UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, *Secretary*

Frank J. Barry, *Solicitor*

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

Edited by

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1962, to December 31, 1962. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

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

This volume will be cited within the Department of the Interior as "69 I.D."

tary of the Interior.

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ERRATA

Page 28—Footnote 4, *Barkeley Pipeline Construction, Inc.*, should read *Barkley Pipeline Construction, Inc.*

Pages 43, 45 and 47—Top heading *Henley Construction Company*, should read *Henly Construction Company.*

Page 113—Top heading, *Estate of Harry Colby, June 20, 1962*, should read *Estate of Harry Colby, June 29, 1962*

Page 159—Footnote 24, *Urban Plumbing and Heating Company*, IBCA–43 (November 21, 1956), 63 I.D. 381, *56–1* BCA par. 1102, should read *Urban Plumbing and Heating Company*, IBCA–43 (November 21, 1956), 63 I.D. 381, *56–2* BCA par. 1102.

Page 181—Case of *Elizabeth Holmes MacDonald, Hugh John MacDonald*, A–27711, Decided *October 30, 1692*, should read Decided *October 30, 1962.*

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Dixon *v.* Dry Gulch Irrigation Co. (45 L.D. 4) ; overruled, 51 L.D. 27.
Douglas and Other Lodes (34 L.D. 556) ; modified, 43 L.D. 128.
Dowman *v.* Moss (19 L.D. 526) ; overruled, 25 L.D. 82.
Dudymott *v.* Kansas Pacific R.R. Co. (5 C.L.O. 69) ; overruled so far as in conflict, 1 L.D. 345.
Dunphy, Elijah M. (8 L.D. 102) ; overruled so far as in conflict, 36 L.D. 561.
Dyche *v.* Beleele (24 L.D. 494) ; modified, 43 L.D. 56.
Dysart, Francis J. (23 L.D. 282) ; modified, 25 L.D. 188.

Easton, Francis E. (27 L.D. 600) ; overruled, 30 L.D. 355.
East Tintic Consolidated Mining Co. (41 L.D. 255) ; vacated, 43 L.D. 80.
*Elliott *v.* Ryan (7 L.D. 322) ; overruled, 8 L.D. 110. (See 9 L.D. 360.)
El Paso Brick Co. (37 L.D. 155) ; overruled so far as in conflict, 40 L.D. 199.
Elson, William C. (6 L.D. 797) ; overruled, 37 L.D. 330.
Emblem *v.* Weed (16 L.D. 28) ; modified, 17 L.D. 220.
Epley *v.* Trick (8 L.D. 110) ; overruled, 9 L.D. 360.
Erhardt, Finsans (36 L.D. 154) ; overruled, 38 L.D. 406.
Esping *v.* Johnson (37 L.D. 709) ; overruled, 41 L.D. 289.
Ewing *v.* Rickard (1 L.D. 146) ; overruled, 6 L.D. 483.

Falconer *v.* Price (19 L.D. 167) ; overruled, 24 L.D. 264.
Fargo No. 2 Lode Claims (37 L.D. 404) ; modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348.
Farrill, John W. (13 L.D. 713) ; overruled so far as in conflict, 52 L.D. 473.
Febes, James H. (37 L.D. 210) ; overruled, 43 L.D. 183.
Federal Shale Oil Co. (53 I.D. 213) ; overruled so far as in conflict, 55 I.D. 290.
Ferrell et al. *v.* Hoge et al. (18 L.D. 81) ; overruled, 25 L.D. 351.
Fette *v.* Christiansen (29 L.D. 710) ; overruled, 34 L.D. 167.
Field, William C. (1 L.D. 68) ; overruled so far as in conflict, 52 L.D. 473.
Filtrol Company *v.* Brittan and Echart (51 L.D. 649) ; distinguished, 55 I.D. 605.
Fish, Mary (10 L.D. 606) ; modified, 13 L.D. 511.
Fisher *v.* Heirs of Rule (42 L.D. 62, 64) ; vacated, 43 L.D. 217.
Fitch *v.* Sioux City and Pacific R.R. Co. (216 L. and R. 184) ; overruled, 17 L.D. 43.
Fleming *v.* Bowe (13 L.D. 78) ; overruled, 23 L.D. 175.
Florida, State of (17 L.D. 355) ; reversed, 19 L.D. 76.
Florida, State of (47 L.D. 92, 93) ; overruled so far as in conflict, 51 L.D. 291.
Florida Mesa Ditch Co. (14 L.D. 265) ; overruled, 27 L.D. 421.
Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324) ; modified, 6 L.D. 716; overruled, 9 L.D. 237.
Forgeot, Margaret (7 L.D. 280) ; overruled, 10 L.D. 629.
Fort Boise Hay Reservation (6 L.D. 16) ; overruled, 27 L.D. 505.
Freeman, Flossie (40 L.D. 106) ; overruled, 41 L.D. 63.
Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550) ; overruled, 7 L.D. 18.
Fry, Silas A. (45 L.D. 20) ; modified, 51 L.D. 581.
Fults, Bill, 61 I.D. 437 (1954) ; overruled, 69 I.D. 181.

Galliher, Maria (8 C.L.O. 137) ; overruled, 1 L.D. 57.
Gallup *v.* Northern Pacific Ry. Co. (unpublished) ; overruled so far as in conflict, 47 L.D. 304.

Gariss *v.* Borin (21 L.D. 542). (See 39 L.D. 162, 225.)

Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.

Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.

Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.

Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.

Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.

Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.

Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.

Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.

Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.

Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.

Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.

Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.

Gowdy et al. *v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.

Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.

Gregg et al. *v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.

Grinnell *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.

*Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568. (See R.R. Rousseau, 47 L.D. 590.)

Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.

Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.

Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.

Gwyn, James R. (A–26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.

Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.

Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.

Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.

Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 689.

Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.

Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.

Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.

Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.

Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427. (See 49 L.D. 413.)

Hastings and Dakota Ry. Co. *v.* Christenson et al. (22 L.D. 257); overruled, 28 L.D. 572.

Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.

Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.

Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.

Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.

Heinzman et al. *v.* Letroadec's Heirs et al. (28 L.D. 497); overruled, 38 L.D. 253.

Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.

Heirs of Philip Mulnix (33 L.D. 331); overruled, 43 L.D. 532.

*Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)

Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.

Heirs of Vradenberg et al. *v.* Orr et al. (25 L.D. 232); overruled, 38 L.D. 253.

Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.

Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A–20899), July 24, 1937, unreported.

Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106. (See 44 L.D. 112, and 49 L.D. 484.)

Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.

Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275.

Herman *v.* Chase et al. (37 L.D. 590); overruled, 43 L.D. 246.

Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.

Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.

Hickey, M. A., et al. (3 L.D. 83); modified, 5 L.D. 256.

Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.

Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.

Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.

Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.

Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.

Holland, William C. (M–27696), decided April 26, 1934; overruled in part, 55 I.D. 221.

Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.

Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.

Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 197.

Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284.

Howard, Thomas (3 L.D. 409). (See 39 L.D. 162, 225.)

Howard *v.* Northern Pacific RR. Co. (23 L.D. 6); overruled, 28 L.D. 126.

Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.

Howell, L. C. (39 L.D. 92). (See 39 L.D. 411.)

Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.

Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413. (See 260 U.S. 427.)

Hull et al. *v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258.

Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.

Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316.

Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.

Hurley, Bertha C. (TA–66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.

Hyde, F.A. (27 L.D. 472); vacated, 28 L.D. 284.

Hyde, F. A. et al. (40 L.D. 284); overruled, 43 L.D. 381.

Hyde et al. *v.* Warren et al. (14 L.D. 576; 15 L.D. 415). (See 19 L.D. 64.)

Ingram, John D. (37 L.D. 475). (See 43 L.D. 544.)

Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95.

Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.

Instructions (32 L.D. 604); overruled so far as in conflict; 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson et al. (A–20411), August 5, 1937, unreported. (See 59 I.D. 282, 286.)

Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.

Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.

Jacks *v.* Belard et al. (29 L.D. 369); vacated, 30 L.D. 345.

Jackson Oil Co. *v.* Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.

Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.

Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.

Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429.

Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.

Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.

Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.

Kemper *v.* St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.

Kilner, Harold E., et al. (A-21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.

King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.

Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.

Kinsinger *v.* Peck (11 L.D. 202). (See 39 L.D. 162, 225.)

Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119.

Knight, Albert B., et al. (30 L.D. 227); overruled, 31 L.D. 64.

Knight *v.* Heirs of Knight (39 L.D. 362, 491; 40 L.D. 461); overruled, 43 L.D. 242.

Kniskern *v.* Hastings and Dakota R. R. Co., (6 C.L.O. 50); overruled, 1 L.D. 362.

Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.

Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.

Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45. (See 280 U.S. 306.)

Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.

La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.

Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.

Largent, Edward B., et al. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.

Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.

Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.

Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.

Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.

Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.

Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.

Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.

Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.

Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.

Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459.

*Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284. (See 43 L.D. 536.)

Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.

Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.

Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.

Lonergan *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.

Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.

Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.

Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.

Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.

Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.

Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.

Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.

Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 13.

Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.

Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.

Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.

Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.

Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.

Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.

Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.

Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.

Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.

Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.

Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536.

Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 369.

Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.

Mather et al. *v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.

Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.

Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.

McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.

McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277.

McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.

McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.

*McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)

McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.

*McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616. (See 35 L.D. 399.)

McFadden et al. *v.* Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.

McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.

McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.

McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.

McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.

McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494.

*McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528. (See 42 L.D. 317.)

McMicken, Herbert, et al. (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.

McNamara et al. *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.

McPeek *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.

*Mee *v.* Hughart et al. (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.

*Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)

Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.

Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.

Meyer *v.* Brown (15 L.D. 307). (See 39 L.D. 162, 225.)

Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.

Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.

Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.

Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.

Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.

Milton et al. *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.

Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.

Miner *v.* Mariott et al. (2 L.D. 709); modified, 28 L.D. 224.

Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.

Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D–43035, May Caramony). (See 58 I.D. 149, 154–156.)

Opinion of Solicitor, October 31, 1917 (D–40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.

Opinion of Solicitor, February 7, 1919 (D–44083); overruled, November 4, 1921 (M–6397). (See 58 I.D. 158, 160.)

Opinion of Solicitor, August 8, 1933 (M–27499); overruled so far as in conflict, 54 I.D. 402.

Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, Feb. 11, 1957 (M–36410).

Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.

Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.

Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331. (See 59 I.D. 346, 350.)

Opinion of Solicitor, August 31, 1943 (M–33183); distinguished 58 I.D. 726, 729.

Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.

Opinion of Solicitor, March 28, 1949 (M–35093); overruled in part, 64 I.D. 70.

Opinion of Solicitor, Jan. 19, 1956 (M–36378); overruled to extent inconsistent, 64 I.D. 58.

Opinion of Solicitor, June 4, 1957 (M–36443); overruled in part, 65 I.D. 316.

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Opinion of Solicitor, Oct. 27, 1958 (M–36531); overruled, 69 I.D. 110.

Opinion of Solicitor, July 20, 1959 (M–36531, Supp.); overruled, 69 I.D. 110.

Oregon and California R.R. Co. *v.* Puckett (39 L.D. 169); modified, 53 I.D. 264.

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Owens et al. *v.* State of California (22 L.D. 369); overruled, 38 L.D. 253.

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Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518.

Papina *v.* Alderson (1 B.L.P. 91); modified, 5 L.D. 256.

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Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268.

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Perry *v.* Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 304.

Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281.

Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854.

Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424.

Phillips *v.* Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93.

Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374.

Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.

Pietkiewicz et al. *v.* Richmond (29 L.D. 195); overruled, 37 L.D. 145.

Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204.

Pike's Peake Lode (14 L.D. 47); overruled, 20 L.D. 204.

Popple, James (12 L.D. 433); overruled, 13 L.D. 588.

Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477.

Prange, Christ C., and William C. Braasch (48 L.D. 448); overruled so far as in conflict, 60 I.D. 417, 419.

Premo, George (9 L.D. 70). (See 39 L.D. 162, 225.)

Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287.

Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599.

Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399.

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Pugh, F. M., et al. (14 L.D. 274); in effect vacated, 232 U.S. 452.

Puyallup Allotments (20 L.D. 157); modified, 29 L.D. 628.

Ramsey, George L., Heirs of Edwin C. Philbrick (A–16060), August 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290.

Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320.

Rankin, James D., et al. (7 L.D. 411); overruled, 35 L.D. 32.

Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404.

Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523.

*Reed *v.* Buffington (7 L.D. 154); overruled, 8 L.D. 110. (See 9 L.D. 360.)

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Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355.

Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250.

Rico Town Site (1 L.D. 556); modified, 5 L.D. 256.

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Roberts *v.* Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174.

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Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649.

Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321.

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*Rogers *v.* Lukens (6 L.D. 111); overruled, 8 L.D. 110. (See 9 L.D. 360.)

Romero *v.* Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244.

Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197.

Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584.

St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194.

*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354. (See 32 L.D. 21.)

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen (20 L.D. 249); overruled, 25 L.D. 86.

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291); vacated, 30 L.D. 191.

Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93.

Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88.

Sante Fe Pacific R.R. Co. *v.* Peterson (39 L.D. 442); overruled, 41 L.D. 383.

Satisfaction Extension Mill Site (14 L.D. 173). (See 32 L.D. 128.)

*Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797. (See 37 L.D. 330.)

Schweitzer *v.* Hilliard et al. (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639.

Serrano *v.* Southern Pacific R.R. Co. (6 C.L.O. 93); overruled, 1 L.D. 380.

Serry, John J. (27 L.D. 330); overruled so far as in conflict, 59 I.D. 416, 422.

Shale Oil Company. (See 55 I.D. 287.)

Shanley *v.* Moran (1 L.D. 162); overruled, 15 L.D. 424.

Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202.

Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63.

Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205.

Sipchen *v.* Ross (1 L.D. 634); modified, 4 L.D. 152.

Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135.

Snook, Noah A., et al. (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364.

Sorli *v.* Berg (40 L.D. 259); overruled, 42 L.D. 557.

Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275.

Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51.

Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528.

Southern Pacific R.R. Co. *v.* Bruns (31 L.D. 272); vacated, 37 L.D. 243.

South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523.

Spaulding *v.* Northern Pacific R.R. Co. (21 L.D. 57); overruled, 31 L.D. 151.

Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467.

Spruill, Lelia May (50 L.D. 549); overruled, 52 L.D. 339.

Standard Shales Products Co. (52 L.D. 522); overruled so far as in conflict, 53 I.D. 42.

State of California (14 L.D. 253); vacated, 23 L.D. 230.

State of California (15 L.D. 10); overruled, 23 L.D. 423.

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State of California (22 L.D. 428); overruled, 32 L.D. 34.

State of California (32 L.D. 346); vacated, 50 L.D. 628. (See 37 L.D. 499 and 46 L.D. 396.)

State of California (44 L.D. 118); overruled, 48 L.D. 98.

State of California (44 L.D. 468); overruled, 48 L.D. 98.

State of California *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335.

State of California *v.* Pierce (3 C.L.O. 118); modified, 2 L.D. 854.

State of California *v.* Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343.

State of Colorado (7 L.D. 490); overruled, 9 L.D. 408.

State of Florida (17 L.D. 355); reversed, 19 L.D. 76.

State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.

State of Louisiana (8 L.D. 126); modified, 9 L.D. 157.

State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5.

State of Louisiana (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.

State of Louisiana (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.

State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358.

State of Nebraska *v.* Dorrington (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123.

State of New Mexico (46 L.D. 217); overruled, 48 L.D. 98.

State of New Mexico (49 L.D. 314); overruled, 54 I.D. 159.

State of Utah (45 L.D. 551); overruled, 48 L.D. 98.

*Stevenson, Heirs of *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)

Stewart et al. *v.* Rees et al. (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401.

Stirling, Lillie E. (39 L.D. 346); overruled, 46 L.D. 110.

Stockley, Thomas J. (44 L.D. 178, 180); vacated, 260 U.S. 532. (See 49 L.D. 460, 461, 492.)

Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51.

Streit, Arnold (T–476 (Ir.)), August 26, 1952, unreported; overruled, 62 I.D. 12.

Stricker, Lizzie (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283.

Stump, Alfred M. et al. (39 L.D. 437); vacated, 42 L.D. 566.

Sumner *v.* Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173.
Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394); overruled, 28 L.D. 174.
*Sweet, Eri P. (2 C.L.O. 18); overruled, 41 L.D. 129. (See 42 L.D. 313.)
Sweeten *v.* Stevenson (2 B.L.P. 42); overruled so far as in conflict; 3 L.D. 248.

Taft *v.* Chapin (14 L.D. 593); overruled, 17 L.D. 414.
Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370.
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*Teller, John C. (26 L.D. 484); overruled, 36 L.D. 36. (See 37 L.D. 715.)
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Toles *v.* Northern Pacific Ry. Co. et al. (39 L.D. 371); overruled so far as in conflict, 45 L.D. 96.
Tomkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27.
Traganza, Mertie C. (40 L.D. 300); overruled, 42 L.D. 612.
Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98.
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Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795.
Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233.
Tupper *v.* Schwarz (2 L.D. 623); overruled, 6 L.D. 624.
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Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549.
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United States *v.* Central Pacific Ry. Co. (52 L.D. 81); modified, 52 L.D. 235.
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Vine, James (14 L.D. 527); modified, 14 L.D. 622.
Virginia-Colorado Development Corp. (53 I.D. 666); overruled so far as in conflict, 55 I.D. 289.
Vradenburg's Heirs et al. *v.* Orr et al. (25 L.D. 323); overruled, 38 L.D. 253.

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Watson, Thomas E. (4 L.D. 169); recalled, 6 L.D. 71.

Weathers, Allen E., Frank N. Hartley (A–25128), May 27, 1949, unreported; overruled in part, 62 I.D. 62.

Weaver, Francis D. (53 I.D. 179); overruled so far as in conflict, 55 I.D. 290.

Weber, Peter (7 L.D. 476); overruled, 9 L.D. 150.

Weisenborn, Ernest (42 L.D. 533); overruled, 43 L.D. 395.

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Western Pacific Ry. Co. (40 L.D. 411; 41 L.D. 599); overruled, 43 L.D. 410.

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White, Sarah V. (40 L.D. 630); overruled in part, 46 L.D. 56.

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Wickstrom *v.* Calkins (20 L.D. 459); modified, 21 L.D. 553; overruled, 22 L.D. 392.

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Wiley, George P. (36 L.D. 305); modified so far as in conflict, 36 L.D. 417.

Wilkerson, Jasper N. (41 L.D. 138); overruled, 50 L.D. 614. (See 42 L.D. 313.)

Wilkins, Benjamin C. (2 L.D. 129); modified, 6 L.D. 797.

Willamette Valley and Cascade Mountain Wagon Road Co. *v.* Bruner (22 L.D. 654); vacated, 26 L.D. 357.

Williams, John B., Richard and Gertrude Lamb (61 I.D. 31); overruled so far as in conflict, 61 I.D. 185.

Willingbeck, Christian P. (3 L.D. 383); modified, 5 L.D. 409.

Willis, Cornelius et al. (47 L.D. 135); overruled, 49 L.D. 461.

Willis, Eliza (22 L.D. 426); overruled, 26 L.D. 436.

*Wilson *v.* Heirs of Smith (37 L.D. 519); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)

Witbeck *v.* Hardeman (50 L.D. 413); overruled so far as in conflict, 51 L.D. 36.

Wright et al. *v.* Smith (44 L.D. 226); in effect overruled so far as in conflict, 49 L.D. 374.

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

NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws, edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1–18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1–52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

TABLE OF STATUTES CITED

(A) ACTS OF CONGRESS

ACTS CITED BY POPULAR NAME

(B) REVISED STATUTE

(C) UNITED STATES CODE

DEPARTMENTAL ORDERS AND REGULATIONS CITED

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

AUTRICE C. COPELAND

A–28454 (SUPP.) *Decided February 27, 1962*

Public Sales: Generally

The conservation policy announced on February 14, 1961, does not require the cancellation of a public sale held prior to the announcement because, after the date of the sale, the market value of the land has increased substantially over its value on the date of sale.

Public Sales: Generally

The consummation of a public sale, under the conservation policy announced on February 14, 1961, will depend upon whether the amount bid or offered by the successful purchaser is equal to or over the fair market value of the land on the date of the sale.

ON RECONSIDERATION

By decision dated October 23, 1960,[1] the Department affirmed a decision by the Director, Bureau of Land Management, dated February 12, 1960, which, in turn, affirmed a decision by the Arizona State Supervisor dated January 5, 1959, rejecting the preference rights asserted by Leslie N. Baker and others to purchase land offered at public sale on August 28, 1958, pursuant to the provisions of the public sale law (43 U.S.C., 1958 ed., sec. 1171), and declaring Mrs. Autrice C. Copeland to be the purchaser of the land. The Department held that, it having been established that no other party was entitled to a preference right, Mrs. Copeland, as the high bidder at the sale, must be declared to be the purchaser of the land.

Thereafter, the Assistant Director of the Bureau of Land Management, in a decision approved by the Secretary of the Interior on April 14, 1961,[2] vacated the sale on the ground that it did not accord with

[1] *Leslie N. Baker et al.* A–28454 (Oct. 26, 1960).
[2] *Leslie N. Baker et al.* (Arizona 019268 etc.).

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the then recently announced land conservation policy. The decision noted that over 2½ years had elapsed since the date of the sale and that the value of the land was approximately 10 times the value at which it was appraised before the sale.

Mrs. Copeland filed a motion for reconsideration of the decision of April 14, 1961, and presented oral argument in support thereof.

The conservation policy to which the decision of April 14, 1961, referred was announced on February 14, 1961.[3] The policy, as it relates to public sales, is that the Government must receive a full return for its property, that no party to a transaction with the Government should receive a windfall, and that, to the extent that the law permits and in the absence of a binding contract, no transaction will be consummated where, in the course of processing, evidence develops that the Government will not receive full value.

No cash certificate has ever been issued to Mrs. Copeland; she thus has no contractual right against the United States (43 CFR 250.5). Nevertheless, it is believed now to be unfair to interpret the policy as requiring cancellation of a sale because after the date of the sale the market value of the land has increased substantially over its value on the date of sale. In this case, an increase in value occurred during a period when Mrs. Copeland had no control over the situation and, but for the unsuccessful appeals of persons later shown to have no preference rights to purchase the land, in all likelihood a cash certificate would have been issued long prior to the announcement of the new policy. In such circumstances, it cannot be said that, where the Government would receive the fair market value of the property as of the date of sale, the Government is not receiving a full return for its property or that Mrs. Copeland would receive a windfall. To so hold would be to penalize Mrs. Copeland for delays after the date of sale not attributable to her.

By the same token, however, if it is unfair to penalize the purchaser at a public sale for appreciations in value of the offered land occuring after the date of the sale, it would be contrary to the Government's interest to permit the consummation of a sale upon the basis of values which were determined before the date of the sale and which do not reflect the true value of the land on the date of the sale. Accordingly, it is concluded that consummation of a public sale should depend upon whether the amount bid or offered by the successful purchaser is equal to or over the fair market value of the land on the date of the

[3] This policy superseded and broadened the so-called anti-speculation policy announced by former Secretary Seaton in February 1960.

sale. The conservation policy of February 14, 1961, will be so construed and applied.

Of course, this does not mean that every appraisal made a day, a week, or a month before the date of sale will have to be reviewed as of the date of sale. Necessarily, as a practical matter, an appraisal must precede the date of sale. Whether an appraisal needs review will depend upon such factors as the time elapsing between appraisal and the date of sale, movements in the real estate market in the vicinity, changes in land use, etc.

In this case it appears that the land in question was appraised in April 1958 at $35 per acre, a total value of $39,516.40 for the 1,129.04 acres offered for sale. The sale was held on August 28, 1958, at which time Mrs. Copeland submitted a high bid of $39,517, sixty cents over the appraised value. The report upon which the appraisal was made is not a part of the record now before the Department. In the circumstances and in view of the fact that the land is located within 20 miles of Tucson, Arizona, in an area where considerable land speculation has taken place, the case should be reviewed by the Bureau of Land Management to determine whether Mrs. Copeland's bid reflected the fair market value of the land on the date of the sale. If so, the sale should be reinstated and processed further. If not, the vacation of the sale will stand.

JOHN A. CARVER, Jr.,
Assistant Secretary.

BELCO PETROLEUM CORPORATION
CHARLES GETZLER

A–29131 *Decided March 2, 1962*

Oil and Gas Leases: Assignments—Applications and Entries: Filing

A partial assignment of an oil and gas lease is a document required by law or decision to be filed within a stated period and as such comes within the provisions of the regulation relating to filings made on the next business day when the last day of the stated period falls on a day when the office is officially closed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Belco Petroleum Corporation and Charles Getzler have appealed to the Secretary of the Interior from a decision dated August 11, 1961, of the Acting Chief, Division of Appeals, Bureau of Land Manage-

ment, which affirmed decisions of the Salt Lake City land office denying approval to assignments of lands embraced in noncompetitive oil and gas leases Utah 0631 and 0645.

Each of the leases was issued for a 5-year term, effective June 1, 1951, and was thereafter duly extended for another 5-year period ending May 31, 1961.

As a result of assignments of the record title filed on September 20, 1960, approved effective October 1, 1960, Gulf Oil Corporation and Belco Petroleum Corporation each held an undivided 50 percent interest in each lease. On April 19, 1961, in the eleventh month of the tenth lease year, two sets of assignments were executed. The first assigned all the Gulf's and Belco's interest in 40 acres of each lease to Charles Getzler, while the second assigned Gulf's interest in the remaining acreage in each lease to Belco. The latter assignments were filed with the land office on April 28, 1961, and the former on May 1, 1961, which was a Monday.

The partial assignments, if proper, would have segregated each lease into two separate leases and would have resulted in the extension of the term of each lease for two years from the time the assignment became effective. Section 30(a) of the Mineral Leasing Act, as amended by the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 187a).[1]

In decisions dated June 7, 1961, the land office rejected the assignments to Getzler on the grounds that they had been filed when less than a month of the lease term remained, that a partial assignment filed less than a month before the expiration of the lease term cannot become effective to segregate the leases and to entitle them to an extension, and that, as a result, the leases expired on May 31, 1961. *Franco-Western Oil Company et al.*, 65 I.D. 316, 427 (1958).

The land office, then, in two other decisions of the same date, denied approval to the assignments of an undivided 50 percent interest from Gulf to Belco, holding that an assignment of an undivided interest does not serve to extend a lease and that, as a result, the leases expired on May 31, 1961. See *Kirby Petroleum Company et al.*, 67 I.D. 404 (1960).

On appeal to the Director, the appellants contended that the last day of the eleventh month of the tenth lease year was April 30, 1961, a Sunday, that under the Departmental regulation, 43 CFR, 1960 Supp., 101.20(c), the request for approval of the assignments to Getzler filed on the following Monday, May 1, 1961, must be con-

[1] This provision was further amended by section 6 of the act of September 2, 1960 (30 U.S.C., 1958 ed., Supp. II, sec. 187a), to limit extensions based on partial assignments only to leases which are in their extended term by reason of production, actual or suspended, or the payment of compensatory royalty.

sidered to be timely filed, that the leases were therefore extended, and that, consequently, the assignment from Gulf to Belco, affecting leases whose terms had been thus extended, ought also to have been approved.

The decision of August 11, 1961, held that a partial assignment of an oil and gas lease is not a document required by law, regulation or decision to be filed within a stated period within the meaning of the regulation cited, that the requests for approval of the assignments were not filed when there was at least one month left in the lease term, and that, consequently, the land office properly denied approval to the assignments to Getzler.

In their appeal to the Secretary the appellants reassert the contentions they urged upon the Director.

The pertinent regulation, *supra*, reads as follows:

> Any document required by law, regulation or decision to be filed within a stated period, the last day of which falls on a day the land office or the Washington Office is officially closed, shall be deemed to be timely filed if it is received in the appropriate office on the next day the office is open to the public.

The section of the Mineral Leasing Act, as amended, *supra*, relating to partial assignments requires that "three original executed counterparts" of the assignment must be filed with the proper land office before an assignment can become effective and that, even then, it will become effective only on the first day of the lease month following a proper filing. The regulation dealing with assignments, 43 CFR, 1960 Supp., 192.140, adds nothing pertinent to the requirements of the statute. In the *Franco-Western* case, *supra*, a Departmental decision interpreting the statute, it was held that in order for a lease to become segregated through partial assignment and thus become entitled to the extension authorized for segregated leases, the partial assignment affecting it must be filed while there is still one month remaining to the lease term and that if the requirements for filing a partial assignment of a noncompetitive lease are not met before the end of the next to the last month of the lease term, the assignment cannot be approved.

In other words, a request for approval of a partial assignment must be filed no later than the last day of the eleventh month of the last year of a lease term. This interpretation of the statute by a Departmental decision seems to me to bring a partial assignment directly within the terms of the regulation as a "document required by law * * * or decision to be filed within a stated period."

A review of the circumstances leading to the issuance of the regulation reinforces this conclusion, for it was adopted to conform the Departmental practice to the court's holding in *Farrelly et al.* v. *McKay*, C.A. No. 3037–55 (D.D.C.), decided October 11, 1955, overturning the Department's decision in *John J. Farrelly et al.*, 62 I.D. 1 (1955), that an application for the extension of a noncompetitive lease required by statute to be filed prior to the expiration of the lease term is timely filed on the first business day following a Sunday or legal holiday on which the primary term of the lease expires. In a later case, *Chester Gordon et al.*, 67 I.D. 1 (1960), the regulation was held to make timely a request for an extension filed on the day after a lease had expired when the last day of the lease was a half-holiday as a result of an Executive order.[2] These decisions demonstrate that the Sunday rule is to be applied liberally and leniently in the absence of some clear indication to the contrary.

Thus it follows that the assignments to Getzler are to be considered as timely filed, as segregating the leases of which the lands they describe were a part, and as extending both assigned and retained portions of the leases for two years from May 1, 1961, the effective date of the assignments. This being so, the assignments from Gulf to Belco pertain to leases that survived their normal expiration date and, all else being regular, ought to have been approved.[3]

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of August 11, 1961, is reversed, and the cases are remanded for further proceedings consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

[2] See also *Bette M. Snyder et al.*, A–28284 (June 8, 1960); *Malcolm Petrie*, 66 I.D. 288 (1959).

[3] In any event, these assignments were timely filed and ought to have been approved effective May 1, 1961, for the fact that, absent some reasons for extending them, they would have expired a month later on May 31, 1961, is no reason for refusing approval to an otherwise valid assignment.

APPEAL OF TRIANGLE CONSTRUCTION COMPANY

IBCA–232 *Decided March 14, 1962*

Contracts: Delays of Contractor—Contracts: Notices

Where the issuance by the Government of a notice to proceed with the contract work would require the contractor to begin performance during unusually severe and unforeseeable weather, the delay by the contractor in not commencing work during the period of such weather is excusable.

Contracts: Delays of Contractor

In determining the question of alleged unforeseeable and unusually severe weather, official weather reports covering a period of ten years next preceding the year of the weather complained of are sufficient to establish an average pattern of weather for comparison purposes.

BOARD OF CONTRACT APPEALS

On February 23, 1960, the contractor appealed from the contracting officer's Findings of Fact and Decision dated August 3, 1959, which was mailed January 28, 1960. It was received by the contractor on January 29, 1960. Hence, the appeal is timely. Appellant seeks an extension of time for performance of his contract because of alleged "unusually severe weather." A hearing in this matter was conducted at Ephrata, Washington, on March 20 and 21, 1961.

The contract described above was awarded February 5, 1959, on Standard Form 23 (Revised March 1953) and contained Standard Form 23A (March 1953). It provided for the construction of concrete lining in existing laterals W44C and W44C7 in the Columbia Basin irrigation project a few miles from Ephrata, Washington, for a total lump-sum price of $54,392.50, the work to be completed in 50 calendar days from the receipt of Notice to Proceed.

Receipt of that notice was acknowledged February 6, 1959, so that the required completion date was March 28, 1959. The contractor did not actually begin work until March 15, 1959, and the job was completed May 6, 1959. This represented a delay of 39 calendar days, for which the contractor was assessed a total of $1,560 at the rate of $40 per day prescribed in the contract.

The General Manager of appellant, Mr. J. Kenneth Riggle, testified that he visited the job site on the Saturday and Sunday prior to the opening of bids on January 22, 1959. At the time of his visit, on January 17–18, 1959, the ground was frozen and there was some snow "but not much drifted." [1]

[1] Transcript, page 85 (hereinafter referred to as "Tr. —").

Mr. Riggle stated that on February 9, 1959, he attempted to drive to the job site but was prevented from reaching it by snow drifts on the roads and on the canal banks.[2] Mr. Riggle testified that on February 10th, 11th, and 12th, he talked over the telephone with Mr. Byron Boston, Assistant Field Engineer of the Bureau of Reclamation at Quincy, who suggested on each occasion that further efforts to get to the job be postponed for a few days because of the weather, there being about six inches of snow on the level and four-foot drifts blocking the roads.[3]

On February 16, 1959 (the date suggested by Mr. Boston), appelant's concrete foreman tried to go to the job site with a pickup truck and "couldn't make it" because of a snow drift, according to Mr. Riggle.[4]

Mr. Boston, Mr. Riggle and several other men were unable to get to the job the following day, February 17, 1959, but on February 25th, Mr. Boston, Mr. Riggle and a Mr. Bietzeke, in a 4-wheel-drive Jeep, were able to arrive at one end of the 3-foot lateral W44C–7, but proceeded only to a point about 4,000 feet from the end of the 8-foot lateral W44C because it would have been necessary to wade through deep snow to reach that lateral.

Also on that date, these persons tried again to drive to the proposed gravel pit, but couldn't get off the country road where they were to turn into the approach to the gravel pit.[5]

On all of these occasions the ground was frozen to a depth of about twelve inches. This was a critical factor in appellant's operations. In order to perform the contract, it was necessary to excavate about 6–8 inches of earth from the existing ditches before placing the gravel base for the concrete lining. The 12-inch layer of frozen earth could not feasibly be removed except to its full depth. This would have required excessive back fill and was not economical, according to Mr. Riggle. Also, it was not feasible to pour concrete unless the air temperature was at least 35 degrees. The average daily temperature at Quincy did not exceed 30 degrees at any time from February 1 to February 22, 1959, according to the official weather bureau records. The average was 31 degrees on February 23; 35 degrees on February 25; and it went up to 46 degrees on February 28. The temperature dropped back to 34 degrees average on March 1, but climbed again to 51 degrees on March 6, 1959.

It is conceded by appellant that work could have been commenced on March 7, 1959.[6] However, due to the refusal to proceed, on the

[2] Tr. 14.
[3] Tr. 15, 16, 17.
[4] Tr. 17.
[5] Tr. 18, 19.
[6] Tr. 24.

part of a subcontractor whom the contractor-appellant expected to to perform the initial stages, the work did not actually begin until March 15, 1959. The Government's witness Byron Boston testified that, in his opinion, work could have been started about March 1, 1959.[7]

It appears from the official weather reports[8] that a somewhat unusual situation existed in January and February 1959. There were only about three inches of snow on the ground in the latter part of January and this condition permitted the soil to freeze to a greater depth than would have been the case with the protection of a thick, insulating snow cover. Then, beginning the 9th of February 1959, several successive storms deposited a total of ten inches of snow and most of it remained on the ground until the end of February, with a maximum depth of thirteen inches, including previous accretions. The result was that this heavy snow cover prevented the frozen ground from thawing until practically all of the snow had melted. A similar pattern of snowfall and soil freezing does not appear to have occurred in the previous ten years,[9] as to January and February, except for the year 1949. Otherwise, in every year, more snow fell in January than in February, as we see from the tabulation below. Also, more snow fell in February 1959 than in any February for the previous ten years.

Inches of Snowfall at Ephrata

Year	*January*	*February*	*March*
1949	3.5	9.5	0.1
1950	10.3	4.5	4.0
1951	7.0	6.1	5.8
1952	13.5	2.0	T*
1953	5.0	0.2	T
1954	14.2	3.0	0.0
Year	*January*	*February*	*March*
1955	7.7	1.0	T
1956	10.7	3.5	T
1957	6.5	2.8	2.0
1958	1.0	0.0	2.0
1959 (Contract Yr.)	6.0	10.0	0.0

*Trace.

[7] Tr. 156.
[8] Government's Exhibit D.
[9] *Cf. Refer Construction Company,* IBCA–267 (February 28, 1962).

Moreover, the average temperatures for January and February over the previous ten years show a peculiar dissimilarity when compared with the months of January and February 1959. For the last 15 days of each January in the years 1949–1958, the average temperature fluctuated between about 17 degrees and 23 degrees, and in February over the same ten years, the average temperature rose in a steady trend from a low of 18 degrees on February 1 to about 40 degrees at the end of February.

In contrast with the previous ten-year averages, the temperatures at Quincy (a weather station nearer to the work site than is Ephrata), for the last 16 days of January 1959 fluctuated between 22 degrees and 41 degrees, being 10 to 15 degrees warmer than the ten-year average on all but 3 days. This was apparently not mild enough to thaw the frozen ground. This contrast was reversed beginning February 6, 1959. Thereafter, until about the first of March, the 1959 average daily temperatures were from 2 to 7 degrees colder than the ten-year average for that period, except for one day when they were both 30 degrees.[10]

Under the circumstances the Board finds that the weather for February 1959 in the vicinity of the work site was unusually severe, and that such weather was not foreseeable. It was maintained by Mr. Boston, the Government engineer, that the work could have commenced about March 1, 1959. Appellent contends that due to the severe weather it could not have commenced work until March 7, 1959. Even if this is true, it should be anticipated from the natural vagaries of the weather in that locality and season that a few days of work would be lost in any event.[11] At least it is probable that appellant's equipment could have been moved to the site about March 1 while the ground was still frozen sufficiently to support it during its transport. Hauling was restricted on March 7, 1959, because "the roads were very soft." [12]

Accordingly, pursuant to Clause 5(c) of the contract, entitled Termination for Default—Damages for Delay—Time Extensions, the time specified in the contract for the performance thereof is hereby extended by 21 calendar days from March 28, 1959, to April 18, 1959. Hence, the appellant is chargeable with a delay of 18 calendar days from April 18, 1959, to May 6, 1959, the date of actual completion.

[10] Government's Exhibit B.

[11] *Cf. Caribbean Engineering Company* v. *United States*, 97 Ct. Cl. 195, 229 (1942). "To be entitled to an extension on account of bad weather, the bad weather must have been in fact unforeseeable. Any prudent man would have anticipated that he would have been delayed at least two days by bad weather, if not more." See also 14 Comp. Gen. 431, 433 (1934).

[12] Riggle, Tr. 24.

CONCLUSION

The appeal is sustained to the extent indicated in the foregoing opinion. It is denied as to the remainder of appellant's claim of excusable delay.

THOMAS M. DURSTON, *Member.*

We concur:

JOHN J. HYNES, *Member.*
PAUL H. GANTT, *Chairman.*

APPEAL OF MERITT-CHAPMAN & SCOTT CORPORATION

IBCA-240 *Decided March 15, 1962*

Rules of Practice: Appeals: Generally

Where a party to an appeal has previously requested reconsideration of a decision and the Board has issued a decision upon such reconsideration, the Board is without authority to entertain a request by that party for a further reconsideration.

Rules of Practice: Appeals: Generally

Where a request for reconsideration of a decision of the Board is not persuasive of error by the Board, the decision will be affirmed.

BOARD OF CONTRACT APPEALS

The Government has, for the second time, requested reconsideration of the decision of the Board in this appeal. Following the first request of the Government for reconsideration, concerning the original decision,[1] the Board modified its holding as to the amount of increased wages of the electrician employees which should be treated as qualified for escalation under the contract terms, by reducing that amount from $1.10 per hour to $.80 per hour.[2]

The Government now requests reconsideration of the modified decision of November 9, 1961, on the ground that the modification in and of itself constitutes an "initial" decision which was not urged by either party, and as to which the Government is entitled to reconsideration for the first time.

Appellant has also requested reconsideration of the modified decision on the ground that the original decision should not have been modified in any respect. Since this is the first request for reconsider-

[1] IBCA-240 (January 4, 1961), 68 I.D. 1, 61-2 BCA par. 3193, 3 Gov. Contr. par 83.
[2] IBCA-240 (November 9, 1961), 68 I.D. 363, 61-2 BCA par. 3194, 4 Gov. Contr. par. 19.

ation by appellant, it is perhaps in a better position to argue for a further reconsideration. However, we do not consider it necessary to dwell on this point. Reconsideration is denied as to appellant for the reason that the fullest consideration has already been accorded to appellant's claims. Nothing is now presented which was not before the Board at the times of the original decision and the first reconsideration.[3]

Reconsideration on behalf of the Government is likewise denied for the reason that the Board is without authority under section 4.15 of the Board's rules [4] to entertain a second request for reconsideration. The *Carson* case, footnote 1, *supra*, is also dispositive of this question.

However, even if it were not for this procedural bar to the Government's request, the Board would be constrained to refuse to modify further its existing decision on the merits of the arguments advanced.

The Government has not cited any precedent or authority for its novel theory, that a modified decision amounts to an initial decision, and the Board has been unable to find any basis for such a proposition. Additional proceedings for reconsideration could be repeated *ad infinitum* on every successive occasion of modification of a decision, if this concept should be adopted.

One argument is that on the first reconsideration the Board erred in partially reducing the amount of the electrician's wage increase eligible for escalation, for the reason that neither the Government nor the appellant had asked for a "middle ground" type of decision. Therefore, the Government now insists on an "all or none" verdict. This was not, apparently, the Government's position when Department Counsel, in his brief on the first reconsideration, cited with seeming approval the decision of the Comptroller General which obligated the contracting officer (and, of course, the Board) to "*determine what part, if any*, of the * * * $1.10 per hour paid the electricians above locally prevailing base wage rates constitute elements excluded from escalation * * *." (Italics supplied.) Obviously, the Board did not err. The Board's authority, to arrive at decisions which may involve holdings as to values somewhere between the disparate claims of the adversaries before it, is, of course, inherent.

The allegation in Department Counsel's second Motion for Reconsideration to the effect that the Board's holding in the first reconsideration is not supported by substantial evidence is too vague for

[3] *Carson Construction Company*, IBCA-21, 25, 28, 34 (May 20, 1959), 66 I.D. 177.
[4] 43 CFR 4.15.

lengthy consideration here. It is enough to say that the Board reconsidered all of the evidence, including the increased base rates paid to electricians by other contractors on nonremote projects as well as to the increased rates negotiated with other groups.[5]

The statements in the same brief, citing a holding of the Board, in the decision of November 9, to the effect that at the time of bidding, the appellant could have had only scant hope that subsistence costs for the electrical workers could be eliminated by the furnishing of house trailer sites and other facilities, is not conclusive as to disposition of this case. This situation was only one of several which was recognized and considered by the Board.[6] It does not follow, from the presence of that mere "scant hope" at the time of bidding, of eliminating subsistence costs, that appellant abandoned that hope entirely in computing its bid, or that the electricians would or could never insist on and obtain a raise in wages in excess of the amount of subsistence, nor does it mean that the issue of subsistence could never be compromised by the electricians with the Arizona contractors. The increased pay rates for electricians were negotiated, not by appellant, but by other employers with no participation whatever on appellant's part. Appellant was nevertheless bound to pay the increased rates. To attach to the Board's observation an import which would indicate that the Board ignored its own observation would not be in accordance with the facts.

The Board did not adopt the standard of the operating engineers' wage increase as a yardstick for determining the amount of the electricians' wage increase eligible for escalation. The Universal Equipment Operator's rate increase of $.73 per hour was compared with the electrician's increase in dispute of $1.10 per hour, and with the increase of $.50 per hour obtained by the Five Basic Crafts. The Board does not adopt the reasoning of the Government to the effect that no comparisons are permitted except with rates of other specialty crafts such as painter, plumber and pipefitter, whose wage increase rates are now belatedly offered in evidence as exhibits to the Government's brief.

At the time of bidding, there was apparently no question raised as to what, if any, contingency appellant might have included in its bid to cover possible increases in wages or subsistence. We do not consider it proper to raise the question now. To say that if any portion

[5] *Cf. Lansdale Tube Company,* ASBCA No. 5837 (December 12, 1961), 61-2 BCA par. 3260. "The Board's decision was based on the totality of the evidence."

[6] Fn. 2, *supra.*

of the $1.10 pay increase is allowed as being eligible for wage escalation, it amounts to a "duplicate payment," (because allegedly appellant must have included subsistence costs in its bid) is not only so speculative as to be repugnant, but avoids the real issue. That issue is, what part, if any, of the increase in pay is actually subsistence and how much, if any, is wages. The purpose and the intent of the parties in the escalation provisions is to partially reimburse the contractor for increases in wages. It is not a "duplicate payment."

Conclusion

The requests for reconsideration on the part of the Government and the appellant are accordingly denied. The decision of the Board dated November 9, 1961, is affirmed.

Herbert J. Slaughter, *Member.*

I concur:

Thomas M. Durston, *Member.*

Paul H. Gantt, *Chairman*, disqualified himself from participation (43 CFR 4.2).

HAROLD LADD PIERCE ET AL.

A-28819 *et al* *Decided March 26, 1962*

Oil and Gas Leases: Applications—Oil and Gas Leases: Noncompetitive Leases

Oil and gas lease offers which were filed before the amendment of the Mineral Leasing Act by the act of September 2, 1960, and which are still pending are subject to the act of September 2, 1960, and offerors thereunder are properly required to consent to leases subject to the terms of the act of September 2, 1960.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Harold Ladd Pierce [1] has appealed to the Secretary of the Interior from a decision of March 2, 1961, by the Director of the Bureau of Land Management affirming the requirement of the Los Angeles land

[1] The following appeals are also included in this decision: A-28904, A-28907, A-28917, A-28930, A-28963, A-28972, A-28973, A-29054, A-29080, A-29214.

The names of the appellants in these cases, the serial numbers of their offers, the dates their offers were filed, and the dates of the decisions by the Director from which the appeals were taken are listed in the appendix of this decision.

office that he consent to the amendment of the lease terms in his pending oil and gas lease offer, filed on June 9, 1959, to accord with the amendment of the Mineral Leasing Act by the act of September 2, 1960, and that he consent to be bound by all of the provisions of the act of September 2, 1960 (74 Stat. 781; 30 U.S.C., 1958 ed., Supp. II, sec. 226 *et seq.*). The instant appeal and those listed in note 1 are being considered together because the issues to be decided in these cases are the same.

The act of September 2, 1960, amended the Mineral Leasing Act to require a number of changes in the terms of noncompetitive oil and gas leases, including the revision of the length of the lease term from 5 to 10 years and an increase in the rental rates to 50 cents an acre or fraction thereof for each lease year. These and several other provisions of the act of September 2, 1960, which affect oil and gas leases are set forth in the Bureau of Land Management's Form 4–1558 (December 1960), entitled "Consent to Changes In Lease Terms Required." Applicants whose offers were pending on September 2, 1960, including each of the appellants in this case, were asked to consent to the amendment of the lease terms in their pending offers by signing Form 4–1558 (hereafter referred to as the consent form) which also contains a statement of the applicant's consent to be bound by all of the provisions of the act of September 2, 1960.

The appellants object to the requirement that they consent to leases subject to the terms of the act of September 2, 1960, because their offers to lease were filed before that date. They object chiefly to the increase in rental required under the 1960 act over that previously in effect.

The Director's decision held that the Secretary has no authority to issue leases after September 2, 1960, in disregard of the amendments made on that date, citing *United Manufacturing Company et al.*, 65 I. D. 106 (1958), which held, *inter alia*, that where an offer for an oil and gas lease was filed before July 29, 1954, and the lease was issued after that date with a notation that it was subject to the act of that date, the lease was subject to the provision of the act of July 29, 1954, terminating leases automatically for failure to pay rental on time.

The appellants urge several reasons to sustain their claim to leases containing the provisions in effect on the day they filed their respective offers.

A number of appellants refer to section 8 of the act of September 2, 1960, which provides that no amendments made by the act shall affect any valid right in existence on the effective date of the Mineral Leasing Act Revision of 1960. The legislative history of this section makes it plain that the Congress did not intend it to include offers pending on the date of enactment. H.R. 10455, 86th Congress, which became the act of September 2, 1960, as passed by the House did not contain a savings clause. During the Senate Committee on Interior and Insular Affairs' consideration of the House bill, it released a Committee Print dated April 1, 1960, which contained a section 9 reading:

> No amendment made by this Act shall affect any right acquired under the law as it existed prior to such amendment, and such right shall be governed by the law in effect at the time of its acquisition. Oil and gas lease offers pending in the Bureau of Land Management on the date of this Act for which leases are subsequently issued shall be subject to the rental provisions in force and effect when the lease offers were filed.

In reply to a request by the Committee Chairman for its views, the Department commented:

> Section 9 of the committee print requires amendment. The first sentence would provide that no amendment made by the bill would affect any right acquired under the law as existing prior to the amendment and the right would be governed by the law in effect at the time of its acquisition. We are in accord with this sentence. However, the second sentence provides that oil and gas lease offers pending in the Bureau of Land Management on the date of approval of H.R. 10455 for which leases are subsequently issued would be subject to the rental provisions in effect at the time of the filing of the offers. This is highly undesirable. Our repeated statements on the need for new rental provisions have shown the need for revision of those provisions. We do not see any justification for such a windfall as this second sentence would permit. The statements which we have made on the profits expected under increased rentals have been prepared on the assumption that all leases issued after the date of this bill's enactment would be subject to the revised rental provisions. Consequently, we recommend most strongly that the second sentence of section 9 be deleted. (Letter dated May 11, 1960, from Under Secretary of the Interior to Chairman, Senate Committee on Interior and Insular Affairs. Senate Report No. 1549, 86th Congress, p. 24.)

The bill as thereafter reported out by the Senate Committee and passed by the Senate read:

> SEC. 8. No amendment made by this Act shall affect any valid right granted under the law as it existed prior to such amendment. (Cong. Record, 86th Congress, page 12761.)

The Committee gave the following explanation for this clause:

> 10. A savings clause, section 8, was written in to insure that the act would be prospective only in effect and that all rights and equities of *leaseholders* under existing *leases* are protected. (Senate Report No. 1549, 86th Congress, p. 5; italics supplied.)

Section 8 was then amended in conference to its final form. The conference report stated:

> 14. Section 8 was added by the Senate to avoid any question with respect to the effect of the amendments to the Mineral Leasing Act made by H.R. 10455 upon *existing leases*. (House Report No. 2135, 86th Congress, p. 14; Italics supplied.)

The only conclusion to be drawn from this review of the legislative history of section 8 is that it was, as the reports repeatedly state, only for the protection of existing leaseholders and that leases issued as a result of offers pending on the date of enactment were to be subjected to the terms and conditions imposed by the new law.

Moreover, although filing an offer is a necessary condition or prerequisite to the issuance of a lease, it does not give the applicant a valid existing right to a lease.[2] Until the United States accepts an offer by issuing a lease, the filing of an offer, in itself, is obviously not a binding agreement to lease. As the offers involved in these appeals were filed before September 2, 1960, and this Department cannot now issue oil and gas leases pursuant to them except in accordance with the act of September 2, 1960, the offers may be accepted only if the applicants consent to their modification in accordance with the act of September 2, 1960. *Cf. United Manufacturing Company et al., supra.*

The appellants further assert that they are being denied a valid right by the requirement that they file the consent form on the assumption that they became entitled to the issuance of leases at no greater rental rates than those which were in effect when their offers were filed. Since an act of Congress could entirely eliminate oil and gas leasing and thus completely nullify any pending offers, the appellants' objections about the statutory increase in the amount of rental due under leases issued pursuant to offers pending on September 2, 1960, are not persuasive. Inasmuch as filing an offer to lease does not result in a binding agreement to lease or create a valid right to a lease, and since the appellants are not required to lease pursuant to their pending offers, but need only refuse to file the consent form if they do not wish to pay the increased rentals required under the act of September 2,

[2] *Haley v. Seaton*, 281 F. 2d 620 (D.C. Cir. 1960); *Richard K. Todd et al.*, 68 I.D. 291 (1961).

1960, the assertions on appeal regarding retrospective operation of the act are not relevant.[3]

The assertions on appeal to the effect that the United States promises to issue a lease in accordance with the terms set forth on the offer form required by regulation for filing an offer are also erroneous (43 CFR 192.42(a)(b)). The fact that the required form included a schedule of rental rates in effect before September 2, 1960, could not operate to prevent or delay the effectiveness of a statutory provision.[4] In this connection it is noted that the consent form which must be filed before leases may be issued pursuant to the appellants' offers are necessary precisely because the offers do not now conform with the act of September 2, 1960. Nor does the possibility mentioned by one of the appellants herein, that the offers might have been assigned, affect the outcome in this case. An assignee, no matter what he may pay for the assignment of an offer, can obtain no more by the assignment than the offerer had to assign.

The appellants also object to the requirement that the consent form be filed on the ground that all applicants who filed offers before September 2, 1960, were not treated alike since some leases were issued before the increase in rental on September 2, 1960, pursuant to offers filed at the same time or even later than the offers here involved, while the appellants are penalized by administrative inaction and delay. It is not possible to prevent the issuance of some leases ahead of others, and, in some land offices, a longer time is required to process all applications than in others. There are many and various circumstances which may affect the time elapsing between the filing and the disposition of a lease offer, and there is no way to assure all offerers that final action can be taken on their offers within a specific length of time. As has been noted, Congress could have included, but did not, a provision that all offers filed before the enactment of the 1960 amendments of the Mineral Leasing Act were to be processed under the provisions of law in effect when the offers were filed. In the absence of such a provision, there is no authority to issue leases pursuant to offers now pending except in accordance with the act of September 2, 1960.

[3] The case of *West* v. *United States*, 30 F. 2d 739 (D.C. Cir. 1929), cited by a number of the appellants, held that an applicant who was qualified under the pertinent regulation to hold a lease at the time of a drawing to determine priority could not be disqualified as a lease applicant by the Secretary as an exercise of his discretionary authority or by a later change in the regulations. There is nothing in the *West* case which suggests that rentals charged under oil and gas leases may not be increased by an act of Congress as to leases issued after the act was passed pursuant to offers which were pending before the act was passed.

[4] A regulation which operates to create a rule out of harmony with a statute is a mere nullity. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936).

Accordingly, the requirement that the appellants herein file a consent form making their leases subject to the act of September 2, 1960, is correct.

However, the appeal of D. L. Cook, one of the appellants under A–29080 (see appendix), must be dismissed because it is defective. Cook's notice of appeal was filed on June 30, 1961. His statement of reasons for the appeal was filed on August 4, four days after the end of the 30-day period in which it was required to be filed. 43 CFR, 1960 Supp., 221.33. The statement was not mailed until August 2, after the expiration of the period within which it was required to be filed. Consequently, the fact that it was received within the 10-day grace period permitted by the rules of practice is of no avail, and the appeal must be dismissed.[5] 43 CFR, 1960 Supp., 221.92(b); *George M. Annis*, A–28795 (November 6, 1961).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the Director's decisions are affirmed and the appeal of Donald M. Cook is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

[5] On December 6, 1961, Cook filed a withdrawal of his appeal as to two of the five offers involved in his appeal. In a separate decision of January 4, 1962, entitled *D. L. Cook*, A–29080a, the appeal was dismissed as to the two withdrawn offers.

APPENDIX

Appeal Number	Name of Appellant	Serial Number of Offer	Filing Date of Offer	Date of Director's Decision
A–28819	Harold Ladd Pierce	Los Angeles 0164354	June 9, 1959	Mar. 2, 1961
A–28904	M. E. and Nancy R. Beall	Anchorage 040985	Jan. 6, 1958	Mar. 20, 1961
	W. L. Nance	Anchorage 041508	Jan. 28, 1958	Do.
	Mrs. Samuel Loschbin	Anchorage 041510	July 23, 1958	Do.
	Mrs. Thelma Ross	Anchorage 050188	Sept. 16, 1959	Do.
A–28907	W. Thomas Bolton	New Mexico 0100822	May 4, 1960	Do.
A–28917	Jack Marantz	Los Angeles 0164190	June 10, 1959	Mar. 16, 1961
	E. Baden Powell			
	do	Los Angeles 0164353	June 9, 1959	Do.
	do	Los Angeles 0164507	June 19, 1959	Do.
	Marvel Petroleum Corporation	Los Angeles 0166328	Dec. 15, 1959	Do.
	do	Los Angeles 0166377	Dec. 24, 1959	Do.
	Jack Marantz	Los Angeles 0166417	Jan. 4, 1960	Do.
	Jean Marvin Powell			
	Marvel Petroleum Corporation	Los Angeles 0166459	Jan. 5, 1960	Do.
A–28930	Joseph A. Egle	Wyoming 0113729	June 27, 1960	Feb. 17, 1961
	do	Wyoming 0112647	do	Do.
A–28930	Duncan Miller	Wyoming 040610	Mar. 20, 1956	Feb. 17, 1961
	do	Wyoming 0112684	June 27, 1960	Do.
	do	Montana 039107	do	Do.
	do	Montana 039421	July 25, 1960	Do.
	do	Montana 039849	Aug. 22, 1960	Do.
	do	Montana 039865	do	Do.
	do	Montana 039885	do	Do.
	do	Montana 039963	do	Do.
	do	Utah 049595	June 27, 1960	Do.
	do	Los Angeles 0157655	Apr. 24, 1958	Do.
	do	Los Angeles 0164844	July 31, 1959	Do.
	do	Los Angeles 0164852	Aug. 3, 1959	Do.
	do	Los Angeles 0164853	do	Do.
	do	Los Angeles 0165215	Sept. 4, 1959	Do.

A–28963 [1]	Cecil H. Phillips	Los Angeles 0163980	Apr. 24, 1959	Apr. 19, 1961
	do	Los Angeles 0164418	June 12, 1959	Do.
	do	Los Angeles 0164529	June 23, 1959	Do.
	do	Los Angeles 0165239	Sept. 11, 1959	Do.
	do	Los Angeles 0167261	Apr. 26, 1960	Do.
	do	Los Angeles 0167331	Apr. 25, 1960	Do.
	do	Los Angeles 0167522	May 19, 1960	Do.
	do	Los Angeles 0167602	June 2, 1960	Do.
	do	Los Angeles 0167653	Aug. 11, 1960	Do.
	do	Los Angeles 0167761	June 27, 1960	Do.
	do	Los Angeles 0168541	Aug. 15, 1960	Do.
	do	Los Angeles 0168547	Aug. 16, 1960	Do.
A–28972	William F. Drew	Wyoming 0117524	July 25, 1960	Feb. 17, 1961
A–28973	Mrs. Grace E. Bloomer	New Mexico 0116575	July 6, 1960	Apr. 4, 1961
A–29054	Duncan Miller	Anchorage 029087	Feb. 7, 1955	June 14, 1961
A–29080	Shirley H. Weaver	New Mexico 0107902	June 22, 1960	May 17, 1961
	D. L. Cook	Wyoming 0120625	Aug. 22, 1960	Do.
	do	Wyoming 0121066	do	Do.
	do	Wyoming 0121067	do	Do.
A–29214 [2]	Robert A. Adams	Los Angeles 0167415	May 2, 1960	July 13, 1961

[1] Five of the seventeen oil and gas lease offers which were included originally in A–28963 have been disposed of separately under A–28963a since the appellant withdrew his appeal as to these offers. The offers included in A–28963a are: Los Angeles 0164453, 0166033, 0166382, 0167524, 0168449.

[2] Relinquishments of seven of the offers originally included in this appeal were filed after the appeal was taken. The offers which were relinquished are Los Angeles 0167228, 0167255, 0167390, 0167403, 0167404, 0167413, 0167416.

FOUR CORNERS OIL & MINERALS CO.
PAUL F. CATTERSON

A-28715 *Decided April 11, 1962*

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Description of Land

Where the regulation governing partial assignments of record title of a noncompetitive oil and gas lease does not require that a partial assignment of unsurveyed lands describe the lands assigned by metes and bounds, although the regulation pertaining to offers does, a partial assignment is not to be denied approval because it does not describe the lands by metes and bounds.

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Description of Land

A description by projection of the public land survey of unsurveyed land conveyed by a partial assignment of the record title of an oil and gas lease is not defective where there is an established public land corner nearby and the land assigned can be accurately located.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Four Corners Oil & Minerals Co. has appealed to the Secretary of the Interior from a decision dated September 30, 1960, of the Director of the Bureau of Land Management which affirmed the action of the manager of the Colorado land office denying approval to a partial assignment of oil and gas lease Pueblo 060108 made by it, as lessee and assignor, to Paul F. Catterson, as assignee.

The lease, which Four Corners Oil & Minerals Co. holds through mesne assignments, was issued effective June 1, 1950, for a five-year term and was extended for five years to June 1, 1960. 30 U.S.C., 1958 ed., sec. 226. It covers lands described as follows:

Unsurveyed Land: Beginning at the Southwest corner of the surveyed SW¼, Sec. 8, T. 41 N., R. 17 W., N.M.P.M., Colorado, for corner No. 1; thence West one mile to corner No. 2; thence south one mile to corner No. 3; thence East one mile to corner No. 4; thence north one mile to corner No. 1, place of beginning, which land will probably be when surveyed described as follows:

T. 41 N., R. 17 W., N.M.P.M., Colorado "Section 18: All; 640 acres Dolores County.

On April 27, 1960, there was filed an assignment to Paul F. Catterson of a part of the leased lands described as:

T. 41 N., R. 17 W. Section 18: SW¼SW¼ 40 acres.

If the partial assignment is proper it will serve to extend both the assigned and retained portions for a minimum of two years. 30 U.S.C., 1958 ed., sec. 187a. *Raymond J. Hansen et al.*, 67 I.D. 362 (1960).[1]

The manager pointed out that while the lease covered unsurveyed lands, the partial assignment described the lands it covered by legal subdivisions rather than by metes and bounds. He then held that the requirement governing offers, that unsurveyed lands be described by metes and bounds connected with a corner of the public land surveys, applies as well to partial assignments and denied approval to the assignment. While affirming the result reached by the land office, the Director did so on the ground that a description of land in a conveyance of realty based upon a nonexistent survey does not describe any land and consequently is fatally defective.

On appeal the appellant contends that the regulation relating to assignments did not require a metes and bounds description for lands transferred by a partial assignment and that the land intended to be covered by the partial assignment is plainly evident.[2]

The pertinent regulations governing assignments are devoid of any reference to the manner in which land affected by a partial assignment is to be described. 43 CFR, 1960 Supp., 192.140; 43 CFR, 1954 Rev., 192.141. On the other hand the regulation pertaining to offers specifically requires a metes and bounds description for unsurveyed lands. 43 CFR, 1960 Supp., 192.42a(a). The first question, then, is whether the provisions of the regulations relating to offers applies to partial assignments.

I cannot find that it does. The regulations dealing with partial assignments impose detailed requirements on persons seeking approval of partial assignments. They must use a specified official form or an unofficial copy of it, file the assignment within a certain time, pay a fee, file a bond if necessary, and submit other specified statements. 43 CFR, 1960 Supp., 192.140, 43 CFR, 1954 Rev., 192.141. Nothing in the detailed requirements of the regulations demands of the assignee or assignor that the *description* of the land to be assigned be described in the same manner as land described in an offer for a lease.

In an analogous case the Department held that where at the time a partial assignment of the record title of an oil and gas lease was

[1] However, to obtain an extension in this manner, a partial assignment, complete in all respects, must be filed no later than the end of the 11th month of the 10th lease year. *Southern California Petroleum Corporation et al.*, A-28236 (September 30, 1960).

[2] The appellant raises other contentions which, in view of the disposition made, need not be considered.

filed the regulations governing assignments did not require a statement by the assignee that he is the sole party in interest, although such a statement was required of an offeror, the assignment is not to be refused recognition for failure to file such a statement[3] *M. Finell et al.*, 67 I.D. 393 (1960).

Similarly, in the absence of a clear requirement that it is, the description of lands conveyed by a partial assignment of the record title of an oil and gas lease is not subject to the requirements of the regulation pertaining to offers.

The Department has often held that if a person is to be deprived of a statutory preference right because of his failure to comply with the requirement of a regulation, that requirement should be spelled out so clearly that there is no basis for disregarding his noncompliance. *M. Finell et al.*, *supra*. *Donald C. Ingersoll*, 63 I.D. 397 (1956); *Madison Oils, Inc., T. F. Hodge*, 62 I.D. 478 (1955).

There remains the question of whether the description is inherently defective because it describes the land it covers by projection rather than by metes and bounds. The purpose of a description is to locate the land applied for, both for the purposes of recordkeeping and physical location. *Henry S. Morgan et al.*, 65 I.D. 369, 378 (1958).[4] Here the SW corner of sec. 8, T. 41 N., R. 17 W. is an established public land corner which lies not more than a mile and a half from the NW corner of the tract applied for and even less from the NE corner. Lease Pueblo 060108 covered an area a mile square described by metes and bounds and as what would when surveyed be sec. 18. There should be no difficulty in locating accurately the land covered by the assignment.

Where neither a statute nor a regulation requires a different method, description by projection rather than by metes and bounds is not inherently bad if the land can be accurately located. *C. W. Parcell et al.*, 61 I.D. 444 (1954).[5] In the *Parcell* case the Department stated—

> The question for decision, therefore, becomes whether the Goodner-Burk application, admittedly filed earlier than the Parcell application, loses priority merely because it described the area in conflict by projection, rather than by metes and bounds. In *Corbett* v. *Norcross*, 35 N.H. 99 (1857), a deed describing the granted land by reference to a plat made up solely by protraction was held effective to pass title to a 200-acre area within a 60,000-acre unsurveyed tract. In *Daniels* v. *Northern Pacific Ry. Co.*, 43 L.D. 381 (1914), the Department held that a railroad selection of unsurveyed

[3] The regulation has been amended to impose the same requirement on an assignee as on an offeror. 43 CFR, 1960 Supp., 192.140. Circular 2019, 24 F.R. 4630, June 6, 1959.

[4] Affirmed *Morgan et al.* v. *Udall et al.*, United States District Court for the District of Columbia, February 20, 1961 Civil Action 3248–58, appeal pending.

[5] Affirmed *C. W. Parcell et al.* v. *Fred A. Seaton* Civil Action No. 2261–55, June 12, 1957 United States District Court for the District of Columbia.

land, described only as what would be, when surveyed, the SE¼ of the NE¼ and the NE¼ of the SE¼, sec. 30, T. 42 N., R. 4 E., B.M., Idaho, was sufficiently certain to segregate the land as against a settlement claim initiated after the date of selection. In that case, as in the present one, there was a public survey monument within less than 2 miles of the land described by protraction. The Department said (43 L.D. at 387):

"The precise locus of the land selected by the railway company, could, therefore, not only have been found to a reasonable certainty at the date of the selection, but fixed to a mathematical certainty at the date of Daniel's alleged settlement."

In the absence of any applicable regulation or rule of law requiring a more specific description in an application for a uranium lease, I cannot hold that the Goodner-Burk application of October 8, 1952, failed to segregate the land it described, so as to lose priority to the appellants' application of November 17, 1952, merely because the description was by projection rather than by metes and bounds.

Accordingly, it is concluded the assignment was not defective because of the description of the land and that, all else being regular, it should have been approved effective as of the first day of the month following the date on which it was filed.

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

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF DUNCAN MILLER

IBCA-305 *Decided April 18, 1962*

Contracts: Appeals—Rules of Practice: Appeals: Generally

The Board of Contract Appeals lacks jurisdiction to reform or rescind contracts.

Contracts: Generally

The disclaimer clause in sales by the United States on an "as is" and "where is" basis requires the application of the strict rule of *caveat emptor*. The "as is" condition applies equally to the condition of the commodity involved at the inspection and to the sale of it.

BOARD OF CONTRACT APPEALS

On June 6, 1961, the Regional Procurement Officer of the Bureau of Reclamation, Boulder City, Nevada, issued an invitation to bid on

the sale of two used motor vehicles. Appellant was the only bidder on Item 2, a Ford ½-Ton Truck, Model F–100. Award was made to him at his bid price of $169 on June 21, 1961. The bid deposit of $50 was applied toward the purchase price, and Mr. Miller was asked to pay the balance of $119.

On July 11, 1961, appellant wrote to the contracting officer:

> When I went to inspect the truck prior to the sale, the battery was low, but I was told it was in excellent condition. The emphasis was placed on the mileage which was fairly low even for a truck, however last week I started the motor and found that when turning the steering either to the left or right a loud pounding shaking noise ensued.
>
> I feel the excellent shop and mechanics you have who are particularly acquainted with this type of unorthodox vehicle could repair this gross defect of the vehicle. * * *
>
> P.S. Would you please advise the next highest bid that was made on this truck.

On July 13, 1961, the contracting officer requested again the payment of the amount of $119 within 15 days in order to conclude the transaction and called attention to Clause 2 [1] of the General Sale Terms and Conditions which notified all bidders that the property was offered for sale "as is" and "where is."

Appellant wrote on July 19, 1961:

> Replying to your letter of July 13, 1961, will you please answer the question in my previous letter as to the next highest bidder? Also, will you please face the facts of the matter which because of the circumstances would amount to the same in effect as a "rooking" by an unscrupulous used car dealer. * * *

The contracting officer replied on July 24, 1961, that appellant's bid was the only one received and again asked for payment. Appellant then wrote on July 25, 1961:

> The point you are overlooking is that you did have written advertising as to inspection and I made the trip for that inspection, but the battery was low, which I was told would be charged at a later date. Thus I was precluded from the motor inspection that was to be available and should have been available at the time of my inspection which was during the advertised inspection period.

[1] "CONDITION AND LOCATION OF PROPERTY. Unless otherwise specifically provided in the Invitation, all property listed therein is offered for sale 'as is' and 'where is.' If it is provided therein that the Government shall load, then 'where is' means f.o.b. conveyance at the point specified in the Invitation. The description is based on the best available information. However, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose. Except as provided in Conditions No. 8 and 10, no request for adjustment in price or for rescission of the sale will be considered. This is not a sale by sample."

> Therefore, I request for a proper adjustment on the matter. The Boom-Boom, which I previously described, in my letter, is rather terrifying from the noise itself, let alone the idea of having a breakdown in an isolated place.

Appellant wrote again on July 31, 1961:

> I am still interested in acquiring the truck on a fair basis. * * *
> P.S.: I feel I wish to appeal this matter for an adjustment.

On August 17, 1961, the contracting officer issued a formal notice of default, referred to Clause 12 [2] of the General Sale Terms and Conditions and notified appellant that, pursuant to Clause 7 [3] the Government would retain from the bid deposit of $50 "a sum equal to twenty percent (20%) of the purchase price of the said Item No. 2, namely, $33.80, as liquidated damages."

On August 28, 1961, appellant asked for:

> Reconsideration and adjustment of the bid. The Decision does not take into consideration the point regarding inspection as brought up in my letter of July 25, 1961; as pointed out I was precluded from the advertised inspection in full.
>
> Therefore, it is requested that the bid be revised to an amount which would have been submitted under the circumstances, which is in the amount of $65.

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[2] "ORAL STATEMENTS AND MODIFICATIONS. Any oral statement or representation by any representative of the Government, changing or supplementing this contract or any Condition thereof, is unauthorized and shall confer no right upon the Purchaser."

[3] "DEFAULT. If, after the award, the Purchaser breaches the contract by failing to make payment as required by Condition No. 4, or by failing to remove the property as required by Condition No. 6, then the Government may send the Purchaser a fifteen-day written notice of default (calculated from date of mailing), and upon Purchaser's failure to cure such default within that period (or such further period as the Contracting Officer may allow), the Purchaser shall lose all the right, title and interest which he might otherwise have acquired in and to the property as to which a default has occurred. The Purchaser agrees that in the event he fails to pay for the property or remove the same within the prescribed time, the Government at its election and upon notice of default shall be entitled to retain (or collect) as liquidated damages a sum equal to 20% of the purchase price of the item (or items) as to which the default has occurred. Whenever the Government exercises this election, it shall specifically apprise the Purchaser either in its original notice of default (or in separate subsequent written notice) that upon the expiration of the period prescribed for curing the default the formula amount will be retained (or collected) by the Government as liquidated damages. The maximum sum, moreover, which may be recovered by the Government as damages for failure of the Purchaser to remove the property and pay for the same shall be such formula amount. If the Purchaser otherwise fails in the performance of his obligations thereunder, the Government may exercise such rights and may pursue such remedies as are provided by law or under the contract."

On October 7, 1961, appellant wrote:

> You haven't replied to my last letter with the suggestion that the bid be amended; also another suggestion would be that I be given credit for the sum due on new bids.
>
> I feel your reference to the lack of appeal on my part, since the question of appeal is not mentioned in your decision, I feel the right of appeal is still outstanding.[4]

On November 29, 1961, the contracting officer then issued a decision in which he stated, in part:

> Through inadvertence, our decision of August 17, 1961, failed to formally advise you that it was a final decision of the Contracting Officer under the contract and that an appeal may be taken to the Secretary of the Interior * * * For this reason, I am supplementing the letter decision of August 17, 1961, redetermining the case and making a final decision as of the date hereof. * * *
>
> Since the vehicle was sold on an "as is" and "where is" basis without any warranty as to its condition, there was no obligation upon the Government to maintain the storage battery for the purpose of inspection or for operating the motor of the vehicle. With respect to any oral statements by employees of the Government as to the condition of the vehicle, your attention is called to Clause 12 * * *.[5]

The contracting officer held that (1) "there is no basis for an adjustment or amendment in the amount of the bid submitted by you or from releasing you from your contractual obligations" and (2) "that the retention of the amount of $33.80 was proper under the circumstances."

Appellant appealed timely on December 28, 1961, by stating laconically:

> The reason for this APPEAL is the obfuscation of the advertised inspection obligation which was not limited and by which there was A FAILURE TO FULLY HANDLE THE MATTER IN THE PUBLIC INTEREST.

This is a case of first impression in this Board. Appellant is not represented by legal counsel, hence the issues are not as clearly established as the Board would desire. But the Board is able to determine the issues. The gist of appellant's complaint seems to be that he was

[4] *M. Benjamin Electric Company, Inc.*, IBCA-280 (June 9, 1961), 61-1 BCA par. 3058. The Board held in *Production Tool Corporation*, IBCA-262 (April 17, 1961), 68 I.D. 109, 61-1 BCA par. 3007, *Barkeley Pipeline Construction, Inc.*, IBCA-264 (April 6, 1961), 68 I.D. 103, 61-1 BCA par. 3006, and *Hunt Contracting Company*, IBCA-261 (May 17, 1961), 61-1 BCA par. 3043, 3 Govt. Contr. 271, that "it will remand an appeal to the contracting officer for the issuance of findings of fact and decision when letters emanating from contracting officers do not finally dispose of pending claims and do not place the contractor on notice that a decision under the 'Disputes' clause is intended."

[5] Fn. 2, *supra*.

not given a proper opportunity to inspect. He asks for either a downward revision in the price of the Ford ½-Ton Truck or for a rescission of the bargain and a credit toward a future purchase from the United States.

Appellant has not referred to any provision of the contract permitting such an adjustment. An examination of the contract by the Board fails to disclose such a provision. Absent such a provision the Board has no authority to grant such relief.[6] The Board lacks jurisdiction either concerning a reformation or a rescission of a contract.[7] The lack of jurisdiction requires the dismissal of the claim. However, since this is a case of first impression, the Board desires briefly to pass on the issue presented by appellant concerning the alleged lack of proper opportunity to inspect.

The first page of the Invitation for Bids states:

> Inspection Invited Between 8 A.M. and 4 P.M. Mondays through Fridays, holidays excluded. Arrange with Leo Dunbar, Foreman, Garage Telephone Reclamation 28.

Clause 2 of Standard Form 114–C, which is quoted in footnote 1, states that "all property listed therein is offered for sale 'as is' and 'where is'." Since the stream cannot rise higher than its source, it seems to the Board that the "as is" condition applies equally to the inspection and to the sale of the truck. Under the circumstances of the consideration of this matter on the record alone, the Board would not interpret the contract as requiring the Government to maintain the storage battery so that the engine might be started and the vehicle operated for the purposes of inspection. Since the Government is not in the "merchandising business," the courts have

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[6] *Star Woolen Company,* ASBCA No. 5917 (December 14, 1959), 59–2 BCA par. 2475, 2 Govt. Contr. 150; *Metropolitan Metals, Inc.,* ASBCA No. 5741 (October 12, 1959), 59–2 BCA par. 2374, 1 Govt. Contr. 757; *Philips Electronics, Inc.,* ASBCA No. 4443 (June 17, 1958), 58–1 BCA par. 1819; *Robert Rosenberg,* ASBCA No. 4631 (January 15, 1958), 58–1 BCA par. 1597.

[7] *Framlau Corporation,* IBCA–228 (November 1, 1961), 68 I.D. 324; *United Concrete Pipe Corporation,* IBCA–42 (May 31, 1956), 63 I.D. 153, 160; *L. D. Shilling Company,* IBCA–23 (August 19, 1955), 6 CCF par. 61,695; *Sam Bergesen,* IBCA–11 (August 1, 1955), 62 I.D. 295, 304.

enforced the disclaimer clause as written and have held buyers to the strict rule of *caveat emptor*.[8]

Consequently, the appeal is dismissed.

PAUL H. GANTT, *Chairman.*

I concur:

THOMAS M. DURSTON, *Member.*

GULF OIL CORPORATION ET AL.

A-28569 *Decided April 20, 1962*

Oil and Gas Leases: Applications—Oil and Gas Leases: 640-acre Limitation

An oil and gas lease offer for separate tracts comprising less than 640 acres is properly allowed as to one tract which is surrounded by land not available for leasing and properly rejected as to another tract which adjoins land that was available for leasing when the offer was filed but was not included in the offer.

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Cancellation—Oil and Gas Leases: 640-acre Limitation

Where an oil and gas lease is issued pursuant to an offer for less than 640 acres which offer is defective for failure to include adjoining land that was available for leasing at the time the offer was filed, and a proper offer for the same land is pending when the lease is issued, the lease will ordinarily be canceled; but where a lease has been issued pursuant to such a defective offer, and the lease or an interest therein has been assigned, the lease will not be canceled or otherwise acted upon pending determination as to whether the assignee is bona fide purchaser within the meaning of the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Gulf Oil Corporation and Mrs. Helen Richardson have appealed to the Secretary of the Interior from a decision of June 9, 1960, by the Director of the Bureau of Land Management holding for cancellation oil and gas leases New Mexico 036709 and 036710. Gulf Oil Corporation is lessee under New Mexico 036710 which covers the SW¼ sec. 11, T. 19 S., R. 31 E., N.M.P.M. Gulf acquired its lease by assignment from the lease applicant, Glenn Lovett, and his wife. Mrs. Richardson is lessee under New Mexico 036709 covering the

[8] *Cf.* Navy Contract Law, Second Edition, par. 11.24 (*"Disclaimer of Warranty"*).

W½SW¼, SE¼SW¼ sec. 10, T. 19 S., R. 31 E. The Director's decision held that oil and gas lease offer New Mexico 036739, filed by Southwestern Petroleum Corporation, covering, among others, the lands included in Mrs. Richardson's and Gulf's leases, should be allowed as the above-identified leases had been improperly issued. The Director's decision reversed a decision of the manager of the Santa Fe Land office which rejected Southwestern's offer to lease.

The Director held that Gulf's and Mrs. Richardson's leases should not have been issued as the offers upon which they were based were defective in that they included less than 640 acres but did not include all of the lands adjoining those applied for which were available for leasing under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 181 *et seq.*), thus contravening departmental regulation, 43 CFR, 1960 Supp., 192.42(d).[1] As Southwestern had filed a proper application for the lands, which application was pending at the time Richardson's and Gulf's leases were issued, the Director held the leases for cancellation.

The appellants' offers were filed simultaneously at 10:00 a.m. on August 9, 1957. The offers included two separated tracts and conflicted as to all of the lands in the two leases here involved. Adjoining the SW¼ sec. 11 (in Gulf's lease) is the NW¼ sec. 14 which tract was leased on September 11, 1957, effective October 1, 1957, pursuant to lease offer New Mexico 035514, filed on June 17, 1957. Thus, on August 9, 1957, when the appellants' offers were filed, the NW¼ sec. 14 was covered only by an offer to lease.

On August 9, 1957, at 1:47 p.m., several hours after the appellants' offers were filed, Southwestern Petroleum Corporation filed its offer which conflicted almost completely with those of the appellants. All three offers included the SW¼ sec. 11. However, Southwestern Petroleum, unlike the appellants, also applied for the NW¼ sec. 14 which adjoins the SW¼ sec. 11.

Each of the offers here under consideration covered less than 600 acres and so was unacceptable unless within one of the exceptions listed in 192.42(d) (see note 1).[2] As the lands are not within the regulatory exception regarding unit plans, they must be entirely

[1] 43 CFR, 1960 Supp., 192.42(d) provides in relevant part that:

> * * * No offer may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey, or where the land is surrounded by lands not available for leasing under the act.

[2] Gulf's assertion that its offer covered 640 acres is incorrect. Gulf's offer described 640 acres of land of which 360 acres were covered by outstanding leases when the offer was

surrounded by lands not available for leasing under the act, in accordance with the second exception. Under this exception, if an offer is filed for 500 acres of land which immediately adjoins 40 acres of public land available for leasing, the offer for 500 acres is defective for failure to include the entire 540-acre tract. In addition, the fact that public land is covered by an outstanding application for an oil and gas lease does not make it unavailable for leasing within the meaning of the regulation. *Natalie Z. Shell*, 62 I.D. 417 (1955); *R. S. Prows*, 66 I.D. 19 (1959); *F. W. C. Boesche*, A–27997 (August 5, 1959), affirmed in a judgment of November 23, 1960, in *Fenelon Boesche, Administrator of the Estate of F. W. C. Boesche, Deceased*, v. *Fred A. Seaton, Secretary of the Interior*, Civil Action No. 2463–59, in the United States District Court for the District of Columbia (an appeal has been filed in the *Boesche* case).

Accordingly, an acceptable offer for less than 600 acres which included the SW¼ sec. 11 was required to include a part of the adjoining NW¼ sec. 14 as this tract was available for leasing on August 9, 1957, when the appellants' offers were filed.

As a result of a drawing held to determine priority for considering conflicting offers filed at 10:00 a.m. on August 9, 1957, Mrs. Richardson's offer was drawn first and the offer filed by Lovett (Gulf's assignor) was drawn second.

In a decision of October 22, 1957, the manager rejected Mrs. Richardson's offer for the SW¼ sec. 11 because her entire offer covered less than 600 acres, and SW¼ sec. 11 was not isolated, i.e., it adjoins the NW¼ sec. 14 which was open for filing when Mrs. Richardson's offer was filed. The manager pointed out that the fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of 43 CFR 192.42(d) citing *Natalie Z. Shell* (*supra*). However, the manager allowed Mrs. Richardson's offer for the above-described 120-acre tract in section 10 which is entirely separated from the land for which she applied in section 11 and which, at the time the offer was filed, was surrounded by land not available for leasing, within the second exception in 192.42(d) (see note 1). As a consequence, the land in

filed. In determining the number of acres covered by a lease offer, lands which are in outstanding leases are not counted (*Janis M. Koslosky*, 66 I.D. 384 (1959)). Accordingly, Gulf's offer covered less than 640 acres.

Similarly, of the 720 acres described in Southwestern's application, 280 acres were in outstanding leases when the application was filed.

section 10 which is now included in Mrs. Richardson's lease, is not affected by the rule in the *Shell* case, *supra*, because the leased land does not adjoin any land which was available for leasing when the application was filed. Thus, the manager's decision rejecting Mrs. Richardson's offer for the SW¼ sec. 11, but allowing her offer for the separate tract in sec. 10 was correct. See *Halvor F. Holbeck*, 63 I.D. 102, 103 (1956). As the issuance of Mrs. Richardson's lease was in conformity with the regulation governing the issuance of leases on tracts containing less than 640 acres, the Director's decision requiring cancellation of the lease because it was issued in violation of that regulation was incorrect and must be set aside.

The circumstances are different with regard to the application filed by Lovett, Gulf's assignor. The manager, in a decision dated October 30, 1957, awarded Lovett the SW¼ sec. 11 even though his application did not include the adjoining NW¼ sec. 14 which was available for leasing when the offer was filed. Thus, his offer for the SW¼ sec 11 was defective for the same reason that Mrs. Richardson's offer for that quarter section was defective and Lovett's offer should have been rejected for that quarter section as Mrs. Richardson's was. Consequently, the Director's decision holding Gulf's lease for cancellation would have been correct if the lease had not been assigned.

Section 27 of the Mineral Leasing Act, as amended by section 3(h)(2) of the act of September 2, 1960 (30 U.S.C., 1958 ed., Supp. II, sec. 184(h)(2)), provides in pertinent part that:

> The right to cancel or forfeit for violation of any of the provisions of this section shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, interest in a lease, option to acquire a lease or an interest therein, or permit which lease, interest, option, or permit was acquired and is held by a qualified person, association, or corporation in conformity with those provisions, even though the holdings of the person, association, or corporation from which the lease, interest, option, or permit was acquired, or of his predecessor in title (including the original lessee of the United States) may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation. * * *

Subsection (3)(i) of the act of September 2, 1960, amending the act of September 21, 1959, provides:

> Effective September 21, 1959, any person, association, or corporation who is a party to any proceeding with respect to a violation of any provision of this Act, whether initiated prior to said date or thereafter, shall have the right to be dismissed promptly as such a party upon

> showing that he holds and acquired as a bona fide purchaser the interest involving him as such a party without violating any provisions of this Act. No hearing upon any such showing shall be required unless the Secretary presents prima facie evidence indicating a possible violation of the Mineral Leasing Act on the part of the alleged bona fide purchaser.

The Department has interpreted these provisions to mean that the cancellation of an oil and gas lease pending on appeal after the passage of the act of September 21, 1959, protecting the rights of bona fide purchasers of oil and gas leases must be set aside where the record shows that there is pending an assignment of the lease to a person who is, apparently, a bona fide purchaser until the validity of the assignment, the status of the assignee as a bona fide purchaser, and the applicability of the act of September 21, 1959, as amended by the act of September 2, 1960, have been determined (*J. Penrod Toles*, 68 I.D. 285, A–28534 (October 16, 1961)). The holding in the *Toles* case governs the disposition of this appeal insofar as it involves Gulf's lease which, the record shows, Gulf holds as an assignee of the lessee under an assignment approved effective February 1, 1958. In accordance with the *Toles* ruling, the case will be remanded to the Bureau to permit a showing as to whether Gulf is a bona fide purchaser within the meaning of the above-quoted statutory provisions.

For the reasons discussed herein, the decision of the Director of the Bureau of Land Management is set aside and the case is remanded to the Bureau of Land Management with directions to reinstate Mrs. Richardson's lease, to give Gulf an opportunity to make a showing that it acquired its interest in New Mexico 036710 as a bona fide purchaser, and to suspend action on Southwestern's application pending the outcome of the showing made by Gulf.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is set aside and the case is remanded for action consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

ESTATE OF JAMES FRANKLIN MACER CROW ALLOTTEE NO. 377

IA-858 *Decided April 24, 1962*

Indians: Domestic Relations

A person of Indian descent, of ¼ Indian blood, who is an enrolled member of an Indian Tribe and possessed of Indian trust land including his own allotment, and who is recognized by his tribe and the Federal Government as an Indian, is validly married to a person of the Negro race, since the miscegenation statute of the state in which the marriage took place did not prohibit an Indian from marrying a Negro.

APPEAL FROM AN EXAMINER OF INHERITANCE

BUREAU OF INDIAN AFFAIRS

Enos J. Erb, as guardian ad litem for Donald Macer Erb, a minor, George Edward Macer, Jr., William F. Macer, Margaret Sarah Erb Rhoads, Eloise Mary Erb Carlton, Velma Lois Erb Bruski, and Geraldine Ann Erb Cleveland, through their attorneys, have appealed from a decision, dated January 31, 1957, of an Examiner of Inheritance, denying a petition for rehearing filed in the above probate matter.

It was determined in the original order entered by the Examiner of Inheritance on October 24, 1955, that the decedent, James Franklin Macer, an enrolled and allotted member of the Crow Tribe, had died intestate on December 17, 1954, at Deer Dodge, Montana, and that his sole heir was his wife Betty Morris Macer.

Appellants, nieces and nephews of the decedent, contend that the Examiner erred in finding that the decedent was validly married. Appellants claim that decedent's father was a white person and decedent's mother was born to parents, one of whom was an Indian, the other a white person. On such basis it is contended by appellants that the decedent, of ¾ white blood and ¼ Indian blood, is considered under Montana law to be a white person whose marriage at Hysham, Montana, on August 31, 1942, to Betty Morris, a Negro, was invalid under a Montana statute which provided that every marriage contracted or solemnized between a white person and a Negro shall be utterly null and void.[1]

[1] Laws of Montana, 11th Session, 1909, Ch. 49 at p. 57, 58. The law was repealed in 1953. Laws of Montana, 33d Session, 1953, Ch. 4 at p. 4.

The question thus presented by appellants is whether the decedent, James Franklin Macer, is a white person within this miscegenation statute so as to make a nullity of his marriage.[2] The statute itself contains no definition of a white person. Likewise, the Montana Constitution provides no definition for our consideration.[3]

I

It is suggested in the briefs submitted by appellants' counsel that the question before us [4] is resolved in Montana under a State and a Federal decision both to the effect that persons of ¼ Indian blood should be considered as white persons. The cases cited by appellants' counsel are *Stiff* v. *McLaughlin*,[5] and *United States* v. *Higgins*.[6] We do not find any substantial support for that suggestion in those cases.

In *Stiff* v. *McLaughlin*, *supra*, the plaintiff caused an execution to be issued against Allen Sloan and delivered it to the defendant, the Sheriff of Missoula County. The Sheriff was requested to levy upon certain pieces of Sloan's personal property on the Flathead Indian Reservation. The Sheriff refused to make the levy, and action was brought against him and his bondsman for damages sustained by plaintiff as a result of the refusal to levy execution. Allen Sloan was of ¼ Chippewa Indian blood, married to an Indian woman belonging to the Flathead Tribe, and they lived on the Flathead Indian Reservation.

While the court did state, as appellants' counsel points out, that Sloan was not an Indian, the court went on to say several times that Sloan did not acquire the status of a tribal Indian. The court found that Sloan's property was susceptible to execution because Sloan was not a member of the Flathead Tribe. The court held that Sloan did not acquire the status of a tribal Indian. It did not hold that Sloan was a white person.

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[2] See generally, 55 C.J.S. Marriage, Sec. 15; 58 C.J.S. Miscegenation, Sec. 1; Keezer On The Law Of Marriage And Divorce, Ch. 10, Miscegenation (3d ed. 1946) with 1959 Cumulative Supplement.

[3] Vol. 1, Revised Codes Of Montana (1947).

[4] This matter does not involve a question of Indian custom marriage for not only was it provided at the time of the marriage, in 25 CFR Sec. 161.28c (1940), since revoked, that the Montana marriage and divorce law applied to Crow Indians but, also, Macer apparently married off the reservation, did not reside on the reservation, and subsequently lived with his spouse in North Dakota and Minnesota. The possibility of a common-law marriage in the states where the couple resided was also considered by this office but it was determined that the Minnesota law would not support such conclusion and North Dakota had a miscegenation statute akin to the Montana statute.

[5] 19 Mont. 300, 48 Pac. 232 (1897).

[6] 110 Fed. 609 (C.C.D. Mont. 1901).

Our analysis of the *McLaughlin* case is supported by *United States* v. *Heyfron*,[7] wherein it was determined that Allen Sloan was a member of the Flathead Tribe by adoption and his personal property was not subject to a Montana personal property tax. The court in arriving at its decision observed, "that ever since his adoption Sloan had been treated as a member of the tribe. He had drawn rations, annuities, and payments, and had enjoyed the privileges accorded full blood Indians of the reservation. The Government and the Indians have regarded him as a member of the Flathead Nation. He had participated in the Indian councils * * *. He was enrolled as a member of the Flathead Nation upon a roll prepared by a special agent of the Indian Department of the United States * * *."

In the case of *United States* v. *Higgins*, *supra*, the other case relied on by appellants' counsel, action was brought by the United States to enjoin Higgins, the Treasurer and Tax Collector of Missoula County, Montana, from collecting personal property taxes from Oliver Gibeau. It appears from the evidence in the case that Oliver Gibeau's father was a white person. His mother was of ½ Indian blood, since her father was a white man and her mother was a Spokane Indian. When Oliver was seventeen years old, his mother went to the Flathead Indian Reservation and made application to be admitted as a member of the tribe. The application was granted. Oliver's adoption was also secured by his mother. His father went to live with the family upon the reservation one year later. Oliver Gibeau grew to manhood on the reservation and became the chief of the Indian police there.

The defendant contended that Oliver Gibeau should be classified as a white man and not as an Indian; and, as Gibeau resided on the part of the Flathead Reservation within Missoula County, he should list his property and be taxed by that County.

The court did state, as appellants' counsel points out, "while there are cases in which quarter breed Indians have been recognized as Indians by the laws of Congress and by the action of the executive department of the government, I cannot refer to any case where a person possessing but ¼ Indian blood and who was born among the white people and lived among them until almost a man grown, has been classed as an Indian. If he had acquired real property it would have been assessed for taxation and taxed." The court said that Oliver

[7] 138 Fed. 968 (C.C.D. Mont. 1905); see *United States* v. *Heyfron*, 138 Fed. 964 (C.C.D. Mont. 1905).

Gibeau should be classed as a white man. It was held that Oliver Gibeau was not an Indian for purpose of taxation.

In so holding, the court deemed it necessary to distinguish one of its earlier decisions, *United States* v. *Higgins*,[8] in which the United States was successful in enjoining Higgins from collecting taxes from one Alexander Matt of ½ Indian blood. The court noted that the facts presented in the earlier case were essentially different because "Matt was born in the Indian country. His people never assumed the habits of civilization. It was not shown that his father ever became a citizen of the United States. He was one of the class recognized and treated as an Indian in the orders of the executive department of the government to the Flathead Indians to remove from the Bitter Root Valley to the present Flathead or Jocko Indian Reservation."

It appears to us, therefore, that the court, in reaching a decision in the Oliver Gibeau matter, used as a governing test not only the factor of Gibeau's white and Indian ancestry, but also factors of his place of birth, his habits of civilization, and the treatment accorded him by the tribe and by the United States Government.[9]

The test employed by the court in determining that Gibeau, of ¼ Indian blood, was a white person for purposes of state taxation is substantially the same test used in *United States* v. *Heyfron*, *supra*, when it was determined that Allen Sloan, of ¼ Indian blood was not a white person for purposes of state taxation.

We are inclined to believe the determining factor, to account for the difference in result as concerns Gibeau and Sloan, was the treatment accorded them by the United States. It appears that both were tribal members by adoption but only Sloan's membership had been recognized by Government enrollment action. As we have explained, the court was careful in determining Gibeau's status to distinguish its earlier decision involving Alexander Matt, who was classed as receiving some type of government recognition as an Indian.[10]

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[8] 103 Fed. 348 (C.C.D. Mont. 1900).

[9] The court also cited *United States* v. *Hadley*, 99 Fed. 437 (C.C.N.D. Wash. 1900) for the ruling that a person of ½ Indian blood was not classed as an Indian. The court in the *Hadley* case dealt with the question of whether the defendant was an Indian within the federal criminal jurisdictional statutes relating to Indians. However, the overwhelming weight of authority clearly does not support the ruling in the *Hadley* case. *State* v. *Phelps*, 93 Mont. 277, 19 P. 2d 319 (1933); *Ex Parte Pero*, 99 F. 2d 28 (C.C.A. 7 Cir. Wisc. 1938), cert. den. 306 U.S. 643.

[10] As for the other factors mentioned by the court in determining the status of Gibeau and Sloan, it seems that in modern times such factors would be unimportant or obsolete. Citizenship would be an obsolete factor in view of the Act of June 2, 1924, 43 Stat. 253, 8 U.S.C. 3, conferring citizenship on all Indians born within the territorial limits of the United States. The factor of assuming the habits of civilization is a subjective test fast losing whatever value formerly assigned it by the court. For example, modern trans-

In any event, while these cases do provide a governing test as to when a person of Indian descent is susceptible to Montana ad valorem taxes, we do not believe that standing alone they dispose of the question before us—whether the decedent, James Franklin Macer, is a white person within the Montana miscegenation statute.

II

Extensive research has disclosed two cases in which courts have dealt with a situation in which a person of Indian descent under a similar miscegenation statute is considered to be a white person.

In *Bailey* v. *Fiske*,[11] the statute prohibited the marriage of a white person with any Negro, Indian or mulatto. The evidence showed that Abigail Jones of 1/8 or 1/16 Indian blood was married to a person of African blood who was a mulatto. The court decided that Abigail Jones must be considered a white woman and her marriage was void. In *Agnew* v. *State*,[12] it was said that a woman of 1/8 or 1/16 Indian blood was a white woman, and it was held a Negro had violated the miscegenation law because of his relationship with her.

The test used in both of these cases is one based solely on the proportion or percentage of Indian and white blood possessed by the individual concerned. The cases indicate that the greater the admixture of white blood, the more likely the courts are to find a person of part Indian blood is a white person under miscegenation statutes. However, the question still remains whether the decedent Macer, a person of 1/4 Indian blood, is prohibited under the Montana miscegenation statute from marrying a Negro.

III

A test based solely on the proportion of Indian and white blood such as was used in *Bailey* v. *Fiske* and *Agnew* v. *State*, *supra*, was apparently not acceptable to the Attorney General of Montana for

portation and communication media no longer leave the Indian on his reservation in isolation from other communities. Also education is generally available off, as well as on, the reservation. Indians also are born on or off the reservation, depending sometime on where a hospital is located, so that the place of birth is not necessarily a factor of significance. Residence on the reservation is another factor which may have little significance since Indians often today leave the area in which they were raised to obtain work or schooling.

[11] 34 Maine 77 (1852).

[12] 36 Ala. App. 205, 54 So. 2d 89 (1951).

the purpose of an opinion [13] rendered on the question of whether those of the white race could adopt a child of 1/8 Indian blood under the Montana adoption statutes which limited adoptions to those of the same race. It was decided that whether a child of 1/8 Indian blood is an Indian or of the white race depends on factors such as environment, circumstances attending bringing up, and upon whether or not he has maintained tribal relations with Indians.

In another opinion,[14] the Attorney General of Montana discussed the definition of an Indian as employed in Montana legislation for the purpose of old age assistance. The definition provided by the Montana legislature included as Indians not only Indians who resided on a reservation, but also Indians who were members of a tribe or nation accorded certain rights or privileges by treaty or by federal statutes.

The Montana legislature could certainly have created by appropriate terms in its miscegenation statute a classification based upon a given quantum of Indian and white blood.

In Virginia, for example, it is provided that white persons can only marry white persons and defines a white person to include those of American Indian descent who have 1/16 or less of Indian blood and no other non-Caucasic blood.[15] However, a person of Indian descent of the 1/4 blood is by definition deemed to be an American Indian.[16]

Oklahoma by statute prohibits white persons from marrying Negroes and in its Constitution [17] defines Negroes to include all persons of African descent. All other persons are deemed to be white persons. In Oklahoma, therefore, individuals with an admixture of white and Indian blood of any proportion, as well as full blooded Indians, are white persons.[18]

In the Enumerators Reference Manual for the 1960 United States Census regarding definitions for color or race it is directed that the

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[13] 15 Rept. And Official Opinions of Atty. Gen., Montana, 1932–34, Opinion No. 414, p. 287.

[14] 21 Rept. And Official Opinions of Atty. Gen., Montana, 1945–46, Opinion No. 129, p. 175.

[15] 4 Code of Va. Sec. 20–54 (1950).

[16] 1 Code of Va. Sec. 1–14 (1950).

[17] Art. XXIII Sec. 11, 1 Okla. Stat. p. 126 (1950).

[18] See, Keezer, supra, note 2 for states which prohibit white persons from marrying Indians.

appropriate circle be marked for white, Negro, American Indians, as well as other races. The Enumerators are instructed to mark American Indian for fullblooded Indians and for persons of mixed white and Indian blood if the proportion of Indian blood is ¼ or more.[19]

Thus, if the Montana legislature had intended to classify a person of any degree of Indian blood as white for the purposes of the miscegenation statute it could easily have done so by definition.

IV

The briefs filed by appellants' counsel in support of the position that the decedent is a white person under the Montana miscegenation statute emphasize at several points the statement appearing in the Handbook of Federal Indian Law,[20] "If a person is three-fourths Caucasian and one-fourth Indian it is absurd from the ethnological standpoint to assign him to the Indian race." However, as pointed out by appellants' counsel, it is also stated that legally such person may be an Indian. As seen from the entire discussion in Section 2 of the Handbook, the definition of who is an Indian depends on social and political factors, and one must look to the particular statute under consideration to determine whether a person is an Indian. It is also said in Corpus Juris Secundum[21] that persons of mixed blood have frequently been held to be Indians within the terms of particular statutes or treaties.

We therefore turn again to the Montana statute which prohibits marriage between white persons and Negroes.

In determining what is meant or intended by a statute, recourse must be had to the plain and ordinary meaning of the language employed, unless it is made apparent from the context that the terms and words used were intended to give a different meaning.[22] When a similar problem of definition of the term white persons arose in the United States Supreme Court under the Federal Immigration and Naturalization Statute in the case of *United States* v. *Thind*,[23] it was said:

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[19] Item P 5, Par. 192, Sec. d, p. 42. For the 1950 and 1940 census the same classification obtained.

[20] Cohen, Handbook of Federal Indian Law, Chapter 1, Section 2, p. 2, par. 1 (1942).

[21] 42 C.J.S. Indians, Sec. 2 c.

[22] In re *Woodburn's Estate,* 273 P. 2d 391, 394. (Mont. 1954).

[23] 261 U.S. 204, 209–210, 213 (1923); see *Morrison* v. *California,* 291 U.S. 82, 85–86 (1933).

> The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken * * * *
>
> The question for determination is not, therefore, whether by the speculative process of ethnological reasoning we may present a probability to the scientific mind * * * but whether we can satisfy the common understanding * * * of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons * * * *
>
> The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white.

It does not appear to us from the context of the Montana miscegenation law that the term white person has any other meaning than its common, ordinary and popular meaning. The law prohibited a white person from marrying Negroes as well as Chinese and Japanese. The law was apparently intended to preserve the integrity of the white race. The words used by the framers of the law were intended to include only the type of man whom they knew as white.

The facts of record clearly show that decedent, as an enrolled member of the Crow Tribe, has an estate which includes lands allotted to him which are held in trust by the United States. Interests in other Indian trust lands the decedent had inherited from his mother are also listed as assets of the estate. Personal property in the estate consists of money in the decedent's individual Indian money account under the supervision of the Superintendent of the Crow Indian Agency, Montana. Included in the account was a per capita payment made to members of the Crow Tribe as well as money derived from lease rentals. On these facts there can be no doubt that the decedent was treated by both the Crow Tribe and the Federal Government as an Indian.

We do not believe the common understanding of the term white person as used by the lawmakers of Montana in 1909 included a person of ¼ Indian blood who was a member of an Indian tribe, accepted as a member by the tribe, and who was issued an allotment and enrolled by the Federal Government as an Indian member of the tribe. The tendency in Montana at the time of the enactment of the miscegenation law, as indicated by our analysis of the *McLaughlin*, *Heyfron* and *Higgins* cases, *supra*, was to consider as Indians persons of ¼ Indian blood who were members of an Indian tribe and treated by the Federal Government as Indians.

In our view of the matter the decedent, James Franklin Macer, as an enrolled and allotted Crow Indian, of ¼ Indian blood, was not prevented from marrying a Negro under the Montana miscegenation law.

The record shows that the Examiner of Inheritance found on the basis of a certified copy of a marriage license and certificate that James Franklin Macer had married Betty Morris on August 31, 1942, at Hysham, Montana. Neither decedent nor Betty Morris Macer obtained a divorce from the other.

In reaching our conclusion in this opinion we have not found it necessary to come to grips with the question of the constitutionality of the 1909 miscegenation statute of the State of Montana. As earlier noted that statute has been repealed and the views we express are not intended to reflect on the broader constitutional question.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Sec. 210.212A(3)(a), Departmental Manual, 24 F.R. 1348), the order of the Examiner of Inheritance, denying the petition for rehearing, is affirmed and the above appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF HENLY CONSTRUCTION COMPANY

IBCA-249 *Decided April 27, 1962*

Contracts: Changes and Extras—Contracts: Additional Compensation—Rules of Practice: Appeals: Generally

Where a request for reconsideration of a decision of the Board is not persuasive of error by the Board, the decision will be affirmed. Where the Board finds on reconsideration that its determinations under its prior decision as to the amounts of equitable adjustments due under the Changes clause were not sufficient, the Board will modify its decision accordingly.

BOARD OF CONTRACT APPEALS

Appellant and the Government have each requested reconsideration of the decision of the Board dated December 7, 1961.[1] That

[1] *Henly Construction Company,* IBCA-249 (December 7, 1961), 61-2 BCA par. 3240, 4 Gov. Contr. par. 49(b).

decision sustained in part the contractor's appeal from the contracting officer's Supplemental Findings of Fact and Decision dated May 26, 1960. A previous decision of the Board [2] had determined that the contractor was entitled to additional compensation by reason of a change in the method of construction of irrigation laterals and wasteways, and remanded the case to the contracting officer to determine the amount of additional compensation.

The Government's request for reconsideration is based principally on the premise that the original Board decision of February 23, 1960, limited the contractor's recovery to the two categories of material described therein. We see no such limitation. The contracting officer's Supplemental Findings of Fact and Decision of May 26, 1960, renders inconsistent the Government's theory of such a limitation, for the contracting officer awarded an indefinite amount for the "minor amount of additional cost involved in finishing required in constructing the 'econ-grade' in fill sections." The Government's theory was fully considered in the Board's decision of December 7, 1961.

Also, the Government claims that in allowing an additional sum of $0.15 per cubic yard for borrow under Claim No. 2, the Board has duplicated the additional allowance of $0.15 per cubic yard for construction of the econ-grade to the extent of 2,691.6 cubic yards, or $403.74. We do not see how this can be true, for the contracting officer found that as to Claim No. 2 under the first Board decision the contractor was entitled to payment for the 2,691.6 cubic yards at $0.40, a total of $1,076.64. There was, of course, an inherent duplication of quantities in that decision. The contractor used borrow from the shoulders for embankments instead of excavating completely to the bottoms of the cuts. When he finally completed excavating the bottoms of these ditches he was apparently paid for such excavation, which should have approximated 2,691.6 cubic yards. The Board held that he should also be paid for the borrowed material, because of Mr. Henly's testimony to the effect that the material in the ditch bottoms was unsuitable for use in embankments.

The Government has moved that an additional hearing be held in this appeal, for the purpose of determining the amount of increased costs, if any, that were experienced by appellant as a result of the

[2] *Henly Construction Company,* IBCA–185 (February 23, 1960), 67 I.D. 44, 61–2 BCA par. 3239, 2 Gov. Contr. par. 198.

change to the econ–grade method of construction. Appellant has now objected to a further hearing because of additional expenses and delays which would be incurred.

Although it is difficult to resolve all of the facts, the Board finds that it is possible to do so without a further hearing, by analysis of the administrative record, to the extent required to bring about an equitable adjustment of the contract price pursuant to the Changes clause. Accordingly, the motion of the Government that another hearing be held is denied.

Appellant's request for reconsideration is based on the alleged inadequacy of the amounts allowed by the Board. It is urged that the allowances for increased cost of the change be based on appellant's total costs and the loss is sustained in the performance of the contract. This was discussed in the Board's decision of December 7, 1961, and we believe that there are ample reasons for not using the total cost method of computing an equitable adjustment in this case.[3] As one example, several large scale operations were conducted under this contract in addition to the portion in dispute.

However, the Board considers that one point made by appellant is well taken. In computing the increased cost of excavating the prism sections in fill embankments, the Board considered only the excavation of fill quantities, and did not apply the increase of $0.20 per cubic yard to excavation in natural ground below fills. Appellant's brief states that a total of 106,809 cubic yards were so excavated, but we believe that this figure is erroneous. Re-excavation in fill areas did not begin until August 1957. The "Record of Excavation Items Included for Monthly Payments" (Government's Exhibit No. 2 in the record of the hearing of November 1959) shows that a net total of 44,741 [4] cubic yards of excavation of all types of classification was

[3] *H. R. Henderson & Company,* ASBCA No. 5146 (September 28, 1961), 61–2 BCA par. 3166, 4 Gov. Contr. par. 47. *Cf. Western Contracting Corporation* v. *United States,* Ct. Cl. No. 344–55 (December 3, 1958); *Flora Construction Company,* IBCA–180 (June 30, 1961), 61–1 BCA par. 3081; *Caribbean Construction Corporation,* IBCA–90 (Supp.) (September 22, 1959), 66 I.D. 334–38, 59–2 BCA par. 2322, 1 Gov. Contr. par. 666. See also *Fred E. Hicks Construction Company,* IBCA–271 (October 20, 1961); *Lake Union Drydock Company,* ASBCA No. 3073 (June 8, 1959), 59–1 BCA par. 2229.

[4] This figure includes a net yardage of 10,814 credited to the month of August 1958. No lateral excavation was performed in July 1958 although the advance pay estimate for July projected 15,363 c.y. This resulted in a net debit for August of 4,549 c.y. as shown in Government's Exhibit No. 2; hence, 10,814 c.y. must have been actually excavated in August.

performed by appellant in laterals from August 1957 to the end of the contract. This amount was exclusive of re-excavation in fill embankments, for which the Government refused to pay at that time. No other excavation in natural ground below fills could have been performed until after the fill embankments had been placed. Also, any possible lateral excavation during this period in cuts or thorough cuts must have been of little or no significance, for the econ-grade was completed the first of July 1958.

Appellant is entitled to have the increase of $0.20 per cubic yard applied to the excavation of natural ground below fills, since that material was just as much involved in the construction of the laterals in the econ-grade as was the material directly above it in fill areas. Accordingly, the Board holds that appellant is entitled to additional compensation in the amount of $8,948.20 for excavation in natural ground beneath partial fill embankments.

Appellant's arguments concerning the quantities of excavations performed have not persuaded the Board of error in its finding that 75,417 cubic yards of material (as shown by the haul sheets which itemized the areas of shortage) were placed in the fill embankments. The "rule of thumb," of one-half cubic yard of content per linear foot of all laterals, referred to in appellant's last brief, was a measurement used by appellant, in attempting to establish its claim. The Board used it as a means of establishing the error in appellant's original estimates of the quantity of unpaid re-excavation from fill embankments, which appellant at that time claimed to be 115,965 cubic yards. The Board has no quarrel with appellant's present calculation of 119,958.9 cubic yards of cubic content in all lateral and wasteways as compared with the 105,600 cubic yards computed by rule of thumb for the entire job, but neither of these figures are determinative of any accurate conclusions as to the correctness of the 75,417 cubic yards placed in fill embankments.

The Board takes this position for the reason that, in attempting to show that the Board's figures are short by 99,401 cubic yards in the total excavation quantities (and that 99,401 cubic yards must, perforce, be added to the 75,417 cubic yards found by the Board to have been placed in fill embankments), appellant has disregarded entirely its calculation of 77,625 cubic yards of excavation which were wasted (or

used to strengthen embankments at the ends of cuts) as being unsuitable material for fills, or as being too far distant from shortage areas to permit economical hauling.

The quantity of 75,417 cubic yards, having been established by the haul sheets as the quantities required for fill material in shortage areas is, therefore, the best evidence as to the volume of the fill embankments, in the opinion of the Board.

Appellant also urges, that if the record of 75,417 cubic yards is accepted, then the shrinkage factor of 1.33 should be applied for pay purposes. At the hearing in November 1959, Mr. Byron Boston, the Field Engineer in charge of the job testified [5]

> Now, the fill material was fixed with the shrinkage factor of 1.33. In other words, any fill will compact whenever equipment rolls over it so you have got to have a shrinkage factor and we made it at 1.33 shrinkage factor.

This was for the purpose of measurement of material for payment, as testified to by Mr. Boston just prior to the quoted testimony. Also, at page 225 of the Transcript, Mr. Boston testified that the factor of 1.33 had no bearing on the amount of excavation that the contractor would be paid for; that the compacting of fills was the place where it would have a bearing; and that the compacting of fills was not in issue.

Item 4 of the contract schedule, "Excavation from Borrow," represents material clearly used for fill embankments only. The final payment estimate shows the total quantity of borrow to be 25,521 cubic yards, and this is a portion of the 75,417 cubic yards placed in fill embankments. The payment shown totals $10,208.40 at $0.40 per cubic yard, without application of a factor of 1.33. Paragraph 50(b) of the Special Conditions permits measurement for payment of borrow either in excavation or in embankment, with the application of a factor to the latter method. Hence, we must conclude that measurement of borrow for payment was made in excavation, in order to arrive at 25,521 cubic yards of borrow, so that the factor of 1.33 may not be applied to borrow.

A similar conclusion cannot properly be reached as to the remainder of the 75,417 cubic yards required for fill embankment, although the total quantity of excavation, common, for laterals and wasteways (238,397 cubic yards) must have included this remainder of 49,896 cubic yards of fill required for shortage areas. The total of 238,397

[5] Transcript, page 171 (hereafter referred to as Tr. —).

cubic yards was paid for without application of a factor, at $0.40 per yard or $95,358.80, for the factor of 1.33 was not applicable to excavation as such, according to Mr. Boston's testimony.

The correspondence between the parties in early 1958 [6] indicates that the shortage areas reflected in the haul sheets were compiled on a detailed and itemized basis and consisted of more than 200 individual and separate shortage areas. It does seem logical that these areas would be computed as a total and appreciated in the total quantity by the 1.33 shrinkage factor. However, of this total the borrow quantity has been demonstrated as having been measured from excavation so the remaining quantity subject to that factor is 49,896 cubic yards.

We find that the shrinkage factor of 1.33 has not been applied to the 49,896 cubic yards remaining after deducting 25,521 cubic yards of borrow, and that appellant is entitled to have the increase of $0.15 per cubic yard for constructing the econ-grade, allowed by our decision of December 7, 1961, applied to the added quantity of 16,465.68 cubic yards, which is the additional volume created by the 1.33 factor. This produces additional compensation to appellant in the amount of $2,469.85.

Conclusion

Upon reconsideration, the decision of the Board dated December 7, 1961, is hereby modified to include the additional sums of $8,948.20 representing additional compensation for excavation in natural ground below partial fill embankments, and $2,469.85 for additional compensation in the construction of the econ-grade. This brings the aggregate amount awarded to the contractor, as a result of the Board's decision of February 23, 1960, to $26,743.07. Except as so modified, the decision of the Board dated December 7, 1961, is hereby affirmed.

THOMAS M. DURSTON, *Member.*

I CONCUR:

JOHN J. HYNES, *Member.*

PAUL H. GANTT, *Chairman*, disqualified himself from participation in the consideration of this appeal (43 CFR 4.2).

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[6] Appellant's letter of February 7, 1958, with enclosures (Exhibit No. 18 of Findings of Fact and Decision dated October 7, 1958).

RAYMOND F. GRAY

IA–1110 *Decided May 7, 1962*

Indian Lands: Acquired Lands

Where an Indian acquires lands subject to the restriction that such lands cannot be sold or alienated without the consent of the Secretary of the Interior, pursuant to those terms in the deed and the pertinent Departmental regulations, an attempted sale of the lands in State Court guardianship proceedings would pass no title without the required approval or removal of restrictions by Departmental officials.

Indian Lands: Acquired Lands

Where Indian lands are sold in violation or apparent disregard of restrictions placed on the lands when acquired, the Government would not be required, as a prerequisite to enforcing the restrictions or to cancel the sale, to return any consideration paid for the lands.

APPEAL FROM THE COMMISSIONER OF INDIAN AFFAIRS

Raymond F. Gray, now deceased,[1] filed an appeal from a decision by the Commissioner of Indian Affairs, dated May 6, 1959, which had affirmed a decision by the Area Director, Bureau of Indian Affairs, Billings, Montana, dated February 6, 1958, refusing to issue an order removing restrictions on certain lands purchased for or on behalf of Lucy Pluffe Kenmille, a Flathead Indian. It appears that Mr. Gray acted as guardian of the estate of Lucy Pluffe Kenmille, and his sale of the lands in question, as guardian, was confirmed on January 8, 1957, by the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Lake. The consideration for the sale, $1,200,[2] apparently was paid by the purchaser of the lands, Mr. R. A. Nadrau, reported to be a non-Indian, and the appellant claimed that the proceeds of the sale were used for the benefit of Lucy Kenmille. Accordingly, in his appeal to the Secretary of the Interior, the appellant asked for (1) a removal of restrictions from the lands, after which appellant apparently would execute a conveyance to Nadrau, or, in the alternative, (2) that the funds paid by the purchaser and alleged to have been expended by appellant on Lucy Kenmille be returned to the purchaser of the lands.

The lands in question constitute Lots 9, 10, and 11 of Block "C," in Glacier View Addition to the Town of Ronan, Montana, Lake County, Montana. By a deed executed on April 21, 1953, approved

[1] By a letter, dated January 12, 1962, addressed to the Honorable Mike Mansfield and referred to this Department, the widow of the appellant is regarded as having joined in the appeal, and the action taken in the present decision also will be deemed to apply to her on behalf of the appellant.

[2] This price appears to have been above the appraised value of the lands, since an appraisal by Bureau of Indian Affairs' realty officials about a year later fixed the valuation at $1,000.

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by the Area Director on August 6, 1953, title to the lots was taken in the name of Lucy Pluffe Kenmille, but with the following restriction:

> * * * subject to the condition that for a period of ten years from the date of this deed, but not thereafter, no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during said period of ten years, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior.

Moreover, the deed also contains a provision that the Indian purchaser of the lots desired to make such purchase with funds derived from her restricted lands, which statement is corroborated by the record that the consideration for the Indian's purchase of the lots was trust or restricted funds of such Indian. The appellant apparently has not questioned the validity of the restrictions placed in the deed, which restrictions effectively prohibit alienation of the land without the approval of the Secretary of the Interior, or his authorized representative.[3]

We have been unable to determine from our record that the State court was aware that it was confirming an attempted sale of restricted Indian land. By letter of July 5, 1956, the appellant notified the Superintendent of the Flathead Indian Agency of his appointment as guardian. While stating in that letter that he would endeavor to sell the property, the appellant stated also that he would submit to the Superintendent's office "any offer that I may receive for the property and I will not attempt to sell the property unless the purchase price has been approved by your office."

In a letter to the appellant, dated January 17, 1957, the then Superintendent, Mr. Forrest R. Stone, stated that his understanding of the guardianship in question was that appellant had been designated guardian of Lucy Kenmille's estate "only for nontrust property in which she may have an interest." Certainly, this alone would constitute a disavowal of allegations by the appellant that the guardianship proceedings were instituted at the request of the agency officials, and for the purpose of effecting a disposition of the restricted lots included in the deed to Lucy Kenmille.[4] Later, and apparently without having given the Superintendent the advance information he said he would furnish, the appellant addressed a letter to the Flathead agency on February 13, 1957, advising of the guardianship sale of the

[3] *Sunderland* v. *United States*, 266 U.S. 226 (1924); *United States* v. *Brown*, 8 F. 2d 564 (8th Cir., 1925), *cert. denied*, 270 U.S. 644.

[4] Neither did Mr. Stone change his position in that respect because in a subsequent letter, dated February 11, 1958, addressed to the Area Director, the statement is made of the "need to correct the statement of Mr. Gray that I authorized him to sell restricted trust property and account for the proceeds through the State courts . . . I was not aware of Mr. Gray having started proceedings in the state courts for the disposition of this property."

lots, and requesting the removal of restrictions on those lots. In his letter of reply, dated February 18, 1957, former Superintendent Stone indicated that the matter would be given immediate attention, but the fact was then impressed upon the appellant that "restricted or trust property cannot be sold, encumbered, or have any liens against it, while it remains in this status * * *."

While the application of Lucy Kenmille for the removal of restrictions from her purchased lots apparently had the initial sanction of the Superintendent's office, upon its referral to the Area Director, that office disapproved the application and returned it to the Superintendent on June 25, 1957. The reason given for disapproval, as stated in a letter, dated November 7, 1957, from the Superintendent's office to the appellant, was that Lucy Kenmille's ability to handle the sale of the property was questionable, and that the justification for the restrictions in the deed she received to the lots was her inability to manage her property without supervision.

Incidentally, the State court guardianship proceedings, including the guardian's sale, cannot be regarded as having properly met all of the requirements specified under the Montana code.[5] Apart from this, it is clear that such proceedings in the State court cannot effect a disposition or sale of the restricted lots of Lucy Kenmille. The manner in which such a disposition can validly be made is stated in the deed under which Lucy Kenmille acquired the lots, the restrictive provisions of which specifically prohibit any alienation of the lots except with the approval or consent of the Secretary of the Interior, or his authorized representative. Moreover, until such consent is obtained, pursuant to such regulations as were prescribed, a purported purchaser of the restricted lots involved could obtain no title.[6] The fact that action by the Secretary or his authorized representative is essential was recognized by the appellant, who, throughout the course of his activities and appeals in the present matter, had continued to request the removal of restrictions from the lots in question.[7]

The manner in which the removal of restrictions requested by the appellant could have been accomplished in the present case was specified in the Departmental regulations on the subject.[8] As stated in this

[5] The various apparent defects in the guardianship proceedings are mentioned in detail in the decision of May 6, 1959, of the Commissioner of Indian Affairs.

[6] *Bailey* v. *Banister, et al.*, 200 F. 2d 683 (10th Cir., 1952); *United States* v. *Brown, supra*, note 3.

[7] Along the same line, the purchaser of the lots at the guardianship sale, R. A. Nedrau, apparently has made inquiry of the agency officials, based upon their reply to him of May 12, 1959, as to when he may obtain title to the lots in question. Mr. Nadrau is not a party to the present appeal.

[8] 25 CFR, 1956 Supp., 241.49, and 25 CFR 121.49 (1958 ed.) *"Procedure for removing restrictions.* An Indian may apply for the removal of restrictions from land acquired by purchase, exchange or gift, and devised and inherited interests therein, held under an instrument of conveyance which recites that the land shall not be sold or alienated without the consent or approval of the Superintendent, the Commissioner of Indian Affairs, or

regulation, a showing is required that the applicant was competent and capable of managing her own affairs, or that the removal of restrictions was otherwise in her best interests. This was not shown to the satisfaction of the Area Director, and he accordingly refused to issue an order removing restrictions. No persuasive reason is presented which would serve to question the correctness of the Area Director's decision, as affirmed by the Commissioner of Indian Affairs. The restrictive clause in the deed of April 21, 1953, was specifically included to preserve the Indian's assets by investment of her restricted funds in the lots covered by the deed. This type of restriction, on its face, showed the inability of the Indian to handle her property without the control or supervision of a representative of this Department. Moreover, in his decision of February 6, 1958, the Area Director stated that his finding of Mrs. Kenmille's inability to conduct her own affairs is fully supported by the view of the appellant himself, particularly as expressed in his letter of November 19, 1957, to the Area Director.

The need for preserving the control of officials of this Department over the restricted lots of Lucy Kenmille is demonstrated also by the fact that the sale attempted through the guardianship proceedings apparently did not conform with another provision of the Departmental regulations regarding the advertising and public sale of restricted Indian lands.[9] Moreover, as stated by the Commissioner in his decision of May 6, 1959, by such regulation, a negotiated sale would have had to come within one of the exceptions in paragraph (c), i. e., "(3) a sale to a non-Indian, when the Secretary determines that it is impractical to advertise." But the Commissioner then observed that such a determination must be supported by a showing that because of geographic or economic isolation there is no competitive market for the property, which apparently had not been shown.

As an apparent alternative to obtaining a removal of restrictions from the lands in question, the appellant contended that the proceeds received for the lots at the guardianship sale, which he claims were expended on Lucy Kenmille, should be returned to the purchaser. In support of this contention the appellant's position is that the agency officials knew of the State guardianship proceedings, and permitted

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the Secretary of the Interior. An application for the removal of restrictions from such land shall be filed with the superintendent or other officer in charge of the Indian agency or other local facility having administrative jurisdiction over the land. The application shall set forth the experience the applicant has had in the transaction of his business affairs and the reasons why a removal of restrictions is desired. If it appears that the applicant is competent and capable of managing his affairs or that the removal of restrictions is otherwise in the best interests of the applicant, an order removing restrictions against alienation of the land may be issued * * *."

[9] 25 CFR, 1956 Supp., 241.24, and 25 CFR 121.24 (1958 ed.), which require, among other things, advertising for at least 30 days prior to the proposed date for opening bids, and an opportunity for the Indian owner to request that the advertisement afford Indians of certain classes the right to meet the high bid.

appellant to expend the proceeds received from the sale in such proceedings. The present record, including statements by the agency officials, do not support the appellant's view that those officials gave approval to the sale of restricted Indian property, and to the use of the proceeds from such sale. In fact, former Superintendent Stone indicated there was no authorization for the appellant to proceed with the sale of Lucy Kenmille's restricted property in State guardianship proceedings, or for him to account on the basis of those proceedings,[10] but cautioned the appellant that restricted or trust property could not be sold, encumbered, or have any liens against it, while it remained in that status. Consequently, it was for the purpose of removing this inhibition to sale that the matter was presented to the Area Director to consider removing restrictions from the lots. In addition, Superintendent Spencer, Mr. Stone's successor in office, stated in part to the Area Director, by memorandum dated December 13, 1957:

> There is no information in this office, as stated before, to indicate that Mr. Stone requested Mr. Gray to apply for the appointment of legal guardian of Mrs. Kenmille, nor is there anything to indicate Mr. Stone requested him to proceed with the sale of the lots and take the responsibility for the expenditure of proceeds of sale * * *.

Thus, there is no basis which would impel favorable consideration of appellant's alternative claim that the proceeds from the guardianship sale paid by the purchaser be refunded. There is no indication that the Indian in the present case has funds which might be used to reimburse the purchaser of the lots. In fact, the tendency of Lucy Kenmille to dissipate her funds had served as the apparent basis for the investment of some of her restricted funds in the lots in question, upon which restrictions were then imposed to preserve the property. It is readily apparent, therefore, that incident to any disposition of those lots, the determination as to whether, or in what manner, proceeds from such a disposition should be expended was also a function to be exercised by officials of this Department. Moreover, assuming good faith, which is not established by the record, and an adequate consideration, even such circumstances are immaterial where the Government sees fit, as the present case seems to require, to rely on restrictions placed on lands for an Indian's protection.[11] Neither is it essential, in a case where Indian lands are purchased in violation or apparent disregard of restrictions placed on the lands, to return consideration paid as a prerequisite to an action to cancel the sale.[12]

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[10] *Supra*, note 4.

[11] *Heckman* v. *United States*, 224 U.S. 413, 446 (1912); *United States* v. *Gilbertson, et al.*, 111 F. 2d 978 (7th Cir., 1940); *United States* v. *Brown*, *supra*, note 8.

[12] *Heckman* v. *United States*, *supra*, note 11, where it was stated (page 446):

> "Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential pre-

In the circumstances, the Commissioner's decision is affirmed, and the appeal from that decision, herein considered, is dismissed.

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

PATENT REQUIREMENTS OF THE COAL RESEARCH ACT, SALINE WATER CONVERSION ACT AND HELIUM ACT

Patents and Copyrights—Coal Research Program

Section 6 of the Coal Research Act of July 7, 1960 (74 Stat. 337, 30 U.S.C. 666) requires that patents on inventions resulting from Government-financed research and development work under the Act be available to the general public without royalty or other restriction.

Patents and Copyrights—Saline Water Program

Section 4b of the Saline Water Conversion Act of September 22, 1961 (75 Stat. 628, 42 U.S.C. 1954b) requires that patents on inventions resulting from Government-financed research and development work under the Act be available to the general public without royalty or other restriction.

Patents and Copyrights—Helium

Section 4 of the Helium Act Amendments of September 13, 1960 (74 Stat. 920, 50 U.S.C. 167b) requires that patents on inventions resulting from Government-financed research and development work under the Act be available to the general public without royalty or other restriction.

Patents and Copyrights—Coal Research Program

Section 6 of the Coal Research Act of July 7, 1960 (74 Stat. 337, 30 U.S.C. 666) requires the Secretary to take steps to assure that background patents essential to the practice of patents or the use of processes resulting from research and development contracts issued under the Act be available to the general public on reasonable terms.

Patents and Copyrights—Saline Water Program

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Patents and Copyrights—Helium

Section 4 of the Helium Act Amendments of September 13, 1960 (74 Stat. 920, 50 U.S.C. 167b) requires the Secretary to take steps to assure that background patents essential to the practice of patents or the use of processes resulting from research and development contracts issued under the Act be available to the general public on reasonable terms.

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requisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail * * *."

See also *United States* v. *Gilbertson, supra,* note 11.

M-36637 *May 7, 1962*

To: THE SECRETARY OF THE INTERIOR.

SUBJECT: PATENT POLICY ON CONTRACTS EXECUTED UNDER SALINE WATER CONVERSION ACT, COAL RESEARCH AND DEVELOPMENT ACT, AND HELIUM GAS ACT

Research and development contracts are presently being negotiated pursuant to authority in the Saline Water Conversion Act [1] and Coal Research and Development Act.[2] A major issue in the negotiations has been the disposition of patent rights resulting from Government-financed research and of patent rights independently acquired by contractors and essential to the practice of processes to produce fresh water from the sea and to convert coal to gasoline. Some potential contractors under these acts have investments in prior research.[3]

On July 25, 1961, by memorandum entitled "Department Patent Policy on Inventions Made During Work Performed Under Research and Development Contracts," and directed to the heads of bureaus and offices of the Department of the Interior, I stated that it was "the general policy of the Department of the Interior to take title to any invention made by a contractor, except where it would be inequitable for the Department to take title because of substantial independent contributions made to the invention by the contractor." With respect to research conducted under the three acts in the title of this memorandum I stated that "the contractor is also required to grant licenses to the public at reasonable royalties." The memorandum of July 25 set no policy with regard to background patent rights.

Subsequently the Saline Water Conversion Act of September 22, 1961, was enacted. Its legislative history clearly indicates that Congress intended that patents resulting from government-financed research be available without royalty or other restriction to the general public. Because the language of the patent provision in the Act is nearly identical to the patent provisions in the Coal Research and Helium Gas Acts, I have in this opinion not only considered the effect of the subsequent passage of the Saline Water Act on the validity of the July 25 memorandum, but have also re-examined in greater depth my position on the two earlier Acts.[4] These studies of the three Acts, their legislative histories, and of government patent practices have led me to conclude that all research and development contracts made under these acts must provide that foreground patents be available

[1] Act of Sept. 22, 1961, 75 Stat. 628, 42 U.S.C. 1954.

[2] Act of July 7, 1960, 74 Stat. 336, 30 U.S.C. 661–668.

[3] In the discussion which follows the term "foreground patents" refers to patents resulting from government financed research and "back ground patents," to those acquired and owned by the contractor.

[4] The three patent provisions are in pari materia as will be discussed in more detail later in the opinion. Under the doctrines of pari materia the meaning of a later statute can govern the construction of an earlier statute in pari materia. See note 37 *infra*.

without cost to the public. I also conclude that the law precludes you from contracting on terms which do not assure that background patents, when necessary to the practice of any process wholly or partly developed by research financed under these acts, be available to the public on reasonable terms.

FOREGROUND PATENTS

Sec. 4b of the Saline Water Act provides that:

> All research within the United States contracted for, sponsored, cosponsored or authorized under authority of this Act, shall be provided for in such manner that all information, uses, products, processes, patents, and other developments resulting from such research developed by Government expenditure will (with such exceptions and limitations, if any, as the Secretary may find to be necessary in the interest of national defense) be available to the general public. This subsection shall not be so construed as to deprive the owner of any background patent relating thereto of such rights as he may have thereunder.[5]

Nearly identical provisions are contained in the Coal Research and Helium Gas Acts.[6]

The decisive question is the meaning of "available" as it relates to "patents" resulting from Government-financed research. It has been argued that patents are available if they are available at a reasonable royalty. Close examination of the language of subsection 4(b) set out above indicates that "available" as used in relation to patents means available unconditionally. A patent is a grant of the right to exclude others from making, using or selling the thing patented.[7] It includes the exclusive right to license others to make, use or vend it.[8] This right is judicially enforceable by suit (1) to enjoin an infringement and (2) to recover damages by reason of infringement.[9] These remedies reflect the two major benefits deriving from patent ownership: the monopoly or exclusive right, and the right to a royalty or financial compensation for use of the patented item by others.

In essence, then, a patent is a right of exclusion with an ancillary right to compensation for use. Retention of this ancillary right to compensation by a contractor would mean that something less than the patent was being made available to the public. Thus the full patent would not actually be available unless it were available without restriction.

If Congress had meant to provide that merely the use of the patented invention was to be available to the public, it need not have used the word "patents" in the act. The requirement that "informa-

[5] Sec. 4b, Act of Sept. 22, 1961; 75 Stat. 628, 42 U.S.C. 1954b.
[6] 74 Stat. 337, 30 U.S.C. 666; 74 Stat. 920, 50 U.S.C. 167b.
[7] *Patterson* v. *Kentucky*, 97 U.S. 501, 24 L. Ed. 1115 (1897).
[8] *Park-In Theatres* v. *Paramount-Richards Theatres* (D.C. Del.), 81 F. Supp. 466, 472.
[9] 35 U.S.C. 283, 284.

tion, uses, products, processes * * *, and other developments" be available would have assured the availability of the use of the patented invention. By including the word "patents," Congress indicated its intention that something more than the use of the invention, to wit the full patent, should be available to the public.

From the legislative history it is apparent that the words "patent" and "available" were not loosely used here to effect an unintended result. An examination of prevailing patent policies in the Executive Branch, of the legislative history of the Acts, and of other statutes in pari materia indicates that Congress fully intended foreground patents to be available to the general public without restriction.

Government Patent Policy

Any inquiry into the meaning of the patent clauses of the Saline Water, Coal Research, and Helium Gas Acts must be set in the context of over-all Government patent policy as known to Congress at the time it enacted those statutes. Congress, over the past two years, has been conducting a major examination of Government patent policy. Bills were introduced in 1960 by Senator Joseph C. O'Mahoney (S. 3156 and S. 3550) and in 1961 by Senator Russell S. Long (S. 1176) and Senator John L. McClellan (S. 1084) to establish a uniform patent policy with regard to inventions arising out of work financed by the Federal Government. The hearings and studies of the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary have revealed that there are many different patent policies followed by the various governmental departments and agencies.[10]

As stated by Senator Long on the Senate floor, May 3, 1960:

> There is no one Government patent policy. Various Federal agencies and departments have sharply varying policies with regard to taking title to patentable inventions made under research and development contracts with private organizations. The law requires that the Government take title to all inventions resulting from Government-financed research, as in the case of the Atomic Energy Commission, National Aeronautics and Space Administration, and the Department of Agriculture. Congress created this policy by statute. Other policies go to the extreme of automatically giving away all commercial rights to the firm doing research, as in the case of the Department of Defense, the Post Office Department, and the National Science Foundation. This type of policy has been adopted wherever administrative discretion was permitted.[11]

The patent policies followed by the Department of Defense and the Post Office Department are not prescribed by statute. The National

[10] See the Preliminary Reports of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, U.S. Senate, 85th Congress, 2d Sess. pursuant to S. Res. 236, 86th Cong. 1st Sess. pursuant to S. Res. 53, 86th Cong. 2d Sess. pursuant to S. Res. 240, and 87th Cong. 1st Sess. pursuant to S. Res. 55; and Hearings of the Subcommittee, 86th Cong. 2d Sess. pursuant to S. Res. 240 (1960), and 87th Cong. 1st Sess. pursuant to S. Res. 55 (1961).

[11] 106 Cong. Rec. 9216.

Science Foundation, however, operates under a statute requiring that each research contract "contain provisions governing the disposition of inventions produced thereunder in a manner calculated to protect the public interest and the equities of the individual or organization with which the contract or other arrangement is executed * * *" [12]

The Atomic Energy Act and the Space Act have sections which provide that the Government shall take title to patents on inventions arising from Government contract research. The agency may waive the Government's claim to the invention in such circumstances as the agency deems appropriate [13] or upon a determination "that the interests of the United States will be served thereby." [14]

The Department of Agriculture conducts a number of research programs under various laws. A major program is performed under the Research and Marketing Act of 1946, which provides as follows for the two areas of research authorized by the Act:

> Any contracts made pursuant to this authority shall contain requirements making the results of research and investigations available to the public through dedication, assignment to the Government, or such other means as the Secretary shall determine.
>
> * * * * * * *
>
> Any contract made pursuant to this section shall contain requirements making the result of such research and investigation available to the public by such means as the Secretary of Agriculture shall determine.[15]

These provisions are interpreted as requiring a worldwide assignment to the Government of the patent rights to inventions arising out of contract research.[16] Other research is performed by State agricultural experiment stations, financed in part by Federal funds under the Hatch Act.[17] As the Hatch Act contains no patent policy requirements, the Department allows disposition of proprietary rights in accordance with State law or policy.

The Veterans Administration is governed in its research in the field of prosthetic devices by a statute providing that "the Administrator *may* make available to any person the results of his research."[18] [Italics supplied.]

Pursuant to this provision sometimes the Government takes title, sometimes the contractor. In the latter situation it is provided that the contractor must give a royalty-free license to anyone designated by the Veterans Administration. In recent testimony, representatives of the Veterans Administration indicated that no one had ever received a royalty on a patent growing out of one of their contracts, so that

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[12] 64 Stat. 154, 42 U.S.C. 1871.
[13] 60 Stat. 768, 68 Stat. 944, 42 U.S.C. 2182.
[14] 72 Stat. 435, 42 U.S.C. 2457.
[15] 60 Stat. 1084, 7 U.S.C. 427i(a); 60 Stat. 1090, 7 U.S.C. 1624.
[16] Hearings, 87th Cong., 1st Sess., note 10, *supra*, Pt. 2, p. 323—Statement of W. D. Maclay, Assistant Administrator, Agricultural Research Service (1961).
[17] 24 Stat. 440, 69 Stat. 671, 7 U.S.C. 361, *et seq.*
[18] 72 Stat. 1116, 38 U.S.C. 216.

there had been no occasion to order a company to issue a royalty-free license. In one instance the VA has executed a contract which allowed the contractor to retain title with a royalty-free license to the Government and no restrictions on licensing to the public.[19]

The Department of Health, Education and Welfare is governed by no statutory provisions on patent policy. It has generally, though, followed a policy of taking title to patents arising from Government-financed research with two exceptions. Grants to or contracts with nonprofit institutions allow the institutions to retain patent rights so long as they are made available to the public without unreasonable restrictions or excessive royalties. In cancer chemotherapy industrial research contracts, however, provision has been made to leave title with the contractors because contractors claimed a strong background position and demanded title as a price of their participation. The Government retains march-in rights in the event that the contractor does not make the invention available in adequate quantities at a reasonable price. Partly as a result of the Department's patent title difficulties in cancer chemotherapy, in 1960 it was trying to avoid research contracts and use only grants in the future.[20]

It would appear that (except for the National Science Foundation) Government patent policy has fallen loosely into a pattern related to the function of the research. The research and development programs of the Defense and Post Office Departments are aimed at procurement of improved hardware or development of improved processes for use by the Government itself. The contractors are allowed to take title to patents with a royalty-free license to the United States.

In the AEC and NASA mixed situations are presented. Both are concerned with procurement of hardware and development of processes incidental to the furtherance of governmental programs, e.g., atomic military development and military development of space. Both also conduct research for the general welfare of the public, e.g., medical and commercial uses of atomic energy, communications satellites, etc. Under the statutes described above, title to patents is taken by the Government, but this right may be waived in certain circumstances.

The Department of Agriculture conducts research for the purpose of benefiting the agricultural industry. Under the Research and Marketing Act, the Government must take title to patent rights, and no provision is made for waiver of the Government's interest.

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[19] Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, U.S. Senate, on S. 3156 and S. 3550, 86th Cong., 2d Sess., pp. 106–121, and Exhibit No. 6 thereto (1960).

[20] Hearings, note 19, *supra*, at pp. 62 and 85; Patent Practices of the Department of Health, Education and Welfare, Preliminary Report of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess. (1960).

HEW has adopted a policy of retaining title to patents in most cases in the absence of any statutory direction. The purpose of its research, too, is direct benefit to general public, with little concern with procurement of invented items for Government use. The same is generally true of VA prosthetic device research, except that the applicable statute provides that the Administrator may make results of the research available to the public.

The late Chairman of the Government Patents Board, Benjamin B. Dowell, recognized that the agencies in which most inventions occur have widely different interests in the use of such inventions and fall into what he called the "procurement group" and the "public service group," defined respectively, as follows:

> (1) those concerned primarily with the procurement of new and better items of material and equipment for their own use * * *, and (2) those concerned primarily with the development of new items and ideas that would advance the national economy and welfare which they may dedicate to the public for free use. . . .[21]

The major exponent of the license policy, the Defense Department, recognizes the difference between procurement research and public service research by providing that:

> Likewise, the Government may obtain title in recognition of the overriding public interest in inventions in fields relating to the health and safety of the public, if their availability for public use will not depend on patent incentives.[22]

Three administrators of patent policy from the Defense Department commented recently in an article in the Federal Bar Journal [23] that:

> In fields vitally and immediately affecting the public welfare, such as broad-scale penicillin research, weather control, or water desalinification, inventions may be made of such great importance that they will be brought to the point of ready availability for public use without depending in any way on patent incentives. Title in the Government would be a recognition of this overriding public interest.

The general pattern found in a study of the policies followed by the various departments and agencies of Government, is that in research for procurement of commodities or processes for Government use, the title to patents is usually retained by the contractor, depending on special circumstances which include adherence to historical attitudes within the particular department or agency. Where, however, the research is for the purpose of developing inventions in furtherance of the public welfare the departments and agencies almost unanimously provide that the patents must be made available to the public without royalty.

The purpose of saline water research and coal research is to find and perfect methods and techniques in furtherance of the public

[21] Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, March 3 and April 25, 1958, p. 22.
[22] Armed Services Procurement Regulations, Sec. 9-107.1.
[23] Vol. 21, No. 1, Winter, 1961, p. 56.

welfare, i.e., in the one case to make provision for future anticipated water shortages and in the other to develop markets for coal and thereby relieve depression in the coal-producing sections of the country. Even without an expression by Congress, therefore, these programs, in the context of general Governmental policy, would seem to require that the Government take title to patents developed by the research it finances.

A study of the legislation and its history confirms that Congress, mindful of the policies prevailing in the executive departments and agencies and doubtless cognizant of the dangers of permitting administrative discretion, provided that patents developed by federally financed research in the fields of saline water, coal and helium are to be made available to the public without royalty or other restriction.

Legislative History

Coal Research and Development Act

The purpose of the Coal Research and Development Act of 1960 was stated by Representative Ken Hechler in House debate on the bill, as follows:

> At the present time over 95 percent of our coal mines have no facilities and little or no money for coal research. Under H.R. 3375 the Secretary of the Interior would contract for and coordinate research to be done mainly by organizations other than the U.S. Bureau of Mines, such as industrial trade associations, educational institutions, state-operated research facilities, and other recognized research groups. The public availability of the practical, coordinated, future findings of such research organizations are very important to all of us and to future generations in terms of the expanded economic growth and defense of our country.[24]

A similar bill had passed both houses of Congress in 1959 but had been vetoed by President Eisenhower because it established a separate coal research agency outside the Department of the Interior. The vetoed bill contained the same patent provision as the bill enacted in 1960.

Senator Robert Byrd of West Virginia, one of the authors of the Senate version (S. 49) of the vetoed bill, testified before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs on June 10, 1959, and explained the patent provision thus:

> All information resulting from the contracts and otherwise, including patents, would be in the public domain.[25]

The Senate Report on the House version of the vetoed bill, containing the same patent provision, stated that:

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[24] 106 Cong. Rec. 2531.

[25] Hearings before the Subcommittee on Minerals, Materials and Fuels of the Committee on Interior and Insular Affairs, U.S. Senate, on S. 49 and S. 1362, 86th Cong., 1st Sess., p. 20.

No research would be undertaken or conducted unless the information developed therein would become available to the public.[26]

Both this report and the later House and Senate reports on the bill, which was enacted in 1960, state:

Since much of the research work carried on by such (large) companies is for the purpose of gaining competitive advantages, the technical knowledge and benefits gained from such research activities ordinarily do not become available to others *as they would if conducted by a Government agency.*[27] (Italics supplied)

This legislative history of the Coal Research and Development Act indicates the Congressional intent that federally financed patents and research information be available to the public without payment of royalties.

Saline Water Act

The Saline Water Conversion Program was first authorized by the Act of July 3, 1952.[28] The Act, among other things, empowered the Secretary to conduct research and technical development work by means of contracts and grants. No provisions were made in this Act or in later amendments for disposition of patents resulting from such contracts and grants.[29]

In September of 1961, Congress passed a new saline water conversion act to expand and extend the program. The House passed its version of the Act, H.R. 7916, without a patent provision on August 21, 1961. During the debate preceding passage, Representative Chet Holifield raised the patent question and was answered by Representative Wayne Aspinall, Chairman of the House Interior and Insular Affairs Committee:

Mr. Holifield. . . . I want to ask the gentleman this question: There will be a great deal of money spent on research and development, most of it in the basic science, some of which involves research and development, together with the development of machinery and hardware of different kinds. Is it the intent of the gentleman and his committee that where moneys are spent for these types of hardware, machinery, and different types of things which will be developed under this program, this will be made available to the people of the United States without placing upon them patent royalties and things like that?

Mr. Aspinall. As far as the particular bill is concerned now under consideration, that was not taken up, but the gentleman from California knows how I feel about that. I am wholeheartedly in support of that program. We have protected the public wherever public money is spent, and it will be our purpose to do so here.

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[26] S. Rept. No. 559, 86th Cong., 1st Sess., p. 2.

[27] S. Rept. No. 559, 86th Cong., 1st Sess., p. 5, H. Rept. No. 1241, 86th Cong., 2d Sess., p. 7, S. Rept. No. 1494, 86th Cong., 2d Sess., p. 5.

[28] 66 Stat. 328, 42 U.S.C. 1951–1958.

[29] Act of June 29, 1955, 69 Stat. 198, 42 U.S.C. 1952, 1953, 1958; Act of September 2, 1958, 72 Stat. 1706, 42 U.S.C. 1958a–1958g. The 1955 amendment did provide that results or information developed in connection with Government financed *foreign* research "be available without cost to the program in the United States herein authorized."

Mr. Holifield. I hope the gentleman will follow along that philosophy, because under the traditional patent rights of the people of the United States, he who has research and development is entitled to the patent involved. In this instance if the Government of the United States pays for it the people of the United States should have it without regard to having to pay patent royalties to individuals who may be fortunate enough to get a Government contract.[30]

Representative Aspinall later took part in the conference committee deliberations which produced the Act in its final form.

The day after H.R. 7916 passed the House, the Senate Interior and Insular Affairs Committee held a hearing on four bills also designed to expand and extend the saline water conversion program—S. 2156, S. 22, S. 100, and S. 109. The Committee indefinitely postponed action on the latter three bills and acted on S. 2156. Senator Long of Louisiana appeared before the Committee during the hearing and proposed an amendment to S. 2156 to include the patent provision which the present Act contains. After pointing out that the language of his proposal was identical to the patent language in S. 109, introduced by Senator Clinton Anderson, he said,

If we are going to spend large amounts of Federal money to develop something, I think it should be available for the benefit of all the people rather than have to pay very high royalty fees or even put a contractor in position so that he could veto the rights of that to be used for the general public, by other contractors, or by other levels of government.

Addressing Chairman Anderson, Senator Long said:

You were the man who made the fight to retain in the Space Act the requirement that NASA could not give away patent rights unless it found it to be in the national interest to do so. It is not as strict a provision as you have authored as the chairman of this committee in other respects.[31]

Only if "available" means available without cost does Senator Long's comment make sense. The Space Act allows the NASA to waive its rights in favor of the contractor. The patent provision in S. 109, authored by Senator Anderson as Chairman of the Senate Interior and Insular Affairs Committee, required that patents be made "available" to the public. There was no provision for waiver of Government rights. This was identical to the patent clause finally included in the Act.

During debate on S. 2156 after it came out of committee, Senator Gordon Allott of Colorado questioned the wisdom of the patent provision, assuming that under its terms the Government would be required to take title to all patents developed under Government research and development contracts:

If we follow the amendment literally, we create a situation in which a company which has already devoted its best research talent to the development of a

[30] 107 Cong. Rec. 15470, Aug. 21, 1961.
[31] Hearings before the Committee on Interior and Insular Affairs, U.S. Senate, 87th Cong., 1st Sess., on S. 2156, S. 22, S. 100, and S. 109, p. 43 (1961).

process, after contracting with the Government, finds that anything it develops beyond that belongs to the Government for the use of the public, and it would get no benefit therefrom.[32]

No one contradicted his assumption. Senator Allott was concerned that it might be difficult to let contracts with such a strict patent policy. Senator Alan Bible answered that the experience of NASA indicated that this would not be a real problem. Senator Francis Case said, though, that "the problem posed by the Senator from Colorado is real. I hope, as he suggests, that the conferees will give consideration to the problem when the bill is in conference." No change was made in the provision in conference although Senator Allott was a member of the conference committee. Obviously proponents and opponents of Sec. 4(b) of the Saline Water Act understood it to require the unrestricted availability of foreground patents to the general public.

On August 31, 1961, the Senate passed its version of the act, amending H.R. 7916, by striking out all after the enacting clause and inserting in lieu thereof the text of S. 2156.[33] The bill was then sent to conference committee. When the bill was reported out of conference committee to the House with the patent policy provision inserted, Representative Emilio Q. Daddario strongly opposed the provision on the ground that it would force free licensing to the public of all patents developed under Government contract:

(This legislation) makes the invented concept not only free to the Government —which is as it should be when the Government helps pay for the development— but free to the general public as well.[34]

The bill passed notwithstanding this objection.

At no point during the debates in either House did any opponent or proponent suggest that the patent provision would allow a contractor to take title to a patent arising from Government-financed research and make it available to the public only upon the payment of a royalty.

The history of the Helium Act Amendments of 1960 contains few references to the patent provision. None appear to be relevant to the point at issue here.

Through the histories of both the Coal Research Act and the Saline Water Act runs the continuing thread of understanding by all those legislators who concerned themselves with the Government's patent policy that the results of Government-financed research would be made available without charge to the public. Where similar language has been used in other statutes relating to Government research, their application has been consistent with this conclusion.

[32] 107 Cong. Rec. 16616, Aug. 31, 1961.
[33] 107 Cong. Rec. 16628, Aug. 31, 1961.
[34] 107 Cong. Rec. 18050, Sept. 13, 1961.

STATUTES IN PARI MATERIA

Statutes in pari materia are those which relate to the same thing or which have a common purpose. Under the pari materia rule it is well established that, in the construction of a particular statute, or in the interpretation of its provisions, all statutes having the same general purpose should be read together. Such related statutes may be construed together as though they constitute one law, governed by one spirit and policy. The legislative intention should be ascertained from a view of the whole system of which the statutes are the parts.[35]

The three statutes under consideration here are obviously in pari materia as to their patent provisions. All are concerned with making the results of Government-financed research available to the public. The similarity of these provisions was pointed up particularly in the debate on the Saline Water Conversion Bill.[36] Thus the legislative histories of the Coal Research Act and Saline Water Conversion Act as detailed above are relevant to interpretation of one another and of the Helium Gas Act.[37]

Two other acts authorizing contract research in the public interest contain language providing for availability of the results of that research to the public. As detailed earlier, the Agricultural Research and Marketing Act requires in one section that the results of certain research contracted for under its authority be made available to the public "through dedication, assignment to the Government, or such other means as the Secretary shall determine"[38] and in another section that results of other research be made "available to the public by such means as the Secretary * * * shall determine."[39]

The Act was passed in 1946. It has consistently been interpreted by the Department of Agriculture to require that the results of all research under the act be made available *without cost* to the public. Congress had been informed of this interpretation in 1960 and in 1961 when the Coal Research and Saline Water Acts were adopted.[40]

The VA provision authorizing research on prosthetic devices uses the word "available" in a permissive rather than a mandatory sense.

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[35] 82 C.J.S. Statutes Sec. 366, P. 803; 2 Sutherland, Statutory Construction, Sec. 5201 (3d ed.); *Application of Martin*, 195 F 2d 303, 39 C.C.P.A. Patents 893; *cert. den.*, 73 S. Ct. 24, 344 U.S. 824, 97 L. Ed. 641; *Willapoint Oysters* v. *Ewing*, 174 F 2d 676.

[36] 107 Cong. Rec. 16608, 16617, Aug. 31, 1961; 107 Cong. Rec. 18050, Sept. 13, 1961.

[37] *U.S.* v. *Freeman*, 3 How. 556, 11 L. Ed. 724 states: "If it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." See also *Great Northern R. Co.* v. *U.S.*, 62 S. Ct. 529, 315 U.S. 262, 86 L. Ed. 836; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 31 S. Ct. 578, 55 L. Ed. 738.

[38] 7 U.S.C. 427i(a).

[39] 7 U.S.C. 1624.

[40] See notes 11 and 16 *supra;* and *Patent Practices of the Department of Agriculture*, Preliminary Report of the Subcommittee on Patents, Trademarks and Copyrights of the U.S. Senate, 87th Cong., 1st sess. (1961).

It says that the "Administrator may make available to any person the results of his research."[41] While the VA does not always take title to patents arising from its contract research, it does require those contractors who retain title to issue royalty-free licenses to designees of the VA. Only one exception has been made to this policy. That contract was inactive or terminated before 1960, and apparently no royalties have been charged on any patents arising from the contract.[42]

Thus two statutes in pari materia with the Acts here under consideration have been administered in such manner that the results of contract research have been made available to the public without royalty under provisions authorizing the head of the agency simply to make these results "available." This is consistent with the conclusions reached here concerning the use of the same word in the provisions of the Coal Research, Saline Water and Helium Acts.

Patent Title

It might be argued that if Congress had intended that the Government should take title to patents on all foreground inventions, it would have said so in precise language. While this argument has merit, it is not persuasive in light of the foregoing material. By using the term "available," Congress left the Department an area for the exercise of discretion. Title may be left in the contractor upon agreement that he will license all applicants royalty-free, the Government and contractor could take joint title, or the patent could be dedicated to the public. Precise language requiring the Government to take title was not actually necessary to accomplish the congressional purpose that the results of publicly financed research be unconditionally available to the public.

Summary

The Department, prior to the passage of the Saline Water Act, interpreted the Coal Research Act and Helium Gas Act to give the Secretary a rather broad discretion in making the results of Government-financed research available to the public. Recent studies of the language and histories of these acts and of the Saline Water Act indicate that this position was incorrect. The clear language of the Acts requires that foreground patents be available to the public. The entire patent would not actually be available if the contractor retained the right under the patent to collect royalties or to set other conditions on the public use of the patented item.

All "public service group" research agencies, whether bound by statute or not, attempt to follow a general policy of making the results of their research, including patents, available without cost to the

[41] 38 U.S.C. 216.
[42] Hearings, *supra*, note 19, p. 117.

public. Probably the most stringent patent policy provision in the Federal law uses the term "available" in requiring free availability of research results under the Agricultural Research and Marketing Act. The Act makes no exceptions, nor does it allow the administrator to weigh equities. The other member of the public service group governed by a statutory patent provision, the VA, works under similar language.

Two major agencies which conduct research for both procurement and public service purposes are the AEC and NASA. Both are governed by strict patent policy statutes which require the Government to take title unless good cause for waiver is established.

The Office of Coal Research and the Office of Saline Water obviously are engaged in research for public service purposes. It would be inconsistent with the language and the underlying purposes of the acts involved and with the pattern of Government patent policy to ascribe to Congress an intent to establish a policy for availability of the results of this research more restrictive to the public than the policy set for AEC and NASA.

The legislative history of these acts and the history and construction of the same language in other acts involving "public service" research confirm the conclusion that the results of Government-financed research under the Saline Water Act, Coal Research Act and Helium Act must be made available without cost to the public. This may be accomplished either by requiring assignment of patent title to the Government, by requiring assignment of a joint title interest to the Government, by contractor retention of patent title with a contractual obligation to issue unrestricted and royalty-free licensing to any applicant, by patent dedication, or by any other means designed to secure the same result.

BACKGROUND PATENTS

As stated above, the three Acts under consideration require the results of Government-financed research (information, uses, products, processes, patents and other developments) to be available to the general public unconditionally. Many of the contracts now under negotiation involve the continuation of research and development commenced by the contractor and already protected by contractor-owned patents. The further work to be financed by the Government could result in patents or other developments, the use of which would infringe upon the background patents. Where a contractor owns background patents essential to the practice of processes partly financed by the Government, full public availability of Government-owned foreground patents would be an illusory benefit since the contractor could effectively cut off the availability of these processes by refusing to license background patents.

Many of our larger contracts are for the construction and operation of pilot plants to test and improve processes and devices already patented by the contractor. There is a strong probability that no foreground patents would derive from this work. In any event though, the background processes could not be commercially useful without such testing. In these circumstances a fully tested commercially usable process could result, at least in part, from research financed by the Government. This result would not be available to the public unless the necessary background patents could be licensed on reasonable terms. Since the statutes require the availability to the public of processes resulting from research developed by government expenditure, it must be inferred that they preclude the Secretary from agreeing to terms that do not accomplish such availability.

It is provided, however, that the patent section language of the Helium Gas Act and the Saline Water Act in itself shall not be construed "to deprive the owner of any background patent * * * of such rights as he may have thereunder." [43] Consequently, the contracts signed under these Acts cannot be construed, in the absence of express language of agreement, to take rights to background patents.

Other provisions of these acts, though, allow you to acquire patents by purchase in order to accomplish the purposes of the acts. Because of the requirement of availability to the public of the results of foreground research, you should take steps to acquire sufficient interest in background patents to assure the availability of the processes. This may be done in different ways. Since the background positions of the various individual contractors are not uniform the means employed should be determined on a case by case basis. I recommend, therefore, that the contracting officers be authorized to exercise their discretion as to means to effect the purposes of the law.

FRANK J. BARRY,
Solicitor.

OFF-RESERVATION FISHING RIGHTS OF INDIANS IN WASHINGTON AND OREGON

Indian Tribes: Generally—Indian Lands: Ceded Lands—Indian Lands: Individual Rights in Tribal Property

Off-reservation fishing rights guaranteed by treaties with Indian tribes are tribal rights which may be regulated by the tribes, and a tribal member who does not fish in conformity with tribal regulations would not have a treaty-right defense to a State prosecution for violation of State conservation laws.

[43] Under the "pari materia" doctrines, this same admonition may be inferred into the Coal Research Act. See note 37 *supra*.

M-36638 *May 16, 1962*

To: The Secretary of the Interior.

Subject: Treaty Rights of Indians in Washington and Oregon to Fish at Usual and Accustomed Places off of Established Indian Reservations

This is in response to the request for my views concerning the regulation of treaty Indian fishing at usual and accustomed places in Washington and Oregon. For many years disputes have arisen between these States and the Indians over the applicability of the State conservation laws to the Indians fishing off their reservations.

The Supreme Court of the United States in *Tulee* v. *State of Washington*, 315 U.S. 681 (1942), held that the off-reservation treaty rights of Indians are subject to restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. Although it has been concluded in subsequent opinions written in *State* v. *Satiacum*, 50 Wash 2d 513, 314 P. 2d 400 (1957) and *State* v. *McCoy*, No. 2187, in the Superior Court of Washington for Skagit County (1961) that Indian treaty fishing is not subject to State conservation laws, I cannot accept this conclusion. As most recently stated by the Supreme Court of the United States in *Organized Village of Kake, et al.* v. *Egan*, 369 U.S. 60, 75 (1962):

> Even where reserved by federal treaties, [Indian] off-reservation hunting and fishing rights have been held subject to state regulation, *Ward* v. *Race Horse*, 163 U.S. 504; *Tulee* v. *Washington*, 315 U.S. 681 * * *.

The fact that the States have had little success in enforcing their conservation laws against off-reservation Indian fishing does not in any way impair the State's right to enact and enforce such laws. Their difficulty in this respect seems to be in proving that the restriction against the Indian fishing which they seek to enforce is necessary for the conservation of fish. See *Confederated Tribes of the Umatilla Indian Reservation* v. *Maison*, 186 Fed. Supp. 519 (D. Oregon 1960).

At this time it seems beyond argument that the treaty right of Indians to fish at the "usual and accustomed places" off of a reservation is a tribal right which may be exercised by all of the Indians enrolled in the tribe but that such rights are not individual rights so as to be inheritable or alienable as individual property, *Whitefoot* v. *United States*, 293 F. 2d 658 (Ct. Cl. 1961), certiorari denied 369 U.S. 818 (1962); *Mason* v. *Sams*, 5 F. 2d 255 (W.D. Washington 1925).

When the dams were constructed along the Columbia River, the United States in dealing with the fishing rights of Indians made all of its contracts and purchases with the tribal organizations. Further, with respect to the tribal nature of Indian fishing rights, the Court of Claims in *Whitefoot* v. *United States*, *supra*, said:

While property is vested in a tribe, it is the individual member who enjoys the use of the property. Federal Indian Law, *supra*, 757. As to fishing, this is true. But, like the lands, the interests in the fisheries are communal, subject to tribal regulation (293 F. 2d 658, 663).

In our opinion it is clear from the foregoing that a tribe may define and regulate its treaty fishing rights. Furthermore, in so doing the tribal group may adopt ordinances to preserve and protect such fishing rights, since the tribe is not bound to sit idly by while individual members commit acts amounting to confiscation or destruction of the tribe's treaty rights. By prescribing the manner in which the off-reservation treaty fishing right is to be exercised by its members, a tribe may afford the basis for State prosecution of Indians who fish contrary to State law in a manner which the tribe has declared to be outside the scope of the treaty right. An Indian who is fishing outside an Indian reservation at a time or in a manner contrary to the provisions of a tribal ordinance would not be exercising the treaty right, and in this circumstance would not have such right available as a defense to a State prosecution for violation of State conservation laws.

FRANK J. BARRY,
Solicitor.

APPEALS OF ERHARDT DAHL ANDERSEN

IBCA–223, IBCA–229 *Decided May 25, 1962*

Rules of Practice: Appeals: Dismissal

Appeals will be dismissed when the parties notify the Board that they have reached agreement on an equitable settlement to carry out decisions of the Board.

BOARD OF CONTRACT APPEALS

On May 18, 1962, the parties hereto, by their respective attorneys, have stipulated as follows:

"It is hereby stipulated and agreed that by acceptance of the sum of $112,392.89 as an equitable adjustment pursuant to the decision of the Board of Contract Appeals in Docket No. IBCA–223 [July 17, 1961 [1] and December 1, 1961 [2]], and the sum of $750 allowed by the said Board in Docket No. IBCA–229,[3] said appeals are settled, and the parties hereto respectfully request and consent to removal of said appeals from the Board's Docket."

This stipulation was accompanied by a "Release of Claim," signed by the contractor-appellant, and dated May 10, 1962, which, in its pertinent part, reads as follows:

[1] 68 I.D. 201, 61–1 BCA par. 3082, 3 Gov. Contr. 505.
[2] 68 I.D. 342, 61–2 BCA par. 3219, 4 Gov. Contr. 49(d).
[3] Fn. 1, *supra*.

NOW, THEREFORE, in consideration of the payment by the United States to the contractor of the sum of $112,392.89, representing an equitable adjustment in IBCA–223, and the further sum of $750 allowed by the Board of Contract Appeals in IBCA–229, the contractor hereby remises, releases and forever discharges the United States or any of its representatives of and from all manner of debts, dues, sum or sums of money, accounts, claims, and demands whatsoever, in law and in equity, under or related to Contract No. 14–20–500–692, specifically including without limitation all claims or demands asserted to the contracting officer or any of his representatives or to the Secretary of the Interior or any of his delegates.

Since the parties have reached agreement as to the final resolution of the instant disputes, the subject appeals are dismissed.

PAUL H. GANTT, *Chairman.*

We concur:

JOHN J. HYNES, *Member.*
THOMAS M. DURSTON, *Member.*

MILTON H. LICHTENWALNER ET AL.

A–28825 et al. *Decided May 31, 1962*

Rules of Practice: Appeals: Statement of Reasons

An appeal to the Secretary will be dismissed when the appellant fails to file a statement of reasons in support of his appeal.

Rules of Practice: Appeals: Timely Filing

An appeal to the Secretary will be dismissed when the appellant fails to transmit the filing fee for the appeal within the 30-day period allowed for filing the notice of appeal.

Homesteads (Ordinary): Mineral Reservation—Mineral Lands: Nonmineral Entries—Regulations: Applicability—Alaska: Homesteads—Alaska: Trade and Manufacturing Sites

Where a regulation is amended to remove the requirement that entrymen on or claimants of lands which are determined to be prospectively valuable for oil or gas after entry but before the entry or claim has been perfected must file a waiver of rights to the oil and gas for which the land has been found prospectively valuable and to substitute a different procedure in such cases, the provisions of the amended regulation will be applied to claimants and entrymen who have appealed to the Secretary from the demand made under the former regulation that they file a waiver, if there are no adverse rights or if the interest of the United States will not be prejudiced thereby.

Alaska: Homesteads—Homesteads (Ordinary): Mineral Reservation

Before the amendment of 43 CFR 102.22 on December 12, 1961, where land covered by a homestead entry or application was found to be prospectively valuable for oil and gas at any time prior to the submission of satisfactory final proof, it was proper to require the entryman to consent to the imposition of a reservation of the oil and gas to the United States, or apply for a reclassification of the land.

Alaska: Homesteads—Mineral Lands: Nonmineral Entries

The act of March 8, 1922, was an extension to the territory of Alaska of the principles of the earlier surface homestead acts which did not apply to Alaska.

Alaska: Homesteads—Homesteads (Ordinary): Mineral Reservation

Where prior to the amendment of 43 CFR 102.22 on December 12, 1961, lands in a homestead entry in Kenai Peninsula, Alaska, were classified by the Geological Survey as prospectively valuable for oil and gas before the entryman had completed requirements for earning patent under the homestead laws, the entryman was properly required to file a mineral waiver and consent to patenting of the land with a reservation to the United States of the oil and gas deposits in the land together with the right to prospect for, mine, and remove the reserved minerals in accordance with the act of March 8, 1922, as amended, if the lands were not subject to patenting under the act of September 14, 1960.

Administrative Practice—Notice

A finding by the Geological Survey that land in Alaska is prospectively valuable for oil and gas need not be published in the Federal Register under the provisions of section 5(a) of the Federal Register Act.

Administrative Practice—Notice

A decision directed to an individual requiring him to perform certain acts or suffer cancellation of his entry need not be published under the provisions of section 5(a) of the Federal Register Act.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Milton Lichtenwalner and others [1] have each appealed to the Secretary of the Interior from decisions of the Bureau of Land Management which affirmed decisions of the Anchorage land office requiring each of them to file a waiver of the oil and gas deposits in land within his claim or homestead entry.[2]

Since the factual situations relating to many of the appellants' claims or entries are identical or similar and many of them have based their appeals on similar or identical contentions, the appeals may be considered in one opinion.

Before considering the appeals on their merits, it is noted that three of them (under A–28977) are deficient under the Department's rules of practice. Gordon S. Hermansen (Anchorage 030644) and Herrick A. Poore (Anchorge 032792) failed to file any statement of reasons in support of their appeals, as required by 43 CFR, 1960 Supp., 221.33. Leo T. Oberts, Anchorage 031997, did not transmit the required $5 filing fee until six days after the expiration of the 30-day period in which he was required to file his notice of appeal. 43 CFR, 1960 Supp., 221.32(c). Accordingly, the three appeals are dismissed. 43 CFR, 1960 Supp., 221.98, 221.32(c).

[1] The appeal numbers, the names of the appellants, the serial numbers of their entries or claims, and the dates of the decisions appealed from are set out in the appendix.

[2] Lichtenwalner has a trade and manufacturing site claim. The other appellants all have homestead entries.

Basically the appellants initiated their claims on or had their homestead entries allowed for public lands which at the time of entry or allowance were not classified as prospectively valuable for oil or gas. At some time later, either before or after they filed acceptable final proof, but in all cases before they had complied with all the requirements for earning a patent, the lands within their entries were classified by the Geological Survey as being prospectively valuable for oil and gas. In addition, for entries lying on the Kenai Peninsula to which the special provisions of the act of September 14, 1960 (74 Stat. 1028), apply, the entrymen had not complied with all the requirements of the homestead law, except for the submission of acceptable final proof, prior to July 23, 1957.

At the time the requirements for mineral waivers were made, they were proper. Solicitor's opinion, 65 I.D. 39 (1958); *George R. Pollard et al.*, A–27898 *et al.* (October 18, 1960). However, the pertinent regulation upon which the requirements were based has recently been amended on December 12, 1961, to remove the requirement that applicants in appellants' position file a mineral waiver.

The regulation now provides:

(a) Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant *will be notified thereof and allowed a reasonable time* to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in event reclassification is denied, or to appeal. He must be advised that, if a hearing is ordered, the burden of proof will be upon him, and also that, if he shall fail to take one of the actions indicated, his entry or claim *and any patent issued pursuant thereto will be impressed with a reservation of oil and gas to the United States.* 43 CFR 102.22, as amended by Circular 2072, 26 F.R. 12128 (*Italics supplied.*)

Prior to its amendment, the regulation provided, in lieu of the language first italicized, that the entryman or claimant "will be allowed 30 days from notice to furnish consent under the act of July 17, 1914 * * * or" and, in lieu of the second italicized language, that his entry or claim "will be cancelled." In other words, an entryman or claimant is no longer required, upon notification of the report of the Geological Survey, to file a consent to a mineral reservation or to suffer cancellation of his entry or claim if he fails to file the consent or to take action to disprove the mineral classification. He is, instead, notified of the Survey's report and advised that if he does not take action to disprove the mineral classification his entry or claim and any patent issued to him will be impressed with a reservation of oil and gas to the United States.

Where a regulation is amended to bestow a benefit upon an applicant, the Department may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases. Cf. *Henry Offe*, 64 I.D. 52 (1957).

Since there are no intervening rights or prejudice to the United States, there appears to be no reason why the appellants should now be obligated to file a waiver and, insofar as the decisions below require them to do so, they are set aside.

The cases are now to be disposed of under the terms of the current regulation. This regulation states that the entryman or claimant is to be given notice of the determination that his entry or claim is in an area in which valuable deposits of oil and gas may occur. Since such a determination was made in each case before the entryman or claimant was requested to file a waiver, and the decision from which each one appealed gave notice of that finding and of the other options available to the entryman or claimant, which the amended regulation has not changed, the provisions of the amended regulation have been satisfied and there is no necessity for giving a new notice to the entryman or claimant.

Instead, if the imposition of the requirement were proper, the cases are to be processed as though the appellants had appealed from a notification under the amended regulation and the propriety of the notification has been affirmed. In other words, in cases in which the entryman has not filed final proof, no further action will be necessary until he does so, and if he has, all else being regular, he will be offered the limited patent provided for by the regulation, 43 CFR 102.22(a), as amended.

However, since the appellants contend that their claims or entries should be free of the oil and gas reservation, it is necessary to examine their arguments to determine whether their claims or entries should go to patent, all other requirements having been met, free from a reservation of oil and gas.

In a recent decision cited by the Appeals Officer (*George R. Pollard et al., supra*), the Department considered a situation identical in all material facts with appellants' and held:

> As originally enacted, the homestead law (43 U.S.C., 1958 ed., secs. 161, 201) permitted entry only of nonmineral land and if homesteaded land was found to be valuable for minerals at any time prior to the submission of satisfactory final proof the entry was canceled. The act of May 14, 1898, as amended (48 U.S.C., 1958 ed., sec. 371), which extended the homestead laws to Alaska, provided: "* * * that no title shall be obtained hereunder to any of the mineral or coal lands of Alaska * * *." Although several later statutes permitted settlement or entry upon public lands valuable for certain minerals (30 U.S.C., 1958 ed., secs. 81, 83–85, 121–123), they were not made applicable to Alaska. Solicitor's opinion, 65 I.D. 39, 42 (1958). The act of March 8, 1922 (48 U.S.C., 1958 ed., secs. 376, 377), however, permitted the initiation of homestead claims on lands in Alaska "known to contain workable coal, oil, or gas deposits, or that

may be valuable for the coal, oil, or gas contained therein" and provided that the patent issued upon full compliance with the laws under which entry was made shall contain a reservation to the United States of all the coal, oil or gas in the land.

The Solicitor's opinion (*supra*) discussed the details of the application of this act to homestead entries. It held that the act is applicable to homestead applications where the lands they cover are reported by the Geological Survey as either valuable or prospectively valuable for coal, oil or gas; that the act was an extension to the Territory of Alaska of the principles of the surface homestead acts (*supra*); and that the procedure set out in the regulations under the latter (43 CFR 102.22(a)) should be followed with respect to homestead entries falling under the 1922 act. It also held that an entry cannot be allowed or a lease or permit issued until the conflict between them is settled and a reservation imposed where necessary.

The regulation referred to, 43 CFR 102.22(a), provides that—

"Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be allowed 30 days from notice to furnish consent under the act of July 17, 1914 (38 Stat. 509; 30 U.S.C. 121–123), or to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in event reclassification is denied or to appeal. He must be advised that if a hearing is ordered the burden of proof will be upon him, and also that if he shall fail to take one of actions indicated, his entry or claim will be cancelled."

Thus it is plain that a mineral reservation must be imposed on an entry in proper circumstances even though it was allowed without one; that the act of March 8, 1922, is an extension of the surface entry acts to Alaska; that reports of the Geological Survey such as were made in these cases are sufficient to require an entryman or an applicant for an entry to consent to a mineral reservation or follow the alternative set out in the regulation; and that once land is determined to be prospectively valuable for oil or gas it can be entered by or held under a homestead entry only if the provisions of the act of March 8, 1922, and the pertinent regulations are followed.[3]

The appellants who have entries located on the Kenai Peninsula contend that, despite the general rule, their entries are freed of an oil and gas reservation under the provisions of the act of September 14, 1960 (*supra*), passed for the relief of certain Kenai homesteaders. This act provides that the United States quitclaims, as of the date

[3] The regulation cited or one similar to it has expressed the Department's policy for almost a half a century. Circular 393, 44 L.D. 32, 37 (1917). As that circular stated:

"A withdrawal or classification will be deemed prima facie evidence of the character of the land covered thereby for the purposes of this act [act of July 17, 1914, 30 U.S.C., 1958 ed., secs. 121–123]. Where any nonmineral application to select, locate, enter or purchase has preceded the withdrawal or classification and is incomplete and unperfected at such date, the claimant, not then having obtained a vested right in the land, must take patent with a reservation or sustain the burden of showing at a hearing, if one be ordered, that the land is in fact nonmineral in character and therefore erroneously classified or not of the character intended to be included in the withdrawal."

To the same effect see: *Foster* v. *Hess* (On Rehearing), 50 L.D. 276 (1924); *James Rankine* (On Reconsideration), 46 L.D. 46 (1917); see also *Washburn* v. *Lane*, 258 F. 524 (D.C. Cir., 1919).

of the act or as of the date of the issuance of the patent, whichever is later, all right, title, and interest of the United States in and to oil and gas deposits in lands in the Kenai Peninsula, Alaska, patented to homestead entrymen pursuant to homestead entries on which all requirements of the homestead laws had been complied with prior to July 23, 1957, except for actual submission of acceptable final proof.

Oil was discovered on the Kenai Peninsula on July 23, 1957. On March 30, 1956, the Bureau had suspended the disposition by lease or otherwise of lands in wildlife refuges. This order, apparently unintentionally, precluded final administrative action on homesteads in the vicinity of the Kenai Moose Range.[4] The act of September 14, 1960, was intended to prevent unfairness to persons whose homesteads are located near the Kenai Moose range and who, except for this fact, might have received an unrestricted patent on their entries (see footnote 4). The decisions appealed from held that for an entryman to be entitled to the benefits of the act of September 14, 1960, he must have fully complied with the residence, cultivation, and improvement requirements of the homestead laws and the regulations thereunder before July 23, 1957. The decisions held that the appellants with homesteads on the Kenai Peninsula had not complied with all the requirements of the homestead laws prior to July 23, 1957, and thus did not qualify for the benefits of the act of September 14, 1960.

Most of Kenai appellants concede that they did not meet the necessary requirements prior to July 23, 1957, but they offer various excuses, such as inability to secure equipment to clear land, for their failure to do so. A few assert that they complied but they offer no proof of their assertions. In short, none of the Kenai appellants has shown that he comes within the provisions of the act of September 14, 1960.

Many of the non-Kenai homesteaders protest that the provisions of the act of September 14, 1960, should apply to them. The Congress, however, determined that the relief granted by the act should be extended only to Kenai homesteaders and the Secretary has no authority to extend it to others.

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[4] The departmental report of June 18, 1959, on S. 1670, which became the act of September 14, 1960, pointed out that even though the order of March 30, 1956, did not prevent a homestead entryman from submitting acceptable final proof after the date of the order, the fact that the order prevented action from being taken on the final proof may have induced some entrymen not to submit proof because doing so would have seemed pointless. The period of suspension under the order continued until after oil was discovered and, consequently, there was a period of 15 months before oil was discovered when persons who completed requirements for homestead patents may not have submitted final proof because of the order of March 30, 1956.

The Department recommended that S. 1670 provide for the issuance of patents without an oil and gas reservation to all homestead entrymen on the Kenai Peninsula who had fully complied with all the requirements of the homestead laws except for the actual submission of acceptable final proof before the discovery of oil on July 23, 1957. (See letter of June 18, 1959, from the Secretary of the Interior to the Chairman of the Senate Committee on Interior and Insular Affairs commenting on S. 1670. Senate Report No. 1905, 86th Cong., 2d. Sess.)

The appellants advance various other grounds for relief. Many allege that employees at the Anchorage land office told them when their entries were allowed that they would receive unrestricted patents upon compliance with the requirements of the homestead law and that they would not have undertaken the difficulties of homesteading in Alaska if they had known they were to receive a restricted patent. Since the lands were not classified as prospectively valuable for oil and gas when the entries were allowed, the advice given was correct, although perhaps incomplete. Whether it was given or not or was accurate or not cannot, however, authorize the issuance of an unrestricted patent to the appellants if, as we have seen, the law does not permit it. An appellant for public lands cannot rely upon erroneous advice given him by a government employee to obtain a right denied him by law. *Robert L. Miller*, 68 I.D. 81 (1961).

Still another point common to many appeals is that one or more of an appellant's neighbors have received unrestricted patents and that, in all fairness, he should also. Since entrymen could earn the right to an unrestricted patent by complying with all requirements of the homestead law prior to July 23, 1957, and some doubtless did, the fact some unrestricted patents have been issued is no warrant for granting them to entrymen such as appellants who did not.

Many entrymen advert to the difficulty they experienced in obtaining equipment to clear their land in order to cultivate it. While such problems may be pertinent in other contexts, they are not relevant to the issue of whether an entryman had earned the right to an unrestricted patent under the general homestead law or the Kenai homesteaders relief act. If he has not, his entry must remain subject to an oil and gas reservation in accordance with the pertinent regulation.

Another ground raised by most of the appellants is that the classification of the land in their entries as prospectively valuable for oil and gas is erroneous. Many point out that there are no commercial wells near their entries or that the well drilled nearest their entries was a dry hole. Others state that no representatives of the Geological Survey ever appeared on their entries or that their entries are not on the Kenai Peninsula. All these objections are without merit. The lands covered by the appellants' entries were determined to be prospectively valuable for oil and gas on the basis that they lie within a sedimentary basin or other area favorable to the accumulation of oil and gas deposits.[5] The technical considerations on which the conclusion to adopt such a method of classification rests are set out in the documents cited in footnote 5. The appellants have offered nothing to demonstrate

[5] "Criteria for Classification of Oil and Gas Lands"—Minutes of Oil Board, November 8, 1956; Memorandum to the Director of the Geological Survey from Chief, Conservation Division, December 10, 1956, both printed in Hearings before the Subcommittee on Public Lands of the Committee on Insular and Interior Affairs, United States Senate, on S. 1670, 86th Congress, 1st session, Part 2, pages 250–253.

that this approach to the problem is not permissible. Therefore, I conclude that the determination that the lands involved in these appeals are prospectively valuable for oil and gas was proper and it will not be disturbed.

Another often repeated allegation is that the classification of the lands as prospectively valuable for oil and gas was kept secret. Assuming that there was some delay in making available to the public the reasoning underlying the Geological Survey's changed approach to the classification problem, the pertinent documents have been accessible to all no later than December 1959.[6] Since the time within which the appellants were required to respond to the request that they file a mineral waiver was extended by the Department until the passage of the act of September 14, 1960, it is apparent that there was ample time after December 1959 for the appellants to submit whatever evidence they desired to disprove the classification. Therefore, the fact that the documents were not immediately available to them has not been prejudicial to the appellants.

Several of the appellants have asked for the reclassification of the land in their entry as nonmineral. None, however, submitted any showing to support his request for classification. There is no justification for reclassifying the land or for ordering a hearing on the classification.

Another argument raised by many appellants is that they submitted final proof prior to the date of the Geological Survey report classifying the land in their entries as prospectively valuable for oil and gas and that, consequently, the burden of proving the land nonmineral in character is upon the Government. The regulation, *supra*, shifts the burden to the Government, however, only when the entryman has submitted satisfactory final proof or has perfected his claim. One of the requirements for completing final proof is that the entryman must publish notice of his intention to do so and file proof of publication.[7] 43 U.S.C., 1958 ed., sec. 251; 43 CFR 65.23, 65.27. In all cases the appellants had not complied with this requirement before the Geological Survey reported the lands in their entries to be prospectively valuable for oil and gas. Thus, in accordance with the provisions of the pertinent regulation, 43 CFR 102.22(a),[8] the burden of proving that the land is nonmineral in character is upon them.

Finally, one appellant, Milton H. Lichtenwalner (Anchorage 049563), contends that his trade and manufacturing site cannot be subjected to a mineral reservation because the Geological Survey report declaring it prospectively valuable for oil and gas was not pub-

[6] See footnote 5, *supra*.

[7] Except in Alaska, notice of intention to make final proof must be published and posted before final proof can be submitted. 43 CFR 166.45, 166.46.

[8] The amendment of the regulation by Circular 2072 (*supra*) left this provision unchanged.

lished in the Federal Register. He relies upon section 5(a) of the Federal Register Act (44 U.S.C., 1958 ed., sec. 305(a)), which requires publication in the Federal Register of Presidential proclamations and Executive orders of general applicability and legal effect and documents required to be so published by act of the Congress. A proviso states that any document or order which prescribes a penalty shall be deemed to have general applicability and legal effect.

It is clear that a communication informing the Bureau of Land Management of a finding of the Geological Survey relating to the land included in the appellant's trade and manufacturing site is not a Presidential document or one determined by the President or the Congress as requiring publication in the Federal Register.

Lichtenwalner urges that it provides a penalty and thus must be published. However, an examination of the memorandum in his case from the Geological Survey to the Director, Bureau of Land Management, reveals that it is concerned only with the mineral value of the land in his claim without any reference whatsoever to a possibility of a penalty.[9] The penalty to which the appellant refers is found only in the land office decision requiring him to pursue one of three courses of action or suffer cancellation of his claim. Decisions in individual cases are not within the publication requirements of the Federal Register Act. *Brownell* v. *Schering Corporation*, 129 F. Supp. 879, 903–905 (D.C.N.J., 1955); affirmed 228 F. 2d 624 (3d Cir., 1956); cert. denied, 351 U.S. 954 (1956).

Thus, in conclusion, in the absence of any reason in any case to reach any other conclusion, the claims and entries of the appellants and any patent issued for them are and will be impressed with a mineral reservation. However, there is now no requirement that the appellants sign a mineral waiver or suffer cancellation of their claims or entries.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the appeals of Gordon S. Hermansen, Herrick A. Poore, and Leo T. Oberts are dismissed, the decisions of the Bureau of Land Management as to the remaining appellants are set aside, and the cases are remanded for further proceedings consistent herewith.[10]

EDWARD W. FISHER,
Deputy Solicitor.

[9] In an analogous situation the Department has held that a definition of the known geologic structure of a producing oil or gas field is not required to be published under section 3(a)(3) of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1002(a)(3)). *Max Barash, The Texas Co.*, 63 I.D. 51 (1956), reversed on other grounds, *Barash* v. *McKay*, 256 F. 2d 714 (D.C. Cir., 1958).

[10] The dismissal of the three appeals returns the three cases (Anchorage 030644, 032792, 031997) to the jurisdiction of the Director, Bureau of Land Management. Further action in these cases should be taken by the Bureau consistent with this decision.

APPENDIX

Appeal No.	Appellant	Anchorage Serial No.	Director's Decision
A–28825	Milton H. Lichtenwalner	049563	February 2, 1961.
A–28849	John J. Yurman	025656	March 2, 1961.
A–28851	Manvil H. Olson	026200	March 2, 1961.
	Carl D. Riddels	026677	
	Willie B. Hunter	028436	
	Edwin G. Church	029675	
	Robert L. Lucas	031034	
		031661	
	Clinton M. Adcock	031088	
	Joseph V. Kruscavage	031103	
	William R. Church	031804	
	Evert G. Van Fleet	032332	
	Ralph E. Phillips	032402	
	Wesley D. Miekle	033297	
A–28873	Ira L. Miller	031569	March 6, 1961.
A–28874	William Dittman	034751	March 2, 1961.
A–28894	Willie L. Seely	029359	March 6, 1961.
A–28931	Lawrence M. Lewis	032558	March 2, 1961.
A–28935	Alexander P. Shadura	032385	March 6, 1961.
A–28942	George Bonin	032613	March 29, 1961.
A–28977	Walter E. Sorton	025512	March 2, 1961.
	Zimri L. Haworth	027056	
	Morris Lee Porter	027799	
A–28977	Calvin C. Daniel, Jr	029324	March 2, 1961.
	Luther R. Rogers	029355	
	H. King Middleton, Jr	030174	
	Bobby E. McBride	030305	
		033343	
	Kenneth McGahan	030514	
	James Clinton Robnett	030535	
	Gordon S. Hermansen	030644	
	Herman R. Hermansen	030702	
	George Axel Moen	031269	
	Neil E. Sagerser	031380	
	Leo T. Oberts	031997	
	William A. Peterkin	032049	
	George F. Wunsch	032580	
	Herrick Poore	032792	
	Theodore Rozak	033488	
	Murray Bell	033729	
A–29211	Jess H. Nicholas, Jr	032690	September 11, 1961.
A–29321	William Francis Allen	031376	October 26, 1961.
A–29342	Edward C. Carney	027887	March 2, 1961.

C. W. TRAINER

A–28895 *Decided June 4, 1962*

Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

The automatic termination provision in section 31 of the Mineral Leasing Act, as amended, does not apply to a situation where, due to other contingencies, additional rent may become due on a date other than the anniversary date of a lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

C. W. Trainer has appealed to the Secretary of the Interior from a decision by the Appeals Officer, Bureau of Land Management, dated March 14, 1961, holding that three oil and gas leases, Las Cruces 066147–B, Las Cruces 066147–C and Las Cruces 066147–E, had terminated on September 30, 1960, for failure to pay rent, under the amendment of section 31 of the Mineral Leasing Act by the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 188), and that therefore assignments of the leases to Trainer, filed in October 1960 could not be approved.

Section 31, as amended in 1954, provides in material part:

> Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however*, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made.

The question is whether the leases terminated under this provision of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*).

The lands in the three leases were originally portions of Las Cruces 066147, issued as of December 1, 1948. Part of the land was segregated in a separate lease designated as the B lease by a partial assignment approved effective May 1, 1951. The base lease and the B lease were further segregated in separate leases designated as the C and E leases by partial assignments filed in September 1958. The assignments became effective on October 1, 1958,[1] and each segregated lease, including the B lease, was continued in full force and effect for a period of two years therefrom and so long thereafter as oil or gas is produced in paying quantities, under section 30(a) of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 187a).[2]

[1] Las Cruces 066147–B covers 120 acres in sec. 15; Las Cruces 066147–C covers 40 acres in sec. 3 (the SE¼SW¼); and Las Cruces 066147–E covers 40 acres in sec. 15, all in T. 20 S., R. 35 E., NMPM, New Mexico. Las Cruces 066147, the base lease, covers 280 acres, including the N½SW¼ and the SW¼SW¼ sec. 3, T. 20 S., R. 35 E.

[2] Section 30(a) was amended by section 6 of the Mineral Leasing Act Revision of 1960 (30 U.S.C. 1958 ed., Supp. III, sec. 187a). However, the amendment is not applicable to leases issued prior to the effective date of that act.

At the time the assignments became effective, the annual rental on each lease had been paid for the tenth lease year. The rentals for the eleventh lease year, commencing on December 1, 1958, were paid in advance of the anniversary date of the leases. Prior to December 1, 1959, the rentals for that portion of the twelfth lease year during which the leases would remain in effect by virtue of the partial assignments, absent production, were paid on a pro rata basis, i.e., for ten months of the year, or through September 30, 1960.

On September 29, 1960, the first productive well was completed within Las Cruces 066147, in the NW¼SW¼ sec. 3, T. 20 S., R. 35 E., NMPM, New Mexico. The land office was notified of this completion by memorandum from the Geological Survey dated October 11, 1960, received in the land office on October 18, 1960. The memorandum included the information that as the result of the discovery the SW¼ sec. 3 was, effective September 29, 1960, added to the known geologic structure of a producing field.

However, prior to the receipt of this information, the land office had, on October 17, 1960, posted the lands in the B, C, and E leases as being available for the filing of new noncompetitive lease offers (43 CFR, 1960 Supp., 192.43).

On October 20, 1960, the record titleholders of the three leases protested this action and requested that no drawing be held with respect to these lands. They contended that their leases had not terminated and that they had until December 1, 1960, to pay their rentals. The rentals for the balance of the twelfth year and all of the thirteenth year were paid on October 25, 1960, and, on October 26, 1960, assignments of the three leases to Trainer were filed.

The protest was denied by decision of the land office dated October 27, 1960, on the ground that, while the leases would normally be entitled to a further two-year extension from September 29, 1960, under another provision in section 30(a) of the act,[3] the rentals had not been timely paid and therefore the leases had automatically terminated on September 30, 1960.

In affirming the land office decision, the Bureau held that the Mineral Leasing Act requires the payment of a full year's rental whenever a lease is to run for a full year from and after any rental due date, whether or not that date coincides with the anniversary date of the lease. The decision stated that while the amendment to section 31 provides for the automatic termination of leases upon failure of the lessees to pay rental on or before the anniversary date, the term "anniversary date" has no significance, and that the Congress did not intend that a lease should extend through any period for which rentals had not been paid in advance.

[3] This provision extends leases segregated by partial assignment for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease.

While the Department has held that the automatic termination provision leaves no discretion in the Secretary and that if a lease falls within its terms it terminates without any action by the Department (*Champlin Oil and Refining Company*, 66 I.D. 26 (1959); *cf. United Manufacturing Company et al.*, 65 I.D. 106 (1958)), I do not construe the provision as applying to the situation here, where due to other contingencies additional rent became due on a date other than the anniversary date of the lease. To so construe the provision would be to disregard the plain wording of the statute that the "anniversary date of the lease" is the controlling date.

The anniversary date of a lease does not change. Where a lease already in its tenth year is segregated by partial assignment and thus extended for an additional two-year period from the effective date of the assignment, the anniversary date of the lease does not shift from the date of the lease (in this case December 1) to the date from which the extension is to run (in this case October 1). In such a situation, for the extension to be effective, the rental for the tenth year must have already been paid in advance and the rental for the eleventh year does not become due until the anniversary date of the issuance of the original lease. Likewise, the rental for that part of the twelfth year during which the lease is to remain in existence by virtue of the partial assignment comes due on the anniversary date of the issuance of the lease. The fact that the rental for that period is prorated on the basis of the number of months of the year during which the lease is to remain in effect [4] does not change the anniversary date of the lease.

Thus when, during the course of the twelfth year, and while the lease is still in effect, something happens which postpones the termination of the lease beyond the time for which rent has been paid, the lease does not fall within the scope of the automatic termination provision. In such a situation I believe that the holders of such extended leases should be given notice that because of the extension of their leases additional rent is due and the lessees should be given a reasonable time during which to place their lease accounts in good standing. Otherwise the two-year extension accorded to the lessee on the discovery of oil or gas in paying quantities on another segregated portion of the lands originally subject to the same lease could be defeated.

Here, the discovery which brought about the extension of the B, C, and E leases occurred just one day prior to the date on which those leases would have otherwise expired. There is nothing in the record to indicate that the then record titleholders knew of the discovery on the base lease prior to September 30, 1960. Nor is there anything in the record to indicate that the land office was apprised prior to post-

[4] See Associate Solicitor's opinion M-36464 (August 8, 1957).

ing that the discovery resulted in the land in the C lease being placed within a known geologic structure of a producing field as of September 29, 1960, and thus no longer available for noncompetitive leasing.[5]

Accordingly, it must be held that the B, C, and E leases did not terminate automatically for failure to pay the additional rental due on October 1, 1960, or on the first day thereafter when the land office was open for business and the fact that the rent for the balance of the twelfth year was not paid on the first day thereafter (October 1, 1960, being a Saturday)[6] was not a bar to the approval of the assignment of the three leases to Trainer.[7]

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Appeals Officer, Bureau of Land Management, is reversed and the case is remanded to the Bureau for consideration of the assignments affecting Las Cruces 066147–B, 066147–C and 066147–E, filed by C. W. Trainer.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF BROOKS AND MIXON

IBCA–277 *Decided June 5, 1962*

Contracts: Delays of Contractor—Contracts: Damages: Liquidated Damages

The allowance of additional time for performance of a contract, allegedly due to rain, is denied where the contractor fails to establish that periods of precipitation were unforeseeable and unusually severe within the meaning of Clause 5(c) of Standard Form 23A (March 1953).

Contracts: Delays of Contractor—Contracts: Damages: Liquidated Damages

The contracting officer's assessment of liquidated damages for alleged failure of a contractor to perform within the time required must be set aside, where the time for performance for the period of assessment had been extended by the contracting officer for an excusable cause.

BOARD OF CONTRACT APPEALS

This is a timely appeal from two separate findings and decisions of the contracting officer dated March 7, 1961, which held that: (1) there was an unexcusable delay of 71 days in completion of Contract

[5] No copy of the notice of the availability of these lands is in the present record. However, the State Supervisor, in a memorandum dated November 4, 1960, states that the lands were posted on the October list of lands available for simultaneous filing.

[6] Even if the automatic termination provision of section 31, as amended, were applicable, the lease would not have terminated on September 30, 1960, but on October 1, 1960. *Duncan Miller*, 66 I.D. 342 (1959).

[7] The C lease covers land which was, effective September 29, 1960, within the known geologic structure of a producing field. Thus the rental under that lease would have increased, beginning with the 13th year of the lease, had notice of the fact been given to the lessee 30 days prior to the beginning of the new lease year (43 CFR 192.80(b)(1)).

No. 14–10–0100–966, and (2) 53 days unexcusable delay in the performance of Contract No. 14–10–0100–987, beyond the time specified in each contract for performance; and that the contractor be assessed the sums of $7,100 and $5,300, respectively, for the specified periods of delay at the rate of $100 per day, as liquidated damages, pursuant to the contract terms.[1] Remission of both assessments is sought by appellant on the grounds that the delays were excusable.

This dispute arises under the above-captioned contracts which required appellant to furnish all labor, materials, and equipment for the construction of a total of four bridges, two overpasses, approaches thereto, paving, and other allied work on the Natchez Trace Parkway, known as Project 1G3, 1G4, and 1G5, located in Tennessee, and Project 3E3, 3E4, and 3E5, located in Mississippi.[2]

Both contracts were on Standard Form 23 (Rev. March 1953), and incorporated the General Provisions of Standard Form 23A (March 1953), which included the regular " * * * Damages for Delay—Time Extensions" provisions, Clause 5, which authorized an extension of time for performance for excusable delay.[3] Each contract contained a Liquidated Damages clause which provided that appellant be assessed liquidated damages of $100 per calendar day for delay in completion of the contracts beyond the time agreed upon.[4] Both contracts contained a Suspension of Work clause, which authorized the suspension of work either in whole, or in part, for such periods as may be deemed

[1] A separate appeal was taken by appellant from each decision of the contracting officer. The appeals were consolidated and given one appeal number by order of the Board of September 11, 1961.

[2] Contract No. 14–10–0100–966, Project 1G3, 1G4, and 1G5, called for the construction of (1) a reinforced concrete rigid frame bridge, (2) a reinforced concrete girder bridge, (3) a reinforced concrete box culvert type bridge, approaches thereto, and other allied work in the State of Tennessee. Contract No. 14–10–0100–987, Project 3E3, 3E4, and 3E5 called for the construction of (1) a 3-span concrete slab bridge, (2) a 3-span concrete girder overpass, (3) a single-span concrete rigid frame overpass, approaches, and other allied work in the State of Mississippi.

[3] The pertinent part of this clause, with which we are concerned, is quoted as follows: "(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof, because of any delays in the completion of the work due to *unforeseeable causes* (italics supplied) beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: *Provided*, That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof."

[4] Article 8.8 Prosecution and Progress and Table 8.1 Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, January 1957, as revised on August 12, 1957, designated as FP–57.

necessary by the Government engineer due to unsuitable weather conditions.[5]

The contracting authority for both contracts was the Department of the Interior, National Park Service, represented by the Director, National Park Service, as contracting officer. Under an interdepartmental agreement, the Bureau of Public Roads, Department of Commerce, served as the constructive agency for the National Park Service, and the Regional Engineer acted as the authorized representative of the contracting officer.

An oral hearing took place before the Board on October 17 and 18, 1961, at Washington, D.C., at which time the testimony of witnesses and other evidence were proffered by appellant and the Government.

Contract No. 14-10-01000-966
Projects 1G3, 1G4, and 1G5

This unit price construction contract in the amount of $207,630.50, later increased by $12,849.84, for a total consideration of $220,480.34, was awarded the above-captioned contractor, hereafter referred to as the appellant, on June 16, 1958. Notice to proceed, dated July 9, 1958, was received by appellant on July 11, 1958, so that the official time for performance began on July 12, 1958. The work was to begin within 10 days and be completed within 350 calendar days thereafter.

The work was not completed until almost two years later on July 8, 1960, or 728 days subsequent to July 12, 1958, which constituted an alleged delay of 71 calendar days, and resulted in the assessment of $7,100 as liquidated damages at $100 per day, pursuant to the contract terms.

Appellant urges that the entire 71 days are excusable, within the meaning of the "* * * Damages for Delay—Time Extensions" provision of the contract, *supra*, and that the total assessment of $7,100 should be remitted for reasons as follows: (1) that unusually severe rain interfered with, and delayed all construction work, particularly the building of a detour road and the reconstruction of U.S. Highway 64, at the Project 1G3 bridge, which road had to be reconstructed and replaced with new material, (2) that the number of inches of rainfall is not the proper criteria for determination of excusability for delay, (3) that the Government interfered with appellant's plan to begin construction at Project 1G4 and required it to initiate work on Project 1G5, and (4) that the Government delayed appellant's progress in staking out Project 1G4 and in approving plans for reinforced steel and timber construction.

In reply to appellant's written requests of June 4 and December 8,

[5] Article 8.7. FP-57 provided in the case of partial suspension of work, the number of days charged against contract time be computed by multiplying the number of calendar days allowed for performance of the work originally shown in the contract by the ratio of the sum earned during the period of partial suspension to the original contract amount.

1959, for extensions of time for performance due to excusable delay, and to appellant's request of August 4, 1960, for remission of the assessment of liquidated damages, the Regional Engineer, as the representative of the contracting officer, replied to all three letters in his findings of fact and decision of March 7, 1961, wherein he found appellant was entitled to an extension of 285 days for performance.

With the exception of an extension of 22 days for performance due to an increase in contract quantities, all delay periods were attributable to unusually severe rainfall as encompassed within the meaning of the "* * * Damages for Delay—Time Extensions" provision (Clause 5), *supra.* The contracting officer's determinations were based on the climatological data for a 10-year period (1950–1959, inclusive) of the United States Weather Bureau, located at Waynesboro, Tennessee, approximately 10 miles from the work site.

Unusual Weather
1958

Due to unusual and severe rainfall during the month of November 1958, an extension of 5 days was granted, and pursuant to the Suspension of Work clause (Article 8.7, FP–57), all work was suspended from November 30 to December 10, 1958, for a period of 10 days. All work was further suspended for 3 days in December 1958, and 7 days in January 1959. A partial suspension for a period of 130 days from December 12, 1959 to April 13, 1960, was issued on December 11, 1959.

Unusual Weather
1959 and 1960

The Regional Engineer further determined that appellant was entitled to additional time for performance of 6, 11, 3, and 2 days, during the months of January, February, March, and April 1959, respectively, and for 50 days during the period from October 16 to December 11, 1959.[6] Appellant was permitted an extension of 52 days for rebasing and resurfacing Highway U.S. 64 during the period from April 20 to June 10, 1960.

In brief, appellant was given a time credit due to unusual weather conditions for 53 days, from November 14, 1958 to April 11, 1959, and by suspension of work, either total or partial, during the period from October 16, 1959 to June 10, 1960, for 232 days,[7] which constitutes a total extension of 285 days for performance.

The contracting officer's determinations were based upon official United States weather reports covering a 10-year period, which in our opinion constitutes a convincing method of distinguishing severe or

[6] Seven days were deducted from this period of 57 days, pursuant to the provision for partial suspension set forth in Article 8.7, FP–57. (See fn. 5.)

[7] A 52-day period from April 20 to June 10, 1960, was excusable due to rebasing and resurfacing U.S. Highway 64, at Project 1G3.

unusual weather conditions from usual weather conditions at the work site,[8] specifically in view of the proximity of the weather station to the construction site.

A report for 70 weeks (July 21–November 21, 1959), was prepared without specifying a source, by appellant, and offered in evidence. This evidence fails, however, to establish that rain and snow periods indicated thereon were unforeseeable, or unusually severe, as required by the "* * * Damages for Delay—Time Extensions" provision (Clause 5), in order to entitle appellant to further excusable time for performance.[9]

From the available evidence, the Board finds that appellant is not entitled to a further extension of time for performance, attributable to unforeseen and unusually severe weather, and considers the contracting officer's determinations of excusability, a commensurate allowance for weather conditions encountered by appellant during performance of subject contract.

Appellant's contention that it is entitled to an excusable delay due to Government interference with its plan to begin excavating for the construction of the bridge at the 1G4 Project, is untenable, and must be denied, since the Government engineer insisted only that the preliminary work on the detour road be accomplished prior to bridge construction, which was required by the contract terms.

We find no merit in appellant's claim for delay in performance allegedly caused by the Government's failure to "stake out" Project 1G4, since the evidence establishes that this bridge was staked out on October 13, 1958, yet excavating for the same by appellant did not begin until November 10, 1958.

We find no error in the contracting officer's findings, as corrected at the oral hearing, that there was an unexcusable delay of 71 days in performance of this contract.[10]

Accordingly, appellant's appeal therefrom is denied in its entirety.

Contract No. 14–10–0100–987
Projects 3E3, 3E4, and 3E5

This unit price construction contract in the amount of $173,147.25 was awarded appellant on June 27, 1958. It called for the construction of (1) a 3-span concrete slab bridge, (2) a 3-span concrete girder overpass, (3) a single span concrete rigid frame overpass, approaches thereto, and other allied work in the State of Mississippi.

Work was to begin within 10 days and be completed within 300 calendar days following receipt of notice to proceed. The official time

[8] *Triangle Construction Company,* 69 I.D. 7, 62–1 BCA par. 3317.
[9] *Caribbean Engineering Company* v. *United States,* 97 Ct. Cl. 195, 229 (1942).
[10] Time computation was as follows: Performance July 12, 1958, to July 8, 1960—728 days. Excusable delay of 285 days, plus 22 days for increased quantities, plus 350 days for performance by terms of contract, equals 657 days. 728 minus 657—71 days.

for performance began on July 28, 1958. The contract was not completed until November 30, 1959, or 490 days subsequent to July 28, 1958, which constituted an alleged unexcusable delay of 53 days, and resulted in the Government's assessment of liquidated damages for this period at the rate of $100 per day for a total sum of $5,300.

It is appellant's contention that there should be no Government assessment of liquidated damages, since all delays in performance are excusable, pursuant to Clause 5(c) of Standard Form 23A, "Termination for Default—Damages for Delay—Time Extension" provision, *supra*, which states that the contractor shall not be charged with liquidated damages because of any delays in completion of the work attributable to unforeseeable causes which includes unusually severe weather. Other allegations of excusable delay attributable to Government interference with performance will not be discussed, in view of our determination herein, that there should be no assessment of liquidated damages for failure to perform within the time required.

The evidence discloses that the District Engineer directed the suspension of all work due to rain and wet grounds, except for one period of 5 days, from December 10 to December 16, 1958 (which was attributable to snow), pursuant to the Suspension of Work clause (Article 8.7 of FP–57 Specifications), as enumerated below:

1958	*Days*
September 11 to September 25	14
October 31 to November 3	3
November 14 to November 19	5
November 28 to December 1	3
December 13 to December 18	5
December 22 to January 3	11
1959	*Days*
January 4 to March 17	71
May 20 to May 26	6
June 9 to June 15	6
Total	124

In his findings of March 7, 1961, the contracting officer extended the time for performance from October 6 to October 15, 1959, or for a period of 10 days, due to wet soil conditions which did not permit seeding and sodding operations.

By Directive S, dated October 12, 1959, the seeding and sodding period was extended from October 16 to October 31, 1959, and by amendment thereto on November 23, 1959, this period was further extended from October 31 to *November 30, 1959*, for a total extension of 45 days.[11]

[11] "1. Article 591–3.4, Seeding, as prescribed on page D–5 of the proposal and contract, is hereby modified to extend the fall seeding period from October 16 to October 31, 1959.
"2. Article 594–3.4, Placing Sod, as prescribed on page D–7 of the proposal and con-

This contract was completed on *November 30, 1959*. In his findings of fact and decision of March 7, 1961, the contracting officer did *not*, however, extend the time for performance from October 16 to November 30, 1959, in accordance with Directive S, dated October 12, 1959, and the amendment thereto, issued on November 23, 1959.

Although the contracting officer determined that there was an unexcusable delay of 53 days in performance, which resulted in the assessment of $5,300 as liquidated damages for this period, this assessment must fail, since Directive S and the amendment thereto, unquestionably extended the time for performance to November 30, 1959, which was the date of completion of performance.

Accordingly, the appeal from the contracting officer's decision pertaining to Contract No. 14–10–0100–987 is granted pursuant to the Termination for Default—Damages for Delay—Time Extensions provision (Clause 5(c)) of the contract. The Government's assessment of $5,300 as liquidated damages must perforce be remitted.

Summary

The appeal from the contracting officer's decision, pertaining to Contract No. 14–10–0100–966, wherein appellant was assessed the sum of $7,100 as liquidated damages for failure to perform within the contract time as extended, is denied.

The appeal from the contracting officer's decision, pertaining to Contract No. 14–10–0100–987 is granted. The assessment of $5,300 as liquidated damages is accordingly remitted.

JOHN J. HYNES, *Member.*

We concur:

PAUL H. GANTT, *Chairman.*
THOMAS M. DURSTON, *Member.*

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tract, is hereby modified to extend the fall sodding period from October 16 to October 31, 1959.

"We have been advised by the Resident Engineer that all work will have been completed on or about October 31, 1959.

"Please indicate your agreement to this directive by dating, signing, and returning the two enclosed copies by return mail.

"(sgd) W. B. COMPTON, Jr.,
W. B. Compton, Jr., for C. H. Buchanan,
Division Engineer.

"Accepted 10/13/59.
Brooks & Mixon Contractors
By: (sgd) E. F. MIXON"

"AMENDMENT A TO DIRECTIVE S

"Directive S, dated October 12, 1959, issued in connection with your contract for the construction of Project 3E3,4,5, Natchez Trace Parkway, is hereby amended to extend the fall seeding and sodding period from October 31, 1959, to November 30, 1959.

"Please indicate your agreement by dating, signing, and returning by return mail the two enclosed copies. The original is for your files.

"(sgd) C. H. BUCHANAN,
C. H. Buchanan,
Division Engineer.

"Accepted 11/24/59.
Brooks & Mixon Contractors
By: (sgd) E. F. MIXON"

OTIS A. ROBERTS

A–29020 *Decided June 12, 1962*

Oil and Gas Leases: Generally—Water and Water Rights: Generally

Where a determination has been made under section 40 of the Mineral Leasing Act that water struck while drilling for oil under an oil and gas lease is not presently valuable and usable at a reasonable cost and where additional information is submitted tending to show otherwise, the case will be remanded for a reconsideration of the determination.

Oil and Gas Leases: Generally—Water and Water Rights: Generally

When water struck while drilling for oil under an oil and gas lease issued pursuant to the Mineral Leasing Act is determined to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, the land on which the well is located will be reserved as a water hole and the well operated or leased to accomplish the purposes of section 40 of the Mineral Leasing Act.

Oil and Gas Leases: Generally—Water and Water Rights: Generally

When water struck while drilling for oil under an oil and gas lease issued pursuant to the Mineral Leasing Act is determined not to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, the well is to be plugged and abandoned by the oil and gas lessee.

Rights-of-Way: Act of March 3, 1891—Rights-of-Way: Act of February 15, 1901

An application for a right-of-way for a well site and pipeline is properly rejected for the development of water discovered in drilling for oil and gas under an oil and gas lease issued under the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Otis A. Roberts has appealed to the Secretary of the Interior from a decision by the Appeals Officer, Bureau of Land Management, dated May 5, 1961, which affirmed a decision dated January 10, 1961, by the Colorado land office, rejecting Roberts' application under the acts of March 3, 1891, as amended (43 U.S.C., 1958 ed., sec. 946 *et seq.*), and February 15, 1901 (43 U.S.C., 1958 ed., sec. 959), for a right-of-way for a well site and a pipeline for the transmission of water upon and across Lot 10, Sec. 3, T. 2 S., R. 84 W., 6th P. M., Colorado.

The application was filed on February 19, 1960, at a time when Roberts had Lot 10 under oil and gas lease pursuant to the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*). The map accompanying the application shows that the proposed pipeline would run from the well site to the Colorado River, which runs along the southwestern portion of the lot. The application recited that water was struck while the land was being drilled for oil, that the well was completed as a flowing artesian water well, that the oil and gas lease (Denver 054284) would expire on February 29, 1960, that the applicant was in the process of giving notice to the Geological Survey that

he intended to test the well further and condition the same for the production of water, and that the well site and pipeline would be utilized for the production and transmission of artesian well water for irrigation, domestic, and industrial purposes. No particulars were given as to which lands might be irrigated through the use of the water or as to the nature of any industrial purposes which might be served by the water.

Roberts was notified on March 24, 1960, that since the water was encountered on public land in the course of drilling for oil or gas, a determination would have to be made under section 40 of the Mineral Leasing Act, as added by the act of June 16, 1934 (30 U.S.C., 1958 ed., sec. 229a), as to whether the water supply available had economic value. The record indicates that Roberts failed to answer an inquiry from the local office of the Geological Survey of May 25, 1960, as to the pertinent factors bearing upon a determination as to whether the water was valuable and usable at a reasonable cost for agricultural, domestic, or other purposes.

The Regional Oil and Gas Supervisor of the Geological Survey determined, on the basis of a report from the Bureau of Land Management, that there was insufficient arable land for irrigation by the well and that the water was not needed for domestic use. He also stated that the proposed industrial use for the water might not materialize for five to ten years "and perhaps never." Accordingly, he determined that the water was not presently valuable or usable at a reasonable cost.

Thereafter, by the decision of January 10, 1961, Roberts was informed that the well would not be conditioned for water production or the land reserved as a water hole. As the water from the well would not be available to Roberts, his application for the right-of-way was denied.[1]

Roberts appealed to the Director of the Bureau of Land Management on the ground that since the Geological Survey had determined that the well would not be conditioned as a water well the Department had no choice but to allow his application for the right-of-way. Roberts also stated that he had, on March 1, 1961 (approximately one year after his oil and gas lease had expired), filed an application with the State of Colorado and obtained a permit to use ground water.

The Director affirmed the decision of January 10, 1961, on the ground that it was proper to refuse to grant a right-of-way where no useful purpose would be served.

In this appeal to the Secretary the appellant has submitted information which suggests that the water from the well may be presently valuable and usable at a reasonable cost for certain purposes. He has submitted a letter to the Secretary of the Interior from the

[1] So far as the record now before me shows, the well has not yet been plugged.

Director of the Department of Public Utilities of the City of Colorado Springs stating that the City is conducting negotiations with Roberts with the objective of acquiring all of Roberts' right, title and interest in the pipeline permit, water well, and aquifer and that, if negotiations are successfully concluded and the right-of-way issued, it is the intention of the City to use the water acquired for the purpose of providing replacement water for its existing diversions from the Colorado River System on the Blue River and its upper tributaries. The Attorney for the City has likewise written to the Secretary expressing the City's interest in the matter. In addition, Roberts states that if the City of Colorado Springs does not complete its negotiations with him others are interested in acquiring the water for industrial purposes. Roberts admits that production tests on the well have not been completed but he contends that he has now demonstrated that the water is currently valuable and usable and that the Department has no choice but to allow his application.

While the information which Roberts has now supplied as to a possible use for the water is a sufficient basis for remanding the matter for a further examination of the question as to whether the water is valuable and usable at a reasonable cost, it does not follow that Roberts' application for a right-of-way for a well site and pipeline for the transmission of the water must be allowed.

The water was struck while Roberts, as lessee under a Federal oil and gas lease, was drilling for oil. Roberts had no right in the land and could have acquired no right to the water found therein in the course of his drilling operations.

Section 40 of the Mineral Leasing Act, to which Roberts' lease was subject, provides that in case a lessee strikes water while drilling, instead of oil or gas,

> the Secretary of the Interior may, when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, purchase the casing in the well at the reasonable value thereof to be fixed under rules and regulations to be prescribed by the Secretary: *Provided,* That the land on which such well is situated shall be reserved as a water hole under section 10 of the Act of December 29, 1916.

The section also provides:

> The Secretary may make such purchase and may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands, * * * *Provided*, That owners or occupants of lands adjacent to those upon which such water wells may be developed shall have a preference right to make beneficial use of such water.

It provides, too, that the Secretary may use the proceeds from the "sale or other disposition of such water as a revolving fund for the continuation of the program," provided for therein.

Thus the section specifically provides that if water struck while drill-

ing for oil or gas is of such quality and quantity as to be valuable and usable at a reasonable cost, then the land on which the well is located shall be reserved as a water hole. Further, when it is determined that the water is valuable and usable, the Secretary of the Interior may operate the well or lease it to others to operate. The Secretary must, of course, reimburse the oil and gas lessee for the cost of his casing where the land on which the well is situated is to be reserved as a water hole and where the well is to be leased or operated.

The Secretary has provided by regulation (30 CFR 221.34 and 30 CFR Part 241), to which the Roberts lease was subject, for the procedure to be followed in the event water is struck. Under the regulations, if the water is found by the Geological Survey not to be valuable and usable within the meaning of section 40, then the well is to be plugged and abandoned by the lessee. Where, on the other hand, the decision is that the water is valuable and usable within the meaning of the statutory provision, applications to lease the well may be entertained after the well has been conditioned for use as a water well, after title to the casing is vested in the United States, and after a decision to lease the water well has been reached (30 CFR 241.6).

Thus it is the Secretary of the Interior who determines whether the well will be abandoned or conditioned as a water well. Under the provisions of his oil and gas lease, Roberts must abide by the decision of the Department as to whether the well is to be abandoned or conditioned as a water well. If the final decision of the Department is that the well is to be abandoned because the water is not valuable within the meaning of section 40 of the Mineral Leasing Act, the well must be plugged and abandoned. In such a situation the water would no longer be available and there would be no occasion for the granting of a right-of-way either for a well site or for pipelines for the transmission of water.

If, on the other hand, the water developed on Lot 10 by Roberts in the course of his operations under his oil and gas lease is valuable within the meaning of section 40 of the Mineral Leasing Act, then Lot 10 will be deemed to be reserved as a water hole and the well thereon is to be operated by the Secretary of the Interior, or under his supervision through lease, to produce water for the purposes enunciated in section 40. In such event, no right-of-way is needed either for the well site or for a pipeline for the transmission of the water across the lot.

Accordingly, it must be held that regardless of the correctness of the previous determination by the Geological Survey that the water is without present value, it was proper to have rejected the Roberts application for the right-of-way.

However, since Roberts has now supplied information unknown to the Regional Oil and Gas Supervisor when he made his decision,

which information tends to indicate that the water may be put to beneficial use at a reasonable cost and that it may be desirable to condition the well as a water well, the case will be remanded for further consideration of the question in view of the information now made available by Roberts. In making this redetermination the Geological Survey may take into consideration any further information which may have come into its possession since its previous determination or any further information which Roberts or others may submit as to the economic value of the water obtainable through the well drilled on Lot 10.

If upon further consideration of the matter, the Geological Survey is still of the opinion that the water is without value within the meaning of section 40 then the Geological Survey should call upon Roberts to plug and abandon the well.

However, if the decision of the Geological Survey is that the water is valuable then the well should be conditioned for use as a water well and the procedure outlined in 30 CFR 241.6 for the awarding of leases to water wells followed. Roberts may, of course, if the decision is that the water found on Lot 10 is valuable, apply for a lease of the well at the proper time.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the rejection of Roberts' right-of-way application is affirmed and the case is remanded to the Bureau of Land Management for further proceedings by it and the Geological Survey consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

LAWRENCE EDWARDS

A–28991 *Decided June 13, 1962*

Grazing Permits and Licenses: Hearings—Administrative Procedure Act: Hearings

A hearing on the question of whether a reduction in grazing privileges under a license permitting use of the Federal range was made in accordance with the range code is subject to the provisions of the Administrative Procedure Act, and in determining whether a licensee's appeal from a decision reducing grazing privileges should be dismissed, the whole record must be considered, and not merely the licensee's testimony and papers in support of his appeal.

Grazing Permits and Licenses: Cancellation and Reductions

Where, in order to reach the carrying capacity of the Federal range, a 24 percent reduction in grazing use is imposed on all licensees and permittees on an equal percentage basis in accordance with the range code and, in addition,

a further reduction in use is also imposed on one licensee, the basis and authority for the further reduction should be set forth in a notice to the licensee, as required by the range code.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lawrence Edwards has appealed to the Secretary of the Interior from a decision of March 20, 1961, by the Director of the Bureau of Land Management which affirmed a hearing examiner's decision dismissing Edwards' appeal from an award of grazing privileges on the range in Montana Grazing District No. 2. Edwards had appealed to a hearing examiner from a decision of January 29, 1957, by the district range manager awarding privileges for 1957 in what is referred to by the Bureau as the west side of the Big Dry grazing district (Montana) No. 2. Because of overgrazing in the area, awards for 1957 were reduced by 24 percent from the use allowed during previous years on this range.

A hearing on the appeal from the manager's decision was held at Miles City, Montana, on September 18, 1958. The issues raised at the hearing were whether a reduction in awards of grazing privileges in the area was necessary, and whether the reduction was made in accordance with the range code. The appellant argued, in effect, that the reduction of grazing privileges required of him by the manager's decision of January 29, 1957, was greater than that imposed on other operators using the area, and that the reduction was made on an unequal percentage basis.

The appellant was the only person who testified at the hearing. He was cross-examined by counsel for the Bureau. The Bureau counsel then moved to dismiss the appeal with prejudice because of the inadequacy and insufficiency of the appellant's case. This motion was taken under advisement. At the outset of the hearing the Bureau also put into evidence a map of the area, and, after its motion to dismiss, it offered in evidence its entire official file of the appellant's grazing use in Montana grazing district No. 2, which was admitted over the objection of the appellant. However, the Bureau submitted no testimony or evidence other than this at the hearing.[1]

The appellant testified that during the past years he and his brother King have made use of one permit but that their livestock operations are separated and that the appellant has always operated as an individual rancher (Tr. 10, 11, 19). He testified further that for many years he has maintained his cattle herd of about 110 head.[2]

[1] The transcript of the hearing will be referred to hereafter as "Tr.", followed by the number of the page to which reference is made.
appeal on other grounds.

[2] The appellant also testified that quite extensive trespass grazing occurred on this range and suggested that if the Bureau prevented the trespass, a reduction of qualified use would not be necessary on the range (Tr. 11–14). On cross-examination, it appeared that the Bureau has attempted to prevent the trespass grazing. However, the appellant's contentions regarding trespass need not be considered here in view of the disposition of this appeal on other grounds.

In a decision of January 22, 1959, the examiner held that the appellant had offered no testimony in support of his claim that his reduction had been disproportionate and not based on an equal percentage basis and that the appellant had not met the burden of proof. Therefore, the examiner granted the Bureau's motion that the appeal be dismissed with prejudice because of the inadequacy and insufficiency of the appellant's case. The Director's decision affirmed the dismissal of the appeal with prejudice on the ground that the examiner's decision was supported by the record.

The portion of Montana grazing district No. 2 which is involved in this appeal will be referred to hereafter as the west side. Is consists of individual and common allotments used in several livestock operations including the separate and individual operations of the appellant, who runs cattle, and of the appellant's brother, King Edwards, who uses this and other Federal range principally for grazing sheep. As the appellant testified, a single license has been issued for many years to Mrs. George Edwards and Sons granting up to 1297 aums (animal unit months) of grazing use authorizing (1) the appellant's use of this range for grazing cattle, (2) the separate use of this range by his brother for grazing sheep, and (3) the brother's use of other range not within the area here involved. That is, for many years before 1957, a single license had been issued to Mrs. George Edwards and Sons, which authorized regular grazing on this range by the appellant's cattle, regular grazing on this range by King Edwards' sheep, and also additional sheep grazing by King Edwards' sheep on range not involved in this appeal.

Of the total of 1297 aums authorized by this license, 451 aums were for privileges on the east side of the grazing district, an area not involved in this appeal. It appears that the 451 aums have been used in the past by the appellant's brother, King Edwards, for sheep grazing. The remaining 846 aums in the license granted grazing privileges on the west side, including privileges for grazing both cattle and sheep, and it is these privileges which are under consideration on this appeal. Not all of these 846 aums available on the west side have been granted under the regular license in recent years, and the regular license for Mrs. George Edwards and Sons has authorized approximately 796 aums use on the west side, although additional grazing use in this area has been allowed the appellant and his brother under special permit or administratively, as contrasted with use under the regular license.[3] However, for purposes of deciding this appeal,

[3] On September 18, 1957, for example, the appellant was administratively allowed 60 aums on the west side in addition to the 580 allowed for cattle grazing in that area under the regular license. (The 1957 decision was suspended pending disposition of this appeal.)

The record indicates that this additional use was administratively allowed because full use was not made of the grazing privileges in this allotment during the regular season.

the ordinary use by the appellant and his brother in the west side area will be regarded as 796 aums, the approximate amount of privileges granted in the years immediately preceding the manager's 1957 decision. That use has continued pending decision on this appeal.

The records show that in the years just before 1957, approximately 580 of the aums authorized on the west side permitted cattle grazing and so were used by the appellant, and that 216 of the aums allowed on the west side by the regular license authorized grazing 800 sheep and 10 horses and that these privileges were used by the appellant's brother, King Edwards. The manager's decision, which led to this appeal, granted the appellant 348 aums on the west side as compared with his prior use of 580 aums, a 40 percent reduction. The decision was consistent with a memorandum in the record by the manager dividing the hitherto single Edwards' license into two parts, one for the appellant (348 aums) and one for King. The record indicates that the manager apparently planned to award King Edwards 301 aums for grazing sheep and horses in the west side area as compared with 216 aums awarded to him before 1957. If the manager's proposal for dividing, between the appellant and his brother, the privileges granted on the west side under the license issued to Mrs. George Edwards and Sons were carried out, the privileges awarded to the appellant's brother would amount to a 40 percent increase over his use on the west side prior to 1957. However, only the propriety of the 1957 award to the appellant, individually, is in issue on this appeal.[4]

In accordance with surveys indicating the carrying capacity of the range, the manager determined that a cut of 24 percent in use on the west side range was necessary to prevent further overgrazing. In deciding what the reduced use on the west side under the Edwards license would be, the manager determined that if the 846 aums of use authorized under the regular Edwards' license were reduced by 24 percent, they could be allowed no more than 643 aums use in that area.

Although the appellant denies the necessity for a general reduction in the over-all amount of grazing allowed on the range in question, he offered no evidence to support his contention other than the fact that his operations had been unchanged for several years and that a substantial trespass had gone uncorrected during the same period. These facts do not prove that the range has the capacity to sustain without injury the amount of grazing previously permitted or that a reduction in the amount made was improper.

[4] The appellant's brother, King Edwards, is not a party to this appeal and the record does not show the basis of the proposal allowing him a 40-percent increase of use in the west side area over that used before 1957. The proposal seems particularly anomalous since the manager purportedly required a reduction in use of at least 24 percent by other operators awarded grazing privileges on this range.

If, as in the past, the manager had issued a license for 1957 use to Mrs. George Edwards and Sons, authorizing 643 aums use on the west side range, indicating grazing by cattle and sheep, respectively, in proportion to the use authorized in previous years, there would be no question as to the correctness of the Bureau's contention that a 24 percent reduction in use on the west side was imposed. The appeal, however, also challenges the manager's decision of January 29, 1957, which imposed a 40 percent reduction on the appellant from his previous use on this range whereas other operators were presumably required to take a reduction of only 24 percent use, with the exception that the appellant's brother would apparently be granted a 40 percent increase in the grazing privileges he could use on this range as compared with his use in previous years.[5]

The discrepancy between the 24 percent cut presumably given other operators and the 40 percent cut required of the appellant by the manager's decision is too great to come within the regulatory provision referred to in the manager's decision that reductions be made on an equal percentage basis for all licensees and permittees on the Federal range allotment area involved.

There is some indication in the Director's decision of the inconsistency of the manager's action in reducing the appellant's use by 40 percent in the area involved when the use of other operators was cut by 24 percent, or, as with the appellant's brother, no reduction was imposed but an increase was planned. The Director's decision states that the 40 percent reduction for the appellant resulted from the division between the appellant and his brother, on the basis of the priority of the base property claimed by each on the west side range which was available for licensing to the Edwards brothers, even though such a division is seemingly denied, by the manager in a number of instances.[6]

[5] The manager's decision states that the reduction in licensed use was necessary to reach the grazing capacity of the range and that the reduction was made in accordance with the range code (43 CFR, 1960 Supp., 161.6(f)) which provides, *inter alia*, that reductions of regular licenses or permits regularly issued are to be made on an equal percentage basis. The manager's decision states that the reductions involved here were made on an equal percentage basis and also refers to the provision that no license or permit will confer grazing privileges in excess of the grazing capacity of the Federal range to be used (43 CFR 161.6(e)(3)).

[6] In his application dated October 31, 1956, for grazing privileges during 1957, the appellant requested that privileges formerly allotted to Mrs. George Edwards and Sons be divided, added that he was applying for all the privileges on the point and for the cattle privileges on the west side, and stated that other Federal range privileges would go to King Edwards. According to the appellant, he was told by Bureau employees that a division between him and his brother of the grazing privileges allowed under the Edwards permit could not be made (Tr. 21). And in a letter of June 11, 1958, the manager told appellant's counsel that it would be impossible to make a division between Lawrence and King Edwards of the privileges available on the west side until a hearing was held and the privileges of Mrs. George Edwards and Sons were determined.

Likewise, the brief submitted to the examiner in support of the Bureau's position implies that the Edwards brothers' privileges on the west side range have not been divided, and states in a footnote that if the Edwards brothers reach agreement as to a division of the base property, then the division of privileges under the license between them may be considered by the Bureau.

Certainly, there is nothing in the decision of January 29, 1957, indicating that the award of 348 aums resulted from a division of the range between the appellant and his brother. Nonetheless, the Bureau's files seem to indicate, and the assertion of counsel for the Bureau at the hearing confirms that the manager's decision of January 29, 1957, reducing the appellant's use of the west side area to 348 aums, amounting to a 40 percent cut, was based on a division between the appellant and his brother of the 643 aums available under the Edwards license after the 24 percent reduction required of all operators in the area. As the appellant received notice only that the reduction for the 1957 season was made under a provision of the range code requiring that regular licenses and permits properly issued shall be reduced on an equal percentage basis, he was not notified of the additional reduction of his grazing privileges resulting in the 40 percent cut, and neither was he notified of the basis of the additional reduction. 43 CFR, 1960 Supp., 161.9(d).

If the number of grazing privileges which the appellant has used on the west side in the past under the license issued to Mrs. George Edwards and Sons should be reduced in addition to the 24 percent reduction required of other users of the range in the area, then such additional reduction should be carried out in accordance with the relevant provisions of the range code. Since the manager's 1957 decision has not been effective pending this appeal, the appellant has not been injured by the error of reducing his operation by more than 24 percent without complying with the range code in making the reduction.

Next, it must be determined whether, in light of the matters already discussed, the examiner's and the Director's decisions dismissing this appeal because of the inadequacy and insufficiency of the appellant's case are correct. Although the appellant's testimony at the hearing, if considered alone, might support the ruling, the decision can be affirmed only if the evidence in the Bureau's file is disregarded, which evidence indicates that the manager's 1957 decision required that the appellant take a 40 percent rather than a 24 percent reduction in grazing use in the area. The provision in the range code permitting an examiner to summarily dismiss an appeal with prejudice because of the inadequacy or insufficiency of the appellant's case surely does not warrant disregarding a substantial part of a record (in this case the Bureau's files) and deciding the motion solely on the basis of the material submitted or offered by the appellant. Counsel for the Bureau agreed at the hearing to let the official record indicate the extent of grazing privileges allowed to the appellant (Tr. 20), and the fact that no evidence was offered by the Bureau at the hearing other than a map and the files makes it particularly incumbent that anyone deciding the case consider the contents of the Bureau files in reaching a decision on the appeal. Section 7(d) of the Administrative Procedure Act (5

U.S.C., 1958 ed., sec. 1006(d) provides that the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision on hearings held under the act with an exception as to material which may be officially noticed. A provision in the range code is almost identical. 43 CFR, 1960 Supp., 161.10(j). In interpreting the requirement, the Supreme Court has held that in determining whether an agency decision should be affirmed, the test to be applied is whether on the record as a whole there is substantial evidence to support the agency findings upon which the decision is based. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 488–491 (1951). In this decision, the court pointed out that the Administrative Procedure Act requires that the whole record be considered and that the decision be supported by substantial evidence when viewed in the light of the entire record (see *Frank Halls et al.*, 62 I.D. 344, 363 (1955)). Accordingly, the appellant's testimony at the hearing, the papers in support of the appeal, and the Bureau's entire file in this case are to be considered in determining whether the motion dismissing the appeal can be sustained.

In view of the matters discussed herein indicating that the manager's 1957 decision required a reduction in the appellant's privileges of approximately 40 percent whereas other operators in the area were presumably given a 24 percent cut and that the reduction as to the appellant and other operators was made under a provision of the code requiring that reduction be made on an equal percentage basis, it seems clear that, as the appellant asserted, the reduction was not made in accordance with the code provision cited in the manager's decision. Consequently, the decisions dismissing the appeal must be set aside except insofar as they upheld the 24 percent reduction of grazing privileges used by the appellant. If the appellant's grazing privileges must be reduced further than the 24 percent reduction imposed on other operators in this area, then the appellant should be notified of the extent and the basis of the reduction, as required by the range code.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is set aside to the extent indicated and the case is remanded for action consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF CHENEY-CHERF AND ASSOCIATES

IBCA–250 *Decided June 19, 1962*

Rules of Practice: Appeals: Standing to Appeal—Contracts: Subcontractors and Suppliers

The Board has jurisdiction of appeals presented by a prime contractor in behalf of a subcontractor involving claims for additional costs of performance.

Contracts: Changes and Extras—Contracts: Specifications—Contracts: Contracting Officer

Under a contract involving the construction of two tunnels, where the contract specifications provide that the judgment of the contracting officer shall determine the quantity of permanent timbering necessary for satisfactory construction of the tunnels, the instructions of the contracting officer for reduction of such quantity of timbering in the major areas of the tunnels do not constitute actual or constructive changes within the meaning of the Changes Clause (Clause 3), of Standard Form 23A.

BOARD OF CONTRACT APPEALS

This appeal is prosecuted by the prime contractor named above, in behalf of its subcontractor, the A. J. Cheff Construction Company. The appeal was timely filed on July 15, 1960. It involves a subcontract for the construction of two tunnels and claims totaling $326,254.20. The claims arise principally from Government instructions which allegedly increased the fall-out of earth material and enlarged the perimeters of the tunnels.

A hearing of this appeal was conducted by Mr. Durston at Seattle, Washington, on March 14 to 17, 1961, inclusive.

The subcontract agreement,[1] dated October 28, 1957, incorporates by reference all of the terms and provisions of the prime contract dated October 11, 1957 (which contained Standard Form 23A), " * * * including all general and special conditions, drawings, specifications and other documents forming, or by reference made a part of * * * " the prime contract. The Board has taken jurisdiction of appeals involving claims presented by a prime contractor where the work was actually performed by a subcontractor. The "Severin" doctrine is not involved here.[2]

The subcontract work consisted of the construction of two concrete-lined tunnels of six-foot inside diameter, as part of the prime contract

[1] Government's Exhibit "O".

[2] *Wiscombe Painting Company,* IBCA–78 (October 26, 1956). *Cf. Nils P. Severin* v. *United States,* 99 Ct. Cl. 435, *cert. den.* 322 U.S. 733; *Young and Smith Construction Company,* IBCA–151 (June 18, 1958), 65 I.D. 274, 58–1 BCA par. 1803; *Farnsworth & Chambers Co., Inc.,* ASBCA No. 5489 (December 10, 1959), 59–2 BCA par. 2427, 2 Gov. Contr. par. 150; *J. M. Brown Construction Company,* ASBCA No. 3469 (July 26, 1957), 57–2 BCA par. 1377. (Under the "Severin" doctrine, a prime contractor may not recover under breach of contract amounts due to its subcontractor where the subcontract contains an exculpatory clause, for under breach of contract and similar causes the plaintiff must show that he has suffered damages.)

work of building the Keene Creek Dam and Green Springs power conduit, in the State of Oregon. One of the tunnels is known as the Cascade Divide Tunnel, about 0.4 of a mile in length, while the other, about 0.92 of a mile long, is called the Green Springs Tunnel. The prime contract price was $2,894,330, while the price of the subcontract was $1,173,710.

The two tunnels are fairly close to each other, and the subcontractor established its base of operations between them. Excavation began at the outlet portal of the Cascade Divide Tunnel on December 23, 1957, and at the inlet portal of the Green Springs Tunnel on December 30, 1957. As the driving of the tunnels progressed, the interior walls and arches were supported by wood lagging and blocking, and by steel arch supports, as required by the prime contract (and through reference, by the subcontract).

At first, as is customary in the entrance of a tunnel, the subcontractor placed the wood lagging in a "solid" manner; that is, after permanent steel arches had been placed about 2 to 6 feet apart, wood planks or timbers, known as lagging, usually about 10 to 12 inches wide and 3 inches thick, were placed horizontally between the steel support arches and the roof and sides of the tunnel. The term "solid," as used to describe lagging, requires explanation. The planks were placed not abutting each other, but were spaced about 4 or 5 inches apart, and extended from the wooden foot-block foundation under each steel support, up the side, over the arch and down to the foot-block on the other side. As additional support where space existed between the planks or lagging and the walls or roof, wooden blocks and wedges were placed.

After the lagging had thus been placed for a short distance in each tunnel, the contracting officer's representative, Mr. James Callan (who was also the Project Construction Engineer), issued instructions that solid lagging be discontinued, and that "skeleton" lagging be used for the remainder of the tunnels. The appellant asserts that these instructions constituted a change order. The Government maintains that the instructions were in accordance with the contract provisions in paragraph 124(a) and (d) of the Special Conditions, which read as follows:

> 124. Permanent tunnel supports. (a) General.—Suitable permanent structural-steel and/or rock bolt supports, and *permanent timber*, as provided in Subparagraphs (b), (c) and (d) below, shall be used to support the roof and sides of the tunnel where required, *and as approved by the contracting officer.*
>
> In permanently supported sections of the tunnel, *lagging shall not be used over greater areas than necessary and it shall be removed as completely as practicable before the concrete tunnel lining is placed.* No payment will be made for the removal of timber and the cost thereof shall be included in the prices bid for other items of work.
>
> Nothing contained in this paragraph shall prevent the contractor at his own

expense, from furnishing and erecting such amounts of *temporary* supports as he may consider necessary, or from using heavier permanent structural-steel supports or more rock bolts than approved, if use of such heavier members and additional rock bolts results in no increased cost to the Government, and no statement herein shall be construed to relieve the contractor from sole responsibility for the safety of the tunnels or for liability for injuries to or deaths of persons or damage to property.

* * * * * * *

(d) Permanent timbering.—Permanent timbering for tunnels shall consist of timber lagging and foot blocks *which have been approved by the contracting officer.* All timber shall be well seasoned sound timber of rectangular cross section. The dimensions of permanent timber lagging and foot blocks for steel supports are not shown on the drawings, but shall in all cases be as directed or approved by the contracting officer.

Measurement, for payment, of furnishing and erecting permanent timbering will be made only of lagging and footblocks and for such amounts as lie between the excavation pay lines. In measuring permanent timbering for payment, the net lengths and commercial cross-section dimensions will be taken.

Payment for furnishing and erecting permanent timbering will be made at the unit prices per thousand (1,000) feet board measure bid therefor in the schedules. *Payment will be made for permanent timbering only as required by the drawings or as approved by the contracting officer, and only for the quantities which, in the judgment of the contracting officer, are necessary for satisfactory construction.* (Italics supplied.)

The skeleton method of lagging, as usually understood in this case, consisted of two laggings on top of the steel arches (one on either side of the center of the arch), and alternate lagging on the sides, down to the "spring line" or horizontal diameter of the tunnel cross-section. Alternate lagging consists of leaving empty spaces between laggings, roughly equal to the width of the lagging. No further *permanent* lagging below the spring line was permitted under the "skeleton" method.

It is contended by the subcontractor that the Government inspectors did not permit, in many cases, as much lagging as we have just described, but in such cases limited the lagging to only the two pieces at the top of the arch. The Government asserts that the subcontractor alone was responsible where the lagging pattern was less than the authorized skeleton lagging, and that in some instances the Government inspectors required the subcontractor to go back and install more lagging.

The purpose of the Government's instructions for skeleton lagging was two-fold. First, the Government did not wish to pay for any more permanent lagging than the contracting officer considered to be necessary. Second, if a substantial amount of additional permanent (or temporary) lagging were installed and paid for, most of it would have to be removed before placing the concrete lining; for otherwise the eventual deterioration of the wood embedded in the concrete would weaken the concrete lining.

No payment would be made by the Government for temporary sup-

ports or lagging, all of which would have to be installed at the contractor's expense, and removed before concreting unless it was located outside of the "B" line and would not weaken the concrete lining.

The A. J. Cheff Company had preiously performed several contracts for tunnels with the Bureau, including the Helena Valley Tunnel and the Crow Creek or Toston Tunnel. Mr. A. J. Cheff, the managing partner of the A. J. Cheff Company, testified that in the construction of those tunnels, "solid" lagging was permitted by the Government throughout the tunnels.[3] The stated reasons of the subcontractor concerning its objections to skeleton lagging were that such lagging was insufficient to prevent air-slacking and fall-out of earth material from the roofs and sides of the tunnels. The two mountains through which the tunnels were driven were of volcanic origin and were composed mainly of tuff, tuff-breccia and basalt in varying proportions and locations. This had been disclosed by the cores obtained from several drill holes and the logs of such cores had been examined by the A. J. Cheff Company representatives. There is no claim that the conditions encountered were different from those described in the logs. The basalt sections of the tunnels presented no support problems, but the tuff and tuff-breccia tended to fall from the roofs and walls of the tunnel, mainly because of a natural process known as "air-slacking." The tuff was soft and fine-grained, and when exposed to the drying effect of air, lost enough of its cohesiveness so as to gradually crumble and break away from the tunnel roofs and walls. Tuff-breccia was somewhat harder, was frequently embedded in tuff-like material, and was composed of small angular volcanic fragments.

It is contended by the subcontractor that by reason of insufficient lagging, the fall-out of such materials was exeessive. This allegedly caused considerable overbreak or enlargement of the perimeters of the tunnels, making some retimbering necessary, and also increasing the volume of concrete which the subcontractor was required to furnish and install at its own expense to fill voids outside the pay lines. Additionally, it is claimed that considerable expense was entailed through the necessity for abnormal clean-up activity, with crews of workers on each shift employed in doing little else except shoveling up the fall-out material, loading it in dump cars and taking it out of the tunnels. It is also alleged that the dump trains were derailed on many occasions by fall-out material on the tracks.

A further claim, not related to the fall-out claims, concerns the alleged directions of the Government in several instances to excavate more deeply the floor or "invert" portions of the Cascade Tunnel, because of undisturbed but unsound material forming the floor. The

[3] Transcript, pages 96, 97 (hereafter referred to as Tr.)

contract required such excavation to extend only to "undisturbed" ground, but it is claimed that in some areas the inspectors required additional excavation where the ground was soft, in order to reach a more solid base for the concrete invert of the tunnel lining. This, of course, allegedly required more work and expense of excavation as well as installation of a greater volume of concrete at the subcontractor's expense. The Government witnesses deny that any overexcavation was ordered, and the evidence does not clearly support the subcontractor's contentions.

Returning to the major claims concerning fall-out, Mr. A. J. Cheff testified that he visited the job twice at early stages of the tunnel construction in response to telephone complaints from his brother, Mr. Elmer Cheff, Superintendent of the subcontractor; that on the first occasion, the Government had stopped the use of solid lagging,[4] and a month or six weeks later, that the fall-out had "gotten bad." [5] Mr. A. J. Cheff testified that on both occasions he discussed the matter with Mr. James M. Graham, the Construction Representative of the Bureau, who was resident at the job site, and complained to him on each visit concerning the method of skeleton lagging and, on the second occasion, as to the increasing amount of fall-out. On his second visit to the tunnels, Mr. A. J. Cheff also telephoned his complaints to the Bureau office in Oregon City, when he talked with a Mr. O'Connor.[6] Mr. Graham's responses on these occasions, according to Mr. Cheff, were to the effect that he was merely taking orders, that Mr. Cheff would have to talk to someone higher up. Mr. Cheff testified that Mr. O'Connor merely cited "certain conditions in the specifications and [said] the orders by the Contracting Officer were sufficient to take care of the work."

Mr. Graham testified [7] that the dispute was primarily over the amount of lagging over the arch, but that the subcontractor had used "quite a number of lagging below the spring line," to which he (Mr. Graham) objected because such lagging was being used as bins for the storage of excavated material. Mr. Graham had pointed out to the subcontractor that such material would have to be removed prior to the placing of the concrete lining and suggested that it be removed from the tunnel "rather than handle the material twice." [8]

This subject came up on other occasions. Mr. Wayne I. Johnson, resident engineer of the Talent Field Division, described a meeting which took place prior to the holing through of the Cascade Tunnel, in the Government trailer office, on the summit of the Green Springs Tunnel.[9] At that time Mr. Johnson says he explained to Mr. A. J.

[4] Tr. 83.
[5] Tr. 91.
[6] Tr. 92.
[7] Tr. 481, 482.
[8] Tr. 482.
[9] Tr. 604.

Cheff that any excavated material placed behind the lagging would have to be removed from the tunnel.

Again, during an inspection trip through the tunnels about May 1, 1958, Mr. Johnson called the attention of Mr. A. J. Cheff to the fact that workmen were shoveling excavated material behind the lagging, and reminded him that it would have to be removed.[10]

It appears to the Board that the subcontractor, as a result of his experience in other tunnels, was under the impression that he would be permitted to back-pack a portion of the excavated material (sometimes called tunnel spoil) behind the lagging, where lagging had been placed below the spring line. In addition to disposing of residual excavation and fall-out material which had not been removed by the muck cars, the spaces behind the pay lines would thus be partially filled, reducing the volume of concrete which otherwise must be used to fill those areas. This had been permissible under his previous contracts, where the tunnels involved were gravity-flow type, not pressure tunnels as was the case under the instant contract.

Mr. A. J. Cheff testified[11] that on an occasion prior to the May 1, 1958 inspection trip, Mr. Graham had explained to him that because of the pressure of the water to be sent through the tunnels it was necessary for more concrete to be placed against the walls; that this was the reason for the skeleton method of lagging. Also, Mr. Cheff stated that prior to bidding he had no information that the job would be skeleton-lagged, that he had "never heard of skeleton lagging in forty years of my work. Mr. Cheff added: " * * * You understand that my experience with the Bureau for many years is when we had bad ground, we shore it thoroughly, from foot block around * * *."[12]

The contract specifications are quite explicit on the subjects of filling all voids with concrete, and limitation of pay quantities, as illustrated by the following excerpts from paragraph 126:

> * * * All spaces outside of the minimum required thickness of concrete lining shall be filled completely and solidly with concrete and special care shall be taken to force concrete into all irregularities in the contact surfaces and to completely fill the tunnel arches. * * *
>
> * * * No payment will be made for concrete required to be placed outside of the "B" lines due to overbreakage, excess excavation, or for any other reason. * * *

The Board is convinced that the difficulties encountered by the subcontractor in the work were almost entirely chargeable to his unfamiliarity with the specifications of the prime contract. The discussions and activities just recounted, with respect to the desires of the subcontractor to install lagging below the spring line, and attempts to

[10] Tr. 608.
[11] Tr. 93, 94.
[12] Tr. 95.

dispose of tunnel spoil by shoveling it behind the lagging, all bespeak an assumption that the job at hand could be performed in much the same manner to which the subcontractor had been accustomed in construction of previous tunnels for the Bureau. This misapprehension apparently led to miscalculations as to the quantities of concrete which would be required to fill solidly the cavities and voids outside of the pay lines.

Considerable evidence was adduced by both sides concerning the disputed extent to which the fall-out of earth material contributed to the enlargement or overbreak of the tunnel, and as to whether additional lagging would have reduced such fall-out. There is some evidence, introduced by the Government, that fall-out was minor in extent, and that the overbreak was due principally to appellant's method of placing the drill holes for explosive charges.

Appellant attempted to show that there were very large quantities of fall-out, and that this was almost entirely the result of the Government's instructions for skeleton lagging; that with the use of "solid" lagging, there would have been an insignificant amount of fall-out. Appellant's testimony was that it had anticipated an overbreak, or enlargement of the tunnels beyond the pay lines, of about 17 percent in volume. The actual percentage of overbreak was about 30 percent, as measured by the quantities of concrete placed. However, a 30 percent overbreak is not unusual. It was experienced in the Emigrant Dam Tunnel which had been completed a short time previously, and which involved earth material similar to that found in the Cascade and Green Springs Tunnels.[13] Moreover, the appellant's expectation of a 17 percent overbreak appears to have been rather sanguine. Mathematical calculations submitted by the Government indicate that in order to stay within a 17 percent overbreak in volume, appellant would have been obliged to hold the average radius of overbreak to a tolerance of about 1.6 inches.[14] Converting the actual overbreak of 30 percent produces an average increase in radius of about 6.6 inches.[15] Although appellant attempted to show that its experience with the Helena Valley Tunnel involved only 15.9 overbreak, the Government records, reflected in an exhibit filed after the hearing, showed an overrun of concrete for that tunnel of 57 percent.[16]

We have considered at length the evidence concerning the alleged quantities of fall-out and the appellant's proposed remedy of additional lagging. We find however, since the primary cause of air-slacking and crumbling of the tuff material was the natural action of the air upon it, that the introduction of "solid" lagging would not have prevented air from reaching the tuff material and hence could not have had any appreciable effect in reduction of the fall-out. In

[13] Government's Exhibit F.
[14] Government's Exhibit H.
[15] Government's Exhibit G.
[16] Government's Exhibit P.

consequence, we arrive at the conclusion that the Government's instructions for, and the use of, skeleton lagging were not the cause of any excessive fall-out, if it was in fact excessive.

Additionally, we find that these instructions did not amount to a change, actual or constructive, since variations in the quantities of permanent lagging were clearly contemplated by the contract to be a matter of judgment to be exercised by the contracting officer, as described in paragraph 124 of the specifications, *supra*.[17] The subcontractor was entitled to install temporary lagging at his own expense, and did so in some instances, but did not choose to do so more extensively when confronted with the realization the Government would not pay for it; that back-packing of tunnel spoil behind these laggings would not be permitted to remain there, and, hence, could not cut down the required volume of concrete.

As to the allied claims for extra work of retimbering and for excessive excavation and concrete for the invert of the Cascade Tunnel, we do not consider these matters to be of sufficient merit to warrant lengthy consideration. There seems to have been no order or authority for retimbering, and it must be presumed to have been voluntary work.[18] It appears that in some of the areas of the invert claimed by appellant to have been overexcavated, the quantities of concrete placed were scarcely in excess of normal sections, and in other sections the quantity of concrete was slightly under the average. The total excess appears to have been only 35 cubic yards. This is consistent with the Government's position that it required deeper excavation only in areas where the earth had been disturbed.

In view of these findings, we do not reach the necessity of discussing the alleged excessive costs of performance.

Conclusion

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member.*

I concur:

JOHN J. HYNES, *Member.*

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[17] *Cf. W & W Construction Company,* IBCA–54 (August 4, 1958), 58–2 BCA par. 1860, where the contract provided that "the contracting officer may require that additional men or plant be placed on the construction" if a proper rate of progress was not maintained.

[18] *Flora Construction Company,* IBCA–180 (June 30, 1961), 61–1 BCA par. 3081, 3 Gov. Contr. par. 468.

AUTOMATIC TERMINATION OF UNITIZED LEASES FOR FAILURE TO PAY RENTALS

Oil and Gas Leases: Production

All the leases included within a unit agreement are made one lease as far as production is concerned. Consequently, actual production on any lease in the unit is constructive production on all other leases in the unit.

Oil and Gas Leases: Unit and Cooperative Agreements

All the leases included within a unit agreement are made one lease as far as production is concerned. Consequently, actual production on any lease in the unit is constructive production on all other leases in the unit.

Oil and Gas Leases: Unit and Cooperative Agreements

A unitized lease shall not be subject to automatic termination under section 31 of the Mineral Leasing Act if there is a producing or producible well anywhere on the unit.

M–36531 and M–36531 (Supp.) are overruled.

M–36629 *June 25, 1962*

To: Director, Geological Survey.

We have been asked to reconsider the Solicitor's Opinion M–36531 of October 27, 1958, and the Supplement to that opinion, dated July 20, 1959. It was held, *inter alia*, in that opinion that a lease which is included in a unit agreement in which there is a producing well, but which is not within a participating area, is subject to automatic termination under section 31 of the Mineral Leasing Act (30 U.S.C., sec. 188) upon the failure of the lessee to pay the annual rental in advance.

In M–36531 careful consideration was given to the question of whether a unit plan makes one lease out of many for rental purposes. The answer reached was that it did not, and from this it was concluded that the automatic termination provision applied to unitized leases outside a participating area. This analysis of the problem was not, in our opinion, the proper one. There is no question that the rental requirements of unitized leases vary, depending upon whether or not they lie within a participating area. Each lessee remains responsible for the payment of the rental on his own lease, and several leases do not become one for rental purposes. However, this is not the determinative question because the problem before us is not really a rental problem, but a production problem.

The closing sentence of section 31 provides that:

* * * upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * *.

The law is clear and certain. Unless there is on the leasehold a producible well, a lease on which required rental has not been paid in advance terminates. There is obviously no actual well on a unitized lease outside a participating area. The question before us is, consequently, whether actual production on one part of a unit is constructive production everywhere on the unit, or in other words: does a unit

plan make one lease out of several leases as far as production is concerned?

The traditional view of the Department has been that actual production anywhere on a unit is constructive production everywhere on the unit. *General Petroleum Corporation et al.*, 59 I.D. 383 (1947); *Seaboard Oil Company*, 64 I.D. 405 (1957). In the former case, concerning leases issued before 1946, it was stated, at page 389, that:

> Since the four leases in question were treated as producing leases for purposes of extension, it follows that the rental provided for producing leases should be paid. They cannot reasonably be regarded as producing leases for extension purposes and nonproducing for rental purposes.

The effect of the act of August 8, 1946 (60 Stat. 950), which amended the Mineral Leasing Act, was summarized in the *Seaboard* case, at page 411, as follows:

> All unitized leases were in effect deemed to be a single consolidated lease so far as production was concerned. When the 1946 act was before the Congress for consideration, the Department recommended the inclusion of a provision which would ratify and expressly sanction the Department's practice of extending unitized leases. Congress adopted the Department's proposal without change. * * * It is indisputable therefore that the intent of section 17(b) was to extend unitized noncompetitive leases on the theory that they are all, in effect, a single consolidated lease so that production anywhere in the unit area will extend all the leases even though there is no actual production from or allocated to a particular lease and even though the land in a lease is not even deemed to be situated on the known geologic structure of a producing field.

The Department's action in preparing the standard form of unit agreement (30 CFR sec. 226.12) was consistent with these holdings. Section 18 of the standard form states in subsection (a) that:

> * * * development and operation of lands subject to this agreement * * * shall be deemed full performance of all obligations for development and operation with respect to each and every part or separately owned tract subject to this agreement * * *.

Subsection (b) of section 18 is more explicit:

> Drilling and producing operations performed hereunder upon any tract of unitized lands will be accepted and deemed to be performed upon and for the benefit of each and every tract of unitized land * * *.

In the *Seaboard* case the appellant's lease was unitized, but was not included in any participating area. With respect to the regulations it was stated at page 412 of that case:

> Under subsection (b) the producing operations conducted in the Whistle Creek unit area must be deemed to have been conducted on the appellant's lease, thus investing it with the character of a producing lease.

It is evident that the Department had prior to M–36531 always regarded a unit plan as one lease for purposes of production. The practical effect of M–36531 was to reverse existing departmental interpretation of the law, but the existing cases were not expressly overruled. The fact that M–36531 was inconsistent with the *General*

Petroleum and *Seaboard* cases was overlooked because the problem was regarded as a rental question. However, as we have pointed out, the true question is whether a unit plan makes several leases one lease for purposes of production. The existing cases of the Department, never overruled, say that that is the effect of a unit plan.

Existing departmental interpretation thus leads clearly to the conclusion that the automatic termination provision of section 31 does not apply to a unitized lease where there is a producible well anywhere on the unit. It may possibly be suggested that this long-standing position of the Department was assumed prior to the enactment of the automatic termination provision in 1954, and that the departmental position must be modified in consequence. We see no merit to this argument. Nevertheless, it may be both helpful and interesting to consider this problem solely in light of the present provisions of the Mineral Leasing Act.

Section 17(j) of the Mineral Leasing Act (30 U.S.C., sec. 226(j)), which is based on the former section 17(b), is the statutory basis for unit plans. It provides that:

> The Secretary is * * * authorized, in his discretion, with the consent of the holders of leases involved, to establish * * * producing [and] rental * * * requirements of such leases and to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest.

The Secretary's authority to incorporate section 18(b), quoted above, in the standard unit agreement receives additional support from this statutory provision.

The fourth paragraph of section 17(j) of the Mineral Leasing Act limits the Secretary's discretionary power with respect to the establishment of rental requirements in one major respect. He may charge minimum royalty or discovery rental only on leases to which oil or gas is allocated, not on all the leases subject to a unit plan. There is no comparable limitation imposed on his authority with respect to the establishment of producing requirements. He is authorized to make actual production on one part of a unit constructive production everywhere on the unit. Thus section 18(b) of the standard unit agreement is clearly consistent with the terms of the statute.

Accordingly, upon reconsideration M–36531 and M–36531 (Supp.) are overruled. To uphold them would be to reverse the Department's traditional interpretation of the law relating to production on unit agreements. Grounds for such a reversal cannot be found in the pertinent statutes and regulations which, on the contrary, support the traditional position adopted in the *General Petroleum* and *Seaboard* cases.

FRANK J. BARRY,
Solicitor.

ESTATE OF HARRY COLBY

IA-726 *Decided June 29, 1962*

Indian Lands: Acquired Lands—Indian Lands: Descent and Distribution: Generally

Land acquired for or on behalf of an Indian and made subject to restrictions against alienation without the approval of the Secretary of the Interior or his authorized representative constitute, upon the Indian's death, a part of his restricted estate subject to the Department's probate jurisdiction.

Indian Lands: Descent and Distribution: Intestate Succession—Indians: Domestic Relations

Illegitimate Indian children are permitted to represent their deceased fathers and inherit in the estate of the father's kindred because they were made the legitimate issue of their father by section 5 of the act of February 28, 1891 (26 Stat. 795, 25 U.S.C. 371).

APPEAL FROM AN EXAMINER OF INHERITANCE

Clarence Colby has appealed from the decision, dated January 19, 1953, of an Examiner of Inheritance, denying his petition for a rehearing in the matter of the estate of Harry Colby, deceased Makah allottee No. 69, whose estate is under the supervision of the Western Washington Indian Agency, Everett, Washington.

The heirs of Harry Colby were determined by an Examiner of Inheritance on November 25, 1952, to be a son, Myron Colby, entitled to one-half of the estate, together with Clarence Colby, the appellant, and Beverly Colby, grandchildren, each of whom was found entitled to a one-fourth interest in the estate. The two grandchildren were found by the Examiner to be the children of Harry Colby's prior deceased son, Martin Colby, by his wife, Thelma Lisk Colby, later Bartells. It is the appellant's apparent contention that this Department and the Examiner of Inheritance had no probate jurisdiction over the estate of Harry Colby, or, in the alternative, that the determination of heirs made by the Examiner is erroneous in that Beverly Colby was found entitled to an interest in the estate.

At the outset, the appellant's allegation that officials of this Department lacked jurisdiction to deal with the assets of Harry Colby's estate, and to make a determination of that decedent's heirs, will be given attention. Appellant did not specify in what respects he regards such jurisdiction as lacking. Under the act of June 25, 1910,

as amended,[1] and as implemented by the departmental probate regulations on the subject,[2] Examiners of Inheritance are vested with authority to consider wills and to determine the heirs of Indians dying possessed of trust or restricted property under the control of this Department. Among this type of restricted property, over which this Department has probate jurisdiction, are lands held under restricted deeds, that is, property purchased with restricted funds under deeds containing restrictions against alienation without the approval of a representative of this Department.[3] It is this latter class of property which appears to constitute the greater portion of Harry Colby's estate. Consequently, no basis is presented or perceived on which to question the exercise of the Examiner's probate jurisdiction in the present case.

Appellant's claim that Beverly Colby is not entitled to an interest in the present estate as the issue of the marriage of Martin Colby, the prior deceased son of Harry Colby, and Thelma Colby Bartells, seems to be based upon the contention that Beverly Colby was born out of wedlock on January 14, 1933, which was almost two years after the final decree of divorce was entered between Martin Colby and Thelma Colby. Moreover, to support that allegation appellant submitted a certified copy of the divorce decree entered on April 11, 1931, as well as a statement by the Deputy County Clerk of Clallam County, Washington, that there was no recorded marriage between the parties in question after 1931. Of course, such circumstances do not preclude the possibility that these parties, although divorced by a state court decree, nevertheless may have continued or resumed their marital relationship according to the Indian tribal customs, before Thelma Lisk Colby entered into a marriage with Charles E. Bartells in the year 1935.

Aside from further conjecture as to the marital relations of Martin Colby and Thelma Lisk Colby, nothing has been presented which would prompt the disturbance of the existing determination that Beverly Colby is the child of Martin Colby. Statements to the contrary by the appellant that he "has reason to believe and does believe that said Beverly Colby is entirely unrelated to Harry Colby," and that for a period of time, not specified, Beverly Colby carried the name of Bar-

[1] 36 Stat. 855, 25 U.S.C. secs. 372, 373.

[2] 25 CFR, Part 15 (1958 ed.), formerly found in 25 CFR, Part 81 (1949 ed.).

[3] The departmental practice of determining the heirs of deceased Indians whose estates consisted of restricted purchased lands was specifically reaffirmed in departmental decision of January 24, 1923 (49 L. D. 414).

tells, are inconclusive absent impelling supporting proof. In fact, upon the remarriage of a woman, it frequently happens that her child by a previous marriage becomes known in the community by the name of the stepfather.

But in a number of other respects the file on the present matter plainly records that Beverly Colby is the child of Martin Colby. At the original hearing appellant himself made no objection to testimony that such was the relationship of the parties, and stated that he had nothing further to say. The birth certificate of Beverly Colby names her father as Martin Colby. Moreover, the witnesses who appeared at the hearing held in 1939 on the estate of Martin Colby testified that such decedent was survived by two children, Clarence Colby, the appellant, and a daughter, Beverly Ann Colby. Accordingly, those two children were determined to be that decedent's heirs by departmental decisions, dated May 6, 1940 (16688–40).

Therefore, we regard existing findings that Beverly Colby is the child of Martin Colby as final. On such a basis she was properly found to be one of his heirs, and also entitled to represent her father as an heir to the estate of Harry Colby. In this latter respect, section 5 of the act of February 28, 1891,[4] amending the provisions of the General Allotment Act of February 8, 1887,[5] provides as follows:

> That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have co-habited together as husband and wife according to the custom and manner of Indian life the issue of such co-habitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and *every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child:* * * * (Italics supplied.)

These provisions of federal law apply rather than any state laws of descent on the subject. By such federal statute an Indian child is made the legitimate issue of his or her father, irrespective of whether the child's birth was the result of co-habitation between the child's father and mother according to the Indian custom, or whether the child was otherwise illegitimate. Moreover, this Department has heretofore concluded that under this same statute illegitimate children are permitted to represent their deceased fathers, and to inherit in the

[4] 26 Stat. 795, 25 U.S.C. 371.
[5] 24 Stat. 388, 25 U.S.C. 348.

estates of the father's kindred in the same manner as those born in lawful wedlock.[6]

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior [sec. 210.2.2A(3)(a), Departmental Manual, 24 F.R. 1348], the action of the Examiner of Inheritance, denying Clarence Colby's petition for rehearing, is affirmed, and the appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF FORD-FIELDING, INCORPORATED

IBCA-303 *Decided July 2, 1962*

Rules of Practice: Appeals: Dismissal—Contracts: Breach

An appeal will be dismissed by the Board for lack of jurisdiction where the contractor's claim is based on breach of contract, involving expense of defending injunction litigation by third parties against contractor.

BOARD OF CONTRACT APPEALS

Department Counsel has moved to dismiss this timely appeal from the contracting officer's decision dated November 7, 1961, on the ground that the claim for expense of collateral litigation is one for alleged breach of contract and, therefore, outside the jurisdiction of the Board. No brief in opposition to the motion has been filed on behalf of appellant.

Under the terms of the contract, which provided for the resurfacing of certain roads and the construction of an airstrip, in the vicinity of Glen Canyon Dam, Arizona, the Government was to furnish gravel deposits for excavation and use by the contractor in the work.

[6] Inheritance Rights of Legitimate and Illegitimate Indian Children, 58 I.D. 149, 157 (1942). "By the 1891 amendment to section 5 of the General Allotment Act, Congress declared illegitimate children to be the legitimate issue of their fathers. From this declaration it would seem that all of the rights of inheritance that go with being the legitimate issue of such fathers were thereby conferred upon the children. Congress did not limit this right of inheritance by declaring that they should be permitted to inherit only from the fathers. Statutes legitimatizing children should be liberally construed. * * * It must, therefore, be assumed that Congress realized that by declaring such children to be the legitimate issue of their fathers it was doing more than declaring that they might be permitted to inherit from their natural fathers. The legislation must also be read with the settled rule that when a person has been made the lawful issue of another he obtains an inheritable status and he may receive and transmit property from that other's collateral and lineal kindred in the same manner as those born in lawful wedlock * * *."

These deposits, or borrow pits were designated on a map described as Drawing No. 557–420–104. The contract provided further:

> * * * If these gravel deposits are deficient in fines or binder, additional material as required, shall be obtained from borrow areas on Government land as designated by the contracting officer. * * *

The contract was awarded November 8, 1956, in the total amount of $36,801. It included Standard Form 23A (March 1953). As a result of unsuitable material in the designated borrow areas, the Government field engineer, as a representative of the contracting officer, instructed the contractor to secure material from another location, known as Section 14, not specified on the contract drawing. Shortly after the contractor began excavating and using gravel from the new location, a suit for an injunction to prevent further removal of gravel was commenced against the contractor by certain mining claimants who asserted a placer mining claim as to the gravel deposits in the new borrow area. The contractor retained counsel and defended the injunction action, which is still pending, awaiting the outcome of companion suits, one being an action brought by the Government for condemnation of the land in question.

The mining claimants are also maintaining an action seeking judicial review of a decision of the Secretary of the Interior which affirmed a null and void finding as to the mining claim. The contractor completed its contract on January 29, 1957.

It appears that the contracting officer's representative assumed that Section 14 had been acquired by the Government, whereas the process of condemnation had apparently just begun. The Declaration of Taking is said to have been signed by the Solicitor of the Department of the Interior on January 14, 1957. The dates of the removal, by the contractor, of gravel from Section 14 are not clear from the record, but the decision of the contracting officer indicates that both the removal of the gravel and the bringing of the injunction litigation occurred or were initiated in the latter part of 1956.

The contractor submitted a claim in April 1957, and again in 1958, in the amount of $515.12, for expenses incurred in defense of the injunction suit, but did not press it further until October 1961, because the contracting officer requested that the claim be held in abeyance until the outcome of the pending collateral litigation. The amount of $515.12 includes $200 for attorney's fees incurred but not paid, the remainder being for expense of travel, wages, telephone calls, etc., in connection with the litigation.

It is generally accepted that where the requisite circumstances are present, breach of contract forms the basis of claims for recovery of expense of collateral litigation.[1] Hence, under the facts of this case, the Board has no jurisdiction,[2] for it seems clear that the claim is for alleged breach of an implied obligation on the part of the Government not to negligently interfere with the contractor in the performance of his contract.[3]

Appellant's counsel has urged in the Notice of Appeal herein, dated December 5, 1961, that the "claim was incurred directly upon the contract," rather than as a result of breach. We do not consider this theory to be tenable. The Government cannot be made liable for litigation costs incurred by its contractor, as a contract obligation, in the absence of express agreement.[4] The contracting officer was empowered by the contract to select other sources of gravel, hence his instructions to take gravel from Section 14 could not be construed as a change order.[5] In any case, expenses of litigation could not be considered as natural and proximate consequences of a change order.[6]

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

THOMAS M. DURSTON, *Acting Chairman.*

I CONCUR:

JOHN J. HYNES, *Member.*

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[1] 25 C.J.S. *Damages* sec. 50–c (1941): "Where the natural and proximate consequence of a wrongful act has been to involve plaintiff in litigation with others, there may, as a general rule, be a recovery in damages against the author of such act of the reasonable expenses incurred in such litigation, together with compensation for attorneys' fees, and such costs as may have been awarded against plaintiff; but such expenses must be the natural and proximate consequence of the injury complained of, and must have been incurred necessarily and in good faith, and the amount thereof must be reasonable. * * *" See also, *Madison County Construction Co.* v. *State of New York,* 31 N.Y.S. 2d 883 (1941), where a contractor building a road for the State was sued by a land owner for trespass and an injunction, and the State was invited to take over the defense of the suit but failed to do so. The State was held to have breached the contract by setting out stakes for the road on land it failed to acquire. *But see, Ramsey* v. *United States,* 121 Ct. Cl. 427, 101 F. Supp. 353 (1951): * * * "Damages remotely or consequently resulting from the breach are not allowed. In the instant case, it could not be reasonably foreseen by the Government that failure to pay the contract price would put the corporation in bankruptcy."

[2] *Allied Contractors, Inc.,* IBCA–265 (May 16, 1961), 68 I.D. 145, 61–1 BCA par. 3047, 3 Gov. Contr. par 348.

[3] *Peter Kiewit Sons' Co.* v. *United States,* 138 Ct. Cl. 668, 674–75, 151 F. Supp. 726, 731 (1957).

[4] *Cf. United States* v. *Rice,* 317 U.S. 61 (1942); *Chouteau* v. *United States,* 95 U.S. 61 (1877).

[5] *Cheney-Cherf and Associates,* IBCA–250 (June 19, 1962) 69 I.D. 102. *Cf. W&W Construction Co.,* IBCA–54 (August 4, 1958), 58–2 BCA par. 1860.

[6] Fn. 4, *supra.*

APPEAL OF BROOKS AND MIXON

IBCA-277 *Decided August 14, 1962*

Rules of Practice: Appeals: Generally

Where a request for reconsideration is not persuasive of error by the Board, the decision will be affirmed.

Rules of Practice: Evidence

Where a document on its face indicates the granting of an extension of time for performance of the contract, a contrary interpretation by the Government will be disregarded by the Board. Even if the document is found to be ambiguous, the doctrine of *contra proferentem* would apply.

BOARD OF CONTRACT APPEALS

The Government has timely requested reconsideration of the Board's decision of June 5, 1962. The Board had granted an extension of time in which a request for reconsideration might be submitted by appellants, however. By letter of August 3, 1962, appellants advised the Board that reconsideration would not be sought. By memorandum dated July 30, 1962, from Department Counsel to the Board, the Government has withdrawn its request for an opportunity to file material supplemental to its request for reconsideration. Hence, the only matter now before the Board is the Government's request for reconsideration dated June 25, 1962.

The basis for the Government's request for reconsideration is the interpretation by the Government as to the intent of Directive "S" dated October 12, 1959, and Amendment "A" thereto, dated November 23, 1959. These documents, which were a part of the appeal file, and hence a part of the record, were issued by the contracting officer, extending the fall seeding and sodding period from October 16 to October 31, 1959, and from October 31 to November 30, 1959, respectively.

The Government says that such extensions were permissive only, and that had it suspended the seeding and sodding operations until the spring of 1960, as it had the power to do under the contract, instead of allowing the work to be completed in the late fall of 1959, the contractor would have been assessed liquidated damages for the time required to perform the work in 1960.

The plain import of Directive "S" and its amendment was the extension of the time in which a portion of the contract work was to be performed. These documents on their face contain no other implication. Even if an ambiguity were involved, the doctrine of *contra proferentem* would apply, requiring that the language be construed in favor of the party who did not draft the documents.[1]

CONCLUSION

The motion for reconsideration is denied, and the Board's decision of June 5, 1962, is affirmed.

THOMAS M. DURSTON, *Member.*

WE CONCUR:

PAUL H. GANTT, *Chairman.*
JOHN J. HYNES, *Member.*

W. DALTON LA RUE, SR., ET AL.

A–29309 *Decided August 14, 1962*

Private Exchanges: Public Interest

The benefit to the public interest which must be shown before a private exchange may be approved is not limited to the interest of the public in the management of grazing lands. Such an exchange may be approved if it is determined, on balance, that the public generally will be benefited through the acquisition of the selected land by the exchange applicant, provided land of equal value is offered in exchange.

Private Exchanges: Protests

Where a proposed private exchange meets the statutory requirement of equal value between the offered and the selected land and it appears that the exchange will be in the public interest, protests against the exchange are properly dismissed.

Private Exchanges: Public Interest

The fact that consummation of a private exchange may adversely affect the livestock operations of protestants who have enjoyed grazing privileges on the selected land does not warrant a determination that the exchange is not in the public interest.

[1] *Midland Constructors, Inc.,* IBCA–272 (October 2, 1961), 68 I.D. 277, 61–2 BCA par. 3153, 3 Gov. Contr. par 591, and cases cited therein.

Private Exchanges: Generally:

The Department's policy statement of February 14, 1961, which states that no private exchange will be consummated except where it is shown that a compelling reason exists for acquiring the offered lands to augment a long range Federal resource management program, is not to be read as compelling the Secretary to disapprove an exchange, absent a showing of compelling need to acquire the offered lands, even though he determines in consideration of all circumstances of the case that the exchange will be in the public interest.

Private Exchanges: Protests

A protest by an oil and gas lessee against a proposed private exchange is properly dismissed where the exchange, if consummated, will reserve title to the oil and gas deposits in the selected land covered by the lease in the United States for so long as the oil and gas lease remains in force.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

W. Dalton La Rue, Sr., and Juanita S. La Rue, Depaoli Brothers, and Forrest L. Parmenter have filed separate appeals to the Secretary of the Interior from a decision by the Associate Director of the Bureau of Land Management dated October 23, 1961, affirming the dismissal of their separate protests against an exchange of lands applied for by North American Aviation, Inc., pursuant to section 8(b) of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g(b)).

The exchange, if consummated, would vest in North American Aviation, Inc., title to over 10,000 acres of land located within the boundaries of Carson City Grazing District No. 3, Nevada, with an appraised value of $86,400, and would vest in the United States title to more than 20,000 acres of land within the boundaries of Winnemucca Grazing District No. 2, Nevada, with an appraised valuation of $90,100.

The applicant states that it needs the selected land to consolidate it with its extensive private holdings in the area to enable it to establish a facility to carry out its development and test work in connection with rocket power plants and rocket engines and components and its extensive laboratory and research work in the field of fuels, chemicals, components, and instruments in connection with such engines and that its present facilities for this work are approaching full capacity for utilization. If the selected land is acquired, the land would be used in connection with this and other operations of the company. The applicant has purchased much of the privately owned land in the area of the selected land and hopes to block up its holdings in

the area, through the medium of exchanges, so that it will be in a position to participate in the expanding Government programs with respect to atomic energy, space exploration, and missile and aircraft development.

Two of the protestants, the La Rues and the Depaolis, are livestock operators in the area who have used portions of the selected land for many years in connection with their livestock operations. The third protestant has an oil and gas lease (Nevada 055732), issued pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226), effective as of September 1, 1960, covering a small portion of the selected area.

On November 2, 1960, the Reno, Nevada, land office found that the exchange would be in the public interest and ordered publication of notice of the proposed exchange, pursuant to section 8(d) of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g(d)).

Thereafter the land office, in separate decisions, dismissed these and other protests which had been filed against the proposed exchange.

In dismissing the La Rue protest, the manager, on January 26, 1961, pointed out that the Taylor Grazing Act is a multiple purpose act and that termination of grazing privileges granted under the act is not inconsistent with purposes of the act; that the fact that consummation of a private exchange may adversely affect the livestock operations of a protestant who has enjoyed grazing privileges on the selected lands does not warrant a determination that the exchange is not in the public interest; that because of the acquisition of most of the privately owned lands in the selected area by the applicant for industrial purposes, the grazing value of the public lands interspersed among its private holdings has been reduced to a point where retention of the public lands in public ownership for grazing management is becoming impracticable; that the offered lands are in a location where grazing is and will continue to be the principal land use for many years; and that acquisition of the offered lands will facilitate adjudication and management of that area. The manager also stated that consummation of the exchange would be in the public interest because of the vital significance of the applicant's operations in the space program of the Government, and he noted that consummation of the exchange, which is considered to be an integral part of North American's land acquisition in the area, would bring to the State of Nevada and the Reno-Sparks area new payrolls, new sources of tax

revenue, and new business which would benefit both the State and local areas. Finally, the manager stated that the La Rues had submitted nothing in support of their allegation that the value of the offered land is not equal to that of the selected land.

The manager dismissed the protest of the Depaolis on the same grounds.

The protest of Parmenter was based largely on the argument that the United States must retain the mineral interest in the land covered by his oil and gas lease in order to protect the lessee. The manager stated that on the basis of reports from the Geological Survey and from examinations conducted by Bureau of Land Management personnel the lands embraced in the Parmenter lease, to the extent that they included land selected under the private exchange application, had been found to be without value for minerals and that the patent issued to North American as the result of its exchange application would reserve to the United States the oil and gas rights, subject to the terms of the oil and gas lease, for so long as that lease remains in force. He found that Parmenter had not shown that the approval of the exchange would be adverse to his interest and dismissed the protest.

In considering the appeals which the protestants took from the decisions of the manager, the Associate Director found that acquisition of the offered land would be beneficial to the proper and effective management of the grazing resources in the Bureau's land management program in the area; that, notwithstanding the fact that the exchange would have a substantially adverse effect on the La Rue operations and would affect the Depaoli operations adversely to a lesser extent, nevertheless the benefits accruing to the public interest in facilitating administration of Winnemucca Grazing District No. 2 outweighed the disruption of private livestock operations occasioned by the loss of the use of the selected land by those livestock operators. The Associate Director held that the manager had erred in his decisions to the extent that he implied or ruled that the proposed use of the selected land by the exchange applicant in furtherance of space and missile programs of the Government is a persuasive factor in determining whether the proposed exchange is in the public interest and in accord with the provisions of the Taylor Grazing Act. He stated:

Consideration of the public interest in a land exchange under the Taylor Grazing Act involve matters related to conservation of Federal resources, i.e., whether

the exchange will facilitate the administration of the public lands, e.g. promote the interests of conservation or range management. The decisions appealed from are therefore modified to eliminate any reference to any so-called national defense justification for the exchange, this being extraneous to the issue of the public interest in the exchange.

He found that the land office had correctly held that W. Dalton La Rue, Sr., as owner of authorized range improvements upon the selected land, is entitled to reimbursement for them but that the grazing users are not entitled to compensation as the result of their loss of grazing use of the selected land or the effect of such loss upon their livestock operations, since the granting of permits for grazing privileges in the selected land did not create any rights in the grantees for which they may be compensated upon consummation of an exchange. He held, further, that it was proper to dismiss the Parmenter protest, since the granting of the selected land to the applicant subject to the outstanding oil and gas lease would not alter the rights of Parmenter.

Finally, he held that the procedures followed by the land office in processing the exchange application and in considering the protests were correct and that a protestant against a private exchange is not entitled as a matter of legal right to a hearing on matters relating to the allowance of the application. He stated:

> The controlling issue in this matter is the public interest in effecting the exchange. The record which has been assembled in the matter is extensive and complete, and it does not appear that any additional relevant facts could be brought out in a hearing. It does not appear that a public interest would be served by a hearing in the matter.

On appeal to the Secretary the argument for a public hearing is repeated and the contention made that the exchange will not facilitate the administration of the public domain.[1]

I agree with the decisions below insofar as they held that a hearing is not required in this matter and that no useful purpose would be served by such a hearing. *M. C. Steele et al.* v. *Ruby Rector Kirby*, 60 I.D. 389, 394 (1950); *Horace D. Stewart et al.* v. *Eastern Oregon*

[1] The record indicates that for some time the livestock operators and North American have been negotiating to effect a settlement of their differences. In its answer to the Depaoli appeal to the Director, North American stated that an arrangement had been tentatively reached between them and that when that arrangement was finally executed the Depaoli appeal would be withdrawn. These negotiations, as well as negotiations with the La Rues, apparently have not come to fruition. On May 28, 1962, North American submitted an affidavit by one of its officers which it requested be added to the record. North American, while not conceding any legal obligation in that respect, stated that it

Land Co., 57 I.D. 95, 100 (1940). The facts necessary to make a determination as to whether the exchange should be consummated are contained in the present record. The difficulty comes in weighing one set of facts against another to determine the ultimate question whether the proposed exchange is in the public interest within the meaning of section 8(b) of the Taylor Grazing Act as amended by the act of June 26, 1936 (49 Stat. 1976).

Section 8(b) provides:

> When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

Laying aside for the moment the Parmenter appeal, reduced to its simplest terms, the case comes down to this: North American needs a large compact tract of land in a remote area in order to carry on its program of testing and development in fields in which the Federal Government and the public generally have an interest. It has selected an area in Nevada which it believes will meet its needs. It has acquired practically all of the privately owned lands in that area and hopes to acquire the interspersed public lands by means of this exchange. It has offered in exchange for the public lands in the vicinity of its recently acquired holdings, lands of comparable value in another grazing district. If the exchange is consummated,

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had offered to pay the La Rues for the whole interest in their entire ranch, its fair and reasonable value to be determined by an impartial appraiser, and that it was still willing to abide by that offer. As an alternative, North American indicated its willingness to pay the livestock operators the fair and reasonable value of their grazing privileges which would be lost if the exchange were consummated, also to be determined by an impartial appraiser. If a mutual agreement could not be reached on such an appraiser North American was agreeable to having such appraiser appointed by the Secretary of the Interior. Following the receipt of the affidavit, the Solicitor of this Department informed the livestock operators that a decision on the pending appeals would be postponed for a reasonable time to allow them to consider the proposal made by North American. In response, the La Rues, on July 16, 1962, stated that they are protesting the exchange because if it is approved their ranch will be destroyed and that they are not interested in a cash sale of their ranch, Monte Cristo, as a settlement. What they want is a comparable ranch in the same general area. They stated that compensation for lost grazing privileges on Federal land does not compensate for the loss of function of their deeded land, which has been developed as a headquarters for their cattle operation. They find similarly inadequate the offer to pay the appraised value of the entire ranch. They requested that North American be given an additional period of time to consider whether it would join in a final effort to settle their differences in direct negotiations and without pre-conditions. By letter dated July 23, 1962, the Department was informed by North American that further direct negotiations with the La Rues would be "utterly futile."

the other appellants who have been using the public domain in the vicinity of their private holdings will no longer be permitted to do so. Because of the location and extent of the Federal lands heretofore utilized by the La Rues, this exchange will probably curtail their operations. The Depaolis will be hurt to a lesser extent.

It is the contention of the livestock operators that the Taylor Grazing Act was passed to stabilize the livestock industry, not to destroy it, and that since the Taylor Grazing Act was passed to benefit the livestock industry and to conserve the public domain upon which that industry depends section 8(b) may not be used as a vehicle for disposing of such land to a private company for industrial uses, particularly when the proposed exchange would force livestock operators out of business or materially reduce their operations, and when the land which the Government would acquire in the proposed exchange will not benefit the Government in its over-all management of grazing. In other words they assert that the "public interests" mentioned in section 8(b) are the interests of the public in the management of grazing lands and that even on the more narrow construction of that term applied by the Associate Director it cannot be shown that a benefit will accrue to the Government by accepting title to the offered lands in exchange for the selected lands.

I am of the opinion that the benefit to the public interests, which is the criterion of the statute, need not be related exclusively to conservation of Federal grazing resources nor need it be shown that a proposed exchange will promote range management. In my opinion the construction placed on section 8(b) by the manager of the Reno land office is the proper one. As he pointed out, the Taylor Grazing Act is a multiple purpose act and while its chief immediate purpose was to stop injury to the public domain by unregulated grazing and to promote the stabilization of the livestock industry, section 1 of the act authorizes the Secretary of the Interior to establish grazing districts in order to promote the highest use of the public domain "pending its final disposal." Section 3 authorizes the Secretary to issue permits to graze livestock on such grazing districts but provides that the issuance of such permits shall not create any right, title, interest, or estate in or to the lands. Section 7, as amended by the act of June 26, 1936, authorizes the Secretary to examine and classify lands within grazing districts and to open such of those lands as he finds to be more valuable or suitable for other purposes than grazing or

proper for acquisition in satisfaction of outstanding rights to disposition under applicable public land laws, after reasonable notice has been given to grazing permittees. Section 14 of the act (43 U.S.C., 1958 ed., sec. 1171) authorizes the Secretary to order into market and sell at public auction isolated or disconnected tracts of the public domain and tracts which are mountainous and too rough for cultivation.

Thus nothing in the other sections of the act suggests that private interests may not acquire public land being used for grazing purposes to the detriment of those licensed to use the land.

Section 8 itself sets up different standards for the acceptance of gifts and the making of exchanges. Only when acquisition of the offered land will promote the purposes of a grazing district or facilitate administration of the public lands may a gift of land be accepted. Neither the test for gifts nor the "public interests" test need be applied when States apply to exchange lands. *Cf.* Solicitor's Opinion, M–36178, 61 I.D. 270 (1954).

It is true that a former Solicitor of this Department expressed the opinion shortly after the passage of the act that section 8 authorized and directed acceptance of gifts and land exchanges only when the proposed gifts or exchanges will benefit the public interests which are enunciated in the Taylor Grazing Act and are served thereby (55 I.D. 9(1934)). However, at that time the provision for private exchanges was part of the same sentence providing for acceptance of gifts and the sentence commenced with the clause "where such action will promote the purposes of the [grazing] district or facilitate its administration." It is possible that the Solicitor misread this clause as applying also to private exchanges. In any event, since the complete revision of the section by the 1936 act to set out the provisions for gifts and private exchanges in separate paragraphs, (a) and (b), it does not appear that the Department has held that the "public interests" which must be benefited by a private exchange must be entirely those related to grazing.[2]

Although it is probable that most exchanges proposed under section 8(b) have been by parties who did not propose to put the selected lands to industrial uses and that, in most cases, the interest of the general

[2] It is significant that section 8(b) expressly authorizes the Secretary to exchange "surveyed grazing district land" for privately owned land outside a grazing district. This is specific authorization for transferring into private ownership public land which forms part of a livestock operation for land that does not.

public has not been materially involved one way or another, nevertheless the general public interest has in some instances been the standard used to determine whether the exchange should be consummated.

Thus in *Horace D. Stewart et al.* v. *Eastern Oregon Land Company*, *supra*, the Department said:

> This application for exchange was made and is being considered under section 8(b) of the Taylor Grazing Act of June 28, 1934, *supra*, as amended, and that section provides that exchanges of this type may be consummated "when public interests will be benefited thereby." In considering the possible benefit to the public interest, individual cases of hardship or dissatisfaction alone cannot be allowed to sway the Department in reaching a decision. To hold otherwise would prevent the consummation of most exchanges not made mandatory by statute. Only in cases where such hardship is likely to be so widespread that a large section of the public will be adversely affected would the Department be warranted in taking cognizance thereof.
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> Since the filing of the motion for rehearing, the Department has been informally advised of a proposal by the attorney for the moving parties that the exchange be rejected insofar as protests have been filed and approved as to the remainder. It is apparent that this suggestion cannot be made a basis for final disposal of the case. As has been pointed out above, the test of an exchange under section 8(b) is whether its consummation will be in the public interest and not whether it is objected to by some individual or group of individuals. If it were to be otherwise, and a protest by someone who has been accustomed to using the land selected by the exchange applicant could serve to block the exchange to the extent that he was interested in the selected lands, it would mean that the requirement of the statute that exchanges should be considered in the light of public interest would be set aside, and instead consideration of private interests would become paramount.
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> The Department considers itself bound to administer the public lands in the interests of all of the people as a whole, and in such manner as will result in the greatest public benefit.

In *Elbert O. Jensen*, 60 I.D. 231 (1948), the Department rejected as too narrow a construction placed on section 8(b) by the Director of the Bureau of Land Management. The reason assigned by the Director for rejecting an exchange application was that as the selected land would be taken out of a grazing district and the offered land could not be placed within the district (being in a national forest), the resulting reduction in the acreage of the grazing district would not be beneficial to the "public interests." The Department said:

> Section 8(b), however, does not impose any such limitation as that adopted by the Director of the Bureau of Land Management with respect to the nature of the "public interests" to be benefited by the exchanges authorized in that section. The "public interests" mention in section 8(b) of the Taylor Grazing Act may

encompass interests outside the particular grazing district involved in the exchange. The prospect of improving the administration of a national forest might, for example, warrant a finding that the "public interests will be benefited" by an exchange under section 8(b) of public land within a grazing district for privately owned land within the boundaries of the national forest.

In *Willis N. Farlow et al.*, 62 I.D. 209 (1955), the Department said:

> It has long been the policy of the Department, in determining whether to allow a private exchange, to consider not only whether acquisition of the offered land would be in the public interest, but to determine whether disposal of the selected lands would outweigh the advantages which might accrue from such acquisition. Thus, it has been said, "Although a proposed exchange may include some elements of advantage to the public, other elements present in the exchange may strike a balance which is unfavorable to the public interests. The Department must weigh all factors and look to the final balance." *David B. Morgan*, A-24365 (July 23, 1946). Thus, applying this principle in determining whether a proposed private exchange is in the public interest, it was held that although the acquisition of the land offered, without consideration of other aspects of the situation, would clearly be in the public interest, nevertheless the exchange would not be in the public interest where the selected land was more suitable for disposition under the Small Tract Act (43 U.S.C., 1952 ed., sec. 682a), and the exchange application was rejected. * * * Likewise on several occasions where allowance of a private exchange would seriously disrupt administration of a grazing district or of public grazing lands, the exchange has been rejected.

Thus while the Department has rejected applications on the ground that the advantage to be gained by the acquisition of the offered land is outweighed by the adverse effect which the disposal of the selected land would have on the public generally and livestock operators using the selected land particularly, nothing in the statutory provision prevents the Department from looking at the advantages to be gained by the public generally by the disposition of selected land in exchange for land of comparable value.

The fact here is that North American proposes to use the selected land for purposes which, it is hoped, will benefit the Federal Government and the general public. The fact also is that it has acquired privately owned land in the area of the selected land and taken that land out of the category of base land upon which grazing privileges may be issued by refusing to lease its newly acquired land to livestock operators. Thus, as the manager stated, the importance of grazing in the selected area has been reduced. This is so whether or not the exchange is approved.

Therefore, taking into account all of the factors surrounding the proposed exchange, I am of the opinion that, even if there were no

advantage to acquisition of the offered land, this exchange is within the contemplation of the statutory provision and that the Secretary of the Interior may, in the exercise of the discretion vested in him by section 8(b) of the Taylor Grazing Act, properly find that the exchange is in the public interest.

There remains for consideration only the question of how the proposed exchange comports with the land conservation policy approved by the Secretary on February 14, 1961. That policy, which is currently in effect, states in part:

> Private exchanges will not be entertained or consummated except where it is shown that there are compelling reasons to acquire the offered lands to augment long-range Federal Resource Management programs.

Under that new policy, absent a showing that there are compelling reasons for the acquisition of the offered land to augment long-range Federal resource management programs, private exchange applications have been rejected. *Bella Drengson*, A-28564 (September 27, 1961); *Palomas Ranch*, A-28166 (August 16, 1961).

It appears in this case that acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes. This is clearly beneficial to the public interest but whether a compelling reason exists, in terms of the policy statement, for acquiring the offered lands may be subject to debate. However, the policy statement is intended to lay down guidelines and principles for governing actions by subordinate officials of the Department. It is not intended to be a straitjacket tying the hands of the Secretary and preventing him from approving an exchange that he finds, upon consideration of all pertinent factors, to be in the public interest.

Such is the case here. The material before me establishes without much question that consummation of the proposed exchange would be in the public interest. Therefore, the dismissal of the protests of W. Dalton La Rue, Sr., and Juanita S. La Rue and of the Depaoli Brothers is affirmed.

The Parmenter appeal is without merit. While the Department understands Parmenter's concern that once a patent to the exchange applicant is issued he will not be entitled to an extension of his lease and other benefits which may flow from the lease, that concern is groundless. Any patent issued to North American covering the land included in the Parmenter lease will except the oil and gas deposits from the grant for so long as his lease remains in force. Title to

such deposits will vest in the exchange applicant only upon termination of the Parmenter lease. Solicitor's Opinion M–36254, 61 I.D. 459 (1954). The issuance of such a patent will not preclude any extension of his lease to which Parmenter may be entitled. Solicitor's Opinion M–36254 (Supp.), 62 I.D. 177 (1955).

Accordingly, it was proper to dismiss the Parmenter protest.

Therefore, for the reasons outlined above, the decision of the Associate Director, Bureau of Land Management, is affirmed.

STEWART L. UDALL,
Secretary of the Interior.

MELVIN A. BROWN

A–28923 *Decided August 31, 1962*

Oil and Gas Leases: Acreage Limitations—Regulations: Validity

The regulation calling for the rejection of oil and gas lease offers where the acreage in those offers, when added to the acreage in outstanding leases and pending lease offers of the offerors, would exceed the maximum acreage limitation on leases set forth in the Mineral Leasing Act is designed to insure the proper administration of the act and is well within the authority of the Secretary of the Interior as the administrator of that act.

Oil and Gas Leases: Acreage Limitations

In computing an offeror's chargeable acreage, it is proper to include all his pending offers, even though such offers may not have received top priority in drawings of simultaneously filed offers already held.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Melvin A. Brown has appealed to the Secretary of the Interior from a decision by the Appeals Officer, Bureau of Land Management, dated March 14, 1961, affirming the rejection by the manager of the Cheyenne, Wyoming, land office, on August 15, 1960, of four oil and gas lease offers for land in Wyoming, filed by Brown on May 23, 1960, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).[1] The offers were rejected because they, with other offers simultaneously filed on May 23, 1960, caused Brown's

[1] The terms of the Mineral Leasing Act were substantially changed by the Mineral Leasing Act Revision of 1960 (74 Stat. 781). However, all references to the act in this decision will be to the provisions thereof in effect prior to that revision.

acreage account to exceed 46,080 acres of land in Wyoming under lease or lease offer. 43 CFR, 1960 Supp., 192.3(e)(2).[2]

Brown points to the acreage limitation on *leases* imposed by section 27 of the act (30 U.S.C., 1958 ed., sec. 184),[3] and challenges the authority of the Secretary under that provision to promulgate a regulation which requires the rejection of *offers* where the acreage in those offers, together with the acreage in outstanding leases held by the applicant and the acreage in pending offers previously filed by the same applicant, exceeds the maximum acreage permitted by the statute to be held under lease by any one applicant in a particular State. He contends further, without conceding the validity of the regulation, that because some of his offers which were pending on May 23, 1960, had not drawn top priority in drawings previously held those pending offers should not be considered in determining whether the offers simultaneously filed on May 23, 1960, including the four offers involved in this appeal, caused his acreage account to exceed the maximum allowable in leases and lease offers.

As to Brown's first contention, section 32 of the act (30 U.S.C., 1958 ed., sec. 189) authorizes the Secretary to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of the act. The Department determined many years ago that in the interest of expediency in the administration of the act and to discourage the filing of offers for leases which the Department is prohibited by section 27 from issuing the limitation imposed by the statute on acreage held under lease should be applied administratively to the acreage included in offers for such leases. *W. D. Clack, Walter Butler Slagle*, A–24517 (December 12, 1947); *John H. Trigg et al.*, 60 I.D. 166 (1948), On Reconsideration, A–24483 (April 8, 1949); *Albert C. Massa et al.*, 62 I.D. 339 (1955).

Although the Department, until January 1959 (Circular 2009; 24 F.R. 281), accorded offerors a period of 30 days within which to re-

[2] "If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety."

[3] "* * * No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State * * *."

On September 2, 1960, the limitation was raised to 246,080 acres by the Mineral Leasing Act Revision of 1960 (30 U.S.C., 1958 ed., Supp. III, 184(d)).

duce their holdings in leases and lease offers upon a determination that they held excess acreage without losing priority of filing dates (43 CFR 192.3(c); *Albert C. Massa et al.*, 63 I.D. 279 (1956), and *John H. Anderson, T. K. and Evelyn H. Sterling*, 67 I.D. 209 (1960)), this was entirely a matter of administrative discretion.

When it became evident that the granting of an opportunity to an offeror to reduce his holdings within a given time led to abuses of the privilege by some offerors and caused confusion and unnecessary delays in the processing of offers, the grace period was eliminated.

The regulation now in effect does not change in any way the long-standing practice of the Department in refusing to recognize offers filed by applicants who already have under lease or lease offer the maximum acreage permitted. It is a means of according fair treatment to all applicants and insuring that the provisions of section 27 will not be violated. If no limitation were imposed on the acreage that could be included in offers, any person could file for far more acreage than he could receive in leases and then pick and choose what acreage he wanted as his offers were reached for processing. This would enable him to tie up vast acreages of land which he could not possibly hold in leases and to bargain, for a price, with junior offerors anxious to lease some of the acreage tied up by him. Speculation would be promoted, without any benefit to the public interest in promoting the development of public land. In addition, a staggering administrative burden would be cast upon the Bureau in having to accept, record, and act upon countless offers which were filed with full knowledge that only a portion of them could eventuate into leases. In view of these considerations I have no doubt that the regulation attacked by the appellant is a reasonable regulation, well within the authority of the Secretary in the administration of the act.

Brown's second major contention is that even if the regulation is to be followed and offers charged, only those offers which have first priority should be charged. He contends that because certain of his offers did not draw top priority in previous drawings they are not chargeable to his acreage account. The answer is that he is still maintaining those offers and cannot at the same time urge that they be disregarded. Those offers are, in effect, junior offers which may ripen into leases should the offers which drew higher priority, for some reason, not qualify. As the Department said in the *Clack, Slagle* case, *supra:*

That some of Slagle's various outstanding applications were junior to those filed by others for the same tracts is urged as a reason for excluding these junior applications from consideration in the acreage computation. The remoteness of Slagle's chance to obtain a lease under such applications does not warrant their disregard. Slagle filed and knowingly maintained such applications presumably because he believed they had value to him. He cannot press his applications on the one hand and deny their effectiveness and value on the other. If he had truly considered such applications of no avail, relief was always readily available to him through their voluntary withdrawal.

In his argument Brown speaks of his offers which were drawn No. 2 and No. 3 in drawings held prior to May 23, 1960, as "unsuccessful" and as giving him no "lease priority." From this it is evident that Brown misconstrues the regulation (43 CFR, 1960 Supp., 192.43) under which his offers were simultaneously filed. That regulation, along with another mentioned therein (43 CFR 295.8), simply establishes the order in which offers simultaneously filed will be considered. The priority list, made up as the result of a drawing, merely assures that the offers will be considered in the same order as that in which they were drawn. It does not bar an offer not drawing first priority from consideration but merely postpones that consideration until offers ahead of it on the priority list are disposed of. *Henry S. Morgan*, A–28688 (August 30, 1961). Thus offers which draw top priority in a drawing may be termed "successful" and as having "lease priority" only in the event the applicants are qualified to hold a lease.

To apply the regulation on acreage limitations as Brown urges, that is, to charge only offers that are first in line, would undoubtedly create a tremendous administrative problem. It is common occurrence that many offers are filed which conflict as to some land. Offers A, B, and C may all include Tract 1. Offers A and B may also include Tract 2; offers B and C, Tract 3; offers A and C, Tract 4; and all the offers additional land not in conflict. To determine chargeability, as Brown insists, would require a determination as to which offer had priority as to which tract. This determination would not only have to be made as of the dates when the offers were filed but also at any later date when an offer might be amended or acted upon. For example, in the case described, if, after offers A, B, and C were filed, offer A were relinquished or rejected as to Tract 1, offer B would then become chargeable with Tract 1. The complexities that could arise from such a procedure would be enormous, particularly when it is remembered that a single offer may include as much as 2,560 acres (64 legal subdivisions of 40 acres each). To mention these difficulties

is to establish that the Department never intended that the regulation in question should have the meaning urged by the appellant.

Brown contends that the recently adopted system of posting available acreage on the third Monday of each month and providing for the simultaneous filing of offers for such lands is confusing because sometimes the results of the previous month's drawing are not known before the available lands to be included in the following month's drawing are posted.

We see no reason why confusion should result from this method of making lands available for leasing. An offeror knows, or certainly should know, how much acreage he applied for out of what may have been available in the previous month and he knows that that acreage is chargeable to his acreage account so long as he is maintaining those offers. He may at any time withdraw his previous offers but while he is maintaining them, whether before or after a drawing, he is chargeable with the acreage included therein. *Cf. Edwin G. Gibbs*, 68 I.D. 325 (1961). Thus it should not be difficult for him to compute the acreage with which he is chargeable. He need only to total the acreage included in his outstanding offers. On the other hand, as pointed out earlier, if he were to be charged only with respect to acreage as to which his offers had first priority, he would indeed have great difficulty in determining his chargeability on any given date because it could be affected by action taken on prior offers filed by others as to which he had no notice.

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

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF OTIS WILLIAMS AND COMPANY

IBCA-324 *Decided September 5, 1962*

Contracts: Additional Compensation—Contracts: Changed Conditions—Rules of Practice: Appeals: Dismissal

An appeal involving a claim for additional compensation under the Changed Conditions clause of a construction contract, based on an overrun in excavation quantities, will be dismissed where the contractor knowingly

submitted an improvident unbalanced bid in reliance upon the Government's erroneous estimates; where the conditions actually encountered did not differ materially from those shown on the drawings, specifications and logs of exploration, and such conditions could have been reasonably anticipated from a study of the drawings, specifications and logs of exploration, or an examination of the site.

BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the above-captioned appeal (which is based on claims for overruns and underruns) on the following grounds:

1. Appellant has not shown that a "change" or a "changed condition" arose, within the meaning of Clauses 3 or 4, respectively, of the General Provisions.

2. The Government has shown that the instant set of facts do not support a cause of action under the applicable case law.

3. Under the appellant's own theory of a breach of contract, the Board is without jurisdiction to consider this appeal.

4. The Board is without jurisdiction to reform the instant contract by increasing the unit price for schedule Item 3, as requested by appellant.

The contract was executed April 10, 1959, on Standard Form 23 (Revised March 1953) and contained Standard Form 23A (March 1953). It provided for unit prices based on estimated quantities, the total estimated contract price being $478,810.98. The work included excavation and construction of irrigation canals and embankments in Block 83, Royal Branch Canal laterals, Columbia Basin Project, in the State of Washington.

The dispute involves two overruns and one underrun in the quantities of Items 1, 2 and 3 of the contract schedule, as shown below:

Item	Description	Schedule quantity	Actual quantity	Contract unit price
1.	Excavation, common, for laterals, wasteways, and drains.	291,000 cu. yds.	180,405 cu. yds.	$0.30 per cu. yd.
2.	Excavation, intermediate, for laterals, wasteways, and drains.	6,000 cu. yds.	47,868 cu. yds.	$1.00 per cu. yd.
3.	Excavation, rock, for laterals, wasteways, and drains.	3,000 cu. yds.	20,612 cu. yds.	$1.50 per cu. yd.

Before submitting his bid prices for these items, the contractor (hereinafter called the appellant) asserts that he first estimated that his costs of performing the three types of excavation would be as follows:

Item 1	*Item 2*	*Item 3*
$0.27 per cu. yd.	$1.00 per cu. yd.	$3.50 per cu. yd.

Appellant submitted a bid of $1 per cu. yd. for Item 2 (the same as his estimated cost). However, relying on the estimated quantities in the contract, appellant submitted unbalanced bids for Items 1 and 3, so as to produce approximately the same aggregate price for those two items as he would have received had he bid on the basis of his estimated reasonable costs, as follows:

Item 1 Bid	*Item 2 Bid*	*Item 3 Bid*
$0.30 per cu. yd.	$1.00 per cu. yd.	$1.50 per cu. yd.

Appellant's stated purpose for unbalancing the bids was that he intended to perform all of the common excavation at the beginning of the contract and then go back and excavate the intermediate and rock materials. This would result in higher initial payments, and would help satisfy his financial requirements for the contract operations as a whole. As it turned out, however, appellant did not follow that plan but excavated all three types of material at virtually the same time during the entire performance period of that part of the work.

In fact, not only did the unbalanced bids fail to achieve appellant's objective of speedier financial returns, but also, due to Government errors in estimates, the common excavation actual quantities were short by about 111,000 cu. yds., and the actual quantities of rock excavation exceeded the estimate by nearly 18,000 cu. yds., thus defeating appellant's attempt to obtain sufficient aggregate payments for the quantities of Items 1 and 3 to cover his estimated reasonable costs.

Presumably, appellant did not sustain a loss on Item 2, intermediate excavation overrun (which was increased nearly eight-fold), since the bid for Item 2 was based on his estimated costs. In any event, no claim is made on that score; and whether the contractor realized a windfall on the overrun for this item is not known. Incidentally, the record before us does not contain any evidence of appellant's actual costs of performance of Items 1 and 3, in support of his claim. The claim consists simply of a request for price adjustment by reason of alleged changed conditions so as to increase his bid price for Item 3 by $2 per cu. yd. to his original (but not bid) alleged estimated cost of $3.50 per cu. yd. Likewise, no cost breakdown has been furnished concerning the supposed estimated cost of $3.50 per cu. yd., or how it was arrived at.

As presented, the claim is for 16,862 cu. yds. of rock excavation at $2 or $33,724. The quantity of excavation is computed by appellant on the basis of adding to the contract estimate a 25% allowance for what appellant considers to be a reasonable variation in estimated quantities (750 cu. yds.). The total of 3,750 cu. yds. is subtracted from the actual quantity of 20,612 cu. yds. of rock excavation to arrive at the net claimed quantity of 16,862 cu. yds. of overrun, representing the extent of the alleged changed condition.

The contract contains the standard Changed Conditions clause,[1] as well as caveatory language in Paragraph 4 of the specifications, as follows:

> 4. *Quantities and unit prices.* The quantities noted in the schedule are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative. Payment at the prices agreed upon will be in full for the completed work and will cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided.

Additional warnings, directing the attention of bidders to the logs of exploration, are set forth in Paragraph 34 of the specifications:

> 34. *Records of subsurface investigations.* The drawings included in these specifications show the available records of subsurface investigations for the work covered by these specifications. The Government does not represent that the available records show completely the existing conditions and does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions. Bidders and the contractor must assume all responsibility for deductions and conclusions which may be made as to the nature of the materials to be excavated, the difficulties of making and maintaining the required excavations, and of doing other work affected by the geology at the site of the work.

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

Exhibit No. 4 to the Government's Statement of Position and Motion to Dismiss is a sworn statement by Isao Kuge, an engineer employed by the Bureau of Reclamation at Denver, Colorado. Mr. Kuge states that at the request of Department Counsel and without any knowledge of the contract estimates or actual quantities, he prepared an estimate of the quantities of excavation under Items 1, 2, and 3 of the contract schedule, utilizing solely the information on Drawings Nos. 2 through 34, including the logs of boring shown on the profile sheets. After 13 hours of study, Mr. Kuge arrived at the estimated quantities shown below:

Item 1, common	*Item 2, intermediate*	*Item 3, rock*
191,100 cu. yds.	20,600 cu. yds.	46,800 cu. yds.

The total of these quantities is 258,500 cu. yds. which compares closely with 248,885 cu. yds. actually excavated. True, Mr. Kuge's estimate of rock was too high and his figures for intermediate were too low, but his total of 67,500 cu. yds. for these two items is quite close to the actual quantity of 68,480 cu. yds. Also, his estimate of common excavation quantities, 191,000 cu. yds., is fairly close to the actual quantity of 180,405 cu. yds. One reason for his failure to accurately estimate the rock and intermediate quantities seems to have been the natural irregularity of the line of demarcation between intermediate and rock conditions; the exact location of this line in the intervals between boring sites could, of course, be pinpointed only through actual excavation. A second reason was that in plotting the line between intermediate and rock materials Mr. Kuge assumed that all caliche above the points of refusal of the power augers would be intermediate, and that all material below the points of refusal would be rock. Apparently, some of the hard caliche below the points of refusal broke up into small pieces on excavation and was classified as intermediate rather than rock.

It appears to the Board that there was available to the appellant ample information on the contract drawings and logs of exploration which, if utilized by appellant, would have clearly indicated the presence of rock in far greater quantity than the 3,000 cu. yds. shown in the contract schedule. The logs of exploration show substantial amounts of basalt and caliche within the profile and above the bottom grade of the laterals to be excavated.

The Government's estimate of 3,000 cu. yds. of rock excavation was due to error. The original estimates for Items 1, 2, and 3 had omitted the excavation required to provide space for earth lining, which was then estimated to be 100,000 cu. yds., although ultimately only about 62,000 cu. yds. of lining were placed. This omission was discovered before advertising for bids, and because the additional quantity had not been divided or broken down as to classification, the entire 100,000 cu. yds. was added to Item 1, common excavation.

This error, of course, increased greatly the estimated quantities for Item 1 and failed to increase appropriately the estimated quantities for Items 2 and 3. Strictly speaking, therefore, the estimate of 3,000 cu. yds. of rock was not due to an optimistic interpretation by the Government of the drawings and borings, but was due to inadvertence. Had appellant given reasonable study to the contract drawings and logs of exploration, he would have realized that this estimate was much too low.

From all of the circumstances, it appears to the Board that, with little or no justification, the appellant assumed that the material to be excavated was such as would be most favorable for the accomplishment of the purposes of his unbalanced bid.

The appellant's asumption is not compatible with the purpose of the Changed Conditions clause.[2] In an earlier case the Board said:

> The purpose of article 4 is, however, to protect prudent contractors against unforeseen abnormalities, and a contractor who ignores the warnings in the specifications and all warning signs that would have been revealed by a reasonably thorough investigation is not entitled to the benefit of the article.[3]

The Court of Claims has recently said that where a contractor merely miscalculates, and the conditions actually encountered did not differ materially from those shown on the drawings, specifications and borings, or if such conditions could have been reasonably anticipated from a study of the drawings, specifications and borings, or examination of the site, he may not recover under the Changed Conditions clause.[4]

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[2] *Erhardt Dahl Andersen,* IBCA–223–229 (July 17, 1961), 68 I.D. 201, 61–1 BCA par. 3082, 3 Govt. Contr. par 505. "In a very real sense Clause 4 anticipates that the contractor's bid will reflect neither undue pessimism nor undue optimism."

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

[4] *Leal* v. *United States,* 276 F. 2d 378, 384–85 (Ct. Cl. No. 199–53, April 6, 1960). *Cf. Wilson, Hockinson & Cantrall, Inc.,* IBCA–263 (July 17, 1962).

This is the general rule, and it does not permit adjustments under the Changed Conditions clause solely because of variations between estimated and actual quantities. The reliance by appellant on such decisions as *Saddler* v. *United States*,[5] is misplaced, since such holdings are clearly distinguishable from the instant case, as well as from more pertinent decisions.[6]

Proponents of the thesis that, without contributing factors, overruns or underruns of themselves constitute changed conditions, have sought support from the holdings in *Peter Kiewit Sons' Co.* v. *United States*,[7] and *Chernus Construction Co.* v. *United States*.[8] Generally speaking, these landmark cases merely stand for the proposition that where because of Government action it is not feasible for the contractor to protect himself against loss caused by overruns or underruns, the Government's erroneous estimate will be treated as a sufficient basis for relief.[9]

In *Kiewit*, the contractor had calculated the quantities independently before bidding from a study of the plans, and found the Government's estimates to be correct. He intended to submit separate bids for three different types of excavation but the Government insisted on a composite bid for all three, and the contractor complied. The Government then changed the slopes of the excavation for borrow material (the type of excavation most profitable to the contractor), reducing the quantity by one-third, or 750,000 cu. yds. and causing a financial loss to the contractor. The Court rejected the caveatory

[5] 287 F. 2d 411 (Ct. Cl. No. 202–57, March 1, 1961), (where the overrun was caused by a cardinal change in design).

[6] *Sandor S. Hirsch and Pernice Contracting Corporation* v. *United States*, 104 Ct. Cl. 45 (1945). In its findings of fact the Court stated: "The topography of the area and character of vegetation thereon, including trees and shrubbery, and the nature of the work required were such that reasonable persons might differ on the exact number of acres to be cleared which would be classified for payment * * *." In its opinion the Court said: "Apparently, plaintiffs' bid for the clearing of the site was too low * * *. But defendant had the right to demand that plaintiffs do the necessary work at the price bid by them. It required no more of plaintiffs than it had a right to require under the contract and that plaintiffs had reason to believe would be required." (Citing *Brawley* v. *United States*, 96 U.S. 168 (1877); *Morris & Cumings Dredging Co.* v. *United States*, 78 Ct. Cl. 511 (1933); *Brock et al.* v. *United States*, 84 Ct. Cl. 453 (1937); *Clarke Bros. Construction Co.* v. *United States*, 103 Ct. Cl. 57 (1945).

[7] 109 Ct. Cl. 517 (1947).

[8] 110 Ct. Cl. 264 (1948).

[9] The exact rationale of the holdings in *Kiewit* and *Charnus* has seemed obscure to at least one commentator. See Seagle, *Changed Conditions—An Appraisal*, 2 Government Contracts Review 16 (July 1958), fn. 26: "Indeed, in both the Kiewit and Chernus cases, the court seemed to rely as much on the equitable doctrine of mistake, as upon the 'changed conditions' provisions, and the precise basis of the decision in each case is unclear."

language in the contract to the effect that the estimates were to be only a basis of comparing bids and that the contractor must complete the work even though the required quantities were more or less than the estimates, and held that a basis for recovery existed. *Kiewit* distinguishes *Hirsch* and *Morris & Cumings*, *supra*, on the ground that those contractors had made improvident bids, and on the further ground that there was involved no composite bid, as there was in *Kiewit*. In the present case the Government did not want a composite bid, as its division of the excavation into three bidding categories clearly shows, and the partial averaging together of the first and last of these categories was an act voluntarily taken by appellant for his own purposes. Under a unit price contract it also was obviously improvident for appellant to bid $1.50 per unit for work that he himself estimated would cost $3.50 per unit, in the hope that this loss could be absorbed through an overbid on another item, and in the face of clear indications that the number of units would materially exceed those on which his unbalanced bid was predicated.

The opinion in *Chernus*, *supra*, identifies its holding with *Kiewit*: "* * * that the parties in making their contract did not intend that the cautionary language of the specifications should turn the process of bidding into a mere speculation." *Chernus* held, in effect, that where because of flood conditions, the drawings prepared in advance of bidding were inadequate, and no investigation of the work site could be undertaken by the Government or by the contractor, the caveatory and exculpatory language in the contract concerning the estimated quantities would not operate to relieve the Government of responsibility for its erroneous estimates. In the present case the drawings were not inadequate, and the work site was readily available for investigation.

A careful examination of the cases cited and discussed here leads us to the conclusion that the principles expressed in the decisions in *Leal* and *Hirsch* are dispositive of this appeal, irrespective of whether the claim is based on the Changed Conditions clause, on the Changes clause, or on some other ground. Hence, we follow the principles expressed in our decisions in *Diamond Engineering Company*,[10] *Texas Construction Company*,[11] and *J. D. Armstrong Company*.[12] On the record before us there is no doubt that appellant made on improvident bid, which was the causative factor in his difficulties, together with his failure to heed the plain warnings in the logs of exploration.

[10] IBCA–93 (December 20, 1957), 57–2 BCA par. 1542.
[11] IBCA–73 (April 23, 1957), 64 I.D. 97, 57–1 BCA par. 1238.
[12] IBCA–40 (August 17, 1956), 63 I.D. 289, 303–11, 56–2 BCA par. 1043.

Accordingly, we find that appellant is not entitled to adjustment of the unit price of Item 3, as a matter of law. Therefore, the motion to dismiss the appeal is granted.

CONCLUSION

The appeal is dismissed in its entirety.

THOMAS M. DURSTON, *Member.*

WE CONCUR:

PAUL H. GANTT, *Chairman.*
HERBERT J. SLAUGHTER, *Member.*

ESTATE OF MARJORIE MAY COPPERFIELD
UNALLOTTED OSAGE INDIAN (RESTRICTED)

IA-1293 *Decided September 14, 1962*

Indian Lands: Descent and Distribution: Wills—Indian Tribes: Oklahoma Tribes—Indians: Probate

Under the provisions of the Act of April 18, 1912 (37 Stat. 86), the approval by the Secretary of the Interior of an Osage Indian's will which contains a revocation clause shall effectively revoke prior wills of the testator even though the approved will fails as a dispositive instrument by operation of law because of the testator's subsequent marriage.

APPEAL FROM THE SUPERINTENDENT OF THE OSAGE AGENCY

J. C. Cornett, Esquire, has appealed from the decision of September 27, 1961, of the Superintendent of the Osage Agency disapproving a purported last will and testament of Marjorie May Copperfield, unallotted Osage Indian, deceased, dated October 12, 1953, and codicil thereto dated August 3, 1954.

On July 28, 1955, Marjorie May Copperfield executed a will in accordance with the laws of the State of Oklahoma. The testatrix died on April 12, 1960, a resident of Ottawa County, Oklahoma. Her will of July 28, 1955, was approved on August 12, 1960, by the Superintendent of the Osage Agency pursuant to the provisions of the Act of April 18, 1912 (37 Stat. 86), and pursuant to delegation of authority by 25 CFR 17.12. The approved will contained the following language:

* * * do hereby make, publish and declare the following to be my Last Will and Testament, *hereby revoking all previous Wills.* (Italics supplied.)

The record shows that at the time of the execution of the will, Marjorie May Copperfield was unmarried. Afterwards, she married David Peace from whom she was divorced on October 8, 1958. She then married Olin Chambers, who survived her. The approved will was offered for probate in the County Court of Ottawa County, Oklahoma, but was denied probate for the reason that it was revoked by operation of law (840SA108) because of her subsequent marriage. The heirs of Marjorie May Copperfield were determined by the law of succession of the State of Oklahoma and in accordance with section 7 of the Act of February 27, 1925 (43 Stat. 1011), as amended, and distribution was made accordingly.

On April 27, 1961 appellant filed with the Superintendent of the Osage Agency a petition seeking approval of a purported last will and testament of Marjorie May Copperfield dated October 12, 1953, and codicil thereto dated August 3, 1954. After due notice and hearing thereon, the Superintendent of the Osage Agency disapproved the proffered will and codicil for the reason that there was no evidence to support a ruling that the revocation clause in the will of July 28, 1955 was conditional. This appeal followed.

The sole issue in this case is: Did the revoking clause in the approved will of July 28, 1955, operate to revoke the will dated October 12, 1953, and the codicil thereto dated August 3, 1954? We believe it did.

Section 8 of the Act of April 18, 1912 (37 Stat. 88), applicable here, reads:

> That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma; *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior. (Italics supplied.)

This language specifically invalidates the entire instrument when not approved as required by the act. Conversely, when approved as required by the act the entire instrument is validated. *Cf. Gilliland* v. *Strikeaxe*, 366 P. 2d 419 (Oklahoma 1961).

Appellant submits that the doctrine of "dependent relative revocation" is decisive of the case. We find nothing in the record to justify the application of the doctrine of dependent relative revocation and to enable us to say that the testator would have desired the first will and codicil thereto preserved in the event the approved will failed in all of its dispositive provisions because of extrinsic circumstances. *Cf. Phillips* v. *Smith*, 100 P. 2d 249 (Oklahoma 1940).

Therefore, pursuant to authority delegated to the Solicitor by the Secretary of the Interior [sec. 210.2.2A (3) (a), Departmental Manual, 24 F.R. 1348], the action of the Superintendent, disapproving the will dated October 12, 1953, and the codicil thereto dated August 3, 1954, is affirmed, and the appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

MARKETABILITY RULE

Mining Claims: Determination of Validity

When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

M–36642 *September 20, 1962*

To: ASSISTANT SECRETARY, PUBLIC LAND MANAGEMENT.

SUBJECT: REVIEW OF THE "MARKETABILITY RULE" AS APPLIED TO THE LAW OF DISCOVERY.

Your memorandum to the Secretary requesting a review of this rule has been referred to this office for reply.

After giving careful consideration to this subject, it is our conclusion that there is no basis for making any change in the test which the Department applies to mining claims in determining whether there has been a valid discovery. However, we believe that, since our decisions may have been misunderstood and an undue rigidity may have been ascribed to them, we should explain the position taken.

The test which we apply, the prudent man test, is based upon the provision in R.S. 2319 (30 U.S.C. sec. 22) that only "valuable mineral deposits" may be located. A valuable mineral deposit, it has been held, is one the discovery of which would justify a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the effort to develop a paying mine.

Castle v. *Womble*, 19 L.D. 455 (1894); *Chrisman* v. *Miller*, 197 U.S. 313 (1905).

The marketability rule about which you have particularly asked our views is merely one aspect of this test. The Department and the courts have, we believe, rightly held that a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrence. Many minerals are deemed intrinsically valuable.

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. On the other hand, where we are concerned with a nonmetalic mineral found in a great many places, application of the prudent man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, which are found in every State. There is a demand for sand and gravel, but in many areas the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Other cases fall between the two extremes of the intrinsically valuable mineral on the one hand and sand and gravel on the other hand. Each case must be judged on its own merits. When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

There are two points which we wish to stress. The first is that the marketability test is only one aspect of the prudent man test, albeit a very important aspect since in the absence of marketability no prudent man would seem justified in the expenditure of time and money. The second is that each case must be judged on its own facts. Too rigid application of rules mistakenly interpreted from departmental decisions could lead to incorrect decisions in the field.

FRANK J. BARRY,
Solicitor.

APPEAL OF ALLIED CONTRACTORS, INC.

IBCA-265 *Decided September 26, 1962*

Contracts: Delays of Contractor—Contracts: Subcontractors and Suppliers—Contracts: Unforeseeable Causes

Under a standard construction contract requiring that causes of delay be "unforeseeable" in order to be excusable, a strike involving a steel supplier, which was in existence when the prime contractor's bid was submitted, does not qualify as an unforeseeable cause of delay.

Contracts: Delays of Government—Rules of Practice: Evidence

Proof of a delay by the Government does not *per se* give a contractor a right to an extension of time in the absence of evidence that the Government's delay caused a delay in the contractor's performance.

Contracts: Delays of Government—Contracts: Additional Compensation—Contracts: Changes and Extras—Rules of Practice: Appeals: Dismissal

An appeal based on claims for costs of unreasonable delay while awaiting the issuance of a change order will be dismissed as constituting an alleged breach of contract over which the Board has no jurisdiction.

Contracts: Delays of Contractor—Rules of Practice: Evidence—Contracts: Unforeseeable Causes

Where an official report of the Weather Bureau states that new low temperature records were established for the month in which there was delay in performance of the contract because of allegedly cold weather, such evidence will be accepted by the Board as meeting the criteria for establishing a claim of unusually severe weather as an unforeseeable cause of delay.

BOARD OF CONTRACT APPEALS

This timely appeal was heretofore the subject of a motion to dismiss. The Board's decision of May 16, 1961,[1] granted the motion as to an unnumbered monetary claim in the amount of $4,586.09, on the ground that it involved an alleged breach of contract. The motion was denied as to all other claims. A hearing was conducted on November 14 and 15, 1961, at Washington, D.C.

The contract was executed October 8, 1959, on Standard Form 23 (Revised March 1953) and contained Standard Form 23A (March 1953). It provided for the construction of access roads, a bridge

[1] IBCA-265 (May 16, 1961), 68 I.D. 145, 61-1 BCA par. 3047, 3 Gov. Contr. par. 348.

across Rock Creek, a parking lot and other work in the area of the Water Sports Center on the north bank of the Potomac River in the District of Columbia, for the total estimated contract price of $92,288.75. Notice to Proceed was delayed at the request of the contractor (hereinafter called the appellant) because of the shortage of steel during a nation-wide steel strike.

As issued November 17, 1959, the Notice to Proceed contained no definite starting date. It was replaced by a letter dated January 13, 1960, requiring commencement of work on January 18, 1960, and completion within 120 days thereafter as provided by the contract, or by May 16, 1960. Liquidated damages of $50 per calendar day were imposed by the contract for delay beyond the required completion date. As extended by change orders granting an additional 34 days, the required completion date became June 19, 1960, but the contract was not completed until September 2, 1960, or 75 days after the required date. Liquidated damages amounting to $3,750 were assessed accordingly.

The appeal is concerned with a number of allegedly excusable causes of delay in excess of the extensions of time allowed by the contracting officer, and a monetary claim of $2,547.83 for costs of delay involving a change order.

Claim No. 1

Claim No. 1 is based on the delay in the commencement of the work. The appellant protested the required starting date of January 18, 1960, on the ground that deliveries of reinforcing and piling steel could not be made until sometime in February or March 1960. Appellant's request for a starting date of February 8, 1960, was denied by the contracting officer, partly on the ground that other portions of the contract work could have been initiated prior to delivery of steel. Appellant's argument is to the effect that it could not schedule such other work economically without assurance as to the delivery date of the steel; otherwise idle time could result for its work forces and equipment.

Clause 5 of the General Provisions includes strikes as an example of unforeseeable causes which, without the fault or negligence of the contractor, may be an excusable cause of delay in the completion of the work. However, we do not consider that appellant is entitled to the protection of this provision. The steel strike began several months before appellant submitted its bid on September 1, 1959, and was still in progress on that date. Hence, the strike cannot qualify as an un-

foreseeable cause of the delay, within the meaning of the contract provision.[2]

The appeal is accordingly denied as to Claim No. 1.

Claim No. 2

This claim is based on an erroneous (or at least ambiguous) drawing identified in appellant's letter of January 11, 1960, as Sheet 5 of 11. The Government's letter of January 26, 1960, furnished clarification concerning the points raised by appellant as to the slopes for the mortared riprap to be placed on the banks of Rock Creek. It developed that the clarification furnished by the Government did not prevent further difficulties. In April 1960, the Government requested a quotation for changing from mortared to dry riprap. In reply, appellant discussed the problem, but furnished no quotation. At a meeting on the worksite on May 18, 1960, the Government again requested a quotation for changing the riprap slope protection, and on the spot, apparently, the appellant quoted a price which the Government considered too high. In consequence, the appellant was instructed to proceed according to the drawing as previously clarified. By letter of June 1, 1960, appellant advised the Government that it was incurring delay and increased costs, and pointed out that in order to comply with the contract drawing as clarified by the Government's letter of January 26, 1960, it would be necessary to have part of the riprap "setting on a fill" in the creek.

A further meeting at the worksite was held on June 6, 1960, when an oral agreement was made to place loose riprap with mechanical equipment instead of mortared riprap, at no change in the contract price. Change Order No. 3 (not accepted by appellant, although performed and paid for) was issued on June 9, 1960, providing for placing the loose riprap "as directed upon a properly shaped subgrade." An extension of 10 days was allowed for this work, which began about June 7, 1960, and was substantially completed July 13, 1960. In his Findings of Fact and Decision of November 23, 1960, the contracting officer denied any further time extension for this change, because of appellant's failure to furnish a quotation as requested in April 1960, and for the further reason of "* * * the break-

[2] 39 Comp. Gen. 478 (1959), citing *United States* v. *Brooks-Callaway Co.*, 318 U.S. 120 (1943); *Elmer A. Roman*, IBCA-57 (June 28, 1957), 57-1 BCA par. 1320; Comp. Gen. B-141493, January 11, 1960.

down of your equipment which delayed completion until July 13, 1960."

Appellant did not challenge these assertions in presenting its case during the hearing. Beyond showing that the Government required from January until June 6, 1960, to arrive at a sound decision concerning the manner of constructing the riprap slopes, appellant failed to introduce any evidence that it was delayed in the prosecution of the work in excess of the 10 days allowed by the contracting officer. Appellant's superintendent, Mr. David H. Walker, testified [3] that it was necessary to perform additional work (which otherwise would not have been necessary), consisting of pumping water from the cofferdam for a period of 2 days while awaiting the Government's decision. Appellant thereafter removed the cofferdam sheeting for the bridge pier, so that the sheeting could be re-driven for the placing of the riprap. Mr. Walker testified,[4] on cross-examination, that the 10 days allowed by Change Order No. 3 was sufficient for performing the actual work involved, but was unable to state what additional time, if any, was required to procure the new type of riprap. No further evidence was offered on this point. Nevertheless, appellant is entitled to an extension of time due to an excusable delay of 2 days while the Government delayed its decision.[5]

As to the remainder of the claimed delay, the burden of proof is on the appellant to establish his allegations by a preponderance of the evidence.[6] This, appellant has failed to do. Proof of a delay by the Government does not, *per se*, give the contractor a right to an extension of time. The evidence presented by appellant is valueless except to the extent that the delay is shown to have caused a delay in the contractor's performance.[7]

The appeal is sustained as a Claim No. 2 to the extent of 2 days of excusable delay. It is denied as the remainder of this claim.

Claim No. 3

The boring logs shown on the drawings for bridge pier footings were in error as to the elevations shown for underwater rock. This was

[3] Transcript, page 50 (hereafter referred to as Tr.).
[4] Tr. 54.
[5] *Wyle Maddox*, IBCA–248 (December 20, 1961), 61–2 BCA par. 3243, 4 Gov. Contr. par. 36.
[6] *Vulcan Rail & Construction Co.* v. *United States*, Ct. Cl. No. 345–58 (July 18, 1962); *Weldfab, Incorporated*, IBCA–268 (August 11, 1961), 68 I.D. 241, 61–2 BCA par. 3121, 3 Gov. Contr. par. 500; *The James Leffel & Company*, IBCA–205 (October 8, 1959), 59–2 BCA par. 2357, 1 Gov. Contr. par. 706.
[7] *Weldfab*, fn. 6 *supra*; *Duncan Construction Company*, IBCA–91 (April 2, 1958), 65 I.D. 135, 58–1 BCA par. 1675.

discovered by the contractor when driving piles for the bridge piers. Pier and abutment footings were increased in depth, additional piles were driven and some were changed from plumb to battered piles. Change Order No. 1 allowed additional compensation and a time extension of 3 days for this additional work required as the result of a changed condition. Change Order No. 1 was not accepted by appellant for the reason that the 3 days allowed was alleged to be less than the actual delay. (None of the four change orders issued was accepted by appellant, although they were performed and paid for by the Government.)

However, Mr. Walker testified that 3 days was the actual time consumed in the performance of this additional work. He was unable to recall the extent of any delay occasioned by waiting for a decision by the contracting officer, nor was he able to testify concerning the time required to procure the additional piles.[8] No further evidence was adduced concerning any alleged additional delay caused by this changed condition.

Accordingly, for reasons similar to those described in our partial denial of Claim No. 2 above, Claim No. 3 is likewise denied.

Claim No. 4

This claim is related to the unavailability of the mole area near the Water Sports Center building for disposal of excess material excavated in the construction of the parking lot. The mole area was designated for such disposal by the contract. However, another contractor, in constructing the Water Sports Center building, prior to the time appellant started work, had disposed of other material on the mole, so that appellant's excavation material was not required for the mole.

The contracting officer found that appellant was not entitled to a time extension by reason of the Government's delay in furnishing a different disposal site. Examination of the appellant's claim and review of the testimony[9] at the hearing has convinced us that appellant has never asserted any claim for extension of time on that account. Rather, appellant asks additional compensation in the amount of $2,547.83 for costs of equipment which was idle from about May 25 to June 9, 1960, when a different disposal site, a short distance

[8] Tr. 20.
[9] Tr. 38.

from the work area, was designated by the Government. It has not been shown that the delay in designating a new disposal site resulted in any specific period of delay in performing other phases of the work. Therefore, the Board will disregard the aspect of time extension in consideration of Claim No. 4. The contractor agreed to haul the excavated material to the new disposal site at no extra charge beyond the contract price specified for hauling it to the mole,[10] apparently because the new site was slightly more accessible, if anything, than was the mole.

Concededly, the designation of the new disposal site amounted to a change in the contract terms, but costs of delay and idle time while awaiting a change order are not compensable under the provisions of this contract.[11] The Changes clause contemplates adjustment of the contract price for increases or decreases in costs *caused* by a change order. It does not contemplaate such an adjustment for costs *not* caused by a change order, nor costs arising during a period of delay while awaiting the issuance of the change order. In the absence of an express contract provision, such as a Suspension of Work clause (not present here), there is no remedy provided under the contract for this type of delay.[12] Assuming, however, that such a delay was an unreasonable one, the claim would be founded on a breach of contract.[13] It is well established that the Board has no jurisdiction concerning a claim for breach of contract.[14]

Accordingly, the appeal as to Claim No. 4 is denied to the extent that it may have been intended to include a request for extension of time. It is also dismissed as to the claim of $2,547.83 for costs of idle equipment.

Claim No. 5

One of the requirements of the contract was the construction of acceleration and deceleration traffic lanes branching from the parking lot into Potomac Parkway. This arrangement permitted cars entering the parking lot from the Parkway to swerve to the right into the

[10] Tr. 127.

[11] *Weldfab*, fn. 6 *supra*.

[12] *United States* v. *Foley*, 329 U.S. 64 (1946); *United States* v. *Rice*, 317 U.S. 61 (1942); *Crook* v. *United States*, 270 U.S. 4 (1926); *Chouteau* v. *United States*, 95 U.S. 61 (1877).

[13] *Peter Kiewit Sons' Co.* v. *United States*, 138 Ct. Cl. 668, 674–75, 151 F. Supp. 726, 731 (1957); *F. H. McGraw & Co.* v. *United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955). *Cf. Weldfab*, fn. 6 *supra*.

[14] *Ford-Fielding Inc.*, IBCA–303 (July 2, 1962), 69 I.D. 116; *Robertson-Henry Co., Inc.*, IBCA–221 (October 4, 1961); *Northolt Electric Co.*, IBCA–279 (May 26, 1961), 68 I.D. 148, 61–1 BCA par. 3060, 3 Gov. Contr. par. 358(a); *Allied Contractors, Inc.*, fn. 1 *supra*; *Ideker Construction Co.*, IBCA–124 (October 3, 1957), 64 I.D. 388, 389, 57–2 BCA par. 1441.

deceleration lane, slowing down to make a further right turn into the parking lot without delaying faster-moving through traffic on the Parkway. When leaving the parking lot the acceleration lane allowed cars to increase speed preparatory to merging with the Parkway traffic.

Several electric lamp posts were located along the edge of the Parkway where the new lanes were to be built, and the contract provided that the poles and the connecting power lines would be removed by others. About May 11, 1960, appellant requested that these obstructions be removed, but they were not removed until July 12, 1960, a lapse of 62 days.[15] However, it appears that work was proceeding in other areas of the parking lot during most of this period.[16] Appellant, in presenting evidence as to this claim, has fallen into the same error that was pointed out in our discussion of the delay claims for the riprap slopes and the disposal area, *supra*, i.e., the entire period of delay on the part of the Government has been charged by appellant as representing a corresponding delay in the progress of the work. There was no testimony or evidence proffered as to any specific period of delay in the performance of the work, caused by the Government's delay in removing the poles. It may be true that slow-downs could have occurred because of the necessity of rearranging the work schedules for other phases of the contract while awaiting action by the Government. However, there is no evidence on this point which would permit the Board to arrive at any conclusion with respect to a specific delay of a definite number of days.

Accordingly, the appeal is denied as to Claim No. 5.

Claim No. 6

This claim consists of 12 minor changes as to which appellant claims it has not been granted sufficient time extensions. All of the items were discussed and denied by the contracting officer and will not be discussed in detail here. As to some, the contracting officer found that sufficient time extensions of a day or two as to each incident had been previously allowed in change orders. As to the remainder, the contracting officer found that there were no significant delays. With these findings we must perforce agree, since in no instance has appellant alleged or proved a specific period of delay resulting from these

[15] Tr. 27.
[16] Tr. 76.

minor changes. No evidence has been proffered which would establish, as to occasions where no time extensions had been granted, that any of these minor incidents caused delays in contract performance. Likewise, there is no proof of delays in such performance over and above those time extensions which had been already allowed.

Accordingly, the appeal is denied as to the 12 items encompassed by Claim No. 6.

Claim No. 7

Four separate items are included in this claim, as follows:

Item 1 of Claim No. 7

Tests on the new waterline were delayed due to leaks in a connecting existing line. This weakness in the old line would not permit the use of sufficient pressure to carry out the required tests of the new line. Appellant's Superintendent of Bridges and Construction, Mr. Clyde Powell, testified that: "Well, I would say I spent the biggest part of a week trying to get a test and never could." [17] Later, he testified that the old line was responsible for a delay of a week, while several other phases of the work were held up.[18]

This delay caused a corresponding delay in the construction of the parking lot. It was not due to any fault or negligence on the part of appellant. The parking lot had been graded at the time of the waterline test and was awaiting a course of crushed stone, to be followed by black-topping. The open ditch containing the new waterline obstructed the passage of heavy trucks, so that work on the parking lot would not proceed. Another temporary cause of obstruction was the stockpiling of dirt excavated from the parking lot. This stockpiling of dirt is related to Claim No. 4, *supra*. No disposal area was available at the time.

A time extension of one day had been allowed by the contracting officer in Change Order No. 1 for the installation of new sprinkler boxes. This was the subject of Item 1 of Claim No. 6. Appellant failed to prove that it was entitled to an additional time extension for installation of sprinkler boxes, but we consider that a good case has been made for an allowance of additional time while the ditch was kept open. The open ditch prevented ingress and egress of 10-ton

[17] Tr. 95.
[18] Tr. 114.

trucks which later hauled several hundred tons of stone and black-top [19] to the parking lot.

The contracting officer denied the request for additional time on the basis that any delay "* * * was due to the attempt by your plumber to test the entire installation on one test * * *," whereas Section 21, Water System, of the specifications, permits testing the waterline in sections. However, Mr. Powell testified that the test was tried "both ways." [20] Also, Mr. Frederick E. Haughwout, a construction engineer for the National Park Service, and representative of the contracting officer, testified that appellant used one of the optional methods outlined in the specifications, in testing the waterline in one piece; that it could also have been tested in sections, but "that was up to the contractor." [21] In view of the testimony of Mr. Powell, that the testing was attempted with the use of both methods (not categorically denied by the Government), we consider that appellant has carried its burden of proof. The difficulties attending the testing, in our opinion, made it impracticable to test the waterline in sections and to immediately thereafter backfill such tested sections for the purpose of permitting ingress and egress of the stone and black-top trucks. It is fair to conclude from the testimony that, for a few days, testing the waterline in sections was scarcely more successful than testing it as a whole. There was also the risk that it might be necessary to re-excavate the tested and backfilled section for further examination and test after the covering material had been reinforced to permit the overpassage of heavy equipment.

The Government Inspector's log [22] indicates that on September 1, 1960, the principal work going on was placing topping on the parking lot; hence, this was one of the portions of the work which was completed last and was determinative of part of the assessment for delay.

We conclude that appellant is entitled to a time extension of 3 days for excusable delay on the basis of the clear evidence that at least 4 days were involved in the denial of access, less one day previously allowed by the contracting officer for the related installation of sprinkler boxes.

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[19] Tr. 107, 108.
[20] Tr. 99.
[21] Tr. 189, 190.
[22] Government's Exhibit B.

Accordingly, the appeal is sustained as to Item 1 of Claim No. 7, to the extent of 3 days' excusable delay.

Item 2 of Claim No. 7

Item 2 concerns the conflicting requirements for working space by appellant and another Government contractor engaged in constructing a building for the same project on the west side of Rock Creek. Appellant needed space on the west side of the creek for construction of the bridge abutments. The other contractor had commenced operations sometime before appellant did, and appellant complained that its own operations were compressed into a small area, thus delaying its work.

The extent of the alleged delay was not shown by appellant, and no proof was offered at the hearing concerning this item. In any event, it was properly denied by the contracting officer on the ground that Clause 12 of Standard Form 23A makes it the responsibility of appellant to cooperate with other contractors at the site in the fitting of the work.

Consequently, the appeal is denied as to Item 2 of Claim No. 7.

Item 3 of Claim No. 7

Appellant complained that delay was caused by the Government in failing to approve appellant's first submission on April 22, 1960, of shop drawings for the sidewalk on the bridge. The contracting officer properly denied this item, in our opinion, because of appellant's failure to include with the drawings the certified approval of its consultant concerning prestressed concrete to be used in the exterior beams.

Moreover, there is no claim or evidence as to any specific period of actual delay in performance of the work by reason of this matter.

Hence, the appeal is denied as to Item 3 of Claim No. 7.

Item 4 of Claim No. 7

Appellant alleges an indefinite period of delay in approval by the Government of revised drawings for prestressed beams for the bridge. This is closely associated with the delay claimed as to Item 3 next above. The contracting officer denied the request for extension on the

ground that appellant caused the alleged delay by its failure to submit its request for revision of the specified design at a timely stage of the contract work. The change in design was approved by Change Order No. 2 dated April 6, 1960. The contractor's letter of April 25, 1960, indicates agreement with the provisions of Change Order No. 2, which stated that no additional cost or time would be allowed. Appellant had inadvertently failed to submit with its bid any request for approval of the alternative design. This error was acknowledged in appellant's letter of April 8, 1960. The request for approval was submitted February 18, 1960. Moreover, no specific period of delay in contract performance was claimed or proved.

Therefore, the appeal is denied as to Item 4 of Claim No. 7.

Claim No. 8

This is a claim for excusable delay, arising out of alleged unusually severe weather. Appellant's statement of claim concerning the delay is as follows:

* * * a review of the logs kept by your Mr. Haugwout would show that during March and April we were unable to work for quite a number of days due to the unusually heavy snows and the extremely high flood tide that occurred in the Potomac River. In addition to this there were many rainy days that prevented our work.

Appellant's Notice of Appeal states:

As everyone in the Nation knows, March 1960, broke all records in the history of Maryland and the District of Columbia insofar as snow fall and floods * * *.

At the hearing, it was established that the appellant's wage employees did no contract work for at least a substantial part of each day on the following workdays in 1960:

Dates	*Weather condition*
February 15 and 16	Snow
February 25	Snow and rain
March 3 and 4	Snow and cold
March 10	Snow (Boiler drained to avoid freezing)
March 16	Snow
April 5	Rain
April 18	Rain
May 9	Rain and high water

Appellant's request for an extension was denied by the contracting officer because "* * * there were very few days on which work was not performed because of unusually heavy snows, the extremely high flood tide in the Potomac River and * * * the weather conditions and high tides encountered were not unusual for the months of March and April and were not unforeseeable."

Apparently, about 10 days were lost by reason of weather. Appellant offered in evidence as its Exhibits Nos. 2, 3 and 4, being official copies of the Department of Commerce Weather Bureau Reports concerning the climatological data measured at Washington National Airport for March, April, and May 1960. Significant data from the report for March 1960 are set forth below:

Date	Snowfall (Inches)	Snow, Sleet, or Ice on Ground at 7 a.m. (Inches)	Average Temperature (F.)
March 3	7.1	6	24
March 4	Trace	8	24
March 9	3.2	2	25
March 10	2.6	8	28
March 16	3.4	2	31
Total for March	17.1		

The March Weather Report also contains the following statement:

> New record for consecutive days with minimum below 32° established on first 16 days. 42.9° is lowest maximum ever recorded. New record for most days with minimum temperature 32° or less was also established.

For April, the only new record established concerned the high temperatures, the monthly mean being 61.2 degrees. Flood stage for the Potomac River is 12 feet. This stage was reached on April 1, 1960, the gage registering 12.1 feet, and on April 6, 1960, with 13.2 feet. Greatest precipitation in 24 hours was 1.47 inches on April 4–5, 1960, the total for the month being 3.15 inches. This exceeds the April normal rainfall by only 0.09 inch. The month of May set no new records. Total precipitation was 4.35 inches, and excess of only 0.37 inch over normal. The Potomac River exceeded flood stage on only 1 day, May 10, with a stage of 12.1 feet; the crest, however, being 13.6 feet at 6 p.m. of that day.

We have consistently held [28] that in order to establish a claim of unforeseeable and unusually severe weather it is necessary to present

[28] *Triangle Construction Company*, IBCA–232 (March 14, 1962), 69 I.D. 7, 62–1 BCA par. 3317, 4 Gov. Contr. par 316(c); *Refer Construction Company*, IBCA–267 (February 28, 1962), 68 I.D. 140, 62–1 BCA par. 3299, 4 Gov. Contr. par. 266(f).

proof of the weather for the month or other period in question, not only as to the year in which the contract performance was affected, but for several past years, an acceptable total for establishing a pattern for comparison being 10 years.

It is well settled that the term "unusually severe weather" does not include any and all weather which prevents work under the contract. The phrase means only that weather surpassing in severity the weather usually encountered or reasonably to be expected in the particular locality during the time of the year involved.[24]

The Board accepts the official statement of the Weather Bureau (that a record was established for cold weather during the first 16 days of March 1960) as meeting the Board's criteria, since it is common knowledge that establishment of such a new record takes into account the records of previous years. The records of heavy snowfall which occurred on several days during that period serve to reinforce our opinion, although standing alone, without evidence as to records of previous years, they would not suffice.

Accordingly, we find that appellant is entitled to an extension of 4 days for excusable delay due to unusually severe weather, on March 3, 4, 10 and 16, 1960.

The other portions of this claim are not supported by the evidence. It is well known that considerable rain may be expected during April and May in this area, and that the Potomac nearly always reaches flood stage in the spring. Hence, such occurrences are not unforeseeable or unusual.

In *Caribbean Engineering Company* v. *United States*,[25] the Court said:

> * * * To be entitled to an extension on account of bad weather, the bad weather must have been in fact unforeseeable. Any prudent man would have anticipated that he would have been delayed at least two days by bad weather, if not more.

The appeal as to Claim No. 8 is sustained to the extent of 4 days' excusable delay.

It is denied as to the remainder of the delays alleged in Claim No. 8.

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[24] *Central Wrecking Corporation*, IBCA–69 (March 29, 1957), 64 I.D. 145, 57–1 BCA par. 1209; *Urban Plumbing and Heating Company*, IBCA–43 (November 21, 1956), 63 I.D. 381, 56–1 BCA par. 1102.

[25] 97 Ct. Cl. 195, 229 (1942). See also 14 Comp. Gen. 431, 433 (1934).

Conclusion

The appeal is sustained as to Claim No. 2 to the extent of 2 days of excusable delay, as to Item 1 of Claim No. 7 to the extent of 3 days of excusable delay, and as to Claim No. 8 to the extent of 4 days of excusable delay, a total of 9 days. The proposed assessment of liquidated damages will be reduced accordingly.

The appeal is denied as to all other claims.

THOMAS M. DURSTON, *Member.*

WE CONCUR:

PAUL H. GANTT, *Chairman.*

JOHN J. HYNES, *Member.*

U.S. GOVERNMENT PRINTING OFFICE: 1962

APPEAL OF D. L. MOFFITT COMPANY

IBCA-285 *Decided October 3, 1962*

Contracts: Drawings—Contracts: Interpretation

Drawings that do not expressly purport to allocate the work shown on them as between separate bid proposals, defined in the specifications and awarded to different contractors, will not be construed as attempting to so allocate the work, where such a construction would tend to confuse rather than clarify the line of demarcation expressed in the specifications.

Contracts: Interpretation—Contracts: Specifications

The phrase "existing water system" in specifications that do not elsewhere clarify this phrase, which is also left unclarified by other aids to interpretation, does not comprehend a waterline whose addition to the system is provided for in the same specifications, since the ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable.

BOARD OF CONTRACT APPEALS

This appeal is from the contracting officer's denial of appellant's claim for an equitable adjustment of the contract price in the amount of $5,150.97, as additional compensation for performance of a phase of hospital construction work allegedly not required by the contract terms.

The claim arises out of the installation of certain outside water service pipelines for a hospital which appellant, a partnership, had contracted to enlarge and remodel. The contracting officer directed appellant, over its protests, to install these pipelines, and appellant thereupon, through a sub-contractor, installed the pipelines in a satisfactory manner. The claim is predicated on the theory that the contract did not require appellant to perform the work in dispute, and that the contracting officer's directions amounted, therefore, to a change within the meaning of the "Changes" clause (clause 3) of the contract. The appeal is timely.

The invitation for bids on the hospital project, which was located on the Pine Ridge Indian Reservation in South Dakota, provided for the awarding of a contract or contracts on the basis of bids received for two "Base Proposals," designated as No. 1 and No. 2, respectively. The advertising resulted in the award of two separate contracts. Appellant submitted a bid on each proposal, but was awarded only the contract for the work included in Base Proposal No. 1. Another firm, which had also submitted a bid on each proposal, was awarded the contract for Base Proposal No. 2. Both proposals were included in a single set of specifications and drawings.

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The contract with appellant, designated as No. 14–20–150–310, was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953) for construction contracts. Generally speaking, it called for (1) construction of a major addition to the hospital building; (2) demolition of existing structures that encroached on the site for the addition; and (3) remodeling of the remainder of the hospital building. It was awarded to appellant on June 19, 1959, and the contract price was $781,200.

The contract for the work included in Base Proposal No. 2 was limited in scope to certain water service facilities for the hospital plant. It was also awarded on June 19, 1959, and the contract price was $36,000.00.[1]

The problem presented by this appeal is to determine whether the work in dispute forms a part of Base Proposal No. 1 or of Base Proposal No. 2, as those proposals are defined in the two contracts. Three construction items are involved. First, a 6-inch waterline that was to diverge from the existing supply main for the hospital at a point south of the addition, that was to follow a rectangular course around the south, east and north sides of the addition, and that was to rejoin the supply main at a point north of the existing hospital building (hereinafter called the by-pass line). Second, a 4-inch waterline that was to run from the existing supply main to the addition (hereinafter called the service line). Third, a 4-inch waterline that was to run from the by-pass line to a location to which an existing fire hydrant was to be moved (hereinafter called the relocated fire hydrant line). The contracting officer ruled that all three items were parts of Base Proposal No. 1, and, hence, were work which appellant was obligated to perform without additional compensation.

Appellant contends, on the contrary, that all three items were parts of Base Proposal No. 2, and should have been performed by the contractor to whom that proposal was awarded. In support of this contention D. L. Moffitt, one of appellant's two partners, testified at the hearing that the costs of the disputed waterlines were not included in appellant's bid on Base Proposal No. 1, but were included in its bid on Base Proposal No. 2, since, as will be seen, the latter proposal specifically covered "connections to existing water system."[2] There is no testimony to indicate that during the period of contract formation

[1] Appellant's bid price on Base Proposal No. 2 was $40,000.00, which exceeded the successful bidder's price by $4,000.00.

[2] Like statements were made in letters from appellant to the contracting officer dated October 13, 1959 (Exhibit 16), January 7, 1960 (Exhibit 21), and June 24, 1960 (Exhibit 24), and in an undated letter received by the Government on January 12, 1961 (Exhibit 25).

either partner was consciously aware of the presence of ambiguity in this phrase or in related portions of the specifications and drawings.

Specifications

The two base proposals are defined, respectively, in subparagraphs b(1) and b(2) of Paragraph 1, entitled "Location and Scope of Work," of the General Conditions of Specification No. 14–59, as follows:

b. *Scope:*

(1) *Base Proposal No. 1:* Furnish all labor, materials, services, and equipment required to construct hospital facilities, complete, in strict accordance with the contract drawings and specifications. This proposal *does not include the water storage tank and connections, * * * which are included under Base Proposal No. 2 * * *.*

(2) *Base Proposal No. 2:* Furnish all labor, materials, services, and equipment required to construct the 75,000 gallon elevated steel water storage tank, *including connections to existing water system, complete,* in strict accordance with the contract drawings and specifications. (Italics supplied.)

The portion of Specification No. 14–59 entitled "Outside Utilities" contains sections dealing with "Waterlines and Appurtenances" and with "Water Storage Facilities." The former (section 2) is devoted to materials, methods and workmanship, and contains nothing which might serve to sharpen the line of demarcation, as drawn in the above-quoted provisions of the General Conditions, between Base Proposal No. 1 and Base Proposal No. 2. The latter (section 3) specifically describes three items of work, namely, an altitude valve and vault, a check valve and vault, and a 75,000 gallon elevated steel water storage tank. While the section contains no indication of the proposal under which these items respectively fall, appellant concedes that the first falls under Base Proposal No. 1, while the Government concedes that the second and third fall under Base Proposal No. 2. Hence, none of them are involved in the present dispute.

The "Water Storage Facilities" section does, however, open with the following general language:

3. WATER STORAGE FACILITIES: This section of the specifications includes the furnishing of all labor, materials, equipment, tools and services for the construction of water storage improvements as shown on the applicable drawings and specified herein, complete and ready for use.

The Contractor shall stake out the water storage improvements * * *.

It is difficult to tell whether the "water storage improvements" thus mentioned are intended to comprise only the three items of work subsequently described in the same section, or are intended to extend to other items of work not there specifically described. But whichever may be the case, the section does not in any event shed light on the

problem of what are the "connections" which the General Conditions of the specifications exclude from Base Proposal No. 1 and include in Base Proposal No. 2.

Drawings

Of the drawings listed in Specification No. 14–59 only two are pertinent to the disputed water line construction. One of these is Sheet No. 1 of Drawing No. J–73A–1, dated April 22, 1959, and designated "Title, Plot Plan & Indexes"; the other is sheet No. Y–1 of Drawing No. Y–659, likewise dated April 22, 1959, and designated "Water Storage Improvements."

The "Title, Plot Plan & Indexes" drawing showed the existing water supply main for the hospital, indicated that this main crossed the space to be occupied by the new addition, and contained directions to the effect that the main was to be cut and plugged at the point where it entered and the point where it left that space. The drawing also showed the by-pass line and indicated that this line would be the means through which water would reach the existing building once the old main had been cut and plugged. The service line and the relocated fire hydrant line were also shown. Finally, the drawing contained certain notes pertaining to water service. One of these was a general note reading: "Refer to DWG. Y–1 for water storage tank, valve vaults and connecting piping." A second note stated: "Reroute 6″ water main around addition see Sheet Y–1." Appended to this note was an arrow pointing to the by-pass line. A third note stated: "6″ connection for water storage tank—See Sh. Y–1." The last note had two arrows appended to it, one of which was directed to a point on the existing supply main nearer the source of supply than the point at which the by-pass line was to diverge, and the other of which was directed to a point on the latter line.

The "Water Storage Improvements" drawing contained a section designated "Location Plan New Water Storage Tank." This section showed the existing water supply main, the by-pass line, the service line, and the relocated fire hydrant line in the same positions as shown on the "Title, Plot Plan & Indexes" drawing. Unlike that drawing, it also showed the 75,000 gallon elevated water tank and the check valve and vault described in the "Water Storage Facilities" section of the specifications, together with a 6-inch inlet line running from the existing supply main through the check valve and vault to the storage tank, and a 6-inch outlet line running from the storage tank to the by-pass line.[3] The point at which the tank inlet line left the existing

[3] The altitude valve and vault was shown on a different section of the "Water Storage Improvements" drawing, and appears to have had no physical connection with any of the water lines here in dispute.

supply main and the point at which the tank outlet line joined the by-pass line were the same as the points marked on the "Title, Plot Plan & Indexes" drawing by the arrows appended to the note referring to "connection for water storage tank." That note, however, was not reproduced on the "Water Storage Improvements" drawing. Instead, the latter contained a note "Connect new 6″ line to exist. waterline" to which were appended two arrows, and, while one of these arrows was directed to the point where the tank inlet line left the existing supply main, the other was directed, not to the point where the tank outlet line joined the by-pass line, but to the point where the by-pass line diverged from the existing supply main. On the "Water Storage Improvements" drawing the by-pass line, service line, relocated fire hydrant line, tank inlet line and tank outlet line were all depicted in the same manner and were all designated "New Water Line." [4]

Neither drawing is of any real assistance in sharpening the line of demarcation between the two base proposals, as defined in the General Conditions. They make no mention whatsoever of either proposal, much less purport to allocate particular items of work to one or the other of them.

The Government argues that all of the new waterlines shown on the "Title, Plot Plan & Indexes" drawing should be considered as parts of Base Proposal No. 1, but there is no statement to that effect in the drawing or elsewhere in the contract. Moreover, the repeated references in the notes on that drawing to the "Water Storage Improvements" drawing indicate that the two drawings were intended to be read together rather than separately. The references in the notes, it will be observed, are not limited to items, such as the water storage tank, which are not shown on the "Title, Plot Plan & Indexes" drawing, but also cover the by-pass line, which is shown on both drawings. This overlapping hardly reflects an intent to allocate the work in accordance with the particular drawing on which it appears.

Appellant argues that all of the lines designated on the "Water Storage Improvements" drawing as "New Waterline" should be considered as parts of Base Proposal No. 2, but, here again, there is no statement to that effect in the drawing or elsewhere in the contract. This argument is also open to the obvious answer that a new waterline frequently serves purposes which have nothing at all to do with connecting a new water storage facility to an existing water system. This is pointedly illustrated by the fact that in the present case neither the

[4] A line, not here in dispute, running from the tank outlet line to a new fire hydrant, was also so depicted and designated.

service line nor the relocated fire hydrant line functions as a connection between the new storage tank and the existing system.

The use of arrows on the drawings to designate particular points of connection is too hit-and-miss to be of value in determining the question at issue. The point at which the tank inlet line leaves the existing supply main is so designated on both drawings, the point at which the by-pass line diverges from the existing supply main is so designated only on the "Water Storage Improvements" drawing, the point at which the tank outlet line joins the by-pass line is so designated only on the "Title, Plot Plan & Indexes" drawing, and the point at which the by-pass rejoins the existing supply main is so designated on neither. Each party disregards the arrows in the drawing upon which the other party relies, a process scarcely justified by the rule that a contract is to be interpreted as a whole and the meaning gathered from the entire context.[5] If, indeed, it was the draftman's intent that the arrows, or certain of them, should serve as means of demarcation between the waterlines to be constructed under one proposal and those to be constructed under the other, that intent was nowhere put into words and was represented in the drawings by symbols which are neither consistent nor complete.

All things considered, both drawings appear to have been prepared for the purpose of showing the work that was to be done, and not for the purpose of showing how it was to be divided between the two base proposals. The arrows, for example, produce no problem if they are viewed merely as descriptive of the physical connections between various waterlines, whereas they raise rather than resolve conflicts if they are viewed as descriptive of the legal responsibilities of the respective contractors in the event of separate awards upon the base proposals. That the drawings should be read as a unified definition of the coverage of the whole job, and not as a combination of separate definitions of the coverage of the individual base proposals, is suggested by the statement in the schedule of the contract that: "The specifications and drawings are prepared for the entire project and it is the responsibility of the bidders to use the material applicable to the proposals * * *."

Connections to Existing Water System

The clearest expression of the intent of the parties as to the scope of the work included in Base Proposal No. 2, and, consequently, excluded from Base Proposal No. 1, is to be found in the previously quoted provisions of the General Conditions, and, particularly, in

[5] *V. P. Loftis Company* v. *United States*, 110 Ct. Cl. 551, 628 (1948); *Whyte Construction Company*, IBCA–204 (October 3, 1960), 60–2 BCA par. 2748, 2 Gov. Contr. 545g; *Restatement, Contracts*, sec. 235(c).

the phrase "the 75,000 gallon elevated steel water storage tank, including connections to existing water system, complete." The contracting officer ruled that the by-pass line was not a part of the "connections" mentioned in this phrase, but was, as he put it, "a new segment of the existing system." We cannot agree with this interpretation.

It certainly requires no demonstration that the word "existing," as ordinarily used in everyday speech, refers to the present and not to the future, and that, therefore, in the context in which it here appears it refers to the water system existing when the contract was made. Nor do we understand the contracting officer as subscribing to a different view. His thinking appears to have been that the by-pass line, since it was to be substituted for a segment of the supply main in existence when the contract was made, should be regarded as being just as much a part of the "existing" water system as was the segment which it was to replace, even though such substitution was to occur only after the contract had been made. This, however, does not represent a normal usage of the word "existing." Certainly, an automobile owner would not, for example, consider a new four-barrel carburetor which he intended to have installed in replacement of an old two-barrel carburetor as being a part of his "existing" automobile until it had been actually acquired and installed. Likewise, in everyday speech an "existing" water system consists of segments which are currently in existence, and does not include segments which are still only in contemplation. Furthermore, if the by-pass line is to be treated as "a new segment of the existing system," it is difficult to see why the tank inlet and outlet lines should not be similarly treated, for, once they had been constructed, they too would become integral segments of the water system. The rule is that "the ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable." [6] In our opinion, the contracting officer's view that the by-pass line should be treated as a part of the "existing" water system, rather than as a connection, does not comport with that rule.

The Board holds that construction of the by-pass line was a part of the work to be performed under Base Proposal No. 2. Both physically and functionally that line served to connect the new water storage tank with the water system in existence when the contract was made. Unless either the portion before or the portion after the point of junction with the tank outlet line was constructed, the stored water would have no way at all of reaching any part of the hospital building, and unless both of those portions were constructed the stored

[6] *Restatement, Contracts,* sec. 235(a); *George A. Fuller Company,* Eng. BCA No. 1593, (September 25, 1961).

water would not be capable of being fed into the water system in the manner contemplated by the drawings. Conversely, replacement of the existing supply main by the by-pass line was not absolutely essential for the continued operation of the water system in the manner in which it had been operated before the making of the contract, since the segment of that main which crossed the site of the hospital addition was so deeply buried that the addition could be, and was, constructed without interfering with the use of this segment. Moreover, just as the word "complete" after the word "hospital facilities" in Base Proposal No. 1 comprehends a myriad of individual items of work that are described in the specifications or drawings but not enumerated in the proposal itself, so too does the word "complete" in Base Proposal No. 2 import that the term "connections to existing water system" was used in a comprehensive rather than a restrictive sense. Appellant, accordingly, is entitled to an equitable adjustment under the "Changes" clause of the contract for the installation of the by-pass line.

On the other hand, the Board holds that construction of the service line and construction of the replacement fire hydrant line were parts of the work to be performed under Base Proposal No. 1. These lines were incapable of being used as connections between the new water storage tank and the existing water system. To the contrary, they were in reality new service outlets through which water was to be conducted to new or relocated points of consumption off that system. Appellant, accordingly, is not entitled to an equitable adjustment on account of either the service line or the replacement fire hydrant line.

The contracting officer in his decision expressly refrained from making any determination upon the amount of the equitable adjustment, should one ultimately be found due, and no testimony upon the question of amount was presented at the hearing. The case, therefore, is remanded to the contracting officer for determination of the amount of the equitable adjustment to be made for installation of the by-pass line, subject to the contractor's right to appeal from such determination under the "Disputes" clause of the contract.

Conclusion

With respect to the by-pass line the appeal is sustained and the case is remanded to the contracting officer for further proceedings consistent with this opinion. With respect to the other items of work in controversy the appeal is denied.

HERBERT J. SLAUGHTER, *Member.*

We concur:

PAUL H. GANTT, *Chairman.*
JOHN J. HYNES, *Member.*

BRUCE ANDERSON

A–28696 *Decided October 10, 1962*

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Applications—Oil and Gas Leases: Future and Fractional Interest Leases

The limitation of 2,560 acres which may be included in an acquired lands oil and gas lease offer is imposed for the purpose of confining the physical extent of a lease and that acreage may not be exceeded in an offer even though the United States owns less than the entire interest in the oil and gas deposits so that the net acreage chargeable to the offeror and for which he must pay rental is less than 2,560 acres.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bruce Anderson has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated September 22, 1960, rejecting Anderson's offer (BLM–A 045986) to lease the Government's 75 percent undivided interest in the oil and gas deposits in 20 tracts of land in Pennsylvania under the terms of the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., secs. 351–359).

The offer, filed on January 24, 1958, covers an area of 3,387.84 acres. The net total area is stated in the offer to be 2,540.88 acres (75 percent of the total acreage).

On January 14, 1960, Merwin E. Liss, offeror under BLM–A 045569, and Jacob N. Wasserman, offeror under BLM–A 047588, both of whose offers are in partial conflict with the Anderson offer, filed a joint protest against the Anderson offer on the ground that the offer violates a regulation of the Department limiting offers to not more than 2,560 acres.

The protest was dismissed by the Eastern States land office on January 18, 1960, but, on appeal, the Acting Director held that the acreage applied for exceeds that permitted to be included in a lease offer under 43 CFR 200.8(d) and that the offer must be rejected under 43 CFR 200.8(g)(1)(ii).

Anderson contends that the undivided fractional mineral interest owned by the United States in the area applied for does not exceed the maximum acreage permitted to be included in a lease offer and that the net acreage in his offer is less than the 2,560-acre limitation. He relies for support of his argument on the fact that in computing acreage holdings under the Mineral Leasing Act for Acquired Lands only that part of the total acreage involved in a lease which is proportionate to the ownership of the United States of the mineral resources therein is charged as acreage holdings (43 CFR 200.6) and

on the further fact that where the interest of the United States in the oil and gas underlying any tract or tracts described in a lease is an undivided fractional interest rentals and royalties are payable in the same proportion as the undivided fractional interest of the United States is to the 100 percent interest (Form 4–1196, sec. 4(a) of the Lease Terms; see also Item 4 under Special Instructions).

However, as pointed out in *Merwin E. Liss, Cumberland and Allegheny Gas Co.*, 67 I.D. 385 (1960), it does not follow that either the method of computing the maximum permissible holdings in a State or the apportionment of rentals when the United States owns only a fractional interest in the oil and gas deposits is applicable to the maximum acreage which may be included in one lease offer. The limitation on the amount of acreage which may be included in one lease offer is imposed to confine the physical extent of leases for purposes of administration and no reason has been advanced why the physical extent of leases should be larger when the United States owns less than 100 percent interest in the oil and gas deposits. The problems of administration remain the same.

In any event, the regulation is clear. It provides that the area covered by a lease offer must not exceed 2,560 acres, except where the rule of approximation applies. Obviously that rule does not apply to the present offer which is for 20 separate tracts of land covering a total of 3,387.84 acres.

Nor may the offer be approved for 2,560 acres under that provision of 43 CFR 200.8(g)(2)(ii) which permits a defective offer to ripen into a lease covering 2,560 acres where the offer covers not more than 10 percent over the maximum allowable acreage of 2,560 acres. As the Anderson offer is for a much larger overage than the 10 percent allowable, the defect in the offer cannot be waived.

Accordingly, it was proper for the Acting Director to reject the Anderson offer.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Acting Director, Bureau of Land Management, dated September 22, 1960, is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

MERWIN E. LISS

A–28896 *Decided October 10, 1962*

Oil and Gas Leases: Consent of Agency—Oil and Gas Leases: Discretion to Lease—Mineral Leasing Act for Acquired Lands: Consent of Agency

Under the Mineral Act for Acquired Lands, the Secretary of the Interior is not required to reject an offer to lease for oil and gas purposes land conveyed to a State in which the United States has reserved a fractional mineral interest because the offeror refuses to accept the terms announced by the State as the condition of its consent to the issuance of the lease; whether to lease or not to lease must be based upon a determination whether the best interests of the United States will be served thereby.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Merwin E. Liss applied for an oil and gas lease pursuant to the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., sec. 351 *et seq.*). His offer was for the 75 percent interest of the United States in the oil and gas deposits in lands conveyed to the State of Pennsylvania subject to a reservation to the United States of a 75 percent interest in the minerals. The State Department of Forests and Waters, in response to an inquiry from the Eastern States land office, stated that it had no objection to issuance of a lease subject to the incorporation of certain stipulations in the lease governing the use of State forest roads and the approval of locations of well sites and other facilities.

The Eastern States land office required Liss by decision of September 20, 1960, to consent to the stipulations. Liss refused and appealed to the Director. On March 31, 1961, the Appeals Officer affirmed the land office, holding that the Department was prohibited by law from issuing a lease without the consent of the instrumentality having jurisdiction over the land. Liss has appealed from that decision to the Secretary.

In his appeal to the Secretary, the appellant reaffirms his objection to the scope of the conditions imposed by the State but he also contends that the statutory provision upon which the Appeals Officer relied does not apply to the State of Pennsylvania.

Section 3 of the Mineral Leasing Act for Acquired Lands provides in applicable part:

* * * No mineral deposit covered by this section [which deposits include oil and gas] shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposits * * * and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered * * *. (30 U.S.C., 1958 ed., sec. 352.)

The Department has construed this provision by regulation as not applying to a State or any agency thereof. The regulation (43 CFR, 1960 Supp., 200.3(c)) reads as follows:

(c) Where the United States has conveyed the title to, or otherwise transferred the control of the surface of the lands containing the deposits to any State or any political subdivision, agency or instrumentality thereof, or a college or any other educational corporation, or association, or a charitable or religious corporation or association, such party shall be given written notification by certified mail of the application for the permit or lease, and shall be afforded a reasonable period of time within which to suggest any stipulations deemed by it to be necessary for the protection of existing surface improvements or uses to be included in the permit or lease, setting forth the facts supporting the necessity thereof, and also to file any objections it may have to the issuance thereof. Where such party opposes the issuance of the permit or lease, the facts submitted in support must be carefully considered and each case separately decided on its merits. However, such opposition affords no legal basis or authority to refuse to issue the permit or lease for the reserved minerals in the lands; in such case, the final determination whether to issue the permit or lease depends upon whether the interests of the United States would best be served thereby.

The last two sentences of the regulation make it plain that the refusal by a State to consent to issuance of a lease affords no legal basis for refusing to issue a lease. Such a lease can still be issued if it is determined that the interests of the United States will best be served thereby.

Thus I conclude that Liss' lease offer should not be summarily rejected on the ground that the Department cannot issue him a lease if he fails to accept the stipulations of the State. Instead, the case should be reconsidered to determine if some accommodation can be reached with the State in light of Liss' objections. If not, a decision should be made whether the interests of the United States would best be served by insistence upon the offeror's acceptance of the State's stipulations and rejection of the offer if he does not accept, or by issuance of a lease without regard to such stipulations, all in the exercise of the Secretary's statutory discretion to lease or not to lease. See *Richfield Oil Company et al.*, 66 I.D. 106 (1959); *Russell H. Reay*, A-28578 (February 24, 1961).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision appealed from is reversed and the case is remanded for further proceedings consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF SOUTHWEST WELDING AND MANUFACTURING DIVISION, YUBA CONSOLIDATED INDUSTRIES, INC.

IBCA-281 *Decided October 29, 1962*

Contracts: Delays of Contractor—Contracts: Damages: Liquidated Damages

Contract provisions for liquidated damages are not converted into a penalty where no actual damage is caused to the Government by the contractor's delay. Such provisions are to be judged as of the time of making the contract.

Contracts: Delays of Contractor—Contracts: Performance

Where a supply contract contains two separate required delivery dates for two lots of equipment to be delivered to the work site, and one lot is delivered 15 days late, the delivery of the remaining lot on time does not constitute substantial performance.

Contracts: Delays of Contractor—Contracts: Waiver and Estoppel

An agreement between the Government and its general contractor for a dam, to extend the time for completion including the time for installation of Government-furnished equipment, does not operate as a waiver by the Government of the delivery schedule in the separate contract with the supplier of the equipment. The equipment contractor had no knowledge of the extension of the general contract until after delivery of the equipment. No representations concerning such extension were made to the equipment contractor by the Government.

BOARD OF CONTRACT APPEALS

This timely appeal is concerned with the denial by the contracting officer of the contractor's claim of $4,500 withheld by the Government as liquidated damages for a delay of 15 days in delivery of equipment to the site of Trinity Dam in California. Oral arguments were heard by the Board in Los Angeles, California, on March 23, 1962.

The contract was awarded June 30, 1958, on Standard Form 33 (Oct. 1957 Edition). It contained Standard Form 32 (Oct. 1957 Edition) and called for the furnishing of penstock header and outlet pipe for a total lump sum price of $2,313,953. Deliveries were to be made as follows:

Part A. Wye branch and all anchor bolts, complete within 360 calendar days.

Part B. All remaining material, complete within 720 calendar days.

Liquidated damages of $300 per day were provided by the last subparagraph (unnumbered) of Paragraph B-10 of the Special Condi-

tions of the contract for delay in delivery of any portion of this equipment.[1]

Part A was accordingly required to be delivered by June 27, 1959, but was actually delivered 15 days later. We are not concerned here with Part B, which was delivered timely. As matters turned out, the wye branch was delivered before it was actually needed, for within a few months after the award of the contract to appellant, the general contractor who was building the dam altered his construction schedule so that the wye branch was not required by him on July 1, 1959 (the original date he had specified for installation of the wye branch). Further changes in the dam construction schedule ultimately made it unnecessary for the general contractor to install the wye branch until about March 1961, or nearly 22 months after it had been delivered.

This, then, is the crux of appellant's claim: that since the Government suffered no actual damage by reason of the delay of 15 days in the delivery of the wye branch, the liquidated damages clause provided for an unenforceable penalty.

It appears that the appellant was not aware of the changes and delays involved in the construction program of the general contractor, until after the wye branch had been delivered to the work site. However, appellant argues that the Government, by agreeing with the general contractor with respect to extended dates for installation of the wye branch as specified in the general contractor's construction schedule, effectively waived the delivery date required by appellant's contract.

Appellant urges that the rule of substantial compliance is applicable to this case, since all of the equipment called for by the contract except for Part A, was delivered on time, the wye branch and anchor bolts being a mere 15 days late, with no adverse effects resulting.

For its principal thesis, appellant mistakenly relies on one of the leading decisions in this field, *Priebe & Sons, Inc.* v. *United States*,[2] where a contract for delivery of dried eggs contained two separate provisions for liquidated damages.

Paragraph 7 of the *Priebe* contract provided for liquidated damages if the contractor did not have the goods inspected and ready for delivery on May 18, 1942, which was the first day of a 10-day period during which the Government could require the contractor to deliver the

[1] "The amount of liquidated damages to be charged for failure to deliver the materials, or any part thereof under either subdivision, in the schedule, for which a separate desired delivery time is stated, within the desired time specified in the schedule, or within the period stated by the contractor in his bid, if such period is greater than the desired time, will be three hundred dollars ($300) for each such subdivision for each calendar day of delay." (The contractor's bid specified the same delivery times as those desired by the Government.)

[2] 332 U.S. 407 (1947).

goods. Paragraph 9 imposed additional liquidated damages for failure to deliver the eggs when required during the 10-day period. On May 26, 1942, the Government requested delivery, and the goods were delivered timely. Inspection, however, had been completed May 22, 1942, 4 days after the required date. The Court held that the provision in paragraph 7, "* * * may not be sustained as an agreement for 'liquidated damages' * * *." The Court stated further: "* * * 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. * * *"

In discussing the principles to be applied when considering provisions for liquidated damages, on page 412 of the opinion, the Court said:

> * * * And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract. * * * (Citing *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105, 121).

Thus, it is seen that the holding in *Priebe*, relied upon by appellant, is readily distinguishable from the instant case and from the general rule. This rule is supported by an impressive line of decisions (and is recognized in *Priebe*): If at the time of contract execution, fair and reasonable attempts are made to fix an approximation of just compensation in the form of liquidated damage provisions for anticipated loss caused by breach of contract, and the actual amount would be very difficult or impossible to ascertain, such provisions are enforced, regardless of the actual damage caused by the breach.[3]

Of the cases cited, *supra*, *Byron Jackson Co.* appears to be most nearly on all fours with the facts of this appeal. There, the contract required delivery of 3 pumps to the Soil Conservation Service, and provided for liquidated damages of $25 for every day of delay as to each pump. The Government admitted that it was not ready to use the pumps even though the same were delivered late, hence there was no actual damage. Nevertheless, since the provisions are to be judged as of the time of making the contract (*Priebe; Bethlehem Steel Co.*, *supra*), the provisions for liquidated damages were enforced.

[3] *Wise* v. *United States*, 249 U.S. 361 (1919); *United States* v. *Bethlehem Steel Co.*, *supra; Sun Printing and Publishing Association* v. *Moore*, 183 U.S. 642 (1902); *Steffen* v. *United States*, 213 F. 2d 266 (6th Cir. 1954); *United States* v. *O. G. Innes Corp.*, 208 F. Supp. 60 (S.D. N.Y. 1962); *Gustav Hirsch Organization, Inc.* v. *East Kentucky Rural Electric Cooperative Corp.*, 201 F. Supp. 809, 812 (E.D. Ky. 1962); *Byron Jackson Co.* v. *United States*, 35 F. Supp. 665 (S.D. Cal. 1940); *Hughes Brothers, Inc.* v. *United States*, 133 Ct. Cl. 108 (1955); Comp. Gen. Dec. B–129256 (May 28, 1962); Comp. Gen. Dec. B–144665 (April 25, 1961); 36 Comp. Gen. 143 (1956); 29 Comp. Gen. 530 (1950); 28 Comp. Gen. 435 (1949).

This Board[4] (and the ASBCA)[5] has consistently followed the doctrine enunciated in *Priebe*, *Bethlehem Steel*, *Wise*, *Byron Jackson Co.*, and similar authorities.

Appellant cites *dicta* of the Board in *Fairbanks-Morse & Co.*[6] to support its contention that proof of no actual damage is a sufficient defense. Apparently, appellant has misinterpreted that portion of the Board's opinion, for the *dicta* referred to is in the form of a subjunctive and should be rendered as follows, for clarity:

> If it were true (which it is not) that the absence of harm is a defense to the liquidated damages provision, the burden of proving facts sufficient to show that there was no harm would be on appellant.

This Board considers such *dicta* to be mere surplusage. The Courts and the Board (in other cases cited footnote 4, *supra*, and in the same *Fairbanks-Morse* opinion) have clearly stated in no uncertain terms that the lack or the absence of actual damage does not convert a liquidated damage provision into a penalty.

In our opinion, the dispositive point in this appeal is whether the amount of $300 per day agreed upon by the parties as liquidated damages "judged as of the time of making the contract" was a reasonable approximation of the damages which *could* be caused to the Government in the event of breach of the delivery requirements. No arguments or proof have been advanced by appellant to establish that the amount was not a reasonable approximation.

During the hearing of oral arguments it was stated by Department Counsel as an estimate, that the loss of income to the Government in the event of delay in completion of the dam and its power plant could run into thousands of dollars per day for each electric generator, since the electric power so generated is sold by the Government to many customers. That statement was not denied or disputed by appellant. Of course, the appellant could not complain that the estimated amount of $300 per day was less than the possible amount of actual damage.

In *Sun Printing and Publishing Association*, *supra*, the Court at page 470 quoted an apt passage from an opinion by Chief Justice Nelson (later on the United States Supreme Court) in a much earlier

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[4] *Refer Construction Co.*, IBCA–267 (May 19, 1961); 68 I.D. 140, 61–1 BCA par. 3048, 3 Gov. Contr. par. 358(c); *Lee Moulding*, IBCA–153 (March 13, 1961), 68 I.D. 57, 61–1 BCA par. 2977, 3 Gov. Contr. par 252(c); *Truax Machine & Tool Co.*, IBCA–195 (July 21, 1959), 59–2 BCA par. 2280, 1 Gov. Contr. par. 563; *Parker-Schram Co.*, IBCA–96 (April 7, 1959), 66 I.D. 142, 59–1 BCA par. 2127, 1 Gov. Contr. par. 289, 563 N.

[5] *Gramm Trailer Corp.*, ASBCA 5847, 5933 & 6203 (November 3, 1961); *Standard Coil Products Co., Inc.*, ASBCA No. 4878 (February 27, 1959), 59–1 BCA par. 2105, 1 Gov. Contr. par. 216; *Superb Bronze & Iron Co., Inc.*, ASBCA No. 1346 (October 19, 1953).

[6] IBCA–146 (August 11, 1958), 65 I.D. 321, 329, 58–2 BCA par. 1867, holding that even where the contractor had received information from the Government some months prior to the required delivery date, that the general contract award had beeen delayed so that the work would not be ready for installation of the pumping equipment on that date; and the contractor accordingly delayed shipment thereof on its own volition, the delay was not excusable and imposition of liquidated damages was valid.

New York case, *Dakin* v. *Williams*, 17 Wend. 447 (N.Y. Sup. Ct. of Jud., 1837):

> If it be said that the measure is a hard one, it may be replied, that the defendants should not have stipulated for it; or having been thus indiscreet, they should have sought the only exemption, which was still within their power, namely: the faithful fulfillment of their agreement.

A careful examination of the several cases briefed by appellant has convinced the Board that they are not in point with the facts of this appeal. In *Massman Construction Co.* v. *City Council of Greenville, Miss.*, 147 F. 2d 925 (5th Cir. 1945), the Court decided in favor of the contractor on the principal ground that the City Council had passed a resolution to the effect that the delay in constructing a bridge was excusable because of faulty information supplied by the defendant concerning subsurface conditions, and that such delay was beyond the contractor's control. This was held to be binding on the defendant as an admission against interest. Also, the Federal Government had contributed 54 percent of the cost of building the bridge (including the amount retained as liquidated damages), and the Court said that such contribution was "not for the purpose of unjustly enriching the City." It is true that this decision was also based upon the fact that after completion, the bridge could not be used because an approach road on the other side of the river had not been built.

However, the Court could have properly decided the case in favor of the contractor by reason of excusable delay. Moreover, the Court cited no Federal decisions, and a total of only three precedents were given in the entire opinion, all being Mississippi decisions.[7] We conclude that *Massman* stands on the peculiar circumstances prevailing there and is not applicable to the present case.

Proceeding to the examination of some of the remaining cases cited by appellant for the proposition that the liquidated damages provision in the instant contract should be construed as a penalty, we find that *Kothe* v. *Taylor Trust Co.*, 280 U.S. 224 (1930), was a case involving a lease which provided that if the tenant filed a bankruptcy petition, the landlord could recover the entire remaining rental for the unexpired balance of the term. The tenant filed a petition in bankruptcy and the landloard attempted to recover $5,000 from the trustee in bankruptcy. The claim was denied on the ground that the amount (15 months' rent) was so disproportionate to any reasonable anticipated damage as to constitute a penalty; and that the agreement was designed to give the lessor preferential treatment in case of the lessee's bankruptcy.

[7] There is no doubt that Federal law applies to liquidated damage provisions of Federal contracts. *Byron Jackson Co., supra.*

Edgar Tobin v. *United States*, 103 Ct. Cl. 480 (1945), held that, on a question of contract interpretation, liquidated damage provisions were applicable to delay in final deliveries of enlarged aerial photographic prints and maps, and not to delay periods following the earlier delivery of original prints and maps for purposes of acceptance or rejection. The Court also held that "If we give any heed at all to the idea that provisions for liquidated damages should be narrowly construed, we should hold, as we do, that there was no agreement for liquidated damages in the situation which occurred." However, no question of penalty was involved.

In *Climatic Rainwear Co., Inc.* v. *United States*, 115 Ct. Cl. 520 (1950), the contractor was excused for delay (and recovered the withheld liquidated damages) because of faulty Government-approved specifications, citing *Tobin*, *supra*, for the narrow construction doctrine. No penalty question was involved.

Wise v. *United States*, *supra*, fn. 3, holds against appellant's thesis, for the Court decided the $200 per day as liquidated damages was reasonable and was not a penalty, where construction of two buildings was involved, and the contractor claimed that the liquidated damages provisions were unenforceable because the contract did not specify whether liquidated damages applied to delay in completion of only one or both buildings.

In *Langona Lumber Corp.* v. *United States*, 140 F. Supp. 460 (E.D. Pa. 1955), *affd*, 232 F. 2d 886 (3d Cir. 1956), there was involved the usual contract provision for assessing excess costs of repurchase after termination for default. The Court held that this type of "liquidated damages" provision (whereby actual damages must be ascertained) should be enforced. However, this has nothing in common with true liquidated damages. It is a misnomer to describe actual damages as "liquidated damages."

Steffen v. *United States*, *supra*, fn. 3, states the rule correctly, that liquidated damages provisions are valid where it would be very difficult or impossible to determine actual damage, and properly holds that a provision for forfeiture of a 10% deposit was a penalty designed to enforce performance, rather than liquidated damages (as argued by the contractor), where the contract was terminated for default. The Government recovered a larger amount representing excess actual costs of having the work done by others, as being the proper measure of damages.

Interior Warehouse Co. v. *The Capetan Yemelos*, 177 F. Supp. 410 (D. Ore. 1959), was an action to collect a penalty (admitted by plaintiff to be a penalty) of $100 per hour for dockage, to enforce a requirement that vessels be ready to take cargo at time of docking.

The penalty was disallowed as being disproportionate, but plaintiff was permitted to prove reasonable value.

Hence, in view of the great weight of authority supporting the general rule, and the paucity of *contra* decisions, the Board is convinced that the grounds advanced for appellant's claim of penalty are not tenable.

Appellant in its additional argument claiming waiver of delivery requirements by the Government, by reason of changes in the general contractor's schedule of construction, cites *Ampro Corporation*, ASBCA No. 1678 (March 1, 1954). The Government was held to have waived the delivery schedule when, after default in the July 1949 delivery requirement, a Government expeditor visited the contractor's plant and inquired if deliveries could be made by September 1, 1949.

In *Buhl Optical Co.*, ASBCA No. 1702 (January 29, 1954), and in *Frank Menard Manufacturing Co.*, ASBCA No. 1558 (November 10, 1953), the Government had accepted deliveries or samples for testing, for long periods after the original default in delivery requirements. In each case the Government was held to have waived delivery schedule.

In *Binenfeld Glass & Mirrors*, ASBCA No. 3568 (September 25, 1957), 57-2 BCA par. 1462, the Government was held to have waived the delivery schedule when it requested a new delivery schedule from contractor long after the original default.

It is apparent from the cases cited by appellant that in every instance the conduct of the Government which constituted waiver took place in its direct dealings with the contractors. Appellant has not brought to our attention any citations, and we have not found a precedent of any kind, for appellant's proposition that the Government, by its change of the construction schedule under a separate contract with a third party entirely foreign to appellant, and without any acts or representation whatever in the premises as far as appellant was concerned, can be said to have waived its vested rights under appellant's contract to have the equipment delivered as agreed by appellant.

Appellant further urges that it should be excused because of "substantial performance" of the contract, by reason of having delivered Part B of the contract schedule on time, and having been only 15 days late in delivering Part A (the wye branch and anchor bolts).

This Board has applied the principle of substantial performance in cases where a construction contract, with required completion by a day certain, is so nearly completed that the remaining minor adjust-

ments and details awaiting final perfection are so inconsequential as not to impair materially the utility of the building or other products.[8] The principle does not fit a situation where delivery of an item intact is required, in order that it may be used at all.

The fact that the penstock header and other remaining material (Part B) were delivered on time is not relevant. Since a different (much later) delivery date was specified for Part B, that group of items might just as well have been procured under a separate contract, for all of the significance it has in a discussion of substantial performance as to Part A.

The instant appeal is likewise distinguishable from a situation where a supply contract (Standard Form 32, such as we have here) calls for delivery of multiple items of the same kind, and the contract provides for variation in quantities which may be agreed to in the contract pursuant to Clause 4 "Variation in Quantity" of Standard Form 32. In such cases a variance (e.g., 1%) is agreed upon in advance, where it would be difficult to deliver the exact quantity of, let us say, 7,000 lag screws, because of allowances in manufacturing processes with automatic machinery turning out about 1,000 screws per hour.[9]

Appellant has cited *Elmer A. Roman*, *supra*. That contract involved construction of 3 comfort stations, two of which were completed on time. The third was incomplete only as to minor matters, clean-up work and 3 toilet fixtures (shipment of which had been delayed) out of a total of 14 fixtures required, so that the station was 98.1% complete. The Board held that the deficiencies were not consequential enough to impair materially the utility of the station, where the deficiencies were remedied shortly after the required completion date. There is no analogy between the instant case and that decision. There could not be partial completion in the case of the wye branch and anchor bolts. The wye branch was not divisible. Also, it would be useless without the anchor bolts, and vice versa. To illustrate the point with a closer analogy, if, in *Elmer A. Roman*, two of the stations had been completed while the third had not been started, there could have been no substantial performance of the contract. It would have made no difference in so far as performance of the instant contract delivery requirement was concerned, whether manufacture of Part A was 99% complete on June 27, 1959, or whether manufacture of Part A had not been started. Hence, we cannot agree

[8] *Elmer A. Roman*, IBCA–57 (June 28, 1957), 57–1 BCA par. 1320; *Urban Plumbing & Heating Co.*, IBCA–43 (November 21, 1956), 56–2 BCA par. 1102.

[9] *Cf. Standard Coil Products Co., Inc., supra*, footnote 5, where delivery of all but 7 of 25,000 radiosondes was held not to be substantial performance, there being no allowance for variation in quantities.

that there is any room for the assertion of substantial performance as an excuse for delay.

The case of *Urban Plumbing Company*, *supra*, was decided on principles similar to those described concerning *Elmer A. Roman*, *supra*. The contract was more than 93% completed on the required date and the structure (a fish trap) was actually used for the intended purpose soon after the required date and before minor details had been completed.

Conclusion

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member.*

I CONCUR:

PAUL H. GANTT, *Chairman.*

I Concur:

JOHN J. HYNES, *Member.*

ELIZABETH HOLMES MacDONALD
HUGH JOHN MacDONALD

A-27711 *Decided October 30, 1962*

Withdrawals and Reservations: Reclamation Withdrawals—Desert Land Entry: Lands Subject to

Vacant unentered public land within an irrigation district which has been designated under the Smith Act (act of August 11, 1916) may thereafter be included in a reclamation withdrawal, and when so withdrawn the land is not subject to entry under the Desert Land Act.

Bill Fults, 61 I.D. 437 (1954), *overruled.*

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Elizabeth Holmes MacDonald and Hugh John MacDonald have appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management, dated April 24, 1958, which affirmed decisions of the manager of the land office at Los Angeles, California, dated February 2 and 15, 1956, rejecting their applications for desert land entries filed on January 2 and February 1, 1956, respectively, on certain lands within the Imperial Irrigation District on the ground that such lands were withdrawn on October 19, 1920, from all forms of disposal pursuant to section 3 of the Reclamation Act of June 17, 1902 (43 U.S.C., 1958 ed., sec. 416).

In their appeals to the Director of the Bureau of Land Management, the appellants asserted that the land is within the Imperial Irri-

gation District and has been subjected to the act of August 11, 1916, popularly known as the Smith Act (43 U.S.C., 1958 ed., sec. 621 *et. seq.*), which permits an irrigation district organized and operated under State law to impose a lien upon unentered, and entered and unpatented public lands within the district boundaries for a proportionate share of charges payable for construction, operation and maintenance of irrigation works. They contended that because of the applicability of the Smith Act the reclamation withdrawal was ineffective to withdraw public lands from public entry and thus defeat the district's power to subject the land to a lien for district irrigation charges.

The Director agreed that in a recent case the Department had held that the designation by the Department of unentered public lands as subject to the Smith Act gave the Imperial Irrigation District a valid existing right to impose a lien against such land for its proportionate share of construction, operation, and maintenance charges which are due and payable, with a view toward having such lien satisfied by an applicant for entry as a condition precedent to entry and that, because of the existence of this right, a subsequent first-form reclamation withdrawal did not operate to withdraw such land from public entry, as contemplated by the Smith Act. *Bill Fults*, 61 I.D. 437 (1954).

The Director also found that the withdrawal was ineffective although it was earlier in time than the Secretary's approval on February 26, 1921, of the district's irrigation plan which made the lands shown in such plan subject to the Smith Act because such approval related back to the date of the district's application for approval of the plan on May 6, 1920. The Director held, however, that the appellants' applications could not be allowed because they do not meet the requirements of departmental regulations for showing of the personal qualifications of the applicants, for demonstration of the existence of a sufficient water supply and the feasibility of the proposed works to convey water to the land and for the proper showing as to the character of the land within the proposed entries (43 CFR 232.13).

In their appeals to the Secretary, the appellants contend that the Director erred in holding that their applications do not meet all requirements for allowance, although they admit that they are unable to obtain from the Imperial Irrigation District a certificate showing that no unpaid district charges are due and delinquent against the land as required by section 5 of the Smith Act (43 U.S.C., 1958 ed., sec. 627), because of the manager's rejection of their entries.

Prior to considering the grounds on which the appellants have based their appeal, I believe it is necessary to re-examine the De-

partment's decision in the *Fults* case, for if that decision is incorrect, then the appellants' applications must be rejected without regard to the inadequacies of their applications.

The *Fults* decision was bottomed on the theory that a reclamation withdrawal of unentered public lands subject to the Smith Act is inconsistent with and impairs the purpose of that act. The decision summarized the act as follows:

> * * * The principal purpose of that act was to render public lands of the United States within a State irrigation district, whether lands subject to entry or entered, but to which title has not been perfected, subject to bearing a proportionate share, along with privately owned lands in the district, of the cost of construction and operation and maintenance of the district's irrigation system. Application of the act to unentered public lands is specifically limited to lands "when subject to entry". Under the act, a State irrigation district may submit a map to the Secretary together with the irrigation plan for the lands within the district, including the lands of the United States which are either unentered but subject to entry or entered but unpatented (sec. 3; 43 U.S.C., 1952 ed., sec. 623). On approval of the map and plan by the Secretary, the aforesaid lands of the United States become subject to State irrigation-district laws in the same manner as privately owned lands in the district and to the bearing of an equitable share of district expenses (secs. 1 and 2; 43 U.S.C., 1952 ed., secs. 621 and 622). Section 2 of the act (43 U.S.C., 1952 ed., sec. 622) further provides that all charges legally assessed against such lands of the United States "shall be a lien on unentered lands and on lands covered by unpatented entries included in said irrigation district"; and this lien may be enforced upon lands in unpatented entries by sale (43 U.S.C., 1952 ed., sec. 626). But no public lands within the district which are unentered at the time any tax assessment is levied against them by the district can be sold for taxation. Such charges, nevertheless, "shall be and continue a lien"; and as a condition precedent to entry of such lands under the homestead or desert-land laws, the applicant must present a certificate from the district showing that no unpaid district charges are due and delinquent against the land (sec. 5; 43 U.S.C., 1952 ed., sec. 627). * * * (p. 440.)

The Department concluded:

> * * * it is clear that the land purportedly withdrawn on June 4, 1930, if properly under first-form reclamation withdrawal, could not be subject to entry and, not being subject to entry, could not be assessed and placed under lien pursuant to the Smith Act. Yet the lands involved in the case were, in fact, properly designated under the Smith Act and thereupon became subject to assessment for district charges and the imposition of a lien for the payment of such charges. Therefore, in line with the *Black* case [*Harley R. Black*, 55 I. D. 445 (1936)], it must be held that no withdrawal could be made which would have the effect of excluding Smith Act lands from assessability under that act and from the concomitantly and cumulatively accruing liens in favor of the district (p. 443.)

In essence, the *Fults* decision is based on the conclusion that a necessary inconsistency exists between the designation of lands under

the Smith Act and a subsequent withdrawal of the lands under the Reclamation Act.

I believe that this conclusion overlooks or fails to give sufficient weight to several factors. In the first place, section 3 of the Reclamation Act, *supra*, does not contain any limitation on the authority of the Secretary to make reclamation withdrawls which is of relevance to the problem under consideration. Also, there is no provision in the Smith Act which expressly places any limitation on the Secretary's authority to make reclamation withdrawals of lands designated under the Smith Act. On the contrary, section 2 of the Smith Act (43 U.S.C., 1958 ed., sec. 626), which authorizes the tax sale by an irrigation district of entered but unpatented public land in the district, provides:

> * * * That in the case of entered unpatented lands the title or interest which such irrigation district may convey * * * shall be subject to the following conditions and limitations: If such unpatented land be withdrawn under * * * the reclamation Act, or subject to the provisions of said Act, then the interest which the district may convey * * * shall be subject to a prior lien reserved to the United States * * *

This provision seems clearly to recognize the compatibility between a Smith Act designation and a reclamation withdrawal.

As a matter of history there has been no conflict created by the reclamation withdrawal of lands previously designated under the Smith Act. It is a fact that on more than one occasion Federal reclamation projects have been undertaken at the behest of or with the full support of irrigation districts which have been unable themselves to complete the necessary works or arrangements essential to securing water for the irrigation of lands in the district. In these cases reclamation withdrawals of lands already designated under the Smith Act have been a necessary part of the undertaking of a Federal reclamation project. Thus, historically, the withdrawal of lands under the Reclamation Act, as a necessary incident to the construction of a Federal reclamation project, has been in aid of achieving the objectives of the Smith Act rather than in derogation of the purposes of that act.

The detriment assumed by the *Fults* decision to be caused an irrigation district by a reclamation withdrawal of land previously designated under the Smith Act is more apparent than real. Until vacant public land in an irrigation district designated under the Smith Act is actually entered, there is no one from whom the district can collect any charges. No one will enter the land until water becomes available for irrigation purposes. If the land is withdrawn for reclamation purposes, it undoubtedly is for the reason that the irrigation district has been unable to fulfill its plans for irrigating the land and that Federal assistance is necessary. Thus the inclusion of the land in a

Federal reclamation project is actually of benefit to the irrigation district since it holds the promise of making the land available for entry through the furnishing of water.

As a matter of practice the Department has made reclamation withdrawals of lands in irrigation districts designated under the Smith Act throughout the years following the passage of that act. The Department has recognized those withdrawals, and, until the *Fults* decision, recognized their validity as barring later entry on the land except under the Federal reclamation laws. See Par. 19, Cir. No. 592, as revised, 52 L.D. 155, 165 (1927); 43 CFR 231.15.

In *George B. Willoughby*, 60 I.D. 363 (1949), the Department expressly recognized the efficacy of the reclamation withdrawal of October 19, 1920, in the Imperial Irrigation District. In that case, the land in question was included in a desert land entry prior to either the reclamation withdrawal or the designation of the land as being subject to the Smith Act. The entryman obtained water from the Imperial District and paid the district's annual assessments against the land for the years 1917 through 1931, but failed to pay them thereafter. The entry was canceled on March 30, 1938. In 1941, the Imperial Irrigation District took "assessment deed" to the land and after the period of redemption had expired sold it to Willoughby who sought to obtain a patent by payment of the price per acre prescribed by section 6 of the Smith Act. The Department approved denial of patent to him under that procedure on the ground that the reclamation withdrawal of October 19, 1920, became applicable to this land when the entry was canceled in 1938, and that Willoughby, as a purchaser of the District's tax title, was, therefore, required to comply with the requirements of the reclamation law as an assignee of an entryman, as prescribed by section 2 of the Smith Act. The Department specifically approved the District's right to sell the land to enforce its lien for assessments made during the period while the entry was in existence even though the entry had been canceled before the commencement of such enforcement. The only question presented was whether Willoughby could acquire the land under the reclamation law or without regard to it and the conclusion that he was obliged to comply with the reclamation law was predicated upon the fact of the reclamation withdrawal.

To the same effect is the decision in *Clytie McPherson et al.*, A–26440 (October 25, 1954), except that, in that case, the reclamation withdrawal was revoked before the entry was canceled. Accordingly, the Department held that the purchaser from the district tax sale was entitled to proceed with his purchase under section 6 of the Smith Act.

In *Claude Johnson, Jr.*, A–25791 (April 7, 1950), the appellant had applied in 1948 or earlier for some of the same land in the Imperial

Irrigation District described by Mrs. MacDonald in her pending application. His application for desert land entry was rejected upon the ground that the land was under reclamation withdrawal and was, therefore, not subject to entry. It was recognized that the land could become subject to entry by the lifting of the reclamation withdrawal, but that it would then be subject to veterans' preference.

In view of the absence of a real impairment to an irrigation district by a reclamation withdrawal of unentered public land in the district designated under the Smith Act, the rationale of the *Fults* case fails. As a matter of fact, the regulations in 52 L.D. 155 referred to above demonstrate in considerable detail the complementary character of the Smith Act and the Federal reclamation laws.

I conclude, therefore, that the *Fults* decision must be, and it is hereby, overruled.

As a consequence, the reclamation withdrawal of October 19, 1920, must be held to have been in effect at the times when the appellants' applications were filed and to have barred such applications. Consequently, the applications were properly rejected for this reason and it is unnecessary to consider the reasons assigned by the Director for rejecting the applications.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed for the reasons stated in this decision.

EDWARD W. FISHER,
Deputy Solicitor.

MR. AND MRS. TED R. WAGNER

A-28989 *Decided October 30, 1962*

Mining Claims: Surface Uses—Surface Resources Act: Verified Statement

Where, within the 150 days required by the act of July 23, 1955, a verified statement was timely filed setting forth the information required by the act in connection with determining rights to surface resources on unpatented mining claims, the determination as to whether an allegedly mistaken reply on the verified statement may be corrected after the 150-day period has elapsed is a matter of administrative discretion.

Mining Claims: Determination of Validity—Mining Claims: Hearings—Surface Resources Act: Generally

Where the date on which a mining claim was located as shown by a verified statement filed under the act of July 23, 1955, is a date when the land was within a first form reclamation withdrawal and so withdrawn from mining location, and after the verified statement is filed, evidence is submitted by the mining claimants tending to show that the claim was first located on

a date when the land was open to mining entry, the Department will not declare the claim null and void for having been located on land withdrawn from mineral entry without a hearing on the question of the date on which the claim was located.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mr. and Mrs. Ted R. Wagner have appealed to the Secretary of the Interior from a decision of April 17, 1961, by the Appeals Officer, Bureau of Land Management, affirming a decision by the manager of the Billings land office declaring null and void the Stockade Bar placer mining claim situated in the N½SW¼NE¼ sec. 1, T. 1N., R. 5E., Black Hills Meridian, Pennington County, South Dakota. The claim is within the Black Hills National Forest.

Pursuant to the request of the Forest Service, United States Department of Agriculture, notice was published in accordance with the act of July 23, 1955 (30 U.S.C., 1958 ed., and Supp. III, sec. 611 *et seq.*), requiring mining claimants on designated lands within the Black Hills National Forest to file, within 150 days of October 30, 1957, a verified statement in the Billings land office setting forth (1) the date of the mining location; (2) the book and page of recordation of the notice or certificate of location; (3) the land description by the section or sections of the public land surveys which embrace such mining claim, or, if the land is unsurveyed, by one of two alternative types of description specified; (4) whether the claimant is a locator or purchaser under the location; and (5) the name and address of the claimant and of any others claiming any interest in or under the unpatented mining claim.

If a verified statement is filed as required by statute, then a hearing is ordered for determining the right, as between the United States and the mining claimant for as long as the claim remains unpatented, to the surface resources of the claim in accordance with section 4 of the act (30 U.S.C., 1958 ed., sec. 612).

Before March 30, 1958, the final day for filing verified statements in this case, Mrs. Tony (Ruth) Fritz, as purchaser and claimant of the Stockade Bar claim, filed a verified statement and an amendment thereof stating, *inter alia*, that the claim was located on August 8, 1941. A report of November 29, 1960, from the Forest Service to the manager regarding this claim states that when the placer was located on August 8, 1941, the land embraced therein was included in a first form reclamation withdrawal effective December 14, 1940; that the land on which the claim is located was open to mineral entry for approximately 76 days between July 29, 1954, and October 13, 1954, when the land was withdrawn for recreation, and the placer location was not relocated or amended during the 76 days the ground was open to mineral entry.

In a decision of January 30, 1961, the manager declared the Stockade Bar placer claim null and void because when the claim was located on August 8, 1941, the land was in a first form reclamation withdrawal, and was not open to mining location. The record indicates that one or both of the appellants herein purchased the claim sometime before the manager's decision was issued.

In the appeal from the manager's decision, it was asserted that the claim was originally located on May 8, 1939, from which time it has been a valid and subsisting claim. In support of this assertion, a copy of a location certificate, filed for record on June 7, 1939, and an affidavit by the original locator were submitted. The affidavit indicates that the Stockade Bar placer which was located on May 8, 1939, is the same Stockade Bar placer that was located on August 8, 1941, and that the 1941 location was made to correct the land description in the 1939 certificate. The appellants requested permission to amend or correct the verified statement to show that the claim was not affected by the reclamation withdrawal because the location of the claim antedated the withdrawal.

The Appeals Officer's decision affirmed the manager's decision declaring the August 8, 1941, location of the Stockade Bar placer null and void and denied permission to amend or correct the verified statement filed herein to reflect that the 1941 location was simply an amendment of the 1939 location on the ground that the statute requires that the statement be filed within the 150 days after the date of the first publication of notice.

On this appeal it is contended that the Government has no authority in a proceeding under the act of July 23, 1955, to declare a claim null and void, but is limited to establishing rights as between the claimant and the United States to use and dispose of the surface resources as long as the claim remains unpatented, as provided in section 4 of the act. The correctness of this contention need not be determined here because the declaration that the appellants' claim is null and void must be set aside in any event. This is so because the only basis in the record on this appeal for declaring the claim null and void is the 1941 location date shown by the verified statement on which date the land was covered by a first form reclamation withdrawal. The 1941 location date is refuted by substantial evidence in the record to the effect that the claim was originally located on May 8, 1939, and that the 1941 location certificate was recorded simply to correct the land description in the 1939 certificate. In the circumstances, the evidence in the record will not support a finding that the placer claim here involved was located on August 8, 1941, and since the appellants contend that May 8, 1939, is the correct location date of this claim, the claim may not be declared null and void on the basis of the 1941 location date

in the absence of a determination to that effect after hearing on the question. *United States* v. *O'Leary et al.*, 63 I.D. 341 (1956). The Appeals Officer's decision purports to limit the declaration of invalidity to the Stockade Bar claim located on August 8, 1941, but since his decision is presumed to refer to the Stockade Bar claim for which this verified statement was filed, the purported limitation is considered as amounting only to a refusal to allow the appellants' request to amend or correct the verified statement.

The Appeals Officer's refusal to permit the appellants to amend or correct the date of location shown on the verified statement filed herein was based upon the statutory requirement that the verified statement be filed within 150 days after the first publication of notice. *Hines Gilbert Mines Company*, 65 I.D. 481 (1958). There is no doubt that the verified statement and the information required by statute to be set forth therein must be filed within 150 days, but the question here in issue is whether, after a verified statement has been timely filed giving the information required by statute, a matter which was incorrectly set forth in the statement may be corrected. This question has not been ruled on by the Department.[1]

Since the statute and the governing regulations make no provision for the correction or amendment of a verified statement, the allowance or disallowance of the appellants' request in this case is a matter of administrative discretion.[2] Accordingly, the Appeals Officer's decision is not followed to the extent that it holds that, as a matter of law, information set forth in a verified statement which is filed within the 150 days required by the act of July 23, 1955, may not be corrected thereafter.

In this connection, it is noted that an invariable refusal to allow the correction of a mistake in a verified statement which was timely filed would mean that proceedings under the act of July 23, 1955, might be determined on an incorrect factual basis. This is so inconsistent with the reason for a statutory hearing provided for by the act that such a result should be avoided if possible. In any event, if a hearing were held, the admissibility of evidence contrary to a statement on the verified certificate presumably would be one of the matters

[1] In *Grace M. Sparkes*, A-28606, 68 I.D. 90 (1961), it was held that a mining claimant whose verified statement has been rejected for failure to describe land within the area covered by the notice of publication and who has not availed herself of an opportunity to correct the description cannot two years after the rejection of her verified statement file a new one. Here the appellants attempted to correct their statement as soon as they learned of the effect of the alleged erroneous statement.

[2] *Cf. Keeler* v. *Commissioner of Internal Revenue*, 180 F. 2d 707, 710 (10th Cir., 1950), in which the Court said:

"* * * We find no provision in the statute which permits a taxpayer to file an amended return after the time for filing his original return has expired. In proper cases the Commissioner, in his discretion, may permit the filing of an amended return * * *."; *Klinghamer* v. *Brodrick*, 242 F. 2d 563 (10th Cir., 1957.)

to be determined. Although allowing the correction of verified statements which were timely filed may lead to delay in administering the act, nevertheless, where a verified statement has been timely filed and a mining claimant gives mistaken information therein which, if not corrected, might lead to a distorted or improper ruling by the Bureau or the Department, I think that either the claimant should be allowed to correct the verified statement for purposes of proceeding under the act of July 23, 1955, or, if not, then the disputed or incorrect information in the verified statement should not be adopted as a basis for final action or decision which is not expressly provided for by the act of July 23, 1955.

Accordingly, the declaration that the claim involved in this appeal is null and void is set aside and the case will be remanded so that the Bureau may decide, on a discretionary basis, whether to allow or deny the request to correct the verified statement filed herein and, thereafter, to conclude this proceeding under the act of July 23, 1955.

The conclusion reached here is not to be taken as holding that a verified statement can be amended after the expiration of the 150-day period to include information required by the statute which was not included in the statement as originally filed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Appeals Officer, Bureau of Land Management, is modified, and the case is remanded for action consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

STATE OF ALASKA

A-29314 *Decided October 30, 1962*

Alaska: Land Grants and Selections—State Selections

An application to select land under the community purposes grant of subsection 6(a) of the Alaska Statehood Act is properly rejected for failure to include a minimum of 5,760 acres in the selection, subject to the opportunity afforded to the State to show that the selected land is isolated from other tracts open to selection.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Alaska has appealed to the Secretary of the Interior from a decision dated October 13, 1961, by which the Legal Assistant, Division of Appeals of the Bureau of Land Management, affirmed a decision of the land office at Fairbanks, Alaska, rejecting the State's application to select 337 acres of land for community purposes under

the grant contained in subsection 6(a) of the Alaska Statehood Act (72 Stat. 339, 340). The single issue raised by the rejection is whether the terms of the grant require that each selection made by the State shall contain at least 5,760 acres unless the selected land is isolated from other tracts open to selection.

The applicable portion of subsection 6(a) provides that:

> For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: * * *.

Subsection 6(g) provides in applicable part:

> Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection. * * *

The State contends that since there are over 200 areas having potential value as park and campground sites and 500 communities in Alaska which receive mail service and thus, it says, qualify as communities for the purpose of selections of public land, a minimum selection of 5,760 acres will necessarily result in only a small portion of the qualified recipients realizing any benefits from the grant of 400,000 acres and that this was not the intent of Congress. The State also points out that in Southeast Alaska existing communities have been located in the most accessible areas and at intersections of existing highway facilities within the Tongass National Forest so that the selection of 5,760-acre tracts will create unnecessarily large exclusions from the forests at points which control accessibility to the forest and the commercial activity carried on there under supervision of the Forest Service.

The difficulties envisioned by the State are real and serious in their import but the language of the statute states clearly that, except for the community purposes selections in national forests which are to be approved by the Secretary of Agriculture, all selections made under

the different grants listed in section 6 of the Alaska Statehood Act are to be made under State law and in conformity with the regulations of the Secretary of the Interior. The recognition of the exception in the case of selections within national forests indicates clearly that subsection (g) is otherwise applicable to all grants contained in the act. The next sentence then specifies that "All selections," without any exception whatsoever, "shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection."

In the report of the Senate Committee on Interior and Insular Affairs on the bill introduced in the Senate (S. 49), for which House bill H.R. 7999, 85th Congress, which became the Alaska Statehood Act was substituted, the Committee explained the language with which we are now concerned as follows:

> The committee amendment appearing in the first sentence of the subsection is intended to exempt the State, in its selection of national forest lands, from the necessity of compliance with regulations of the Secretary of the Interior. This exemption is included because subsection 6(a), referred to in the amendment, names the Secretary of Agriculture as the approving authority for selections of national forest lands (although the ultimate patents of national forest lands will be issued by the Secretary of the Interior).
>
> The subsection requires that all lands authorized to be granted in quantity shall be selected in reasonably compact tracts considering the situation and potential uses of the lands involved, and sets a minimum of 5,760 acres per tract to be selected unless isolated from other selectable areas. (S. Rept. No. 1163, 85th Cong., 1st Sess., p. 18.)

While it is possible to question the desirability of applying the minimum acreage rule to community purposes selections, the language of the statute and the committee report leave no doubt that this must be done except in those instances wherein it appears that a lesser acreage suitable for transfer to the State under the community purposes grant is isolated from other land open to selection.

The land office stated in its decision of March 21, 1961, that the land selected "is not isolated as required by the law and regulations." If this is so, the State's application was properly rejected. However, if the State believes that the land selected is isolated, it should be afforded the opportunity to establish this.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision appealed from is affirmed, subject to the opportunity afforded to the State to establish that the tract selected is isolated within the meaning of the statute.

EDWARD W. FISHER,
Deputy Solicitor.

U.S. GOVERNMENT PRINTING OFFICE: 1962

CLAIMS OF WILBUR B. CASSADY AND MARY A. CASSADY, AND FARMERS INSURANCE GROUP

TA-235 (Ir.) *Decided November 7, 1962*

Irrigation Claims: Generally

Under Public Works Appropriation Acts, an award may be made only upon a showing that the damage was the direct result of non-tortious activities of employees of the Bureau of Reclamation.

Irrigation Claims: Injury: Animals and Livestock

Damage caused by burrowing animals cannot be said to be the direct result of non-tortious activities of the Bureau of Reclamation.

Torts: Generally

In the administrative determination of claims under the Federal Tort Claims Act the individual interests of a subrogor and subrogee for convenience are, sometimes, each referred to as an individual claim. However, they are only interests in the same single claim. If the combined interests of subrogor and subrogee exceed the administrative jurisdictional limit of $2,500, the claim may not be considered administratively.

APPEAL FROM ADMINISTRATIVE DETERMINATION

Wilbur B. and Mary A. Cassady, P.O. Box 44, Socorro, New Mexico, and their subrogee-insurer, Farmers Insurance Group, 121 Jefferson N.E., Albuquerque, New Mexico, have timely appealed from an administrative determination (T-D-205 (Ir.)) of November 28, 1961, of the Acting Regional Solicitor, Denver Region, Denver, Colorado, denying their claims in the amounts of $2,356.25 and $350, respectively. The claims allege damages to real and personal property owned by Mr. and Mrs. Cassady caused by the flooding of their land when a break occurred in the bank of the Jarial Lateral of the Middle Rio Grande Project of the Bureau of Reclamation on July 1, 1961.

The record establishes that the break in the lateral was caused by the activities of gophers, and the appellants admit this in the notice of appeal.

In the original determination, the Regional Solicitor denied the claims under the Federal Tort Claims Act [1] because "* * * there was no negligence or other wrongful conduct by employees of the Bureau of Reclamation." The claims were denied under the Public Works

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

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Appropriation Act, 1962,[2] because the break was caused by the activities of rodents, and not the activities of the Bureau of Reclamation.

It is clear from the notice of appeal that the claimants seek to have the original determination reversed on the grounds that the damage to their property was caused by the negligence of employees of the Bureau of Reclamation. Appellants argue that the Acting Regional Solicitor did not give "due consideration" to the appellants' theory of negligence.

Any award to the appellants based on a negligence theory would have to be made under the Federal Tort Claims Act. While the individual interests of the subrogor and subrogee are less than the jurisdictional limit for administrative determination under that Act, the combined claim is $2,706.25, which is in excess of that $2,500 limit.[3] For convenience, sometimes each interest is referred to as a claim. But the interests of subrogor and subrogee are only interests in the same single claim.[4]

Therefore, these claims may not be considered administratively under the Federal Tort Claims Act, since they exceed the jurisdictional amount of $2,500. The original determination is affirmed.

The claim may be considered only under the Public Works Appropriation Act. Under the current Act, and its predecessors, awards may be made only upon a showing that the damage was a direct result of non-tortious activities of employees of the Bureau of Reclamation.[5]

As previously stated, the record establishes that the break in the lateral was caused by the activities of gophers, and there is no dispute on this point. This Department has long held that damage resulting from the burrowing of animals cannot be said to be the direct result of non-tortious activities of employees of the Bureau of Reclamation, and that claims arising out of such damage may not be paid under the Public Works Appropriation Acts.[6]

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[2] 75 Stat. 722, 727. The Congress passed the Public Works Appropriation Act, 1963, on October 13, 1962, but the act has not been signed by the President as of the date of this administrative determination.

[3] 28 U.S.C., 1958 ed., Supp. I, sec. 2672.

[4] 41 Op. Atty. Gen. No. 13 (November 6, 1950).

[5] *Northern Pacific Railway Co.*, T–560 (Ir.) (May 10, 1954), and administrative determinations cited therein; 39 Op. Atty. Gen. 425 (1940).

[6] *A. A. Enriquez and Ernest Pappas*, T–571 (Ir.) (December 18, 1953); *J. A. Holden*, T–158 (Ir.) (January 18, 1949); *Anna Barnes*, 57 I.D. 584 (1942); 39 Op. Atty. Gen. 425 (1940); Dec. Comp. Gen. A–45268 (June 30, 1933).

Therefore, I affirm the administrative determination (T–D–205 (Ir.)) of November 28, 1961, of the Acting Regional Solicitor, Denver Region, Denver, Colorado, denying this claim.

EDWARD W. FISHER,
Deputy Solicitor.

AUTHORITY OF THE SECRETARY OF THE INTERIOR TO RESTORE LANDS IN SAN CARLOS MINERAL STRIP TO TRIBAL OWNERSHIP

Indian Lands: Ceded Lands—Indian Reorganization Act

The vacant, unappropriated and undisposed of portions of the land ceded to the United States by the San Carlos Indian Tribe by agreement of February 25, 1896 (29 Stat. 360) and commonly known as the "San Carlos Mineral Strip" are "surplus" land under Section 3 of the Indian Reorganization Act of 1934 (48 Stat. 984; 25 U.S.C. 463(a)) and the Secretary of the Interior has the discretionary authority to restore such land to tribal ownership.

M–36599 *November 28, 1962*

TO: THE SECRETARY OF THE INTERIOR.

SUBJECT: REVIEW OF THE LEGAL ASPECTS OF THE SAN CARLOS MINERAL STRIP PROPOSED RESTORATION.

The San Carlos Indian Tribe seeks restoration to tribal ownership of the vacant, unappropriated and undisposed of portion of the land it ceded to the United States by agreement of February 25, 1896. This land is within the area commonly known and referred to as the "San Carlos Mineral Strip." Under the terms of the agreement and the subsequent ratifying act of June 10, 1896, the lands were "opened to occupation, location, and purchase under the provisions of the mineral land laws only * * *"[1] The net proceeds accruing from the disposal of the "coal and mineral lands, lying within the ceded territory" were to be placed by the United States to the credit of the San Carlos Tribe. The lands were opened to mineral prospecting and later withdrawn. Disposition under the mineral land laws has supplied net revenues of $12,433 to the Tribe. Portions of the land have been leased for grazing by the Bureau of Land Management pursuant to the Taylor

[1] 29 Stat. 360

Grazing Act.[2] The tribe now has approximately $90,000 income from these leases deposited to its account with the United States.

Restoration of the vacant and unappropriated areas in the Strip is sought under the Indian Reorganization Act of 1934 (Wheeler-Howard Act).[3] Section 3 of the Act provides as follows:

> The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, before or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act * * * [further provisos are inapplicable].

While this provision has been utilized extensively to restore lands which were surplus to allotments made to Indians under treaties, agreements, special laws, and the General Allotment Act,[4] (Dawes Act), this is the first occasion to examine into the application of the provision to other lands ceded by an Indian tribe in trust to the United States. Section 3 provides that in order to qualify for restoration at the discretion of the Secretary, land must be:

1. Remaining surplus lands
2. Of an Indian reservation
3. Opened before June 18, 1934 or authorized to be opened:
   a. To sale, or
   b. To any other form of disposal by Presidential proclamation or by public land laws.

There is no question but that two of the three requisites are met here. It was settled in an opinion of this office dated June 15, 1938 involving ceded Colorado Ute Indian lands that to qualify for restoration, land need have been part of a reservation only at the time it was ceded to the United States.[5] As detailed above the Strip was part of the San Carlos Reservation until ceded. The cession was made in 1896 and was for disposal of the ceded land under the mineral laws. Thus the last two requirements are met.

The major question remaining is whether or not the Strip comprises "surplus lands" within the meaning of the act. For a clear understanding of the problem some reference must be made to the

[2] Act of June 28, 1934, 48 Stat. 1273, as amended, 43 U.S.C. 315, 315j and 315m.
[3] 25 U.S.C. 463(a), 48 Stat. 984.
[4] 24 Stat. 388.
[5] Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands, 56 I.D. 330.

evolution in real property relationships between the Federal Government and the Indian tribes.

EVOLUTION IN REAL PROPERTY RELATIONSHIPS

Prior to 1880, most of the treaties, agreements and statutes by which Indian tribes ceded lands to the United States provided for outright and final conveyance, in return for which the Indians received cash payments, annuities, substitute lands, or other things of value. After cession, the Indians were removed from the land and often relocated on new land in the West.

After 1880 and until the 1930's a new pattern prevailed. Land not needed by the Indians (surplus land) was not ceded absolutely to the Government but was conveyed under an agreement whereby the Government opened the lands for disposal and credited the Indians with the proceeds only as the land was sold. The United States was not itself bound to purchase any of the lands. Under the pattern the United States in effect took title in trust for the Indians and the land remained tribal property until disposed of.[6] These two basic patterns are often termed "cession and removal" and "relinquishment in trust." The most common relinquishments in trust were made by agreements which contemplated allotments under the General Allotment Act and its subsequent amendments. This Act authorized the President to allot tribal lands in designated quantities to reservation Indians. If any surplus lands remained after the allotments had been made, the Secretary was authorized to negotiate with the tribe for the purchase of any of such land by the United States, purchase money to be held in trust for the sole use or benefit of the tribe to which the reservation belonged. The resulting agreements usually provided for the United States to open the land for public disposal and credit the tribes with the proceeds.

While most relinquishments in trust were made after the passage of the General Allotment Act, some were undoubtedly effected by cessions outside of or prior to the Act. As one example, land ceded by the Colorado Ute Indians under the act of June 15, 1880, before the enactment of the General Allotment Act, was held by the Assistant Secretary on June 15, 1938 to be in this category.[7] In a subsequent opinion dealing with the application of the Taylor Grazing Act to

[6] *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920), aff'g. 250 Fed. 591 (1918) and 254 Fed. 59 (1918).

[7] 56 I.D. 330, supra.

"Indian lands ceded to the United States for disposition under the public-land laws," the Solicitor held that the lands in the San Carlos Mineral Strip are in this same trust category.[8]

In 1934, the most recent stage in the evolution of federal attitudes toward real property relationships between the United States and the Indians was expressed in the Indian Reorganization Act. The allotment system had allowed the Indians to part with 90,000,000 acres of land over a fifty-year period. Large numbers of Indians were landless and many reservations were crowded. One of the major purposes of the Act was to provide sufficient nonalienable land for Indian tribes to assure their present and future support. The first five sections of the Act were designed to effectuate this purpose. Section 1 of the Act prohibited further allotment of Indian lands. Section 2 extended existing periods of trust and restrictions on alienation previously placed on Indian lands. Section 4 prohibited inter vivos transfers of restricted Indian land except to an Indian tribe, and limited testamentary disposition of such land. Section 5 authorized the acquisition of lands for Indians and declared that such lands would be tax exempt. Section 3 fitted into this same general framework; it allowed the Secretary to restore to tribal ownership surplus lands previously opened to sale.

DEPARTMENTAL INTERPRETATIONS

This Department has had occasion many times since the passage of the I.R.A. (Indian Reorganization Act) to examine into the exact meaning of section 3. Less than three months after the passage of the Act, the Department issued an instruction withdrawing undisposed-of land in Indian reservations which could be eligible for restoration under the terms of section 3. The purpose of the withdrawal was to prevent disposition of the land until: (1) it had been determined which tribes would elect to come under the Act, and (2) the Secretary could decide which lands he wanted to restore to the tribes which so elected. In listing the lands to be withdrawn, the instruction discussed the meaning of the term "surplus lands." It defined them as lands "the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians."[9] The San Carlos Mineral Strip was listed as one of the tracts withdrawn.

In 1936, Solicitor Nathan Margold considered whether certain land formerly a part of the San Carlos or White Mountain Indian Reserva-

[8] 58 I.D. 203, 210.
[9] 54 I.D. 557, 563.

tion, but restored to public domain by Executive order, was "surplus land" within the meaning of section 3. The restorations to public domain had been made in 1873, 1874, 1876, 1877 and 1902, and were absolute and unconditional. Margold confirmed the meaning of "surplus lands" established in the 1934 Instruction as lands of Indian reservations opened to sale or disposal for the benefit of the Indians. Since the land involved in the opinion had been ceded unconditionally it was held not to be "surplus land." [10]

In considering the significance of the term "surplus land," Assistant Secretary Oscar Chapman said in a 1938 opinion: [11]

> The word "surplus" means that which remains over and above what is required. It might be argued that practically all lands ceded by Indians were surplus lands according to this definition since they were doubtless considered as not being required by the Indians. However, Congress could not have intended that all remaining undisposed-of ceded lands should be available for restoration to tribal ownership, as such lands would embrace practically all of the remaining public domain. The Interior Department has taken the position that section 3 is not intended to cover all ceded lands but those ceded lands in which the Indians have retained an interest by reason of the fact that the lands were ceded to the United States to be disposed of by the United States in specified ways, the proceeds of the sale to be held for the benefit of the Indians. This type of ceded land was evidently in the mind of Congress at the time of the passage of the Reorganization Act. The debates on the bill in the Senate show that section 3 was discussed as a provision making possible the restoration of the use of the lands to the Indians in place of the proceeds to which they were entitled from any sale. (Congressional Record, 73d Congress, 2d Session, page 11135).

The same tack was taken in Solicitor's Opinion of January 15, 1960 [12] holding that certain ceded lands, previously reserved for school and agency purposes, could be restored under section 3 even though no trust relationship as such was involved. The opinion recognized that:

> The rationale of the interpretations and the administration by the Department of section 3 of the 1934 act is that the *significant and controlling* factor under this legislation is the existence of a tribal right to proceeds from the sale of the lands and not the narrower question of the existence or absence of a trust title. This interpretation is in harmony with the language of the act and its *broad purpose to augment the tribal land base.* (Italics supplied)

[10] M–27878, May 20, 1936.
[11] 56 I.D. 330, 334.
[12] 67 I.D. 10.

All of these opinions indicate the consistent position in this Department since the enactment of the I.R.A. that "surplus lands" are lands held in some manner for the benefit of the Indian tribes. None of the opinions, however, deals directly with the question involved here: namely, whether the term "surplus" refers generally to lands surplus to the needs of Indians or only to lands remaining after allotments. The previous opinions all involved allotment surpluses so no distinctions were attempted between such allotment surpluses and land which was surplus to other needs of the Indians.

The issue arises because of possible ambiguity in the term "surplus lands." The phrase had often been used in connection with the General Allotment Act as a term of art referring to land remaining after allotments had been completed. Such remaining land was to be disposed of by the United States for the benefit of the Indian tribes as detailed earlier. The common meaning of the word "surplus," though, as quoted earlier from Assistant Secretary Chapman's opinion, is "that which remains over and above what is required." Such a construction would include all lands which were surplus to the needs of the Indians, rather than just those surplus to allotment needs. Hence the ambiguity, and the necessity for the application of rules of statutory construction.

The rules of statutory construction all have as their basic aim ascertainment of legislative intent. Probably the best method of determining legislative intent is to look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved by the act.[13]

In *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265 (Ct. of Claims, 1955), the court discussed the various rules of statutory construction at length and then said:

> The court should give the statute the plain meaning indicated by its language unless that meaning is clearly at variance with the legislative purpose as manifested by the whole act and confirmed by the legislative history, in which latter event the court would be justified in following the purpose rather than the literal meaning of the portions of the statute under consideration.

The plain meaning of the language of the statute here—"the remaining surplus lands of any Indian reservation opened before June 18, 1934"—seems clear. It means the undisposed portion of land which was opened to disposal before 1934 because it was surplus to the needs

[13] *The United States* v. *Coombs*, 37 U.S. 72 (1838) (12 Pet.); 82 C.J.S. Statutes, Sec. 323.

of the Indians at that time. Questions arise only upon consideration of the word "surplus" as a word of art. Applying the rule enunciated by the Court of Claims, however, there should be no departure from the plain meaning of the language unless such meaning is clearly at variance with the legislative purpose.

The legislative purpose of the first five sections of the Act, as outlined above, was to provide more land for the Indian tribes. The purpose of this particular section was to allow the Secretary to restore to tribal ownership lands which the Government held in trust or in other manner for the benefit of the tribes. The plain meaning of the language under consideration here is not in any way at variance with this purpose, but is in fact most consonant with it.

There is no valid reason for separating land which is not needed for allotment from land which is not needed for other purposes. If the purpose of the I.R.A. had been to make land available for further allotments, there would be a logical reason for restricting "surplus lands" to surplus allotment lands. The Secretary would then be able to use for allotment purposes land which had originally been intended for allotments. But such is not the case. The I.R.A. rejects the allotment system. It seeks to put land back into tribal ownership. It is most logical to empower the Secretary to return to the tribes *any* land which the Government holds for their benefit. Whether the land was surplus to allotments or surplus to other needs of the Indians when ceded is totally immaterial to the purpose of the Act. What is material is the fact that the lands are held for the benefit of the Indians. The Secretary is given the freedom to determine whether it would benefit the Indians more to have the land or the proceeds therefrom, and to act accordingly.

The legislative history of section 3 indicates that most Senators, in the course of debate, referred to "surplus lands" as land remaining after allotments. This is easily explained, however, by the fact that all the surplus lands in the states these men represented were allotment surpluses. Thus their statements are not at all inconsistent with the inclusion of other surplus land, such as the Mineral Strip. Senator Steiwer of Oregon was more careful in his statements during the debate and recognized that "surplus lands" were "those tribal lands not necessary for allotment or *for other purposes* * * *" [14] (Italics supplied).

[14] 73 Cong. Rec. 11135.

Administrative interpretations of the section have all been consistent with inclusion of the Strip. The 1934 Instruction included the Strip as one of the areas withdrawn.[15] Assistant Secretary Chapman's 1938 Opinion said:

> The reference to surplus lands in section 3 of the Reorganization Act refers, however, *primarily* to surplus lands remaining after the actual or contemplated allotment of the Indians * * * (Italics supplied.)[16]

His use of the word "primarily" indicates recognition that more than just allotment surpluses were included in the term "surplus lands." On November 30, 1937, W. H. Flanery, Assistant Solicitor, in the absence of the Solicitor, stated as follows in a memorandum to the Commissioner of Indian Affairs discussing S. 3003 of the 75th Congress, a bill providing for payments to the San Carlos Apache Indians for this land:

> The consideration of immediate payment of the relatively small amount proposed in the bill does not warrant the relinquishment of *an existing authority (Indian Reorganization Act) under which the Department may give recognition to the Indian Claim by restoring the undisposed of lands to tribal ownership.* (Italics supplied.)

Also worthy of consideration is the settled rule of construction that in the field of Indian legislation ambiguities are to be resolved in favor of the Indians.[17] Such a resolution of the ambiguities here would compel the conclusion that section 3 is applicable to the Mineral Strip lands.

SUMMARY

In view of the plain meaning of language of section 3, the underlying purposes of the I.R.A., the continuing interpretations of the section by this Department, and the principles governing the construction of Indian legislation, it is my opinion that the Secretary has the discretionary power to return the remaining undisposed of portions of the Mineral Strip to the San Carlos Tribe.

FRANK J. BARRY,
Solicitor.

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[15] 54 I.D. 559, 563.

[16] 56 I.D. 330, 334.

[17] *Winters* v. *United States*, 207 U.S. 564, 576 (1908); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *United States* v. *Nice*, 241 U.S. 591, 599 (1916); *Carpenter* v. *Shaw*, 280 U.S. 363, 366 (1930).

LEASING OF CROW INDIAN LANDS

Indian Lands: Allotments: Alienation—Indian Lands: Leases and Permits: Generally

Executory lease agreements with competent Crow Indians which purport to cancel existing leases between the same parties as of a date one year or eighteen months in the future and to take effect themselves as five-year leases at that future date violate the Act of March 15, 1948 (62 Stat. 80) and are void.

Indian Lands: Allotments: Alienation—Indian Lands: Leases and Permits: Generally

Any leasing agreement or combination of agreements affecting a competent Crow allotment held in trust by the United States which does not allow the Indian to negotiate freely for a new lease of the property at least once every five years violates the Act of March 15, 1948 (62 Stat. 80) and is void.

Statutory Construction: Implied Repeals

While the law generally does not favor repeals by implication, the amendment of an act by the substitution of language which omits the words of a previous intermediate amendment constitutes a repeal of that intermediate amendment, in the absence of indications of a contrary Congressional intent.

M-36644 *November 29, 1962*

To: Assistant Secretary Public Land Management

Subject: Leasing of Crow Indian Lands.

In response to your memorandum of November 13, 1961, we have re-examined the issues raised in the brief of Tribal Attorney Bert W. Kronmiller dated April 10, 1961. Mr. Kronmiller questioned the validity of five-year leases of competent Crow Indian lands which purport to cancel existing leases as of a date one year in the future and to take effect upon such cancellation. We replied in our letter of September 29, 1961 that the leases were void.

The Act of March 15, 1948 [1] authorizes competent Crow Indians to lease allotted lands held under trust deeds but states that no lease (except of irrigable lands under the Big Horn Canal) shall be made for a period longer than five years. This Act amended the Act of May 26, 1926 [2] which contained a similar five-year restriction. The 1926 Act had previously been amended in 1927 [3] to provide that no lands leased for grazing could be re-leased prior to one year before

[1] 62 Stat. 80.
[2] 44 Stat. 658.
[3] Act of March 3, 1927, 44 Stat. 1365.

the termination of such lease and that agricultural lands could not be re-leased more than eighteen months before such termination.

We understand that until recently, non-Indians have followed a general practice of annually or biennially entering into executory lease agreements with competent Crow Indians which purported to cancel existing leases between the same parties as of a date one year or eighteen months in the future. These lease agreements purported to take effect themselves as five-year leases at that future date. The Indian has customarily been paid one or two years rent when the new lease agreement was executed.

Since the issuance of our letter of September 29, 1961, many rancher-lessees have canceled their previous leases which were to have terminated in 1965 or 1966 and are obtaining new five-year leases commencing upon execution. As consideration for these leases the lessees are paying up to one year's rental. Our study of this matter has been directed to these new leases as well as the leases dealt with in our previous letter.

This re-examination has led us to affirm our conclusion that the leases described by Mr. Kronmiller are void. Apparently these leases were made in reliance on the 1927 amendment. Since that Act allowed Indians to re-lease their lands one year or eighteen months prior to the "termination" of existing leases, the lessees apparently assumed that the word "termination" included early termination by agreement and made the executory lease cancellations and re-leases on that assumption. While this assumption may be incorrect, there is no reason to deal with this issue as I have determined that the 1948 Act effected a repeal of the 1927 amendment. Consequently the validity of these leases must be judged under the provisions of 1948 Act as these or similar provisions have been interpreted by the courts.

The courts have uniformly held that leases of restricted Indian land which purport to take effect at times one year or more in the future are void. The leases described in the Kronmiller brief fall into this category.

These overlapping leases have had the effect of allowing lessees to continue in possession indefinitely at artificially depressed rental amounts. While the Indians were not bound to enter into contracts of this nature, as a practical matter they were induced to do so by the promise of immediate, though inadequate, cash payments. Since the leases were made at times when the lessees held three- to four-year unexpired terms, the Indians could deal with no one else and had to

accept whatever the lessees offered. The five-year limitation was designed to protect against just such improvidence.

Congress set a five-year limitation on the power to lease allotted trust land as a protection to the Indians. The essence of the protection afforded by the limitation is the Indian's opportunity at least once every five years to renegotiate this lease—to deal with the property as his own and bargain for better rentals and lease terms. Any contractual arrangement which denies this opportunity to the Indian violates the law and is void.

The validity of the leases executed recently after cancellations of prior leases must be determined on a case by case basis according to the criteria set out above.

1. *Statutory Background*

The Act of June 4, 1920 [4] directed the Secretary of the Interior to allot lands within the Crow Indian Reservation among the members of the Crow Tribe. The Act provided that trust patents were to be issued to competent allottees unless they elected, in writing, to have their allotments patented to them in fee. The force and legal effect of the trust patents was to be as prescribed by the General Allotment Act of February 8, 1887.[5] This Act states that any contract made touching trust lands "shall be absolutely null and void." While the General Allotment Act called for a 25-year trust period, the period has been extended a number of times and is currently in effect under the Secretarial General Order of January 7, 1959.[6]

Until 1926, competent Crow Indians holding allotted lands under trust patents could not lease these lands, except with the approval of the superintendent. The Act of May 26, 1926 amended the Act of June 4, 1920 by adding a proviso to section one which allowed unsupervised farming and grazing leasing by competent Crow Indians as follows:

* * * *Provided further*, That any allottee classified as competent may lease his or her allotment or any part thereof and the allotments of minor children for farming and grazing purposes. Any adult incompetent Indian with the approval of the superintendent may lease his or her allotment or any part thereof and the allotments of minor children for farming and grazing purposes. The allotments of orphan minors shall be leased by the superintendent. Moneys received for or on behalf of all incompetent Indians and minor children shall be paid to the superintendent by the lessee for the benefit of said Indians. No

[4] 41 Stat. 751.
[5] 24 Stat. 388.
[6] 24 Fed. Reg. 127.

lease shall be made for a period longer than five years. All leases made under this section shall be recorded at the Crow Agency.

The purpose of this amendment, as expressed by the House Managers at the conference committee on the bill, was to "give the Crow Indians a very liberal voice in the leasing of their lands *and also give adequate protection.*" (Italics supplied.)[7] By late 1926 the Indians' right to issue five-year leases without Government supervision was being exploited by white men in the area. Lessees holding under five-year leases issued (with the approval of the superintendent) in 1923 were obtaining new five-year leases to become effective two years in the future and paying the rent in advance. This left the Indian with very little, if any, income from the land during the term of the lease.

On January 27, 1927 delegates of the Crow Tribe wrote to Congressman Scott Leavitt of Montana, Chairman of the Committee on Indian Affairs, describing the problem and requesting that Congress amend the 1926 Act to forbid such overlapping leases. The letter recognized that the Supreme Court in *U.S.* v. *Noble*, 237 U.S. 74 (1915), had held that Indian leases of trust lands to commence at unreasonable periods in the future were void, but sought the legislation anyway saying:

> While we are convinced because of this decision that these overlapping leases which are being taken are illegal, the members of our tribe are confronted with the fact that the lessees taking these leases are threatening to take the Indians into court who made the leases. This would involve them in delay, expense, and litigation. In order to meet this condition we have drafted the proposed amendment which we think will meet the situation and clarify and remove all doubts.[8]

The amendment suggested by the tribe would have provided that no lease could be re-leased or renewed prior to six months before the "expiration" of its term. In reporting on the bill, the Secretary of the Interior suggested that the provision be amended to allow re-leasing one year (for grazing leases) or eighteen months (for farming leases) prior to "termination" of the existing lease. The Secretary's suggested amendment was adopted in the form of two provisos inserted before the last sentence of the language added to section one by the 1926 Act.

In 1947 a bill (S. 1317) was introduced in the Senate to give to the members of the Crow Tribe the power to manage and assume charge of their restricted lands for their own use or for lease pur-

[7] H. Rept. 1255, 69th Cong., 1st Sess.
[8] 69 Cong. Rec., 2d Sec. 4365.

poses while such lands remained under trust patents. The purpose of the bill was to remedy a major deficiency in the 1920 and 1926 Acts. Under these acts only the original Crow allottees could lease their lands; their heirs or devisees were not "competent" and thus could not lease. By 1947 only 318 of the 575 Indians who had been classified as competents under the 1920 Act were alive. In that year only 318 of 2,470 Indians on the Crow Reservation were classified as competent.[9] The House Report on the bill indicated that its purpose was to put "all adult Crow Indians on an equal basis in the handling of their individual and collective affairs regarding land leases." [10]

The bill as introduced did not mention the earlier 1926 and 1927 Acts. It passed the Senate and then was substantially amended and passed by the House. A conference committee met in early 1948 and reported the bill out in the form in which it was enacted as an amendment to the 1926 Act.[11]

2. *Repeal of the 1927 Act.*

In our letter to Mr. Kronmiller we stated that the 1948 Act did not by implication repeal the 1927 Act. We were mistaken; it did effect such a repeal. While it is true that the law does not favor repeals by implication, this general proposition does not apply when an Act is amended by the substitution of new language which omits the words of previous amendments. The 1948 Act amended the last proviso of the 1926 Act "to read as follows:". It then repeated, with modifications, the language from the beginning of the last pro-

[9] S. Rept. 386, 80th Cong., 1st Sess.

[10] H. Rept. 940, 80th Cong., 1st Sess.

[11] "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last proviso of the first section of the Act of May 26, 1926, entitled, 'An Act to amend sections 1, 5, 6, 8, and 18 of an Act approved June 20, 1920, 'an Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds and for other purposes'," approved May 26, 1926 (44 Stat. 658, 659), be amended to read as follows: *"Provided further,* That any Crow Indian classified as competent may lease his or her trust lands or any part thereof and the trust lands of their minor children for farming and grazing purposes: *Provided,* That any Crow Indian classified as competent shall have the full responsibility of obtaining compliance with the terms of any lease made: *And provided further,* That leases on inherited or devised trust lands having more than five competent devisees or heirs shall be made only with the approval of the Superintendent. Any adult incompetent Indian with the approval of the Superintendent may lease his or her trust lands or any part thereof and the inherited or trust lands of their minor children for farming and grazing purposes. The trust lands of orphan minors shall be leased by the Superintendent. Moneys received for and on behalf of all incompetent Indians and minor children shall be paid to the Superintendent by the lessee for the benefit of said Indians. No lease shall be made for a period longer than five years, except irrigable lands under the Big Horn Canal, which may be leased for periods of ten years. All leases made under this Act shall be recorded at the Crow Agency."

viso of section one to the end of the section. It omitted the two provisos inserted in 1927.

In very similar situations, the Federal courts have held that such an intermediate omitted amendment is repealed. Where section 7 of the Judiciary Act of 1891 was amended in 1895 "to read as follows * * *," and in 1900 the original section of the act of 1891 was amended "to read as follows * * *," the court held that the original section and amendatory act of 1895 were necessarily repealed by the 1900 Act though it did not declare in terms the repeal of either. *Rowan* v. *Ide*, 107 Fed. 161 (5th Cir. 1901), cert. denied, 181 U.S. 619, 21 Sup. Ct. 924, 45 L. Ed. 1031 (1901).[12]

In 1960, a Federal district court in Pennsylvania held that the words "amended to read as follows" in a statutory amendment set forth a legislative intent that all law on the subject is to follow and that the new statute is to be a full substitute for the amended statute. The court pointed out that there is no need for inconsistency in order for the amendment to operate as a repeal. *U.S.* v. *Baker*, 189 F. Supp. 796 (W.D. Pa. 1960).

The application of the principle set out in these cases to this situation does not appear to do violence to the intent of Congress. As stated above, the 1927 Act had merely formalized the existing law and, as will appear in the next section, reduced the degree of protection previously afforded the Indian.

3. *Invalidity of In Futuro Leases*

With the 1927 Act repealed by the 1948 Act, we turn to the language of the 1948 Act and judicial decisions interpreting such language to determine the legality of the competent Crow extension leases.

U.S. v. *Noble*, 237 U.S. 74, 59 L. Ed. 844 (1915) is the leading case on the nature of an Indian's authority to lease for a specified period of years without Government supervision. The case involved leases executed by a Quapaw Indian under statutes providing that "allotments shall be inalienable for a period of twenty-five years" but allowing allottees to lease the lands "for a term not exceeding * * * ten years for mining or business purposes." [13] While a number of leases and assignments were involved in the case, the transaction pertinent to the issues here was a lease for ten years executed to Y in 1905

[12] See also *Heinze* v. *Butte & B. Consol. Min. Co.*, 107 Fed. 165 (9th Cir. 1901); *Minnesota & M. Land & Improvement Co.* v. *City of Billings*, 111 Fed. 972 (9th Cir. 1901); *Columbia Wire Co.* v. *Boyce*, 104 Fed. 172 (7th Cir. 1900).

[13] Act of March 2, 1895, 28 Stat. 876, 907; Act of June 7, 1897, 30 Stat. 62, 72.

when the property was already subject to a valid ten-year lease to X signed in 1902. The Court held the 1905 lease invalid saying:

> At common law, as the Government points out, it was the established doctrine, that a tenant for life with a general power to make leases could make only leases in possession, and not leases in reversion or *in futuro*. He was not authorized by such a power to make a lease to commence "after the determination of a lease in being." Such a lease was deemed to be "reversionary" * * * (cases) "A general power to lease for a certain number of years without saying either in possession or reversion, only authorizes a lease in possession and not *in futuro*. Such a power receives the same construction as a power to make leases in possession" * * * This is not to say that an agreement for a new lease, at a fair rental, made shortly before the expiration of an existing lease, would not be sustained in equity * * *.

The Court recognized that this rule of common law was designed to protect remainder men, but reasoned by analogy that where the purpose of the limitation of the term was to protect the Indian allottee, the rule should apply equally.

> * * * The protection accorded by Congress, through the restriction upon the alientation of the allottee's estate—modified only by the power to lease as specified—was not less complete because the limitation was not in the interest of a remainderman, but was for the benefit of the allottee himself as a ward of the Nation. The Act of 1897 gives him authority "to lease" for a term not exceeding the stated limit. Taking the words in their natural sense they authorize leases in possession and nothing more.[14]

The language of the 1948 Act stating that no competent Crow lease "shall be made for a period longer than five years, except irrigable lands under the Big Horn Canal, which may be leased for periods of ten years" is substantially similar to Quapaw Act language construed in the *Noble* case *supra*. Under this authority a competent Crow may make leases in possession of allotted trust lands and nothing more.

The case does recognize, though, that it is sometimes necessary to execute a new lease shortly before the expiration of an existing lease in order to regulate the course of cultivation in the ensuing year. This was dealt with more particularly in a series of Oklahoma decisions. In *Mullen* v. *Carter*, 173 Pac. 512 (Okla. 1918), an Indian allottee, acting under a statute similar to the one here involved, leased to X for a term expiring December 31, 1911. On September 5, 1911 he leased to Y for a term commencing January 1, 1912. The Court held that the lease was not necessarily invalid as a lease *in futuro* provided:

[14] 237 U.S. 83.

* * * such lease is made near the termination of the existing valid lease, and the circumstances are such that it is necessary to make the lease at such time in order to regulate the course of cultivation intended to be pursued the following year, and provided, further, that in no case shall such new lease be for a period of more than five years from its date. * * *[15]

Whether in such a situation the lease was made at a time reasonably near the termination of the existing lease and when necessary to control the course of cultivation for the ensuing year is a question of fact to be determined on the evidence in each case. In *Carter* v. *McCasland*, 268 Pac. 706 (Okla. 1928) a Choctaw homestead allotment, which could be leased for not more than one year, was leased on August 22, 1923 for a one-year term beginning January 1, 1924. The trial court specifically found that it was necessary to take the lease at that time in order to regulate cultivation for the year 1924. The Oklahoma Supreme Court reversed on the basis that there was no evidence to support such a finding, and held the lease invalid.[16]

The leases of allotted Crow lands described by Mr. Kronmiller were signed during the first or second year of existing five-year leases and provided for the cancellation of existing leases and the commencement of new five-year terms on a date one year or more in the future. Since the lessees were already in possession under leases with lengthy unexpired terms, no necessity could be shown for making the cancellations and new leases operative in the future. These are clearly leases *in futuro* and invalid under the *Noble* case.

In *Bunch* v. *Cole*, 263 U.S. 250, 68 L. Ed. 290 (1923), the Supreme Court indicated that leases *in futuro* were not merely voidable but void. The lower court had held that a state statute in effect created tenancies at will as to such leases. The Supreme Court reversed, holding that the state law conflicted with the Federal law in trying to give life to void leases, and was thus invalid under the Constitution.

* * * These leases were made in violation of a congressional prohibition. They were not merely voidable at the election of the allottee, but absolutely void and not susceptible of ratification by him. Nothing passed under them and none of their provisions could be taken as a standard by which to measure the compensation to which the allottee was entitled for the unauthorized use and occupancy of his land.

The statutes governing the Crow leases are substantially identical to those interpreted in *Bunch* v. *Cole supra* where the relevant statute provided that "* * * any lease of such restricted land made in violation

[15] See also *Hudson* v. *Hildt*, 51 Okla. 359, 151 Pac. 1063 (1915).
[16] See also *Nemecek* v. *Gates*, 33 P. 2d 768 (Okla. 1934) to the same effect.

of law * * * shall be absolutely null and void."[17] The Crow leases are on lands which are in trust status, the force and legal effect of which status is prescribed by the General Allotment Act of February 8, 1887. It also provides that any contract touching the trust lands "shall be absolutely null and void." The permission given in the 1926 and 1948 Acts to lease for five years without Government approval is an exception to this provision and any lease outside this permission is subject to the general nullifying provision.

4. *Effect of Surrender and Lease.*

While the new leases now being executed after the surrender and cancellation of pre-existing leases are not clearly invalid under the rule of the *Noble* case *supra*, their validity is nevertheless subject to question.

A similar transaction was involved in *Harley* v. *McCasland*, 19 P. 2d 356 (Okla. 1933). There Dora Hall, a Choctaw Indian, made a five-year agricultural lease of part of her allotted surplus lands to Brown on September 20, 1922. Brown assigned to Harley. Seven months before this lease was to terminate, in February 1927, while Harley was in possession of the property, he and Dora Hall executed a contract which declared the old lease to be null and void and granted Harley a five-year term commencing February 15, 1927. The statute empowered the Choctaw Indian allottees to lease their surplus land "for a period not to exceed five years, without the privilege of renewal." In this situation the court held the February 1927 lease void stating that the statute authorized a lease in possession and nothing more. The court also relied on the statement in two earlier Oklahoma cases that:

> * * * the spirit and intention of the act goes to the extent of precluding the allottee from leasing his land in any manner, so that on the expiration of five years from any date, after the beginning of the term of a lease granted he cannot have it *free, clear, and unincumbered.* (Italics supplied) *Whitham* v. *Lehmer*, 22 Okla. 627, 98 Pac. 351 (1908), and *Hudson* v. *Hildt*, 51 Okla. 359, 151 Pac. 1063 (1915).

To the same effect are *Eagle-Picher Lead Co.* v. *Fullerton*, 28 F. 2d 472 (8th Cir. 1928) cert. denied 279 U.S. 839, 73 L. Ed. 986 (1929); *S.S. & G. Mining Co.* v. *Fullerton*, 250 Pac. 911 (Okla. 1926); *Balthrep* v. *Clark*, 222 Pac. 520 (Okla. 1924); *Dowell* v. *Brown*, 208 Pac. 220 (Okla. 1922). These cases all involve either new leases ob-

[17] Act of May 27, 1908, Sec. 5, 35 Stat. 313.

tained during the life of an existing lease by the same lessee, or early cancellations of existing leases following by an immediate re-leasing to the same lessee. All indicate that such transactions violate the rule of the *Noble* case *supra*.

Two Federal cases would seem to conflict with these holdings. In *U.S.* v. *Abrams*, 194 Fed. 82 (8th Cir. 1912) a Quapaw allottee, Minnie Redeagle, leased her lands to Abrams in 1902 for ten years. In 1905 and 1906 she leased the same land to the Iowa and Oklahoma Mining Company for ten years. In 1910 Abrams and the Company executed and delivered to her a cancellation and surrender of each of the three leases. On the same date Minnie Redeagle executed a new ten-year lease to the Company. The United States sued to invalidate all but the 1902 lease, claiming that when the Indian made the first ten-year lease, she exhausted her power and authority as to that land until the expiration of the ten-year period. The court denied the Government's claim, holding that there was:

> * * * nothing in the letter or spirit of the congressional enactment, which restrains her, after having made a lease, from entering into a valid contract with the lessee to cancel such lease before the expiration of its term, and then make a new lease to such party or parties as she might see fit for another term, not exceeding 10 years.

The Government took no appeal from the decision.

This same court was reversed in the *Noble* case *supra* three years later in an appeal from a similar holding involving, however, not a cancellation and re-leasing, but a lease to Y during the life of a lease to X. But the underlying principle of the *Noble* case *supra*, i.e., that an allottee's leasing authority was limited to a power to make a lease in possession was not known to the circuit court at the time of *U.S.* v. *Abrams supra*.

In 1931, though, the court distinguished the *Noble* case and appeared to follow the *Abrams* case in *Hallam* v. *Commerce Mining & Royalty Co.*, 49 F. 2d 103 (10th Cir. 1931), cert. denied, 284 U.S. 643, 76 L. Ed. 547 (1931). There a Quapaw allottee, Anna Beaver Hallam, leased to Wills in 1911 for ten years, then leased to him again in 1912 for ten years. Wills assigned both leases to the Commerce Company in 1913. In 1913 and 1915 Beaver again made leases to Wills, as agent for Commerce Company, each for ten years. Then later in 1915 Wills, as agent, and Mrs. Hallam agreed that all prior leases were surrendered and canceled, and on the same date Mrs. Hallam signed a new lease to Wills, as agent, for ten years. In 1919 Mrs. Hallam was declared incompetent and subsequently in 1922 the

Commerce Company obtained a new lease from her, with the approval of the Secretary of the Interior. The Secretary of the Interior also expressly approved, retroactively, the 1915 lease. Mrs. Hallam sued Commerce Company for cancellation of all the leases and an accounting for the ores extracted, claiming that all but the 1922 lease were overlapping leases and void under the *Noble* case.

The court reviewed the *Noble* case and distinguished it on the basis that its holding did not apply to a new lease granted to the same lessee during the life of an old lease. It said that such a lease operated as a surrender of the first lease by operation of law, and was thus not a lease *in futuro*. The court then stated that the lease of June 11, 1915, executed after the cancellation and surrender of the prior leases, was valid under the *Abrams* case. These statements constituted only dicta, however, since the court held that in any event the Secretary's subsequent approval validated the lease from its inception.

While these two lines of cases apparently are in conflict, they have one basic principle in common. The Oklahoma cases recognize the importance of the Indian's having the land free, clear and unencumbered at least once every five years. The *Abrams* case states that nothing in the congressional enactment restrains the Indian from canceling a lease, then making "a new lease to such party or parties as she might see fit for another term." *Abrams* assumes that the Indian would be free to lease as she saw fit, the Oklahoma cases say she must be so free or the lease is void. The crucial factor is the Indian's freedom to deal with the property as his own at least every five years.

In empowering competent Crow allottees to lease for five-year terms and no more, Congress recognized "the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal Government to safeguard their interests and *protect them* against the greed of others and their own improvidence * * *" (Italics supplied)[18]

Congress did not intend that the Indian be entirely free to lease his property. The five-year limitation on the power to lease was meant to afford a protection to the Indian. The essence of this protection is the right to deal with the property free, clear, and unencumbered at intervals of no less than five years. If a non-Indian lessee could obtain a new lease long before the termination of his existing lease,

[18] *Sunderland* v. *U.S.*, 266 U.S. 226, 233 (8th Cir. 1924), 45 S. Ct. 64, 69 L. Ed. 259 (1924).

he could set his own terms. The Indian could deal with no one else because a lease with another person to commence at the termination of the existing lease would be void under *Noble*. In such circumstances the lessee could perpetuate his leasehold indefinitely at artificially depressed rental rates and the protection of the five-year term would be destroyed. The ultimate test, then, of any leasing agreement or combination of agreements affecting a Crow allotment held in trust by the Government must be whether it allows the Indian to deal freely with the property at least once every five years.

This brings us to the question of the validity of the leases signed after the September 29, 1961, letter. If the lessee purported to surrender the term of his existing lease only on condition that the Indian agree to issue the new lease, this violated the Act and resulted in the invalidity of the new lease. In such circumstance the Indian did not get the land free and unencumbered, but with strings attached. He could not look to other potential purchasers and negotiate his own terms. On the other hand, if the purported surrrenders were made in good faith and left the Indian free to lease to anyone, the new leases are valid.

While this leaves each case involving a cancellation and subsequent new lease to be determined on its merits, a court might view the transactions with some suspicion because of the prior practice in the area. In *U.S.* v. *Noble*, *supra*, the court said:

> * * * This is not to say that an agreement for a new lease, *at a fair rental*, made shortly before the expiration of an existing lease, would not be sustained in equity. (Italics supplied)

If a fair rental is necessary to the validity of a new lease made shortly before the expiration of an existing lease, the absence of a fair rental in a new lease after early cancellation of an old lease would surely cast some doubt on its validity.

SUMMARY

I have concluded that the leases described in Mr. Kronmiller's letter are void. Any leases executed after the expiration or cancellation of prior existing leases may be valid provided the Indian lessor had a real opportunity before re-leasing to seek other lessees and renegotiate terms.

FRANK J. BARRY,
Solicitor.

APPEAL OF EASTERN MAINTENANCE COMPANY

IBCA-275 *Decided November 29, 1962*

Contracts: Performance—Contracts: Delays of Contractor

A contract is substantially performed when it is so nearly completed that the remaining work is inconsequential and will not impair the utility of the product of the contract.

Contracts: Changes and Extras—Contracts: Contracting Officer—Rules of Practice: Appeals: Generally

Under a change order for elimination of part of the work, where the contracting officer considers but omits to complete the equitable adjustment of the time allowed for performance of the remainder of the work, and the contractor has not appealed as to that omission, the Board will take jurisdiction *de novo* as to such errors or omissions and will determine the equitable adjustment.

Rules of Practice: Appeals: Generally—Contracts: Contracting Officer

The Board will generally remand a claim not previously presented to the contracting officer. Under the unusual circumstances surrounding this appeal, the claim will not be remanded, since the ends of justice would not be served when such remand would cause further delay in the disposition of the claim.

BOARD OF CONTRACT APPEALS

This timely appeal involves a claim for return of liquidated damages amounting to $10,530, imposed for a delay of 27 days in completion of the contract. The appeal was heretofore dismissed for failure to prosecute,[1] without prejudice to reinstatement upon motion by appellant within 30 days. On timely motion by appellant's counsel, the appeal was restored to the docket on April 30, 1962. An oral hearing was conducted on May 22, 1962.

The contract was awarded June 20, 1958, in the total sum of $488,300. It incorporated by reference Standard Form 23A (March 1953 ed.), and provided for the construction of concrete raceways, spring collection chambers, gravity type weir and water supply system at the U.S. Fish Cultural Station, Bowden Springs, West Virginia. Notice to proceed was received by the appellant on July 30, 1958, and completion was required within 330 days thereafter, according to the contract terms. By reason of change orders, an extra work order and suspension of work for the winter season, the required date for completion became October 3, 1959.

[1] *Eastern Maintenance Company*, IBCA-275 (April 6, 1962).

Final acceptance of the work took place on November 9, 1959, but the contracting officer found, in the Findings of Fact and Decision dated January 26, 1961, that the work had been substantially completed on October 30, 1959. (The appellant had made no written claim as to substantial performance.)

This finding resulted in the assessment of liquidated damages for 27 days of unexcused delay at $390 per day as prescribed by the contract, or of a total of $10,530.

Appellant seeks payment of the entire sum so retained by the Government, on the basis of the following claims of alleged excusable delays and alleged improper actions by the Government:

1. There was an excusable delay of about 60 days in the delivery of certain sizes of concrete asbestos pipe due to a strike in a supplier's plant.

2. Unusually severe (cold) weather, and high water in the adjacent river which impeded the construction of the weir.

3. Change Order No. 1 dated July 30, 1958 (which was never accepted by appellant), eliminated one of the 3 raceways to be constructed and erroneously reduced the time for performance by 30 days on account of this reduction of work.

4. Change Order No. 3 allowed an insufficient additional period for performance of additional work in the enlargement of a collection chamber.

5. The Government erred in establishing the date of substantial completion as October 30, 1959; the correct date according to appellant being September 30, 1959.

6. The Government did not suffer any damage by reason of the delay; therefore, the liquidated damages retained were actually a penalty.

Claims Nos. 3 and 5 above appear to be justified, as will be discussed below, eliminating the necessity for consideration of the remaining claims.

Claim No. 3—Change Order No. 1

The elimination of one of the raceways by Change Order No. 1 does not justify a reduction of 30 days in the period allowed for contract performance.

Mr. M. F. Nodurft, the proprietor of the appellant company (the only witness for appellant), testified, without objection by the Government, that no time should have been deducted (although he later admitted that 10 days would have been fair), that it would not have

taken any more time to build three raceways than it did to build two.[2] Practically all of the piping for the third raceway was required to be installed. The only substantial item eliminated was the concrete raceway itself. While it is true that no explicit ruling was made on this point by the contracting officer, his Findings did contain a recital of the provisions of Change Order No. 1, including the deduction of 30 days. In any event, the question remained open as a result of appellant's refusal to accept Change Order No. 1. Apparently the appellant did not include in his claim letters his objections to the 30-day reduction, while specifying other claims of error in the imposition of liquidated damages. The notice of appeal contained only a general exception to the Findings as to liquidated damages. For these reasons, Department Counsel urges that the Board has no jurisdiction as to the claim of 30 days deducted by Change Order No. 1, there having been no formal presentation to the contracting officer, and hence no consideration or decision by the contracting offier as to this aspect. Under ordinary circumstances, we would agree with this view.[3]

However, the appeal file contains convincing evidence that this matter was considered by the contracting officer. In a memorandum dated September 30, 1960, from the Property Management Officer, Boston, to the Administrative Officer, the following appears as part of a "Note" below the signature:

> * * * I believe we could not have denied that (1) the 30-day deduction in time incorporated in Change Order No. 1 was unnecessary and (2) the job was substantially completed (99.99999999 per Engineers) with the repair of leak on October 20, 1959—20 days before final acceptance.

Also, in a report attached to a memorandum dated August 26, 1960, from the Regional Engineer, Boston, Massachusetts, to the Regional Director, Boston, Massachusetts, the following paragraph appears:

> However, the contractor could have substantiated at least a partial remission of liquidated damages by arguing that the decrease of 30 days contract performance time taken by the Government in disputed Change Order No. 1 is illogical. His construction procedure was to install two sets of raceways 1,000-foot long, simultaneously. With an increase in force, 3 sets of raceways could have been constructed in an equivalent time. Conversely the contract performance time should not have been reduced by 30 days.

[2] Tr. 25, 41–44. Mr. Herbert C. Bever, Government construction engineer on the job, did not contradict Mr. Nodurft's testimony. Tr. 112.

[3] *Barkley Pipeline Construction, Inc.*, IBCA–264 (April 6, 1961), 68 I.D. 103, 61–1 BCA par. 3006, 3 Gov. Contr. 271, and cases cited therein.

Finally, in a memorandum dated January 6, 1961, from the Regional Director, Boston, Massachusetts, to the Director, Bureau of Sport Fisheries and Wildlife, Washington, D.C., there appear the following paragraphs 3 and 4 concerning proposed Findings of Fact:

3. Do you agree with our proposal on substantial completion even though Contractor's claim for remission of liquidated damages is not based on substantial completion?

4. If you agree on the "substantial completion" action can we go one step further and cancel out the 30-day decrease in performance time per change order No. 1 which all here agree need not have been deducted? This again brings up the same question as on Number 3, i.e., do you agree on our authority to allow a claim not specifically presented by the claimant?

The contracting officer found that the contract had been substantially completed on October 30, 1959, rather than on November 9, 1959 (the date of final acceptance), despite the fact that appellant had made no written express claim concerning substantial completion.

Although the contracting officer had thus made an express determination concerning substantial completion, under similar conditions he remained silent with respect to the proposed cancellation of the 30-day reduction in performance time as recommended by his staff. Such silence is equivalent to denial.

In *Fox Sport Emblem Corporation*,[4] the War Department Board of Contract Appeals held that the taking of the appeal, "which confers jurisdiction on the Board to consider the case, opens up the entire case and the Board may consider any error that may come to its notice. This the Board may do quite aside from the question of whether or not the error considered has been questioned by the appellant on its appeal." In that case the contracting officer had found that the appellant was entitled to an extension of time (from which no appeal was taken) due to a delay caused by a strike in a subcontractor's plant, but on the appeal it developed that the actual cause of the delay was the rejection by the appellant of material furnished by the subcontractor as not meeting the specifications. The Board voided the extension of time allowed by the contracting officer.

Here, the contracting officer found that as a part of the equitable adjustment due appellant as a result of Change Order No. 1, the reduction in the contract price resulting from the elimination of one raceway should be $58,294.66 rather than $70,000.00 as stated in Change Order No. 1. It follows that, although appellant did not

[4] BCA No. 87 (March 4, 1943). *Cf. Jeneckes'*, IBCA–44 (November 28, 1955), 62 I.D. 449, 453.

appeal from that finding, the Board nevertheless has jurisdiction to consider the equitable adjustment because of possible errors, which, if left unnoticed, would defeat the ends of justice.

Moreover, we find ourselves generally in agreement with the holding of the Armed Services Board of Contract Appeals in *Grand Central Aircraft Company*,[5] to the effect that on appeal, under certain circumstances, the entire matter of the equitable adjustment of a change order is before the Board for determination, *de novo*. There the appellant had not included in his claim two of the elements of his costs of performing a change order, and, consequently, the contracting officer had not considered them. The Board took jurisdiction and decided the additional claims.

The Changes clause of the instant contract provides in pertinent part that:

> * * * If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * *

We note that one equitable adjustment is contemplated for the entire change order. Hence, the equitable adjustment of Change Order No. 1 was not completed by the contracting officer's findings and decision as to the decrease in the contract amount, the appellant never having accepted the change order as to the time required for performance.

Also, we are mindful of the language of the Court of Claims in *Globe Indemnity Company* v. *United States*:[6]

> * * * contracting officers and heads of departments should exercise the great powers conferred on them by these contracts to do equity; they should not feel under obligation to take advantage of technicalities, where to do so would defeat justice. * * *

Here, the contracting officer had two opportunities to correct an injustice, one of which he acted upon by finding that the contract had been substantially performed on October 30, 1959, instead of on November 9, 1959. With respect to the 30 days deducted from the allowable time for contract performance we feel that he erred, perhaps from an abundance of caution, in putting aside the recommendations of his staff, to the effect that this deduction should be eliminated from Change Order No. 1.

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[5] ASBCA No. 5128 (September 23, 1959), 59–2 BCA par. 2352, 1 Gov. Contr. 729.
[6] 102 Ct. Cl. 21, 38 (1944).

The Court of Claims stated in *McWilliams Dredging Company* v. *United States*:[7]

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

The Board is cognizant of the limitations on its powers "to do equity" outside of the four corners of the contract. That lack of jurisdiction does not, however, restrict the Board's power to act equitably within the four corners and to make an equitable adjustment promised to the contractor by the explicit terms of the contract. Accordingly, what the contracting officer, through inadvertence or error, has failed to do by way of completing such an equitable adjustment, the Board will do.[8]

Moreover, the record shows that about a year elapsed from the date of the appellant's last claim letter until the findings of fact and decision were issued. Under the compelling necessity of the circumstances peculiar to this case, including the additional length of time which would elapse in the event that this portion of this appeal were remanded to the contracting officer for the purpose of preparing new findings, we conclude that no useful purpose would be served by such remanding.[9] Consequently, the Board accepts jurisdiction. Nodurft has testified, as we noted, *supra*, that while he considers that no time at all should have been deducted, perhaps a reduction of ten days would have been fair, and the Board so holds.

Claim No. 5—Substantial Performance

As to the finding that the contract was substantially completed on October 30, 1959, Mr. Nodurft testified that it was substantially completed by the middle of September or at least by September 30, 1959.[10] We cannot agree with that conclusion since it was necessary to repair

[7] 118 Ct. Cl. 1, 16 (1950).

[8] *General Electric Company*, ASBCA No. 4865 (July 1, 1960), 60–2 BCA par. 2705, 2 Gov. Contr. 502. *Cf. Morgan Construction Company*, IBCA–253 (September 20, 1960), 67 I.D. 342, 60–2 BCA par. 2737, 2 Gov. Contr. 500.

[9] *Cf. Industrial Construction Corp.*, NASA 59–1, 2 (November 27, 1961), 61–2 BCA par. 3218, 3 Gov. Contr. 585; *El-tronics, Inc.*, ASBCA No. 5457 (February 28, 1961), 61–1 BCA par. 2961, 3 Gov. Contr. 285; *Bar-Ray Products, Inc.*, ASBCA No. 3065 (November 4, 1957), 57–2 BCA par. 1502.

[10] Tr. 62, 63.

a leak in the pipes after that date and this work would have interfered with the intended use of the structures. Those repairs were completed October 21, 1959, and it appears from the record that the raceways, being then 99 percent complete, could have been used from that day forward.[11] We hold, therefore, that the contract was substantially performed on October 21, 1959.

CONCLUSION

1. The appeal is sustained as to the claim for equitable adjustment of time allowed for performance arising out of Change Order No. 1, to the extent of 20 days' increase in the period for performance of the contract, thus making the required completion date October 23, 1959.

2. The appeal is sustained as to the claim of substantial performance, to the extent that the date of substantial performance is determined to have been October 21, 1959.

These two determinations set aside the Findings of Fact and decision of the contracting officer, in part, to the effect that there were 27 days of delay in the performance of the contract.

THOMAS M. DURSTON, *Member.*

I CONCUR:

PAUL H. GANTT, *Chairman.*

I CONCUR:

JOHN J. HYNES, *Member.*

[11] *Southwest Welding and Manufacturing Division, Yuba Consolidated Industries, Inc.*, IBCA–281 (October 29, 1962), 69 I.D. 173, and cases cited therein.

APPEAL OF ALLIED CONTRACTORS, INC.

IBCA-265 *Decided December 10, 1962*

Rules of Practice: Appeals: Generally

The Department of the Interior Board of Contract Appeals is not an intermediate board, and further appeals may not be taken within the Department from the Board's decisions. Such decisions are final for the Department (43 CFR 4.4).

BOARD OF CONTRACT APPEALS

On September 26, 1962, a decision was issued by the Board sustaining this appeal in part, and denying and dismissing the appeal as to the balance of appellant's claims.[1]

On October 8, 1962, the Board received from appellant, a letter dated October 5, 1962, signed by its counsel, reading in its entirety as follows:

> We respectfully wish to appeal the decision of this Board in the above titled case.
>
> The decision as handed down is arbitrary and inequitable; and not justified by the facts in the case.

The Interior Board of Contract Appeals is not an intermediate board. The rules governing the procedures before the board state specifically in 43 CFR 4.4 concerning the "*Authority of Board*":

> The Board exercises the authority of the Secretary in deciding appeals from findings of fact or decisions by contracting officers of any bureau or office of the Department of the Interior, wherever situated, or any field installation thereof. *Decisions of the Board on such appeals are final for the Department.* * * * (Italics supplied.)

Since no further appeal lies, we construe appellant's letter of October 5, 1962, to amount to a request for reconsideration, pursuant to 43 CFR 4.15.

No substantiation has been furnished to the Board in support of the statements in appellant's letter, to the effect that the Board's decision was arbitrary, inequitable and not justified by the facts.

Accordingly, appellant's request for reconsideration is denied.

THOMAS M. DURSTON, *Member.*

I CONCUR:

PAUL H. GANTT, *Chairman.*

[1] IBCA-265, 69 I.D. 147, 1962 BCA par. 3501, 4 Gov. Contr. 512.

APPEAL OF RAY D. BOLANDER COMPANY, INC.

IBCA-331 *Decided December 14, 1962*

Rules of Practice: Appeals: Generally—Rules of Practice: Witnesses

The purpose of holding of conferences pursuant to 43 CFR 4.9 is the simplification and sharpening of issues; the possibility of obtaining stipulations, admissions of facts, and the introduction of documents; the determination of the number of witnesses and the limitation of expert witnesses, if any; and the discussion and consideration of such other matters as may aid in the disposition of appeals.

BOARD OF CONTRACT APPEALS

A conference with respect to the above-captioned appeal was held, pursuant to 43 CFR 4.9, at the Department of the Interior Building, Washington, D.C., on December 13, 1962. The appellant was represented by its counsel, Mr. H. Earl Capehart, Jr., of Indianapolis, Indiana, and Mr. Robert M. Gray of Washington, D.C., and by its president and vice president, Mr. Ray D. Bolander and Mr. Paul Browning, respectively. The Government was represented by its co-counsel, Mr. William T. Corbett and Mr. Robert B. Nolan.

At this conference both parties, with my concurrence, agreed as follows:

1. The appeal will be scheduled for hearing at Washington, D.C., beginning on February 26, 1963. Notices confirming the place and time will be sent out by the Board in due course.

2. The Government will make available for inspection by appellant at least 30 days in advance of the hearing (a) the project diaries, (b) the laboratory reports upon the soil tests listed in Table I, at pages 16 and 17, of the findings of fact, and (c) the information revealed by any soil density tests made while the job was in progress, to the extent that such diaries, reports and information are in the possession of or obtainable by the National Park Service or the Bureau of Public Roads. Counsel for appellant will draft a stipulation covering these matters, which, upon execution by counsel for both parties, will be submitted to the Board.

3. Counsel for appellant will endeavor to frame a question designed to elicit information from the Government as to whether all papers pertinent to the issues involved in the appeal are contained in the appeal file (43 CFR 4.6 (a)-(c)), heretofore submitted to the Board.

This question is to be included in the stipulation mentioned in paragraph 2 above.

4. The Government will call as a witness Mr. L. T. McCullough, who served as project engineer, and will make him available for cross-examination by appellant at the hearing.

5. Each party will submit a list of its witnesses, indicating which of them are regarded as experts, to the other party and the Board at least 30 days in advance of the hearing.

6. The parties will endeavor to agree upon the rental value of the equipment involved in the claims, and will embody in a stipulation any such agreement which they are able to reach.

7. If either party in the course of preparing for the hearing uncovers any other issue of fact as to which it believes that agreement may be possible, it will seek to work out with the other party a stipulation determining this issue.

8. At the hearing the evidence will be presented claim-by-claim, insofar as practicable, in order to facilitate the subsequent separate consideration of each claim.

HERBERT J. SLAUGHTER,
Deputy Chairman.

AUTHORITY FOR THE ACQUISITION OF LANDS FOR FISH AND WILDLIFE CONSERVATION PURPOSES AT FEDERAL WATER-RESOURCE DEVELOPMENT PROJECTS AUTHORIZED PRIOR TO THE DATE OF ENACTMENT OF THE FISH AND WILDLIFE COORDINATION ACT

Fish and Wildlife Coordination Act: Generally

The Fish and Wildlife Coordination Act contains authority for the acquisition by agencies constructing water-resource development projects of lands for fish and wildlife conservation purposes in connection with projects not substantially completed as of the date of enactment of the Fish and Wildlife Coordination Act.

M-36643 *December 18, 1962*

To: COMMISSIONER OF FISH AND WILDLIFE.

SUBJECT: INTERPRETATION OF SECTION 3(C) OF THE FISH AND WILDLIFE COORDINATION ACT

This responds to your memorandum, dated June 4, 1962, concerning the question whether section 3(c) of the Fish and Wildlife Coordina-

tion Act, as amended (16 U.S.C., sec. 661 *et seq.*), authorizes Federal construction agencies to acquire lands for fish and wildlife purposes in previously authorized projects or whether the construction agency must seek additional, special, and specific legislation in every instance.

The uncertainty that has arisen concerns the correct interpretation of section 3(c), beginning with the *proviso* dealing with the acquisition of lands for previously authorized projects. It is the position of the Department of the Army, as expressed in a letter, dated August 8, 1960, by the former Secretary of the Army, that lands at previously authorized projects can be acquired for fish and wildlife purposes only if the acquiring agency recommends such acquisition to the Congress and the acquisition is specifically authorized by the Congress. We understand that the Department of the Army, Corps of Engineers, has decided in the case of at least four previously authorized projects, the John Day Lock and Dam Project, authorized May 17, 1950 (64 Stat. 179), the John Redmond Dam and Reservoir Project, authorized May 17, 1950 (64 Stat. 174), the West Branch Reservoir Project, authorized July 3, 1958 (72 Stat. 313), and the Pomona Reservoir Project, authorized September 3, 1954 (68 Stat. 1262), that additional and specific authorization is necessary to acquire lands for fish and wildlife purposes. A review of the legislative history of each of these projects discloses that the Congress did not specifically authorize the acquisition of lands for fish and wildlife purposes at these projects when they were authorized. We believe, however, for the reasons stated below, that the Fish and Wildlife Coordination Act, *supra*, authorizes the Corps of Engineers and other Federal construction agencies to acquire lands for fish and wildlife purposes at water-resource projects authorized prior to the 1958 amendment to the Fish and Wildlife Coordination Act.

The original Coordination Act was enacted on March 10, 1934 (48 Stat. 401). This act was subsequently amended in its entirety by the Act of August 14, 1946 (60 Stat. 1080). The purpose of this amendment was to strengthen the fish and wildlife conservation authority of the Secretary of the Interior, primarily with regard to activities at water impoundment projects. The House Committee on Agriculture in a report (H. Rept. No. 1944, 79th Congress) on the 1946 legislation states in part:

> The proposed bill would place in effect a much-needed program and facilities for the effectual planning, maintenance, and coordination of wildlife conservation, management, and rehabilitation. Although such a program was con-

templated by the Act of March 10, 1934 (48 Stat. 401), that legislation has proved to be inadequate in many respects and it now is proposed that it be amended to provide for more adequate procedures.

This legislation, however, was not entirely adequate to meet the needs for fish and wildlife conservation at water projects since it did not contain clear authority for the inclusion of fish and wildlife conservation measures at Federal water control projects and *in that it did not clearly apply to projects previously authorized.* The Senate Committee on Interstate and Foreign Commerce in its report (S. Rept. No. 1981, 85th Congress) on H.R. 13138, later enacted as the Act of August 12, 1958 (72 Stat. 563), revising the first four sections of the Coordination Act, as amended, explained these deficiencies as follows:

* * * * * * *

Principally the 1946 act does not provide clear, general authority for the Federal agencies who construct water-resource projects to incorporate in project construction and operation plans the needed measures for fish and wildlife conservation. The act is mainly concerned with compensatory measures to mitigate the loss of or damage to fish and wildlife resources; it contains no clear authority to permit the planning of installations of appropriate means and measures to take advantage of opportunities provided by water projects for enhancement or improvement for fish and wildlife resources.

Existing law is of questionable application to many authorized projects, a very serious shortcoming. The Corps of Engineers, for example, has a backlog of 650 active authorized projects with an estimated cost of about $6 billion on which construction has not yet started. Many of these cover vast areas, containing some of the most important fish and wildlife resources of the Nation. The Bureau of Reclamation has about 150 projects or units at an estimated cost of $3.7 billion in this category. Most of these projects have never been investigated from the standpoint of their effects on fish and wildlife resources. Many of them were authorized 15 or 20 years ago or more. *It would make good sense to have the policies and procedures of the Coordination Act applicable to them in order that the wishes of the Congress in enacting the 1946 statute and the proposed amendments can be observed.* (Italics supplied.)

The Act of August 12, 1958, among other things, was intended to provide basic authority for Federal construction agencies to modify the construction of water resource projects, including those authorized before that act was passed but not then substantially completed, to include measures for fish and wildlife conservation in such projects. Section 2(c) of the amended act provides for the modification of projects, as follows:

(c) Federal agencies authorized to construct or operate water-control projects are hereby authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the

date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with section 3 of this act, in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects * * *.

Section 3(c) of the amended act gives specific authority to agencies constructing water-control projects for the acquisition of lands for fish and wildlife purposes in connection with such projects. That section provides:

(c) When consistent with the purposes of this Act and the reports and findings of the Secretary of the Interior prepared in accordance with section 2, land, waters, and interests therein may be acquired by Federal construction agencies for the wildlife conservation and development purposes of this Act in connection with a project as reasonably needed to preserve and assure for the public benefit the wildlife potentials of the particular project area: *Provided*, That before properties are acquired for this purpose, the probable extent of such acquisition shall be set forth, along with other data necessary for project authorization, in a report submitted to the Congress, or in the case of a project previously authorized, no such properties shall be acquired unless specifically authorized by Congress, if specific authority for such acquisition is recommended by the construction agency.

As stated above, the Department of the Army, in its letter of August 8, 1960, construed that portion of the *proviso* clause of section 3(c) beginning with the word "*if*" "* * * not as a qualification upon whether specific authorization is required, but rather as a declaration of intent that the Congress will authorize land acquisition for fish and wildlife purposes in previously authorized projects only if specifically recommended by the construction agency."

When the 1958 amendment to the then Coordination Act was being considered by the Congress, this Department and the Department of the Army commented on one of the bills (S. 2496) proposed for enactment. Section 3 of that bill provided in part:

When consistent with reports prepared in accordance with the provisions of section 2 of this Act by the United States Fish and Wildlife Service and when approved by the Secretary of the Interior, the acquisition of land and interests therein by Federal construction agencies is authorized for the purposes of this Act.

The Department of the Army by letter to the Chairman, Senate Committee on Interstate and Foreign Commerce, dated April 29, 1958, in commenting on S. 2496, without referring to this section, in part stated as follows:

S. 2496 would give broad authority for acquisition of lands for prevention of damage to wildlife resources and for improvement of such resources, in accord-

ance with recommendations of the Fish and Wildlife Service and subject to approval by the Secretary of the Interior. No specific action by the Congress thereon would be required nor would affected States necessarily have an opportunity to comment on the appropriateness of such acquisition. It is considered essential to the accomplishment of such acquisition that before properties are acquired for this purpose, the extent of such acquisition be described as accurately as practicable and be set forth, along with other data necessary for project authorization, in a report submitted to the Congress, and that no such properties be acquired unless specifically authorized by the Congress, if specific authority for such acquisition is recommended by the construction agency.

Modification of the basic legislation of this matter has been the subject of extensive coordination among the Departments of the Interior, Army and Agriculture and the Bureau of the Budget as it relates to the various Federal programs that would be affected. As a result of these endeavors, the Department of the Interior has proposed certain modifications of the law on which substantial agreement has been reached among the agencies. A copy of those proposals is inclosed. If the amendments proposed in S. 2496 were modified to make the bill consistent with the inclosed proposals, the Department of the Army would interpose no objection to its enactment.

By letter to the Chairman of the Senate Committee on Interstate and Foreign Commerce dated April 1, 1958, this Department also commented on S. 2496 and enclosd "a revised text for the bill with the recommendation that it be substituted for * * * S. 2496." Subsequently a bill (H.R. 13138) was enacted as the Act of August 12, 1958. The Senate Committee on Interstate and Foreign Commerce, in its report on H.R. 13138 (S. Rept. No. 1981, 85th Cong.), stated:

H.R. 13138 in the form reported by your committee *is based on the recommendations of the Secretary of the Interior contained in a letter to the committee dated April 1, 1958.* That letter stated, in part:

* * * we have discussed this proposed legislation with other interested departments, including particularly, the Department of Agriculture and the Department of the Army. The bill as transmitted herewith has their concurrence. (Italics supplied.)

The committee report, in a general discussion of the purposes of H.R. 13138 stated further:

The bill provides for the inclusion of fish and wildlife conservation features in these authorized projects so long as they are "compatible with the purposes for which the project was authorized." * * *.

* * * * * * *

* * * existing law contains *no reference to the authority of the water-project construction agencies to acquire land around water-use projects for fish and wildlife conservation purposes.* In very many cases, the availability of lands to the Fish and Wildlife Service or the State fish and game departments for these purposes is the key to adequate and satisfactory project measures to compensate

for losses and to provide for the enhancement and improvement of fish and wildlife. The conservation agencies are restricted and hampered by this lack of authority, particularly where the land acquisition necessary for flood control and other so-called primary purposes of projects results in little or no land being available for conservation purposes.

The amendments proposed by this bill would remedy these deficiencies and have several other important advantages * * *. (Italics supplied.)

It is our opinion, therefore, that the construction agencies of the Federal Government are authorized by section 3(c) of the Fish and Wildlife Coordination Act, as amended (16 U.S.C., sec. 661 *et seq.*), to acquire land for fish and wildlife purposes in connection with previously authorized projects without the necessity of seeking additional, special, and specific legislation. That such is the intent of the legislative proposal which was enacted in 1958, amending the act is, we believe, clearly shown by the above language of the committee report and the section-by-section analysis of the legislation presented by the then Under Secretary of this Department in his testimony of June 27, 1958, before the House Subcommitee on Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries. The explanation of sections 2(c) and 3(c) given in this document is as follows:

Subsection 2(c)

H.R. 12371 [which is similar to H.R. 13138] would provide in the interest of wildlife conservation, *for modification of projects to be authorized in the future, and those previously authorized,* on which construction is not substantially completed as of the date the amended act becomes law. (Italics supplied.)

* * * * * * *

Subsection 3(c)

A provision in this subsection spells out the type of information to be contained in water-use reports going to the Congress which contain recommendations for land acquisition for fish and wildlife management purposes. In the case of recommendations for land acquisition in connection with a previously authorized water-use project, a specific authorization from the Congress is required, *if* specific authority for the acquisition of the land is recommended by the construction agency. If specific authority is not so recommended, land acquisition for fish and wildlife purposes on these previously authorized projects would be generally authorized by the bill [H.R. 12371].

Therefore, in view of the specific language of the Act of August 12, 1958, and in view of the above legislative history, we are of the opinion that Federal construction agencies are authorized to acquire lands for fish and wildlife purposes in connection with previously authorized projects. Further, we believe that the provision requiring

special, additional Congressional authorization for such acquisitions applies only in the event the constructing agency determines to recommend the acquisition to Congress rather than to proceed to acquire the land without submitting its recommendation to Congress. We believe that to decide otherwise would result in Congress enacting a useless act, since any agency of the Government can seek specific legislation to acquire lands for public purposes without being specifically authorized to do so. We do not believe Congress intended that section 3(c), beginning with the proviso, be meaningless as the above legislative history clearly indicates that this was not the Congressional intent.

We point out, however, that the construction agency would still be required to seek an appropriation to acquire such lands. This is made clear by the Committee on Interstate and Foreign Commerce's Report, *supra*, on H.R. 13138 in which it is stated at page 6:

> The Congress, moreover, would retain full control, through its consideration of project-authorizing legislation [in the case of new projects], and the review of supplemental reports, in the case of projects already authorized, of any costs incurred for fish and wildlife conservation purposes.

FRANK J. BARRY,
Solicitor.

EUGENIA BATE

A-28519 *Decided December 28, 1962*

Oil and Gas Leases: Applications

An oil and gas lease offer which contains a description of the land to be leased placed upon the offer form by means of the duplicating process known as "ditto" meets the requirement of a departmental regulation that it be prepared in ink.

Oil and Gas Leases: Applications—Agency

A person who selects the land to be applied for, fills in the land description on a previously signed oil and gas lease offer, and files the offer is the agent of the offeror and the offer to earn priority must be accompanied by the statement required by the pertinent regulation, 43 CFR 192.42(e)(4).

Oil and Gas Leases: Applications—Agency

Where an oil and gas lease offer is filed by a person pursuant to a written agreement under which he is empowered to act as an attorney in fact for the offeror, the offer to earn priority must be accompanied by the state-

ment required by the pertinent regulation, 43 CFR 192.42(e)(4), even though the party's offer is prepared in a manner not specifically provided for in the agreement.

Oil and Gas Leases: Applications—Agency

The Department's regulation, 43 CFR 192.42(e)(4), requiring statements of interest to be filed where an agent or attorney in fact has been authorized to act with respect to an offer is applicable to a situation where the agent's authority to act ceases with the filing of the offer.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Eugenia Bate has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated May 9, 1960, affirming a decision of the land office at Santa Fe, New Mexico, dated December 7, 1959, which dismissed her protest against the issuance of a noncompetitive oil and gas lease in response to another lease offer for the same land filed at the same time.

It appears that, in this case, 27 oil and gas lease offers for certain land in Eddy County, New Mexico, were filed at the opening of the land office to the public at 10:00 a.m. on September 29, 1959. To determine the priority in which the offers should be considered for the award of a lease, the land office held a public drawing and awarded first priority to an offer of Katherine S. Foster and Brooke H. Duncan II. Mrs. Bates, who was accorded second priority by the drawing, protested the award.

The appellant suggests two defects in the successful offer: first, that it was filed by someone other than the offerors without the filing of the separate statements of interest required when an agent or attorney in fact acts for an offeror; and second, that it contains a description of the land to be leased that has obviously been reproduced by a mechanical duplicating machine in contravention of the explicit directive on the printed lease form "Fill in on a typewriter or print plainly in ink and sign in ink" and the departmental regulation (43 CFR 192.42(g)(2)(iii) which permits acceptance of an offer completed in pencil or script although deficient because of such completion.

The appellant's second contention is without merit. She points to the obvious use of a duplicating machine to insert the legal description of the land to be leased in the printed lease form as indication of the invalidity of the successful offer. The regulations and the lease form require that an offer be filled in on a typewriter or printed plainly in ink (43 CFR, 1961 Supp., 192.42 (d)). However, another regu-

lation permits the acceptance of an offer completed in pencil or script (43 CFR 192.42(g)(2)(iii)). Thus an offer is acceptable if printed in ink or completed in script. The appellant contends that mechanical duplication does not meet even these requirements.

It may be debatable whether the description in the Foster-Duncan offer is in script or is printed. A first glance catches the flowing lines of script, but in very few instances are any letters connected by a continuous stroke and, although the angles of the letters have been softened to curves, the pattern of each letter is that of printed characters rather than that of script. However, whether the letters are printed or in script is immaterial. The question is whether the letters are in ink or pencil. Admittedly, a pencil was not used. The reproduction used on the leased forms appears to be the product of a process known as "ditto" which results from the application to a porous wax base of a master copy made with a special type of carbon paper which transfers ink contained in a gelatinous base to paper. When the master copy is pressed upon the wax base, the ink is transferred thereto and is retransferred again and again to glazed paper as it is thereafter applied. The obvious conclusion in this instance is that the form is filled out in ink. Thus the appellant has not proved her charge that the successful offer was not prepared according to requirements.

She seems to suggest some impropriety by observing that a person completing a description in script could very easily know whether there are settlers on the land[1] whereas a person several thousand miles away for whom an offer is prepared by duplication cannot know.

The purpose of the directions for preparation of lease offers is, of course, to insure legible offers which facilitate handling in the land offices. If there are persons who desire to file lease offers using other persons as dummies, a requirement for typewritten or handwritten offers will not terminate such practice. Admittedly, more time is consumed in the preparation of lease offers in this manner than by duplication but if such persons are informed of the necessity of presenting oil and gas lease offers that are typewritten or handwritten it may be assumed that they will do so without abandonment of their primary purpose. The moral fervor of the appellant's objection thus disappears.

With respect to the appellant's first contention, the Department's regulations provided at the time the offers were filed:

[1] The lease offer form requires the offeror to certify that there are no settlers on any unsurveyed lands included in the offer.

(e) Each offer, when first filed, shall be accompanied by:

* * * * * * *

(4) If the offer is signed by an attorney in fact or agent, *or if any attorney in fact or agent has been authorized to act on behalf of the offeror with respect to the offer or lease,* separate statements over the signatures of the attorney in fact or agent and the offeror stating whether or not there is any agreement or understanding between them, * * * by which the attorney in fact or agent * * * has received, or is to receive, any interest in the lease when issued * * *. (43 CFR 192.42; italics added.)

The appellant asserts that Mrs. Foster and Duncan are part of a group having a contract with Bryan Bell who handles filings for them and that Bell has employed Miss Josephine Gutierrez to handle such filings in the New Mexico land office. The appellant states that Miss Gutierrez filed the Foster-Duncan offer along with 14 others in the Bryan Bell group and urges, in effect, that this is a filing by an agent within the meaning of the italicized portion of the regulation, requiring the filing of separate statements of interest. Such statements were not filed.

In defense of their offer, the successful offerors, Mrs. Foster and Duncan, submitted a sworn statement which declared that they had an arrangement with Bryan Bell whereby they relied upon him to advise them of public land in New Mexico as it became available for noncompetitive oil and gas leasing, to assist in the preparation of lease offers for filing and in the process of filing, all for a cash consideration which was not disclosed. Bell was to have no interest in their offers or in any leases which might be issued to them, they said. They understood that Bell employed Miss Gutierrez to handle clerical details of the completion and filing of offer forms in New Mexico, but they denied that she could acquire any interest in either their offers or their leases.

Subsequently, Mrs. Foster and Duncan submitted a copy of their agreement with Bell, executed on July 23, 1959. Under this agreement Bell was to determine what public lands were to be suitable for noncompetitive leasing. He agreed, at his option, either (1) to provide his clients with a list of lands on which they could execute offers for Bell to file, or (2) to act as their attorney in fact in filing offers for the land. For his services Bell was to be paid a fee for each offer filed, the agreement specifically providing that he had no interest in any offer filed.

It is obvious that if Bell elected to act as attorney in fact in making a filing, the regulation quoted earlier would be applicable and require the furnishing of the separate statements of interest. However, if he elected to furnish a list of lands to his clients and to physically file

an offer executed by them, the regulation would not be applicable unless it could be said that he was acting for them in the capacity of an attorney in fact or agent. In the immediate case neither procedure provided for in the agreement was followed. Bell did not sign and file the offer for Mrs. Foster and Duncan as their attorney in fact. Nor did he simply furnish them with a list of lands available for filing and merely physically file an offer completed by them. It appears without dispute that Bell or Miss Gutierrez filled in the land description in an offer signed in blank by Mrs. Foster and Duncan and then filed the offer in the land office.

The question is whether in these circumstances the regulation quoted above applies so as to require the rejection of the offer for failure of Mrs. Duncan and Foster and Bell or Miss Gutierrez to submit the statements of interest required by the regulation.

Without regard to the agreement, the procedure followed by the parties constituted Bell an agent of the offerors. Bell selected the land applied for, filled in the description on a previously signed oil and gas lease offer and filed the offer. A person who has authority to perform these functions for another is an agent.[2]

[2] See: *Hoffman & Morton Co.* v. *American Insurance Co.*, 181 N.E. 2d 821 (Ill. 1962), in which the court stated the facts and held as follows:

"The record shows that New York City is the center of the United States fur market. Retail furriers throughout the country, including plaintiff, purchase most of their furs in New York, either directly or through New York fur buyers.

"Plaintiff, about 15 years ago, entered into a continuing agreement with George Bloom, a New York fur buyer, whereby plaintiff paid Bloom a monthly fee of $400, plus incidental expenses in servicing plaintiff's account, in return for Bloom's keeping plaintiff apprised of the fur market, making selections when requested, and having them shipped to plaintiff on approval. Plaintiff withheld no income taxes from Bloom's fee, paid no social security taxes for him, paid no part of Bloom's office rent, secretarial expenses or other office expenses, such as light, heat or telephone, and 'had no right to tell Bloom how to run his business.' Bloom 'worked for approximately ten other furriers' throughout the country.

* * * * * * *

"Plaintiff contends that under the undisputed evidence, as a matter of law, George Bloom was an independent contractor, and cites authorities, which we have examined. In support of this contention, plaintiff argues that Bloom contracted for a stipulated price to accomplish something for plaintiff, and plaintiff reserved no direction over the conduct of Bloom's work. Plaintiff emphasizes that Bloom 'shopped the market' where he chose, worked for ten other furriers throughout the country, used his discretion in determining how much time to devote to plaintiff's needs, used his own judgment in selecting furs, had his own office, hired his own employees, and paid his own business expenses.

"We do not believe the foregoing facts to be determinative of the question before us, nor are we persuaded by the cases cited, where the issue is an alleged agent's power to make his principal liable to third parties in tort or contract.

"The distinguishing characteristic of an agent is that he represents another contractually. When properly authorized, he makes contracts or other negotiations of a business nature on behalf of his principal, by which his principal is bound. (Mechem, Outlines of the Law of Agency, 1952 Ed., p. 4.) An agent is generally defined by the Illinois courts as being one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is called the 'principal,' and to render an account. *Dean* v. *Ketter*, 328 Ill. App. 206, 210, 65 N.E. 2d 572 (1946).

"A person may be both an independent contractor and an agent for another. Thus, an attorney at law, a broker, an auctioneer, and other similar persons employed either for a

Furthermore, although the parties did not follow either of the procedures described in their agreement for filing offers, the offer was filed pursuant to their agreement and was subject to its terms. That is, it undoubtedly was a consequence of the agreement, and it counted as one of the offers the offerors had agreed to file and for which Bell was to be paid. Therefore, it was subject to the terms of their agreement, which, as we have seen, authorized Bell to act as an attorney in fact for the offerors. Accordingly, the offer falls within the terms of the regulation as one for which the required statement ought to have been filed.

The appellees also contend that an offer does not come into existence until filing and that since Bell's authority terminated upon the filing of the offer, he never had power, authority or connection with the offer.

The regulation makes no distinction between pre-filing and post-filing authority. On the contrary, an examination of the reasons underlying its demands demonstrates that it applies to both situations. The statement, of course, is required so that the Department may be informed of who has interests in offers and leases. To achieve its purpose, it may insist, as the regulation does, that disclosure be made not only by those who have interests but by those who so act in relation to offers and leases that it is likely that they do. With the details of the relationship of the parties in its possession, the Department may then ascertain whether or not its regulations have been violated.

Furthermore, the agreement provides:

1. The Company agrees to use its best efforts to furnish the following information, assistance, and advice to the Client:

* * * * * * *

d. In the event the Client is successful in securing a noncompetitive lease, the Company agrees to advise Client as to the best means of developing oil and

---

single transaction or for a series of transactions, are agents, although as to their physical activities they are independent contractors. All of them have the power to act for and to bind the principal in business negotiations within the scope of their agency, as in the instant case. Restatement of Agency, 2d Ed., 1958, p. 12.

"It is undisputed that Bloom selected the furs in question, on specific directions from plaintiff, authorized their invoice to plaintiff, and made the shipment in accordance with plaintiff's general instructions to ship by air freight 'whenever possible.' Bloom had the power to make plaintiff a party to certain business transactions. Plaintiff paid the freight charge on shipments made by Bloom and did so in the instant case. Upon receiving a shipment on approval, plaintiff undertook a contractual obligation to the seller to pay for the furs or return them. We believe these facts are sufficient, as a matter of law, to hold that Bloom was the agent of plaintiff for the purchase and shipment of the lost furs." (Pp. 822–824.)

Also see: *Commonwealth* v. *Minds Coal Mining Corporation*, 60 A. 2d 14 (Pa. 1948); 1 Restatement, Agency 2d, secs. 1, 14, 14N, 220.

gas production from said lease and as to how the Client may most profitably manage his investment in said lease.

e. In the event the Client is not successful in securing the noncompetitive lease as to which he has submitted an offer, the Company will offer its assistance in expediting the return of the rentals submitted within a reasonable length of time. The Company shall use its best efforts and judgement in providing this service, but it is specifically agreed and understood that the Company will not be responsible or liable to the Client for any loss whatsoever by reason of this service.

Thus, the company's obligations and authority, under the agreement, continued after the filing of the offer, whether or not it resulted in a lease.

Accordingly, it is concluded that Bell was authorized to act as an agent or attorney in fact on behalf of the offeror with respect to the offer or lease and was obligated to file the required statement with the offer. In the absence of the statement, the offer earned no priority over Bate's offer which was drawn second in the drawing held to determine priority among the offers filed simultaneously. *W. H. Burnett et al.*, 64 I.D. 230 (1957); *Roy M. Johnson*, A–28173 (February 29, 1960).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is reversed.

EDWARD W. FISHER,
Deputy Solicitor.

CHARLES B. GONSALES ET AL.

WESTERN OIL FIELDS, INC., ET AL.

A–28699
A–28887

Decided December 28, 1962

Oil and Gas Leases: Applications—Agency

A noncompetitive oil and gas lease erroneously issued pursuant to an offer filed by one acting as an agent for the offeror without an accompanying statement of any possible interest of the agent in the offer or the prospective lease, as required by regulation 43 CFR 192.42(e)(4), is properly held for cancellation.

Oil and Gas Leases: Cancellation

Where an oil and gas lease is issued to an offeror whose offer earned no priority because it was not accompanied by a required statement of the agent as to his possible interest and there was pending prior to the issuance of the lease a proper offer filed by a qualified junior applicant, the lease must be canceled.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Charles B. Gonsales has appealed to the Secretary of the Interior from a decision of September 22, 1960, of the Acting Director of the Bureau of Land Management which directed that his noncompetitive oil and gas lease, New Mexico 042700, be canceled and reversed a decision of the Sante Fe land office rejecting the conflicting offer New Mexico 057239 filed by Southern California Petroleum Corporation, E. A. Culbertson and Wallace W. Irwin. Western Oil Fields, Inc., has appealed to the Secretary from a decision of March 14, 1961, of the Acting Appeals Officer of the Bureau of Land Management rejecting its noncompetitive offer to lease for oil and gas, New Mexico 070521, for conflict with two outstanding oil and gas leases. The appeal is limited to the rejection of the offer insofar as it conflicts with lease New Mexico 070510, issued to Charles B. Gonsales.

Since the determinative factor in each appeal is whether Garrett R. Quintana, son of Charles Gonsales, was an agent of his father, the appeals will be considered together.

In A–28699, it appears that offer New Mexico 042700, signed by Charles Gonsales, was filed on February 14, 1958. Southern filed its conflicting offer, New Mexico 057239, on December 12, 1958. On August 14, 1959, the manager issued a lease to Gonsales effective September 1, 1959, and in a decision of October 28, 1959, rejected Southern's offer. On appeal, the Director found that Quintana had been authorized to act as an agent for Gonsales, that Quintana had not filed the statement required by the pertinent regulations, 43 CFR 192.42(e)(4), that, as a result, Gonsales' offer had not earned priority over Southern's, and that the lease issued to Gonsales must be canceled so that one could be issued to Southern, all else being regular, as the first qualified applicant.

In his appeal, Gonsales contends (1) that his lease is not subject to administrative cancellation; (2) that the decision of a Federal court granting summary judgment to him in an action charging fraud brought against him by an employee of Southern California Petroleum Corporation, who filed an offer to lease the same land which was junior to his offer, New Mexico 042700, is res judicata of the issue of agency because the appellants before the Acting Director were the real parties in interest in that action although they were not named as parties; and (3) that the evidence does not show a violation of regulation 43 CFR 192.42(e)(4).

These contentions are without merit.

The Department's position that in the circumstances of this case it has authority to cancel a lease has recently been sustained by the

courts. *Boesche* v. *Udall*, D.C. Cir., No. 16238, November 16, 1961 (decision reinstated en banc June 15, 1962). See also *J. Penrod Toles*, 68 I.D. 285, 288 (1961).

The existence or nonexistence of an agency relationship between Gonsales and the person who prepared and filed his offer or Gonsales' entitlement to a lease in response to the filing of his offer, New Mexico 042700, was not at issue or determined in the New Mexico lawsuit. The court found only that the plaintiff, Lyons, was not entitled to any relief against Gonsales and his son because of misconduct of Gonsales or his son in the filing of oil and gas lease offer New Mexico 042700 and that Lyons had come into court with unclean hands. The court did not consider whether the son acted as Gonsales' agent or whether he met the requirements of the Department's regulations in preparing and filing the offer.

There remains the final point that Quintana was not Gonsales' agent. The pertinent regulation provided:

> (e) Each offer, when first filed, shall be accompanied by:
>
> * * * * * * *
>
> (4) If the offer is signed by an attorney in fact or agent, or if any attorney in fact or agent has been authorized to act on behalf of the offeror with respect to the offer or lease, separate statements over the signatures of the attorney in fact or agent and the offeror stating whether or not there is any agreement or understanding between them, or with any other person, either verbal or written by which the attorney in fact or agent or such other person has received, or is to receive, any interest in the lease when issued * * *. (43 CFR 192.42.)

The appellant does not deny that he did not file the required statement, but insists that there was no necessity for so doing.

After a careful review of the records in both appeals, I have concluded that the record amply supports the Director's holding that Quintana was authorized to act as an agent for his father in filing offer New Mexico 042700.

The details of the relationship between Quintana and Gonsales are set out in depositions taken from them on July 22, 1958, in connection with the litigation referred to above. Quintana testified that he is Gonsales' son, that he is a petroleum geologist, that he does geological work for his father, that he receives a substantial amount of money from his father for his work, that he files applications mostly for his father but sometimes for himself and sometimes for his mother, and that he checks the records in the land office daily. Gonsales testified that he generally signs offers after they are prepared, but that he sometimes does sign offers in blank, that he gives his son signed checks made out to the Bureau of Land Management with amount left blank, that

his son has authority to fill in the amount, that if he were out of town on the day the application was filled out it could have been signed in blank, that his son had authority to file an application "blind" for the land covered by the lease "anytime anything comes up." Gonsales could not recall whether he had signed New Mexico 042700 in blank, but Quintana stated that his father had signed the application in his presence.

In another case decided today involving a comparable situation it was held that a person who selects the land to be applied for, fills in the land description on a signed oil and gas lease offer, and files the offer is the agent of the offeror. *Eugenia Bate*, 69 I.D. 230 (A–28519).

Since Quintana performed or was authorized to perform the same functions as the person held to be an agent in the *Bate* case, it is my conclusion that he was properly held to be an agent within the meaning of the pertinent regulation. Thus he was obligated to file the required statement with the offer and, in its absence, the offer earned no priority until it was filed. *Eugenia Bate, supra.*

It follows that Gonsales' offer had not earned priority over the junior offer filed by *Southern California Petroleum Corporation et al.* The Department is under a mandatory duty to issue to them, as the first qualified applicant to file for land available for leasing, a lease for the lands in conflict, if a lease is to be issued to anyone. *J. Penrod Toles, supra.* A noncompetitive lease issued erroneously to a senior applicant after a proper junior application offer has been filed must be canceled. *Boesche* v. *Udall, supra; J. Penrod Toles, supra.*

In A–28887 is appears that Gonsales' offer, New Mexico 070510, was filed at 10:00 a.m. on August 18, 1959, and that *Western Oil Field's* conflicting offer, New Mexico 070521, was filed at 10:03 a.m. the same day. A lease was issued to Gonsales effective February 1, 1960.

The Acting Appeals Officer found that Western had submitted no substantial probative evidence that the same business operating arrangement between Gonsales and Quintana that the Director had found existed for New Mexico 042700, filed some 18 months earlier, pertained to New Mexico 070510 and that the evidence showed no more than an accommodation filing by one person for another. He also held that there was no requirement that an oil and gas lease be filed no later than 10 days after it was signed. The manager rejected Western's offer and the Acting Appeals Officer affirmed his action. Western appeals on the ground that Gonsales' offer earned no priority because it was filed more than 10 days after and in fact more than 4 months after it was signed and because Quintana, who witnessed the offer, was an agent of Gonsales and thus there should have been filed the statement required by the regulation.

Western contends that the agency relationship was established prior to the filing of New Mexico 070510, that it was a general agency in connection with filing lease offers, and that the facts show that the agency existed after filing. In support of the latter contention, it points out that Quintana signed as "agent" in requesting an examination of the case record of New Mexico 070510 on December 14, 1959. It also has submitted a copy of a letter to it dated September 26, 1959, signed by Quintana offering the acreage covered by New Mexico 070510 at $100 per acre plus a 5 percent overriding royalty.

The regulation requires a statement in all cases in which an agent has been authorized to act on behalf of the offeror with respect to the offer or lease, whether or not the agent has an interest in the offer. We have found that Quintana was an agent for Gonsales as to New Mexico 042700. The testimony given by them in their depositions established not only an agency relationship for that offer, but an agency relationship which had existed for sometime in the past and which was still subsisting, at least, on July 22, 1958, the date of the depositions. Gonsales has offered no evidence that the nature of his arrangements with Quintana was in any way modified. That it was not is borne out by the fact that in December 1959, Quintana signed a request to examine the case record in New Mexico 070510 as "agent" and, even more strikingly, that in September of that year, a little over a month after the offer was filed, Quintana signed the proposal to sell the offer to Western.

It is my conclusion that Quintana was an agent of Gonsales, that Gonsales signed offers and checks in blank, that Quintana was authorized to complete the offers and checks and file them when he deemed it opportune, and that Quintana had authority to act with respect to New Mexico 070510, both before and after it was filed. Accordingly, he was an agent within the purport of the regulation and the statement required in such circumstances had to be filed before the offer could earn priority. Thus, the reasons given for holding New Mexico 042700 for cancellation are equally pertinent here. It follows that New Mexico 070510 is to be canceled and a lease issued on New Mexico 070521, all else being regular.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the Acting Director's decision of September 22, 1960, is affirmed, and the Acting Appeals Officer's decision of March 14, 1961, is reversed and the case remanded for further proceedings consistent herewith.

EDWARD W. FISHER,
Deputy Solicitor.

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Note.—See the front of this volume for tables.

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