assertion that it covered the highwall during its reclamation operations, we do reject its argument that by temporarily covering the highwall it has completely satisfied its obligation "to eliminate all highwalls."⁴ This Board recognizes that at some time an operator must be relieved of the responsibility for ensuring that a highwall created

² Were OSM to so charge River Processing, the company would bear the burden of establishing the premining configuration of the disturbed lands upon OSM's showing of fresh rock exposures remaining after backfilling and final grading by the company. See 30 CFR 715.14(a)(1).

³ This section of highwall is indicated on Exhibit A-26 by cross-sections 7 through 28, and is described in Finding No. 15, *supra*. There is some indication in the record that the exposure of highwall in this area may not be continuous; our order takes this uncertainty into account.

⁴ We, of course, are aware that some settling of backfilled materials is expectable and cannot be avoided even by the most diligent efforts to compact the material. At the hearing, Inspector Vaughan testified for OSM that he would anticipate less than 5 percent settling after proper compaction under the conditions at River Processing's minesite (Tr. 166-67). This phenomenon poses a special problem in the context of steep-slope mining operations such as the one involved here. The requirement that the permittee eliminate all highwalls completely, as we have construed it, should be able to be satisfied, however, if a permittee places and grades sufficient backfilled material above the level of a highwall to account for reasonably expectable settling. Such a reclamation procedure would appear to be consistent with the relevant provision of 30 CFR 716.2(b): "The highwall shall be completely covered with spoil and the disturbed area graded to comply with the provisions of § 715.14 of this chapter. Land above the highwall shall not be disturbed unless the regulatory authority finds that the disturbance will facilitate compliance with the requirements of this section" (italics added). If, in complying with the portion of the remedial action ordered by OSM that we uphold in this decision, River Processing determines that it is necessary to disturb land above the highwall, the company shall consider itself to be authorized to do so in accordance with 30 CFR 716.2(b).

during its mining operation remains covered. However, this responsibility must continue at least for a sufficient period of time to allow the regulatory authority to determine that the highwall has in fact been covered and that the backfill material has been placed and compacted in a manner that properly takes into account the expected settling.⁵ In our opinion, under the facts of this case, River Processing remained responsible for those highwalls created during its mining and exposed at the time of OSM's November 1980 enforcement action.⁶

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior under Secretarial Order No. 3092, dated April 26, 1983, and 43 CFR 4.1, the decision of the Administrative Law Judge, Docket No. NX 1-52-R, is affirmed in part, as modified, and reversed in part.⁷

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

R. W. MULLEN
Administrative Judge

RICHARD F. CARROLL (ON RECONSIDERATION)

76 IBLA 151

Decided *September 27, 1983*

Petitions for reconsideration of *Richard F. Carroll*, 71 IBLA 307 (1983), in which the Board reversed and remanded the decisions of the Montana State Office, Bureau of Land Management, rejecting noncompetitive over-the-counter oil and gas lease offers M 55630, M 55631, M 55632, and M 55633.

Petitions granted; Board's decision affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Filing

Where an oil and gas lease offeror signs an offer form in ink, photocopies four exact reproductions of the front page of the offer form, including the signature, with the intent that the photocopied signature be his signature, and submits the five documents as the offer, that offer fulfills the signature requirement of 43 CFR 3111.1-1(a).

⁵ Such a determination, and any subsequent review thereof, may be aided by information furnished by the permittee showing the method of fill placement, method of compacting, the anticipated settling rate, and any additional steps taken to ensure that the highwall will remain covered.

⁶ In responding to OSM's appeal, River Processing did not repeat its argument, advanced in the proceeding below, that OSM should be equitably estopped from taking enforcement action against the company with respect to any highwall exposures because OSM did not charge the company with a violation during its Sept. 24, 1979, inspection, when backfilling and grading were substantially completed, and OSM did not inspect the mine site again for 14 months even though the Surface Mining Act and regulations call for inspections to occur at least once every 6 months. We have taken note of River Processing's argument, however, and in this regard we refer to the general rule of this Department that "[t]he authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties." *Virgil V. Peterson*, 66 IBLA 156, 159 (1982), and citations therein.

⁷ Consistent with this decision, OSM shall take such enforcement action as is necessary to require River Processing to eliminate completely any appreciable exposure of highwall remaining in the area identified by the numbers 7 through 28 on Exhibit A-26 of the record in this case.

September 27, 1983

2. Administrative Authority: Laches--Estoppel--Oil and Gas Leases: Applications: Filing

The authority of the Department to enforce its oil and gas leasing regulations is not vitiated or lost through erroneous interpretations of the regulations allegedly provided by Departmental employees.

3. Administrative Practice--Appeals--Oil and Gas Leases: Applications: Generally--Regulations: Applicability

A decision of the Board of Land Appeals holding that the signature requirement of 43 CFR 3111.1-1(a) is met when the offeror signs one offer form in ink and photocopies four exact reproductions of the front page of the offer form, including the signature, is not an abrupt departure from other Board rulings nor a retroactive application of a new rule, but is merely the initial interpretation and application of an existing regulation to this specific factual circumstance.

4. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Filing

Where the first-filed over-the-counter noncompetitive oil and gas lease offers each contain a curable defect listed in 43 CFR 3111.1-1(e), and where the offeror cures such defect, the offeror retains his priority as of the date the original offers were filed, even though a second qualified offeror filed an offer for some of the same lands included in the previously filed offers before the first offeror cured the defect in his offers.

APPEARANCES: James D. Voorhees, Esq., and Linnea Mitchell Simons, Esq., Denver, Colorado, for petitioner Frances Kunkel; William A. Forsythe, Esq., for petitioner Ted H. Williams.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

INTERIOR BOARD OF LAND APPEALS

By decision dated March 22, 1983, *Richard F. Carroll*, 71 IBLA 307 (1983), this Board reversed decisions of the Montana State Office, Bureau of Land Management (BLM), which rejected Richard F. Carroll's noncompetitive over-the-counter oil and gas lease offers M 55630, M 55631, M 55632, and M 55633 because these offers were in violation of 43 CFR 3111.1-1. BLM explained that only one originally signed copy of each offer was filed and the other four copies of each offer were xeroxed copies of the front of the original. BLM stated that 43 CFR 3111.1-1 provides that five copies of the official form or valid reproduction thereof shall be filed and that each offer must be signed in ink by the offeror.

In reversing BLM's decisions the Board held that where an oil and gas lease offeror signs an offer form in ink, photocopies four exact reproductions of the front page of the offer form, including the signature, with the intent that the photocopied signature be his signature, and submits the five documents as the offer, that offer fulfills the signature requirement of 43 CFR 3111.1-1(a), and it is improper to reject that offer because the four photocopies were not signed in ink by the offeror. The Board also held that where a

noncompetitive oil and gas lease offeror submits one original lease offer form and four photocopies which are exact reproductions of the front of the lease form, but fails to reproduce the reverse side of the lease form, he has not met the requirements of 43 CFR 3111.1-1(a), which specifies that five copies of the official form, or valid reproduction thereof, must be filed but that failure to submit copies of the reverse side of the form is a curable defect under 43 CFR 3111.1-1(e)(4).

The Board remanded the case to BLM and directed BLM to give Carroll an opportunity to comply with 43 CFR 3111.1-1(a). The Board stated that if Carroll complies with 43 CFR 3111.1-1(a) and the offers are acceptable, BLM should consider the offers to have been filed on the date the original offers were filed, June 24, 1982.

On April 8, 1983, and April 25, 1983, Ted H. Williams and Frances Kunkel filed petitions for reconsideration of the Board's decision in *Richard F. Carroll, supra*. Both Williams and Kunkel had filed offers to lease lands included in Carroll's offers.

In his motion for reconsideration Williams first contends that BLM should be estopped from accepting Carroll's offers to lease. Williams bases this argument on the fact that the instructions on the offer-to-lease form (Form 3110-1) state in three places on the form: "Fill in on typewriter or print plainly in ink and sign in ink"; "This offer must be filled in on a typewriter or printed plainly in ink and must be signed in ink"; "This offer must be prepared in quintuplicate * * *."

In support of the estoppel argument, Williams also asserts that the Montana State Office has followed a policy of rejecting noncompetitive oil and gas lease offers which do not have an original ink signature on each of the five copies submitted. Williams states that employees of BLM have represented to Williams that the regulations as well as lease Form 3110-1 require an original ink signature on each of the five forms to constitute a valid offer.

In his second argument, Williams contends that the Board's holding in *Fayette Oil & Gas Corp.*, 71 IBLA 79 (1983), herein referred to as "*Fayette*," and *Richard F. Carroll, supra*, that an offer consisting of a lease form with an original signature and four photocopies of that signature satisfies 43 CFR 3111.1-1(a), established a "new rule" and that retroactive application of this rule is improper.

Frances Kunkel adopts and incorporates by reference the discussion in Ted Williams' request for reconsideration. In addition, Kunkel asserts that the Carroll offers as originally filed were defective and did not entitle Carroll to a lease. She asserts that although the defects are curable, the Carroll offers are entitled to priority only as of the date the curative materials are filed. Kunkel points out that the Carroll offers were filed on June 24, 1982, and the Kunkel offers were filed on July 7, 1982.

Kunkel bases her argument on section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976), which states that the person first making application for the lease who is qualified to hold the lease shall be

September 27, 1983

entitled to the lease. Kunkel points out that the first-qualified applicant is one who is qualified under the applicable statutes and regulations to hold a lease and whose application or lease offer has complied with all mandatory regulations. Kunkel cites numerous decisions in which the Board held that a party whose offer does not comply with applicable regulations is not a qualified applicant until the defect is cured (if curable) and an offer which has a curable defect can earn priority only from the date the defect is cured. Kunkel states that on July 7, 1982, before any curative action was taken with respect to Carroll's offers, Kunkel filed her offers in compliance with the regulations, and is therefore the first-qualified applicant entitled to leases described in her offers as between herself and Carroll.

[1, 2] We affirm our decision in *Richard F. Carroll, supra*, in which we held that where an oil and gas lease offeror signs an offer form in ink and photocopies four exact reproductions of the front page of the offer form, including the signature, with the intent that the photocopied signature be his signature, and submits the five documents as the offer, that offer fulfills the signature requirement of 43 CFR 3111.1-1(a). BLM's interpretation of the regulation, that all five copies must be signed in ink, is incorrect. Petitioners' argument that BLM should be estopped to accept Carroll's offers because of the instructions on the offer-to-lease form and the information provided by BLM employees is without merit. We find that the offer-to-lease form does not specify that the offeror must sign all five copies in ink. This is petitioners' interpretation of the instructions.

[3] Also, the authority of the Department to enforce its oil and gas leasing regulations is not vitiated or lost through erroneous interpretations of the regulations allegedly provided by Departmental employees. *Dennis M. Joy*, 66 IBLA 260 (1982).

In considering the significance of actions taken by BLM officials in accepting oil and gas lease offers, we must bear in mind that the Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by his subordinates or his predecessors. See *Pathfinder Mines Corp.*, 70 IBLA 264, 90 I.D. 10 (1983); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976). It necessarily follows that this Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates. *Pathfinder Mines Corp., supra*. Therefore, we find that the alleged providing of erroneous information by BLM to petitioners does not warrant application of the estoppel doctrine.

[4] Petitioners' second contention concerns the allegedly improper retroactive application of the holding in *Carroll, supra*, and *Fayette, supra*, that an offeror complies with the signature requirement of 43 CFR 3111.1-1(a) when he submits one offer form signed in ink and

photocopies four exact reproductions including the signature. Petitioners contend that BLM has consistently rejected offers which do not have original signatures on each copy and that the holding in *Carroll, supra*, and *Fayette, supra*, constitutes a "new rule" with regard to the signing of oil and gas lease offers. Petitioners admit that the Secretary has the power to make a new rule but object to its retroactive application. Petitioners state that this rule did not exist at the time they filed their offers. Petitioners cite *Runnells v. Andrus*, 484 F. Supp. 1234 (D.C. Utah 1980), in which the court found the Secretary's interpretation of the relevant regulation (43 CFR 3102.6-1(a)(2) (1975)) reasonable and recognized the Secretary's right to interpret said regulation.¹ Petitioners conclude that the present case is analogous to *Runnells, supra*, because they relied on the past practices of BLM in filing their lease applications and at the time they filed their applications, there was no IBLA ruling allowing the kind of application Carroll filed.

We find that the situation in the present case is distinguishable from that in *Runnells, supra*. Although it is true that at the time petitioners filed their applications there was no IBLA ruling specifically allowing the kind of application filed by Carroll, there were IBLA decisions interpreting the signature requirement.

In *Mary Adele Monson*, 71 I.D. 269, 271, n.2 (1964), the Department stated with respect to the requirement of signing the offer that:

[T]he regulation does not require that each of the five required copies be individually signed in ink, but it is sufficient if only one copy was directly signed in ink and the signature was impressed on the other four copies through the use of carbon paper. *Duncan Miller, Robert A. Priester*, A-28621 etc. (May 10, 1961).

In *Mary I. Arata*, 4 IBLA 201, 203, 78 I.D. 397, 398 (1971), we stated:

There is an abundance of legal authority discussing and interpreting the terms "sign" and "signature." Many state and federal cases hold that the terms included any memorandum, mark, or sign, written or placed on any instrument or writing with intent to execute or authenticate such instrument. It may be written by hand, printed, stamped, typewritten, or engraved. It is immaterial with what kind of instrument a signature is made. *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) (contract); *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966) (Uniform Commercial Code); *Blackburn v. City of Paducah*, 441 S.W.2d 395 (Ky. 1969) (resignation of city official); *Weiner v. Mullaney*, 59 Cal. App. 2d 620, 140 P.2d 704 (1943) (trust); *Bishop v. Norell*, 88 Ariz. 148, 353 P.2d 1022 (1960) (Statute of Frauds). The law is well settled that a printed name upon an instrument with the intention that it should be the signature of the person is valid and has the same effect as though the name were written in the person's own handwriting. *Roberts v. Johnson*, 212 F.2d 672 (10th Cir. 1954).

From the discussions in these cases, it is clear that the Board's ruling in the *Fayette* and *Carroll* cases does not constitute an abrupt departure from a well stated practice, as did the Board's holding in *D. E. Pack, supra*. On the contrary, the Board's ruling in the present

¹ In *Runnells, supra*, the court reversed the portion of the Board's decisions in *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977), and *D. E. Pack (On Reconsideration)*, 38 IBLA 23, 85 I.D. 408 (1978), giving the Board's interpretation of 43 CFR 3102.6-1(a)(2) (1975) retroactive effect.

September 27, 1983

case is merely the initial interpretation and application of an existing regulation to this specific factual circumstance. It "fills a void in an unsettled area of the law." *Runnells v. Andrus, supra*. Because of our prior decisions in *Monson, supra*, and *Arata, supra*, and the clear language of the regulation, our decision in *Carroll* was not the retroactive application of a new rule.

[5] In support of its motion for reconsideration, petitioner Kunkel asserts that Carroll should not be allowed to cure the defect in his offers and retain his priority as of the date of the original offers, where a complete offer by a qualified offeror has intervened. Petitioner cites numerous Board decisions to support this point. While petitioner's assertion is generally correct as it applies to over-the-counter noncompetitive oil and gas lease offers, the concept of "curable defect" warrants our consideration.

Concerning defects in simultaneously filed oil and gas lease offers, the Board stated in *Ballard E. Spencer Trust, Inc. v. Morton*, 18 IBLA 25, 28 (1974), *aff'd*, 544 F.2d 1067 (10th Cir. 1976):

Under the simultaneous filing procedure it would be utterly pointless to allow the applicant whose defective offer is first drawn additional time to cure the defect, because he could not possibly gain priority over the next drawn offer which was regular on its face. The present procedure requires that three offers be drawn for each parcel. If the first drawn offer is unacceptable for any reason, the second drawn offer gains priority as of the date and time the offers were simultaneously filed. If the second offer is then found to be unacceptable, the third offer gains first priority. If none of the three offers are acceptable as filed, the parcel must be listed for a subsequent simultaneous filing. 43 CFR 3112.5-1.

Therefore, under the "simultaneous filing" procedure a defective application filed by a first-drawn applicant must be rejected because giving an unqualified applicant additional time to file infringes on the rights of the second-drawn qualified applicant. *Ballard E. Spencer Trust, Inc. v. Morton, supra*.

By contrast, in the over-the-counter filing procedure, each offer is given priority by the date and time it is filed by the qualified offeror. Thus, if an offeror files a defective offer and a qualified offeror files an offer for the same land before the first offeror cures the defect, the lease must issue to the second offeror. *Emerald Oil Co.*, 31 IBLA 119, 122 (1977). *Michigan Wisconsin Pipe Line Co.*, 17 IBLA 282, 284 (1974). This principle applies in all cases *except* those specifically enumerated in 43 CFR 3111.1-1(e).

Regulation 43 CFR 3111.1-1(e) provides as follows:

(e) *Curable defects.* An offer to lease containing any of the following deficiencies *will be approved* by the signing officer provided all other requirements are met:

(1) An offer deficient in the first year's rental by not more than 10 percent. The additional rental must be paid within 30 days from notice under penalty of cancellation of the lease.

(2) An offer completed in pencil or script.

(3) An offer on a lease form not currently in use.

(4) *An offer on a form not correctly reproduced* provided it contains the statement that the offeror agrees to be bound by terms and conditions of the lease form in effect at the date of filing. [Italics added.]

It is apparent that the regulation contemplates that an offer deficient in these respects "will be approved by the signing officer * * *." This is entirely inconsistent with the idea that such offers will lose their priority.

Confusion arises over the use of the term "curable defect." In the over-the-counter offers cited by Kunkel, the defects involved failure to comply with a mandatory regulation; offers with such defects must be rejected. These offers would gain priority only as of the date the curative material was filed, whereas offers with the defects listed in 43 CFR 3111.1-1(e) would retain their priority and be approved. Thus, there may be said to be two classes of "curable defects"; those which are covered by the regulation, and those which are not.

For example, in *John P. Errebo, Jr.*, 32 IBLA 191 (1977), the offeror failed to file five copies of his offer as required by 43 CFR 3111.1-1(a). The Board noted that failure to file the required number of copies is not included in the list of curable defects set forth in 43 CFR 3111.1-1(e), and then stated at page 192: "We have specifically ruled that all failures to comply with this regulation [43 CFR 3111.1-1(a)], save those listed in 43 CFR 3111.1-1(e) are fatal to an oil and gas offer. *Duncan Miller*, 10 IBLA 208, 211 (1973)." In *Curtis Wheeler*, 55 IBLA 65 (1981), an appeal involving a similar factual situation, the Board noted that failure to file the required number of copies is not included in the list of curable defects enumerated in 43 CFR 3111.1-1(e), and held that the offer may earn priority as of the date when the required fifth copy of the lease offer was filed with BLM.

In *Metro Energy, Inc.*, 52 IBLA 369 (1981), BLM rejected appellant's 11 oil and gas lease offers for failure to accompany each offer with an interest statement as required by 43 CFR 3102.7 (1979). The Board noted that failure to file the required interest statement is not among the curable defects listed in 43 CFR 3111.1-1(e). The appellant correctly noted that the Board has held that an offer which has been rejected for failure to file such statements may be reinstated when the required filing is made, and the offer will earn priority as of the time the required filing is made. Appellant withdrew six offers and the withdrawals, if effective, left a sufficient number of statements to cover the active offers. The Board held that those offers may be considered to be cured and earn priority as of the date when the withdrawal of the other offers was filed with BLM.

Again, in *Milan S. Papulak*, 30 IBLA 77 (1977), the rental submitted by the offeror was deficient by less than 10 percent. The Board held that this was a curable defect under 43 CFR 3111.1-1(e), but that if appellant had not submitted legally sufficient rental, within the limits of a curable deficiency, rejection of the offer would have been required.

The language used in 43 CFR 3111.1-1 dictates that offers with defects enumerated in 43 CFR 3111.1-1(e) should be treated differently

September 27, 1983

from offers with defects not enumerated. 43 CFR 3111.1-1(d) states: "(d) *Rejection*. Except as provided in this section an offer which is not filed in accordance with the regulations in this part will be rejected and will afford the offeror no priority." The words "except as provided in this section" refer to 43 CFR 3111.1-1(e) which reads in pertinent part: "(e) *Curable defects*. An offer to lease containing any of the following deficiencies will be approved by the signing officer provided all other requirements are met * * *." The curable defects are then listed.

Since 43 CFR 3111.1-1(d) provides that offers with deficiencies be rejected with no priority, then it follows that 43 CFR 3111.1-1(e) must be interpreted to mean that offers with the defects listed "*will be approved*," (italics added), rather than rejected, and will receive priority as of the time they are filed, if all other requirements are met. If the offers with defects listed in 43 CFR 3111.1-1(e) received priority as of the time they were "cured," like the defects in the cases discussed above, then it would be meaningless to list them separately. This is the interpretation the Department gave 43 CFR 200.8(g)(2) (1954), a former version of 43 CFR 3111.1-1(e), in *Celia R. Kammerman*, 66 I.D. 255, 263 (1959). There the Department stated that 43 CFR 200.8(g)(2) "sets out the circumstances under which failure to comply with a mandatory requirement of the regulation *will not result in loss of priority*." (Italics added.) Therefore, we hold that if Carroll submits five copies of the lease form or valid reproductions thereof and if the offers are acceptable, he retains his priority as of the date the original offers were filed, June 24, 1982, even though Kunkel's offers were filed prior to the time Carroll cured the defect in his offers.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, and the Board's prior decision styled *Richard F. Carroll*, 71 IBLA 307 (1983), is affirmed for the reasons set forth herein.

ANNE POINDEXTER LEWIS
Administrative Judge

WE CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

September 30, 1983

APPEAL OF WAKON REDBIRD & ASSOCIATES

IBCA 1682-6-83

Decided September 30, 1983

Contract No. YA 553-CT2-66, Bureau of Land Management.

Government motion to dismiss granted.

**Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts:
Federal Procurement Regulations--Rules of Practice: Appeals:
Dismissal**

A Government motion to dismiss an appeal and remand it to the contracting officer for decision is granted where the Board finds that it is without jurisdiction over a claim of mutual mistake first presented in the complaint, since a published regulation prescribes that claims of mistake alleged after award of a contract, whether mutual or unilateral, are to be presented initially to the contracting officer for decision.

APPEARANCES: Mr. Robert W. Tate, Attorney at Law, Seattle, Washington, for Appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal and remand the matter to the contracting officer for his decision on the claim of mutual mistake asserted for the first time in appellant's complaint. Appellant opposes the granting of the Government's motion on the ground that such action would not be in the best interest of either the Government or the contractor and would substantially delay the progress of the current appeal.¹

Background

Contract No. YA-553-CT2-66 was awarded to the Small Business Administration on May 26, 1982. The same day a subcontract for the entire work covered by the contract was awarded to Wakon Redbird & Associates of Anchorage, Alaska (hereafter contractor or appellant). The contract as awarded was in the amount of \$176,352² and called for the performance of specified survey work (AF-1).

In a seven page letter to the contracting officer, dated November 18, 1982, the contractor requested a change order because of the difficulties encountered in performing the contract work. The penultimate sentence of the letter states:

¹ Accompanying appellant's opposition to the granting of the Government's motion to dismiss the appeal was a "Motion to Amend Appellant's Complaint" from which the following is quoted: "Appellant has not yet entirely decided on what theory, or alternative theories, it intends to rely upon other than the possibilities of mutual mistake of fact, avoidance of contract, breach of contract, or constructive change." (Complaint at 1-2.)

² The claim for equitable adjustment denied by the contracting officer was in the amount of \$296,612.59 (Appeal File 10). Hereafter appeal file exhibits will be identified by "AF" followed by reference to the number of the particular exhibit being cited.

The inability to follow these lines on the ground from controlling monument to controlling monument constitutes a change of conditions. This inability coupled with the need to open these lines and mark them has lead to extensive increases in time and expenses, which results in this request for a change order.

(AF-4). In letters to the contracting officer under dates of December 9, 1982 (AF-7),³ and January 5, 1983 (AF-9),⁴ the contractor submitted additional arguments in support of the claim asserted.

Discussion

In its brief in support of the motion to dismiss the appeal, the Government asserts (i) that in the complaint appellant alleges as sole ground for recovery, a mutual mistake; (ii) that the issue of mutual mistake was never presented to the contracting officer for consideration; (iii) that all of appellant's claim letters involved requests to the contracting officer for the issuance of a change order; (iv) that nothing in the claim letters apprise the contracting officer that the contractor was asserting a mistake, either unilateral or mutual; and (v) that being an equitable remedy, a claim of mutual mistake has been specifically provided for by regulation.⁵

Cited in support of the Government's motion are the decisions of this Board in *VTN Colorado, Inc.*, IBCA 1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542; *A. S. Wikstrom, Inc.*, IBCA 466-11-64 (Mar. 23, 1965), 65-1 BCA par. 4725; and *Merritt-Chapman & Scott Corp.*, IBCA 257 (June 22, 1961), 68 I.D. 164, 61-1 BCA par. 3064.⁶ After asserting that the principle announced in these cases is now mandated by the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613), Government counsel states that the contracting officer, the Board, or the Claims Court are all without jurisdiction over a claim which was

³ The concluding sentence of the letter of Dec. 9, 1982, reads as follows: "We request reconsideration of our request for a change order based upon the contents of this letter and our submittal of November 18, 1982" (AF-7).

⁴ In the letter of Jan. 5, 1983, appellant states:

"[I]t is incumbent upon the person letting the contract to clearly and accurately define the scope of work. This contract does that, but it goes on to define the manner in which this work will be accomplished and establishes a minimum accuracy requirement which is to be met using the prescribed procedure.

"When the owner prescribes the method in which the project is to be accomplished then he has assumed responsibility and liability for the effectiveness of the method. When the prescribed method will not deliver the desired end product and the prescribed method must be revised in order to deliver the end product, then there has been a change in conditions in which the contract was originally agreed upon and the owner becomes responsible for any new costs incurred."

(AF-9 at 1).

⁵ Immediately thereafter the Government's motion states:

"The Federal procurement regulations at 41 C.F.R. 1-2.406-4 provide the procedures which both the contractor and the contracting officer must follow in the processing of a mistake claim. These regulations expressly apply to both unilateral mistake and mutual mistake alleged after award. First, the contractor must submit the allegation of mistake to the contracting officer. He also must submit the evidence required in the regulation to the contracting officer. * * * Finally, the regulation requires that the contracting officer's decision is subject to the disputes clause of the contract." (Brief in Support of Motion to Dismiss at 3.)

⁶ In the case last cited, the Board noted that there was a fundamental difference in the theory of the claim presented to the contracting officer for decision (breach of contract) and the claim specifically raised for the first time in appellant's brief (constructive change). Thereafter the Board stated:

"The claim as now framed is not an appropriate one for determination in this appeal, since it was never presented to the contracting officer for decision. There is nothing in the original claim documents to apprise the contracting officer that the claim was for the making of an equitable adjustment pursuant to an alleged constructive change order. Accordingly, the indispensable ingredients for exercise of the Board's appellate jurisdiction are lacking as to the alleged constructive change order." (68 I.D. 167, 61-1 BCA at 15,852.)

September 30, 1983

not first presented to the contracting officer for decision (citing *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981)).

Cited generally for the proposition that the contracting officer, the Board, or the Claims Court are without jurisdiction to waive any mandatory requirement of the Contract Disputes Act of 1978 are the decisions of the Court of Claims in *W. H. Moseley Co., Inc. v. United States*, 677 F.2d 850 (1982); *Paul H. Lehman, Inc. v. United States*, 673 F.2d 352 (1982); and *Skelly and Loy v. United States*, 685 F.2d 414 (1982).⁷

In its response to the Government's motion to dismiss appellant states (i) that appellant's complaint illustrates that it is relying upon the same allegations to support its theory of a mutual mistake of fact and previous theories offered by appellant in correspondence with the contracting officer; (ii) that the underlying facts disputed between the parties are clearly set forth in the exhibits to the Rule 4 file (Appeal File);⁸ and (iii) that the sole issue is the manner in which they are currently being characterized by appellant in its complaint.

Relied upon by appellant in support of its opposition to the granting of the Government's motion to dismiss are the cases of *Cosmic Construction Co.*, VACAB No. 1504 (Mar. 18, 1982), 82-1 BCA par. 15,696; *Westclox Military Products*, ASBCA No. 25592 (Aug. 4, 1981), 81-2 BCA par. 15,270; *TMW, Joint Venture*, ASBCA No. 24349 (Mar. 28, 1980), 80-1 BCA par. 14,389; *Cincinnati Electronics Corp.*, ASBCA No. 23742 (Oct. 19, 1979), 79-2 BCA par. 14,145; and *El-Tronics, Inc.*, ASBCA No. 5457 (Feb. 28, 1961), 61-1 BCA par. 2961.

Nowhere in its response does appellant comment upon the cases cited by the Government in support of its motion to dismiss the appeal; nor does appellant address the question of the significance to be attached to appellant's failure to submit its claim of mutual mistake to the contracting officer for decision as required by 41 CFR 1-2.406.4.⁹

⁷ The "Brief In Support Of Motion To Dismiss," states at page 7:

"[T]he Government moves the Board to dismiss appellant's complaint and remand the claim asserted therein to the contracting officer for his consideration and decision. In the alternative, the Government would not object to the dismissal of the complaint for the purpose of appellant filing a new complaint or amending the complaint to conform to the claim which was submitted to the contracting officer and decided by him. However, if appellant insists on pursuing a claim based on mutual mistake, we submit that the only alternative is dismissal of the appeal and remand to the contracting officer."

⁸ In this connection appellant states: "[A]t this point in time Appellant is not offering any new facts to alter those that were presented to the contracting officer." ("Response to Respondent Motion to Dismiss" at 1.)

⁹ Included among the provisions of 41 CFR 1-2.406.4 are the following:

"§1-2.406-4 Disclosure of mistakes after award

"(b) In addition to the cases contemplated in paragraph (a) of this §1-2.406-4, contracting officers are authorized under the circumstances set forth in paragraph (c) of this §1-2.406-4 and in accordance with agency procedures to make certain determinations in connection with mistakes in bids alleged or disclosed after award. A determination may be made (1) to rescind a contract or (2) to reform a contract . . .

"(c) Determination under paragraph (b) of this §1-2.406-4 may be made only on the basis of clear and convincing evidence that a mistake in bid was made, and either the mistake was mutual or that the unilateral mistake made by the contractor was so apparent as to have charged the contracting officer with notice of the probability of the mistake . . .

"(e) Mistakes disclosed after award shall be processed as follows:

"(1) Whenever a mistake in bid is alleged or disclosed after award, the contracting officer shall advise the contractor to support the alleged error by written statements and by all pertinent evidence, such as the contractor's file copy of the bid, the original worksheets and other data used in preparing the bid, subcontractors' and suppliers' quotations (if any), published price lists, and any other evidence which will serve to establish the mistake, the manner in which it occurred, and the bid actually intended."

All of the Board's decisions relied upon by the Government in support of its motion to dismiss antedate the passage of the Contract Disputes Act of 1978. It appears, however, that obtaining a contracting officer's decision on a claim before filing it with a Board of Contract Appeals or other tribunal continues to be of fundamental importance in satisfying the jurisdictional requirements of the Contract Disputes Act of 1978. Addressing this question in *L.T.D. Builders, ASBCA* No. 28005 (June 16, 1983), 83-2 BCA par. 16,685 at 83,018, the Armed Services Board stated:

Here the Complaint did, in fact, contain two new claims, admittedly minor ones, not considered by the contracting officer and thus were claims not the subject of his final decision. Prior to the Contract Disputes Act we, on occasion, took a pragmatic approach to similar matters and refused to send back a claim for a final decision where it was a matter of form over substance. In other words, where there was no legitimate expectation that the contracting officer would do other than deny the claim.

With the passage of the Contract Disputes Act Congress mandated that our jurisdiction depended upon the existence of a contracting officer's final decision. Such a decision has been referred to as the "linchpin" of our jurisdiction. Congress has spoken on this issue and we are not at liberty to ignore this clear Congressional mandate. Cf. *United States v. Hamilton Enterprises*, No. 37-82 (U.S. Ct. App. Fed. Cir. June 6, 1983).

Responding to the Government's motion to dismiss, appellant asserts that the sole issue in the case is the manner in which the facts are currently being characterized by appellant in its complaint, noting that the underlying facts disputed between the parties are clearly set forth in the exhibits to the Rule 4 file and that at this point in time appellant is not offering any new facts to those that were presented to the contracting officer for decision (note 8 *supra*, and accompanying text). In advancing this position appellant is either oblivious of or has chosen to ignore the fact that a published regulation prescribes the manner in which claims of mutual mistake alleged after award are to be processed including the requirement that they be presented initially to the contracting officer for decision (note 9 *supra*).

It is entirely possible, of course, that appellant was completely unaware of the requirements of 41 CFR 1-2.406.4 and consequently has proceeded down the appellate road without regard to them. The regulations in question were published in the *Federal Register*, however, and under long established precedents, the publication of a regulation operates as constructive notice to the public of its contents. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

Decision

The controlling issue in this case is whether the Board has jurisdiction over a claim of mutual mistake not presented to the contracting officer for decision. Based upon the above discussion, the Board finds (i) that there was nothing in the claim letters submitted to the contracting officer to apprise him that a mutual mistake was being alleged; (ii) that in the circumstances there was no reason for the contracting officer to treat the claim submitted as involving a claim of mutual mistake; (iii) that the failure of appellant to submit a claim of

September 30, 1983

mutual mistake to the contracting officer for decision before including a claim so framed in the complaint filed with the Board represented a fundamental difference in the theory relied upon for recovery before the contracting officer and that relied upon for recovery before the Board; (iv) that not only the parties but also the Board are bound to adhere to published regulations affecting our jurisdiction;¹⁰ and (v) that proposing to amend the complaint to include the theories relied upon before the contracting officer, while retaining the theory of mutual mistake and advancing still other theories, is not a solution to the jurisdictional question presented, since one of the principal theories relied upon as a basis for recovery has not been presented to the contracting officer for decision as is required by a governing regulation.

So finding, the Government's motion to dismiss the appeal is granted and appellant's motion to amend the complaint is denied. The instant appeal is remanded to the contracting officer for decision on the basis of a record augmented to satisfy the requirements of 41 CFR 1-2.406.4. When new or supplemental findings are issued by the contracting officer, the contractor may, if aggrieved, again appeal to this Board within 90 days from the date of receipt thereof.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

DAVID DOANE
Administrative Judge

APPEAL OF STEPHEN J. KENNEY

IBCA-1438-3-81

Decided September 30, 1983

Contract No. 9-07-60-C0041, Bureau of Reclamation.

Sustained in Part.

1. Contracts: Construction and Operation: Estimated Quantities-- Contracts: Disputes and Remedies: Burden of Proof

In a unit price, estimated quantity contract, where the contractor made a prima facie case of the amount of work done as well as the reason for the discrepancy between its case thereon and the Government's and where the Government failed to rebut the contractor's case on the reason for the discrepancy, the Board found that the amount of work done was in accordance with the contractor's claim.

¹⁰ All of the decisions cited by the appellant in support of its position are readily distinguishable from the instant case, since none of them involved a published regulation affecting jurisdiction.

2. Contracts: Construction and Operation: Drawings and Specifications--Contracts: Construction and Operation: Intent of Parties

The Board found that the contractor reasonably interpreted the contract specifications to require that all materials, except solid rock, should be scaled and where such interpretation was communicated to Government personnel who acquiesced therein, the Board accorded minimal significance to a Government geologist's subjective intent for the rock scaling project (though corroborated by a drawing) not communicated to the contractor and in conflict with the contractor's interpretation of the specifications.

3. Contracts: Construction and Operation: Changes and Extras

The Board concluded that the Government should be allowed no offset for work done in an area outside the designated work areas in the contract when such outside work was directed by the Government's authorized representative to be performed by the contractor and the evidence showed that the directive was inarticulate and that the testimony of the Government witnesses with regard to excessive work, both as to type of material and geographic extent, was in conflict.

4. Contracts: Disputes and Remedies: Burden of Proof

The Board concluded that the Government failed to prove its contention that the contractor removed excessive material for safety reasons, whether by use of explosives or equipment, where the evidence established (1) that the contractor's equipment was incapable of moving solid rock and (2) that rock outcroppings first appearing to be solid turned out to be loose and that the less dangerous overall procedure adopted after such discovery was to blast such outcroppings when encountered.

5. Contracts: Disputes and Remedies: Burden of Proof

Where the evidence established that in the course of performance of the contract, the contractor, by blasting, removed some quantity of solid rock not compensable under the contract, the Board nevertheless found the contractor's evidence more persuasive than the Government's on the question of the quantity of solid rock removed and held the Government entitled to an offset against the compensable work performed measured by the quantity of solid rock removed proved in the contractor's case.

APPEARANCES: Mr. Bruce R. Toole, Crowley, Haughey, Hanson, Toole, & Dietrich, Billings, Montana, for Appellant; Mr. Gerald R. Moore, Department Counsel, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Appellant Stephen J. Kenney has filed this appeal claiming entitlement to \$358,747.43. Appellant originally presented a claim to the contracting officer (CO), requesting a total contract payment of \$1,078,430.43, representing component amounts on each of the five contract payment items. Three of the items totaling payment in the amount of \$12,500, were not and are not in dispute. The CO, in his decision dated January 5, 1981, allowed a portion of the remaining two claims and denied the rest. These items related to quantities of extra work allegedly done in compliance with the contract and Government directions and an additional amount for bonding corresponding to the amount of the additional work. Based on the following analysis, we conclude that appellant is entitled to relief.

September 30, 1983

Background

Respondent, Bureau of Reclamation (BOR), awarded an estimated quantity, unit price contract to appellant on September 28, 1979. The purpose of the contract was to remove (scale) certain rock and similar materials on a natural slope downstream from the Yellowtail Dam near Fort Smith, Wyoming. Near the canyon floor in front of the dam, there was located a stilling basin, which provided a facility for reducing the velocity of water flowing from the dam several hundred feet vertically above the canyon floor to the river below (Tr. 35). The site for the stilling basin was prepared by cutting perpendicularly down the toe of the slope mentioned leaving what essentially is a vertical cliff adjacent to the basin. Above this manufactured cliff the subject slope ran for a considerable distance until it intersected with another vertical face which constituted the rest of the natural canyon wall (Appellant's Exhs. 9, 14, 18, 20). BOR became aware that rock and other similar materials were falling down the slope and into the stilling basin. These falling materials presented the potential for a serious disruption in the normal operation of the basin and thus of the dam as well as a hazard to people working in or otherwise visiting the area (Tr. 168, 180). Looking for a solution to that problem, BOR focused on scaling the areas above the stilling basin and dispatched its regional geologist, Glenn Taucher, to the site to research that project. Ultimately, appellant was the low bidder and was awarded the contract, as mentioned. There were actually two invitations for bid, and appellant was low bidder both times. The reason for the second invitation was that the first bids were considerably in excess of BOR's estimate (Tr. 23):

What happened to the job concept between Mr. Taucher's research trip to the site and the award of the contract to appellant appears to be a significant factor affecting the current dispute. Mr. Taucher testified that BOR's purpose, *i.e.*, protecting the stilling basin and associated areas, could be accomplished by removing loose debris and detached boulders, largely by handscaling and the use of high pressure hoses (Tr. 169-70, 181, 184, 186-87). Mr. Taucher, however, had very little to do with drafting the specifications or otherwise contributing to the contract terms except for helping in the preparation of a drawing which became part of the contract and which purported to locate on the slope those areas to be scaled and of concern to BOR (Tr. 180-81; Appellant's Exhs. 18-19). In fact, the contract specifications departed significantly from what Mr. Taucher said *his* intent was for the job. Specifications Par. 2.1.2 "*Scaling Canyon Walls Above Spillway*" describes the work to be accomplished in language similar to that used in other scaling contracts in the canyon let over a period of years (Tr. 428; Appellant's Exh. 47). In pertinent part that language reads as follows: "The contractor shall remove large unstable boulders, talus,

detached or semi-detached masses of rock, and fine material and overhangs from the canyon walls inside the limits as shown on Drawing No. 3 [referred to above in connection with Mr. Taucher's intent for the contract] . . . or [as] directed * * * " (Appeal File, Tab A). There are, of course, other provisions of that paragraph which are of varying significance to this decision, but the most consequential part of the specification just quoted is this language: "*semi-detached masses of rock*" and "*overhangs.*" The inclusion of these words suggests a considerably expanded scope of work beyond that contemplated by Mr. Taucher.

Having never been made aware of Mr. Taucher's input until after the beginning of the present controversy, appellant, naturally enough, relied on its reading of the specifications just quoted to guide it in preparing its bid and method of operation. Appellant had worked in the area on many aspects of the Yellowtail Dam project, was generally familiar with the area, and in the course of preparing its bid conducted a thorough inspection of the site closely followed by an examination of the specifications (Tr. 22, 73-74). Afterward, appellant, with observations and conclusions born of this background, attended two preconstruction meetings, one in Billings and one at the site. On both occasions the CO and the CO's representative (COR) were present (Tr. 27-28). During these meetings, appellant passed along a number of items of information to BOR representatives that are important to our decision. Amongst them were: Appellant's conclusion that the contract estimate for the quantity of rock to be scaled, 2,000 cubic yards (c.y.), was "way low" (Tr. 25, this information was actually first transmitted to BOR personnel at a meeting called by them to assist in determining why their unit cost estimate for the first invitation was so much lower than the bidders'); that appellant intended to use power equipment in accomplishing the job (Tr. 28-29); and that appellant contemplated using blasting to break up large rocks to the size required by the specifications (Tr. 53-54, 77-78). The only hint of BOR objection to the proposed mode of accomplishment for the job was Mr. Stephen Kenney's feeling that some of the BOR people (before discussing the subject with appellant) may have had in mind a handscaling operation (Tr. 30).

The contract required completion of the scaling in time for the spillway to be available for use in the 1980 spring runoff. Although the notice to proceed was received by appellant on October 15, 1979, considerations of safety and weather made it necessary to delay the actual start of the project until March 1980.

Appellant began the operation, after protecting the stilling basin as required by the contract, by lifting three pieces of dirt-moving equipment to the upper reaches of the slope (Tr. 42-44). These were the smallest pieces of equipment made by the manufacturer (Tr. 41; Appellant's Exhs. 15, 16, 17); they were equipped with optional ripper teeth (Tr. 75). The plan and practice for the project was to operate the equipment horizontally across the face of the slope from upstream to

September 30, 1983

downstream and back, simultaneously bearing rock for ultimate removal and creating a bench as an operating surface for the equipment. When the equipment had carried the material to the upstream point of the bench where it could be dropped without falling into the stilling basin, the equipment pushed the material down the slope (Tr. 48-52). The material was then essentially dragged down to the toe of the slope by using a slusher bucket suspended on a cable and moved by a crane near the river's edge so that the material accumulated at a spot upstream from the stilling basin (Tr. 52-53). During the early part of the operation, appellant then loaded the material into trucks and moved it to the designated disposal site which was the river itself (Tr. 62-63). During that period the measurement of material taken off the slope for which payment was to be made under the contract ("pay dirt") was accomplished by counting truckloads of removed material and using an assumed number of cubic yards per load (Tr. 62). Later, however, the dam superintendent became concerned about the amount of material being placed in the river, and the parties then agreed upon an alternative method of disposal (Tr. 63-65). They decided that they would create a stockpile at the toe of the slope upstream from the stilling basin (Tr. 65; Appellant's Exh. 20).

Quite early in the operation, appellant identified an area on the slope which it felt should be scaled in order to protect the stilling basin in accordance with the spirit of the contract (Tr. 61; Appellant's Exh. 18). This area, denominated "Area X," was upstream from the stilling basin, that is it was not directly above it on a two-dimensional plane, and it was outside of the areas designated to be scaled under the contract. Because of the topography of the site, however, material falling from Area X, which was described as a prominent ridge topped by a 15-foot pinnacle (Tr. 338), would end up in the stilling basin. Appellant demonstrated this phenomenon to the BOR inspector, Lester Hunt, noting the presence of a good deal of material in Area X of similar composition to that in the designated scaling areas (Tr. 59-61). Mr. Hunt then authorized appellant to scale at least some portion of Area X.¹ Ultimately, BOR directed appellant essentially to tailor the operation so that scaling was to be finished in less than all of the areas originally designated, despite the fact that the result of the directive was to leave on substantial portions of the slope a considerable amount of the material described in the specifications as to be removed (Tr. 97, 100-01; Appeal File, Tab K). Appellant completed the scaling portion of the job on May 12, 1980, and BOR accepted the project as satisfactorily completed as of June 18, 1980.

¹ Although he described himself as the COR (Tr. 212), it is apparent that Mr. Hunt was not the COR (Tr. 324). He was, however, authorized by the CO to act as his representative in identifying areas to be scaled as contemplated by the contract (Appeal File, Tabs G and J).

Issues

There are four issues in this case, divisible into two categories. The first relates to the amount of material taken off the slope. Once that is settled, the second category of issues relates to how much of that amount is pay material. The second category then is directed toward resolving whether the amount so determined should be reduced for any, or a combination, in whole or in part, of three reasons in determining appellant's entitlement. Those reasons, which comprise the subissues raised by BOR under the second category, are:

- (1) Allegedly excessive material taken beyond directions in Area X;
- (2) allegedly excessive material taken solely to provide a stable surface for the operation of appellant's equipment;
- (3) allegedly excessive material taken from solid rock by explosives.

Discussion

The Amount of Material Taken Off the Slope

[1] Appellant alleged that 10,530 c.y. of material was removed while BOR contended that the correct figure was 9,852 c.y. Appellant offered proof of its total (as did BOR) and an explanation for this discrepancy. As noted, the initial mode of operation was to move the scaled material to a disposal area in the river, measuring the amount by the truckload. After the expression of concern by the dam superintendent that too much material was going into the river, appellant, upon direction, separated larger rock pieces to place over the other disposed materials as rip-rap and stockpiled them nearby the stilling basin for later placement over the material in the river (Tr. 63, 133). BOR took a cross section of this rip-rap rock stockpiled during the truckload measuring period and determined it to be 957.4 c.y. in size. The truckload quantity was determined by BOR to be 3,858.25 c.y. (Appellant's Exh. 27). Appellant accedes to both these measurements. There were also 68 c.y. of material lodged behind the wall of the stilling basin (Exh. 27), and to this figure appellant also accedes. There were two other items of BOR measurement going into its total: One was a substantial quantity of material *in* the stilling basin and the other was the amount placed in the (alternate disposal) stockpile area upstream from the stilling basin at the toe of the slope. Both were measured by cross section. Although appellant effectively proved that BOR's figure for the quantity of material in the stilling basin was substantially lower than the fact (Tr. 304-05, 310), it acceded to BOR's figure. That is ultimately inconsequential because appellant placed the material taken from the basin into the stockpile before taking *its* cross section thereof. Appellant's surveyor testified that he originally measured 5,886 c.y. in the stockpile (Tr. 121). This was approximately 3,700 c.y. more than BOR's measurement of the stockpile, which was 2,189 c.y. (Appellant's Exh. 27). We know that appellant placed the contents of the stilling basin in the stockpile after BOR's survey and

September 30, 1983

before its own. BOR's cross section of the stilling basin material indicated there was approximately 2,779 c.y. there, leaving a little over 900 c.y. unaccounted for of the 3,700 c.y. difference between the parties' respective stockpile survey figures. We also know that of the 957.4 c.y. of stockpiled rip-rap material, 201 c.y. were not used for rip-rap and were placed in the stockpile (Tr. 134-35). The BOR survey did not take that into account, leaving something a bit over 700 c.y. unaccounted for—approximately the difference between the parties respective final figures—9,852 c.y. and 10,530 c.y. As might be inferred from the foregoing, appellant explains the difference this way: BOR took its cross section of the stockpile on May 1; appellant's surveyor took his cross section on July 11 (Tr. 108); between those two dates, appellant added to the stockpile the contents of the stilling basin, 201 c.y. of rip-rap, and the additional amount taken from the slope between May 1 and the completion of scaling operations on May 12.² Adding the various components, including the July cross section, results in a figure far greater than BOR's and very much in line with appellant's.³ We conclude that by submitting the evidence just mentioned appellant established at the least a prima facie case that it removed from the slope the volume of material it claims.⁴ Appellant's case effectively refuted BOR's case for its figure, and BOR did nothing to refute appellant's. Although BOR's brief indicated that it still disputed appellant's figure, it failed to present any argument on the issue (BOR Brief at 2). For the foregoing reasons we find that appellant removed 10,530 c.y. of material from the slope.

² Actually the 700-yard difference or at least the bulk of it can be as logically explained by reference to the testimony of BOR's witness, Dean Edmisten (appellant's former foreman), regarding the amount of material removed from the stilling basin. According to the figures given in his testimony there were from 577 to 903 more c.y. in the stilling basin than the BOR cross section indicated. Appellant called into question the cross section calculation to a degree sufficient for us to incline toward crediting BOR's other witness' testimony (that is, Mr. Edmisten's) about the volume of material in the basin more than that of the surveyor who made the cross section calculation (Tr. 151-52, 163-65).

³ To make this clearer, consider the following recapitulation:

(1) Undisputed quantities:			
a.	Rip-rap stockpile.....	957.4	c.y.
b.	Truckload quantity.....	3,858.25	
c.	Lodged behind stilling basin wall.....	68.	
		<hr/>	
		4,883.65	c.y.
(2) BOR's additional quantities:			
a.	Cross section of material while in stilling basin.....	2,778.9	c.y.
b.	May 1 cross section of stockpile.....	2,189.4	
		<hr/>	
		4,968.3	c.y.
c.	Add total of (1).....	4,883.65	
		<hr/>	
		9,851.95	c.y.
(3) Appellant's additional measurements:			
a.	July 11 stockpile measurement.....	5,886.	c.y.
b.	Add total of (1) (without fraction).....	4,883.	
		<hr/>	
		10,769.	c.y.
c.	Deduct 201 c.y. (to avoid double-counting for that portion of rip-rap stockpile which eventually went into main stockpile).....	-201.	
		<hr/>	
		10,568.	c.y.

(Appellant's claim figure is 10,530 c.y. See note 4)

⁴ Arguably, appellant proved an even greater figure than that claimed. Using its surveyor's figure for the stockpile, it still totaled 33 c.y. more than its claim figure. The surveyor, however, testified that he detected a minor error in his calculations and that the proper figure was actually 33 c.y. more than the one appellant used in presenting its claim (Tr. 121). Although counsel for appellant was aware of these inaccuracies, he declined to amend the claim to take account of them (Tr. 121; Appellant's Brief at 4).

The Offsets

As noted, BOR contends that a large portion of the material removed should not be paid for because it is outside of the definition of "pay dirt" as described in the specifications. The total amount BOR would have us disallow is 2,806 c.y. (BOR Brief at 2). The reasons for the claimed disallowance, as mentioned, are three: (1) Excessive scaling in Area X beyond directions; (2) excessive material taken for safety reasons, especially to provide a stable surface for the operation of appellant's equipment; (3) excessive material taken by blasting.

Our first task is to determine what materials should be taken according to the contract. As might be inferred from the earlier sections of this opinion, we conclude that appellant properly scaled and should be paid for all material except solid rock. BOR's contentions to the contrary do not persuade us otherwise as will be seen.

[2] Mr. Kenney testified that he observed during his pre-bid inspection a substantial amount of "sheeting" on the slope in areas required to be scaled, and there is now in the area substantial evidence of "sheeting" in areas originally designated to be scaled (Tr. 54-55, 95-97; Appellant's Exhs. 22, 23, 24). "Sheeting" is a geological phenomenon the description of which comports with the notion of the "detached or semi-detached masses of rock" which were required to be removed according to the specifications (Tr. 426-27). BOR wants us to read the contract so that rock lying in "sheets" is not covered. To do this, we are asked to consider Mr. Taucher's testimony and drawing No. 3, prepared by Mr. Taucher, as we determine the meaning of the specifications. According to BOR, drawing No. 3 should be given weight, because the specifications refer to it and make it part thereof. Drawing No. 3, of course, sets out Mr. Taucher's estimates of volumes to be scaled from the designated removal areas of the slope, totaling 2,000 c.y. Also, Mr. Taucher's testimony is consistent with that estimate and inconsistent with appellant's interpretation (BOR Brief at 5-6). We have already treated Mr. Taucher's testimony and essentially characterized it as inconsequential because the contract contains a much different performance standard from that expressed by his testimony, except to the extent that Mr. Taucher's intent for the contract affected drawing No. 3 which indeed is a part of the specifications. Nevertheless, by acceding to appellant's assessment that

September 30, 1983

the estimated quantity of material to be scaled was too low, BOR also rendered drawing No. 3, so far as it sets out component estimated quantities, to be of no consequential effect. Concerning this situation, it can be said that the drawing and the specifications' wording, when juxtaposed, created an ambiguity as to what the contract's purpose was. In such circumstances, any reasonable interpretation of the contract will be allowed. Unlike the usual situation where we are called upon to measure the reasonableness of a contractor's interpretation after the fact, here appellant effectively pointed out the inconsistency before performance began by telling BOR that he intended to use equipment to scale the "sheeting" layers and that the estimated quantity was out of line with reality. By failing to object, BOR gave the impression that it acquiesced in appellant's interpretation of the contract terms. Moreover, whatever might be said about BOR's efforts at communication with appellant during performance, we can tell that the inspector was not concerned with appellant's scaling semidetached rock, e.g., "sheeting" layers, but with solid rock. Given these facts, it is simply too late to accord any significance to Mr. Taucher's intent for the job or even to the estimated quantities presented on drawing No. 3, except to the extent that it provides some reason for the attempted disallowance of as much volume as possible.⁵ Our conclusion that the contract called for removal of all material except solid rock is of importance to our consideration of the issues of excessive scaling for safety reasons and by reason of blasting but is of lesser importance on the Area X issue.

Area X

BOR's brief on the Area X issue seems to indicate that the inspector, Mr. Hunt, identified Area X as requiring scaling and told appellant to remove only "loose material" therefrom. It further indicates that the testimony on the latter proposition is uncontradicted (BOR Brief at 10-12). As has already been discussed, it was in fact appellant who suggested that Area X should be scaled. Also, testimony on the material to be scaled cannot properly be described as uncontradicted. Mr. Kenney testified that the direction was to "take that point [the ridge comprising Area X] down" (Tr. 61). Given the quality of BOR's attempts at communication with appellant during performance generally (to be discussed later), we are inclined to find Mr. Kenney's testimony on this issue to be the more credible, but there are other factors which are corroborative of that conclusion and which strengthen it. For instance, BOR argues that it was obvious that appellant had exceeded Mr. Hunt's direction "[o]nce the contractor completed scaling" (BOR Brief at 11), the implication being that it was

⁵ We note that during the pendency of the first invitation for bid, BOR issued a supplemental notice which had the effect, amongst others, of changing the estimated quantity of materials to be scaled from 13,000 c.y. to the current 2,000 c.y. (Appeal File, Tab A). Neither party came forward with testimony or argument to explain this change.

impossible to make that observation earlier. What troubles us about that is that if Mr. Hunt were as positive of the extent of Area X and of the nature of the material he authorized appellant to remove as he testified he was, the fact of appellant's exceeding instructions would have been extremely obvious during performance, and that should have led Mr. Hunt to be explicit in explaining to appellant its apparent error. (Neither Area X as Mr. Hunt now views it nor the same area as appellant viewed it was a physically small area susceptible of difficult-to-detect slight overwork. It also was not an area that was worked in a relatively short amount of time. In fact, Mr. Hunt estimated that by his instructions, appellant should have scaled about 200 c.y. of material (Tr. 216), but the CO disallowed 639 c.y. of material scaled because of excessive work in Area X (Appeal File, Tab R), a difference, especially given the magnitude of the original estimate, that implies that even a casual observer would plainly see that appellant was doing much more than Mr. Hunt says he authorized). In these circumstances, we find it inexplicable that Mr. Hunt was unaware of any excess work. Such an awareness would carry with it the obligation to inform appellant of its error. The fact that he did not so inform the appellant (Tr. 257-58, 260) is consistent with the notion that he had no objection to the way appellant was doing the work and with appellant's contention that it was told to "take that point down." Also, Mr. Hunt persisted in saying that his only instruction was to scale "loose material"; he neither issued any written order nor specified how deep to scale nor any other particular dimensions (Tr. 256). It seems unlikely that the inspector would issue such a laconic instruction without some questioning by appellant, but Mr. Hunt testified to none. This tends to make more improbable Mr. Hunt's silence during operation if he thought appellant's efforts were causing excessive material removal. We believe that whatever Mr. Hunt now thinks that he told appellant about the nature of the material to be scaled in Area X, it was in fact ineffective to give appellant any idea other than that it was expected to scale Area X in the same manner that it was scaling the designated areas on the slope.

That conclusion answers only one question about the Area X operation. We now know that appellant reasonably believed he was to take the same materials from Area X as the contract required to be taken on the rest of the slope, but we do not know the geographical extent of Area X. Again, we have the "take that point down" viewpoint of appellant applying to extent as well as to the types of material to be taken. Thus, appellant contends that it believed that the entire ridge should be removed. BOR contends that Mr. Hunt wanted only the downstream portion of the ridge scaled. Appellant has characterized this position as nonsensical, because removing a uniform layer of that portion of the ridge on the downstream side of the pinnacle would leave a downstream slope with the same pitch as the original slope, thus posing the same danger in regard to material in the area falling into the basin. Another BOR witness, Kurt Groepler,

September 30, 1983

BOR engineer, testified to his understanding of Mr. Hunt's authorization in a way that could be interpreted as requiring appellant to make what amounts to a vertical cut at the pinnacle of the ridge and remove material downstream of it (Tr. 337-39). This position makes even less sense in terms of the basin's safety than Mr. Hunt's position, especially in view of the testimony of appellant's expert witness on the current state of affairs. The expert, Dr. Reichmuth, testified that the present contours of the Area X portion of the slope, that is after appellant removed the ridge, are still such that any material falling in that area would end up in the basin, with few exceptions (Tr. 456-57). If the unstable material of the ridge were removed and its pitch substantially flattened, as has been the case, and material lying on it would still fall into the basin, then it stands to reason that loose material remaining in the area with an essentially unchanged or steepened pitch, which describes the two BOR positions, would present a greater danger. All of this establishes that if Mr. Hunt's directions were as he said they were, they were unreasonable, but it does not establish that he did not issue such unreasonable instructions, although it is corroborative of appellant's evidence of its understanding of the instructions.

There are two other factors which similarly support appellant's position. First, as in the prior question of what kinds of material appellant was to remove, it was obvious during performance that appellant was scaling an area larger than what Mr. Hunt now says he instructed appellant to scale, but there was no notice given to appellant to that effect. Second, there is considerable confusion amongst BOR witnesses about the extent of the area covered by Mr. Hunt's instructions, causing us to question the reliability of Mr. Hunt's recollection about what precise terms he used in his instructions. For instance, Mr. Hunt identified an area downstream and thus outside of his interpretation of the limits of Area X where appellant was "shooting tights," which is pertinent to another issue discussed later. This "tights" area is in a draw or natural water course slightly upstream from the original designated scaling area and identified by Mr. Hunt as being outside of Area X by his instructions (Tr. 245-46; Appellant's Exh. 20). We know, however, that the water course area had no evidence of the sheeting phenomenon on it, because passage of water over many years had actually removed some of the solid rock which was under the sheeting plane on other areas of the slope where sheeting occurred (Tr. 440-41, 453-54). Therefore, there was little material to scale in the area. Nevertheless, Mr. Groepler's interpretation of the proper limits of Area X extended to and included this water course (Tr. 337; Appellant's Exh. 18). He testified, however, that appellant exceeded Mr. Hunt's limits by going both too far downstream and too far upstream of them (Tr. 340-41). Directly abutting the Area X boundary on the downstream side according to

Mr. Groepler, is the upstream limitation of the original designated scaling areas (Appellant's Exhs. 18, 19). Thus, we have one BOR witness saying that his view of Area X's limits are considerably downstream of another witness' and that appellant over-scaled by going downstream of that limit right into a designated scaling area.

[3] Given the foregoing circumstances, we conclude that appellant reasonably believed that its instructions were to remove from the entire ridge of Area X the same materials he was required to scale from the rest of the slope and that if Mr. Hunt intended to convey a more restrictive authorization than that, he did so in a manner insufficiently articulate so that appellant would not be dissuaded from the reasonable interpretation he put on the instructions he received. We therefore further conclude that there should be no reduction in the total amount of pay dirt by reason of appellant's excessive efforts, if any, as to type of materials or as to geographical extent, in Area X.⁶

The Safety Factor

[4] The essence of BOR's contention about excessive material taken for safety reasons is that appellant required a certain width of shelf on which to rest at least one track of the equipment to assure that it would not slide down the slope (BOR Brief at 18-19). According to BOR, there were a number of places on the slope where the bench of loose material appellant used to serve that purpose generally simply was not wide enough to do so. In those places, appellant created a shelf by cutting into solid rock either by blasting or by using the ripper-equipped earth-moving equipment. Mr. Hunt described these areas by the term "tights" meaning a solid ledge or outcrop which presented an obstacle to continued normal passage of the equipment (Tr. 237).

To support its contention, BOR relies on Mr. Hunt's observations and its Exhibit G. Mr. Hunt's observations (apparently) consist primarily of his recollections regarding appellant's blasting when it encountered "tights." Mr. Hunt visually estimated the amount of material being shot to eliminate "tights" and kept a record of them in his daily log, amounting after recapitulation to 360 c.y. (Tr. 232-42; Appellant's Exh. 5). The photos in its Exhibit G, according to BOR, depict an example of the shelf cut out of solid rock to provide solid footing (BOR Brief at 18).

Appellant contends that although it was necessary to have solid footing for safe operation of the equipment, it was almost totally unnecessary to cut into solid rock to create it. Some of the best evidence of that is the testimony of Dr. Reichmuth who said that the evidence was absolutely clear that appellant did not cut into the solid rock in the natural water course (just upstream of the original designated areas) yet was able to move back and forth across that area by developing the same kind of bench of loose material despite the

⁶ BOR also contended that some of the blasting resulting in removal of solid rock took place in Area X as well as the designated scaling areas. The section of the discussion just concluded does not treat that contention. It will be treated in the discussion section on blasting generally.

September 30, 1983

relative absence of such material in the water course area itself (Tr. 453-55). (Dr. Reichmuth used that as an example of the lack of need for cutting into rock on the slope generally--if appellant could get across a large area like the watercourse where there was relatively little loose material by bringing along loose material from other places, then it could similarly get around any outcrop of solid rock of the size described by Mr. Hunt's term "tights.") Also, appellant contends that BOR's characterization of the significance of Exhibit G is erroneous (Appellant's Reply Brief at 18).

Thus, we have a classic deadlock, appellant attempting to refute BOR's contention with solid evidence of its own. Yet we know that blasting was allowed for breaking up masses of rock to a specified maximum size and that appellant used explosives. We also know that appellant used power equipment fitted with ripper teeth.

We can eliminate one of the subissues easily. BOR makes only incidental reference to its position on use of the equipment in that portion of its brief dealing specifically with the safety/"tights" issue (BOR Brief at 18), but it more directly challenges the use of that equipment in the general prefatory portion of its brief (BOR Brief at 6-8). The implication is that by using equipment as it did, appellant necessarily scaled material other than "pay dirt." Given our earlier conclusion that only once-solid rock should be excluded from the designation "pay dirt," we reject the result of that implication. The evidence indicates that equipment of this minimal size, with rippers attached, accomplishes only more efficiently and more quickly what could be done manually. Even much more powerful equipment cannot move solid rock (Tr. 75-77). We conclude therefore that appellant's use of its equipment had no direct effect on any nonpay material taken.⁷

We have not resolved the problem on the use of blasting to facilitate use of the equipment, however. Initially, we can agree with appellant that BOR had mischaracterized the import of its Exhibit G. The photos in Exhibit G depict a bench 4 feet to 6 feet wide (Tr. 227). It is apparent, however, that this is a unique phenomenon on the slope with no other area resembling it. It was created to facilitate the erection of

⁷ In its brief, BOR cited our decision in *Steenberg Construction Co.*, IBCA 520-10-65 (May 8, 1972), 79 I.D. 158, 72-1 BCA par. 9459, for the proposition that the "Government was not liable for over excavation beyond neat lines reflected in contract drawings * * * [resulting] from the contractor's selection to use heavy equipment where lighter equipment was preferable and adequate" (BOR Brief at 8). The distinctions between that case and this are numerous. For instance, except for Area X, which was never reflected in drawings anyway, we do not read BOR's argument to be that appellant's use of equipment caused it to excavate beyond any "neat lines" shown on drawings; BOR's contention is that appellant scaled deeper than it needed to, not that it scaled more extensively than directed. Our construction of the contract to disallow solid rock volume from the pay material classification takes that contention into account. Also, here there was no lighter equipment available that could be viewed as adequate and preferable. To the logical extension of the *Steenberg* holding that another method of scaling, though not including the use of lighter equipment, might be adequate and preferable and thus supportive of a finding that any excess material scaled by the selected method above what would have been scaled by the "preferable" method should be disallowed, we respond that there has been no showing that such a "preferable" method existed and, in particular, note Mr. Hunt's testimony that appellant's chosen method "was possibly as good a way and probably more effective than any other method you could use" (Tr. 246-47). Finally, to hold *Steenberg* applicable, we would need to find the use of equipment to result in excess scaling. As the text makes clear, we cannot make that finding where, as here, we have construed the contract's pay material provision as we have.

a protective fence which was another component of the contract. According to Mr. Hunt, the material taken to create this bench was not solid rock but was loose talus and there was no disallowance for material taken from that area (Tr. 260-61). Another BOR witness, Mr. Edmisten, testified that in the early going appellant encountered what appeared to be rock outcroppings. Working around and leaving them, appellant consistently found that their apparent character changed when it moved down the slope and scaled beneath them. At that point what had appeared to be solid had apparently become loose. If it were loose, of course, it posed a significant danger to the men working below it as well as to the stilling basin. As a result, appellant pushed or backed up on the outcropping with its equipment (a hazardous practice itself), and the material composing the outcropping invariably came down. After several experiences of this nature, described as "mistakes," appellant changed its mode of operating so that when it thereafter encountered such outcroppings, it blasted them then rather than employing the prior more dangerous method of removing what had inevitably turned out to be loose material whenever the operations left them and proceeded below them (Tr. 300-01).⁸ We conclude that BOR has failed to prove that any disallowance should be made for material removed, whether by use of explosives or equipment, to facilitate use of the equipment.

Blasting to Remove Solid Rock

As noted, a question about excessive blasting pervades all three of the offset category issues. BOR contends that appellant blasted solid

⁸ A principal feature of appellant's case and argument is that appellant received very little instruction on its operation day to day despite repeated requests for some and thus proceeded as well as it could in the absence thereof (Appellant's Brief at 9; Appeal File, Tabs E and F). BOR has a quite different view of things, implying that Mr. Hunt's communications were frequent and restrictive, particularly regarding excessive scaling because of the removal of "tights" (Tr. 6-7). Our review of the evidence leads us to the conclusion that the pattern of inspector's communications was less than exemplary. Mr. Hunt testified that he had conversations with Mr. Edmisten about excessive rock in tights being taken on two or three occasions (Tr. 278), about blasting to remove tights on two or three occasions (Tr. 218), or about excessive blasting generally throughout the slope on two occasions (Tr. 273). The context of this testimony makes it evident that Mr. Hunt was talking about the same conversations in each of these three incidents. He also indicated that his conversations about excessive blasting was occasioned by excessive fly rock being occasionally caused by blasting (Tr. 273). Nevertheless, he kept no record of any such conversations in his daily log (Tr. 260). Regarding Area X, he felt there was excessive material being scaled but failed to communicate that while logging truckload quantities at the same time with no offset for nonpay material (Tr. 258). He told Mr. Edmisten that he was keeping a record of nonpay material and he testified that Mr. Edmisten understood (Tr. 275, 278). He also had one conversation (Tr. 262) or "no more than two or three" (Tr. 273) with the job superintendent, Mr. Kenney, during the performance period. This or these were about the need for a stable area for operation of the equipment.

It is clear that appellant concluded that there was no solid rock removed to create a safety bench for operation of equipment (Tr. 536-38), so Mr. Hunt's conversation before the operation began (the single conversation with Mr. Kenney at Tr. 262) that appellant *would* take nonpay material is of marginal significance. Moreover, his conclusion that Mr. Edmisten "understood" that appellant would not be paid is contradicted by Mr. Edmisten's testimony. He recalled that he seldom made log entries of conversations with Mr. Hunt, because the bulk of their communications were of no significant moment (Tr. 288). He did recall that Mr. Hunt expressed an opinion about excessive "tights" removed but Mr. Edmisten said that that was merely a start for a conversation in which Mr. Edmisten took the contrary position (Tr. 288-89).

We thus must measure the quality of BOR's communication effort with the following as background: (1) A lack of clear recollection of the number and the nature of Mr. Hunt's communications; (2) a meager number of meaningful conversations, if there were any, regarding excess material; (3) a failure to make a record of any communications as should be expected if they were considered important at the moment; and (4) a failure generally to log disallowed quantities or at least specifically to inform appellant of what *was* logged. Given this background, the most we can say about BOR communication here is that it was little more than infrequent expression of concern that too much scaling might have been going on. We cannot say that it was forceful and positive enough to put appellant on notice that its methods were unsatisfactory or that it was scaling excessive material.

September 30, 1983

rock in Area X; it also contends that appellant blasted on a number of areas of the slope to facilitate safe equipment operation; and beyond those two points, it contends that there was still more excessive blasting. BOR does not advance a supposed reason for appellant's excessive blasting in this third category (nor for Area X), as it did for the safety/"tights" excess, but it need not in order to prevail. We are not concerned about reasons here but with whether appellant blasted solid rock and, if it did, the proper measurement of the quantity so taken.

There are a number of items of evidence about blasting. For instance, when Mr. Hunt made his estimates about how much material was removed by reason of blasting "tights," he totaled 360 c.y. (Appellant's Exh. 5). We have already decided that appellant's blasting "tights" had nothing to do with solid rock, but this estimate is potentially instructive, because we know that less than all the blasting was done to remove "tights." Also, another BOR witness, Mr. Edmisten, an experienced powder man, testified that there was only a small amount of blasting considering the total amount of material taken off the slope and that the removal by blasting certainly amounted to no more than 5 percent of the total (or something less than 530 c.y. of any kind of material whether or not previously solid) (Tr. 307). Although these two items of evidence could hardly carry a party's burden on the issue, they are corroborative of the parties' respective positions on the measure of solid rock removed by blasting, Mr. Hunt's testimony being tangentially corroborative of BOR's position, and Mr. Edmisten's position being corroborative (but closer in correlation) with appellant's.

The principal items of evidence we must weigh, however, are those of BOR's engineer, Mr. Groepler, and appellant's expert, Dr. Reichmuth. For a variety of reasons, explored below, we find Dr. Reichmuth's testimony to be the more convincing and accordingly conclude that BOR failed to carry its burden of proving an offset because of blasting solid rock, at least in major part.

Where a contractor has made a prima facie showing of the total amount of work done and the Government contends that some of that work is not compensable under the terms of the contract, it is the latter's burden to prove that such noncompensable work was done and how much. That is never an easy burden to carry, and it is even more difficult here where the Government did very little, if anything, to measure nonpay materials during the operation and thus must prove its case by reconstructing prior events. Nevertheless, BOR has attempted to do that reconstruction but has, in our view, run afoul of all of the disabilities and frailties innate in such a reconstruction attempt. For instance, BOR had to rely on a number of assumptions and estimates to prove the quantity of offset it claimed, as a result of having to infer certain matters from postoperation evidence, because it

simply could not prove directly the facts upon which it would have preferred to rely. Also, ultimately, it was shown that less than all of the assumptions had a valid, objective, scientific basis. Each assumption and each estimate make it increasingly difficult to accept BOR's final conclusion, so that it would be difficult to say whether, by itself, BOR's case constituted a prima facie showing of its contention. In any event, appellant's evidence effectively rebutted BOR's. Our analysis follows.

To begin with, BOR plotted every powder shot hole it found on a semitransparent chart representing that portion of the slope scaled (Appellant's Exh. 36; see BOR Exh. J). For purposes of computation, Mr. Groepler then divided the slope so represented into a number of more or less rectangular sections (as well as certain other areas representing the blasted portions of Area X and others). Then using a depth estimated by use of certain assumptions about the blasting (to be discussed later) and a width and length derived by reference to the sides and ends of the rectangles so charted, Mr. Groepler calculated the volume of rock removed by blasting. Our initial view of exhibit 36 causes our first question about the calculation. There are very few shot holes plotted near the bottom of the rectangles and thus of the slope represented and relatively few near the top. Most of the shots are clustered in the lower to the lower middle portions of the rectangles. (In fact, on the approximate half of the chart representing the downstream portion of the job, there are generally so few shots located as compared to the upstream half that the term "clustering" is not appropriate.) Despite this bunching of shot holes, Mr. Groepler used the full length of the rectangles as one of the dimensions to determine volume. Having considered that, we assumed, for argument, that Mr. Groepler's characterizations of the bunched shot holes as being for unnecessarily removing solid rock was correct and then questioned whether the more isolated shots on the upper reaches of the rectangle were indications either of places where large boulders or rock masses were blasted down to size, which was permissible, or of places where appellant encountered "tights" for which we have decided no disallowance should be made. Mr. Groepler's calculations took no account of either possibility (Tr. 386-87).

Another difficulty is Mr. Groepler's computation of the depth of each shot hole. He used a factor of 1.5 of the depth of the average powder hole to determine the length of one of the legs of a triangular plane corresponding to the hole shot in the slope (Tr. 377-78; Appellant's Exh. 35). The basis for that factor was his own observations of blasting in solid rock and, at first, textual authority (Tr. 382). He later testified from textual material which failed to support the factor directly (Tr. 402-04). He also admitted that his calculations, by using a depth measured perpendicular to the plane of the earth's surface rather than one measured perpendicular to the pitch of the slope, represented a 24 percent error against appellant (Tr. 374). To these and other questions about his assumptions though,

September 30, 1983

Mr. Groepler repeatedly took the position that to the extent that his assumptions and calculations were speculative they were nevertheless based on a logical sense of fairness to both sides and on good averages (i.e., Tr. 380-81). Using a similar line of reasoning, Mr. Groepler, after reaching his total of solid rock in place, used a bulking factor of 1.75 to determine the volume after blasting. This was reached by taking the midpoint of the two limits of bulking factors found in a textual table, being 1.5 and 2.0 (Tr. 387-88).

Regardless of the problems we have with BOR's position respecting quantity, as may be seen from the foregoing, we are also well aware that indeed many powder shots were located in solid rock (BOR Exhs. K, L, M). Mr. Groepler's calculations were based on the assumption that they were located in solid rock and that the slope above them ran at a uniform pitch with a uniform depth of sheeting layer. Appellant does not dispute this for practical purposes but does dispute the conclusions and calculations BOR derived from it. One portion of its rebuttal case presents an explanation for how shot holes could be placed in solid rock without the subsequent blast breaking up as much *solid* rock in this slope as Mr. Groepler calculated. Dr. Reichmuth presented an exhibit which he had prepared and about which he testified. On the exhibit (Appellant's Exh. 12), which is a transparent recreation of exhibit 36 with shot holes on the slope plotted, Dr. Reichmuth showed how the great majority of shots were arranged in one of several neat lines. Noting that these lines were more or less parallel with contour lines on the slope and referring to the photographic exhibit 41 as further support, he presented his theory that the sheeting surface was controlled and caused to bulge in a somewhat predictable pattern down the slope, in what we infer to be a natural phenomenon. This, then, according to the theory, would explain why appellant blasted as and where it did, penetrating through the abnormally thick sheeting layer and into solid rock. Using Mr. Groepler's dimensions for the average hole depth then, Dr. Reichmuth determined the area of a triangular plane conforming to the approximate shape of a blasted cavity and multiplied that figure by the total length of all the lines drawn on the exhibit parallel to contour lines. The result of this calculation was that a maximum of 38 c.y. of rock had been removed by blasting (Tr. 478-83). (Actually, Dr. Reichmuth said that a more reasonable figure would be 20 c.y., because his calculations took some of Mr. Groepler's assumptions into account, and he felt that the assumptions were not totally reasonable (Tr. 483).)

Dr. Reichmuth's calculations and theory are more persuasive than Mr. Groepler's, largely because they figure volume of rock removed according to where blasted rather than essentially all over the slope despite the fact that most areas were apparently unaffected by blasting. Nevertheless, despite the fact that Dr. Reichmuth's

calculations comport more closely with what evidence we do have about what course the operation took, namely testimonial evidence from Mr. Kenney and Mr. Edmisten, his testimony is, like Mr. Groepler's, based on a reconstruction of what happened during the job. Other testimony by Dr. Reichmuth, however, provides us with something more concrete in determining the amount of solid rock removed.

Dr. Reichmuth is a leading expert in soil mechanics and rock physics with a rich background from both a scholarly and practical viewpoint in the scientific aspects of this case (Tr. 422-25). Relying on his expertise and exhibit 45, the "duPont Blasters' Handbook," described as one of the best known references for blasting, he testified that the absolute maximum volume of rock that could be blasted by the amount of explosives used on this job is 359 c.y. He reached that figure by taking the number of pounds of explosives (he acknowledged that his calculations used 200 pounds when the actual total amount used on the slope was 212 pounds) and multiplying that by an explosive ratio of .25, taken from exhibit 45. The explosive ratio used, when interpreted, means .25 pounds of explosives will blast 1 ton of rock. By working that computation and dividing the number of pounds of rock so derived by the number of pounds in a cubic foot, he was able to obtain the volume mentioned (Tr. 475-79). He further testified, however, that that explosive ratio of .25 is the optimum one, available only in ideal circumstances. A more nearly accurate ratio for this job is 1.0 (or 1 ton of rock blasted for each 1 pound of powder), given the less than ideal circumstances of low poundage of powder per hole, small depths of holes, etc. (Tr. 475, 507-08). Thus, the theoretical, ideal computation of 359 c.y. should be reduced by a factor of 4 to reach a reasonable practical limit of 100 c.y. of rock that could be blasted by the amount of powder used, "which gives [BOR] a little bit," according to Dr. Reichmuth (Tr. 508-09). BOR attempted to discredit Dr. Reichmuth's testimony by recalling Mr. Groepler in rebuttal. He testified that insofar as the textual material Dr. Reichmuth relied upon was based on experiments done on a flat plane, it had little relevance to the amount of rock that could be blasted on an incline as prevailed in this case (Tr. 521-22). On surrebuttal, however, Dr. Reichmuth effectively undermined that testimony by declaring that in blasting the explosive force of the ignited powder so overwhelms any gravitational force that any difference in the pitch of the plane of the blasted surface "has really no significance" (Tr. 526-27).

[5] To review then, we have found that *some* solid rock was removed by appellant during the project, but all of the evidence on the proper measure of that rock has been theoretical. The weakness of Mr. Groepler's computations as compared to Dr. Reichmuth's has been shown, but even the latter, because also based on a reconstruction, still leaves undetermined the precise amount of solid rock blasted. Dr. Reichmuth's testimony on the mechanics of blasting in solid rock, however, is convincing and at least provides a secure grasp on the limit

September 30, 1933

of solid rock that could be blasted by the amount of powder used in these circumstances. Although it is BOR's burden to prove the offset it claims, it need not do so by reference to only its own evidence. BOR has shown us that some solid rock was blasted, and, although appellant's evidence on the amount blasted was the better and although the more reliable part of that presented merely a limit, BOR may use that evidence to make its case. For lack of a more secure basis, in such circumstances, we find that appellant removed 100 c.y. of in-place solid rock by blasting.

The bulking factor, however, still presents a question. As mentioned, Mr. Groepler used a 1.75 factor, being the mid-point between two possible limits. Dr. Reichmuth, on the other hand, relied on three sources to testify about the bulking factor. Two textual references gave a bulking factor for limestone (the type of solid rock on the slope) of 1.52 and 1.57, respectively, while his own tests of a sample of the slope material yielded a result of 1.54 (Tr. 491-92). These authorities, being so consistent with one another, provide the better evidence on the issue, and we find therefore that the proper bulking factor is 1.55, being an admittedly arbitrary approximate average. Thus, BOR is entitled to an offset against the entire amount of material removed of 155 c.y.

One final item is the amount of the bond. Appellant contends that the amount of the bond premium to become payable by BOR corresponds to the proper amount to be paid for the rest of the contract as determined in this decision (Appellant's Brief at 1). BOR has not disputed this contention. It is also undisputed that appellant paid \$12,939.43 for its bond and that the rate it paid was \$12 per thousand dollars of work done (Appeal File, Tab A). Since we find that appellant is entitled to be compensated for work done on the contract in the amount of \$1,050,000 (see Recapitulation below), we also find that it is entitled to \$12,600 for its bond premiums.

RECAPITULATION OF QUANTUM

1.	3 undisputed portions of contract.....	\$12,500
2.	Rock scaling (10,530 c.y. less 155 c.y., or net of 10,375 c.y. @ \$100/c.y.)	1,037,500
3.	Bond.....	12,600
4.	Total due on contract	\$1,062,600
5.	Less prior payments (Appeal File, Tab R) ⁹	719,692
6.	Amount due appellant	\$342,908

⁹The CO's decision appealed from indicates that appellant was entitled to \$724,680.50 total on the contract, but appellant has consistently maintained that it received the figure on line 5 above. Insofar as BOR has not contradicted that contention, we have accepted the lower figure as the proper one for purposes of the recapitulation.

Therefore, we grant appellant's appeal, in part, to the extent of \$342,908, plus interest to be computed in accordance with the provisions of the Contract Disputes Act of 1978.

DAVID DOANE
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Administrative Judge

WILLIAM F. MCGRAW
Chief Administrative Judge

GEORGE ANTUNOVICH, JOHN E. CURRAN

76 IBLA 301

Decided *October 19, 1983*

An appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring mining claim N MC-35041 null and void ab initio.

Affirmed.

1. Mining Claims: Lands Subject to--State Grants

Land which has been granted and approved to a state without a reservation of minerals to the United States is not available for the location of mining claims, and a mining claim located on such land after it is so conveyed is null and void ab initio.

2. Conveyances: Generally--Mineral Lands: Determination of Character of

A conveyance for public lands carries with it an implied affirmation of every necessary prerequisite. After the Secretary of the Interior has decided that any particular land is not mineral in character and has approved conveyance thereof on that basis, the transfer of title is not vitiated by the subsequent discovery of minerals.

3. Mining Claims: Lands Subject to--State Selections

The final approval of a list of state selected lands ended the Department's authority to resolve conflicting claims to those lands, including its authority to recognize the validity of mining claims situated thereon.

4. Conveyances: Generally--State Grants

While the Secretary of the Interior may recommend appropriate judicial action to cancel a conveyance and regain title if the circumstances warrant, a stranger to any prior claim or interest has no standing to seek cancellation of a state grant.

APPEARANCES: John E. Curran, for Antunovich and Curran.

October 19, 1983

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

George Antunovich and John E. Curran (Antunovich and Curran) appeal from a June 13, 1983, decision of the Nevada State Office, Bureau of Land Management (BLM), declaring mining claim N MC-35041 null and void ab initio.

George Antunovich located Gold Star mining claim, N MC-35041, on August 25, 1969, in the N 1/2 NW 1/4 of sec. 6, T. 16 N., R. 21 E., Mount Diablo meridian, Storey County, Nevada. His notice of location was recorded on August 29, 1969, and filed with BLM on October 16, 1978. Proofs of labor submitted for 1978 to 1982 list Jack Curran as part owner in this and adjacent claims located by Antunovich. In a notice dated June 13, 1983, concerning mining claim recordation, BLM informed Antunovich and Curran separately that, while those portions of their claims located on public lands were properly recorded, portions thereof were located on private lands not subject to mineral entry.¹ In its decision, also dated June 13, 1983, BLM declared null and void the Gold Star claim because it was located entirely on land transferred out of Federal ownership prior to location. After reviewing records for the land on which the Gold Star claim is located, BLM had determined that the W 1/2 of sec. 6, T. 16 N., R. 21 E., Mount Diablo meridian, was conveyed to the State of Nevada pursuant to the Acts of July 4, 1866, and June 8, 1868.

[1] Mining claims may be located only on lands open to the operation of the United States mining laws. The Mining Law of 1872, 30 U.S.C. § 22 (1976), stipulates: "Except as otherwise provided, all valuable mineral deposits *in lands belonging to the United States*, both surveyed and unsurveyed, shall be free and open to exploration and purchase." (Italics added.) Land which has been conveyed to a state without a reservation of minerals to the United States is not available for the location of mining claims and a mining claim located on such land after it is so conveyed is null and void ab initio. *Don P. Smith*, 51 IBLA 71 (1980); *John F. Drobnick*, 41 IBLA 164 (1979). Notwithstanding their assertion that the land has been used for

¹ BLM's notice was issued in reference to the following mining claims:

Blue Star—N MC-35033
 Morning Star—N MC-35034
 Evening Star—N MC-35038
 Western Star—N MC-35043
 South Star—N MC-35044

The private lands located upon which are not subject to mineral location were listed as: W 1/2 E 1/2, W 1/2 sec. 1, T. 16 N., R. 20 E., Mount Diablo meridian; those lands within MS 37, sec. 36, T. 17 N., R. 20 E., Mount Diablo meridian; W 1/2 sec. 6, T. 16 N., R. 21 E., Mount Diablo meridian.

Although the BLM notice advised that the claims are "located on private land which is not subject to mineral location," there was no adjudicative holding by BLM that the claims are null and void, and no right of appeal was provided. Only the Gold Star claim was the subject of the formal decision declaring the claim void. Nevertheless, appellants have appealed the statements in the notice as well as the decision invalidating the Gold Star claim. Accordingly, we have limited our review to a consideration of the decision concerning the Gold Star claim, although we have addressed all of the allegations presented by appellants in support of their appeal.

mining purposes for over 100 years, claimants' location in 1969 is the date which we must consider as controlling in a determination of when claimants may have gained an interest, if any, in the land located.² Accordingly, since the land had been granted to the State of Nevada prior to their location efforts, BLM was without authority to recognize the claim.

This appeal is one wherein the conditions precedent to transfer of the land is questioned by those whose only claim to the land was initiated nearly 90 years after it was granted and approved pursuant to statute. Appellants argue that the subject parcel of public lands was transferred contrary to the intent of Congress to exclude from selection all lands mineral in character. They allege that the mineral character of the W 1/2 of sec. 6 was established prior to the grant by its continuous use for mining purposes and refer to "Various Patented Mining Claims over portions of the West one-half of Sec. 6."³ They seek revocation and annulment of the grant of the subject land to the State of Nevada.

[2] In the Act of July 4, 1866, 14 Stat. 85, titled "*An Act Concerning Certain Lands Granted to the State of Nevada*," Congress expressly granted lands to be selected by the State for specified school purposes. While section 5 of the Act excluded from selection lands "valuable for mines of gold, silver, quicksilver, or copper," in order to facilitate selection, section 6 temporarily segregated the public lands in the State from entry, sale, or location under any law of the United States except the Homestead Act.

The 1866 Act was added to by the Act of June 8, 1868, 15 Stat. 67, where Congress provided a method for selecting the lands granted. Section 2 of the Act reiterated the exclusion of "lands valuable for mines of gold, silver, quicksilver, or copper."

The W 1/2 of sec. 6 was listed as selected by the State on May 19, 1873, on List No. 4, which was approved by the Acting Secretary on

² The fact mining work has been performed and claims located on certain land for many years does not, by itself, create any rights against the Government. *Arthur W. Boone*, 32 IBLA 305 (1977); *Roy R. Cummins*, 26 IBLA 223 (1976). Reliance upon an open status of land is unreasonable and, hence, estoppel will not lie where details of a withdrawal or conveyance were available upon inquiry. *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 447 (9th Cir. 1971). Failure of the Government to inform that lands located upon were closed to mining location cannot give life to invalid claims. *William C. Reiman*, 54 IBLA 108 (1981); *Foster Mining and Engineering Co.*, 7 IBLA 299, 79 I.D. 599 (1972).

³ Antunovich and Curran describe the "Patented Mining Claims" as follows:

MS 39.....	Knickerbocker.....	Pat. June 21, 1870
MS 52.....	Frankel.....	Pat. April 30, 1872
MS 41 and 69.....	Globe-Arizona.....	Pat. April 22, 1875
MS 39.....	Knickerbocker Baltimore Con. (American Flat & Maryland MCs)	Pat. December 21, 1880
MS 99 and 47.....	Ledge No. 2.....	Pat. June 25, 1884"

They list the latter claim, issued after the Secretary's approval, as evidence of the Department's inattention to its records. Title to public mineral lands could have been acquired pursuant to the Act of July 26, 1866, 14 Stat. 251, or the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1976).

October 19, 1983

October 16, 1882, "subject to any valid interfering rights which may have existed at the date of selection." No reservation of minerals was made because no mineral lands were available for selection.⁴

Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. The approval of the list of lands selected implies that all necessary prerequisites had been met. *West v. Standard Oil Co.*, 278 U.S. 200, 211-12, 218-19 (1929). Indeed, the Department was obligated at that time to determine whether the land was mineral in character.

As a conveyance for public lands carries with it an implied affirmation of every fact made prerequisite, once title has transferred, no executive officer of the Government may reconsider those facts. See *Lee E. Williamson*, 48 IBLA 329 (1980); *Solicitor's Opinion*, M-36539 (Nov. 19, 1958). In response to the proposition that a subsequent discovery of minerals would alter the determination and, thus, vitiate the conveyance, the Supreme Court presented the following discussion and holding in *Burke v. Southern Pacific R.R.*, 234 U.S. 669 (1914):

But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. * * *

The point is also covered by the case of *Davis v. Weibbold*, 139 U.S. 507, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the town-site act (Rev. Stat., § 2392) that "no title shall be acquired to any mine of gold, silver, cinnabar, or copper," does not apply where the mines were discovered after a patent has been issued.

Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in *Cowell v. Lammers* [21 Fed. Rep. 200, 206]: "There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent."

And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar, while Secretary of the Interior [5 L.D. 194]: "The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent."

⁴ Appellants cite 43 U.S.C. § 869-1 (1976) as supporting their proposition that Congress intended that all lands valuable for minerals be excluded from entry. As originally enacted, the Recreation and Public Purposes Act expressly limited its applicability to "nonmineral" lands. See Act of June 14, 1926, 44 Stat. 741. However, by the Act of June 4, 1954, 68 Stat. 173, Congress removed the term "nonmineral" from the statute and added the proviso which is now found at 43 U.S.C. § 869-1 (1976): "Each patent or lease so issued shall contain a reservation to the United States of all mineral deposits in the lands conveyed or leased and of the right to mine and remove the same, under applicable laws and regulations to be established by the Secretary."

It was not until 1909 that Congress instituted a policy of separating the surface estate from the rights to the underlying minerals in statutes providing for conveyance of public lands. See *United States v. Union Oil Company of California*, 549 F.2d 1271, 1275 (9th Cir. 1977), cert. denied, 434 U.S. 930 (1978). Prior to this presently accepted method of preserving Federal control over minerals, the Government sought to retain minerals by precluding from selection, as in the present case, lands known at that time to be mineral in character. The applicability of subsequent discovery of minerals on transferred lands previously determined nonmineral in character is discussed elsewhere in this opinion.

And again, at page 524: "The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated."

* * * But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals.

* * * * *

The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. *Smelting Co. v. Kemp*, 104 U.S. 636, 641; *Steel v. Smelting Co.*, 106 U.S. 447; *Maxwell Land Grant Case*, 121 U.S. 325, 379-381; *Heath v. Wallace*, 138 U.S. 573, 585; *Noble v. Union River Logging Railroad*, 147 U.S. 165, 174; *Burfenning v. Chicago, &c. Railway*, 163 U.S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

Id. at 687-89, 691-92.

[3] This board has repeatedly held that the effect of the issue of a patent for public land is to transfer the legal title from the United States and to remove from the jurisdiction of this Department the inquiry into and consideration of all disputed questions of fact, including the resolution of conflicting claims to the land. *Hank Patterson*, 71 IBLA 109 (1983); *Harry J. Pike*, 67 IBLA 100 (1982); *Silver Spot Metals, Inc.*, 51 IBLA 212 (1980). See *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897); *Everett Elvin Tibbets*, 61 I.D. 397, 399 (1954). By comparison, a grant by Congress to a state for the use of schools is also an absolute transfer, vesting title for a specific purpose. *Alabama v. Schmidt*, 232 U.S. 168 (1914); *Utah v. Kleppe*, 586 F.2d 756 (10th Cir. 1978), *rev'd on other grounds sub nom. Andrus v. Utah*, 446 U.S. 500 (1980). If the granting act provides for other action by the Secretary equivalent to a patent, such as final approval of a list of the lands, the approval ends the jurisdiction of the Department. *West v. Standard Oil Co.*, *supra* at 212. The approval of the list ("clearlisting"), like the issuance of a patent, ended the Department's authority to resolve conflicting claims to the transferred lands, including its authority to recognize the validity of mining claims situated on those lands.

[4] An allegedly improper conveyance ordinarily cannot be challenged or remedied by the Department after legal title has passed. However, the Secretary may recommend appropriate judicial action to cancel the conveyance and regain title if the circumstances warrant. *H. B. Baldwin*, 37 IBLA 215 (1978).⁵ See *Diamond Coal and Coke Co. v.*

⁵ A suit to cancel a conveyance will generally be recommended only where (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under

October 19, 1983

United States, 233 U.S. 236 (1914). Accordingly, the only possible action left to the Department in this case is to consider whether it would merit a recommendation to the Attorney General that an action be commenced to nullify the conveyance.

Antunovich and Curran, in their statement of reasons, argue for revocation of the grant because "the legal rights of the claim holders were not upheld." In *Burke v. Southern Pacific R.R.*, *supra*, the court stated the following:

Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it. *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 313; *Diamond Coal Co. v. United States*, 233 U.S. 236, 239; *Germania Iron Co. v. United States*, 165 U.S. 379; *Duluth & Iron Range Railroad Co. v. Roy*, 173 U.S. 587, 590; *Hoofnagle v. Anderson*, 7 Wheat. 212, 214-5. In the last case this court said, speaking through Chief Justice Marshall: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. . . . If the patent has been issued irregularly, the Government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant and to appropriate it to himself." Of the same import are *Cooper v. Roberts*, 18 How. 173, 182; *Spencer v. Lapsley*, 20 How. 264, 273; *Ehrhardt v. Hogaboom*, 115 U.S. 67, 68.

Id. at 692-93. It is well settled that a patent issued by the United States cannot be successfully attacked by strangers who are not able to show any interest in the land at the time the patent was issued and were not prejudiced by it. *Putnam v. Ickes*, 78 F.2d 223, 227 (D.C. Cir.), *cert. denied*, 296 U.S. 612 (1935).

As a grant for the benefit of schools also extinguishes legal title in the United States on appropriate records, nullifying subsequent entries and locations under the laws of the United States, claimants here have no standing to seek a cancellation of this grant. It is clear that they were not occupants of the land in question at the time it was selected and the selection list approved, nor have they asserted any preexisting superior title through which they may claim. The grant intended by Congress was completed according to statute well in advance of Antunovich and Curran's claim and, thus, it is beyond their power to question its validity. Moreover, even if the conveyance to the State was improper and subject to annulment, a subsequent restoration of the lands will not resuscitate an invalid claim. *See, e.g., Arthur W. Boone*,

obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. *Id.* at 219; *Everett Elwin Tibbets, supra*.

43 U.S.C. § 1166 (1976) provides that a suit to annul a patent shall be brought within 6 years. However, this statute of limitation does not apply to conveyances by an approval by the Department of a list of selections. 30 Op. Att'y. Gen. 572 (1916). Because of the disposition of this appeal, we need not discuss which limitations would apply to such a suit as contemplated by appellants' arguments.

supra, Beverly Trull, 25 IBLA 157 (1976). A return of the land to United States ownership will avail them nothing.

Antunovich and Curran, strangers to the events and rights precedent to selection and approval of the subject land under the statutory grant and proponents of a collateral attack upon the determination of the mineral character of the land, clearly have no basis for pursuing an action to nullify the conveyance. Under these circumstances, we cannot recommend that any action be taken.

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:

R. W. MULLEN
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

KAISER STEEL CORP.

76 IBLA 387

Decided *October 27, 1983*

Appeal from decision of the Utah State Office, Bureau of Land Management, overruling objections in part and readjusting coal lease Utah-039706.

Reversed and remanded.

1. Coal Leases and Permits: Leases--Mineral Leasing Act: Generally

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and BLM may subsequently provide the specific terms or conditions for readjustment.

2. Coal Leases and Permits: Leases--Mineral Leasing Act: Generally

Coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 are, at the time of readjustment, subject to the requirements of that Act and regulations promulgated pursuant to that Act.

3. Coal Leases and Permits: Leases--Mineral Leasing Act: Generally

When notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, and such notice prescribes a specific date when readjusted lease terms shall be transmitted to the lessee, BLM's subsequent failure to transmit the readjusted lease terms within the time specified in the notice constitutes a waiver of the right to readjust the lease.

APPEARANCES: M. William Tilden, Esq., San Bernardino, California, for appellant.

October 27, 1983

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Kaiser Steel Corp. has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated May 11, 1982, which readjusted certain terms and conditions of its coal lease Utah-039706 and overruled its objections in part to the lease readjustment.

The record shows that coal lease Utah-039706 was originally issued July 1, 1960, to the predecessors in interest of the present lessee, Kaiser Steel Corp. (Kaiser).¹ The lease was issued under the authority of the Mineral Leasing Act of 1920, 41 Stat. 437, *as amended*, 30 U.S.C. § 207 (1976).² Pursuant to the statute and the express terms of section 3(d) of the lease, BLM retained the right to readjust and fix royalties and other terms of the lease at the end of 20 years from the date of issuance, *i.e.*, as of July 1, 1980.

On February 22, 1980, over 4 months prior to the end of the 20-year period, Kaiser received a notice from BLM of the proposed readjustment of lease terms and conditions under 43 CFR 3451. The notice specifically stated: "A notice containing the readjusted terms and conditions will be forwarded to you on or before September 1, 1980. The readjustment will become effective 60 days after your receipt of that notice."

On June 11, 1980, BLM issued a second notice of readjustment stating: "In accordance with the regulations under 43 CFR 3451.1(d)(2), a notice containing the readjusted terms and conditions will be forwarded to you no later than July 1, 1981."

BLM did not issue the notice of the proposed readjusted lease terms until September 22, 1981. The notice provided a 60-day period for the lessee to file objections to the proposed readjustment terms. Kaiser timely filed its objections contending that the Government had no authority to readjust the lease at that time and filed specific comments and objections to various lease provisions. BLM subsequently issued its decision of May 11, 1982, readjusting the lease effective December 1, 1981, and overruling many of Kaiser's objections.

Kaiser has appealed to this Board contending that 30 U.S.C. § 207 (1976) permits readjustment of the lease only at the end of each 20-year period the lease is in existence, citing *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949 (10th Cir. 1982), and *Kaiser Steel Corp.*, 63 IBLA

¹ The original lessee for this lease was Heiner Coal Co. of Salt Lake City, Utah, who assigned its interest in the lease to Pacific States Steel Corp. of Union City, California, effective Dec. 1, 1960. Kaiser later acquired the lease from Pacific States effective May 1, 1965.

² When this lease was issued, sec. 7 of the Mineral Leasing Act provided:

"Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods."

Sec. 7 of the Mineral Leasing Act of 1920 was amended by sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(a) (1976), to read in pertinent part as follows: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

363 (1982). It is Kaiser's position that the BLM notice of intent to readjust the lease terms received before the end of the 20-year period is insufficient because 43 CFR 3451.1(d), which purportedly allows for the readjustment of leases up to 2 years after the 20-year anniversary date, does not apply to this lease since it was not in effect at the time the lease was entered into and was not made a part thereof.

[1] First, we must point out that contrary to appellant's interpretation of the law, failure of BLM to finally *readjust* the coal lease terms prior to the 20-year anniversary date of the lease does not preclude readjustment. In *Rosebud Coal Sales Co. v. Andrus, supra*, the Tenth Circuit held that the time for giving notice of a readjustment of the provisions of a coal lease issued pursuant to 30 U.S.C. § 207 (1976), was to be "when each twenty-year period expired, on that date and not at a later time." *Id.* at 951.³ Following this decision, this Board overruled its prior case law to the contrary, *California Portland Cement Co.*, 40 IBLA 339 (1979), and held that in the absence of notice of readjustment prior to the end of the 20-year lease term from BLM to the lessee, BLM had no authority to belatedly readjust the terms of the coal lease. *Kaiser Steel Corp., supra*. The predicate of the Board's action, however, was the failure of BLM to *notify* the lessee of the intended readjustment prior to the end of the 20-year term, not the failure to actually readjust the lease within that time frame.

In *Lone Star Steel Co.*, 65 IBLA 147 (1982), the Board delineated this distinction. In *Lone Star*, notice of intent to readjust was given prior to expiration of the 20-year period, yet BLM's decision on the lessee's objections did not issue until after that date. The Board held that the coal lease was properly readjusted consistent with the Tenth Circuit's decision in *Rosebud, supra*. Most recently, we have reiterated that, where notice of intent to readjust a coal lease is given to a lessee prior to expiration of the 20-year period, such notice satisfies the statutory requirements for timely readjustment, and BLM may subsequently provide the specific terms or conditions for readjustment. *Coastal States Energy Co.*, 70 IBLA 386 (1983), *appeal filed, Coastal States Energy Co. v. Watt*, No. 83-0730J (C.D. Utah filed June 3, 1983).⁴

[2] Appellant's theory as to the inapplicability of 43 CFR 3451 to its lease is also without merit. We have specifically considered and rejected the argument that the general lease provisions of an older coal

³ Indeed, in rejecting the Department's argument that failure to adjust the lease or give notice of an intent to adjust the lease prior to the 20-year expiration date did not bar subsequent readjustment the circuit court quoted with approval the finding of the district court that "[t]he list of coal lease readjustments occurring from January 1, 1960, to August 4, 1976, indicates that the majority of the leases were readjusted within days of the readjustment date and a substantial number received readjustment notices before the readjustment date expired." *Id.* at 952 (italics supplied). The court did not purport to hold that the actual readjustment must occur prior to or on the readjustment date.

⁴ The Departmental regulations have been amended to reflect that notice of intent to readjust prior to expiration is sufficient. As stated in the *Federal Register* announcing that final rulemaking:

"The recent decision of the Tenth Circuit Court of Appeals in the *Rosebud Coal Sales Co. v. Andrus* (No. 80-1842, Jan. 8, 1982) case is currently being reviewed in the Bureau of Land Management. The United States has decided not to appeal the decision. The court's decision was rendered after publication of the proposed rulemaking. The language of § 3451.1(b) has been amended in the final rulemaking to reflect the court's decision that Federal coal leases may not be readjusted unless actual notice is given of the readjustment, or of the intent to readjust, prior to the twenty-year anniversary date of the lease."

47 FR 33129 (July 30, 1982).

October 27, 1983

lease insulate the lessee from the current regulations promulgated pursuant to the Federal Coal Leasing Amendments Act of 1976 (FCLAA). In *Coastal States Energy Co.*, *supra* at 390-91, we stated:

That general lease language cannot serve to negate the statutory authority of the Secretary to readjust lease terms and conditions. Regulations in effect at the time of readjustment are applicable to leases subject to readjustment. Coastal would have us believe that only regulations in effect at the time its leases were issued govern the readjustment process. This is clearly incorrect. Just as the statute authorizes readjustments of terms and conditions, so too may the procedures for implementation be adjusted. Those procedures were revised pursuant to FCLAA. We find no ban to applying those regulations to readjustment of Coastal's leases.

Accordingly, the terms of 43 CFR 3451.1(c)(1) and (2) which allow for readjustment up to 2 years after the 20-year anniversary date with proper notice of proposed readjustment prior to that date are applicable and control the disposition of this case.

[3] In this situation it is clear that BLM gave sufficient notice within the requirements of 43 CFR 3451.1(c)(1) prior to the lease anniversary date with its notice of February 22, 1980. However, appellant contends that by failing to meet its own time limits set forth in this notice, as well as the subsequent one issued on June 11, 1980, BLM has waived its right to readjust the lease. We agree. The applicable regulation, 43 CFR 3451.1(c)(2), provides:

In any notification that a lease will be readjusted under this subsection, the authorized officer shall prescribe when the notice of readjusted lease terms shall be transmitted to the lessee. This time shall be as soon as possible after notice that the lease shall be readjusted, but shall not be longer than 2 years after such notice. *Failure to transmit the notice of readjusted lease terms in the specified period shall constitute a waiver of the right to readjust, unless the delay is caused by events beyond the control of the Department.* [Italics added.]

This regulation gives BLM up to 2 years from initial notification to transmit the details of the readjusted lease terms to the lessee. Under this regulation, BLM has latitude to shorten that period by setting an earlier date than the maximum 2 years provided by the regulation. BLM did this by first setting a date of September 1, 1980, and next setting a date "no later" than July 1, 1981. Once a time limit is set by BLM in its notice, readjustment terms must be communicated to the lessee within that period, absent a delay caused by events beyond the Department's control. Thus 43 CFR 3451.2(a) clearly sets forth: "(a) If the notification that the lease will be readjusted did not contain the proposed readjusted lease terms, the authorized officer shall, *within the time specified in the notice that the lease shall be readjusted*, notify the lessee of the proposed readjusted lease terms." (Italics added.)

When BLM did not transmit the readjusted lease terms to appellant within its own "specified period," it failed to comply with the requirement of the regulations and waived its right to readjust the

lease.⁵ The fact that BLM might have originally set a period of up to 2 years is irrelevant. BLM expressly chose to bind itself to a shorter timetable and must accept the consequences of its choice. *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

The record does not reflect any unusual circumstances which could be termed "beyond the control of the Department" that may have caused the delay of the transmittal of the readjusted lease terms. Nor is there any evidence that BLM had interim correspondence with appellant concerning the reasons for its inability to meet its own deadline. Accordingly, BLM's decision to readjust coal lease Utah-039706 must be reversed.

Appellant also raised several objections to specific terms and conditions of the readjusted lease which we need not discuss since these issues are now moot in view of the disposition of the case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is reversed and the case is remanded for action consistent herewith.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

**TRANSWESTERN PIPELINE CO. v. ACTING DEPUTY
ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)**

12 IBIA 49

Decided October 28, 1983

**Appeal from decision of the Acting Deputy Assistant Secretary--
Indian Affairs (Operations), requiring tribal consent as a prerequisite
to the approval of rights-of-way across tribal land.**

Affirmed.

**1. Indian Lands: Rights-of-Way--Rights-of-Way: Conditions and
Limitations**

In plain and unambiguous regulations codified at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land, not just those sought under 25 U.S.C. §§ 323-328 (1976).

⁵ Inasmuch as it is immaterial to the outcome of the instant appeal, we do not here decide whether BLM may extend the period contemplated in its initial notification by timely informing a lessee of its intent to extend such period of time.

October 28, 1983

2. Board of Indian Appeals: Jurisdiction--Regulations: Validity

The Board of Indian Appeals does not have authority to declare a duly promulgated regulation of the Department to be invalid.

3. Indian Lands: Rights-of-Way--Indian Tribes: Treaties--Rights-of-Way: Conditions and Limitations

Article IX, paragraph 6, of the Treaty with the Navajo, June 1, 1868 (15 Stat. 667), in which the tribe agreed not to oppose "the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States," may not be interpreted as bestowing tribal consent to all applications for rights-of-way across the Navajo Indian Reservation.

4. Indian Tribes: Treaties--Statutory Construction: Indians

Ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians.

APPEARANCES: Jeffrey B. Smith, Esq., Phoenix, Arizona, and James W. McCartney, Esq., Houston, Texas, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Transwestern Pipeline Co., appellant, seeks review of an August 31, 1982, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee). This decision held that consent of the Navajo Nation (tribe) was a prerequisite to Departmental approval of rights-of-way across tribal land for a natural gas pipeline and radio communications tower facilities.

Background

Appellant, a Delaware corporation with its principle place of business in Houston, Texas, has been found by the Federal Power Commission (FPC; predecessor to the Federal Energy Regulatory Commission) to be a "natural-gas company" within the meaning of the Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, 15 U.S.C. §§ 717-717w (1976).¹ Pursuant to certificates of public convenience and necessity issued after extensive hearings by the FPC,² appellant operates a natural gas pipeline extending from the Panhandle-Hugoton area of Texas and Oklahoma and the Permian Basin area of Texas and New Mexico to pipeline facilities operated by the Pacific Lighting Gas Supply Co. at the California-Arizona border, near Topock, Arizona. Appellant supplied approximately 675,000 mcf of natural gas per day to Pacific Lighting for distribution in Southern California in 1980. Present design would allow for the delivery of approximately 750,000 mcf per day.

¹ All further citations to the *United States Code* are to the 1976 edition.

² See Opinion No. 500, 36 FPC 176 (1967); Opinion No. 500-A, 36 FPC 1010 (1967); 39 FPC 676 (1968); and Docket No. CP68-181 (Feb. 4, 1969).

Appellant's pipeline crosses lands held in trust by the United States for the Navajo Nation and certain individual Indians, including lands within the Navajo Indian Reservation. Appellant's 20-year right-of-way across tribal lands for the pipeline and appurtenant facilities was approved on April 24, 1961, by the Secretary of the Interior (Secretary), through his designated representative. On August 23, 1963, a second right-of-way was approved for a similar period of 20 years, with an effective date of October 5, 1961. The second right-of-way was for a radio communications tower and appurtenant facilities, used in connection with appellant's pipeline.

Appellant states that on November 26, 1979, it sought extensions of the existing rights-of-way from the Navajo Nation in accordance with 25 CFR 169.19.³ As evidence of its good faith and financial responsibility, appellant asserts that it deposited \$140,000 with the Navajo Area Office, Bureau of Indian Affairs (BIA). When appellant heard nothing from the tribe, it sought approval of the rights-of-way directly from BIA. Each application, dated August 24, 1981, sought a "right-of-way or renewal of right-of-way" under "the Acts of March 11, 1904, 33 Stat. 63, March 2, 1917, 39 Stat. 973, codified at 25 U.S.C. § 321 and the Act of February 5, 1948, 62 Stat. 17 codified at 25 U.S.C. § 323" (Applications at 1).

By letter dated January 21, 1982, the Acting Navajo Area Director advised appellant that, in accordance with Departmental regulations found at 25 CFR 169.3, "[i]t is clear that the Secretary has determined that Tribal consent is a condition necessarily attendant to the granting of a renewal." Section 169.3(a) states: "No right-of-way shall be granted over and across any tribal land * * * without the prior written consent of the tribe." The Acting Area Director's decision consequently advised appellant that its applications were being forwarded to the Navajo Nation for its consideration.

This decision was affirmed on appeal by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) by letter dated August 31, 1982. Appellant's subsequent appeal to the Board was received on October 4, 1982. In urging reversal of appellee's position that tribal consent must be obtained for the requested rights-of-way, appellant argues:

1. The statutory authority for approval of the rights-of-way in question is found in 25 U.S.C. § 321. Under this statute the Secretary has the mandatory, nondiscretionary duty to process the applications without imposition of a condition of tribal consent.
2. The regulations cited by appellee as requiring tribal consent were adopted pursuant to 25 U.S.C. § 323 and are not applicable to the granting of rights-of-way sought under 25 U.S.C. § 321.
3. The consent requirement set forth in Departmental regulations may not properly be applied to the Navajo Nation as it is not an

³ Departmental regulations found in 25 CFR were renumbered without substantive change on Mar. 30, 1982. See 47 FR 13327. The regulations currently in 25 CFR Part 169 previously appeared in Part 161. This opinion will use the Part 169 numbers.

October 28, 1983

Indian Reorganization Act tribe or a tribe from which Congress has otherwise deemed consent to be required.

4. The Department's consent regulations are invalid and cannot be relied upon.

5. Assuming the Secretary has discretion to require tribal consent, appellee's action in this case conflicts with the public interest and is arbitrary, capricious, and an abuse of discretion.

6. Tribal consent to rights-of-way such as those sought here can be found in the Treaty with the Navajo, dated June 1, 1868, 15 Stat. 667.

Discussion and Conclusions

Appellant's applications for new or renewal rights-of-way were filed under two acts.⁴ The Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. § 321 (1904 Act), authorizes the Secretary "to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation." The statute is silent as to whether tribal consent is required before the Secretary may grant a right-of-way.⁵

The Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328, commonly known as the General Rights-of-Way Act of 1948 (1948 Act), provides that the Secretary "is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any" Indian trust lands. Section 2 of the 1948 Act, 25 U.S.C. § 324, provides that "[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under * * * [the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479] shall be made without the consent of the proper tribal officials." As the tribe notes, the 1948 Act was intended to dispel some of the confusion that had resulted from the prior practice of enacting specific legislation dealing with each separate type of right-of-way or easement. See Tribe's Answer Brief at 3.

Regulations implementing the various statutes authorizing the granting of rights-of-way across Indian lands are found in 25 CFR Part 169.⁶ Sections 169.1-169.21 are general provisions relating to all types of rights-of-way. Sections 169.22-169.28 deal with specific types of rights-of-way. Section 169.25 addresses rights-of-way granted for oil and gas pipelines. Subparagraph (a) states:

⁴ Appellant has argued on appeal that its applications "were filed primarily as a request for a new or original permit pursuant to 25 USC § 321." See Appeal, Oct. 1, 1982, at 5. The incongruity of this position and appellant's argument that the 1948 Act is inapplicable to its pending rights-of-way applications with the actual dual filing was addressed by the tribe in its answer to appellant's appeal. See Tribe's Answer Brief, July 12, 1982, at 2-4.

⁵ The only reference to "consent" found in the 1904 Act appears in the second proviso which concerns the construction of lateral lines across lands owned by individual Indian allottees.

⁶ The statutory authority for the promulgation of Part 169 is stated to be "5 U.S.C. 301; 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text." Because it is clear that, among other acts, the 1904 Act is "cited in the text" in 25 CFR 169.25, the Board rejects appellant's contention that Part 169 was adopted pursuant only to 25 U.S.C. §§ 323-328, and is not applicable to rights-of-way sought or granted under 25 U.S.C. § 321.

The Act of March 11, 1904 (33 Stat. 65), as amended by the Act of March 2, 1917 (39 Stat. 973; 25 U.S.C. 321), authorizes right-of-way grants for oil and gas pipelines across tribal, individually owned and Government-owned land. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) shall also be subject to the provisions of this section.

The section then sets forth specific requirements for pipeline rights-of-way.

[1] The Board finds that "other pertinent sections of this Part 169" in section 169.25 refers to those general sections found in 25 CFR 169.1-169.21 that are not inconsistent with the specific provisions of section 169.25. One such section is 169.3, which clearly and unambiguously requires tribal consent before any right-of-way across tribal lands, not just one sought under 25 U.S.C. §§ 323-328, can be approved. A second section incorporated by this reference is 25 CFR 169.19, the section under which appellant sought renewals of its rights-of-way from the tribe in 1979. This section clearly states that a renewal application which does not seek a change in status or location of a prior right-of-way may be approved by the Secretary "with the consent required by § 169.3." An application seeking to change the prior status or location is treated as a new application, to which section 169.3 would also apply.

[2] The Board therefore finds that the Secretary has, through regulation, made the policy determination to require tribal consent for any new or renewal right-of-way across tribal lands. The Board is bound by this determination because it does not have the authority to declare duly promulgated regulations of the Department to be invalid. *Native Americans for Community Action v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 214, 90 I.D. 283 (1983); *Zarr v. Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174, 90 I.D. 172 (1983).

Furthermore, the same question of whether the consent requirement of 25 CFR 169.3(a) could extend to any right-of-way across tribal lands, even when the pertinent statute was silent as to consent, was recently addressed by the Ninth Circuit Court of Appeals in *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (1983). The issue in *Southern Pacific* was whether tribal consent was a prerequisite to the approval of a railroad right-of-way application across the Walker River Paiute Reservation, sought under the Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318. In concluding that 25 CFR 169.3(a) applied and that the Secretary had acted within his power in requiring tribal consent for the acquisition of a right-of-way under 25 U.S.C. § 312, the court stated:

The district court held that the 1899 Act grants to a railroad the power of eminent domain to condemn rights-of-way through Indian reservations and that "[t]he concept of tribal consent as a pre-condition to the grant of a right-of-way is the very antithesis of the exercise of the power of eminent domain." The district court also held the 1899 Act to be a grant *in praesenti* subject to the performance of conditions precedent and

October 28, 1983

conditions subsequent. Therefore, in the district court's view, the Act does not vest in the Secretary authority to establish grant preconditions beyond those contained in the statute but rather expressly specifies the conditions the Secretary must find to be satisfied prior to approving an application. The Secretary and the Tribe challenge the district court's determination that the 1899 Act is a grant of the power of eminent domain and a grant *in praesenti*. They argue that Section 312 of the Act delegates to the Secretary authority to promulgate legislative rules and, thereby, the authority to establish grant preconditions by regulation. We conclude that the interpretation advanced by the Secretary and the Tribe is both reasonable and in accord with our obligation to construe the 1899 Act liberally in the Tribe's favor.

700 F.2d at 553.

The appeals court went on to observe, among other things, that the rulemaking authority set forth in the 1899 Act "would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act" (*id.*); that, like the General Rights-of-Way Act of 1948, the 1899 Act had as its purpose "the preservation and protection of Indian interests" (*id.* at 554) and, accordingly, that the Act's provisions could be construed in light of intervening legislation such as the 1948 Act which mandates tribal consent for rights-of-way across lands owned by IRA tribes; and that the regulation in issue "is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands" (*id.* at 556).⁷

The Ninth Circuit's opinion in *Southern Pacific* was rendered during the pendency of the present appeal before the Board and subsequent to the briefing period. Thus, the parties have not addressed the ruling.⁸ Regardless of particular differences between the 1899 Act interpreted in *Southern Pacific* and the 1904 Act at issue here, the Ninth Circuit's opinion confirms the general principle of law that the Secretary may, by regulation, require tribal consent for rights-of-way other than those sought under the General Rights-of-Way Act of 1948.⁹

⁷ This finding upholds the legality of the regulation requiring tribal consent for all rights-of-way across tribal lands. The Secretary's adherence to a legal requirement is not "discretionary" and cannot be arbitrary, capricious, or an abuse of discretion. The fact that the result in this case arguably conflicts with another public interest does not justify the disregard of law. The Secretary is bound by his regulations, which have the force and effect of law.

⁸ The Board notes, however, that appellant was aware of the *Southern Pacific* case, in which it appeared as amicus curiae.

⁹ The Walker River Paiute Tribe is organized under the IRA. Appellant argues that even if the consent requirement could be applied under acts other than the 1948 Act, it cannot be applied to the Navajo Nation, which is not organized under the IRA. This argument is based on the observation that the requirement of tribal consent appears in 25 U.S.C. § 324, which addresses IRA tribes. The Acting Deputy Assistant Secretary addressed this argument at pages 3-4 of his Aug. 31, 1982, decision:

"Congress' policy of Indian self-determination extends to both IRA and non-IRA tribes, and the consent requirement for rights-of-way is one tool the BIA uses for advancing that policy. In addition, the consent requirement has been Departmental policy since 1951, a policy that the Department proposed abandoning in 1967. In response to this proposal, the House Committee on Government Operations recommended that '(t)he section of the present Indian right-of-way regulations (25 CFR 161.3 [now 169.3]) which requires consent of all tribes to right-of-way grants of their lands, regardless of how or whether they are organized, should be retained without modification The Secretary of the Interior should obey 25 CFR 161.3 and not grant rights-of-way in disregard of it on any pretext, even when he feels the Indians are withholding consent contrary to their own best interests.' *Disposal of Rights in Indian Tribal Lands Without Tribal Consent*, H. Rept. No. 91-78, 91st Congress, 1st Session (1969). Following the committee's recommendation, the Department abandoned its plans to amend 25 CFR §161.3 and has continued to require tribal consent to the granting of rights-of-way over tribal lands regardless of how the tribe is organized."

Appellant also argues that, if tribal consent to the present rights-of-way is required, the Navajo Nation has already consented to this type of right-of-way by virtue of language found in the Treaty with the Navajo, June 1, 1868, 15 Stat. 667.¹⁰ Appellant points to Article IX, paragraph 6, of the Treaty of 1868 in which the tribe agreed not to oppose "the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States." Appellant submits that its "facilities have been determined to be works of necessity and utility by virtue of the certificates of public convenience and necessity in evidence in this matter" and that under the Treaty the tribe "has consented or otherwise waived its consent to the construction and operation of the facilities to which Transwestern's Applications pertain and to the issuance of the requested rights-of-way" (Appeal Brief at 9). Appellant correctly observes that this argument was not discussed by the Acting Deputy Assistant Secretary in the decision under review.

Article IX, paragraph 6, of the Treaty with the Navajo is virtually identical to Article XI, paragraph 6, of the Treaty with the Sioux, April 29, 1868, 15 Stat. 635, in which the Sioux Tribe agreed not to object "to the construction of railroads, wagon-roads, mail-stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States."¹¹ The Sioux treaty provision was considered in *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D. 1958), and was found not to constitute a waiver of tribal opposition to the construction of a dam and reservoir on tribal land even though the project was arguably a work of utility or necessity.

Although the treaty language relied upon by appellant has not been previously interpreted in connection with right-of-way privileges on the Navajo Reservation, the Treaty with the Navajo has been characterized by the Supreme Court in general terms as an affirmation of tribal sovereignty over internal affairs of the reservation. In *Williams v. Lee*, 358 U.S. 217, 221-22 (1959), the Court stated:

No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos. On June 1, 1868, a treaty was signed between General William T. Sherman, for the United States, and numerous chiefs and headmen of the "Navajo nation or tribe of Indians." At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, [31 U.S. (6 Pet.) 214 (1832)] was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. [Footnote omitted.]

¹⁰ See Kappler, 2 *Indian Affairs Laws & Treaties*, at 1018.

¹¹ See Kappler, 2 *Indian Affairs Laws & Treaties*, at 1002.

October 31, 1983

Similarly, in *Southern Pacific*, the court found that, as a sovereign entity, the Walker River Paiute Tribe had "independent authority to regulate the use of its own lands" (700 F.2d at 556).

[3] The Board agrees with the tribe in this case that so long as appellant chooses to do business on the Navajo Reservation, it is subject to the right of the Navajo Nation to exercise certain governmental powers over the reservation. A generalized treaty provision, such as the one found in the 1868 Treaty, is insufficient to constitute consent to any and all rights-of-way, even for "works of utility or necessity," that might be sought through tribal lands.¹²

[4] This holding comports with "the fundamental postulate, enunciated in *Worcester v. Georgia*, see 31 U.S. at 393, that ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians." *Santa Rosa Band v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975). See also *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Deputy Assistant Secretary-Indian Affairs (Operations) rendered August 31, 1982, is affirmed.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

ROGER K. OGDEN

77 IBLA 4

Decided October 31, 1983

Appeal from decision of the District Manager, Salmon District Office, Idaho State Office, Bureau of Land Management, rejecting desert land entry application I-8888.

Affirmed.

¹² Cf. *Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBLA 54, 58, 90 I.D. 61, 63 (1983), reconsideration pending. The Board held that a clause in a negotiated oil and gas lease stating that the parties agreed to "abide by any agreement for the cooperative or unit development of the field or area" constituted prior tribal consent to a communitization agreement found appropriate by the Secretary.

October 31, 1983

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WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

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77 IBLA 4

Decided October 31, 1983

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1. Administrative Practice--Desert Land Entry: Generally

Where BLM uses a computerized economic analysis to justify rejection of a desert land entry application, BLM must explain the basis of its analysis and data and the deficiencies of the applicant's proposal in its decision so that the applicant has some basis for understanding and accepting the rejection or appealing and disputing it.

2. Desert Land Entry: Applications

Where BLM determines that lands identified in a desert land entry application cannot be farmed as an economically feasible operating unit, BLM properly rejects the application.

APPEARANCES: Roger K. Ogden, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Roger K. Ogden has appealed the May 23, 1983, decision of the District Manager, Salmon District Office, Idaho State Office, Bureau of Land Management (BLM), rejecting his desert land entry application I-8888 because BLM's analysis of his proposal showed that it would not be economically feasible.

Appellant submitted a petition/application for classification and desert land entry on September 10, 1974, for the E 1/2 NE 1/4, SE 1/4 sec. 26, and the N 1/2 NE 1/4 sec. 35, T. 16 N., R. 26 E., Boise meridian. Following completion of an environmental assessment (January 7, 1980), mineral report (December 8, 1981), and land report (June 28, 1982), BLM approved classification of the lands as suitable for desert land entry and notified appellant by letter dated November 2, 1982. Thereafter, BLM performed its computer-assisted economic analysis for appellant's entry to project the anticipated revenues versus production costs based on a yield of 2 tons of alfalfa and 40 bushels of barley for three variations of appellant's irrigation system. In each case the adjusted net revenue was a negative amount.¹ The most favorable projection of the three (Plan 1) showed a deficit of \$21,264.39.

In his statement of reasons, appellant urges that, contrary to BLM's data, the average yield in the area is 4 to 5 tons of alfalfa and 85 to 110 bushels of barley per acre. Appellant points out that BLM used prices for new equipment in its calculations when he intends to use equipment he already owns or can buy used at cheaper prices. He argues that he plans to do most of the work himself rather than employ others. He notes that although BLM lists the soil as poor, the county agent has told him that the soil conditions would not affect the production of 4 or more tons per acre.

BLM's decision did not provide appellant with any detailed analysis of the reasons supporting its finding.² After review of the record, the

¹ The total cost of the irrigation system varied with changes in the number of pumps, wells, and water lines and different projections for the amount of annual labor costs for water-related work.

² In its entirety, the decision reads:

"On May 16, 1983 this office completed an Economic Analysis of your desert land application as required by 43 CFR 2520.0-8(d)(3). The analysis was completed to determine the practicability of farming the lands as an economically

October 31, 1983

Board informed BLM, by memorandum dated August 4, 1983, that it could find no basis in the case record for the yield figures used by BLM or explanation of the assumptions on which the computer analysis was developed and therefore there was no way to determine the correctness of BLM's decision or the merit of appellant's arguments. We requested BLM to comment on the matters raised by appellant and our concerns and, if feasible, to run the computer analysis using appellant's data for comparison.³

In response BLM has submitted detailed comments on appellant's arguments and two informational documents concerning its computer-assisted economic analysis. The first of those documents is Idaho Instruction Memorandum No. ID-83-134 concerning criteria for processing agricultural development applications to which is attached a cooperative agreement between BLM and the State of Idaho's Department of Water Resources (IDWR) on agricultural development in Idaho and an addendum to the agreement detailing the assumptions underlying the agricultural economic feasibility computer model. The computer model was developed jointly by BLM and IDWR. See Instruction Memorandum No. ID-83-134. The second document is a copy of the user's manual for computer-assisted economic evaluation of desert land entry applications. BLM has also submitted an amended version of its computer analysis for Plan 1 using appellant's prices and higher yield figures.

[1] Initially we state emphatically that it is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision and demonstrated in the record. Otherwise the Department is left open to the charge that its actions are arbitrary. This Board has explained the reasons for ensuring that both the written decision and record reflect a rational basis for BLM's actions in the context of competitive oil and gas bid evaluations. We have said,

[T]he appellant is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board can determine its correctness if disputed on appeal. *Steven and Mary J. Lutz*, 39 IBLA 386 (1979); *Basil W. Reagel*, 34 IBLA 29 (1978); *Yates Petroleum Corp.*, 32 IBLA 196 (1977); *Frances J. Richmond*, 24 IBLA 303 (1976); *Arkla Exploration Co.*, 22 IBLA 92 (1975).

Southern Union Exploration Co., 51 IBLA 89, 92 (1980). This is not to say that the Board will substitute its own judgment for that of

feasible operating unit. Some of the factors used include soils, climate, topography, farming systems and practices common to the locality, character of the subject land and adjacent land, as well as your proposed plan of irrigation.

"The analysis showed that your proposed entry would not be an economical unit to farm. Your application is hereby rejected.

"This decision becomes final thirty days after its receipt unless an appeal is filed pursuant to the regulations in 43 CFR, Part 4, Subpart E. (See enclosed Appeal Information Sheet, ID-040-1840-2.)"

³ A copy of this memorandum was sent to appellant and BLM was directed to send a copy of its response to appellant, which it did.

Departmental experts but rather that the Board will require sufficient facts and a sufficiently comprehensible analysis to ensure that a rational basis for the determination is present. *M. Robert Paglee*, 68 IBLA 231, 234 (1982). The same reasoning is true for the case now before us.

The increasing use of computer models to support decisionmaking makes the above requirements even more imperative. The running of a computer program is not a substitute for evaluation of the issue at hand but rather support for the decision made.⁴ BLM may not simply report the results of its computer analysis; it must reveal the underlying facts used to obtain the result and the assumptions on which the computer program is based and it must demonstrate why its facts and assumptions, and therefore its result, are more reasonable than the applicant's or offeror's, as the case may be. See *Southern Union Exploration Co.*, 41 IBLA 81 (1979). The applicant must be given some basis for understanding why his or her plans do not meet the requirements of the law and applicable regulations.

In this case, although the computer printouts and data sheets included in the case file provided a record of the information BLM used that resulted in the negative revenue projections, there was no explanation as to where the data came from, why it provided a reasonable basis for evaluating appellant's desert land entry, and what distinguished it from appellant's plan. In that respect the BLM decision appealed in this case was deficient.

[2] Nevertheless, in response to our request, BLM has submitted the earlier-identified documents which describe the basis on which the computer analysis was developed and show that it has a reasonable relationship to the evaluation of desert land entries, when used as an evaluation tool. BLM's response to appellant's arguments on appeal provides the missing support for its data and points out the deficiencies in appellant's plan. BLM states that its information comes from many sources, including county extension agents, agricultural services offices, universities, banks, and seed companies, as referenced in the materials submitted to the Board. BLM reports that the average yield for Lemhi County on Soil Conservation Service Class IV soils is 2 tons of alfalfa hay per acre and 40 bushels of barley per acre and that the yields that appellant presented represent above average yields due to good climate conditions in the last 2 to 3 years. BLM explains that its yield figures are based on the class of the land which takes into consideration both soil structure and limiting factors such as climate, potential for erosion, slope, moisture holding capacity, and fertility. BLM projects that based on the location, soils, climate, and average adjacent farm yields, appellant's entry would produce 3 to 3.5 tons per acre of alfalfa and 65 bushels per acre of barley "at the very most."

⁴ Instruction Memorandum No. ID-83-134 states in part that the computer model in this case was developed "as a tool to be used in assessing the economics of agricultural development," and cautions: "You should not expect the computer model to make the decision to either allow or reject an entry. It is the responsibility of each manager to make an informed decision based upon the best information available."

October 31, 1983

BLM asserts that it cannot assess the abilities of individual farmers and therefore its analysis must use average yield figures.

BLM's costs for the irrigation system reflect prices that would be available to all individuals based on the best available information. BLM asserts that it is proper to use local estimates because the nearest town is 150 miles away and not everyone would travel to purchase equipment from outside sources and to use new equipment prices because it does not have the resources to research the availability, price, and condition of used equipment for every desert land entry evaluation. BLM recognizes that it is possible for an entryman to shop around for good prices, trade work, or use equipment he already owns but asserts that to realistically determine economic feasibility it must nevertheless show what the costs for the items would be. Finally, BLM states that it used custom rates to reflect planting and harvesting costs, not to question appellant's abilities, but because he does not own any farm equipment and is not in the farming business, and because such rates approach the true costs of farming.

As requested by the Board, BLM ran its computer analysis using 3.5 tons per acre for alfalfa and 65 bushels of barley per acre and appellant's price for pipe and wheel lines. The latter resulted in the total projected cost for the irrigation system being \$65,543.20 instead of the BLM estimate of \$91,804.80. Even with this savings at a maximum expected yield the net adjusted revenue figure arrived at is only \$3,721.77 per annum.

Appellant has provided no comment on the materials and response submitted by BLM.

We conclude that BLM's determination that appellant's proposed plan of irrigation is not economically feasible was proper and we affirm BLM's rejection of his desert land entry application. *Richard Platt*, 2 IBLA 60 (1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Idaho State Office is affirmed.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

November 17, 1983

SATELLITE ENERGY CORP.

77 IBLA 167

Decided November 17, 1983

Appeal from decisions of the Utah State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease applications U-52506, U-52510, U-52511, U-52514, U-52515, U-52526, U-52527, U-52539, U-52607, U-52627, and U-52645.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Applications: Filing

Automated Simultaneous Oil and Gas Lease Application, Form 3112-6a (June 1981), commonly referred to as Part B, was designed to facilitate automated processing adopted in order to expedite the issuance of leases and lessen the paperwork of the public. If Form 3112-6a is completed in a manner which allows automated machine processing, is correct with respect to the information read by the computer, and is correct and complete with respect to that information not machine read, the application does not contain a fatal error because the arabic numerals corresponding to those numbered circles blackened by the applicant under the heading "Mark Social Security Number" are not placed in the boxes above the corresponding numbered circles. The required information is contained on the face of the application in readable form. No information is lacking, and no ambiguity has been created by the applicant.

APPEARANCES: George B. McPhillips, Esq., Mineola, New York, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Satellite Energy Corp. appeals from decisions of the Utah State Office, Bureau of Land Management (BLM), dated May 3, 1983, rejecting the above enumerated oil and gas lease applications for failure to properly complete Part B, automated form 3112-6a of the applications.

Since January 1, 1982, the form approved by the Director, BLM, for simultaneous oil and gas drawings with respect to parcels located in Wyoming is the Automated Simultaneous Oil and Gas Lease Application, forms 3112-6 and 3112-6a. 46 FR 55783 (Nov. 12, 1981). The automated form, also used for parcels located in Utah since November 1, 1982 (47 FR 40412 (Sept. 14, 1982)), is designed to accommodate the automated processing of simultaneous oil and gas lease applications. 46 FR 55783, 55784 (Nov. 12, 1981).

Form 3112-6 is titled "AUTOMATED SIMULTANEOUS OIL AND GAS LEASE APPLICATION PART A." Form 3112-6a is titled "AUTOMATED SIMULTANEOUS OIL AND GAS LEASE APPLICATION PART B." Part A, which should be submitted only with the applicant's first filing under the automated process, enables

BLM to record the applicant's name, address, "identification" number, and certain other information. Part B identifies all parcels which the applicant desires to lease and a separate Part B is submitted for each drawing. Part B includes a section designated "Mark Social Security Number." This section contains blocks for entering the digits of the number. Under the blocks are rows of numbers in circles. The circles containing the appropriate numbers must be blackened in pencil for computer identification of the applicant and correspond with the number printed in the blocks and entered on Part A. Although the number is designated "SOCIAL SECURITY NUMBER" on the form, it may be a person's social security number, a business entity's employer identification number, or a number assigned by BLM. On the reverse of Part B under the heading "PART B INSTRUCTIONS," the following instruction is given: "SOCIAL SECURITY NUMBER--With a lead pencil, print in the appropriate squares the number used by the applicant on Part A and mark the corresponding circles."

Appellant submitted Part B forms for the January 1983 simultaneous oil and gas lease drawing for the State of Utah. In each of the applications identified in the first paragraph of this decision the appellant was designated as the first-priority applicant. On examination, after the drawing, it was found that in appellant's applications the circles identifying its bureau applicant number were blackened, but the numbers had not been entered in the blocks above the circles.

BLM's reason for rejection reads: "Satellite 8301101 failed to fully execute Part B of the simultaneous oil and gas lease application by not totally completing the section regarding the social security/identification/Bureau of Land Management BAN number. Therefore, the application is rejected. 43 CFR 3112.2-1(a); 43 CFR 3112.6-1(a)."¹

Appellant contends that the blocks on the left side of Part B of the applications are for the convenience of the applicant and are not mandatory. In support of this contention appellant submitted a copy of a decision of the Wyoming State Office, BLM, dated March 28, 1983. This decision dismissed a protest filed by Lane Lasrich, second-priority applicant for parcel WY-127 in the January 1983 simultaneous

¹These regulations provide:

"§ 3112.2-1 Simultaneous oil and gas lease applications.

"(a) An application to lease under this subpart consists of a simultaneous oil and gas lease application on a form approved by the Director, Bureau of Land Management, completed, signed and filed pursuant to the regulations in this subpart. The first applicant for a lease, as determined under the regulations in this subpart, who is qualified to hold a lease under the Act and the regulations in this title shall be entitled to submit an offer for the lease as described in § 3112.4-1 of this title.

"§ 3112.6-1 Rejection of an application.

"Rejection is an adjudicatory process which follows selection. Filing fees for rejected filings are the property of the United States and shall not be returned.

"(a) *Improper filing.* Any application which is not filed in accordance with § 3112.2 of this title or any application which is unacceptable, as set forth in § 3112.5 of this title, shall be rejected. Misplacement of name or address or incomplete address on the face of form 3112-1 shall not be a basis for rejection until 30 days from posting the list of priority or return of the documents described in § 3112.4-1 of this title as undeliverable, whichever is later."

The regulations concerning oil and gas leasing were amended effective Aug. 22, 1983. 48 FR 33648 (July 22, 1983). Rejection criteria now appear at sections 3112.5-1 and 3112.5-2.

November 17, 1983

drawing. In the Lasrich case the protest was based upon the first-priority applicant's failure to fill in the blocks on the left side of Part B of the application. The first-priority applicant for parcel WY-127 is also the appellant in this case. The decision of the Wyoming State Office stated: "The blocks on the left side of Part 'B' of the application are for the convenience of the applicant and are not a mandatory part of the application. As you suggested in your letter, the computer reads only the bubbled (darkened circle) numbers." The decision upheld the validity of the first-priority application.

[1] On November 6, 1981, the Director, BLM, approved forms 3112-6 (Part A) and 3112-6a (Part B) for simultaneous oil and gas lease applications submitted to the Wyoming State Office, BLM. At that time simultaneous oil and gas lease applications were submitted to the state offices of the state in which the parcel to be leased was located. Use of forms 3112-6 and 3112-6a began on January 1, 1982. See 46 FR 55783. On September 14, 1982, notice was printed in the *Federal Register* that effective October 14, 1982, all states except Alaska would use forms 3112-6 and 3112-6a, and that all applications (except for Alaska) would be submitted to the Wyoming State Office, BLM. 47 FR 40412. After October 14, 1982, all automated simultaneous lease applications were processed by the Wyoming State Office, BLM. Until the adoption of forms 3112-6 and 3112-6a all applications were manually processed. The new forms were developed and adopted to "accommodate the automated processing of simultaneous oil and gas lease applications." The development of the automated process was the result of BLM's efforts "to expedite the issuance of leases and lessen the paperwork burden on the public." 46 FR 55783, 55784 (Nov. 12, 1981).

This Board must now resolve the apparent conflict between the application of the regulatory requirements for proper completion of form 3112-6a by the Wyoming State Office and the Utah State Office, BLM.

The "computer read" portion of Part B is that portion represented by the "bubbled numbers" located on the left side of the form. The computer does not "read" those blocks above the numbers and the presence or absence of those numbers in the blocks does not affect the ability of the computer to process the application. The number indicated in the blackened circles is the feature by which the machine distinguishes the application as distinctly that of the applicant, and proper completion of the circles is necessary. See *Victor S. Duletsky*, 77 IBLA 12 (1983).

The supplementary information in the notice that the "new" forms would be used for Utah parcels stated, with respect to the processing of form 3112-6a, that "Applications filed on the automated form and received in a condition that the authorized officer determines would

prevent automated processing will not be acceptable." 47 FR 40412.² It can be assumed that if the application is, in fact, processed, the application is complete as to those items machine read. If this is the case, any error or failure to complete the left hand side of form 3112-6a which does not prevent automated processing will be an inconsequential omission.³

In the case before us, the machine did in fact read the applications filed by appellant. As a result, appellant was found to be the first-priority applicant. There is nothing in the record which would indicate in any way that the failure to fill in the blocks with the numbers corresponding with the "bubble numbers" rendered the application unprocessable. Under the circumstances we believe that the Wyoming State Office properly interpreted the regulatory requirements in accordance with the intent expressed at the time of adoption of the forms.

Even though appellant did not fill in the blocks as required by the instructions, we must look to the results of this error. The applications were otherwise complete. The number which was to have been placed in the boxes was contained on the face of the applications immediately below the boxes in the form of blackened numbered circles. None of the information required was absent from the face of the form, and no ambiguity was created. In *Conway v. Watt*, 717 F.2d 512 (10th Cir. 1983), the Circuit Court of Appeals held that nonsubstantive errors are inappropriate grounds for finding simultaneous oil and gas lease applications fatally defective. In the case now before this Board the omission on the face of the appellant's applications was nonsubstantive and therefore the application should be further processed, all else being in order.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed, and the cases are remanded to BLM for further action consistent with this decision.

R. W. MULLEN
Administrative Judge

WE CONCUR:

ANNE POINDEXTER LEWIS
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

² This requirement is now expressed in regulation 43 CFR 3112.2-1(g), 48 FR 33678 (July 22, 1983).

³ It is recognized that Part B of the application could be machine processed without the information contained on the right-hand side of the application. However this information is not contained elsewhere on the application, even though it is not used by the machine in the processing of the application. Therefore, if the information on the right side of the application is not completed, and the application is not signed by the applicant as required by the regulations and in the manner described in the instructions, the application will be considered to have a fatal error.

November 25, 1983

L. A. MELKA MARINE CONSTRUCTION & DIVING CO., INC.

IBCA-1511-9-81

Decided November 25, 1983

Contract No. CX3000-9-0160, National Park Service.

Motion granted to vacate decision and dismiss appeal.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction

Where the Board found that the contractor failed to comply with the certification requirements of 41 U.S.C. § 605(c)(1), it held that the fact that the contracting officer did not render a decision on the claim as submitted does not affect the consequences of the failure to certify.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction

The Board held that the failure of a contractor to certify a claim to the contracting officer in accordance with 41 U.S.C. § 605(c)(1) renders the claim as submitted a nullity, relieving both the contracting officer and the Board from any obligation and authority to issue a decision thereon.

3. Contracts: Contract Disputes Act of 1978: Jurisdiction--Rules of Practice: Appeals: Motions

The Board rejected appellant's contention that certification of a claim appended to a complaint makes Government counsel an agent of the contracting officer for the purpose of compliance with the requirements of 41 U.S.C. § 605(c)(1) and granted the motion of the Government to vacate the Board's decision rendered on the merits and to dismiss the appeal for lack of jurisdiction.

APPEARANCES: Peter Paul Mitrano, Attorney at Law, Alexandria, Virginia, for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

On July 28, 1983, this Board rendered a decision with regard to this appeal whereby appellant was awarded \$46,476.13 plus interest as compensation for changed work performed pursuant to the above-numbered contract. On August 30, 1983, the Government filed a motion with the Board requesting that its decision be vacated and the appeal dismissed for lack of jurisdiction.

In its memorandum filed in support of that motion, the Government recited the following facts: (1) that upon completion of the work, appellant submitted a claim dated November 25, 1980, to the contracting officer in the amount of \$82,048; and (2) that upon receipt of the Board's decision, the contracting officer reviewed the file to ascertain the date upon which interest would accrue, and, in the course thereof, discovered that appellant had not certified its claim as required by the Contract Disputes Act of 1978.

In the same memorandum, the Government states the law: (1) To require a certification by a contractor of any claim over \$50,000 submitted to the contracting officer, 41 U.S.C. § 605(c)(1); (2) to place the burden upon the contractor to submit the required certification, *T & H Construction*, ASBCA Nos. 26561, 26726 (Dec. 29, 1982), 83-1 BCA par. 16,247; (3) to prohibit any waiver of the congressionally mandated certification requirements, *Paul E. Lehman v. United States*, 673 F.2d 352 (1982), and *W. H. Mosley Co. v. United States*, 677 F.2d 850, 851 (1982); and (4) to preclude jurisdiction by a board of contract appeals or any other tribunal over a contract claim not properly certified when submitted to the contracting officer, *W. M. Schlosser Co. v. United States*, 705 F.2d 1336 (1983). The Government then suggests that the only remedy in this situation is to vacate the decision of July 28, 1983, and dismiss the appeal.

In its response to the Government's memorandum, among other things, appellant asserts: That the Government has taken the position that since appellant did not provide a proper certification, appellant will only be paid the sum of \$42,894 even though the Board in its decision awarded appellant the sum of \$46,476.13 plus interest; that the cases relied upon by the Government are not controlling in the instant matter because said cases involve contracting officers' decisions issued without certifications while here "the contracting officer did not issue a decision, and was not deemed to have denied appellant's claim"; that the Contract Disputes Act of 1978 (CDA) anticipates that the Board may hear an appeal without a contracting officer's decision; and since the Government's counsel received a certification contained in the complaint, the Government's motion "is not controlling to the facts in this appeal." Appellant also contends that jurisdiction of the Board is not dependent upon section 605(c) of the CDA.

Discussion

Based upon our reexamination of the record in this appeal we make the following findings of fact:

1. That in its claim presented to the contracting officer by letter dated November 25, 1980, in the amount of \$82,048, appellant failed to incorporate the certification required by the CDA in section 605(c) thereof;
2. that at no other time did appellant present to the contracting officer a duly certified claim pertaining to the subject matter of this appeal;
3. that after the appeal had been taken appellant appended a certification to its complaint which was served upon Government counsel, but not upon the contracting officer;
4. that although the contracting officer did not render a specific decision on the uncertified claim presented by appellant on November 25, 1980, the appellant, on September 1, 1981, by letter filed a Notice of Appeal without requesting the Board to direct the

November 25, 1983

contracting officer to issue a decision within a specified period as permitted by section 605(c)(4) of the CDA.

[1, 2] Upon review, we find that the legal authorities cited in the Government's memorandum, are correctly cited for the propositions stated and, contrary to the contention of appellant, are controlling and applicable to the instant matter. The fact that the contracting officer did not render a specific decision on the claim submitted does not affect that consequences of the failure to certify. As a practical matter, we hold the failure of the appellant to satisfy the certification requirements of 41 U.S.C. § 605(c)(1), makes the claim as submitted a nullity, relieving the contracting officer, as well as the Board, from the obligation and authority to issue a decision thereon.

In *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (1983), at page 1384, the United States Court of Appeals for the Federal Circuit summarized the current state of the law on the matter of certification as follows:

Moreover, the statutory mandate that all claims over \$50,000 must be certified is one of the most significant provisions of the CDA. The importance Congress ascribed to the certification requirement as a mechanism to discourage the submission of unwarranted claims and encourage prompt settlements was fully discussed in *Lehman v. United States*, 673 F.2d 352 (Ct. Cl. 1982) and need not be repeated here. Suffice to say that certification is not a mere technicality to be disregarded at the whim of the contractor, but is an unequivocal prerequisite for a post-CDA claim being considered under the statute. The CDA "requires that to be valid a claim must be properly certified." *Folk Construction Co. v. United States*, Ct. Cl. No. 99-80C (order entered January 16, 1981). Unless that requirement is met, there is simply no claim on which a contracting officer can issue a decision. *Shelly & Loy v. United States*, 685 F.2d 414 (Ct. Cl. 1982). The submission of an uncertified claim, for purposes of the CDA, is, in effect, a legal nullity and therefore no interest can accrue.

[3] We note that appellant cited no authority, and we know of none, for the proposition that Government counsel may be treated as an agent for the contracting officer for purposes of meeting the statutory certification requirements by appending a certification at the end of a complaint filed in an appeal before the Board. We therefore reject appellant's contention that such procedure rectifies the infirmities of an uncertified claim submitted to the contracting officer.

It is unfortunate that the failure to properly certify the claim was not discovered until after the Board issued its decision on the merits. Nevertheless, we see no alternative to the suggestion of the Government that the motion to vacate the decision and dismiss the appeal must be granted.

Decision

Accordingly, based on the above-stated findings of fact and conclusions of law, the Government's motion is granted and the

Board's decision of July 28, 1983, is hereby vacated and the appeal dismissed for lack of jurisdiction.

DAVID DOANE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF NICHOLSON CONSTRUCTION CO.

IBCA-1711-8-83

Decided November 30, 1983

Contract No. K5120153, Office of Surface Mining.

Appeal Dismissed.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Rules of Practice: Appeals: Timely Filing

Timely filing of an appeal under the Contract Disputes Act of 1978 is jurisdictional and an appeal filed with the Board after the expiration of the 90-day period allowed by the Act is dismissed with prejudice as the Board has no jurisdiction to consider an appeal which is not timely filed.

APPEARANCES: J. C. Wirtner, Secretary/Treasurer, Nicholson Construction Co., Bridgeville, Pennsylvania, for Appellant; Anna M. Norton, Department Counsel, Pittsburgh, Pennsylvania, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This appeal comes before the Board on the Government's motion to dismiss the appeal as untimely filed.

Findings of Fact

1. Contract No. K5120153 was awarded to the Nicholson Construction Co. for stabilization of an area of subsidence in a residential section of Fairmont, West Virginia (Appeal File 5.1).
2. By letter of December 23, 1982, the contractor submitted five claims for extra work (Appeal File 4.1).
3. The contracting officer issued a final decision on the claims on April 5, 1983, allowing payment in full for claim No. 3 and denying the remaining claims. The decision informed the contractor of its right to appeal to the Board within 90 days of the date of receipt of the decision (Appeal File 3.1, 3.2).

November 30, 1983

4. A copy of the contracting officer's decision, filed with appellant's complaint, bears a stamp showing that the decision was received on April 6, 1983, by the Nicholson Construction Co.

5. The contractor appealed the decision of the contracting officer to the Board by letter dated July 20, 1983, which was received by the Board on July 25, 1983. The appeal letter was dated on the 105th day after the receipt of the contracting officer's decision by the contractor and was received by the Board on the 110th day.

Decision

Section 605(b) of the Contract Disputes Act of 1978, 41 U.S.C. § 605(b) (Supp. IV 1980), provides that the contracting officer's decision on a claim shall be final and conclusive and not subject to review unless an appeal or suit is timely commenced. Section 606 of the Act allows a period of 90 days from receipt of the contracting officer's decision for appealing to the Board and section 609(a)(1), in lieu of an appeal to the Board, permits the filing of an action in the United States Claims Court within a period of 12 months from the date of receipt of the decision of the contracting officer.

The United States Court of Appeals for the Federal Circuit has held that the 90-day deadline is a part of a statute waiving sovereign immunity which must be strictly construed. The Board may not waive the 90-day period imposed by statute and has no jurisdiction to consider an appeal which is not filed within the time period of 90 days. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

The letter of appeal to the Board was dated July 20, 1983, the 105th day after receipt of the contracting officer's decision by the contractor on April 6, 1983. The appeal was not filed within the 90-day period allowed by statute. Pursuant to the decision in *Cosmic, supra*, the Board has no jurisdiction to consider an appeal which is untimely filed.

Accordingly, the Board hereby dismisses the appeal of Nicholson Construction Co. with prejudice to any further proceeding before the Board.

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

DONALD ST. CLAIR ET AL.

77 IBLA 283

Decided *November 30, 1983*

Appeal from a decision by the Director of the Office of Surface Mining Reclamation and Enforcement (OSM) denying appellants' requests (1) that OSM take enforcement action against a West Virginia surface coal mining operation pursuant to its oversight role under 30 CFR 842.11; and (2) that OSM conduct, as authorized by 30 CFR 733.12, an investigation into the West Virginia Department of Natural Resources' administration of its surface mining and reclamation program.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Except for decisions on citizens' complaints, to which a different rule applies, an OSM State Director's decision is appealable to the Board under 43 CFR 4.1281 only if the decision states the right of appeal.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Where a State has acquired primacy over the regulation of surface mining operations within the State, OSM is required to conduct an immediate Federal inspection on the basis of a citizens' complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the State regulatory authority has failed to take appropriate action.

APPEARANCES: Mark Squillace, Esq., Washington, D.C., for appellants; Gregory R. Gorrell, Esq., and Laura E. Beverage, Esq., Charleston, West Virginia, for intervenor; John Woodrum, Esq., Field Solicitor, Charleston, West Virginia, Glenda R. Hudson, Esq., and Walton D. Morris, Jr., Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Factual and Procedural Background

Donald and Louise St. Clair and Ella Jane Moore, appellants herein,¹ are residents of Mingo County, West Virginia, who live within the

¹ Mr. St. Clair is the former chairperson of the Public Service District, established by the Mingo County Commission for the purpose of securing and providing safe drinking water for people living in the District. At the time of the events leading up to this case, Ms. Moore was a commissioner of the District, and Mrs. St. Clair was the chairperson of the Ragland Water Board, a local organization with about 150 members.

November 30, 1983

Ragland Public Service District. Island Creek Coal Co. (Island Creek), the intervenor, operates within the District a surface coal mining operation known as Coal Preparation Facility #25, which is located near the St. Clairs. The Ragland Public Service District has long had problems with its water supply. As early as February 27, 1980, the West Virginia Department of Health (DH) issued a "Boil Water Order" to Ragland residents.² The Office of Surface Mining Reclamation and Enforcement (OSM) was aware of the problem, having first learned of it as a result of a citizen's complaint filed in 1979. It has since monitored the situation, but its water analyses in 1980 and 1981 indicated that there was no contamination.

In March 1981 OSM became aware that Island Creek was discharging water containing polyacrylamides³ into one of three abandoned underground mines which, according to appellants, are connected hydrologically with each other and with the source of Ragland's water supply. Island Creek had a valid water quality permit for the discharge, which had been issued by the West Virginia Department of Natural Resources (DNR), the State regulatory authority. On January 5, 1982, DH issued another order, requiring appellants and other Ragland residents to cease drinking the local water altogether, because its laboratory tests had detected an increased presence of polyacrylamides. The order recited that detectable levels of polyacrylamides could have an adverse health effect.⁴ On February 25, 1982, apparently prompted by the DH notice regarding the presence of polyacrylamides and by a long-held suspicion that the area's water problems were related to Island Creek's operation, appellants filed a citizens' complaint with OSM under the authority of 30 CFR 842.12(a) and 842.11(b).⁵

² Ragland was but one of 23 communities in three West Virginia counties which were subject to the order. The stated reason for the order was "major deficiencies and inadequacies of the subject water systems" discovered after "various investigations" in the affected communities. The order lists eight such deficiencies. Seven can be categorized as essentially procedural. The eighth is "[n]umerous unsatisfactory bacteriological samples" but there is no way to determine whether all eight apply to all communities or, if not, which of the eight apply to Ragland.

³ Polyacrylamides are used as a settling agent in water. According to the record these polymers are harmless but the monomers, acrylamides, which often occur in association with the polymers, are highly toxic.

⁴ This announcement may have been technically incorrect, because polyacrylamides as such are considered harmless; only acrylamides are harmful. However, there is a suspicion that acrylamides regularly occur in association with polyacrylamides.

⁵ On Jan. 21, 1981, the Secretary approved the program submitted by West Virginia in pursuit of the latter's taking primacy in regulating surface coal mining in the State as provided in section 503 of the Surface Coal Mining and Reclamation Act of 1977, 30 U.S.C. § 1253 (Supp. V 1981). That had the effect of changing the character of OSM's role in regulating West Virginia surface coal mines from that of primary regulatory authority to that of oversight authority. The important features of OSM's oversight responsibilities are announced in 30 CFR Parts 733 and 842.

On Feb. 13, 1981, the Circuit Court of Kanawha County, West Virginia, enjoined the operation of the State law implementing the approved program until (with an extension) Feb. 13, 1982. As part of its judgment, the court found that the interim regulations were "presently enforceable and . . . [would] constitute a viable surface mining and reclamation program" which would, at least for the time being, protect the various environmental and business interests identified as affected in the proceeding underlying the injunction.

Section 502(d) of the Act, 30 U.S.C. § 1252(d) (Supp. V 1981), requires operators who wish to conduct surface coal mining operations after 8 months following Secretarial approval of a state program, to submit a permit application within 2 months after that approval. The 2-month application requirement must be met, according to the statute, "regardless of litigation contesting that approval." OSM has taken the position that the litigation provision of section 502(d) was intended to apply only to pending court cases; that is, that the pendency of a suit would have no effect on the 2-month application deadline, but that an injunction or order resolving a dispute (and thus taking the

Continued

The complaint alleged (1) that Island Creek's activities had caused and were causing water contamination and (2) that the contamination constituted an imminent threat to the health and safety of the public and a significant imminent environmental harm to water resources. On the basis of the latter allegations, appellants requested an immediate Federal inspection.⁶ In response to the complaint, OSM's State Director on March 3 wrote to DNR to provide the latter with its 10-day notice (see note 6). The letter contains this language: "I have reason to believe that an imminent danger exists in Ragland * * * as a result of the operations at the Island Creek Coal Company preparation plant."

Thereafter, a DNR assistant phoned appellants and informed them that an inspection would take place on March 11, 1982, and that they would be allowed to accompany the inspectors. Appellants asked for and were given permission to bring along two representatives, a former OSM inspector and appellants' attorney. At the appointed place and hour, approximately 25 people were present, including representatives of the United Mine Workers of America, State and county health departments, Mingo County Commission, OSM, Island Creek, and others. There ensued an apparently acrimonious confrontation between appellants, particularly their counsel, and Island Creek officials, followed by what appellants have characterized as merely a tour and not an inspection.

On March 23, 1982, appellants, through counsel, wrote to the OSM Director, recounting the events detailed above and asking for relief. The complaints set out in the letter were as follows:

1. OSM should have conducted an immediate inspection (without 10-days' notice to the State) based on the State Director's belief that an imminent danger existed.

dispute out of the category of pending litigation) could have such an effect. Letter dated Mar. 24, 1981, from Donald R. Tindel, Associate Solicitor, to David C. Callaghan, Director, DNR. (The OSM position is bolstered by two circumstances. First, the Act specifically contemplates that a court may enjoin a state from enforcing its program. See §§ 502(d) and 503(d). Second, the injunction resulted from a suit attacking the West Virginia statute which provided the authority for the state permanent program, not the approval thereof; the named defendant was the Director of DNR, not the Secretary of the Interior.) But for the injunction, permit applications would have been due on Mar. 21, 1981, for operations to be conducted after Sept. 21, 1981. Insofar as the injunction was in effect for a year and a day, the full run of the 2- and 8-month periods would end Mar. 22, and Sept. 22, 1982, respectively. DNR required an application, in the form of an addendum to earlier applications for operators in a situation like Island Creek's to be filed by Mar. 22, 1982. It also required, as part of its application package, certain hydrological information, which required a 6-month study, to be filed by Sept. 22, 1982. According to Island Creek, it complied with these filing requirements (Reply of Island Creek at 26).

⁶ As mentioned in note 5, many of OSM's oversight responsibilities are in 30 CFR Part 842. Under 30 CFR 842.12, a citizen may request OSM to undertake an inspection of an operation covered by a state program. The nature of the inspection is more fully explicated in 30 CFR 842.11 and includes as a purpose for such an inspection the enforcement of requirements or permit conditions not being enforced by the state.

Once a citizen files a request for inspection with OSM, the latter has one responsibility and two avenues of proceeding. The responsibility is to determine whether the allegations supplied by the citizen, if true, constitute a violative condition or imminent danger. If it does so determine, then it must either conduct an immediate inspection or notify the state regulatory authority of the possible violation so that the State may conduct an inspection. The test of whether to inspect or to notify is whether the citizen requesting Federal action "provides adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air or water resources exists and that the state regulatory authority has failed to take appropriate action." 30 CFR 842.11(b)(1)(i)(C). OSM is also under an obligation to conduct an inspection if, having given the State notice, 10 days elapse and the state has failed to take appropriate action or to inform OSM that it has a valid reason for its inaction.

It is against this regulatory framework and under its authority that appellants filed their request with OSM.

November 30, 1983

2. DNR forewarned Island Creek of the March 11 "inspection" (logically inferred from the presence of corporate officials), in violation of section 517(b)(3) of the Act and 30 CFR 842.13(a)(1).

3. West Virginia had no regulations governing surface mining at the time of the OSM 10-day letter and at the time of the inspection. Thus the State lacked the authority to handle the citizen complaint.

4. By barring the citizens' representatives from participating in the inspection, OSM and the State deprived the citizens of their right to participate as contemplated in the Act.

5. DNR failed to conduct an adequate and complete inspection by:

- a. notifying Island Creek in advance;
- b. apparently intending not to conduct an inspection after the initial meeting of the various parties until prodded by the citizens;
- c. refusing to allow citizens' representatives to participate;
- d. failing to bring along equipment necessary to conduct an investigation and record the results;
- e. allowing Island Creek to prohibit the citizens from taking photographs;
- f. failing to take water samples or conduct tracing tests;
- g. failing to take a sufficiently independent posture vis-a-vis the Island Creek officials, turning the "inspection" into a mere tour.

The relief requested was as follows:

1. OSM should conduct a complete inspection allowing the citizens and/or their representatives to be present and taking certain measures listed in appellants' letter.

2. OSM should cite Island Creek for all observed violations of law and conditions creating an imminent danger or a significant imminent environmental harm and should impose affirmative obligations designed to correct such violations and conditions. Appellants listed certain suspected violations, including failure to submit a proper permit application.

3. OSM should conduct an investigation into West Virginia's administration of its program. (As noted previously, some of OSM's oversight responsibilities are delineated in 30 CFR Part 733. Under 30 CFR 733.12(a), OSM is to evaluate the administration of each State program at least annually. Under the same section an interested person may request that the Director of OSM undertake such an evaluation.)

On June 8, 1982, OSM replied by letter to the March 23 complaint. The letter informed appellants that OSM had been involved in the Ragland water problem since August 1979 (as mentioned above). The knowledge gained as a result of that involvement caused OSM some concern, so it had offered its help to DH. OSM had also enlisted the Environmental Protection Agency's (EPA's) assistance to further DNR's and DH's efforts. These latter three agencies had agreed among themselves to divide responsibilities for a thorough and ongoing

analysis and monitoring of the Ragland water problems. OSM promised continuing efforts to monitor the Ragland situation and to assist DNR where possible, consistent with OSM's oversight role. OSM had also contacted DNR because of the concerns raised in appellants' complaint and had secured DNR's offer to perform a new inspection with appellants present. Thus, OSM represented that it had done everything it reasonably could to resolve the problem, effectively rejecting appellants' claims and requests for relief. OSM denied appellants' request for an evaluation of the State program, because it did "not believe that such an evaluation would be useful." The letter did not specifically grant the right to appeal to the Office of Hearings and Appeals (OHA).

On July 7, 1982, the citizens filed their notice of appeal with the Interior Board of Surface Mining and Reclamation Appeals (IBSMA). On September 21, IBSMA allowed the intervention of Island Creek. On August 20, 1982, appellants filed their preliminary statement of reasons. Their arguments are as follows:

1. OSM erred in failing to conduct an immediate Federal inspection. (OSM's March 3 letter to DNR citing "imminent danger" was, according to appellants, evidence of a conclusion that warranted a mandatory Federal inspection.)

2. OSM erred in not later conducting an investigation because of the State's failure to respond appropriately within 10 days of the OSM notice. The State's efforts were inadequate, because:

a. DNR gave Island Creek prior notice of the March 11 inspection, Section 517(c);

b. DNR failed to allow appellants' representatives to accompany the inspection;

c. The "inspection" itself was inadequate, because there was:

(i) no camera or inspection equipment;

(ii) no tracing tests;

(iii) no data on Island Creek's use of polyacrylamides collected;

(iv) no data on Island Creek's disposal of other potentially harmful materials;

(v) failure to review Island Creek's permit.

d. OSM had given DNR a second opportunity to inspect after effectively acknowledging that DNR's inspection was inadequate. This was more than 3 months after the 10-day notice.

The relief requested in appellants' preliminary statement is similar to that requested in their complaint to OSM, including ordering OSM to inspect the Island Creek operation and to enforce the Act. Among the suspected violations listed is one challenging permitting requirements of the State program (*see note 5*).

Other matters raised in the statement are OSM's assertedly unlawful denial of the request for evaluation of the West Virginia program and its failure to meet any of the deadlines for responding to the three requests for administrative review in appellants' March 23 letter. Regarding the denial of the request for review of the State

November 30, 1983

program, appellants note that 30 CFR 733.12(a)(2) requires OSM to verify allegations by a citizen that question the validity of State administration of its program and to determine whether such evaluation should be made. Since OSM made no effort to verify these allegations, the Board should order OSM to do so and to provide a detailed report of its effort and findings.

OSM's response contains some facts not disclosed by appellants. For instance, according to a March 12 letter from DNR to OSM, water samples were taken during the March 11 inspection. Also, DNR's position was that, given the complexity of the issues, a rapid resolution of the problem was impossible, but "all parties agreed to join in an intensive investigation" to be coordinated through DNR.

The parties participated in an oral argument before IBSMA on November 19, 1982.⁷

Discussion

[1] We must first consider a procedural question. Island Creek has alleged lack of Board jurisdiction because the decision appealed from failed to grant specifically the right of appeal to this Board.

The basis for that objection is the statement of the Board's jurisdiction to decide appeals from decisions by the Director of OSM, found in 43 CFR 4.1281. That section allows appeals from decisions "where the decision specifically grants such right of appeal." As noted previously, the Director's decision of June 8, 1982, did not grant such right.

Appellants contend, however, that relying on only that section of 43 CFR Part 4 to determine this Board's jurisdiction is erroneous. On September 15, 1982, 30 CFR 842.15 was amended to include a new subsection (d) with a reference to the jurisdiction section, 43 CFR 4.1281, and a requirement that any decision of the Director on a citizens' complaint under 30 CFR 842.12 contain a statement regarding a right of appeal to OHA. The effective date, being in September, obviously came after the Director's June 8 decision, but an earlier set of circumstances must be taken into account in addressing this issue. In a settlement agreement in March 1980, concluding the dispute in a District of Columbia District Court case, *Council of the Southern Mountains, Inc. v. Andrus*, CA No. 79-1521, OSM agreed to allow the right of appeal from Director's decisions in citizens' complaint proceedings in accordance with a memorandum issued by the OSM Director to all Regional Directors on February 4, 1980. That memorandum instituted the policy of including the right of appeal language in each informal review decision based on a citizens'

⁷ Subsequent to this oral argument, the Secretary by Order dated Apr. 26, 1983, transferred all functions and responsibilities delegated to the Board of Surface Mining and Reclamation Appeals to the Board of Land Appeals. 48 FR 22370 (May 18, 1983). Unfortunately, while the hearing was transcribed at the time, it was never typed nor were the tapes retained. Thus, they were not available for consideration by the present panel.

complaint.⁸ For these reasons, we conclude that OSM intended that citizens have the right of appeal from decisions on their complaints, and we reject the contention that we lack jurisdiction to review decisions based on citizens' complaints.

There is another area, however, in which our authority to assume jurisdiction is far less clear. As noted, OSM's decision also dealt with the (separately stated) request for OSM to evaluate the West Virginia program. The jurisdiction regulation, 43 CFR 4.1281, requires a Director's decision to state the right to appeal as a condition of appealability as much for decisions on State evaluation requests as for decisions on citizens' complaints. Unlike the latter situation, however, there has been for the former neither (1) regulatory change referring to the OHA jurisdiction provision, (2) OSM agreement, approved by a district court, to grant the right of appeals in all cases, nor (3) any other statement of policy which leads us to believe that OSM intended for appellants or others similarly situated to have that right automatically.⁹ Our review, therefore, takes account only of those issues involved in the citizens' complaint.¹⁰

[2] There are two distinct (though interrelated) matters to be discussed in connection with the citizens' complaint under appeal. The first is whether, upon receiving appellants' February 25 letter, OSM should immediately have conducted a Federal inspection. Appellants contend that when, in his letter to DNR asking for State action, the OSM State Director stated that he had reason to believe there was an imminent danger existing at Ragland, he closed the question, having concluded all that was necessary to order a Federal inspection without notifying the state. OSM contends that that language represented an

⁸ We are not unmindful that the memorandum referred only to 30 CFR 721.13, the interim program counterpart to 30 CFR 842.15. It is possible, however, to read the memorandum more broadly, given its multiple usage of "citizen complaint" without tying those words specifically to section 721.13. Whatever the proper view of that possibility, the regulatory amendment and the February 1980 memorandum and subsequent court action make manifest the Secretary's intent that all decisions on citizens' complaints be reviewable whether or not they contain the right to appeal and whether the complaint preceding them arose under Part 721 or Part 842. Although it did not sway us in reaching this conclusion, we also note that it was the intervenor and not OSM which objected on this basis; we also raise without deciding, because it is unnecessary, whether any party other than OSM may assert the objection.

⁹ In addition, we would note that a decision not to evaluate necessarily involves the exercise of a good deal more discretion by OSM than a decision for any kind of action following a citizens' complaint. There are two major reasons for this: (1) an evaluation is likely to require a major Departmental effort to accomplish while an inspection occasioned by a citizens' complaint likely will not, and (2) OSM is required to conduct such an evaluation yearly anyway. Moreover, largely because of the size of the effort necessary, OSM would ordinarily require more than one instance of state deficiencies at one site before it orders an evaluation, especially when the program to be evaluated is less than 5 weeks old at the time, as in this case. Because a request for evaluation might be based on such relatively insubstantial allegations, OSM should have more discretion than in the situation where similar allegations in a citizens' complaint will properly evoke a response, namely an inspection or request for state action, more in line with the nature of the charges. The regulations covering the two types of requests tacitly recognize the distinctions and grant OSM greater discretion in evaluation situations. Section 733.12 of 30 CFR requires only that the Director verify an interested person's allegations and determine whether to evaluate, while 30 CFR 842.12 requires OSM to go to considerable lengths in explaining its actions in response to a citizens' complaint. This is not to suggest that OSM has carte blanche to deny any request for evaluation it receives but rather that it possesses greater latitude in this area than it does in the area of citizens' complaints. That distinction is consistent with requiring the specific grant of a right to appeal from a decision refusing to evaluate before the Board's jurisdiction may be invoked.

¹⁰ In their Mar. 23 letter to the Director requesting informal review of the OSM response to the Feb. 25 citizens' complaint, appellants raised the request for evaluation for the first time, along with certain alleged Island Creek deficiencies, in particular its alleged failure to secure a permanent program permit. Insofar as appellants never asked for a Federal inspection in respect to these deficiencies, appellants must have raised them and the state actions in relation thereto not as part of a citizens' complaint but as support for their request for an evaluation of the State program. They, therefore, are among the issues we will not reach for the reasons disclosed in the text. The only issues we will reach are those raised in the Feb. 25 letter and the OSM response to the letter.

November 30, 1983

unfortunate choice of words and that it was merely a recitation of the allegations of the complaint. OSM filed an affidavit from the State Director which states that he had no information to corroborate appellants' allegations other than that there were water problems in Ragland, that they were a matter of concern to a number of governmental agencies, and that OSM had no evidence which would establish a connection between the problems and any ongoing mining. The affidavit indicates that the State Director's purpose in the letter was merely to transmit the request to DNR. The tenor of the affidavit is that the State Director felt OSM could do nothing about the situation currently, given the circumstances that it had been aware of the problem for some time, that it had found no connection between the problem and any mining operation, and that it was aware that a number of agencies were then actively seeking a solution.

We accept OSM's explanation of the "imminent danger" language used in the letter transmitting the complaint to DNR. The State Director's affidavit corroborates what would otherwise be a logical conclusion that the language was merely a recitation (albeit, perhaps an ill-advised one) of the language presented in the complaint. Given the conclusory contents of the complaint and what the State Director already knew about the situation, it would have been highly unlikely for him to conclude that there was an imminent danger; his use of that language, therefore, appears to have been nothing but a statement of the complaint language.

A major factor leading to our conclusion is the deficiency of the complaint itself when measured against the regulatory guidelines concerning what is necessary to trigger an immediate Federal inspection. The regulations require OSM to conduct an immediate Federal inspection when "[t]he person supplying the information provides *adequate proof* that an imminent danger * * * exists and that the State regulatory authority has failed to take appropriate action." 30 CFR 842.11(b)(1)(ii)(C) (*italics added*). Appellants' February 25 letter cannot be characterized as "providing adequate proof" of the existence of an imminent danger. It simply states appellants' belief that Island Creek's "activities" have contaminated their water and that that contamination has caused an imminent danger. It also states appellants' belief that Island Creek has violated "regulations in the West Virginia permanent program that correspond to 30 CFR 816 and/or 817.41 * * *," without linking that belief to any allegation of imminent danger. The only matter mentioned in the complaint which could possibly be characterized as "proof" is a statement that the DH "has recommended that no one drink or cook with the water from our water supplies," a fact of which OSM already had knowledge. Thus, the complaint simply does not provide the adequate proof necessary to support appellants' beliefs. In fact, far from providing adequate proof

that the State had failed to take appropriate action, the complaint did not even allege such a failure.

The second issue is whether OSM erred in not ordering a Federal inspection after the alleged failure of DNR to take appropriate action in response to the OSM notice. Under 30 CFR 842.11(b)(1)(ii)(B), OSM is required to conduct an inspection if, 10 days after notification to the State, the latter "has failed to take appropriate action to have the [alleged] violation abated and to inform [OSM] that it has taken such action or has a valid reason for its inaction." Since DNR issued no notice of violation during the 10-day period after notification to it, OSM should have ordered an investigation only if DNR failed to inform it of a valid reason for its failure to do so. The time for OSM to make the determination of whether DNR had presented that valid reason was the expiration of the 10-day period. Because the OSM notification to DNR was dated March 3, 1982, that period could not have expired before March 13, 1982. On March 12, 1982, an official of DNR wrote to the State Director in response to the OSM March 3 notice. The letter stated that a "citizens inspection" had taken place on the preceding day, March 11, and that no violations had been observed. It further reported that DH and Water Resources Division representatives had taken water samples at four sites at DNR's request and that, although the samples had not yet been analyzed, DNR expected to furnish OSM with a more complete report in about a week's time. The letter also cited an agreement among the parties (which included OSM, DNR, DH, Mingo County Commission and Island Creek) to "work in close cooperation with the Ragland Public Service District [represented at the time by Mrs. St. Clair and Mrs. Moore] in order to find potential solutions to the water problems."

OSM also had in its possession memoranda from two of its inspectors, who were present at the March 11 inspection, reporting thereon. One of them is dated March 17 and the other, though apparently undated, is identified by OSM as being dated March 26, 1982. Disregarding whatever oral communications may have taken place between the inspectors and the Director, these reports were apparently not available for consideration at the end of the 10-day notification period but were available by or shortly after the time OSM received appellants' March 23 letter requesting informal review. The thrust of the memoranda was that, although the inspection and the discussion preceding it were not without some snags, the inspection was adequate. An interesting aspect of the March 17 memorandum was its reporting of the contentions of Island Creek at the discussion. The Island Creek representative stated that Island Creek had not begun to use polyacrylamides until 1 month after DH detected them in the water and that Island Creek's water sample analyses had not detected the presence of polyacrylamides (although the DH representative noted that the differing results could be a matter of differences in analysis methodology between Island Creek and DH). This memorandum also reported that when OSM conducted a followup

November 30, 1983

interview with Mrs. St. Clair on March 12, she expressed dissatisfaction with some aspects of the discussion on March 11 but admitted that she was not denied access to any portion of the operation.

As noted, the question presented is whether DNR failed to inform OSM of a valid reason for its failure to take enforcement action. We conclude that DNR *did* so inform OSM and that the latter's failure, in mid-March 1982, to order a Federal inspection from DNR, given what OSM already knew about the Ragland situation, was enough by itself to assure OSM that the State's response was appropriate. The inspectors' memoranda, though after the fact, supported OSM's conclusion that no Federal inspection was warranted. Appellants' views on the alleged deficiencies in the inspection, as expressed in their March 23 letter, simply were unavailable to OSM when it made its decision, nearly 2 weeks earlier, on whether to order a Federal inspection. All factors considered, we believe that OSM's decision not to order a Federal inspection after the 10-day notice to the State was both rational and appropriate.

The final aspect of the question, therefore, is whether, after receiving appellants' March 23 request for informal review and considering the allegations therein, OSM should have reversed its earlier decision not to inspect. Looking at appellants' allegations of deficiency, we note that all but one were either on disputed matters of law (*i.e.*, whether citizens' representatives should be allowed on inspections) or on matters of fact disputed by other sources of information available to OSM, like the DNR response and the inspectors' memoranda (*i.e.*, the adequacy of the inspection). The only allegation that was not specifically disputed by OSM's other sources was DNR's alleged prenotification to Island Creek personnel of the inspection.

In light of the differing versions of the adequacy of the State response, OSM was certainly justified in proceeding with caution to ascertain the true state of the facts, rather than rushing into the situation based only on appellants' allegations. OSM's June 8, 1982, decision disclosed a careful consideration of all factors. It recites OSM's considerable earlier involvement in the situation and its later efforts to get EPA involved and to help coordinate the efforts of a number of agencies to resolve the problem. Acknowledging appellants' complaints about the inspection, it details its intercession with DNR to secure a new inspection, despite information in its possession disputing the validity of those complaints. To the extent that the decision conveys OSM's conclusions that the water problem could not at that time be linked to Island Creek's surface coal mining operation and that resolution of the problem would not be furthered by ordering a Federal inspection, we believe that the record fully supports those conclusions.

We agree with the decision's assertion that OSM had done all it reasonably could have to resolve the problem in the circumstances. We refuse to second guess OSM's decision not to inspect when we are aware of its efforts to solve the problem by coordinating several agencies' efforts and by refraining from any action that would have undermined or seriously impeded the coordinated effort then going on.

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

ADMINISTRATIVE JUDGE ARNESS CONCURRING:

I agree generally with the statement of the pertinent facts of record made by the lead opinion and concur that the result reached by that opinion is correct. I am unable to agree, however, with the reasoning in the opinion, or the dicta, especially the observation that "OSM had done all it reasonably could to resolve the problem." I am unable to agree, also, concerning either the description by the lead opinion of the March 3, 1982, notice to DNR or the conclusion that the notice merely reported to DNR the existence of a citizen's complaint alleging the possible existence of "imminent danger" to Ragland's water supply. Nowhere in the record is there an explanation why the notice from OSM to DNR should be read to state that *appellant*, and not *OSM*, found the existence of "imminent danger" in the contaminated water. The March 3, 1982, notice from OSM to West Virginia states, in pertinent part:

This notification is being provided to you as required by Section 521(a)(1) of P. L. 95-87. I have reason to believe that an imminent danger exists in Ragland, West Virginia as a result of operations at the Island Creek Coal Company preparation plant.

* * * * *

OSM has previously conducted an investigation of the Ragland situation and a complete copy of our file on the investigation was provided to you last month. However, since that investigation was conducted, new issues have surfaced which led to Mr. St. Clair's allegation of an imminent danger. In accordance with OSM policy, this complaint is being referred to you for action.

There is no apparent ambiguity in the notice. The letter explains, albeit in conclusory terms, the basis for the conclusion reached by OSM that there exists an "imminent danger." "Imminent danger" has been defined as a condition which creates the possibility of a substantial injury that a rational person, cognizant of the danger, would choose to avoid. *Carbon Fuel Co.*, 3 IBSMA 207, 88 I.D. 660 (1981). While the nature of the "new issues" which are the apparent basis for the agency conclusion that such a condition was to be found in the Ragland water supply are not specified, it is clear that something new, according to the letter of notice, has occurred to make the continuing pollution of Ragland's water merit an inspection of the

November 30, 1983

nearly plant No. 25 of the Island Creek Coal Co. On appeal, OSM has not explained the meaning of the words "new issues" used in the notice. The record concerning this transaction is simply not clear.

On the record presented, the case is similar in effect to that described in *Apache Mining Co.*, 1 IBSMA 14, 85 I.D. 395 (1978), where the Board of Surface Mining and Reclamation Appeals held that, once an appeal is filed, OSM loses authority to take action either to rescind or reconsider a prior action until action is taken on the appeal by the Board. Thus, here, even though OSM would prefer to treat the matter differently now that all the facts have been developed, this desire to reconsider is not enough, by itself, to explain the action taken by the March 3 notice. The explanation by OSM of the meaning of its March 3 notice is a clear illustration of the clarity of hindsight. It need not be otherwise characterized. Even, however, assuming the March 3, 1982, notice did constitute a finding by OSM of imminent danger, the subsequent development of the record fails to establish that the suspicion was founded in fact. In the context of the circumstances of the case, including the initiation of the State program, the transfer of primary responsibility from the Federal program, the implementation of new State regulations and permanent Federal regulations governing the subject of surface mining, and the history of the lengthy dealings between all the represented parties concerning the Ragland water, the language of the March 3 notice may ultimately be appropriately explained.

On March 11, 1982, as a result of the March 3 notice by OSM to the State, an inspection was held at which appellants were denied the right to take photographs and to be accompanied by their experts. Such an inspection would have been inadequate under the interim regulations governing the Federal program in the initial enforcement of SMCRA by OSM. See *Eastover Mining Co.*, 2 IBSMA 70, 87 I.D. 172 (1980). Those interim regulations were no longer effective on the date of the inspection. Whether another inspection was, or should have been conducted as a result cannot be decided, however, since the record indicates that appellants refused or ignored subsequent State efforts to reinspect. Moreover, reports of State inspections made following the March 11 inspection indicate the activity at plant No. 25 may not be clearly linked to the pollution of the water supply of Ragland.

On the record before the Board, therefore, it is impossible to determine whether the refusal on March 11 to allow inspection as demanded by appellants amounted ultimately to a violation of the State regulations implementing SMCRA. Appellants' refusal to accept as valid later State efforts to reinspect plant No. 25 merely confuses the situation. Since the record indicates that investigation and cooperation between the various agencies concerned is continuing,

there seems little point, under the circumstances, to require a Federal inspection now.

FRANKLIN D. ARNESS
Administrative Judge, Alternate Member

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the result reached by the lead and the concurring opinion, I wish to separately address, in greater detail, two of the issues presented by the instant appeal. The first of these relates to the question of the propriety of the language used by the OSM State Director in his letter of March 3, 1982, to the Director of the West Virginia Department of Natural Resources (DNR). In particular, I wish to focus on the language examined by both opinions at some length, viz., the State Director's declaration that "I have reason to believe that an imminent danger exists in Ragland, West Virginia as a result of operations at the Island Creek Coal Company preparation plant."

Appellants suggest that, having admitted that it had reason to believe that an imminent danger existed, OSM was obliged, under the express terms of section 521(a)(1) of the Act, to conduct its own immediate inspection of the Island Creek Coal Co. (Statement of Reasons at 7). Counsel for OSM has responded by attempting to explain away the language of the letter, noting that "this statement was merely a recitation of the allegations Mr. St. Clair made in his February 25 request for an inspection and it was not based on any independent corroboration by OSM" (Answer at 19). The lead opinion characterizes this language as "merely a recitation (albeit, perhaps an ill-advised one) of the language presented in the complaint." The concurring opinion opines that the post facto rationalizations of this language represent "the clarity of hindsight" and expressly rejects the lead opinion's view that the language was merely a recitation of appellants' complaint arguing that it shows the "conclusion" of OSM that an imminent danger existed. With due respect, I think it clear from a reading of the applicable regulations that *all* of the above statements are, to a lesser or greater extent, wrong.

It is necessary, here, to pay particular attention to the relevant language of the regulation. Thus, 30 CFR 842.11(b)(1) provides that:

An authorized representative of the Secretary shall immediately conduct a Federal inspection to enforce any requirement of the Act * * *:

(i) When the authorized representative has reason to believe * * * that there exists any condition, practice or violation which creates an imminent danger to the health or safety of the public * * * and—

(ii)(A) There is no State regulatory authority * * *; or

(B) The authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction; or

(C) The person supplying the information provides adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to

November 30, 1983

land, air or water resources exists and that the State regulatory authority has failed to take appropriate action. [Italics added.]

Under this regulatory scheme, it is clear that as a *precondition* for a Federal inspection the authorized representative must have "reason to believe" that a violation has occurred. Once this precondition exists, however, a Federal inspection will only occur *if* one of the three conditions set forth in section 842.11(b)(1)(ii) is met. Thus, contrary to appellants' argument, the fact that the OSM State Director stated he had "reason to believe" that an imminent danger existed could not, without more, have served as an adequate basis on which to premise a Federal inspection. Not only is there nothing in the letter sent by the OSM State Director which would indicate that any of the three necessary conditions had been met, but also, as the lead opinion demonstrates, there was nothing in appellants' letter to the OSM State Director that would have supported a finding that any of these conditions were present. Appellants' argument is correctly rejected.

This being said, however, both the lead and concurring opinion, as well as the brief filed by OSM, imply that the OSM State Director employed inartful language in notifying DNR of appellants' complaint. I cannot agree. Section 521(a)(1) of SMCRA requires notification of the State regulatory authority where the Secretary (or his authorized representative) "has reason to believe" that any person is in violation of the terms of the Act. Thus, under the statutory mandate, a finding that the authorized representative "has reason to believe" is a required predicate of State notification. It is clearly a term of art. And, more importantly, the applicable regulations make it obvious beyond cavil that, *as a matter of law*, the OSM State Director did have "reason to believe" that a violation existed. Thus, 30 CFR 842.11(b)(2) provides: "An authorized representative shall have reason to believe that a violation, condition or practice exists if the facts alleged by the informant would, *if true*, constitute a condition, practice or violation referred to in paragraph (b)(1)(i) of this section." (Italics supplied.)

Appellants had alleged that activities of Island Creek Coal Co. had resulted in the contamination of the Ragland community water supplies. *If true*, this allegation clearly made out a violation of the Act. Therefore, under the regulations, the OSM State Director did, in point of fact, have "reason to believe" that an imminent danger existed. I can discern no basis for questioning the OSM State Director's choice of words in transmitting the complaint to DNR when that choice of words is dictated by the applicable regulations.

Secondly, I think comment is warranted on a number of the deficiencies alleged to have occurred in the State inspection, as well as OSM's response to complaints relating thereto. In this regard, I would note that under 30 CFR 842.11(b)(1)(ii)(B) a Federal inspection would have been required to be undertaken unless the State showed it had a valid reason for its failure to have the violation abated. It is obvious, of

course, that the nonexistence of an alleged violation would explain the failure to abate. So, too, would a description of ongoing activities of either an investigative or ameliorative nature. But the correctness of the OSM State Director's decision not to order a Federal inspection under this provision must, in the first instance, be judged on the basis of the information available at the time he makes his decision. The sufficiency of the State inspection on which the State regulatory authority seeks to justify its failure to abate is, thus, a matter of prime significance. I think it is properly subject to examination in the context of this appeal.

I think it is impossible to review the record as it *now* exists and conclude that an adequate initial inspection was conducted by the West Virginia authorities. It is clear from the record, indeed, no one denies it, that Island Creek Coal Co. was informed in advance that an inspection was to occur. This obviously violates the Act. *See* section 517(c)(2), 30 U.S.C. § 1267(c)(2) (Supp. V 1981). It is also clear that appellants' attorney was not permitted to participate in the inspection. I think that this was similarly violative of the Act for reasons which I will set forth.

Admittedly, the Act provides only that "[w]hen the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection." Section 521(a)(1), 30 U.S.C. § 1271(a)(1) (Supp. V 1981). This right of inspection, however, clearly applies to State inspections through 30 CFR 840.15. *See also* 44 FR 15297 (Mar. 13, 1979) (a State program "must provide citizens with the right to request State inspection and to participate in the resulting inspections, at least to the degree provided by Section 521(a)(1) and 30 CFR 842"). The major source of contention is not whether the citizen who made the complaint can accompany a State inspector, but rather whether the citizen can designate a third party to represent him or her for the purposes of inspection.

When appellants' attorney sought to represent them at the inspection, Kensie Jones, President of Island Creek Coal Co., objected. The State inspector acceded to his objections. I believe, given the fact situation disclosed in this record, that it was manifest error to refuse to allow appellants' counsel to participate in the inspection, Jones' objection notwithstanding.

The fact that the statute does not expressly provide that citizen complainants can designate a third party to represent them is not of particular consequence. Where rights are accorded to individuals, it is the general rule that they may be exercised on their behalf by those whom they designate. Exceptions to the general rule are usually premised either on the necessity of limiting participation to *specified* individuals or on the personalized nature of the right granted. No such limiting intent appears in SMCRA. Indeed, the exact opposite is the case.

November 30, 1983

In authorizing the filing of citizen complaints, there are no qualifications as to which "citizens" can do so. In fact, the statute actually refers, in this context, to "information from *any* person" and provides that such person shall "be allowed to accompany the inspector during the inspection." Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271 (1982). In promulgating the interim program regulations, the Department noted, with reference to 30 CFR 721.11(b) which implemented the citizens complaint provisions, that:

The recommendation was made in one comment to add the words "any person having an interest which is or may be adversely affected" to § 721.11(b). It was suggested that allowing the submission of information by any person would invite submission of frivolous claims. This recommended language was not adopted because the Act and the legislative history are clear that receipt of any information may trigger a Federal inspection in the initial regulatory period, if it provides a reasonable belief that the Act is being violated.

42 FR 62664 (Dec. 13, 1977). In promulgating the regulation involved herein under the permanent program, the Department differentiated between the filing of a citizen's complaint under 30 CFR 842.12(c), and the availability of informal review under 30 CFR 842.15(a), which, in contradistinction to the virtually unbridled access provided in the complaint process, limited informal review to a complainant "who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation."¹ Thus, it is clear beyond peradventure that appellants' counsel would have had standing, in his own right, to initiate a complaint, and would have been entitled to accompany the inspector regardless of Island Creek Coal Co.'s objections. Anyone in the United States could have done likewise. Considering the broad availability of this right it would stand logic on its head to hold that the right is, nevertheless, so personal that it cannot be exercised through a designated representative.

Parenthetically, I would note that if 500 individuals had signed the complaint I do not doubt that Island Creek Coal Co. would argue that the complainants were required to select a representative, rather than permit all 500 to trudge their way through. This merely underlines the point that the language of the statute and regulations are subject to the rule of reason. I believe that not only may complainants designate a representative, at times they might properly be required to do so.

As I noted above, the correctness of a decision of the OSM State Director not to order a Federal inspection must initially be judged based on the information which the State Director had available to him on the running of the initial 10 days, since, by statute and regulation, unless the State regulatory agency justified its failure to abate the alleged violation by that time, OSM would be required to

¹ This is consistent with the traditional approval which this Board has taken in matters relating to protests filed with the Bureau of Land Management (BLM). Thus, under 43 CFR 4.450-2 any person may file a protest of an action proposed to be taken by BLM. However, only a person adversely affected from denial of the protest has standing to appeal to this Board under 43 CFR 4.410. See *United States v. United States Pumice Corp.*, 37 IBLA 153, 153-59 (1978).

conduct a Federal inspection. By letter of March 12, 1983, DNR informed the OSM State Director that an inspection had occurred with two of the complainants participating, that four water samples had been taken, and noted that all parties had agreed to participate in an intensive investigation which would be coordinated through DNR. I have no difficulty agreeing with the thrust of the lead opinion that, based on this letter, the OSM State Director had more than an adequate basis for concluding that the State regulatory agency had justified its failure to abate the alleged violation.

This cannot end the matter, however. It is clear that the oversight responsibility, and the possibility that a Federal inspection must be ordered, continues beyond the 10-day period. Thus, for example, if appellants had subsequently informed the OSM State Director that, in fact, no inspection had taken place, no samples were taken, and the complainants were actually barred from any participation, in short, that every factual allegation of the State regulatory agency was false, clearly the State Director would not be foreclosed from reconsidering his prior decision that the State regulatory agency had justified its failure to abate.

In any event, even if the refusal by the OSM State Director to order a Federal inspection is judged solely on the basis of the information available to him during the 10-day period after his notification of the filing of the citizens' complaint is received by the State regulatory agency, where the complainants seek informal review pursuant to 30 CFR 842.15(a), the correctness of the State Director's decision must be judged by all information available *at that time*. See generally *In re Lick Gulch Timber Sale*, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983). By the time OSM Director Harris issued his decision denying review on June 8, 1982, the record was replete with examples supportive of appellants' allegation that the inspection was inadequate.

First of all, by memorandum of March 17, 1983, the OSM State Director was informed not only that appellants' attorney had been refused permission to participate in the inspection, but also that two separate inspections, one of which had no citizen participation, had actually been conducted. It was on this latter inspection that the water samples were taken, and it seems clear that the complainants were not even aware of this inspection since they alleged in their application for informal review that *no* samples were taken. This information raised serious questions concerning the sufficiency of the State regulatory agency's response.

In addition, the April 6, 1982, letter from DNR to the State Director clearly should have alerted the OSM Director to major problems in the West Virginia approach to citizens' complaints. Indeed, it is difficult to read the DNR response without coming to the conclusion that the State officials felt little obligation to support the citizen complaint process mandated by SMCRA. The following statements are symptomatic of the approach taken by DNR:

November 30, 1983

(2) Allegation: DNR refused to permit Mr. Mark Squillace, Mr. Don Steck, and Mr. Ken Mills, official representatives of the Ragland PSD the right to speak, question or comment about the inspection and/or investigation. In addition they were refused the right to accompany the inspection and/or investigation team.

FACT: The abovementioned individuals were allowed comment and questions during the meeting phase. Again public record supports this fact.

These individuals were not allowed to participate in the inspection nor was there any official documentation as to their capacity relative to the Ragland PSD. [T]his department had no obligation to allow them to participate in the inspection.

* * * * *

(7) Allegation: DNR appeared to be taking a guided tour of the facility instead of inspecting and/or investigating the charges.

FACT: Those citizens involved were escorted to those facilities which they specifically requested to inspect.

Upon completion of the inspection, Ms. Moore and Ms. St. Clair were asked if they had any other specific areas they might want to inspect. Having none, the inspection was concluded.

I have already discussed my views on the representation issue. I do, however, wish to expressly note that it was DNR's obligation to inspect and that the complainants had absolutely no obligation to point out areas to be inspected. They are given the right to accompany DNR on *its* inspection. The entire tenor of this response is indicative of a misapprehension on the part of DNR as to its obligations.² It is clear that appellants are essentially correct in their assertion that they were given a tour rather than an inspection, particularly as there was another "real" inspection simultaneously occurring of which they were given no notice.

The Director, OSM, should have made reference to these deficiencies. I think this is particularly true where the essential predicate of the denial of relief is based on the failure of appellants to avail themselves of another opportunity for inspection. Without guidance as to what that inspection should entail, such a reinspection would have, no doubt, exhibited the same defects manifest in the original.

Nevertheless, I am constrained to concur with the majority disposition. The record before the Board is now replete with accounts of the various activities of State and Federal agencies attempting to ascertain the cause of Ragland's water problems. I fail to see how ordering a Federal inspection would advance resolution of this problem. I would hope, however, that we are not faced with a similar record in the future when called upon to review a citizens' complaint.

JAMES L. BURSKI
Administrative Judge

² I would hope that the glaring shortcomings were the result of West Virginia's inexperience in working with the mandated procedure rather than an indication of its ultimate approach.

December 5, 1983

SEATTLE INDIAN CENTER

v.

**ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS)**

12 IBIA 67

Decided *December 5, 1983*

Appeal from denial of fiscal year 1983 funding under the Indian Child Welfare Act.

Vacated and remanded.

1. Administrative Procedure: Burden of Proof

When the Bureau of Indian Affairs seeks a determination that a prior decision of the Board of Indian Appeals is erroneous and should be overruled, it bears the burden of proving the error.

2. Indian Child Welfare Act of 1978: Financial Grant Applications: Generally

If there is no duplication of service population between a tribe providing services under the Indian Child Welfare Act and an independent organization providing the same types of services, the mere fact that the organization is located in an area designated "near reservation" by the tribe does not render it ineligible to seek grant funds.

3. Indian Child Welfare Act of 1978: Financial Grant Applications: Generally

When more than one otherwise eligible grant applicant applies for funds under the Indian Child Welfare Act to provide services to the same Indian population, funding should be given only to the organization whose proposal best promotes the purposes of the Act.

APPEARANCES: Moshe Judah Genauer, Esq., and Janice M. D'Amato, Esq., Seattle, Washington, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On July 7, 1983, the Board of Indian Appeals (Board) received a notice of appeal from the Seattle Indian Center (appellant) seeking review of the May 16, 1983, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) which denied appellant fiscal year 1983 funding under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (Supp. II 1978). For the reasons discussed below, the Board vacates the decision and remands the case to the Bureau of Indian Affairs (BIA) for further action.

Background

Appellant is a multi-service Indian organization serving a largely urban Indian population in the Seattle/King County area of Washington State. It has operated family service programs since its inception in 1972 and for the last 5 years has received funding under the ICWA. Its programs include a foster care and adoption program which provides service to approximately 3,500 Indians living in King County. Appellant's total client population includes 6,253 Indians living within the Seattle city limits, and 12,437 Indians living in King County (Appellant's Opening Brief at 2-5).

On January 27, 1983, appellant submitted a proposal to the Portland Area Office, BIA, for fiscal year 1983 funding under the ICWA. The application was denied by the Area Director on February 18, 1983, on grounds that appellant was not an eligible applicant because it was located in an area designated "on or near" reservation, and its application did not comport with regulations in 25 CFR Part 23 governing ICWA grant applications. Appellant appealed the Area Director's decision to the Deputy Assistant Secretary on March 25, 1983.

On May 16, 1983, the Acting Deputy Assistant Secretary affirmed the Area Director's decision, stating that appellant's service area, Seattle/ King County, had been designated a "near reservation" area by the Puyallup Tribe. Consequently, the decision found that appellant was not an eligible grant applicant because 25 CFR 23.25(c) and 23.26(a) provide that under these circumstances, the Puyallup Tribe was the only proper grant applicant for the Seattle area.

On June 28, 1983, appellant filed a notice of appeal with the Board from the May 16, 1983, decision. After receipt of the administrative record, the appeal was docketed on August 16, 1983. An expedited briefing schedule was established on August 30, 1983, at appellant's request. Briefing was concluded on October 20, 1983.

Discussion and Conclusions

In *United Indians of All Tribes Foundation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 226, modified upon reconsideration, 11 IBIA 276, 280, 90 I.D. 376, 378 (1983) (*United Indians*), the Board stated:

[A] finding that an Indian organization providing ICWA services is located in an area designated "near reservation" may suggest the organization provides services that duplicate services furnished by a tribe. However, the law does not provide that location alone determines whether a program is properly characterized as "off" or "near" reservation. The BIA must instead ascertain whether the client population of the program, in fact, duplicates the population for which the tribe would ordinarily be expected to provide services.

This decision thus held that the mere fact that an Indian organization providing ICWA services is located in an area designated "near

December 5, 1983

reservation" by a tribe does not render that organization ineligible to be an independent grant applicant.

The facts of this case show, and both parties agree, that it falls within the Board's holding in *United Indians*. Appellant is an organization not affiliated with any tribal government and provides ICWA services to an Indian population in the urban Seattle/King County area. Although it is located in an area designated "near reservation" by the Puyallup Tribe, see 44 FR 2693 (Jan. 12, 1979),¹ it states that it serves an Indian population of approximately 18,700 Indians, less than 3 percent of whom are members of the three closest tribes, the Puyallup, Muckleshoot, and Suquamish. The holding in *United Indians* would, therefore, preclude a finding that appellant here was ineligible to be an independent applicant for ICWA funding merely because it was located in an area designated "near reservation."²

Appellee, in an attempt to avoid having *United Indians* control the disposition of the present case, "requests that the Board reconsider its findings in [*United Indians*] through this appeal" (Appellee's Answer Brief at 1).

Regulations in 43 CFR 4.315 govern reconsideration by the Board:

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from receipt of the decision and shall contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

The Board notes that appellee sought and was granted reconsideration of the initial decision in *United Indians*. Perhaps interpreting the one petition rule of 43 CFR 4.315(b), appellee did not seek reconsideration of the second *United Indians* decision.

The Board has not previously construed the one petition rule, and does not do so now. The intent of that rule is to prevent the filing of successive petitions for reconsideration of the same decision. An argument could be made that the rule should not be construed to limit the filing of a petition for reconsideration of an opinion issued upon reconsideration when the second opinion decides issues not reached in the first opinion.

[1] In any case, appellee did not petition for reconsideration of the second decision. Neither did appellee pursue any alternative course of action in an attempt to alter the decision. The Board, therefore,

¹ Appellee states that King County has also been designated "near reservation" by the Muckleshoot and Suquamish Tribes. See Appellee's Answer Brief at 2 n.1. As of July 5, 1983, when the first decision in *United Indians* was issued, the Muckleshoot and Suquamish Tribes had each proposed King County as a "near reservation" area, but the designation had not been published in the *Federal Register*. Appellee does not give a citation for such publication between July 5 and the date of its brief. Appellant states that neither of these tribes has designated Seattle as a "near reservation" area. See Appellant's Opening Brief at 9.

² Appellee contended in *United Indians* and in the present case that organizations located in areas designated "near reservation" were required by 25 CFR 23.25(c) and 23.26(a) to seek funding through a subgrant from the tribe or tribes making the designation.

declines to "reconsider" its second decision in *United Indians*. If appellee is dissatisfied with that decision, it bears the burden of showing why the decision was legally incorrect and should be overruled. See 5 U.S.C. § 556(d) (1976).

Appellee first argues that *United Indians* was based upon a misunderstanding of the way in which BIA administers the ICWA grant program³ in that one procedure which the Board suggested could be followed in calculating a tribe's service population for the determination of maximum funding levels is already being used. Thus, appellee argues that the tribe, not BIA, determines the extent of its service area. Although a tribe may have designated a particular area as "near reservation," appellee states that the tribe is not required to service an area larger than it wishes. This may result in the claimed service area for ICWA purposes being smaller than the area designated "near reservation." The corollary of this is appellee's assertion that the tribe may claim as its service population the entire "near reservation" area, or presumably an area of any other size, if a subgrant to an organization providing services to the entire area is made by the tribe.

Appellant responds that it is irrelevant to this case whether or not the present regulations theoretically permit the inclusion of all of an area designated "near reservation" within a particular tribe's service population because appellee's own exhibit shows that none of the three tribes in the area included the Indian population of Seattle or urban King County in their requests for funding.⁴ By using location within a "near reservation" area as the sole criterion for determining whether an organization is eligible to apply independently for an ICWA grant, appellant contends that BIA is excluding the entire urban Indian population in and around Seattle from the ICWA program.

The Board agrees with appellant. The three tribes in this area clearly chose to provide services only to their tribal members residing within the area designated as "near reservation," and sought ICWA grants based upon that population. Neither did the tribes indicate they desired to administer subgrants to other organizations that might provide ICWA services to urban Indians of other tribes not otherwise covered by tribal programs.

Consequently, some Indians residing in an area designated "near reservation" are not being served by the tribe making the designation or through a subgrant from that tribe. If it were held that no other organization located in the "near reservation" area is eligible to apply

³ The ICWA program is relatively new and the procedures for equitably administering it and dispensing the limited appropriations are still being refined. The Board acknowledges that its understanding of the problems encountered in the operation of the grant program comes only from information presented in the context of specific appeals. It further acknowledges that it is not omniscient and cannot anticipate every possible permutation that might arise because of overlapping populations and programs.

Information on the actual operation of this and all other BIA programs and actions is within the control of BIA. Such information should be available to BIA's attorneys in the Office of the Solicitor. The Board renders its decisions based upon the factual data presented in the administrative record and the briefs of the parties, unless an evidentiary hearing is held. It is thus the primary responsibility of BIA and the Solicitor's Office to ensure that all relevant information is presented to the Board. The Board cannot issue a decision upon information not in the record. See 43 CFR 4.24.

⁴ Appellant refers to exhibit 1 attached to Appellee's Answer Brief.

December 5, 1983

independently for a grant, those individuals living in a "near reservation" area, but not covered by a tribal program, would be excluded from the benefit of funds appropriated by Congress on their behalf.

Appellee next argues that the Board has improperly restricted eligibility for ICWA grants by holding that service population is the determinative factor rather than programs provided. Thus, appellee contends, two organizations could serve exactly the same client population as long as they provided different services.⁵ Appellee states that "duplication of services is not a factor in determining who can apply for a grant but rather a factor in determining whether the grant proposal best promotes the purposes of the [ICWA]. * * * Therefore, a tribe and an organization can have the exact same client population and both can be funded if they are not duplicating services" (Appellee's Answer Brief at 7).

Appellant replies that in this argument "Appellee apparently concedes that it should not be necessary for an applicant serving the same geographical area as a tribe to subgrant through a tribe as long as no duplication of services exists. Thus, the BIA decision here was incorrect. * * * Based upon Appellee's own argument, the eligibility of all applicants for ICWA funds should be based upon the need for the services they provide and not upon the artificial geographic criteria of service area or 'near reservation' areas" (Appellant's Reply Brief at 3).

The Board considered in *Navajo Tribe v. Commissioner of Indian Affairs*, 10 IBIA 78, 89 I.D. 424 (1982), the question whether two organizations providing ICWA services to the same or essentially the same client population could be independently eligible grant applicants. In that case, an organization which was located in an area designated "near reservation" by the Navajo Tribe, and which sought to provide services to essentially the same client population as the tribe, was held not to be independently eligible to apply for ICWA funds. The question whether the organization would have been eligible if it were providing services not duplicated by the tribe was not raised or considered.⁶

Appellee's argument raises for the first time in a case before the Board the potential that more than one organization may be funded to provide services to the same client population. The Board must again agree with appellant that appellee's argument itself shows the error of the decision in this case. If more than one organization can provide services to the same population as long as the types of services are not duplicated, BIA must necessarily examine the programs proposed by all organizations within an area to determine whether there is

⁵ An example of this might be one organization which provides foster care and adoption services not provided by another organization which exclusively provides family counseling.

⁶ Board decisions are based upon the facts of that particular case. While generalizations of legal principles are normally possible and appropriate in analyzing Board decisions, different factual situations not considered in a case may change the result.

duplication. The exclusion of some organizations at the outset based on the mere fact of their location would prevent a reasoned analysis of whether services were being duplicated.⁷

[2, 3] Based upon the information provided in this case, the Board affirms and extends its prior decisions concerning eligibility for ICWA grant funding. When funding is sought by an organization located in an area designated "near reservation" by a tribe or tribes, the BIA must ascertain whether or not the organization intends to provide services for a population already covered by a tribal ICWA program or a tribal subgrant. If there is no duplication of population, the organization should be found to be an eligible grant applicant and should be considered for funding under the "off-reservation" procedures established pursuant to 25 U.S.C. § 1932 (Supp. II 1978). *United Indians, supra*. If there is a duplication of population in applications from two or more organizations, BIA must determine whether there is also a duplication of services. From the information presented by appellee in this case, if there is a duplication of services to the same population, and absent other disqualifying factors, each organization should still be found to be an eligible applicant, but funding should be given only to the organization whose proposal best promotes the purposes of the ICWA.

Finally, appellee states that because BIA "recognize[d] the administrative difficulties Seattle organizations may have by subgranting with local tribes, the BIA proposed regulations to allow organizations located in near reservation areas, which serve a majority of clientele who are not members of or affiliated with tribes designating the near reservation area, to apply as individual applicants. Final promulgation of the amended regulations is not expected prior to processing of the 1984 ICWA application" (Appellee's Answer Brief at 3-4).⁸ Appellee concludes "that until the proposed amendments to the ICWA regulations are finalized, an organization located in a near reservation area must subgrant for ICWA funds through a tribal governing body." *Id.* at 7.

This argument assumes that the current regulations require subgranting by any organization located in a "near reservation" area. As previously discussed, the Board has held that this is not correct. The BIA's proposed effort to clarify its regulations and to incorporate

⁷ Appellee's arguments in this case demonstrate confusion between ICWA programs and entities eligible to apply for ICWA funding. Eligible entities are defined by 25 CFR 23.21(a) as any Indian tribe or tribes or any off-reservation Indian organization, including multi-service Indian centers. The Board's decision in *United Indians* applies in the decision of whether a particular entity is eligible to apply independently for ICWA funding by holding that the client population to be served by the entity, rather than the entity's geographic location, is determinative. This decision thus requires that, when the client population of an applicant for ICWA funding does not duplicate the client population served by a tribal program, the applicant must be treated as an off-reservation Indian organization, even though it may be located in an area designated "near reservation." In these cases, the applications must comply with 25 CFR 23.26(b) and 23.28(b) or (c).

Appellee's second argument presented here, that two or more entities can provide services to the same client population as long as the services provided are different, goes to the question of the nature of the programs offered. As mentioned, *supra*, the Board has not previously considered this question. The nature of the services offered by an ICWA recipient is irrelevant to the question of whether funding for the program is properly sought under the off-reservation or "on or near" reservation regulations.

⁸ Again, appellee does not furnish a citation for *Federal Register* publication of these proposed regulations.

December 7, 1983

previous administrative rulings, however, is desirable and will benefit all persons concerned with the administration of the ICWA program.⁹

Therefore, the Board finds that appellee has failed to show that the decision in *United Indians* was erroneous and should be overruled. Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 16, 1983, decision appealed from is vacated and the case is remanded to the Bureau of Indian Affairs for consideration of appellant's application for ICWA funds in accordance with this opinion.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

PUEBLO OF LAGUNA
v.
ASSISTANT SECRETARY FOR INDIAN AFFAIRS

12 IBIA 80

Decided December 7, 1983

Appeal from a determination of the Assistant Secretary for Indian Affairs, contained in a December 2, 1982, letter to the Chairman of the House and Senate Subcommittees on Interior Appropriations, that a proposed school on the Laguna Indian Reservation was not needed and that construction should not proceed.

⁹ Appellant contends that Seattle and urban King County were not designated "near reservation" areas by any of the three tribes in the area, and that, furthermore, the area could not be so designated under the Supreme Court's holding in *Morton v. Ruiz*, 415 U.S. 199 (1974), and Departmental regulations establishing the designation system. Appellant first argues that an examination of the tribal resolutions concerning designation of "near reservation" areas clearly shows that the tribes did not intend to designate the urban areas in and around Seattle as "near reservation." Appellant states that none of the tribes listed Seattle as part of their designations. The record in this case and in *United Indians* indicates that Seattle is located in King County. The Board is not aware of the local political structure of the State of Washington, but takes official notice of the fact that, in some states, cities can be separate political entities from the county in which they are located. To the extent that appellant's arguments raise a question of whether the *Federal Register* publication of "near reservation" areas affecting Seattle may be in error, the Board suggests that BIA review those designations and determine whether any correction should be made.

Appellant further argues that *Morton v. Ruiz*, *supra*, and 25 CFR 20.1(r), which defines "near reservation," both indicate that a "near reservation" area must be adjacent or contiguous to the reservation and there must be social, cultural, and economic affiliation between the Indians living in the "near reservation" area and the reservation. Appellant alleges that neither of these conditions is met in the Seattle area. In the first *United Indians* decision, the Board held that even assuming it had jurisdiction to review a "near reservation" designation and that the appellant had standing to take an appeal from that designation, there was no indication that a proper and timely appeal had been taken. The Board held that it would not permit a collateral attack on the designations in the context of an appeal from a denial of ICWA grant funding. See 11 IBIA at 233. Likewise, the Board will not address the merits of this argument in the present appeal. However, inasmuch as the argument raises serious concerns about the designation process, BIA may wish to consider the matter further.

Vacated and referred for evidentiary hearing and recommended decision.

1. Board of Indian Appeals: Jurisdiction--Secretary of the Interior

In reviewing a decision of the Assistant Secretary for Indian Affairs referred to the Board of Indian Appeals by the Secretary of the Interior under 43 CFR 4.220(a)(2), the Board has the full authority of the Secretary to review questions both of law and of discretion.

2. Administrative Procedure: Administrative Review--Administrative Procedure: Substantial Evidence--Rules of Practice: Supervisory Authority of the Secretary

In exercising the full review authority of the Secretary of the Interior, the Board of Indian Appeals is not required to uphold a decision of the Bureau of Indian Affairs merely because it is reasonable and based upon substantial evidence in the record, but has the authority to review the decision de novo.

3. Regulations: Binding on the Secretary--Regulations: Publication

Procedures promulgated by the Department of the Interior specifically to provide uniformity in decisionmaking are "rules" within the meaning of 5 U.S.C. § 551(4) (1976) and are binding upon the Department, whether or not they are codified in the *Code of Federal Regulations*.

4. Regulations: Publication

When an appellant personally received documents supplementing and amending a document previously published in the *Federal Register*, acknowledges that it knew the later documents would be used in deciding its case, and does not allege failure of publication, the Board of Indian Appeals will apply the procedures established in the later documents in deciding the appeal.

5. Administrative Practice--Regulations: Applicability

In the absence of specific rules governing reevaluation of an Indian school construction funding application, the Bureau of Indian Affairs will be held to the rules governing the initial evaluation of such an application, in order to avoid the appearance and reality of arbitrary, ad hoc decisionmaking.

6. Administrative Practice--Administrative Procedure: Adjudication

Although true ex parte communications are the antithesis of reasoned, informed, and objective decisionmaking, the circumstances of this case do not permit a finding that the proceeding before the Bureau of Indian Affairs was impermissibly tainted by ex parte communications.

7. Administrative Procedure: Administrative Review

Administrative review is intended to provide the reality as well as the appearance of an objective and impartial reexamination of the law and discretion applied initially by a subordinate agency official.

8. Administrative Procedure: Administrative Review

Without definite proof to the contrary, the Board of Indian Appeals must assume that, in affirming a decision of a Bureau of Indian Affairs field official, the Assistant Secretary for Indian Affairs made an objective and impartial review of the decision and was convinced of the correctness of that position.

December 7, 1983

9. Administrative Procedure: Administrative Review

A decision by the Bureau of Indian Affairs that is not supported by the record will not be upheld. In appropriate circumstances, the matter will be referred for an evidentiary hearing and recommended decision.

APPEARANCES: Richard Schifter, Esq., Washington, D.C., for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

Appellant Pueblo of Laguna (the Pueblo) seeks review of a determination of the Assistant Secretary for Indian Affairs (appellee) that construction of a new school on the Laguna Indian Reservation should not proceed because the school was not needed. The Bureau of Indian Affairs (BIA) had previously ranked this school as its number one priority school construction project for fiscal year 1982, and funds for its construction had been appropriated by Congress. At the direction of the Senate Subcommittee on Interior, of the Senate Committee on Appropriations (Senate Committee), the need for the school was reevaluated. On December 2, 1982, appellee notified both the Senate and House Subcommittees on Interior (Senate Subcommittee; House Subcommittee) that the school was not needed and should not be constructed. Appellant seeks review of this decision and the process through which it was reached.

Background

The essential background facts of this case are not in dispute. The Laguna Indian Reservation and adjacent Indian and non-Indian communities are presently served by two schools: the Laguna Elementary School (Laguna Elementary), operated by BIA for grades K-6, and the Laguna-Acoma Junior/Senior High School (L-A School), operated by the Grants, New Mexico, school district (district) for grades 7-12.

The L-A School, which was built with Federal funds appropriated under P.L. 81-815,¹ was designed as a junior high school. It has, however, always been operated as a junior/senior high school. On April 5, 1972, the Pueblo of Laguna Council (council) passed Resolution No. 25-72 in which it noted that the L-A School was badly overcrowded, and that requests for funding to construct additional classroom space had not achieved results. The council asked BIA to construct a new school to serve grades 7 through 9.

¹ Act of Sept. 23, 1950, as amended, 64 Stat. 967, 20 U.S.C. §§ 631-647 (1976).

All further citations to the *United States Code* are to the 1976 edition, unless indicated otherwise.

Congress appropriated funds in 1973 and 1974 for planning and designing a new school. Because of disagreements among BIA, the Pueblo, and the Grants school district, a definite plan for the new school was not developed until 1976. At that time, the plan was to retain grades K-5 at Laguna Elementary and grades 9-12 at the L-A School and to construct a new middle school for grades 6-8. The district was to seek funding for the necessary alterations to the L-A School from the Office of Education under P.L. 81-815 and the Pueblo would seek funding for the construction of the middle school from BIA.

Requests for P.L. 81-815 funding for the L-A School alterations were denied by the Office of Education in 1976 and again in 1978. Funding from BIA was held up because of Congressional concern over BIA's failure to develop a standard system for analyzing and ranking school construction requests.² This concern resulted in Congress' decision not to fund any BIA school construction projects in fiscal year 1978, and the requirement that BIA establish and publish in the *Federal Register* a system for analyzing project requests. See Education Amendments of 1978, P.L. 95-561, 92 Stat. 2319, 25 U.S.C. § 2005(c) (Supp. II 1978).

Standard procedures for analyzing and ranking school construction requests were published in the *Federal Register* on May 22, 1979. See 44 FR 29864. When the Laguna project was analyzed under this new system, it was determined that although there was overcrowding, the problem was not severe enough to justify funding that year.

Because of the results of this analysis, the Pueblo requested that the project be reevaluated as a junior high school project to serve grades 7 through 9. An evaluation team visited the site on August 2, 1979. Because the team believed that more information was needed, the project was not ranked that year. A second onsite evaluation was conducted on August 14, 1980. As a result of this evaluation, the Laguna project was ranked number one priority for fiscal year 1982. See 45 FR 74997 (Nov. 13, 1980). The project was subsequently funded, see F.Y. 1982 Interior Appropriations Act of December 23, 1981, 95 Stat. 1391, P.L. 97-100; construction bids were requested and opened; and a low bid of \$3,230,000 was selected.³

The Grants school district had not sought further Federal funds for alterations and additions to the L-A School after the failure to obtain P.L. 81-815 funds. In 1980, however, the district floated a bond issue for school construction. Although initial plans for these funds had not included any expenditure for the district's Indian students, the Laguna and Acoma Pueblos filed suit seeking to force some of the funds to be used at the L-A School. Under a settlement agreement reached in the suit, 42 percent of the funds, or about \$750,000, would be spent in the part of the district in which the Indian population resided.

² Apparently Indian school construction projects were previously funded largely on political grounds, rather than on the merits of a particular project.

³ The ranking of school construction priorities for fiscal year 1983 was published on Dec. 24, 1981, the day after the Laguna project was funded by Congress. In this listing, Laguna was ranked number 2. See 46 FR 62549.

December 7, 1983

Apparently at this time, resentment against the new Laguna school surfaced in the Grants school district, which withdrew its previous support for the new construction, claiming that the new school would be duplicative. School district officials met with BIA personnel and apparently with the New Mexico Congressional delegation. BIA was thereafter requested by the Chairman of the Senate Subcommittee, a Senator from New Mexico who had previously supported the new school, to respond to certain questions concerning the proposed project. The following text was inserted into the Senate report on Interior's 1982 supplemental appropriations bill:

The Committee directs that no funds be spent for further planning, design or construction of the proposed Laguna Junior High School until the application has been reviewed. Such review shall take into account the declining enrollment and the renovations which are being made to the Laguna-Acoma Junior-Senior High School which is located on the reservation. If the review shows that Laguna was assigned the proper position on the priority list the construction may proceed upon notification of such finding to the House and Senate Committees on Appropriations.

S. Rep. No. 516, 97th Cong., 2d Sess. 111 (1982).

In response to this Congressional directive, BIA reviewed the Laguna project. The new report, completed on or about September 15, 1982, reversed the previous findings and concluded that enrollment at the L-A School was actually less than capacity.

Appellant sought and was granted an opportunity to respond to the new factual findings. However, appellant was informed that because of pressure from Congress, BIA intended to submit the report before the date set for appellant's presentation. Appellant filed suit in Federal District Court seeking a temporary restraining order (TRO) against BIA's submission of the report to Congress. The TRO was denied when BIA agreed to give appellant an opportunity to present its position to the Deputy Assistant Secretary--Indian Affairs (Operations) on September 29, 1982.

Appellant states that its counsel was informed on November 23, 1982, that no decision had yet been reached. The final decision was communicated orally to counsel on December 1, 1982, and the written decision was signed by the Assistant Secretary for Indian Affairs and submitted to the Senate and House Subcommittees on December 2, 1982. Also on December 2, the full House Appropriations Committee acted to reprogram the funds which had been appropriated for Laguna. See H. Rep. No. 942, 97th Cong., 2d Sess. (1982).

In an affidavit submitted with appellant's opening brief, it is stated that appellant learned from a House Committee staff person that the full Committee had acted upon a November 18, 1982, House Subcommittee recommendation. Furthermore, appellant was informed that the House Subcommittee acted after receiving material from the Albuquerque, New Mexico, office of BIA. The Committee staff person said it would be too much trouble to find the document in the

Committee background materials and referred appellant to a specific individual in the Albuquerque Area Office.

Following these actions, appellant sought to file an appeal from the Assistant Secretary's action with the Office of Hearings and Appeals (OHA) of the Department of the Interior (Department). The notice of appeal was docketed and dismissed on January 17, 1983, on the grounds that OHA did not have general review authority over decisions of the Assistant Secretary and could review such decisions only as they might be specially referred to it by regulation or on a case-by-case basis. See *In the Matter of Pueblo of Laguna (Laguna Middle School)*, 5 OHA 77 (1983).

Appellant subsequently sought and obtained a special referral from the Secretary of the Interior (Secretary), who directed consideration of the case by the Board of Indian Appeals (Board) on March 23, 1983. After receiving the administrative record from BIA's Albuquerque Area Office, the Board docketed the case and established a briefing schedule. The case was fully briefed and oral argument was heard on October 20, 1983.

Jurisdiction and Scope of Review

[1] As noted in the January 17, 1983, decision of the Director of OHA docketing and dismissing appellant's original notice of appeal, neither OHA nor the Board has general review authority over decisions of the Assistant Secretary for Indian Affairs. See also *Willie v. Commissioner*, 10 IBIA 135, 138-39 (1982). Here, however, the matter was specifically referred to the Board by the Secretary. Such referral, which is provided for in 43 CFR 4.330(a)(2), gives the Board jurisdiction to review a matter that would otherwise be final for the Department as the decision of a Secretarial-level official. The Board interprets this referral as granting it authority to review questions both of law and of discretion as fully as could the Secretary. This interpretation was explicitly endorsed by counsel for appellee at oral argument (Tr. 49).⁴

Issues on Appeal

Appellant's arguments can be generally broken down into three major areas of concern: (1) The governing law in this case; (2) procedural violations and irregularities; and (3) substantive violations. Subsidiary issues are raised in each of these general areas. Appellant argues both that the decision violates substantive law and is arbitrary, capricious, and an abuse of discretion.

Standard of Review

Appellee cites appellant's assertion that the decision is arbitrary, capricious, and an abuse of discretion as an admission that the decision

⁴The Board does not have general review authority over decisions committed to the discretion of the Secretary. See 43 CFR 4.330(b)(2) and 4.337(b); *Billings American Indian Council v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 142, 144 (1983).

December 7, 1983

was discretionary. Consequently, appellee argues that the decision should be upheld because substantial evidence in the record demonstrates that it is reasonable, even though someone else might have reached a different conclusion. See Appellee's Answer Brief at 17; Tr. 40, 50-51.⁵

This argument seeks to impose upon the Board's review of this matter the statutory standard for judicial review of administrative decisions. Under this standard, a court reviewing a final agency decision would normally be bound to uphold the decision if it were based upon substantial evidence in the record. See 5 U.S.C. § 706(1)(E).

[2] The Board is not a reviewing court. It is part of the administrative body making the determination and is acting by specific delegation from the head of that administrative body. It, therefore, is not limited by statutes restricting judicial review of administrative decisionmaking. See *Walch Logging Co. v. Portland Assistant Area Director (Economic Development)*, 11 IBIA 85, 101, 90 I.D. 88, 96 (1983). The scope of review of administrative decisions by the Secretary has recently been discussed by the Interior Board of Land Appeals:

The Secretary, or an appeals board with authority to act as fully and finally as might the Secretary, is not so limited in the scope of appellate review and decisionmaking as to be required to affirm decisions by subordinate officers and employees merely because they are supported by "substantial evidence" or are perceived not to be arbitrary and/or capricious, particularly where a preponderance of the evidence leads to a different result. The Secretary, as chief executive officer of the Department with full supervisory powers, has plenary authority to review *de novo* all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of public policy or public interest in cases involving the exercise of discretion. Act of March 3, 1849; 9 Stat. 395. [See also 5 U.S.C. § 557(b).] The Secretary's inherent authority in this regard may not be diminished or constrained by those whose only authority derives from the delegated powers of the Secretary. Therefore, the scope of appellate review by or on behalf of the Secretary can be so limited only by the Secretary himself in a duly promulgated regulation, or by the Congress through enacted law. No such restraint on the scope of agency review has been imposed in cases such as this one. Therefore, the Board has a duty to consider and decide them "as fully * * * as might the Secretary." 43 CFR 4.1. [Italics in original. Footnotes omitted.]

United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983).

The Board of Land Appeals has jurisdiction to review discretionary decisions of the Bureau of Land Management (BLM). The jurisdiction of the Board of Indian Appeals has been limited by regulation found in 43 CFR 4.330(b)(2), which states that it may not review decisions of BIA made through the exercise of discretion. Thus, in order to avoid impinging upon the exercise of discretion, the Board customarily accords greater deference to decisions of BIA which involve the

⁵ It is clear from the oral argument that appellant believes the decision to be based upon an interpretation of law, not upon an exercise of discretion (Tr. 3).

Counsel for appellee incorrectly stated at oral argument that appellant's initial notice of appeal to OHA had been denied because the decision involved was discretionary (Tr. 49). As previously mentioned, the appeal was denied on the sole ground that the decision was rendered by the Assistant Secretary for Indian Affairs, a Secretarial-level official over whose decisions neither OHA nor the Board has general review authority.

application of special expertise when those decisions are supported by substantial evidence than does the Board of Land Appeals to similar decisions of BLM officials. See, e.g., *Walch Logging Co., supra*; *Wooding v. Portland Area Director*, 9 IBIA 158 (1982); *Fort Berthold Land & Livestock Association v. Aberdeen Area Director*, 8 IBIA 230, 88 I.D. 315 (1981); *Combs v. Commissioner*, 4 IBIA 27, 82 I.D. 184 (1975).

The Board has held that the referral of this matter by the Secretary grants it the full authority of the Secretary to review questions both of law and discretion. Because the Board is not required to give deference to the discretionary decisions of BIA in this matter, it has the duty to review the matter de novo.

Discussion and Conclusions

The Board begins consideration of this case with the assumption that all parties have a common goal: A proper determination of the educational needs of the Laguna children. In this regard, the Board further assumes that appellee, as trustee for those children, has no vested interest in the determination made in December 1982, except as he believes it to be correct. Both of these assumptions were implicitly recognized in the Secretary's referral of this decision, which was otherwise final for the Department, for additional administrative consideration.

A. Governing Law.

The first general area of contention between the parties concerns the governing law in this case. Appellant argues that, in reevaluating its application, BIA was required to follow the procedures for evaluating Indian school construction requests established pursuant to the Congressional mandate contained in the Education Amendments of 1978. As previously mentioned, under this mandate, BIA developed and published in the *Federal Register* uniform rules for the determination of need for the construction of Indian schools and for the ranking of requests for such construction (published procedures). See 44 FR 29864 (May 22, 1979).

The record reveals that subsequent to the *Federal Register* publication, BIA issued three other documents relating to school construction applications: *Guidelines for Determining Educational Spaces for Bureau of Indian Affairs Schools*, which appears to be dated March 13, 1980 (*Guidelines*; BIA Exh. 76, Attachment 4); *School Construction Application Procedure*; undated (*Procedure*, Pueblo Exh. 4);⁶ and a memorandum from the Deputy Assistant Secretary--Indian Affairs (Operations) to all BIA area directors and tribal governments, entitled "Procedures for Advising Applicants for School Construction on the Status of their Applications and Ranking," dated

⁶ In order to distinguish between exhibits, those documents forwarded to the Board by BIA as the administrative record in this case will be designated "BIA Exh." and those supplied by appellant in supplementation of the administrative record will be designated "Pueblo Exh."

December 7, 1983

May 5, 1980 (Memorandum, BIA Exh. 76, Attachment 3). None of these documents was published in the *Federal Register*.

Appellee contends that none of the above procedures are "regulations" and are, therefore, not binding upon the Department. Furthermore, appellee argues that all of the procedures were developed for the initial determination of need for school construction and of priority rankings, and that they are not required to be applied in a reevaluation. See Appellee's Answer Brief at 11-12. Apparently, appellee contends that no standard procedures exist for the reevaluation of need and priority determinations.⁷

The Board will first address appellee's contention that the published procedures are not regulations and are not binding upon the Secretary. It is clear that these procedures were developed and initially published in the *Federal Register* at the express direction of Congress because of concern over the lack of a standard system for evaluating school construction requests. The preamble appearing in the *Federal Register* candidly recites the general lack of credibility in the method previously employed to determine which projects would be funded. See 44 FR 29864 (May 22, 1979).

It is difficult to conceive of a more explicit requirement for the development and utilization of standard procedures for a program administered by an executive agency. Here, Congress singled out a particular program of a particular agency and mandated specific improvements in the way the program was managed. The method chosen by Congress to deal with the problems it perceived in the administration of the Indian school construction program fully comports with the general provisions relating to publication of agency rules⁸ or procedures affecting members of the public set forth in 5 U.S.C. § 552, which applies to all Federal agencies and programs.

[3] It is true that the published procedures were not incorporated into the *Code of Federal Regulations*, the Government-wide compilation of general rules affecting the public. It is perhaps this fact which lead to appellee's argument that the procedures are not "regulations." Whether or not the procedures should be termed "regulations," they are clearly "rules" within the meaning of 5 U.S.C. § 551(4), and the Department is bound by the public pronouncement of its own rules. See, e.g., *Vitarelli v. Seaton*, 359 U.S. 535 (1959). See also *Allen v. Navajo Area Director*, 10 IBIA 146, 89 I.D. 508 (1982); *Shoshone and Arapahoe Tribes v. Commissioner*, 9 IBIA 263, 89 I.D. 200 (1982) (in both cases, Departmental procedures were found to be rules as defined in section 551(4) although not so characterized by BIA).

⁷ Counsel for appellee stated at oral argument that she knew of no instances in which a tribe had appealed a school construction priority determination or ranking (Tr. 49). Appellee's contention that no standard procedures for reevaluation exist may be related to this apparent paucity of appeals.

⁸ In 5 U.S.C. § 551(4), a rule is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

However, it appears in this case that appellee did not follow the procedures published in the *Federal Register* in the initial determination of appellant's application, and that appellant did not expect those procedures to be employed. Instead, the later *Guidelines*, *Procedure*, and Memorandum were applied.

[4] Appellant acknowledges personal receipt of the *Guidelines*, *Procedure*, and Memorandum, and knowledge that these documents would be used in evaluating its initial application. Under 5 U.S.C. § 552(a)(1) and (2)(ii), agency decisions and rules may be applied against a person who had actual and timely notice of those decisions and rules, even without publication in the *Federal Register*. Under the circumstances of this case, the Board will apply the later documents rather than the procedures published in the *Federal Register* in reviewing the case. The Department will be required to follow the above-named documents as if they had been published in the *Federal Register*.⁹

[5] Appellee next contends that none of the procedures developed to evaluate initial school construction applications applies to a reevaluation. First, to the extent that appellee seeks a Board determination that a reevaluation, as distinct from an initial determination, is totally discretionary, the Board declines to accept the argument. Alteration of the basic procedures used to determine need and ranking depending upon whether the investigation is an initial evaluation or a reevaluation invites both the appearance and reality of arbitrary, ad hoc decisionmaking. See *Morton v. Ruiz*, *supra*. This was precisely the situation Congress sought to remedy in requiring the adoption of standard procedures.

A second aspect of appellee's argument is that its reevaluation of appellant's application was circumscribed by the specific instructions of the Senate Subcommittee to consider declining enrollment and the renovations being made to the L-A School, factors not normally considered under the standard procedures. The record reveals, however, that BIA did not confine its reevaluation to the two factors raised in S. Rep. No. 97-516, but rather conducted a full redetermination of the application. Once BIA undertook a full reevaluation of the Laguna project because of the statement in the Senate report, it was required to conduct that study under its established procedures except as specific alterations were required to conform to the instructions in that report.

In summary, the Board finds that appellee's reevaluation of appellant's application for school construction funds should have been conducted in accordance with the procedures set forth in the *Guidelines*, *Procedure*, and Memorandum, except as specific changes

⁹ The Board expresses no opinion as to whether the failure to publish the later documents in the *Federal Register* is a violation of either or both 5 U.S.C. § 552(a)(1)(D) or 25 U.S.C. § 2005(e) (Supp. II 1978). Neither does the Board consider the question whether these documents could be used to deny the construction application of a tribe which did not have actual knowledge of their existence and applicability and which alleged that they were not properly published. See 5 U.S.C. § 552(a)(1); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Allen*, *supra*; *Shoshone and Arapahoe Tribes*, *supra*.

December 7, 1983

were required to conform with the instructions set forth in S. Rep. No. 97-516. However, despite appellee's legal arguments on these points, it appears from the record that the reevaluation was conducted within the framework of the established procedures. The real issue is whether the procedures were properly interpreted and applied.

B. Alleged Procedural Errors.

Appellant next raises several procedural arguments. First, appellant alleges that BIA's reevaluation decision was based on ex parte communications with the Grants school district. "Ex parte communication" is defined in 5 U.S.C. § 551(14) as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." This definition applies to all rulemaking and adjudicatory functions of an administrative agency that are required to be conducted under the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559. Ex parte communication is further defined in the Board's regulations as a "communication between any party and a member of the Board concerning the merits of an appeal" without knowledge of such communication and its contents by opposing parties. See 43 CFR 4.317(b). There is no comparable regulation governing appeals within BIA. See 25 CFR Part 2.

[6] True ex parte communications are the antithesis of reasoned, informed, and objective decisionmaking, and so should be eschewed whether or not they are prohibited by statute or regulation. In this case, appellee's consideration of appellant's application was not subject to the APA or to a regulation prohibiting ex parte communications. Furthermore, the record does not permit a clear determination of whether ex parte communications actually occurred, or whether appellant merely did not have what it considered an adequate opportunity to rebut the district's position. Under these circumstances, the Board will not find that the proceeding was impermissibly tainted by ex parte communications.

Appellant's second allegation of procedural error involves BIA's failure to consult with it before making a final determination. Appellant finds a consultation requirement in the May 5, 1980, Memorandum.

The Board disagrees with appellant's reading of the Memorandum. In distinction to some other BIA documents, such as the "Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs" considered by the court in *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979), and raised in appellant's opening brief, the Memorandum does not specifically require prior consultation with the tribe. It merely requires that the tribe be kept informed of the status of its application and ranking, and of its right to appeal a tentative ranking with which it disagrees. The record discloses that appellant was kept advised of the matters addressed in

the Memorandum and was given some opportunity to present its views to the Department.¹⁰

Appellant's consultation argument appears to be a corollary argument to the major contention of procedural error found in the allegation that the reevaluation decision was made at the area office level without any meaningful opportunity for input by the Pueblo and that the "final decision" issued by the Washington office was a mere rubber stamping of the area office's decision. This allegation is based upon appellant's discovery that the House Appropriations Committee had received and acted upon material submitted to it by the BIA area office weeks before the issuance of the Assistant Secretary's decision on December 2, 1982.

The indication in the record that an individual in the BIA area office provided Congress with what in essence was a proposed Departmental decision during the period in which the person affected by that proposed decision still had a right of appeal to a higher Departmental official and consequently during a period in which that decision was not final or effective is disturbing. See 25 CFR 2.3(b). Although the Board has no specific knowledge of the procedures within BIA for communicating with Congress, it is doubtful that under even normal circumstances communications from the area office at this point in a proceeding would be appropriate.

[7] Washington officials are entitled to rely upon their subordinates in the field for recommended decisions. Field officials are frequently in a much better position to collect and analyze data and to bring their awareness of local conditions and relations to a problem. However, administrative review is intended to provide the reality as well as the appearance of an objective and impartial reexamination of the law and discretion applied initially by the field official.

[8] The Board is not privy to the deliberations of the Assistant Secretary. Although several circumstances are revealed in the record which tend to support appellant's argument, without definite proof to the contrary, the Board must assume that the Assistant Secretary made an objective and impartial review of the area office's initial decision and was convinced of the correctness of that position.

Therefore, although the Board is concerned about the procedures followed in this case, it finds that the procedural matters raised by appellant are not sufficient in themselves to invalidate the decision.

C. Alleged Substantive Errors.

[9] Finally, appellant raises arguments based on four alleged substantive violations of the *Procedure*. In each case, the Board finds that the administrative record furnished to it by BIA and supplemented by appellant is insufficient to support the Assistant

¹⁰ This finding does not constitute a Board determination that the Department need not consider the position of an Indian tribe in matters concerning the tribe. As trustee for Indian tribes and the agent carrying out legislative mandates and Federal policy concerning tribal self-determination, the Department has a responsibility to act in the best interest of those tribes. The determination of a tribe's best interests should not be reached in a vacuum.

December 7, 1983

Secretary's factual determinations.¹¹ Therefore, the Board finds that it is appropriate to refer this case to the Hearings Division of OHA for an evidentiary hearing and recommended decision on the issues discussed below.

Appellant first asserts that during the reevaluation, relocatable classrooms (mobile units) were improperly counted in determining the capacity of the L-A School for the purpose of ascertaining the number of "unhoused students." "Unhoused students" is the basic unit used to determine the need for additional school facilities:

A student is considered unhoused when the condition of the school facility is such that it can no longer be used without major repair, renovation or complete replacement; when the space is no longer adequate for the educational program; when the enrollment exceeds the design enrollment of the facility.

Procedure at 4, Policy 4. The *Procedure* further provides at page 6 that:

Students are unhoused if they must attend school in temporary structures. Temporary structures are mobile units or facilities brought in for short term or emergency use with a limited life span of not more than 10 years. Buildings placed on concrete slabs with a life expectancy of more than ten years are permanent structures.

In 1978, 1979, and 1980, evaluation teams visiting the L-A School found that mobile units on the site should not be counted in determining the capacity of the school. In an August 1982 letter to the Chairman of the Senate Subcommittee, appellee remarked that the mobile units were one of the problems at the L-A School. In the September 1982 reevaluation study, however, the capacity of 7 of the 13 mobile units was included in determining the school's design capacity. This change was explained on the grounds that these particular mobile units were affixed to the ground in such a way as to become permanent fixtures and had an anticipated lifespan of more than 10 years.

Appellant raises both legal and factual arguments against BIA's classification of any of the mobile units at the L-A School as permanent structures. These arguments are based on the alleged plain meaning of the section defining unhoused students, the meaning of the provision relating to concrete slabs, and the fact that some of the mobile units counted by BIA are only leased to the school. Appellant

¹¹ Appellant has furnished the Board with several documents which were not included in the record furnished by the BIA area office, including Pueblo exhibit 15, "Study of Space Utilization and Need: Laguna Elementary, Laguna-Acoma Jr./Sr. High School," September 1982, by Mauck, Stasty & Rassam, P.A., appellant's primary exhibit in opposition to BIA's study.

The Board's regulations in 48 CFR 4.335(a) provide that "[t]he record on appeal shall include, without limitation, copies of transcripts of testimony taken, all original documents, petitions, or applications by which the proceeding was initiated and all supplemental documents which set forth claims of interested parties, as well as documents upon which all previous decisions are based." Paragraph (b) of section 4.335 further states that the record shall include "certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed."

These regulations are intended to ensure that the Board has before it *all* documents relating to the matter that were within the Department when the decision under review was rendered. Because 5 U.S.C. § 706 provides that judicial review of administrative decisions must be supported by the record, the agency can only harm its position by failing to ensure that all documents within its possession when it was considering a particular decision are provided to the Board. Regardless of the particular standard of review that is applied in a specific case, the Board cannot uphold a decision that is not supported by the record. To do so would be a dereliction of its duties and responsibilities as a delegate of the Secretary.

also cites Congressional concern over health and safety conditions in BIA schools as evidence that mobile units should not be included because of their inherent fire hazard problems.

The Board recognizes that it has no special architectural or safety engineering expertise. Furthermore, it has been able to observe the mobile units at issue only through several pictures supplied by appellant at oral argument. The Board takes official notice of the general use of mobile units as interim measures intended to provide sufficient classroom space to alleviate a temporary situation.

The *Procedure* clearly does not contemplate the permanent housing of Indian students in mobile classrooms. The parties here apparently do not disagree that the units included in determining the design capacity of the L-A School in the 1982 reevaluation were brought to the school as mobile units. They do, however, disagree on whether the units are now permanent, although physically separate, additions to the school, or whether they remain temporary structures. The determination of the nature of these structures is a question of fact.

Appellant's second substantive argument against the reevaluation decision is that BIA erred in determining capacity of the school on the basis of square footage alone, without relation to the school program. According to appellant, the *Procedure* and *Guidelines* require that capacity be measured in terms of the educational program provided. Based upon its interpretation of BIA's procedures, appellant argues that the capacity of the school is at most 360.

Appellee argues that in its prior evaluations it erred by relying upon the representation of school officials as to design capacity rather than making an independent determination of the capacity, and in failing to take several additions into consideration. Appellee alleges that the design capacity of the main school building is 535.

The Board agrees with appellant that the *Procedure* and *Guidelines* contemplate a determination of capacity in relation to the educational program. See Pueblo Exh. 4 at 2, 4; BIA Exh. 76, Attachment 4 at 1, 3. It does not appear that in its reevaluation BIA considered the use of space in relation to the educational programs in determining the school's design capacity. Instead, BIA appears to have determined capacity merely by dividing the square footage by the number of students. See BIA Exh. 67 at 2.

Because the determination of the capacity of the L-A School is a question of fact, and because of the extreme disagreement between the parties regarding design capacity, an evidentiary hearing is again required.

Appellant next argues that, in determining enrollment, BIA should have taken into consideration Laguna students who were attending off-reservation boarding schools because of overcrowded conditions at the L-A School and who would return to that school if conditions improved. In support of this argument, appellant submitted affidavits from the parents of 50 such students. Appellee counters that the *Procedure* provides for an enrollment count based on the number of

December 7, 1983

students actually enrolled, and that students who are not enrolled simply cannot be counted.

The *Procedure* does provide for a decision based on current enrollment data. The wisdom of such an approach is not at issue in this case. If BIA were making this reevaluation merely under the *Procedure*, the Board would have to accept appellee's argument. However, the reevaluation in this case is also based on the Senate Committee report, which specifically required BIA to consider "declining enrollment." In considering factors indicating a decline in enrollment, BIA should also have considered factors indicating potential increases in enrollment.

The affidavits submitted by appellant are dated April and May of 1983. Some of the students at that time were juniors and seniors, and may have graduated or may desire to graduate from the school they have been attending. Furthermore, none of the parents of the children were available for cross-examination as to other possible factors influencing their choice of a school for their children. The Board is not in a position to determine how many students might return to the L-A School and so should, therefore, be included in determining enrollment for the purposes of the reevaluation mandated by the Senate Committee. Again, an evidentiary hearing is required to resolve this question.

Finally, appellant objects both to BIA's consideration of projected enrollment and to the figures used. The argument that the *Procedure* does not contemplate projected enrollment has already been addressed. Appellant objects that the record does not disclose either the factual basis for BIA's projected enrollment figures or the process used to determine projected enrollment from the raw data. Appellee generally attacks appellant's conclusions that current enrollment in the elementary grades indicates a future increase in junior and senior high school enrollment. The parties disagree over the net impact of the discontinuation of certain mining activities in the area.

The Board agrees with appellant that the record does not provide sufficient information to support appellee's conclusion that enrollment in the L-A School will decline. An evidentiary hearing is necessary to consider this issue.

Therefore, pursuant to the special delegation of authority from the Secretary, the Board finds that the administrative record in this case does not support the Assistant Secretary's December 2, 1982, decision. Accordingly, that decision is vacated and the case is referred to the Hearings Division of OHA for a hearing and recommended decision by an Administrative Law Judge to resolve the questions of fact and law involved. This hearing shall be conducted in full compliance with administrative due process standards applicable generally to other hearings proceedings conducted by Administrative Law Judges of the

Hearings Division. The present administrative record may be considered as part of the evidentiary record in the hearing.

The administrative record and recommended decision in this case shall be returned to the Assistant Secretary for Indian Affairs who shall then make a new determination, based upon the information presented at the hearing and the findings of the Administrative Law Judge, as to whether the application of the Pueblo of Laguna for school construction funds meets the standards established in the *Procedure* and, if so, what its ranking should be compared with other current Indian school construction applications.¹²

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
*Administrative Judge, Alternate Member*¹³

FRANKLIN D. ARNESS
Administrative Judge

WILBUR BARTON
v.
AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF
INDIAN AFFAIRS¹

12 IBIA 110

Decided December 9, 1983

Consolidated appeals from decisions of the Navajo Area Director, Bureau of Indian Affairs, terminating financial assistance to appellants.

Plan approved; appeals dismissed.

1. Indians: Welfare--Regulations: Publication

Because the list of specific types of assistance provided by the Bureau of Indian Affairs under the general assistance program is not a rule within the meaning of 5 U.S.C. § 551(4) (1976), the general assistance eligibility criteria published in 25 CFR Part 20

¹² Appellant seeks a Board order that, if its application is found to have been improperly reevaluated, it be again placed in the number one priority position. Although the Board sympathizes with appellant's request, it cannot, in clear conscience, grant it. The Board is cognizant of the fact that a finding that the Laguna project meets the requirements established under the *Procedure* would impact upon other, equally or more deserving, Indian school construction applications. The Board sees no value in punishing the children affected by those projects because of a possible violation of BIA's duty to appellant.

¹³ Wm. Philip Horton, formerly Chief Administrative Judge, Board of Indian Appeals, was transferred to the position Chief Administrative Judge, Board of Land Appeals, effective Oct. 30, 1983. He remains a signator on this position as an Alternate Member of the Board of Indian Appeals by special assignment of the Director, OHA. See Memorandum dated Nov. 15, 1983.

¹ The Board hereby consolidates the following cases with *Barton: Arletta Bischoff v. Acting Area Director, Navajo Area Office, Bureau of Indian Affairs*, Docket No. IBIA 82-17-A; *Irving Clark v. Area Director, Navajo Area Office, Bureau of Indian Affairs*, Docket No. IBIA 82-18-A; *Pearlene Dayze v. Area Director, Navajo Area Office, Bureau of Indian Affairs*, Docket No. IBIA 82-19-A; *Francis Harvey v. Area Director, Navajo Area Office, Bureau of Indian Affairs*, Docket No. IBIA 82-22-A; and *June James v. Area Director, Navajo Area Office, Bureau of Indian Affairs*, Docket No. IBIA 82-23-A.

December 9, 1983

may be used in determining eligibility for custodial care assistance, even though Part 20 does not specifically indicate custodial care as a type of assistance available through the general assistance program.

APPEARANCES: Stephen LeCuyer, Esq., DNA-Peoples' Legal Services, Inc., Shiprock, New Mexico, for appellants; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

Appellants in the above-named consolidated cases are all Navajo Indians who were receiving care and training funded by the Bureau of Indian Affairs (BIA) at Toyei Industries (Toyei), Toyei, Arizona. This assistance was terminated effective January 12, 1981, on the grounds that appellants were not eligible for custodial care assistance under the provisions of 66 BIAM (Bureau of Indian Affairs Manual) 5.10A. The decisions found that appellants did not require care from others in daily living due to age, infirmity, physical or mental impairment. Each appellant sought review of this decision by the Navajo Area Director, BIA, and the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary). When the Deputy Assistant Secretary did not render a decision in appellants' cases within the 30-day time period established in 25 CFR 2.19, appellants sought and obtained review by the Board of Indian Appeals (Board).

In decisions dated October 15, 1982, the Board found, *inter alia*, that appellants' assistance had been improperly terminated by reference to a rule published only in the BIA Manual in violation of 5 U.S.C. § 552 (1976) and *Morton v. Ruiz*, 415 U.S. 199 (1974). The Board ordered BIA to develop a plan to implement the holding, and retained jurisdiction over the appeals to review the BIA plan.²

Discussion and Conclusions

On remand BIA determined that appellants are not eligible for custodial care assistance because they each received supplemental security income (SSI) after they left Toyei. This determination is based upon BIA's interpretation of 25 CFR 20.21, which states:

Indians meeting the requirements prescribed in § 20.20(a) [concerning basic requirements for receipt of any form of financial assistance from BIA] shall be considered eligible for general assistance under this part: *Provided*, That:

* * * * *

² See *James v. Navajo Area Director*, 10 IBIA 334 (1982); *Harvey v. Navajo Area Director*, 10 IBIA 318 (1982); *Dayzie v. Navajo Area Director*, 10 IBIA 269 (1982); *Clark v. Navajo Area Director*, 10 IBIA 253 (1982); *Bischoff v. Navajo Area Director*, 10 IBIA 237 (1982); and *Barton v. Navajo Area Director*, 10 IBIA 173 (1982).

(b) They do not receive and are not eligible to receive public assistance or Supplemental Security Income payments and are not included in such payments made to others. However, otherwise eligible Indians may receive general assistance under this part upon application for and pending initial receipt of such payments.

The BIA has previously argued that the general assistance provisions apply to appellants' receipt of custodial care assistance because 66 BIAM 5.2A and 5.10B(1) make custodial care a type of general assistance. See 10 IBIA at 185; 10 IBIA at 248; 10 IBIA at 265; 10 IBIA at 281; 10 IBIA at 329; and 10 IBIA at 345.

Appellants each acknowledge receipt of SSI payments since they left Toyei.³ They furthermore acknowledge that such payments would render them ineligible for receipt of custodial care assistance if such assistance falls under the general assistance provisions of 25 CFR Part 20.⁴

In the October 15, 1982, decisions in appellants' cases, the Board found that 66 BIAM 5.2A and 5.10B(1) made custodial care a type of general assistance. The Board also found that 25 CFR Part 20 did not specifically indicate that custodial care was part of the general assistance program or that BIA provided funds for custodial care. The Board did not reach the question of whether the sections of the BIA Manual making custodial care a type of general assistance were required by 5 U.S.C. § 552(a)(1)(D) (1976) to be published in the *Federal Register* in order to be effective.⁵

[1] The eligibility requirements for BIA assistance programs are found in 25 CFR Part 20. The basic requirements for participating in any program are found in section 20.20. More specific requirements for receipt of general assistance are found in section 20.21, for child welfare assistance in section 20.22, for family and community services assistance in section 20.24, and for miscellaneous services in section 20.23. The specific types of assistance available through each of these programs are not listed in Part 20, but are specified in 66 BIAM 5.2A. The Board finds that the list of types of assistance provided under the general assistance program is not itself a rule within the meaning of 5 U.S.C. § 551(4) (1976), but rather is an interpretation of a regulation in accordance with 5 U.S.C. § 552(a)(2)(B) (1976).⁶ Therefore, the list is not required to be published in the *Federal Register*, but may be recorded in the BIA Manual or other internal operations guides.

Accordingly, BIA correctly determined that each appellant became ineligible for BIA custodial care assistance when he or she began

³ One appellant, Irving Clark, states that he returned to Toyei from Nov. 26, 1981, until Aug. 25, 1982. During that period, he personally stopped receiving SSI payments, which apparently were paid to Toyei for his care. At all other times, he received SSI payments.

⁴ According to appellants, a Mar. 9, 1977, memorandum from the Acting Deputy Commissioner of Indian Affairs permits the Navajo Area Office to waive the prohibition against receipt of BIA general assistance by an individual receiving SSI income. Appellants conclude that this memorandum provides a basis for them to receive BIA and SSI assistance simultaneously. This waiver, however, permits BIA to use general assistance funds only to supplement SSI payments in cases in which SSI benefits alone are not sufficient to cover the full cost of care for individuals placed in institutional or custodial care. This memorandum would apply only if appellants were receiving such care and their SSI payments were insufficient to meet costs.

⁵ See 10 IBIA at 185; 10 IBIA at 248-49; 10 IBIA at 265; 10 IBIA at 281; 10 IBIA at 329-30; and 10 IBIA at 346.

⁶ For a discussion of these statutory provisions, see 10 IBIA at 183-84; 10 IBIA at 246-48; 10 IBIA at 263-64; 10 IBIA at 279-80; 10 IBIA at 327-29; 10 IBIA at 343-45.

December 9, 1983

receiving SSI payments. Receipt of SSI payments appears to have coincided closely with each appellant's departure from Toyei. Based upon the representations of BIA and the admissions of appellants, the Board approves BIA's plan to find appellants ineligible for custodial care assistance under 25 CFR Part 20 from the time they left Toyei.⁷

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, these appeals are dismissed on the grounds that appellants are not eligible for the receipt of BIA custodial care assistance under 25 CFR Part 20.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

HENRY W. BEGAY

v.

AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF
INDIAN AFFAIRS¹

12 IBIA 119

Decided *December 9, 1983*

Consolidated appeals from decisions of the Navajo Area Director, Bureau of Indian Affairs, terminating financial assistance to appellants.

Plan rejected; appeals dismissed.

1. Administrative Procedure: Burden of Proof--Indians: Welfare

Speculation or presumptions concerning an individual's circumstances are insufficient to support a finding under 25 CFR 20.21(a) that the individual is not eligible for receipt of general assistance from the Bureau of Indian Affairs on the grounds that his or her needs are met by other resources.

2. Indians: Welfare

The requirement in 25 CFR 20.11(b), that a recipient of assistance from the Bureau of Indian Affairs report any change in circumstances, is an administrative procedure, not an eligibility requirement.

⁷ A settlement agreement between Toyei and BIA on the amount owed to Toyei for services previously rendered to appellants was approved by the Board on Aug. 23, 1983. Payment has been made under this agreement. This settlement is conclusive of all issues arising from BIA general assistance payments to appellants before they received notification of the termination of their assistance. See *Begay v. Navajo Area Director*, 12 IBIA 107 (1983).

¹ The Board hereby consolidates *Bessie Benally v. Area Director, Navajo Area Office, Bureau of Indian Affairs*, Docket No. IBIA 82-16-A, with *Begay*.

3. Indians: Welfare--Regulations: Publication

Individuals may not be deprived of custodial care benefits provided by the Bureau of Indian Affairs solely on the basis of eligibility requirements set forth only in the Bureau of Indian Affairs Manual.

4. Indians: Welfare

The Board of Indian Appeals will not force individuals to accept assistance from the Bureau of Indian Affairs that they have not shown they desire.

APPEARANCES: Stephen LeCuyer, Esq., DNA-Peoples' Legal Services, Inc., Shiprock, New Mexico, for appellants; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

Henry W. Begay and Bessie Benally (appellants) are Navajo Indians who were receiving care and training funded by the Bureau of Indian Affairs (BIA) at Toyei Industries (Toyei), Toyei, Arizona. This assistance was terminated effective January 12, 1981, on the grounds that appellants were not eligible for custodial care under the provisions of 66 BIAM (Bureau of Indian Affairs Manual) 5.10A. The BIA found that appellants did not require care from others in daily living due to age, infirmity, physical or mental impairment. Appellants sought review of these decisions by the Navajo Area Director, BIA, and the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary). When the Deputy Assistant Secretary did not render decisions in appellants' cases within the 30-day time period established in 25 CFR 2.19, appellants sought and obtained review by the Board of Indian Appeals (Board).

In decisions dated October 15, 1982, the Board found, *inter alia*, that appellants' assistance had been improperly terminated by reference to a rule published only in the BIA Manual in violation of 5 U.S.C. § 552 (1976) and *Morton v. Ruiz*, 415 U.S. 199 (1974). The Board ordered BIA to develop a plan to implement the holdings, and retained jurisdiction over the appeals to review the BIA plan. See *Begay v. Navajo Area Director*, 10 IBIA 189 (1982); *Benally v. Navajo Area Director*, 10 IBIA 221 (1982).

Discussion and Conclusions

In response to the Board's October 15, 1982, orders, BIA attempted to contact appellants. A March 29, 1983, letter from the Deputy Assistant Secretary to the Board states that BIA was unable to contact appellant Begay. Although messages had been left for him at the local trading post, according to the usual and accustomed practice, appellant had not contacted BIA. Attempts to reach appellant continued through June 9, 1983, without success. Based upon appellant's past history of receipt of

December 9, 1983

supplemental security income (SSI) payments, BIA speculated that he was again receiving these benefits.

The BIA was able to contact appellant Benally's mother, who informed the interviewer that appellant had been married and was living with her husband. Appellant's mother stated that she knew appellant was not interested in returning to Toyei. The BIA, therefore, speculated that appellant's needs were being met through her marriage.

The BIA plan for appellants involves finding them ineligible for custodial care assistance from the time they left Toyei. This plan is apparently based upon a presumption that appellants' needs were being met through other resources, on the assumption that if their needs were not being met, they would have contacted BIA for further assistance.

If BIA were able to prove that appellants' needs were being met through other resources, the disposition of these cases would be controlled by the Board's holding in *Allen v. Navajo Area Director*, 12 IBIA 116 (1983). That case held that the eligibility criteria for BIA general assistance set forth in 25 CFR Part 20, and particularly in 25 CFR 20.21(a), can be applied in determining eligibility for receipt of custodial care assistance. Under section 20.21(a), a person otherwise eligible for general assistance is rendered ineligible if his or her needs are met by other resources. *See also Barton v. Navajo Area Director*, 12 IBIA 110 (1983).

[1] The Board will not accept speculation or presumptions as proof that appellants' needs are being met by other resources.² Because BIA is not able to demonstrate that appellants' needs are met by other resources, or that they are ineligible for receipt of custodial care assistance by reason of any other criterion set forth in 25 CFR 20.21, appellants may not be determined ineligible on the mere assumption that they fail to meet the basic eligibility criteria for BIA general assistance.

[2] Alternatively, in its reply to appellants' response to the plan developed for them, BIA raises 25 CFR 20.11(b) as grounds for finding appellants ineligible. This regulation states: "Recipients shall be required to make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of financial assistance."

Even assuming *arguendo* that appellants were "recipients" of BIA general assistance so that they should bear the burden of proving changed circumstances,³ and that both appellants in fact had experienced a change in their circumstances,⁴ BIA's argument is still

² These cases are thus distinguishable from *Allen, supra*, in which BIA representatives spoke personally with the appellants.

³ The Board's Oct. 15, 1982, order in these cases places the burden on BIA to show appellants' present circumstances.

⁴ Although the record indicates that appellant Benally was married, which presumably is a change of circumstances of the type envisioned in the regulation, there is no suggestion that appellant Begay's circumstances have changed in any way.

not convincing. Section 20.11(b) is clearly identified as an "administrative procedure," not as an eligibility requirement. There is no indication in the regulation or surrounding sections that failure to comply with it renders an individual ineligible for receipt of further assistance. The Board declines to read such a drastic punishment into a regulation obviously intended merely to assist BIA with administrative and recordkeeping functions.

[3] The only remaining basis for BIA's determinations would be the provisions of 66 BIAM. The use of eligibility criteria set forth only in the BIA Manual was addressed in the original decisions in these and 17 related cases. The Board held that eligibility criteria found only in the BIA Manual could not be used to deprive an individual of benefits because although these provisions were "rules" within the meaning of 5 U.S.C. § 551(4) (1976), they had not been published in the *Federal Register* as required by 5 U.S.C. § 552(a)(1)(D) (1976) and by the Supreme Court's decision in *Morton v. Ruiz, supra*. Appellants state that no social services regulations were published in the *Federal Register* between October 15, 1982, the date of the Board's original decisions, and the time when BIA proposed to find appellants ineligible for assistance. Appellee does not dispute this statement, and the Board is not independently aware of any such publication.

The same reasoning applies to the application of BIA Manual provisions to the present eligibility determinations. The Board hereby incorporates by reference those parts of the original decisions that pertain to the need for publication of rules of general applicability in the *Federal Register*. See 10 IBIA 199-200, 10 IBIA 231-32.

Because the eligibility criteria in the BIA Manual have not been published in the *Federal Register*, they may not be used to deprive appellants of custodial care assistance. There is, therefore, no legally sufficient basis in the record for a determination that appellants are not eligible for custodial care assistance. Accordingly, the Board rejects BIA's plan for appellants that proposes to find them ineligible for receipt of custodial care assistance.

[4] However, the record also does not permit a determination that appellants actually desire to receive assistance from BIA. The record indicates that BIA has made good faith efforts to contact appellants in accordance with the Board's order and to determine if appellants are eligible for and desire to receive assistance. There are no affirmative assertions by appellants that they, in fact, desire to receive assistance from BIA, or explanations for their failure to respond to BIA.⁵ Under these circumstances, the Board will not require BIA to continue efforts to contact appellants or force individuals to accept assistance without proof that they are actually seeking assistance. Appellants' social services records, however, shall be amended to show that they are not

⁵ Appellants present only legal argumentation that they cannot be found ineligible.

December 9, 1983

receiving assistance because of their failure to indicate a desire for assistance, rather than a determination that they were ineligible.⁶

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the BIA plan for appellants is rejected, but the appeals are nonetheless dismissed on the grounds that there is no evidence that appellants actually desire to receive assistance from BIA.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

COOK INLET REGION, INC.

77 IBLA 383

Decided *December 9, 1983*

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting selections under section 14(h)(1) of the Alaska Native Claims Settlement Act for cemetery sites and historical places.

Affirmed in part, reversed in part, set aside in part, and remanded.

1. Alaska Native Claims Settlement Act: Conveyances: Generally-- Applications and Entries: Generally

A decision rejecting an application, filed at a time when the land was withdrawn, pursuant to the tract book or notation rule may be reversed where the application remained pending unadjudicated until after termination of the withdrawal (and thus no administrative burden would be avoided by rejection) and where consideration of the application would not give the applicant any preference right in the land over the general public to which he was not otherwise entitled.

2. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act authorizes the Secretary to withdraw and convey historical places and cemetery sites to the appropriate regional corporation. Although lands withdrawn under sec. 11 of the Alaska Native Claims Settlement Act for village selection may not be conveyed under sec. 14(h), after Dec. 18, 1975, lands withdrawn under sec. 11 for village selections which have not been selected

⁶ A settlement agreement between Toyei and BIA on the amount owed to Toyei for services previously rendered to appellants, was approved by the Board on Aug. 23, 1983. Payment has been made under this agreement. This settlement is conclusive of all issues arising from BIA general assistance payments to appellants before they received notification of the termination of their assistance. See *Begay v. Navajo Area Director*, 12 IBLA 107 (1983).

or lands embraced in village selections which have been relinquished lose their status as lands withdrawn under sec. 11 and may be conveyed under sec. 14(h)(1).

APPEARANCES: Russ Winner, Esq., Anchorage, Alaska, for appellant; James Vollintine, Esq., Anchorage, Alaska, for intervenor; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

This appeal is brought by Cook Inlet Region, Inc. (CIRI), from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting certain land selection applications filed pursuant to section 14(h)(1) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1613(h)(1) (1976). The basis for the rejection was the fact that the lands at issue had been withdrawn by Public Land Order No. (PLO) 5174 and PLO 5425 under section 11(a)(3) of ANCSA, 43 U.S.C. § 1610(a)(3) (1976), and were embraced in village selections made under section 12 of ANCSA, 43 U.S.C. § 1611 (1976), at the time of appellant's section 14(h)(1) selections. BLM held that since the land was covered by outstanding applications of record at the time that appellant's selections were made, rejection of appellant's applications was mandated by 43 CFR 2091.1(b).¹

The decision recited that CIRI filed selection applications AA-11094, AA-11103, and AA-11107 on December 18, 1975. Selection applications AA-11838, AA-11839, and AA-11840 were filed by CIRI on June 30, 1976. The BLM decision noted that appellant's section 14(h)(1) selection applications conflicted with prior village selection applications filed under section 12 of ANCSA on December 17, 1974, and December 15, 16, and 17, 1975. BLM also noted that conflicting village selection applications were all relinquished on March 17, 1978.

CIRI contends in its statement of reasons for appeal that the regulation at 43 CFR 2091.1(b) is a regulation of general applicability which is superseded in this case by the more specific regulations governing ANCSA selections. Counsel for appellant asserts that the ANCSA regulations contemplate topfiling by Native groups and adjudication of conflicting applications. Specifically, counsel cites 43 CFR 2652.3(b) which provides that village selections within areas withdrawn under sections 11(a)(1) and 11(a)(3) of ANCSA shall be given priority over regional selections for the same land. CIRI argues that lands for which a village selection was filed, which selection is later relinquished or disapproved, are "not selected" within the meaning of 43 CFR 2653.3(a), thus permitting section 14(h)(1) selections after

¹ Appellant's applications were also rejected in part because of conflict with patented lands, certain Native allotment applications, and the homesite application of Vernard E. Jones, AA-85. Counsel for appellant acknowledges on appeal that patented land must be excluded from CIRI's selection application. Counsel for BLM concedes error in the decision below to the extent that it rejected appellant's application for lands within unpatented Native allotment applications or the homesite application which is currently the subject of a Departmental contest. Therefore, these aspects of the decision below are no longer at issue in the appeal before the Board.

December 9, 1983

December 18, 1975, from lands formerly withdrawn under section 11(a)(3) and not selected.

Further, CIRI contends that even assuming 43 CFR 2091.1(b) is relevant, BLM has erroneously applied the regulation. Appellant argues that the regulation only precludes holding an application pending possible future availability of the land where approval of the application is prevented by an allowed entry or selection of record. Appellant contends the regulation is not applicable where, as here, BLM waits until after relinquishment of the conflicting applications to reject the junior applications. CIRI asserts that an equitable construction of the regulation bars rejection of a premature filing in circumstances where to do otherwise would not create an administrative burden and would not give applicant a preference right to which he is not otherwise entitled. Appellant contends that neither is the case here.

Further, CIRI argues that the deadline of July 1, 1976, imposed for section 14(h)(1) selections by 43 CFR 2653.1(a)² coupled with the fact that the village selections were not relinquished until March 17, 1978, requires an interpretation that topfiling is permitted under 43 CFR 2653.3(a) authorizing selection after December 18, 1975, from lands withdrawn under section 11(a)(3) and not selected under section 12. Counsel cites the *Appeal of William Thomas Woolard*, 2 AN CAB 150, 84 I.D. 891 (1977), as supporting this result.

Counsel for BLM has responded to appellant's brief. Counsel asserts that the notation or tract book rule expressed in the regulation at 43 CFR 2091.1 requires rejection of an application for land filed "while" BLM records show the land to be selected or otherwise unavailable for disposal. BLM argues that the applicability of the rule is strengthened by the recognition in the regulation of certain exceptions relating to Native selections where topfiling is permitted, none of which are relevant to appellant's selections. Counsel further notes that the regulation at 43 CFR 2653.3 expressly limits section 14(h)(1) selections on land withdrawn under section 11(a)(1) to land "not selected under sections 12 or 19 of the Act." The preamble to publication of the regulation is cited wherein it indicates that BLM declined to amend the regulation from its proposed form to permit overselection. 41 FR 14735 (Apr. 7, 1976).

Counsel for BLM also contends that the terms of ANCSA preclude appellant's application. Section 14(h)(1), 43 U.S.C. § 1613(h) (1976), authorized the Secretary to withdraw and convey only lands outside those withdrawn under section 11, 43 U.S.C. § 1610 (1976). Further, although section 22(h), 43 U.S.C. § 1621(h) (1976), provides for automatic termination of withdrawals under section 11 for lands which are not selected by December 18, 1975, it provides for continued

² This deadline was extended to Dec. 31, 1976. 43 CFR 2853.4(b), 41 FR 44040-41 (Oct. 6, 1976).

withdrawal of selected lands. BLM asserts that the land could have been subject to section 14(h)(1) selection only after relinquishment of the village selections on March 17, 1978. Counsel contends that a waiver could have been obtained by CIRI of the regulatory deadline December 31, 1976, for section 14(h)(1) selections as this deadline was not mandated by statute. However, counsel contends selection is now precluded by the terms of the Alaska National Interest Lands Conservation Act (ANILCA), § 201(7), P.L. 96-487, 94 Stat. 2371, 2380 (1980), establishing the Lake Clark National Park and National Preserve.

CIRI has filed a reply brief in which it asserts that application of the notation rule by BLM to selections under ANCSA will produce an incongruous result. Since village corporations were allowed to select acreage in excess of their entitlement, 43 CFR 2651.4(f), subsequent disallowance of excess acreage embracing historical sites after the deadline for regional selections would preclude Native selection of the sites.

Amici curiae, the Nondalton Native Corp., the Nondalton City Council, and the Nondalton Village Corp., have filed a brief in support of CIRI's appeal. Amici point out that three of the CIRI applications under section 14(h) embrace the historic Kijik village site and cemetery and that Kijik is the former village site of the Nondalton Indians. Counsel argues that under section 22(h) of ANCSA all withdrawals made under ANCSA terminate on December 18, 1975, except that any lands selected by a Native corporation shall remain withdrawn until conveyed. It is alleged that, in essence, selection merges with the withdrawal and, if the Native selection is relinquished or rejected, the underlying withdrawal is simultaneously terminated retroactively as of the date of selection. Thus, counsel contends that CIRI's selections are properly regarded as not being barred by the withdrawals and the selections which were subsequently relinquished.

Further, counsel for amici contends that section 14(h)(1) does not require that the selected lands be unreserved or unappropriated when they are selected, but only before they are withdrawn and conveyed by the Secretary. Finally, counsel for amici points out that the contest proceeding concerning the homesite application of Vernard E. Jones has been stayed by order of the Administrative Law Judge pending the outcome of this appeal. Amici advise that an agreement has been reached between the homesite applicant (contestee), the Nondalton Native Corp., and CIRI to settle the contest, contingent upon approval of the CIRI selections which are the subject of this appeal. Pursuant to the settlement agreement, the homesite applicant would relinquish his claim in return for the grant by CIRI to applicant of an estate in the subject land for his life or 12 years (whichever is longer).

Appellant requested that the parties to this appeal be allowed to make an oral presentation of the arguments in support of their position. See 43 CFR 4.25. The request was granted and oral argument

December 9, 1983

was held before the Administrative Judges deciding this case on September 8, 1983.

Two essential issues are raised by this appeal. First, whether the tract book or notation rule as embodied in the regulations at 43 CFR 2091.1 is properly applied to reject the CIRI applications. A further question is whether ANCSA and the regulations promulgated thereunder preclude topfiling and require rejection of the CIRI applications.

[1] The regulation at 43 CFR 2091.1 provides in pertinent part:

[A]pplications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land * * * when approval of the applications is prevented by:

(a) Withdrawal or reservation of lands; except that this does not prevent the filing of applications by village and regional corporations under 43 CFR Parts 2561 [land in Native allotment applications] and 2652 [regional selections] for public lands withdrawn under section 11(a)(1) of the Alaska Native Claims Settlement Act.

Neither of these exceptions to the notation rule provided in the regulation for ANCSA selections expressly applies to appellant's applications.³ In a recent case this Board examined the rationale for the notation rule:

In *State of Alaska*, 73 I.D. 1 (1966), *aff'd sub nom. Udall v. Kalerak*, 396 F.2d 746 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969), the rationale for the general rule that application made for land while it is withdrawn is invalid and does not become valid upon revocation of the withdrawal was set forth. Two major considerations were recited: avoidance of burdening land records with applications for land which is unavailable for the foreseeable future; and the equitable consideration of assuring the public an equal opportunity to file for the land and avoiding giving an applicant a preference to which he has no right. *State of Alaska*, *supra* at 9. The Department held that where these considerations were not thereby compromised an application for land filed while the land was withdrawn could be considered after restoration of the land. This holding was clarified in *David W. Harper*, 74 I.D. 141 (1967), where it was noted that the refusal to accept applications for land before it is open to disposition is primarily a matter of policy which need not absolutely preclude acceptance of applications for land filed prior to the time the land becomes available for disposition where no rights are vested in an applicant by the filing of his application other than the right to have the application considered, if no undue administrative burden is placed upon the Department in accepting such premature application, and if the application can be adjudicated in such a manner that no applicant can obtain an advantage over another applicant by virtue of premature filing. *David W. Harper*, *supra* at 149-50.

Vaughn K. Leavitt, 55 IBLA 59, 62 (1981).

The land within CIRI's applications was withdrawn at the time the applications were filed by PLO 5174, 37 FR 5576 (Mar. 16, 1972), *as amended* by PLO 5425, 39 FR 24902 (July 8, 1974). These lands were withdrawn from all forms of appropriation under the public land laws,

³ The exception regarding regional selections, 43 CFR Subpart 2652, could be read to support appellant's topfiled applications. The regulations at 43 CFR 2652.0-3 references section 14(h)(1) selections. Another regulation provides for priority of village selections over regional selections for the same lands. 43 CFR 2652.3(b). Thus, topfiling is clearly contemplated by this regulation. Despite the reference to section 14(h)(1), it appears as argued by counsel for BLM at the oral argument, that 43 CFR Subpart 2652 is properly construed as applying to village selections under section 12 of ANCSA. Selections under section 14(h) of ANCSA are the subject of the regulations at 43 CFR Subpart 2653.

including state selection, location under the mining laws, and mineral leasing, pursuant to section 11(a)(3) of ANCSA and reserved for village selection under section 12 of ANCSA. Paragraph 2 of PLO 5174 further provided that after each village corporation has exhausted its rights of selection under section 12(a) and 12(b) of ANCSA in the area withdrawn by the order, the regional corporation for the area (now CIRI) may select any of the remaining lands under section 12.⁴ Thus, it is clear that the lands at issue were withdrawn from operation of the public land laws for Native selection and that, to the extent that the lands were not selected by the village corporations, the lands were subject to selection by CIRI. Clearly, appellant was not in the position of seeking a preference right to which it was not entitled when it filed its applications while the land was withdrawn under section 11(a)(3).

Further, no undue administrative burden was avoided by the BLM decision rejecting the CIRI applications. The terms of the PLO by which the lands were withdrawn for Native selection contemplated that CIRI would have the right to select the lands (pursuant to section 12 rather than section 14(h)) subject to prior village selections. As noted previously, the regulations contemplated topfiling by regional corporations of village selections with the latter having priority. 43 CFR 2652.3(b); see discussion at note 3, *supra*. To the extent that the topfiled CIRI selections involved any administrative burden, it was certainly not alleviated by rejecting the applications after the conflicting village selections had been withdrawn and after the lands were no longer subject to selection by the regional corporation. In these circumstances it was error to reject appellant's selections, filed while the land was embraced in village selections, subsequent to the relinquishment of the conflicting village selections on the basis of the notation or tract book rule.

[2] This raises the question of whether ANCSA and the regulations promulgated pursuant thereto preclude topfiling and require rejection of appellant's applications. Section 14(h) of ANCSA, 43 U.S.C. § 1613(h) (1976), provides that the Secretary of the Interior is authorized to withdraw and convey 2 million acres of "unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title" for the various purposes described therein. Section 14(h)(1) authorizes the Secretary to "withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places."

Although the land in appellant's applications was originally withdrawn under section 11, 43 U.S.C. § 1610 (1976), for village selection, this is not necessarily dispositive of whether the applications may be considered favorably after relinquishment of the village selections. All withdrawals under ANCSA terminated as of December 18, 1975, with the exception of lands selected by village or

⁴Section 12(c) of ANCSA, 43 U.S.C. § 1611(c) (1976), provides for selection by the regional corporations of their share (allocated pursuant to a statutory formula) of the difference between 38 million acres and the 22 million acres selected by the village corporations pursuant to sections 12(a) and 12(b).

December 9, 1983

regional corporations which remain withdrawn until conveyed. 43 U.S.C. § 1621(h) (1976). At the time the village selection applications in this case were relinquished on March 17, 1978, the withdrawal pursuant to section 11 terminated simultaneously. Consequently, the lands fall within the purview of the regulation permitting section 14(h)(1) selections after December 18, 1975, from lands formerly withdrawn under section 11(a)(1) or 11(a)(3) and not selected under section 12. 43 CFR 2653.3(a). This is consistent with the terms of section 14(h) itself which authorizes the Secretary to withdraw and convey unreserved and unappropriated public lands outside the areas withdrawn by sections 1610 and 1615 for village selection. Although the Secretary could not withdraw and convey the lands pursuant to section 14(h)(1) at the time the CIRI applications were filed, this was no longer the case once the conflicting village selection applications were relinquished.

The view of Departmental officials at the time that the deadline for section 14(h)(1) applications was extended to December 31, 1976, as expressed in the preamble to the regulatory revision, was that the land must be available for section 14(h)(1) selection at the time the selection application was filed. See 41 FR 44041 (Oct. 6, 1976). The selection deadline was moved back to permit refile of prior selections erroneously filed. Obviously this extension would not benefit CIRI as the conflicting village selections were not relinquished until 1978. However, we do not read the terms of section 14(h) to require rejection of appellant's applications after the village selection applications have been relinquished. The Department has held that under section 14(h) the withdrawal of land for village selection pursuant to sections 11(a)(1) and 11(a)(3) does not preclude the filing of section 14(h) selections while the land is withdrawn where the withdrawal later terminates and the land has not been selected by a village corporation. *Appeal of William Thomas Woolard, supra*. It is true that at least a part of the land selected by Woolard was not embraced in any village selection application filed prior to the December 18, 1975, statutory deadline. However, this distinction from the CIRI case became irrelevant when the village selection applications conflicting with the CIRI applications were relinquished in 1978 and the lands were no longer either withdrawn under section 11 or selected under section 12. Accordingly, the decision appealed from is in error.

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 as to the land rejected because it was previously embraced in relinquished village selection applications, affirmed as to patented lands, set aside as to land in Native allotment

and homesite applications not finally adjudicated, and the case is remanded.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

WILL A. IRWIN
Administrative Judge

JOSEPH A. BARNES *ET AL.*

78 IBLA 46

Decided *December 13, 1983*

Appeal from the decision of the Oregon State Office, Bureau of Land Management, denying a protest against patent 36-83-0013.

Affirmed.

1. Mining Claims: Patent

The Bureau of Land Management properly determines the acreage of mining claims that have been conformed to surveyed legal subdivision of the township by reference to its official land status records.

2. Patents of Public Lands: Reservations--Railroad Grant Lands

Language in a patent of railroad grant lands that excludes mineral lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon discovery of minerals in the land. The issuance of a railroad grant lands patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

3. Mining Claims: Surface Uses--Surface Resources Act: Verified Statement

Acceptance by the Bureau of Land Management of mining claimant's verified statement under sec. 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1976), confirms only those rights to surface resources that the claimants held on July 23, 1955, as defined or limited by other existing law.

4. Mining Claims: Patent--Mining Claims: Surface Uses--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Mining Claims

The Bureau of Land Management properly reserves to the United States in a mineral patent for O & C revested grant lands the timber now on a mining claim subject to the Act of June 9, 1916, 39 Stat. 218, and the timber now or hereafter growing on a mining claim subject to the Act of Apr. 8, 1948, 62 Stat. 162.

December 13, 1983

5. Administrative Authority: Generally--Constitutional Law: Generally--Statutes

The Department of the Interior, as an agency of the executive branch of the Government, is not the proper forum to decide whether a statute enacted by Congress is unconstitutional.

APPEARANCES: Edward Ray Fechtel, Esq., Eugene, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

On June 15, 1983, the Oregon State Office, Bureau of Land Management (BLM), issued mineral patent No. 36-83-0013 to Joseph A. Barnes, Lucille N. Barnes, Peter J. Nemeč, Agnes C. Nemeč, and Clarence H. Berg for the Deep Diggings and High Bar placer mining claims encompassing 114.22 acres of land described as lots 9, 15, 18, 19, and 22, sec. 19, T. 29 S., R. 7 W., Willamette meridian, Oregon. The patent was issued subject to certain conditions, not at issue before this Board, and reserved to the United States a right-of-way for ditches and canals, also not at issue, and the following contested timber rights:

2. Under authority of Section 3 of the Act of June 9, 1916 (39 Stat. 218) the timber now on Lots 9, 15, 18, and 22 of the described land, excepting and excluding that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining claim located July 19, 1938, and recorded July 23, 1938, in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right of the purchaser of the timber to enter upon the land and to cut and remove the timber;

3. The timber now or hereafter growing on that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining claim located July 19, 1938, and recorded July 23, 1938, in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right to manage and dispose of the timber as provided by law, in accordance with and subject to the provisions of the Act of April 8, 1948 (62 Stat. 162);

On August 8, 1983, the patentees protested against the form in which BLM issued the patent, complaining that they are entitled to 121 acres of land and that because they have a vested right to the surface resources of the lands granted, the reservation to the United States of the timber reserves was improper. BLM denied the protest by decision dated August 17, 1983. The patentees thereafter filed a timely notice of appeal of BLM's decision to this Board and submitted a copy of their original protest letter as their statement of reasons.

As noted, appellants first complain that they are entitled to 121 acres, not 114.22 acres, of land by virtue of their application and payment for 121 acres. BLM responded that the actual acreage which their patent application encompassed was only 114.22 acres in accordance with appellants' notices of amended locations, dated January 27, 1964, for the two mining claims.¹ BLM noted that a \$15 overpayment was being processed for return to appellants.

¹ The notices of amended locations were filed to conform the claims' land descriptions to the amended lottings of the supplemental plat of survey for sec. 19, T. 29 S., R. 7 W., Willamette meridian.

[1] Appellants' patent application, OR 26402, initially submitted to BLM on April 14, 1981, identified the Deep Diggings claim as "60 acres, more or less" described as lots 15 and 22, sec. 19, T. 29 S., R. 7 W., Willamette meridian, and the High Bar claim as "70 acres, more or less" described as lots 9, 18, 19, and 23, sec. 19, T. 29 S., R. 7 W., Willamette meridian. Thus appellants' application seemed to encompass approximately 130 acres of land in section 19.

Review of the master title plat for T. 29 S., R. 7 W., Willamette meridian, reveals, however, that the actual surveyed acreage for lots 15 and 22 is 38.35 acres and 19.43 acres, respectively, or a total of 57.78 acres for the Deep Diggings claim. The actual acreage for the High Bar claim is: Lot 9, 37.72 acres; lot 18, 9.27 acres; lot 19, 9.45 acres; and lot 23, 9.57 acres, or a total of 66.01 acres. Therefore, the two claims as described in appellants' patent application actually encompassed 123.79 acres, not 130 acres.

By letter dated December 22, 1982, BLM informed appellants that its mineral examiners had concluded that lot 23, 9.57 acres of the High Bar claim, was nonmineral in character. *See* Mineral Report, dated Aug. 27, 1982, and approved December 2, 1982, at 16. BLM indicated that appellants could withdraw their application as to lot 23 or BLM would institute contest proceedings against that portion of the claim. By a statement dated February 3, 1983, appellants withdrew their application as to lot 23, leaving the High Bar claim at 56.44 acres and the total acres for the two claims at 114.22.

Accordingly, we find that BLM issued patent No. 36-83-0013 for the proper acreage. It appears that appellants' acreage figure was calculated based on the subdivision of sec. 19 as a regular 640-acre section which it is not. *See* Exh. B, Mineral Patent Application OR 26402.

Appellants' second complaint is against the reservation of the timber on the lands and related rights to the United States. Appellants argue first that the lands are not Oregon and California Railroad (O & C) revested grant lands subject to the Act of June 9, 1916, 39 Stat. 218, because they are mineral lands. Appellants point out that section 2 of the Act of July 25, 1866, 14 Stat. 239, granted public land, "not mineral," to the railroad and that the patent issued to the railroad excluded "[a]ll mineral lands, should any be found to exist in the tracts described above." Appellants contend that ownership of sec. 19, T. 29 S., R. 7 W., Willamette meridian, should be considered never to have passed to the railroad because sec. 19 was mineral land as evidenced by mining claims that had been located there before 1866. Appellants concluded that the railroad agent's affidavit in support of a patent for sec. 19 had to have been false and therefore sec. 19 was procured by fraudulent acts.

Appellants argue that the action of the Secretary of the Interior on February 25, 1920, to classify the lands at issue as class 2 timberlands under section 2 of the Act of June 9, 1916, 39 Stat. 219, was arbitrary and capricious and in excess of the authority granted him because the

December 13, 1983

lands should have been excluded from the railroad grant as mineral lands in the first place or, alternatively, if the lands were within the purview of the 1916 Act, the Secretary failed to determine the amount of timber growing on the lands as required by the Act. Appellants assert that the portion of sec. 19 at issue had less than 300,000 board feet of merchantable timber on each 40-acre tract.²

Appellants urge that the Act of April 8, 1948, 62 Stat. 162, superseded the 1916 Act regarding the rights of mineral entryman to the surface resources of revested O & C lands. They contend that it validated all mineral claims located on revested O & C lands, if otherwise valid, and restricted the rights to surface resources of only those claims located after August 28, 1937. Appellants state that all of the claims at issue were located prior to that date and note particularly that the Oro Grande placer mining claim was located on June 3, 1916, not in 1938.

Appellants also claim that the United States is estopped to deny their rights to surface resources by virtue of BLM's September 13, 1966, decision in contest No. Oregon 014538-A undertaken pursuant to section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1976). Appellants argue that their rights to surface resources on the lands were adjudicated and accepted by BLM in that proceeding.

In its August 17, 1983, decision, BLM responded to each of appellants' arguments but found them unpersuasive.

It is helpful to set out the history of the O & C lands before addressing appellants' arguments. By Act of July 25, 1866, 14 Stat. 239, and Act of May 4, 1870, 16 Stat. 94, Congress granted to the California and Oregon Railroad Co. certain lands to aid in the construction of the railroad through Oregon. By the Act of June 9, 1916, 39 Stat. 218, Congress declared revested in the United States certain of the lands which had been granted to the railroad. Section 2 of the Act provided that the various lands would be classified as powersite lands, timberlands, or agricultural lands. Section 3 of this Act provided that the lands revested, except for lands classified for powersite purposes, would be open to exploration, entry, and disposition under the general mining laws if they were chiefly valuable for the mineral deposits contained therein. Section 3 also provided, however, that "any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided * * * but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States." 39 Stat. 219.

Subsequently, Congress adopted the Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. §§ 1181a-1181f (1976), which provided generally that

² Class 2 was defined as: "Timberlands, which shall include lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision." 39 Stat. 219.

O & C lands under the jurisdiction of the Department of the Interior that were classified as timberlands should be managed for permanent forest production and that the timber should be cut and sold in conformity with the principle of sustained yield. The Department interpreted the Act as partially repealing section 3 of the Act of June 9, 1916, in effect, so that lands classified as valuable for timber were deemed no longer open to mineral location or leasing. See *Applicability of Mining Laws to Revested Oregon and California and Reconveyed Coos Bay Grant Lands*, 57 I.D. 365 (1941).

Then Congress passed the Act of April 8, 1948, 62 Stat. 162, that provided:

[N]otwithstanding any provisions of the Act of August 28, 1937 (50 Stat. 874), or any other Act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, all of such revested or reconveyed lands, except power sites, shall be open for exploration, location, entry, and disposition under the mineral-land laws of the United States, and all mineral claims heretofore located upon said lands, if otherwise valid under the mineral-land laws of the United States, are hereby declared valid to the same extent as if such lands had remained open to exploration, location, entry, and disposition under such laws from August 28, 1937, to the date of enactment of this Act: *Provided*, That any person who under such laws has entered since August 28, 1937, or shall hereafter enter, any of said lands, shall not acquire title, possessory or otherwise, to the timber, now or hereafter growing thereon, which timber may be managed and disposed of as is or may be provided by law, except that such person shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is disposed of by the United States: *Provided further*, That locations made prior to August 28, 1937, may be perfected in accordance with the laws under which initiated.

Thus, Congress restored revested O & C lands to mineral location except that a locator of a mining claim could not acquire title to the timber "now or hereafter growing thereon."

The first issue for us to address is whether sec. 19, T. 29 S., R. 7 W., Willamette meridian, was patented to the railroad.

The mineral lands exception in the railroad grant acts was the subject of a number of early Supreme Court and Departmental decisions. In *Central Pacific R. R. v. Valentine*, 11 L.D. 238 (1890), Secretary Noble ruled that discovery of the mineral character of land at any time prior to the issuance of the patent for it required exclusion of the land from any railroad grant which contains a provision excepting all mineral lands. This was in contrast to determining the status of the land for other purposes on the date that the route of the railroad line was definitely fixed. This construction was upheld in *Barden v. Northern Pacific Railroad*, 154 U.S. 288, 329-32 (1894). The Supreme Court also recognized in that case, however, that although the land office may not have always made the proper characterization of the lands involved in railroad grants, issuance of a patent was conclusive as to the status of the land absent direct proceedings voiding the patent. It noted:

It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of

December 13, 1983

supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. * * * The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

154 U.S. at 330.

Until 1903, patents issued under the railroad grant acts in most instances contained language excepting mineral lands. Since this language might have been construed as allowing the Federal Government to reclaim lands for which patent had issued if they later were found to contain mineral reserves, a railroad company requested that the Secretary of the Interior eliminate the excepting language from its patents. The Secretary reviewed pertinent decisions of the Supreme Court and concluded that the issuance of a patent under the railroad land grant acts is determinative of the nonmineral character of the lands for the purposes of the grant. *Northern Pacific Railway*, 32 L.D. 342, 344 (1903). The Secretary concluded with a directive to the General Land Office to exclude language from future railroad land grant patents.

The Supreme Court subsequently reviewed the same issue in *Burke v. Southern Pacific R.R.*, 234 U.S. 669 (1914). The court concluded that the General Land Office was without authority to issue patents with language excepting mineral lands because the granting Act contemplated that only nonmineral lands would be patented and that the patents would unconditionally pass title. The court stated as well that

a bill in equity, on the part of the Government, [may] lie to annul the patent and regain title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill * * *; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it.

234 U.S. at 692.

[2] In summary, once patents issued, the railroad company held full and complete title to the lands. The minerals were not reserved to the United States because mineral lands could not be included in a railroad grant. Furthermore, such patents cannot now be attacked by persons in appellants' circumstances because, as we shall see, appellants had no interest in the lands at the time the patent was issued. *George Antunovich*, 76 IBLA 301, 90 I.D. 464 (1983); *Diane B. Katz*, 48 IBLA 118 (1980).

[3, 4] With the exception of the Oro Grande claim, appellants and BLM agree that the claims on which this patent is based were located

after 1916 when the lands were opened to entry under the 1916 Act. As to the Oro Grande claim, BLM found that it has an effective location date of July 19, 1938. Appellants assert that it was located on June 3, 1916. The record shows, as BLM found, that the Oro Grande claim is a relocation of the original Van Gundy claim. That claim was located on June 3, 1916, and consequently was null and void ab initio because on that date the land was still patented to the railroad without a reservation of the minerals. *John Roberts*, 55 I.D. 430 (1935). Thus, the 20 acres of land in the High Bar claim covering the Oro Grande claim are governed by the provisions of the Act of April 8, 1948, because its effective location date is in 1938.

As previously noted, contest No. Oregon 014538-A against the mining claims at issue was undertaken pursuant to the Act of July 23, 1955, which was enacted to provide for the multiple use of the surface of the public lands among other purposes. 43 CFR 3710.0-3; 43 CFR 185.120 (1964). Section 4 of that Act, 30 U.S.C. § 612 (1976), provides that any mining claim "hereafter located" shall not be used, prior to the issuance of patent, for purposes other than mining and reserves to the United States the right to manage and dispose of the surface resources of such claim. See 43 CFR 3712.1. Section 5, 30 U.S.C. § 613 (1976), provides a procedure for determining whether mining claims located prior to the date of the Act, July 23, 1955, would be subject to the provisions of section 4. In brief, the procedure provides that the head of a Federal agency responsible for administering the surface resources of lands belonging to the United States may institute proceedings leading to a determination of surface rights by filing with the Secretary of the Interior a request for publication of notice to mining claimants. A mining claimant asserting a right to surface resources must then file a verified statement detailing certain information as to the claim. Failure to file the statement within the required time constitutes the waiver and relinquishment of any right, title, or interest under the mining claim contrary to or in conflict with the limitations and restrictions specified in section 4 of the Act. See 43 CFR 3712.2 through 3712.3. If a verified statement is filed, the Secretary of the Interior must then schedule a hearing to determine the validity and effectiveness of any right, title, or interest under the mining claim asserted by the mining claimant. See 43 CFR 3713.2. In order to establish any right to the surface resources, or, in other words, the inapplicability of section 4, a mining claimant must prove that he made a discovery on his claim within the meaning of the mining laws prior to July 23, 1955. *United States v. Payne*, 68 I.D. 250 (1961).

Joseph A. Barnes, Julia R. Fisher, and Harvey A. Reed³ submitted a verified statement for the Deep Diggings and High Bar placer mining claims to BLM on July 17, 1964. The statement asserted that they claimed "right, title, and interest in the vegetative surface resources

³ Julia R. Fisher bequeathed her interest in the mining claims at issue to Harvey A. Reed, her son. Appellants acquired their interests in the claims by mesne conveyance from appellant Joseph Barnes and/or Harvey Reed. See Abstract of Title #12622, Douglas Abstract Co., Roseburg Oregon.

December 13, 1983

and other surface resources under such mining claims as hereinafter described which are contrary to and in conflict with the limitations and restrictions specified in Section 4, 69 Stat. 367, as to the mining claims hereinbelow described." A notice of hearing issued on June 22, 1966, in which BLM asserted that "[a] discovery of valuable minerals has not been made within the limits of any of the unpatented mining claims." Following a mineral report dated August 18, 1966, recommending that the claimant's verified statement be accepted, BLM recognized the rights of the claimants and reported such to the hearing examiner, who then dismissed the proceedings undertaken pursuant to section 5 of the Act of July 23, 1955. Decision on contest No. Oregon 014538-A, dated September 13, 1966; Final Decision on Closing Determination Area, Oregon 014538, dated December 19, 1966, amended January 13, 1981.

Nevertheless, section 7 of the Act, 69 Stat. 372 (codified at 30 U.S.C. § 615 (1976)), provides that:

Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act, or as a result of a waiver and relinquishment pursuant to section 6 of this Act; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent hereafter issued under the mining laws of the United States for any mining claim heretofore or hereafter located, of any reservation, limitation, or restriction not otherwise authorized by law, or to limit or repeal any existing authority to include any reservation, limitation, or restriction in any such patent, or to limit or restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees, and licensees which is otherwise authorized by law.

BLM has consistently interpreted this provision to preserve all rights to a mining claim located prior to the Act that exist on the date of the Act, unless the claimant fails to file a verified statement, or it is determined pursuant to a hearing that the rights asserted in a verified statement are not valid, or the claimant waives his right. 43 CFR 3714.3; 43 CFR 185.137 (1964). BLM has also concluded that although section 7

preserves to all mining claimants the right to a patent unrestricted by anything in the Act and provides that no limitation, reservation or restriction may be inserted in any mineral patent unless authorized by law, * * * *it also makes it clear that all laws in force on the date of its enactment which provide for any such reservation, limitation, or restriction in such patents and all authority of law then existing for the use of lands embraced in unpatented mining claims by the United States, its lessees, permittees, and licensees continue in full force and effect.* [Italics added.]

43 CFR 3714.3; 43 CFR 185.137(a) (1964).

Accordingly, the effect of the proceedings pursuant to section 5 of the Act of July 23, 1955, in this case was to recognize only the rights to surface resources that appellants held on July 23, 1955. Those rights are defined by the Acts of June 9, 1916, and April 8, 1948. Thus, the

reservations of timber and associated rights in patent No. 36-83-0013 are proper.

[5] In conclusion we note that appellants have also argued that the Acts of June 9, 1916, and April 8, 1948, are unconstitutional as written and applied in this case. They assert that they have been denied equal protection as provided by the United States Constitution because others with "similar vested interests" have been granted unrestricted patents. They also contend that their property has been taken for public use in violation of the Fifth Amendment to the Constitution. As BLM noted in its decision, the Department of the Interior, as an agency of the executive branch of Government, is not the proper forum to decide whether or not a statute enacted by Congress is constitutional. *Tesoro Petroleum Corp.*, 65 IBLA 99 (1982); *United States v. Imperial Gold, Inc.*, 64 IBLA 241 (1982).

However, even if BLM has improperly issued patents without timber reservations to others in exactly the same circumstances as appellant, that is not a sufficient reason for BLM to continue to do so. See *George Brennan, Jr.*, 1 IBLA 4 (1970). The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers. *Rachalk Production, Inc.*, 71 IBLA 374 (1983); *Kenneth F. Cummings*, 62 IBLA 206 (1982); 43 CFR 1810.3(a). Insofar as appellants' Fifth Amendment due process rights are concerned, due process does not require notice and a prior hearing in every case that an individual is deprived of property as the individual is given notice and an opportunity to be heard before the deprivation is final. As we have often stated, even if due process did require the Department of the Interior to afford appellants some form of hearing, the requirement is satisfied by appeal to this Board. *Robert J. King*, 72 IBLA 75 (1983); *H. B. Webb*, 34 IBLA 362 (1978).

Appellants have requested that a fact-finding hearing be held in this case. Such hearings may be ordered at the discretion of the Board under 43 CFR 4.415. A hearing is necessary only where there are disputed issues of fact determinative of the legal issues on appeal which require resolution through the introduction of testimony and other evidence. See *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971). Appellants' request for a hearing is denied because there are no disputed facts controlling the outcome of this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is affirmed.

WILL A. IRWIN
Administrative Judge

December 13, 1983

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

EDWARD W. STUEBING
Administrative Judge