

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
Vera E. Burgin
Clarice S. Davis



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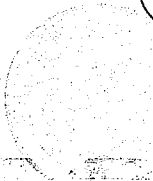
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1965, to December 31, 1965. 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. John A. Carver served as Under Secretary; Messrs. Harry R. Anderson, Frank P. Briggs, Stanley A. Cain, Kenneth Holum, John M. Kelly, and J. Cordell Moore served as Assistant Secretaries of the Interior; Mr. Otis D. Beasley served as Assistant Secretary for Administration; Mr. Frank J. Barry served as Solicitor of the Department of the Interior and Mr. Edward Weinberg as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "72 I.D."



Stewart L. Udall

Secretary of the Interior

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ERRATA

Page 3—Table 3d column, omission of the letter *l* in the word *actual*.

Page 230—Paragraph 5, Line 2—the word *correction*, should read *connection*.

Page 314—Footnote 1—See page 23 *et seq, infra*, should read page 323.

Page 317—Paragraph 4—Rule 7 (5 *L.D. at 548*), should read (51 *L.D. at 548*).

Page 323—Footnote 14—See discussion on Page 20, *supra*, should read Page 322.

Page 440—Appeal of Sunset Construction, Inc., IBCA-494-9-64, should read IBCA-454-9-64.

Page 447—Footnote 22, 70 I.D. 242, 63 BCA, should read 1963 BCA.

Page 559—Topical Index Heading "Grazing Permits and Licenses: Generally," Paragraph 1—Line 2 should read quires that one who leases *land* * * *

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

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- Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113.
- Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27). (See 39 L.D. 574.)
- Copper Glance Lode (29 L.D. 542); overruled so far as in conflict, 55 I.D. 348.
- Corlis *v.* Northern Pacific R.R. Co. (23 L.D. 265); vacated, 26 L.D. 652.
- Cornell *v.* Chilton (1 L.D. 153); overruled, 6 L.D. 483.
- Cowles *v.* Huff (24 L.D. 81); modified 28 L.D. 515.
- Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114.
- Crowston *v.* Seal (5 L.D. 213); overruled, 18 L.D. 586.
- Culligan *v.* State of Minnesota (34 L.D. 22); modified, 34 L.D. 151.
- Cunningham, John (32 L.D. 207); modified, 32 L.D. 456.
- Dailey Clay Products Co., The (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656.
- Dakota Central R.R. Co. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131.
- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110.
- DeLong *v.* Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54.
- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300.

- Denison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122.
- Deseret Irrigation Co. *et al.* v. Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27.
- Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429.
- Dickey, Ella I. (22 L.D. 351); overruled, 32 L.D. 331.
- Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27.
- Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128.
- Dowman v. Moss (19 L.D. 526); overruled, 25 L.D. 82.
- Dudymott v. Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561.
- Dyche v. Beleele (24 L.D. 494); modified, 43 L.D. 56.
- Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188.
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355.
- East Tintic Consolidated Mining Co. (41 L.D. 255); vacated, 43 L.D. 80.
- *Elliot v. Ryan (7 L.D. 322); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199.
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Emblem v. Weed (16 L.D. 28); modified, 17 L.D. 220.
- 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 L.D. 348.
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 473.
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183.
- 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.

- Gallihier, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Gariss *v.* Borin (21 L.D. 542). (See 39 L.D. 162, 225.)
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Glassford, A. W. *et al.* 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.
- Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy *et al. v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
- Gregg *et al. v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
- Grinnell *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- *Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568. (See R. R. 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.* Letrodec's Heirs *et al.* (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
- Heirs of Philip Mulnix (33 L.D. 331); overruled, 43 L.D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 190.)
- Heirs of Talkington *v.* Hempfing (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.
- Henry D. Mikesell, A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.
- Herman *v. Chase et al.* (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
- Hickey, M. A. *et al.* (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696); decided April 26, 1934; overruled in part, 55 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, 19 L.D. 86, 284.
- Howard *v. Northern Pacific R.R. Co.* (23 L.D. 6); overruled, 28 L.D. 126.
- Howard, Thomas (3 L.D. 409). (See 39 L.D. 162, 225.)
- 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 L.D. 371.
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 L.D. 417, 419.
- Kemper v. St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.
- Kilner, Harold B. *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.
- Lonergran v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L. *et al.* (61 I.D. 103) distinguished by Richfield Oil Corp. 71 I.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.

- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather *et al.* v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616. (See 35 L.D. 399.)
- McFadden *et al.* v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 36 I.D. 340.
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528. (See 42 L.D. 317.)
- McMicken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al.* v. State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck v. Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee v. Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Meyer v. Brown (15 L.D. 307). (See 39 L.D. 162, 225.)
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Mikesell, Henry D. A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.

- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al.* *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled 29 L.D. 112.
- Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- *Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396. (See 43 L.D. 520.)
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode. (35 L.D. 493); overruled so far as in conflict, 55 L.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan, Henry S. *et al.* (65 L.D. 369); overruled to extent inconsistent, 71 L.D. 22.
- Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al.* *v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mt. Whitney Military Reservation (40 L.D. 315). (See 43 L.D. 33.)
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen *v.* Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 L.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—
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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

APPEAL OF GUY F. ATKINSON COMPANY, ET AL.

IBCA-385

Decided January 12, 1965

Contracts: Construction and Operation: Changed Conditions

A mutual mistake by the Government and the contractor with respect to a physical condition at the site of the work is within the scope of the "Changed Conditions" clause of a standard-form Government contract if, and only if, the mistake has as its subject either a condition that is indicated in the contract or a condition that is unusual and not to be expected in work of the character provided for in the contract.

Contracts: Construction and Operation: Estimated Quantities

Under a contract which contains an "approximate quantities" provision, estimates of quantities noted in the bidding schedule do not constitute indications or representations within the meaning of the "Changed Conditions" clause.

Contracts: Construction and Operation: Conflicting Clauses

The provisions of the "Changed Conditions" clause prevail over the specifications and drawings of the same contract to the extent that such provisions are inconsistent with the specifications and drawings, unless the contract expresses a clear intent that the latter are to prevail.

Contracts: Disputes and Remedies: Appeals

Procedural requests looking towards the submission of a Government counterclaim to the Board of Contract Appeals should be accompanied by a showing that the Board would have jurisdiction to entertain the proposed counterclaim.

BOARD OF CONTRACT APPEALS

This appeal arises from a contract of the Bureau of Reclamation for the construction of Trinity Dam, a facility of the Central Valley Project in California. The contract, which was dated March 8, 1957, was a unit price contract in the estimated amount of \$48,928,100.50. It was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953).

The appeal centers around a controversy as to whether an overrun of excavation in an area known as "borrow area C" amounted to or was caused by a changed condition. Appellant asserts that it is

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entitled to an equitable adjustment in the amount of \$259,389.29¹ on account of the overrun. The Government denies that any changed condition within the meaning of the contract was encountered.

On September 1, 1964, the Board entered an order which denied the Government's motion to dismiss the appeal and granted appellant's motion for a hearing. The Government has requested that this order be reconsidered. Briefs have been submitted by both parties. It is apparent that the parties are in fundamental disagreement as to what are the elements that would have to be proved in order for the appeal to be sustained. Resolution of this disagreement is needed in order for the case to progress.

Trinity Dam was designed as an earth-fill dam, to be constructed of materials excavated at its site or taken from borrow areas in its vicinity. A large part of these materials consisted of tailings (boulders, cobbles and coarse gravel) and screenings (silt, sand and fine gravel) deposited by the gold dredges that formerly operated along the Trinity River. The design of the dam contemplated that the dredger tailings and screenings would be used in constructing the relatively pervious portions of the dam embankment that were designated on the plans as zone 3.

The sources from which the materials for zone 3 should be obtained and the manner in which they should be placed and compacted were prescribed in paragraph 60 of the specifications, as follows:

The zone 3 portions of the dam embankment shall be constructed of dredger tailings, dredger screenings, and undredged sand and gravel. The dredger tailings shall be obtained from excavation for permanent construction and from borrow areas B and C. The dredger screenings shall be obtained from excavation for permanent construction and from excavation for minimum channel requirements in borrow area B. The undredged sand and gravel shall be obtained from excavation for permanent construction and from borrow area B.

The materials shall be placed in approximately horizontal layers. Dredger tailings shall be placed separately from other materials in layers not exceeding 18 inches in thickness after compaction. Dredger screenings and/or undredged sand and gravel shall be placed in layers not exceeding 12 inches in thickness after compaction. Dredger tailings may be placed in consecutive layers. Each layer of dredge screenings and/or undredged sand and gravel shall be placed between 2 layers of dredger tailings. Dredger screenings shall not be placed within 15 feet of the upstream slope of dam embankment, zone 3. Dredger screenings or undredged sand and gravel shall not be placed in dam embankment, zone 3 below elevation 1940. Boulders with maximum dimensions greater than the thickness of the layer in which they are to be compacted shall be removed and placed on the outer slopes of dam embankment, zone 3.

Each layer shall be thoroughly wetted and compacted by 4 passes of the treads of a crawler-type tractor weighing approximately 40,000 pounds. One pass of the treads is defined as the required number of successive trips which, by means of sufficient overlap, will insure complete coverage of an entire layer by the tractor treads.

¹ The claim as presented to the contracting officer was for \$286,364.17, but was later reduced by appellant to the amount stated in the text.

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The sources of materials were further particularized by a table set out in paragraph 44 of the specifications. According to this table, the portions of the excavation for permanent construction—referred to in paragraph 60—from which materials for zone 3 should be obtained were the areas designated on the plans as dam embankment foundation below elevation 1940, and as excavation area 3. However, paragraph 44 expressly disclaimed an intent to give the table any greater effect than “as a general guide for information purposes.”

Unit prices for a number of classes of excavation, together with estimated quantities for each class, were stated in the bidding schedule. The estimated quantities for the classes here pertinent, determined on the basis of the location of the materials involved, are listed below. The actual quantities, as reported by the Government, are also listed.²

Class of excavation	Estimated quantities in cubic yards	Actual quantities in cubic yards
Dam embankment foundation below elevation 1940.....	1, 700, 000	1, 060, 452
Excavation area 3.....	2, 400, 000	1, 782, 927
Borrow area B.....	6, 400, 000	6, 267, 404
Borrow area C.....	3, 000, 000	3, 802, 968

Each of these four classes of excavation was divided into two bidding ranges, with a different unit price for each range. Borrow area C will be used as an example, since the controversy centers around the overrun in quantities which occurred with respect to it. One bidding range for that area was described as being “first 1,500,000 cubic yards.” The estimated quantity for this range was 1,500,000 cubic yards and the unit price was \$1.60 per cubic yard. The other bidding range for the area was described as being “over 1,500,000 cubic yards.” The estimated quantity for this range was 1,500,000 cubic yards, and the unit price was 0.45 per cubic yard. The general purpose of the bidding ranges, as explained in paragraph 17 of the specifications, was to insure that, so far as practicable, underruns would not decrease and overruns would not increase, the sum received by the contractor on account of the fixed costs of the excavation work.³

² The Board’s use of the Government’s figures is merely for illustrative purposes, and in no sense constitutes a finding as to their correctness.

³ The pertinent portion of paragraph 17 reads as follows:

“Each range has been listed in the schedule as a separate item for payment purposes only and for all other purposes the two ranges together shall be considered as one item of work. Each range or schedule item represents approximately 50 percent of the estimated quantities to be performed under each of the above items of work. It is the intent that this division of quantities into ranges will permit bidders to include in the unit price bid for quantities within the first range that part of the contractor’s cost for contractor’s camp, mobilization and demobilization, special plant, and fixed overhead properly allocated to both ranges. It is further intended that the unit price bid for the quantity in excess of the first range will exclude any part of the contractor’s costs for contractor’s camp, mobilization and demobilization, special plant, and fixed overhead properly allocated to both ranges.”

Detailed specifications relating to the borrow areas were contained in paragraph 54 of the specifications. Those that have been stressed in the briefs are as follows:

(a) General—All materials required for: (1) Dam embankment, zones 1 and 3; (2) Pervious backfill; (3) Selected surfacing; which are not available from excavations required for permanent construction under these specifications, or from excavation, overburden, in rock source shall be obtained from borrow areas A, B, and C. The location and extent of all borrow pits within borrow areas shall be as directed. The Government reserves the right to change the limits or location of borrow pits within the limits of the borrow areas in order to obtain suitable material and to minimize clearing and stripping operations. The contracting officer will designate the depths of cut in all parts of the borrow pits, and the cuts shall be made to such designated depths.

* * * * *

The contractor shall be entitled to no additional allowance above the unit prices bid in the schedule on account of any changes ordered by the contracting officer in the amounts of materials to be secured from any borrow area, or on account of the designation by the contracting officer of the various portions of the borrow areas from which materials are to be obtained, or on account of the depths of cut which are required to be made.

* * * * *

(g) Borrow area C.—Zone 3 materials to be excavated in borrow area C consist essentially of dredger tailings. Cuts will be designated in this area to limit, in general, excavation to this material. Borrow pits for zone 3 material will not require preconditioning by irrigation.

No direct payment will be made for any operations necessary to select and obtain suitable zone 3 material, or to properly condition the material, and the entire cost of such operations shall be included in the unit prices per cubic yard bid in the schedule for excavation in borrow area C.

Both parties agree that the quantity of material excavated from borrow area C exceeded the estimated quantity for that area by 802,968 cubic yards and, therefore, necessarily also exceeded the estimated quantity for the "over 1,500,000 cubic yards" bidding range by 802,968 cubic yards. They also agree that, during the process of placing and compacting the alternating layers of dredger tailings and screenings, the voids in the layers of tailings filled up with screenings to a greater extent than had been anticipated when the contract was made. The Government concedes that the estimated quantities noted in the bidding schedule were based on the assumption that one cubic yard of material in borrow would produce approximately one cubic yard of material in the zone 3 portion of the dam embankment, whereas, according to its computations, one cubic yard of material in borrow actually produced only about 0.81 cubic yard of material in place. Appellant's figures as to the degree of shrinkage are substantially the same.

At this point agreement ends concerning the salient facts. Appellant contends that the shrinkage was an inherent consequence of the types of materials and methods of construction prescribed by such pro-

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visions of the contract as paragraphs 54 and 60. The Government contends that the shrinkage was a consequence of the particular processes chosen by appellant for excavating the materials and for forming the zone 3 embankment. Appellant contends that the overrun in the materials excavated from borrow area C was caused by the shrinkage. The Government contends that the overrun was caused by other circumstances of greater significance than the shrinkage. Among them were underruns in the materials suitable for zone 3 that could be obtained from excavation for the dam embankment foundation below elevation 1940 and from excavation area 3, and overruns in the materials available for the zone 2 portion of the dam. Changes were made in the plans that reduced the total volume of the zone 3 portion of the dam and that provided for the taking of material for its construction from sources other than those stated in paragraphs 44 and 60. The Government alleges, and appellant denies, that these changes in plans were made because of circumstances, such as the underruns and overruns just mentioned, that had no part in causing the shrinkage.

The first question which needs resolution in this opinion is whether appellant's allegations that the parties made a mutual mistake of fact as to the degree of shrinkage which would occur are relevant to the claim here asserted.

The provision of the contract under which appellant seeks to obtain an equitable adjustment on account of the overrun with respect to borrow area C is the "Changed Conditions" clause (Clause 4) of the General Provisions.⁴ Counsel for appellant in his brief opposing the request for reconsideration summarizes appellant's position as being that "there was a mutual mistake on the part of the Government and appellant with respect to the degree of shrinkage and/or consolidation that the physical properties of tailings and screenings, when placed respectively in alternating layers of 18 and 12 inches would cause," and that "because of such mutual mistake with respect to the manner in which the indicated materials would react when used to construct the dam, that a changed condition arose which subjected the appellant to

⁴ The clause just mentioned reads as follows:

"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."

additional costs." The Department Counsel, on the other hand, urges that appellant's mutual mistake theory is not a legally tenable one and, therefore, would not support the allowance of an equitable adjustment even if the facts stated by appellant were proved to be true.

The ultimate standards by which the merits of the instant appeal must be judged are the two categories of changed conditions defined in Clause 4, namely, "(1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract." Under these standards a mutual mistake with respect to a material fact will, in some circumstances, give rise to a changed condition and, in others, will not do so.

Various assumptions as to what might be proved, if a hearing were to be held upon the instant appeal, will serve to illustrate the point. Suppose it were to be proved that appellant when bidding on the contract believed that the dredger tailings and screenings would not shrink, that the Government when awarding the contract entertained a like belief, that the tailings and screenings did shrink to a material degree from causes not reasonably subject to appellant's control, and that the contract "indicated"—within the meaning of the "Changed Conditions" clause—that shrinkage would not occur. Clearly, such a mutual mistake would amount to a changed condition of the first category. Suppose, as an alternative, it were to be proved that appellant when bidding on the contract believed that the dredger tailings and screenings would not shrink, that the Government when awarding the contract entertained a like belief, that the tailings and screenings did shrink to a material degree from causes not reasonably subject to appellant's control, and that such shrinkage was "unusual" and not to be expected "in work of the character provided for in this contract"—within the meaning of the "Changed Conditions" clause. Clearly, such a mutual mistake would amount to a changed condition of the second category.

Suppose, however, it were to be proved merely that appellant when bidding on the contract believed that the dredger tailings and screenings would not shrink, that the Government when awarding the contract entertained a like belief, and that the tailings and screenings did shrink to a material degree from causes not reasonably subject to appellant's control. In other words, the proof would include no showing that the shrinkage was contrary to anything indicated in the contract, or that the shrinkage was unusual and not to be expected in work of the character provided for in the contract. A mutual mistake as to shrinkage that occurred in these circumstances would not, in our opinion, amount to a changed condition of either category.

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The "Changed Conditions" clause spells out, in language that was obviously chosen with deliberate care, the standards by which a claim of changed conditions is to be measured. We can find in the clause no support for the proposition that a mutual mistake as to a physical condition at the site of the work constitutes a changed condition *per se*. The mutual mistake must have as its subject either a condition that is indicated in the contract or a condition that is unusual and not to be expected in work of the character provided for in the contract. If these tests are met, a mutual mistake as to shrinkage of natural materials at the site would fall within the scope of the "Changed Conditions" clause; otherwise it would not.

The views just expressed are in line with interpretations consistently followed by this Board.⁵ We believe that they are not in conflict with the *Kiewit*⁶ and *Chernus*⁷ cases, upon which appellant relies. The opinions in those cases are unclear as to whether the real basis for the decisions was the "Changed Conditions" clause, the "Changes" clause of the contracts there involved, or equity jurisdiction over mistakes of fact.⁸ Assuming the "Changed Conditions" clause was the basis, the import of the opinions is that the alleged mutual mistakes pertained to conditions which were "indicated" by the contract drawings or which, if not so indicated, amounted to changed conditions of the second category. Thus, neither decision can properly be read as meaning that a mutual mistake of fact is a changed condition *per se*. Conversely, however, no case of which we are aware holds that a mutual mistake of fact may not be treated as a changed condition if it fairly meets either the first or second category tests.

It follows that appellant has not "put itself out of court," as Department Counsel seems to contend, by arguing that its claim is based upon a mutual mistake. On the contrary, appellant is entitled to an opportunity to show that a mutual mistake did occur by reason of the presence of physical conditions which were materially different from those indicated in the contract, or which were materially different from those that would ordinarily inhere in work of the character provided for in the contract.

A second question which needs resolution in this opinion concerns

⁵ *Promacs, Inc.*, IBCA-317 (January 31, 1964), 71 I.D. 11, 1964 BCA par. 4016, 6 Gov. Contr. par. 116(a); *Otis Williams & Co.*, IBCA-324 (September 5, 1962), 69 I.D. 135, 1962 BCA par. 3487; 4 Gov. Contr. par. 471; *Erhardt Dahl Andersen*, IBCA-223 (July 17, 1961), 68 I.D. 201, 61-1 BCA par. 3082, 3 Gov. Contr. par. 505; *John A. Quinn, Inc.*, IBCA-174 (November 29, 1960), 67 I.D. 430, 60-2 BCA par. 2851, 3 Gov. Contr. par. 62; *Wawberg Construction Co.*, IBCA-144 (March 31, 1959), 66 I.D. 123, 59-1 BCA par. 2122, 1 Gov. Contr. par. 280; *J. A. Terteling & Sons, Inc.*, IBCA-27 (December 31, 1957), 64 I.D. 466, 57-2 BCA par. 1539.

⁶ *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 517 (1947).

⁷ *Chernus v. United States*, 110 Ct. Cl. 264 (1948).

⁸ Compensation for a mutual mistake of fact was awarded in *National Presto Industries, Inc. v. United States*, Ct. Cl. No. 370-58 (October 16, 1964).

the relevancy of the estimated quantities noted in the bidding schedule to the claim here asserted.

Reference has already been made to the fact that the bidding schedule placed the estimated quantity of excavation from borrow area C at 3,000,000 cubic yards, and to the fact that this figure had been computed on the basis of an assumption that one cubic yard of material in borrow would produce approximately one cubic yard of material in the zone 3 portion of the dam embankment. Counsel for appellant seems at times to contend that the 3,000,000 cubic yard figure "indicated"—within the meaning of the "Changed Conditions" clause—that one cubic yard of material in borrow would produce approximately one cubic yard of material in the zone 3 portion of the dam embankment. In the context of the instant case such a contention would not be a tenable one.

Paragraph 4 of the specifications was an "approximate quantities" provision, of a type often included in Government construction contracts, that read as follows:

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.

It seems very plain to the Board that an estimate of quantities which is accompanied by an "approximate quantities" provision containing the language of paragraph 4 cannot reasonably be said to be an indication on which a claim for a first category changed condition could be founded. The wording "approximations for comparing bids" imports that, once the bids have been evaluated, the office of the estimate of quantities has been fulfilled, and that the contract is to be performed and administered as though no estimate had been included. Furthermore, the wording "actual or relative" imports that the term "approximations" was designed to comprehend not merely small and insubstantial deviations, but also wide and material ones. Read as a whole, the first sentence of the "approximate quantities" provision tells prospective bidders that if they want to know how many or how few units of a given type of work are called for by the contract, they must look to the dimensions, standards and other requirements spelled out in the drawings and specifications, and are not entitled to rely on the estimates appearing in the bidding schedule. Accordingly, we have repeatedly held that the drawings and specifications, rather than the estimates of the bidding schedule, govern the size and characteristics of the job to be done, notwithstanding the existence of wide and material variations between the estimates and the quantities actually required by the drawings and specifications, and even though such varia-

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tions stemmed from errors in the Government computations on which the estimates were based.⁹

There is no conflict between the "approximate quantities" provision, as so interpreted, and the "Changed Conditions" clause. The letter prescribes the effect that is to be given to such indications of subsurface or latent physical conditions as the Government may have chosen to include in the contract; it does not command the Government to include in the contract all of the indications that conceivably could be deduced from the known or ascertainable information. Consistently with that clause, the Government could have omitted from the bidding schedule any and all estimates of quantities whatsoever; thereby eliminating any and all possibility of such estimates being construed as an indication of subsurface or latent physical conditions. The first sentence of the "approximate quantities" provision also eliminates that possibility and, in so doing, merely clarifies the intent of the Government to refrain from making an indication which the "Changed Conditions" clause does not require it to make.¹⁰

The presence of the "approximate quantities" provision, on the other hand, has no bearing upon the question of whether provisions of the contract other than the quantity estimates of the bidding schedule contain indications, quantitative or otherwise, which would support the claim of changed conditions here at issue.¹¹ In the context of this case, its presence also has no bearing upon the question of whether circumstances exist which might bring the claim within the purview of the second category of changed conditions, except that, logically, the estimates of the schedule would no more serve to show that a condition was "known" within the meaning of the second category than they would to show that it was "indicated" for the purposes of the first category.

The conclusions just stated concerning the effect of the "approximate quantities" provision are supported by prior decisions of the

⁹ *Otis Williams & Co.*, supra note 5; *Osberg Construction Co.*, IBCA-139 (October 16, 1959), 66 I.D. 354, 59-2 BCA par. 2367, 1 Gov. Contr. par. 703; *Diamond Engineering Co.*, IBCA-93 (December 20, 1957), 57-2 BCA par. 1542; *Texas Construction Co.*, IBCA-73 (April 23, 1957), 64 I.D. 97, 57-1 BCA par. 1238; *J. D. Armstrong Co.*, IBCA-40 (August 17, 1956), 63 I.D. 289, 56-2 BCA par. 1043.

¹⁰ See *Concrete Construction Corp.*, IBCA-432-3-64 (November 10, 1964), 1964 BCA par. 4520; *Allied Contractors, Inc.*, IBCA-322 (August 10, 1964), 1964 BCA par. 4379; *Promacs, Inc.*, supra note 5; *Erhardt Dahl Andersen*, supra note 5; *Dane Construction Corp.*, IBCA-135 (February 15, 1960), 60-1 BCA par. 2549, 2 Gov. Contr. pars. 228, 229; *Flora Construction Co.*, IBCA-101 (September 4, 1959), 66 I.D. 315, 59-2 BCA par. 2312, 1 Gov. Contr. pars. 647-50.

¹¹ Questions of this type were considered in such cases as *Morgen & Oswood Construction Co.*, IBCA-389 (November 21, 1963), 70 I.D. 495, 1963 BCA par. 3945, 6 Gov. Contr. par. 90; *D. A. Whitley*, IBCA-177 (March 8, 1961), 61-1 BCA par. 2941, 3 Gov. Contr. par. 198(e); *Herman Groseclose*, IBCA-190 (December 22, 1960); 61-1 BCA par. 2885, 3 Gov. Contr. par. 63(f); *Osberg Construction Co.*, supra note 9; *Inter-City Sand & Gravel Co.*, IBCA-128 (May 29, 1959), 66 I.D. 179, 59-1 BCA par. 2215, 1 Gov. Contr. pars. 430-32; *Waxberg Construction Co.*, supra note 5.

Board.¹² In our opinion, they are also consistent with the applicable judicial precedents. *Kiewit*¹³ and *Chernus*¹⁴ involved situations where the quantities of work actually performed varied materially, not merely from the estimated quantities noted in the bidding schedule, but also from any quantities that could have been ascertained or computed, with reasonable practicability, from the drawings and specifications themselves, as supplemented by such additional information as a reasonable pre-bid investigation would have disclosed.¹⁵ Whether a like situation here exists cannot be determined until the evidence has been heard.¹⁶

The other cases cited by appellant, such as *Loftis*¹⁷ and *Fehlhaber*,¹⁸ rejected interpretations of particular contract provisions, such as those relating to "unclassified excavation" and "site investigations and representations," that were not required by the terms of the provisions construed and that would have made them incompatible with the "Changed Conditions" clause. The interpretation here placed upon the "approximate quantities" provision, however, is not only justified by the terms of that provision, but also leaves unimpaired both the letter and the spirit of the "Changed Conditions" clause.

A third question that needs resolution at this time is the soundness of the contention of the Government that "the specially written and specific terms of the contract relating to the excavation in question (Paragraphs 4, 17, 54, and 60), take precedence over and modify the standard changed conditions clause."

This contention would be valid if the portions of the specifications just mentioned were in conflict with the "Changed Conditions" clause, and if the contract expressed a clear intent that the former should prevail over the latter.¹⁹ However, none of the paragraphs mentioned present such a conflict associated with such an intent.

We have already pointed out that the first sentence of paragraph 4

¹² *Otis Williams & Co.*, supra note 5; *Osberg Construction Co.*, supra note 9; *Reid Contracting Co.*, IBCA-74 (December 19, 1958), 65 I.D. 500, 58-2 BCA par. 2037, 1 Gov. Contr. pars. 50-52; *Diamond Engineering Co.*, supra note 9, *J. D. Armstrong Co.*, supra note 9.

¹³ *Supra* note 6.

¹⁴ *Supra* note 7.

¹⁵ The rationale stated in the text is not at odds with those stated in *Otis Williams & Co.*, supra note 5, and *J. D. Armstrong Co.*, supra note 9. The differences in language reflect the differences in the factual situations involved, and illustrate the various limitations inherent in the *Kiewit* and *Chernus* holdings.

¹⁶ Quantities estimated in bidding schedules were given some weight for the purpose of determining whether changed conditions existed in *Lord Bros. Contractors*, IBCA-125 (February 16, 1959), 66 I.D. 34, 59-1 BCA par. 2069, 1 Gov. Contr. par. 176, and *J. A. Terteling & Sons, Inc.*, supra note 5. In those cases, however, the issue of whether the contracts contained "approximate quantities" provisions that would preclude reliance on the estimates was neither raised nor considered.

¹⁷ *Loftis v. United States*, 110 Ct. Cl. 551 (1948).

¹⁸ *Fehlhaber Corp. v. United States*, 138 Ct. Cl. 571 (1957), cert. denied 355 U.S. 877 (1957).

¹⁹ *Morrison-Knudsen Co. (reconsideration)*, IBCA-36 (March 23, 1959); 66 I.D. 71, 59-1 BCA par. 2110, 1 Gov. Contr. par. 269.

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is consistent with the "Changed Conditions" clause. The second sentence is also consistent, since its concluding words "unless otherwise specifically provided" are fully broad enough to comprehend the equitable adjustments specifically provided for in the "Changed Conditions" clause.

Paragraphs 17, 54 and 60 deal in part with construction requirements and in part with payment requirements. To the extent that these paragraphs prescribe construction requirements, such as the qualities and sources of the materials to be used or the procedures and standards of embankment construction to be observed, they are consistent with the "Changed Conditions" clause, which makes no attempt to prescribe what work is to be done or how it is to be done. To the extent that these paragraphs prescribe payment requirements, they could be said to conflict with the "Changed Conditions" clause since, unlike paragraph 4, they make no express accommodation for the possibility of the prices stated in the bidding schedule being adjusted, either upward or downward, in the event a changed condition is encountered. The contract, however, nowhere expresses a clear intent that any of these paragraphs is to prevail over the "Changed Conditions" clause. Thus, for example, paragraph 54 provides that the contractor is to be entitled to "no additional allowance" above the prices stated in the bidding schedule "on account of" various types of action taken by the contracting officer pursuant to the terms of the contract, but it does not go on to add "or on account of any changed condition encountered by the contractor" or other words of like import. In the absence of some such unequivocal expression of an intent to modify or supersede the "Changed Conditions" clause, the rule of interpretation that the General Provisions of a Government contract prevail over the specifications and drawings requires us to treat that clause as paramount.²⁰

The provisions of paragraphs 4, 17, 54 and 60 of the contract, accordingly, do not preclude appellant from maintaining a claim based upon the theory that the shrinkage of the dredger tailings and screenings amounted to or was caused by a changed condition.

This brings us to the ultimate issue of whether appellant has alleged facts which, if true, would establish a claim of changed conditions. This issue must be determined in the light of the foregoing rulings to the effect that a mutual mistake of fact as to shrinkage of materials would not be a changed condition *per se*, and that a quantity estimate noted in the bidding schedule would not be an indication or

²⁰ *William L. Warfield Construction Co.*, IBCA-196 (May 3, 1962), 1962 BCA par. 3374, 4 Gov. Contr. par. 314; *Seal & Co.*, IBCA-181 (December 23, 1960), 67 I.D. 435, 61-1 BCA par. 2887, 3 Gov. Contr. par. 39; *Herman Groseclose*, *supra* note 11; *Caribbean Construction Corp.*, IBCA-90 (June 28, 1957), 64 I.D. 254, 57-1 BCA par. 1315; *Central Wrecking Corp.*, IBCA-69 (March 29, 1957), 64 I.D. 145, 57-1 BCA par. 1209.

representation upon which a changed condition of the first category could be predicated.

Appellant's statements of position are voluminous and only partially summarized in this opinion. We read them as including averments that the design of Trinity Dam, as revealed by the drawings and specifications, without regard to the quantity estimates of the bidding schedule, indicated that the dredger tailings and screenings from borrow area C would not shrink to any material degree when placed and compacted in the zone 3 embankment. We also read them as including averments that shrinkage did occur to a material degree, that it was brought about by circumstances not reasonably subject to appellant's control, and that it increased the costs of the job in amounts not capable of being fairly absorbed by the applicable unit prices. We further read the statements as including averments that the shrinkage was caused by physical properties of the dredger tailings and screenings, that appellant made a thorough pre-bid investigation which failed to disclose any reason for believing shrinkage would occur, that the physical properties of the tailings and screenings were unusual, and that the shrinkage was not to be expected in work of the character provided for in the contract. Speaking generally, the averments appear sufficient to establish, if proved, a claim of changed conditions in either the first or the second category.²¹ We conclude, therefore, that our order of September 1, 1964, was correct and should be affirmed.

One final matter needs resolution. The Government has asked that if the appeal is not dismissed, a period of six months be allowed for the presentation to the Board of counterclaims against appellant. The reasons for so asking, as outlined in the Government's statement of position, are as follows:

If the Board should rule adversely to the Government's Motion to Dismiss, this would appear to amount to a determination that, notwithstanding plain language of the specifications that quantity variations are a risk of the contract, a variation of quantity of any substantial magnitude supports a claim based upon mutual mistake, and, in turn, mutual mistake supports a valid claim of changed conditions. A holding to such effect would appear to the Government also to require a price redetermination in favor of the Government as to any schedule items where there were substantial overruns or underruns and where the variation was financially advantageous to the contractor. Therefore, in the event the Board rules adversely on the Government's Motion to Dismiss, it will be necessary that a thorough audit of the contractor's cost records be undertaken to determine what counterclaims should be asserted by the Government against the contractor in this proceeding based upon precisely the same grounds as the contractor's claim against the Government. * * *

This request was, in effect, summarily dismissed by the order of September 1, 1964. Such dismissal was appropriate. The Govern-

²¹ See *Morgen & Oswood Construction Co.*, *supra* note 11.

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ment's request was not accompanied by a showing that the Board would have jurisdiction to entertain the proposed counterclaims. The jurisdiction conferred upon the Board is appellate in nature, and the right of appeal is granted to the contractor, but not to the Government, by the "Disputes" clause (Clause 6) of the contract. It is only in a narrow range of exceptional circumstances that the Government has been permitted to assert a claim in its own favor in connection with an appeal under the "Disputes" clause.²³ In the present case the passage quoted above reveals that the contemplated counterclaims would have a potentially much broader scope. Hence, a demonstration by the Government that the Board would have jurisdiction over the counterclaims, if and when they were presented, would seem to be a prerequisite for the favorable consideration of any such request as that here in question.

Our order does not, of course, preclude the Government from presenting counterclaims or from submitting further procedural requests in anticipation of their presentation. It may be that the substantive rulings made in this opinion will dispose of the considerations which led the Government to believe that counterclaims would be justified. If they do not, any further steps looking toward the presentation of counterclaims to the Board should be accompanied by an adequate jurisdictional justification.²³

The request for reconsideration of the order of the Board dated September 1, 1964, is granted, and, after reconsideration, that order is hereby affirmed.

HERBERT J. SLAUGHTER, *Deputy Chairman.*

I CONCUR

THOMAS M. DURSTON, *Member.*

I CONCUR

JOHN J. HYNES, *Member.*

LEGISLATIVE AUTHORITY FOR ENDANGERED SPECIES PROGRAM

Funds: Generally

Acquisitions of lands, waters, or interests therein for the preservation of species of fish or wildlife that are threatened with extinction using funds made available under the Land and Water Conservation Fund Act of 1965 are limited to acquisitions that are otherwise authorized by law.

²³ See *Jeneckes'*, IBCA-44 (November 28, 1955), 62 I.D. 449 6 CCF par. 61,732; *Montgomery Construction Co.*, ASBCA No. 2556 (January 23, 1956); *Gray Construction Co.*, ASBCA No. 1994 (September 17, 1954); *Fox Sport Emblem Corp.*, W.D. BCA No. 87 (March 4, 1945), 1 CCF 57; 35 Comp. Gen. 512 (1956).

²³ *Of. Rasmussen Construction Co. (reconsideration)*, IBCA-358 (October 1, 1964), 1964 BCA par. 4508.

Migratory Bird Conservation Act: Acquisition of Refuge Lands

Plain language of the Act authorizes the Secretary of the Interior to purchase or rent lands approved by the Migratory Bird Conservation Commission for endangered species of migratory "game" birds.

Acquisitions under the Act for endangered species of migratory "game" birds could be financed through funds made available from either the Land and Water Conservation Fund Act of 1965, or from the Migratory Bird Hunting Stamp Act, or from funds authorized by the Migratory Bird Conservation Act itself.

The Migratory Bird Conservation Act when read as a whole and considered in the light of its legislative history and purpose is unclear in regard to the purchase of lands for "nongame" migratory birds.

The Migratory Bird Treaty with Great Britain lists as protected birds both "game" and "nongame" migratory birds.

Fish and Wildlife Coordination Act: Generally

The term "wildlife" as used in the Act includes migratory birds.

The Act authorizes the acquisition of lands at water-resource projects for endangered species of fish and wildlife, including migratory birds.

Lands acquired under this Act need not be approved by the Migratory Bird Conservation Commission, nor is State consent needed.

Fish and Wildlife Act of 1956

The term "wildlife" as used in the Act may be construed broadly to include all wild vertebrates, including endangered species thereof, other than fish.

The Act specifically authorizes the Secretary of the Interior to acquire refuge lands for all forms of wildlife, including endangered species thereof.

M-36676

January 13, 1965

TO: ASSISTANT SECRETARY FOR FISH AND WILDLIFE

Subject: LEGISLATIVE AUTHORITY FOR ENDANGERED SPECIES PROGRAM.

This Department recently transmitted to the Bureau of the Budget a legislative proposal to carry out a program of land acquisition and propagation for the conservation of rare or endangered species of fish, birds, mammals, amphibians, and reptiles. During the consideration of this proposal, questions were raised about this Department's existing authority to carry out an endangered species program for these wild vertebrates.

The recently enacted Land and Water Conservation Fund Act of 1965, 78 Stat. 897 (1964), makes available appropriated funds for "the acquisition of land, waters, or interests in land or waters" for, among other things, "any national area which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction." These funds, however, cannot be used for this purpose "unless such acquisition is otherwise authorized by law." Also, these funds are limited to the land acquisition part of any such program. The following is an analysis of the Department's present general

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authority to carry out a program of land acquisition for endangered species of wild vertebrates.

The first statute is the Migratory Bird Conservation Act, 45 Stat. 1222 (1929), as amended, 16 U.S.C. secs. 715-715d, 715e, 715f-715k, 715l-715r. Section 4 of the Act permits the Secretary of the Interior to recommend to the Migratory Bird Conservation Commission the purchase of those areas of land and waters which he determines are needed for the conservation of migratory "game" birds. Section 2 authorizes the Commission "to consider and pass upon any area of land, water, or land and water that may be recommended by the Secretary of the Interior for purchase or rental" under the Act. Section 5 authorizes the Secretary "to purchase or rent such areas as have been approved for purchase or rental by the Commission, * * *, and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes."

Obviously, the plain language of these sections permits the Secretary to recommend, and the Commission to approve, lands for purchase or rent that he determines are necessary for endangered species of migratory "game" birds. Such approved lands could then be purchased and rented by the Secretary.

Acquisitions under this Act for such birds could be financed through the use of funds made available from the Land and Water Conservation Fund Act of 1965 or from the Migratory Bird Hunting Stamp Act, 48 Stat. 451 (1934), as amended, 16 U.S.C. secs. 718-718h. In addition, section 12 of the Migratory Bird Conservation Act authorizes an annual appropriation of \$200,000 for, among other things, the acquisition of lands under this Act.

The Act, however, when read as a whole and considered in the light of the legislative history and its purpose, is not clear in regard to the purchase of lands for any "nongame" migratory birds, including endangered species.

The plain language of section 4 when read alone appears to limit the Secretary's authority to recommend to the Commission only lands that are necessary for migratory "game" birds. Since, as a practical matter, the Commission only considers and passes upon areas that are recommended for purchase by the Secretary, it would ordinarily follow that his purchase authority in section 5 is limited to lands needed for migratory "game" birds.

The ambiguity arises when sections 12 and 11 are read with sections 2, 4, and 5. Section 12 authorizes an annual appropriation of \$200,000 for, among other things, "the acquisition, * * * of suitable areas of land, water, or land and water, for use as migratory bird reservations, * * *, and for the administration, * * * of such areas and other preserves, reservations, or breeding grounds frequented by

migratory game birds." The section uses both the term migratory "game" birds and "migratory birds." Section 11 defines "migratory birds" to mean those defined in the 1916 treaty with Great Britain. The treaty lists as protected birds both game and nongame migratory birds. The language of these sections suggests that the Act may have been intended to protect both game and nongame migratory birds. The issue is whether this protection was intended by Congress to be by way of purchasing lands as sanctuaries for either type of bird, or by purchasing lands only for migratory "game" birds.

The legislative history has been examined in an effort to determine congressional intention.

The Secretary of Agriculture in commenting to the Committee on Agriculture of the House of Representatives (H. Rept. No. 2265, 70th Cong.) on the proposed Act stated :

The object of this legislation is twofold :

(1) It authorizes the purchase, rental, or acquisition by gift or devise and maintenance of marsh and water areas *especially suitable for migratory birds* to be used as inviolate sanctuaries where breeding, feeding, and resting places for such birds will be perpetuated and safeguarded.

(2) *It supplements the protection afforded migratory birds under the migratory-bird treaty act* (U.S. Code, pp. 436, 437, secs. 703-711) by providing refuges as a means of increasing the numbers of these birds and maintaining them in ample abundance for future generations. *The species affected include not only the ducks, geese, and others classed as game, but the great hosts of smaller birds [these were classified by the treaty as insectivorous birds] so vitally essential to the agricultural interests of the country through their unceasing warfare against injurious insects.* (Italics supplied.)

The House Committee in reporting on this legislation also appears to have understood that these were the objectives of the legislation. The committee report states :

According to the present information of the department [of Agriculture] the welfare of migratory birds requires at least 125 sanctuaries, one or more in each State * * *. This country would then be making an effort comparable with that of Canada in this effective and essential manner of affording adequate protection to our resources in migratory-bird life.

The committee has been forcefully impressed by the earnestness of conservationists in all parts of the country *in stressing the importance of providing a system of refuges embracing desirable water and marsh areas where waterfowl and other migratory birds may find feeding, nesting, breeding, and resting places.*

Too great emphasis can not be laid upon the matter of providing a substantial system of sanctuaries embracing such areas. * * * your committee is of the opinion that if the country's migratory-bird life is to be continued for the enjoyment and utilization of our people *the establishment of a system of sanctuaries, such as that contemplated under this measure, is essential.* (Italics supplied.)

Congressman Andresen, one of the cosponsors of the legislation, in commenting during the debate in the House on the legislation stated that the bill before the House of Representatives "deals with the con-

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servation of migratory birds." (70 Cong. Rec. 3170) He stated further:

The act fixes a national policy for conservation of migratory birds to more effectively meet the obligations of the United States under the migratory-bird treaty with Great Britain.

* * * * *

The program proposed by this bill ultimately contemplates the establishment of permanent sanctuaries for migratory birds in every State * * *. Areas where birds may nest, feed, and rest without being molested by hunters. Inviolable sanctuaries. It has for its aim the preservation of ducks, geese, song birds, and insectivorous birds for future generations, as well as an assurance of a liberal supply of the migratory birds which may be legally taken for the hunters of to-day.

* * * * *

Such birds as the bobolinks, catbirds, humming birds, martins, meadowlarks, orioles, robins, wrens, woodpeckers, and many others are migratory birds. * * * The sanctuaries established under this bill will be havens for these industrious and valuable creatures. Increasing the number of insectivorous birds in America will be of enormous financial benefit to agriculture, * * *.

The areas acquired under this act will serve a threefold purpose. First, sanctuaries for migratory birds; second, spawning and feeding grounds for fish, as well as ideal fishing grounds; and third, places for propagation of fur-bearing animals, such as beaver, mink, muskrat, and so forth.

* * * * *

* * * the purpose of this bill is to dovetail into the other act [Migratory Bird Treaty Act] and make it a part of the general scheme of protection of migratory birds.

The legislative history indicates four things. First, Congress and the executive branch intended to implement further the treaty with Great Britain. Second, Congress and the executive branch intended to give protection to treaty-protected birds through the establishment of inviolable sanctuaries for them. Third, Congress and the executive branch understood that treaty-protected birds include nongame migratory birds, as well as migratory "game" birds. Fourth, Congress and the executive branch used the terms "game" birds and "migratory birds" interchangeably in discussing the legislation.

We believe that two possible conclusions may be drawn from the legislative history. First, although Congress was concerned with a fuller implementation of the treaty with Great Britain, it was principally concerned with the protection of migratory "game" birds. The limitation on the Secretary's authority to recommend and to purchase lands needed for migratory "game" birds was intentional, and the protection of nongame birds was intended to be incidental to the protection of gamebirds. Nongame birds would be protected only to the extent they could also use the "game" bird sanctuaries.

Much of the debate centered on the need to provide additional feeding, resting, and nesting areas for ducks, geese and other game birds and to prevent hunting on the sanctuaries. The references to non-game migratory birds in the legislative history was an indication that Congress expected that the game sanctuaries would provide protection to these birds also, but not to buy lands primarily for them.

The Department, in carrying out a migratory bird acquisition program, has as a matter of fact purchased lands primarily for migratory "game" birds. This is especially true since the enactment of the Migratory Bird Hunting Stamp Act in 1934. That Act authorized the sale of "duck stamps." The receipts are used for the acquisition of lands under the Migratory Bird Conservation Act. The legislative history of the 1934 Act, but not the plain language of the Act itself, indicates a strong intention that these receipts are to be used for the acquisition of migratory "game" bird sanctuaries only. Since 1934, "duck stamp" receipts have been the main source of revenue for acquisitions under the Migratory Bird Conservation Act.

The second possible conclusion is that Congress intended to authorize the purchase of lands both for game bird sanctuaries and for nongame bird sanctuaries and that the term migratory "game" birds in section 4 of the Act has no special significance.

Section 12 of the Act refers to the acquisition of reservations for migratory birds and to the administration of the reservations "frequented by migratory game birds." In the debate, Congress refers to both game and nongame birds. No distinction is made. The Act defines "migratory birds" to mean treaty-protected birds. These include both game and nongame birds. Congress and the executive branch clearly intended that the treaty with Great Britain should be fully implemented by affording protection to all migratory birds through the acquisition of lands by purchase, gift or devise as sanctuaries. The Commission is not expressly or impliedly prohibited from considering and approving areas for purchase which are recommended by the States or other interested persons. The Secretary's purchasing power is restricted only to areas approved by the Commission.

We are not attempting here to indicate which conclusion is most persuasive. As a matter of policy, the Department has in the past followed the first. This is primarily because the need for game bird habitat has been the greatest. The need for acquisition for endangered species of non-game birds has only recently become apparent. Thus, both needs are now important. We therefore have suggested that the ambiguity in the Act should be clarified in the proposed legislation to authorize an endangered species conservation program.

A second statute is the Fish and Wildlife Coordination Act, 48 Stat. 401 (1934), as amended, 16 U.S.C. secs. 661-666c (1958). This Act

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authorizes the various Federal water-resource construction agencies, including this Department, to acquire lands in connection with a project for the conservation, protection, and enhancement of wildlife. Section 8 of the Act defines the term "wildlife" to "include birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent." This obviously includes migratory birds. It also includes rare and endangered species of wildlife. It is limited, however, to acquisitions at water-resource projects.

Acquisitions pursuant to the Fish and Wildlife Coordination Act of lands at such projects as a mitigation or enhancement measure to conserve endangered species of migratory birds are not required to be approved by the Migratory Bird Conservation Commission, because such approval is only required for acquisitions under the Migratory Bird Conservation Act. No purpose would be served by Commission review, since Congress specifically authorizes most water-resource projects, including the fish and wildlife features.

In addition, State consent to acquisition is not needed. State consent is only required where the lands are acquired under the Migratory Bird Conservation Act.

Acquisitions under the Fish and Wildlife Coordination Act for endangered species of fish and wildlife, including migratory birds, at water-resource projects are a part of the project costs and would be financed through the use of appropriations to carry out a project.

A third statute is the Fish and Wildlife Act of 1956, 70 Stat. 1119 (1956), as amended, 16 U.S.C. 742a-742d, 742e-742j. Section 7 of this Act directs the Secretary to, among other things,

* * * take such steps as may be required for the development, management, advancement, conservation, and protection of wildlife resources through * * *, acquisition of refuge lands * * *.

The Act does not set forth any procedures to be followed in acquiring refuge lands. It also lacks specific sanction and enforcement provisions, as well as specific provisions relating to the issuance of regulations.

The Secretary is authorized, however, by Revised Statute sec. 161, as amended, 5 U.S.C. sec. 22, to issue regulations to carry out the Department's functions. Also, Title 18, U.S.C. sec. 41 specifically prohibits certain activities on, among other places, refuges and provides a penalty for any violation. Where there is public recreation, the Secretary is authorized by the act of September 28, 1962, 76 Stat. 653, 16 U.S.C. sec. 460-460k-4, to issue regulations to carry out the purposes of the Act. Penalties are also provided under the 1962 Act. No provision is made under either authority for arrests by the Secretary or his employees.

The term "wildlife" as used in the 1956 Act is not defined. It does not include fish, however, because whenever the Act authorizes a program relating to "fish," the term is specifically used. We believe that the term "wildlife" may be construed broadly to include all wild vertebrates other than fish. This includes endangered species.

The 1956 Act, therefore, authorizes the acquisition of refuge lands for all forms of endangered species of wild vertebrates, except fish. As in the case of the Fish and Wildlife Coordination Act, the Secretary in acquiring refuge lands under the 1956 Act to conserve endangered species of migratory birds is not required to obtain the prior approval of the Migratory Bird Conservation Commission or the consent of the States, because these requirements only apply to acquisitions under the Migratory Bird Conservation Act. The acquisitions under the 1956 Act are not specifically authorized by Congress. The Secretary may therefore wish for practical reasons to obtain Commission approval and possibly State consent before acquiring lands for endangered species of migratory birds under the 1956 Act.

Acquisitions to conserve endangered species of wildlife may be carried out with the use of direct appropriations under the authority of the 1956 Act or with the use of money made available to the Secretary under the Land and Water Conservation Fund Act of 1965. "Duck stamp" funds would not be available, because they are limited to acquisitions under the Migratory Bird Conservation Act.

Special statutes, such as the act of August 22, 1957, 71 Stat. 412, 16 U.S.C. sec. 696-696b, and the Fur Seal Act of 1944, 58 Stat. 100, 16 U.S.C. sec. 631a-631q, have also been enacted to protect particular endangered species of fish and wildlife such as the Key deer, and both the fur seal and the sea otter, respectively. These statutes would, however, have limited value in carrying out an endangered species acquisition program, because their authority is for the most part limited to specific species and in some cases to specific areas.

While we have indicated a number of alternative approaches in obtaining necessary appropriations to carry out a program under these statutes, we point out that present and future policy considerations may dictate that only one approach should be followed in each case.

Certain gaps still exist in carrying out an endangered species program. Acquisitions for endangered species of fish are limited to water-resource projects. Adequate sanctions and enforcement provisions do not exist in all cases. Unified procedures for carrying out the program are not established. Authority is needed to use donated funds to purchase lands. Also, clear authority is desired to carry out propagation activities for endangered species. These and other gaps in existing authority are filled by the proposed legislation mentioned earlier. The legislation will also clarify the ambiguous provisions of the Migratory Bird Conservation Act.

January 19, 1965

The views expressed herein supplement and supersede the views previously expressed on the subject of land acquisition under the Fish and Wildlife Act of 1956 and endangered species in memoranda dated July 10, 1961 and August 24, 1964.

EDWARD WEINBERG,
Acting Solicitor.

FRANK MELLUZZO ET AL.

A-30128

A-30132

Decided January 19, 1965

Mining Claims: Lands Subject to—Small Tract Act: Generally

When a small tract application is filed, a mining claim is subsequently located on the same land, and the land is then classified as chiefly valuable for small tract purposes, the classification relates back to the time of the filing of the small tract application and the subsequent mineral location becomes invalid upon allowance of the application.

Mining Claims: Lands Subject to—Small Tract Act: Generally

The Secretary is under no obligation to issue regulations providing for mineral location of mineral deposits reserved from disposition under the Small Tract Act.

Mining Claims: Determination of Validity

No hearing is necessary to invalidate mining claims located on land previously included in small tract applications and subsequently classified for small tract disposition.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Frank Melluzzo and John L. Perry have appealed to the Secretary of the Interior from a decision of the Division of Appeals of the Bureau of Land Management, dated July 24, 1963, which affirmed a decision of the land office at Phoenix, Arizona, declaring their P&M Enterprise No. 1 placer mining claim null and void in its entirety and their P&M Enterprise No. 5 placer mine claim null and void in part because of the filing of small tract applications covering the No. 1 claim in its entirety and the No. 5 claim in part before the mining claims were located and the subsequent classification of the land for disposition as small tracts.

Likewise, Frank Melluzzo, Wanita Melluzzo, and W. W. Adams have appealed to the Secretary from a Division of Appeals' decision of July 31, 1963, which affirmed a Phoenix land office decision declaring their La Fe and La Fe No. 1 placer mining claims null and void in part for the same reason.

The claims, located for building stone, are in Maricopa County, Arizona, within the Phoenix city limits. The attached appendix,¹ shows that the conflicting small tract applications were filed at different times from June 1946 to March 1955. In each instance, the mining claim in conflict was located from about 1 month to 9 years later. In the case of the P&M Enterprise No. 1, the Bureau of Land Management noted about 6 weeks after the filing of the two conflicting small tract applications and over 5 years before the mining claim was located that the land was under consideration for small tract purposes. In each instance the land was classified for small tract purposes on October 13, 1955, by Small Tract Classification Order No. 45, 20 F.R. 7921. The land office declared the claims to be invalid on the basis of the facts shown by the land office records without a formal contest proceeding.

The decisions below were based upon the Department's decision in *Harry E. Nichols et al.*, 68 I.D. 39 (1961). The facts in the case were that small tract applications were filed for land which previously had been taken under consideration by the Bureau of Land Management for small tract classification. After the applications were filed, a mining claim was located on the land. Thereafter the land was classified for small tract disposition. The Bureau of Land Management declared the claim to be invalid on the ground that the classification, which segregated the land from mining location, related back to the filing of the applications.

The Department agreed that this ruling would be correct in situations where a small tract application was filed, a mining claim next located, and then a small tract classification made, but held that the ruling was inapplicable to the facts in the *Nichols* case because, there, the land had been taken under consideration by the Bureau for small tract classification before the small tract applications were filed. The reasons for the distinction were fully set forth in the *Nichols* decision and need not be repeated here.

As we have seen, the present cases involve the sequence of small tract application, mining location, and then small tract classification. With respect to the two small tract applications in conflict with the P&M Enterprise No. 1, the land applied for, together with other land, was noted by the Bureau as being under consideration for small tract classification on July 23, 1946, approximately a month after the applications were filed. As for the other small tract applications in conflict with the remaining mining claims, it appears that the lands applied for were not noted as being under consideration for small tract classification prior to the issuance of Small Tract Classification Order No. 45, *supra*. The factual situation here, then, is unlike that actually

¹ See Appendix, p. 25.

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existing in the *Nichols* case. Instead it is like that considered in the *Nichols* case as being subject to the doctrine of relation back, *i.e.*, the sequence of small tract application, mining location, and then classification.

Appellants attack the Bureau's reliance on the Department's ruling in the *Nichols* case on this sequence of events on the ground that the ruling is dictum, that it is merely a ruling on a hypothetical fact situation which did not exist in *Nichols*. Conceding this to be true, it does not follow that the conclusion reached in *Nichols* is erroneous. On the contrary, the ruling is fully supported by the reasoning set forth in *Nichols*.

The appellants attempt to bring all but the P&M Enterprise No. 1 under the factual situation in the *Nichols* case by relying on paragraph 4 of Small Tract Classification Order No. 45. That paragraph provided:

All valid applications filed prior to 3:32 p.m. July 26, 1946, will be granted, as soon as possible, the preference right provided for by 43 CFR 257.5(a).

Appellants assert that since all but the two small tract applications in conflict with the P&M Enterprise No. 1 were filed after July 26, 1946, they have no preference and therefore the relation back doctrine does not apply.

43 CFR, 1958 Supp. 257.5(a), cited in paragraph 4, provided at the time order No. 45 was issued that an applicant who filed prior to receipt by the land office of notice that the land was under consideration for small tract classification would be given priority over others upon a favorable classification.² The implication to be drawn from paragraph 4 of order No. 45 is, therefore, that notice was received by the land office at 3:32 p.m., July 26, 1946, that the land described in the order was under consideration at that time for small tract classification. The implication, however, does not appear to be in accord with the facts.

The record shows that on July 23, 1946, a teletype was sent by the Director's office to the Phoenix land office advising that certain described land was under consideration for small tract classification and that the land office notified the Director's office on the same day that his wire was received at 4 p.m. The land described included the land previously filed on by the applicants in conflict with the P&M Enterprise No. 1 but did not include any part of the other land included in the other applications in conflict with the other three claims. Nothing in the case records show that any other notice including these lands was received in the land office on July 26. On the contrary, as noted earlier, the records indicate that the lands were not noted as considered

²The substance of the regulation remains the same today. 43 CFR 2333.0-6(b).

for small tract classification prior to the issuance of order No. 45. There is no basis, therefore, for holding that the applications filed after July 26, 1946, had no priority.

Appellants assert that paragraph 4 of order No. 45 cannot be so lightly ignored and intimate that they invested time and money in reliance on the clear terms of the order. This could not have been true because the four claims in question were located in the period November 26, 1951, to April 27, 1955. Order No. 45 was not issued until October 13, 1955, and not published until October 20, 1955.

Appellants attempt to attack the basic concepts of the *Nichols* decision by contending that the Small Tract Act does not withdraw or authorize the withdrawal of any land from mineral location; that, on the contrary, the act provides for the reservation of mineral deposits in dispositions under the act, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe; and that the Secretary cannot frustrate the statute by not adopting regulations providing for mining the reserved deposits.

The Department met and answered this same argument in *The Dredge Corporation*, 64 I.D. 368, 374 (1957), saying there that

The appellant contends that the fact that the Secretary has issued no regulations relating to mining on those lands [lands classified for small tract purposes] is proof that the mining laws apply. This is not so. The act makes the reserved minerals subject to disposition only under applicable laws "and such regulations as the Secretary may prescribe." The Secretary has prescribed that there shall be no prospecting for or disposition of the reserved deposits at this time and until he prescribes regulations permitting the prospecting for, mining and removal of such reserved deposits the lands in which such deposits may be found are not open to location under the mining laws.

The *Dredge Corporation* subsequently brought suit, asking the Federal district court to determine that the Secretary's decision from which the above quotation was taken is invalid and void and of no force and effect. However, the court sustained the defendant's motion for summary judgment and in the course of its opinion said:

The next issue raised by plaintiff is that the Secretary's acts of issuing the regulation found in 43 CFR. sec. 257.15 then failing to issue further regulations dealing with the disposal of minerals not subject to the Mineral Leasing Act made the land in question open to location under the mining laws.

The Small Tract Act provided that the Secretary of the Interior has discretion to sell or lease land "under rules and regulations as he may prescribe." The Secretary issued a regulation (43 CFR sec. 257.15) clearly stating that "No provision is made at this time to prospect for, mine, or remove the other kinds of minerals (sand and gravel included) that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting." Similar to his discretionary powers granted under the Mineral Leasing Act, under the Small Tract Act the issuance of regulations or the nonissuance of regulations is a matter of the Secretary's discretion. Plaintiff's arguments of discrimination are without merit. *Pease v. Udall*, 9th Cir., decided April 29, 1964; *Superior Sand and Gravel Mining Co. v. Ter. of Alaska*, 224

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F. 2d 623 (9th Cir. 1955). (*The Dredge Corporation v. Penny et al.*, Civil No. 475, D. Nev., May 18, 1964.)

Appellants next seem to contend that it was improper to invalidate their claims without a contest proceeding and hearing. They seem to suggest that there is a factual question as to whether the lands in question were under consideration for small tract classification on July 26, 1946, as paragraph 4 of Order No. 45 apparently implies. Aside from the implication, however, appellants do not claim to have any evidence that such was the situation. They do not say that they would be able to submit any evidence on the point at a hearing. Consequently, there appears to be no factual issue to be resolved at a hearing. In *The Dredge Corporation v. Penny et al.*, *supra*, the court held that no hearing was required where the only issue presented was whether mining claims could validly have been located on lands already classified under the Small Tract Act and already leased under that act.

Finally, appellants state that some of the small tract applicants may no longer be available to exercise their preference rights and that their claims should not be invalidated unless the applicants are still maintaining their applications. This position is well taken. Appellants' claims should not be invalidated as to portions in conflict with the prior small tract applications until leases are issued in response to the applications.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions appealed from are modified to the extent indicated and otherwise affirmed and the cases are remanded for such further action as is appropriate.

ERNEST F. HOM,
Assistant Solicitor.

APPENDIX

Serial numbers of conflicting small tract applications	Date small tract applications filed	Name of mining claims	Date of mineral location	Date of consideration for small tract classification	Date of small tract classification
Phoenix 083188.....	6-10-46	P&M Enterprise No. 1.....	4-22-55	7-23-46	10-13-55
Phoenix 083197.....	6-13-46			7-23-46	
Arizona 02872.....	2- 4-52	P&M Enterprise No. 5.....	4-27-55		10-13-55
Arizona 03378.....	4-22-52				
Arizona 08279.....	3-30-55				
Phoenix 083809.....	3-19-47	La Fe No. 1.....	2-10-53		10-13-55
Arizona 01100.....	1-29-51				
Arizona 04137.....	10-30-52				
Phoenix 083809.....	3-19-47	La Fe.....	11-26-51		10-13-55
Phoenix 083844.....	4-24-47				
Arizona 01100.....	1-29-51				

APPEAL OF BOESPFLUG-KIEWIT-MORRISON

IBCA-320

Decided January 21, 1965

Contracts: Performance or Default: Generally—Contracts: Construction and Operation: Subcontractors and Suppliers—Delegation of Authority: Extent of—Contracts: Construction and Operation: Construction against Drafter

Where a contract contains a clause delegating to the contracting officer's representative broad authority concerning the administration of the contract, an interpretation by the contractor that such clause relieves him of responsibility for seeing to it that appropriate construction procedures are utilized by his subcontractors, is not a reasonable construction of the contract, and hence, the doctrine of *contra proferentem* does not apply.

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Contracting Officer

Where a contract does not require Government approval concerning the proportions or method of mixing ingredients to be used for plaster, a series of correspondence consisting of the submission by the contractor to the Government of a proposed plaster formula, the solicitation by the Government of an opinion from a plaster manufacturer, a reply from the manufacturer and the transmittal of the reply by the Government to the contractor, does not constitute approval by the Government of such formula, even if modified to conform to the manufacturer's recommendations.

Contracts: Construction and Operation: Payments—Rules of Practice: Evidence—Contracts: Construction and Operation: Subcontractors and Suppliers

A claim for additional payment arising out of the extensive failure and cracking of plaster and the repair thereof by the contractor will be denied where the weight of the evidence discloses that the defective plaster was the result of noncompliance by the plastering subcontractor with industry specifications and instructions that were known or readily available to the contractor.

BOARD OF CONTRACT APPEALS

On September 19, 1955, the contractor, an organization of joint venturers,¹ appealed from the denial of its claim by the contracting officer's Findings of Fact and Decision, received by the contractor on August 22, 1955. Hence, the appeal was timely. The claim in the amount of \$266,953.05, on which the appeal is based, involves extensive cracking of plaster in the Native Service Hospital building in Anchorage, Alaska, which was constructed by the contractor (hereinafter called "B-K-M," or "appellant") under the above-numbered contract. Because of litigation in the courts of the State of Washington, concerning matters allied to the disputes involved in this appeal,

¹ The firms which were combined for the purposes of this contract were J. C. Boespflug Construction Company, Peter Kiewit Sons' Company and Morrison-Knudsen Company, Inc.

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prosecution of the appeal was delayed. In September 1960, the litigation in the state courts being still pending, the appeal (then docketed as IBCA-52) was dismissed by the Board without prejudice to its later reinstatement when the state court litigation should have come to an end.²

The litigation in the courts of the State of Washington consisted of a suit brought by B-K-M as plaintiff, against its plastering subcontractor, Steeves and Wilson, and the American Surety Company of New York, as defendants. The American Surety Company of New York was the surety on the bond furnished to B-K-M by Steeves and Wilson for the performance of the plastering subcontract. The American Surety Company, as such surety, after the default of Steeves and Wilson, engaged the appellant to perform the repair of the plaster, which had been left unfinished by Steeves and Wilson. The amount due the appellant from the surety company for performing such repairs, in accordance with the separate agreement between them, was one of the issues in that litigation.

Judgment was obtained by appellant against Wilson (the suit as to the other partner, Steeves, having been dismissed after his bankruptcy) in the amount of \$266,953.05, and against the American Surety Company in the amount of \$175,991.70, in June 1961.

In April 1962, appellant requested reinstatement of the appeal before the Board, and a hearing on the appeal was conducted in Seattle, Washington, on October 23 to 26, 1962. Because of lengthy delay on the part of the reporting service, the transcript of the hearing was not received until December 10, 1963.

At the hearing, it developed that the claim involved is that of the plastering subcontractor, Steeves and Wilson, presented by the appellant as prime contractor.³ It also appears that the bonding company, the American Surety Company, is the successor party in interest as claimant, having succeeded by subrogation to the rights of the subcontractor.⁴ It has been agreed that at this time there is for consideration by the Board only the question of liability. If the Board should find for the appellant, the appeal would be remanded to the contracting officer for determination of the question of damages, subject to the right of further appeal if the contracting officer's determination of damages should not be satisfactory to the appellant.⁵

In addition to the limitation described above, a stipulation concern-

² *Boespflug-Kiewit-Morrison*, IBCA-52 (September 28, 1960), 60-2 BCA par. 2772.

³ Tr. 15.

⁴ *Idem.*

⁵ Letter dated September 28, 1962, from the Board of Counsel for appellant.

ing the issues and the facts was filed with the Board at the commencement of the hearing. The text of the stipulation is quoted below:

The parties hereto through their respective counsel hereby stipulate to the following facts in connection with this appeal:

ISSUE

The issue in this case is whether the contractor is entitled to extra compensation by reason of the failure of plaster in the Anchorage Native Service Hospital at Anchorage, Alaska or by reason of the contractor's efforts to remedy the plaster failure. The contractor's claim is for the sum of \$266,953.05 and relates to the hospital building as distinguished from the quarters building.

STIPULATED FACTS

Appellant is a joint venture consisting of Peter-Kiewit Sons Co., Morrison-Knudsen Co., Inc. and J. C. Boespflug Co. and was prime contractor for the construction of the Alaska Native Service Hospital under Contract No. I-1-IND-42213 dated July 20, 1949. A correct copy of the contract accompanies the Findings of Fact of the Contracting Officer as Exhibits A and B respectively.

By the terms of the contract the work was to be completed within 1,380 calendar days after notice to proceed. Notice to proceed was given by the Contracting Officer on August 3, 1949. An extension of time of 42 calendar days was granted by Change Order 10-W dated Sept. 27, 1950 which extended the completion time to June 25, 1953. The work was determined by Edward A. Poynton, Chief, Branch of Buildings and Utilities who is charged with the administration of the contract by the Contracting Officer to be substantially completed on July 10, 1953. Final acceptance was given on October 14, 1953. The sum of \$2,800 was assessed against the contractor as liquidated damages for delay in completion of 14 calendar days.

By the terms of the contract the use of lightweight aggregate at the contractor's option in lieu of sand in the preparation of all plaster was permitted. Such lightweight aggregate to be similar and equal to zonolite plaster aggregate as manufactured by the Universal Zonolite Corp., Chicago, Illinois. The plastering of the hospital commenced on June 4, 1951.

Before the commencement of plastering the contractor submitted the plastering formula proposed to be used through Government Project Engineer Max E. Boyer and the Project Engineer referred the matter to the U.S. Gypsum Co., Chicago, Illinois by telegram dated May 28, 1951 which read:

"Contractor proposes following plaster formula colon two sacks fibered plaster four cubic feet zonolite and four shovels sand Stop Your comments by air mail requested."

The U.S. Gypsum Co. replied by telegram dated May 29, 1951 as follows:

"2-100 lbs bags of plaster to four cubic feet of zonolite and 4 shovels of sand is 1 part gypsum to 2.3 parts aggregate. This proportioning is satisfactory for plastering over gypsum lath and browning over metal lath. It would be too lean for scratch coat on metal lath, would be ok if 4 shovels of sand omitted on metal lath scratch coat. ASTM specs on 3 coat work require 1 part gypsum to two parts aggregate for scratch coat and one part gypsum to three parts aggregate for scratch on brown coat. Two coat work over gypsum lath requires one part gypsum to 2½ parts aggregate. Lightweight aggregates are proportioned on a cubic foot basis and sand by weight. Where zonolite is used it is absolutely imperative that proper heat and ventilation be provided during plastering."

Samples of lime to be used were submitted to the Project Engineer for approval and approval, subject to contract requirement, was obtained by letter dated

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June 15, 1951. Water used in the mix was drawn from the Anchorage city water system.

The Contracting Officer found that except for sand and water the other specified materials used in the plastering of the hospital met the requirements of the specifications.

Plastering of the hospital building commenced on June 4, 1951. It was supervised by Max E. Boyer as Government Project Engineer until his retirement from Government service about December 8, 1951, at which time he was succeeded by Virgil E. Reimer as Project Engineer.

Plastering of the hospital building continued without interruption until Dec. 15, 1951 at which time operations were shut down until after the holidays. Shortly after the first of January, 1952, it was found that severe cracking had occurred in the plastering throughout the building. The cracking continued and by the end of January was quite severe. Early in March the plastering sub-contractors, Steeves and Wilson, partners, announced their inability to proceed further and the surety company made arrangements for the prime contractor to take charge of completion of the work. Representatives of the Government demanded that the contractor repair the cracked plaster and the contractor protested in writing this requirement. However the contractor did proceed to have repairs made. Various consultants were called to the job by the Government, the contractor and the surety company. Reports of various kinds were made attributing the cracking to a variety of causes. After repairs were made new cracks continued to develop and in many cases the repaired cracks reopened.

During the hearing the Board declined to grant the Government's motion to admit in evidence the record and testimony in the state court litigation, for the reason that the parties in that litigation were not the same as the parties in the appeal, and on the further ground that the issues in that litigation, while connected with the dispute involved in this appeal, were in large part quite different. Moreover, the Board considered it undesirable to substitute the record of testimony taken in the state court in the place of testimony of witnesses who were present and available to testify at the appeal hearing.⁶

The Government also moved to dismiss the appeal on the ground that the judgment of the state court was *res judicata* and hence made the instant appeal moot. The Board denied this motion as being untimely, as well as for the further reasons of dissimilarity of parties and issues.⁷ The Board held, however, that excerpts from the record of testimony in the state court litigation could be used for the purpose of refreshing the memory of a witness or to impeach a witness.

"Zonolite" is a trade name for a mineral generally known as vermiculite. The evidence submitted by both parties tended to show that the state of the art of using vermiculite as an aggregate in the plastering industry was generally in a developmental stage (at least in the area of Alaska), at the time of the inception of the contract, and that the

⁶ Cf. *United States v. Aluminum Co. of America*, 1 F.R.D. 48 (S.D. N.Y. 1938).

⁷ Cf. *Laurson v. O'Brien*, 90 F. 2d 792 (7th Cir. 1937); *Douglas v. Wisconsin Alumni Research Foundation*, 81 F. Supp. 167 (N.D. Ill. 1948).

body of generally available knowledge concerning the requirements and limitations governing such use of vermiculite had increased considerably since that time. Moreover, the causes of the serious failure of the plaster, after its application to the walls of the building, by reason of extensive cracking, long remained a mystery to the various officials of the parties to the contract and the plastering subcontract. Numerous theories were advanced by the parties as reasons for the plaster failure, beginning in January 1952, but not until after April 1952, when experts from the U.S. Bureau of Standards arrived on the scene, was it definitely determined that a combination of causes was responsible for the damage.

The contracting officer's Findings of Fact and Decision comprise 160 pages, and only brief summaries will be quoted here. The contracting officer summarized appellant's claim as follows:

The Contractor claims that the plaster in the Hospital was installed in accordance with the plans and Specifications, under Government supervision and, therefore, the excessive cracking that occurred was not due to the fault or negligence of the Contractor who should be reimbursed for all expenses incurred in the repair of the cracked plaster and that an extension of time should be granted to cover the delay caused thereby.

The Contractor claims delay in the completion of the work because of a carpenters' strike.

The Contractor claims delay in the completion of the work because of a strike against the Alaska Steamship Company.

The decisions reached by the contracting officer are set forth below:

1. The \$266,953.05 claimed for expenses incurred or resulting from the repair of the plaster cracking in the Hospital is denied.
2. The request for an extension of time because of the delay due to the plaster cracking is denied.
3. The Contractor's request for an extension of eleven (11) calendar days time for the completion of the project because of a carpenters' strike is granted.
4. The Contractor's claim for an extension of time because of delay alleged to have occurred on the Hospital as a result of a strike against the Alaska Steamship Company is denied.
5. The Contractor's claim for payment of \$164.52, the cost of removing plaster sample panels for use in making tests, is denied.

In its Notice of Appeal, the appellant took specific exceptions to a number of the contracting officer's detailed findings concerning the plaster failure and the delay resulting therefrom. Also, specific appeals were taken as to all of the contracting officer's decisions (which, for convenient reference have been assigned numbers as indicated above) except for decisions numbered 3 and 4.

The several main arguments advanced by appellant in support of its claims may be briefly stated and commented upon as follows:

1. The first argument is based upon section 25 of the Standard

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General Conditions of the contract, concerning the "Government Superintendent," which reads as follows:

The District Construction Engineer will have general supervision of the work and will from time to time make inspections of the work or detail representatives from his office for that purpose. A Project Engineer will be assigned to supervise work on the project. The Project Engineer shall be responsible for the work being performed in strict accordance with the drawings and specifications and shall call any deviation to the attention of the Contractor or his representative immediately upon discovery. The Project Engineer shall enforce all of the provisions of the Contract that pertain to matters prosecuted at the site. The Project Engineer shall be responsible for the detailed supervision of the work. The District Construction Engineer and the Project Engineer have full authority to demand of the Contractor or his representative that the contractor comply with all the terms of the Contract and perform the work in strict accordance with the Contract drawings and specifications. All demands upon the Contractor shall be made in writing but where necessary to make demands orally the oral instructions will be confirmed in writing later. Minor matters that are adjustable amicably need not be in writing, at the discretion of the party making the demand. Decisions of the District Construction Engineer or Project Engineer are subject to appeal as provided in Article 15 of the Contract.

The Contracting Officer may at any time detail to the project for inspection of the work, investigation of claims, labor disputes or any other matters that may require attention, any persons whom he may desire. Such persons will not in any way interfere with the Contractor or the work except to the extent necessary to obtain the information required and the Contractor or his representative shall cooperate fully with the persons so detailed.

It is the appellant's view that the provisions of section 25 give the District Construction Engineer and Project Engineer such broad powers and authority over the enforcement and administration of the contract, and inspection of the work, that those provisions have the effect of making the Government responsible for selecting the particular procedures to be used by the contractor or subcontractor in meeting the requirements of the specifications.

The Board considers that such an interpretation is unreasonable. The responsibility of a prime contractor for compliance with the contract specifications is not diluted by provisions delegating to the Project Engineer the necessary authority for enforcement of the contract requirements. Hence, appellant is not entitled to application of the rule of *contra proferentem* in the interpretation of the provisions of section 25.⁸

Moreover, in the last paragraph of section 24, just preceding section 25, it is provided that:

The Contractor shall be responsible for all acts of the subcontractors employed by him, and the approval of the District Construction Engineer of any subcontractor will not relieve the Contractor of such responsibility. The failure of any subcontractor to complete work in a satisfactory manner within the proper time will not excuse the Contractor from any delay in the completion of the entire Contract except as provided under Article 9 of the Contract.

⁸ R & M Contractors, Inc., IBCA-325 (April 21, 1964), 71 I.D. 132, 135, 1964 BCA par. 4208, 6 Gov. Contr. 257.

Article 9, "Delays-Damages," of Standard Form 23 (Revised April 3, 1942), forming a part of the contract, contains provisions for excusable delays, not pertinent here.

It is obvious, therefore, that there is also no ambiguity in the contract respecting the continuing responsibility of the appellant for acts of subcontractors. The courts have consistently held that where there is no ambiguity, there is no need to construe the contract.⁹

2. Appellant contends that the Government approved the formula for the plaster mix. We do not agree. In the first place, there was no contract requirement for such approval. The Specifications (Division A-17 Lathing and Plastering) allow the use of lightweight aggregate "at the contractor's option *in lieu of sand* in the preparation of all plaster throughout the project, [which] shall be similar and equal to 'Zonolite' plaster aggregate as manufactured by the Universal Zonolite Corporation, Chicago, Illinois." (Italics added.)

There is no contract requirement that approval of "Zonolite" be obtained from the Project Engineer; Zonolite (or its equal) was the material specified if the option were exercised. Nevertheless, a sample of "Zonolite" was submitted for approval in connection with notification by appellant to the Government of the exercise of the option to use that material. It was approved, necessarily and perfunctorily of course, for the Project Engineer could not properly disapprove material authorized specifically by the contract.

No formula was prescribed in the contract for the proportions to be used in mixing the plaster, for the Government may properly assume that a contractor who holds himself out as an experienced plastering contractor or subcontractor would have the necessary "know-how" concerning ingredients and their mixing. The area representative of the Zonolite Corporation suggested a formula to the plastering subcontractor which included the use of sand together with the Zonolite aggregate. The addition of sand was proposed for the purpose of eliminating a slick film on the finished surface. As described in the stipulation hereinbefore quoted, the proposed formula was transmitted to the Project Engineer, although approval of the plaster formula was not required by the contract. The Project Engineer did not approve the formula but transmitted it to the U.S. Gypsum Co., Chicago, Illinois, for comment. On receiving the reply, the Project Engineer transmitted the comments of the U.S. Gypsum Company (see stipulation) to the appellant and its subcontractor.

The comments so received, and their transmittal to appellant, were in no sense an approval of the formula which had been proposed. Such comments were in fact a critical and cautionary warning, to the

⁹ *Hongkong & Whampoa Dock Co., Limited v. United States*, 50 Ct. Cl. 213, 222 (1915).

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effect that the addition of sand to the aggregate as well as the Zonolite, would result in too lean a mixture for the "scratch" coat applied to the metal lath. Sand should be omitted from this primary plaster coat, additionally, the warning was clear that "it is absolutely imperative that proper heat and ventilation be provided during plastering" where Zonolite is used.

We conclude that the Project Engineer, in obtaining the comments of the U.S. Gypsum Company, was merely cooperating with the appellant and its plastering subcontractor by obtaining an opinion from a known authority in the plastering field. There was no reason why the plastering subcontractor and the appellant should not have carried out their own respective responsibilities in the matter of making such inquiries. It is unfortunate that in exercising the option to use Zonolite in lieu of sand, the plastering subcontractor and appellant chose to use a material concerning which they apparently knew very little. Sand was the material they customarily used.

3. Appellant asserts that the work of mixing and applying the plaster was uniformly carried out in accordance with the recommendations of the U.S. Gypsum Company. The testimony in favor of such a conclusion is unconvincing, to say the least. It is obvious (and the testimony confirms it), that none of the appellant's supervisory employees or the partners of the subcontractor had sufficient competence in the techniques of plastering, and none of the Government inspectors were able to devote full time to watching the operation of mixing the plaster. The mixing operation was so critical to satisfactory plastering performance (especially in view of the admonitions of the U.S. Gypsum Company), that the failure of the prime and subcontractor's superintendence in that regard was, in our opinion, a serious dereliction of duty.¹⁰

Mr. Marvin Quayle, Vice President of the American Gypsum Company, was called as a witness by the Government and was qualified as an expert in the field of plastering and in the use of vermiculite (or Zonolite) as an aggregate. He visited the project in April 1952, at the request of the Northwest Vermiculite Company, which concern was furnishing the Zonolite aggregate to the plastering subcontractor. Mr. Quayle was also a technical adviser for the Zonolite Company. He testified that he observed the operations of plaster mixing for an entire day. He also spent several nights in the hospital building, sometimes until 3 a.m. and 4 a.m., in order to check temperatures.

As to the mixing operations, Mr. Quayle found that, in addition to the usual ingredients of gypsum and vermiculite, 4 shovels of sand

¹⁰ Article 8 of the contract provides as follows:

"Article 8. Superintendence.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him."

were being used in each batch for the scratch coat, and 6 shovels of sand for the brown coat. This clearly indicated a drastic departure from the so-called formula, as modified by the warnings of the U.S. Gypsum Company. Under that formula, as so modified, there should have been no sand whatever in the scratch coat and only 4 shovels of sand for the brown coat. Moreover, the shovels being used to measure the sand were larger than standard, with the result that the quantity of sand used was even further in excess of the proportions suggested for the brown coat. Mr. Quayle also found that excessive quantities of water were being used in the mixing and that the sequence of mixing was wrong.

Because of the great water-absorbent properties of vermiculite, it is possible to use excessive quantities of water without affecting the consistency of the plaster. Hence, the proper procedure should have been to put into the mixture the proper quantity of water, then the vermiculite, and after that the sand and gypsum. Mr. Quayle observed that the sequence being used was as follows: water, sand, gypsum, and last, the vermiculite or Zonolite (Tr. 301).

Apparently, there were some variations during the contract performance in the sequence of adding the several ingredients. Mr. Wilson, of the plastering subcontractor firm of Steeves and Wilson, testified that water was added at the beginning and again at the end of the mixing operation, to obtain the desired consistency. Mr. Quayle testified that under Mr. Wilson's description of the mix, the ingredients would become segregated so that some portions of the plaster would have sand and other portions would have no sand, some parts with vermiculite and others containing no vermiculite. Such a series of separation would cause weakness in the plaster when applied to the walls of the building.

It was also the opinion of Mr. Quayle that "retarder," a substance used to delay the "set" or hardening of the plaster, and which he observed was used in the plaster mix, would create undesirable results by permitting the vermiculite to continue its absorption of water from the plaster for a longer period after it had been applied to the walls.

Mr. Quayle further stated that the proper procedures for mixing plaster were contained in the ASA (American Sand Association) specifications, which are generally available to contractors. Additional specifications, prepared by a committee of which Mr. Quayle was a member, appeared on every bag of Zonolite as well as in folders which were "mailed to thousands of architects and plastering contractors and general contractors throughout the country." Other technical information and instructions appeared on bags of gypsum purchased for the project and in technical manuals available to contractors generally. It would appear that in actual practice in the

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plastering work on this project, such instructions, as well as the warnings contained in the telegram from the U.S. Gypsum Company, that small quantities of sand should be used in the brown coat and no sand at all should be used in the scratch coat in addition to vermiculite (because of the danger of excessive proportions of aggregates to the gypsum content) were largely ignored by the plastering subcontractor (and by B-K-M as well, in its position of responsibility to see to it that the work was properly executed and that prompt corrective measures were taken when deficiencies became obvious).

In this connection, it also appears that at the time of Mr. Quayle's visit in April 1952, the temperatures taken during the nights of April 25 and 26, indicated that the hospital building was not heated adequately for good ventilating and drying conditions. The temperatures ranged from 30 to 32 degrees, evidently because the heating equipment had been shut down for the night. In short, it was Mr. Quayle's opinion that the failure of the plaster was due to excessive water, excessive quantities of aggregate to cementaceous material (gypsum), lack of ventilation and heat, and careless installation of studs and metal lath (which overlapped in many cases).

It should be observed that the disputes here considered do not rest on any questions of acceptance of the work by the Government. The damage to the plaster occurred long before the time arrived for acceptance. Nor was it necessary for the Government to invoke the one-year guaranty provisions in paragraph 40 of the Standard General Conditions of the contract. The Government invoked the provisions of Article 10 of the contract in requiring appellant to repair the faulty plaster.¹¹

Mr. Quayle's testimony was buttressed and amplified by the opinion evidence (supported by scientific tests) of the expert witness who, in our opinion, was the most knowledgeable in the techniques of plastering.

The experts furnished by the Bureau of Standards were Dr. Wells (who was deceased prior to the hearing), Mr. Nolan Dickson Mitchell (now retired) and Mr. William Cullen. Mr. Mitchell testified at the hearing, and we are persuaded that his testimony was the most convincing of any evidence offered. Mr. Mitchell's qualifications in the field are impressive (Tr. 423). We quote at length from his testimony because, in attempting to paraphrase it, some of its clarity and value could be lost.

¹¹ "Article 10. Permits and responsibility for work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged." (Italics added.)

Beginning at page 425 of the transcript, with some omissions for interruptions, Mr. Mitchell testified as follows:

Q In your responsibility as an expert, on concrete building foundations, what did you find out?

A There was no evidence of any lack of proper foundation, or of good concrete work. There were a few slight shrinkage cracks that we observed there, but no more than is usual.

Q What did you observe with respect to the condition of the plaster?

A On the metal lath, the plaster, for the most—in most of the rooms and corridors was badly cracked in a random pattern known as map cracking.

On the concrete surfaces I observed no cracks except where the concrete was cracked, and there were very few of those. I recall observing only three cracks on the concrete.

* * * * *

Q All right. Was there any indication as to the cause of the cracking of the plaster?

A Yes, there were very evidently two reasons for the cracking of the plaster.

Q What probable causes were in evidence?

A Well, the way the plaster had deflected outward, adjacent to the cracks, and the way the surface of the plaster, and also at the corners of the outlet boxes, cracks had started at the corners of the boxes and also at the corner of the door frames, the metal door frames.

Q Did you find any corroborating evidence to substantiate your views?

A Yes, I found a number of things corroborating my views.

Q And what are they?

A Well, I made tests of the plaster and found that it was weak, and we took samples of the plaster from the walls and we found those to be curved also, as I had observed on the wall; I found evidence of the use of excessive water in the mix, where it was glazed on the keys of the plaster. In some instances they had been so wet that it ran down, more like a liquid.

Q Would you explain what you mean by plaster keys?

A Plaster keys are that part of the plaster which is pressed through the openings of the laths to hold the plaster in position on the base.

Q And you mentioned the glaze. Now what causes this glazing?

A The glaze is caused by excess water flowing out of the plaster and down the surface, bringing out the plaster,—that is, the gypsum cement,—plaster from among the aggregates, and it forms a sort of a glaze.

Q What is the effect of this excess water in the mix?

A It reduces the strength of the plaster from that which a normal amount of water would produce.

Q What other factors did you notice that tended to cause the shrinkage?

A Well, the drying out of the plaster from the vermiculite, the drying of the water from the vermiculite tends to shrink it, any mixture, and this is particularly true of vermiculite, which has a great amount of water over and above that required for sand in plaster.

Q Did you find any indication of slow-set factors?

A Well, I didn't get any myself there, but Dr. Wells had reported to me a lot of evidence of slow set, and evidence that retarders had been used in the plaster.

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Q Would that have any effect, and if so, how?

A Retarder reduces the strength.

Q What else did you determine as to the mix?

A Well, it wasn't evidence on the job, but in tests made subsequently on samples taken from the building we found the additives in the mix up to the limits permitted by the specifications, and some were beyond those limits.

Now as I mentioned before, the greater amount of water, the greater amount of shrinkage that could be expected.

Q Did you take samples from the partitions of the hospital?

A I marked them out, and in the presence of the contractor, cut them from the partitions.

* * * * *

Q Did you take them by yourself, or were there other people—

A Oh, yes. Dr. Wells was with me part of the time, and Mr. Cullen was with me at all times when I selected the area to be taken.

Q Who is Mr. Cullen?

A Mr. Cullen was the other man that accompanied Dr. Wells and myself. He was a member of the staff of the National Bureau of Standards.

Q On examination of these samples, what can you say concerning the composition of the plaster?

A I found that the plaster had aggregates composed of vermiculite and sand, and of course gypsum.

Q Did you make an analysis of the light finish plaster?

A Dr. Wells analyzed the finish, and I have a table prepared by Dr. Wells in a report,—for my report.

Q What does that table—

A That is Table 12.

Q That is your report?

A Yes, it is on page 32.

Q Table 2 of that report says characteristics of plaster. What does this table show?

A It shows the amount of water required for making up plaster mixes with the standard sand, and with Anchorage sand and with vermiculite and with the mixture of vermiculite and sand. It also shows what is known as the consistency of it, the time of set, and the tensile strength of briquets made from these mixtures.

Q Does your view indicate anything with respect to the effect of the addition of sand?

A Yes, the tensile strength of a vermiculite and sand plaster made up of 100 parts of gypsum cement, 17 parts of vermiculite to 45 of sand by weight, requires about one-eighth more water to give a normal consistency, and its tensile strength is lowered forty percent by the addition of the sand, over that of the mixture without sand.

The EXAMINER. Mr. Mitchell, does the reduction in tensile strength have anything to do with shrinkage?

The WITNESS. Not necessarily, but it does permit cracking at a much less degree of shrinkage that would otherwise occur.

The EXAMINER. Thank you.

Q (By Mr. BRABNER-SMITH.) I call your attention to Table Number 11, where you analyzed plaster. Will you explain this table?

A This table is the result of the analysis of base coat plasters from the samples taken from the various locations as indicated in the first column. The weights of the samples are given, the percentage of the insolubles, the magnetic content of the insolubles is given in column 5, the percentage of sand in the aggregate is given in column 6. Columns 7 and 8 show the volume of the two aggregates, vermiculite and sand, per hundred pounds of gypsum cement.

Q Can you explain the wide variations in the amount of aggregate per hundred pounds of gypsum plaster and sand?

A The only estimation I have is that it was either mixed that way, or segregated after being mixed so as to produce that. I can't imagine segregation producing any such wide variations as are shown in these columns. You will notice that two samples—or three samples, were taken of each and run through the test, so as to confirm the analysis as to the amount of sand.

Q This table 11, columns 7 and 8, I think those are the last two—

A The last two columns, the pair of columns on the right.

Q That also shows the total aggregate per hundred pounds. Does this indicate a possible proportion in terms of the contract?

A No.

Q Explain why.

A Well, some of these are beyond any reason. Here is one that has 4.48 cubic feet of aggregates to the hundred pounds of gypsum, whereas the limit specified for the brown coat plaster was only three and a half. Now, one, two, three,—there are four of the seven samples that would be beyond the amount of the top limit as given by the specifications.

Q I notice here that in one sample there is no sand; and in another there is .17, .22, .53, .68, .70. This is a wide variation, is it not?

A Yes. Yes, it is an extremely—

Q What does that indicate to you?

A That the mixture had been changed, or that somebody was careless in proportioning it.

Q Is there any evidence that increasing the amount of the proportion of water in vermiculite plaster mix increased the shrinkage?

A No, increasing the water decreases the strength, as shown by table 2.

Mr. Mitchell also stated in substance that the extent of the cracking he observed in the plaster was as bad as he had ever seen in a number of cases he had examined for failure of plaster.

Mr. Mitchell testified further concerning the white finish plaster coat, that, while the ingredients were of good quality, there were extreme variations in the mix, which would cause weakness in the plaster and cause cracking much earlier than with a uniform mix. Also, due to the long continued exposure of the finish coat to excess moisture, chemical changes had occurred, converting some of the gaging plaster to nesquehenite, a chemical having a higher water content, and also resulting in the creation of magnesium sulphate, all of which would tend to disrupt the white finish plaster.

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Considerable carbonation of the calcium content of the plaster was discovered by Mr. Mitchell, which in his opinion was caused by the carbon dioxide gas given off in normal combustion by the oil-fired heaters used temporarily by the appellant in the fall of 1951, under conditions of inadequate ventilation, before the permanent heating equipment was installed in the hospital. Such carbonation would also tend to shrink the plaster. Carbonation of plaster does not occur normally until several years after its application.

Summarizing Mr. Mitchell's testimony, the primary causes of the plaster failure and cracking were the weakness and shrinkage of the plaster. Underlying reasons for the weakness and shrinkage were the excessive amount of water used in the mix, the large proportion of aggregate to gypsum cement, the slowness of setting of the gypsum cement, and the condition of long continued moisture followed by drying (Tr. 441). The strains and stresses, which had been set up by shrinkage in the base scratch coat and brown coat, could not be relieved except by cracking which was aggravated by reduced tensile strength.

The Board finds that the failure of the plaster was caused by the acts of commission and omission on the part of the plastering subcontractor and of the appellant, as borne out by the weight of the evidence. Appellant has failed to sustain its burden of proof in support of its claims that the findings and decision of the contracting officer were in error.¹² Accordingly, those findings and decisions are affirmed in so far as they are the subjects of this appeal.

CONCLUSION

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member.*

I CONCUR:

HERBERT J. SLAUGHTER, *Deputy Chairman.*

APPEAL OF LAYNE TEXAS COMPANY

IBCA-362

Decided January 29, 1965

**Contracts: Construction and Operation: Changed Conditions—Contracts:
Disputes and Remedies: Equitable Adjustments**

The encountering of boulders and other forms of hard rock during the drilling of test holes and water supply wells under a contract which describes the materials to be drilled merely as clay, sand and gravel forma-

¹² *Allied Contractors, Inc.*, IBCA-322 (August 10, 1964), 1964 BCA par. 4379.

tions, located in alluvial and lake deposits along a mountain front, constitutes a changed condition to the extent that the percentages of rock and boulders encountered and the drilling problems created by their presence are outside the range of those which the contractor anticipated, and are also outside the range of those which, in the light of the information available at the time of bidding, were of sufficient probability of occurrence to be considered as normal for the work area.

BOARD OF CONTRACT APPEALS

This is a timely appeal from the contracting officer's denial of the Layne Texas Company's claim for an equitable adjustment of the contract price pursuant to the "Changed Conditions" clause (Clause 4) of a contract for drilling test holes and water supply wells on the Weber Basin Project of the Bureau of Reclamation.

The contractor—hereinafter referred to as the appellant—seeks an increase in the cost of performance in the amount of \$38,349.17, predicated on the theory that it encountered undisclosed and unanticipated quantities of subsurface boulders, in sizes as large as one foot in diameter, and other forms of hard rock while drilling the test holes and water supply wells. The sites of the work were between the Wasatch Mountain Range and Great Salt Lake in the vicinity of Ogden and Bountiful, Utah.

The contract was entered into on June 27, 1961. It was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953). These included the regular "Changed Conditions" clause (Clause 4)¹ for construction contracts. The contract price was \$152,605.15

The Board in its initial decision on this appeal² denied a motion to dismiss the appeal prior to an oral hearing made by Government Counsel on the ground that appellant had failed to timely comply with the notice requirements of the "Changed Conditions" clause. The

¹ The full text of the clause reads as follows :

"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."

² *Layne Texas Company*, IBCA-362 (January 30, 1964), 1964 BCA par. 4022, 6 Gov. Contr. par. 95(f).

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contracting officer found that "Government personnel were aware of the problems the contractor had encountered in performing work required under the contract but considered all the work within the scope of the specifications." His conclusion that timely notice was not given appears to have been based on the theory that the notice required by the "Changed Conditions" clause is notice of the making of a claim for additional compensation. This was erroneous, since the notice required by that clause, as distinguished from the notice required by the "Changes" clause (Clause 3), is merely notice of the existence of the physical conditions encountered.³ No evidence was presented at the hearing which would justify different determination than that reached in our initial decision. We find, therefore, that there was substantial compliance with the notice requirements of the "Changed Conditions" clause.

Paragraph 12 of the specifications of the contract as amended by Supplemental Notice No. 1 described the principal components of the work to be performed as follows:

- a. Drilling test holes at not less than six nor at more than nine potential water supply well sites.
- b. Electric logging all test holes.
- c. Securing samples of clay, sand, and gravel materials from each hole.
- d. Obtaining water samples from selected aquifers.
- e. Reaming out test holes at Weber Delta Alternate and No. 2 sites and installing 20-inch outside diameter casing.
- f. Developing and testing Weber Delta Alternate and No. 2 Wells.

Paragraph 31 of the specifications described the geologic conditions in the work area as follows:

31. *Geologic conditions*

The potential well sites are believed to be located in alluvial and lake deposits along the Wasatch Front. Available records of private, municipal, and Bureau of Reclamation wells in Weber and Davis Counties indicate that *drilling will probably be through clay, sand, and gravel formations.*

The data on these wells may be examined at the office of the Bureau of Reclamation in Ogden, Utah. The Government does not represent that these records show completely the existing conditions and does not guarantee the correctness of any information shown thereon relative to geological conditions or any interpretations thereof. Bidders and the contractor are responsible for any deductions and conclusions which they may make as to the nature of the materials in which the holes are to be drilled and of the difficulties of performing the work required under these specifications. (*Italics supplied.*)

An oral hearing took place before the writer of this decision on April 1 and 2, 1964, in Washington, D.C., at which time the testimony of witnesses and other evidence were proffered by appellant and the Government.

³ *Shepherd v. United States*, 125 Ct. Cl. 724, 729-33 (1953).

Factual Basis of the Claim

The Weber Basin Project—of which the subject contract was one phase—is basically an irrigation project of the Bureau of Reclamation, in which provision is also made for municipal and industrial water supplies. Test holes were drilled for the purpose of determining potential groundwater possibilities. If it appeared likely that water could be obtained, the holes were subsequently reamed out to a larger diameter and cased for development as production wells.⁴

Four months prior to award of this contract, appellant satisfactorily completed another contract which had been awarded to it by the Bureau of Reclamation. That contract called for the development of the first two production wells in the Weber Basin Project, which were designated as the Clearfield No. 1 and Riverdale Wells. They were situated 6 and 2 miles, respectively, south of Ogden, Utah. In all, approximately 50 test holes and wells had been drilled in the work area.⁵

During performance of the subject contract, appellant actually drilled seven test holes, all of which were driven with rotary drill equipment as distinguished from cable tools. The test holes were either $7\frac{7}{8}$ or $9\frac{7}{8}$ inches in diameter, and, with one exception, were driven to depths below ground surface ranging from 1,005 to 1,208 feet. They were designated as follows: Weber Delta Alternate, Weber Delta No. 2, Weber Delta No. 3, Bountiful No. 1, Bountiful No. 2, Well No. 24 (also known as Clearfield No. 2) and Well No. 34 (also known as Weber Delta No. 1).

As required by the terms of subparagraph 12e of the specifications, appellant reamed and cased two of the test holes in order to develop them as production wells. These holes were reamed out in stages until they were at least 24 inches in diameter, so as to accommodate casing 20 inches in diameter. The holes so developed were those designated as Well No. 24 and Well No. 34.⁶

Appellant anticipated, when submitting its bid, that not more than 20 percent of the material encountered would consist of boulders and other large material.⁷ Its bid was predicated on a site inspection; on the statements pertaining to geologic conditions set forth in para-

⁴ Tr. pp. 166-168, 209.

⁵ Gov. Ex. 1 attached to statement of the Government's position. App. Exs. 1, 2.

⁶ By Change Order No. 1, dated September 6, 1961, Weber Delta No. 2 was abandoned after the test hole had been driven to a depth of 287 feet. By the same order Well No. 24 and Well No. 34 were substituted for Weber Delta Alternate and Weber Delta No. 2 as the test holes to be reamed and cased for development as production wells. The order was agreed to by appellant.

⁷ Tr. p. 8.

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graph 31 of the specifications; on the experience obtained by it in drilling the Clearfield No. 1 and Riverdale Wells, in drilling other wells in the State of Utah, and in drilling wells in alluvial valleys elsewhere; and on its evaluation of drillers' logs in the Utah State Engineer's Office in Salt Lake City, where records of all test holes and wells drilled in the work area were maintained. Most of the sites covered by the instant contract were closer to the Wasatch Front, the source of the alluvial deposits, than the Clearfield No. 1 and Riverdale wells. Because of this, appellant expected that drilling conditions at these sites probably would be worse than at the Clearfield No. 1 and Riverdale wells,⁸ and, in figuring its bid, made an allowance of 30 percent on account of this difference.⁹

In the course of drilling the test holes and reaming and casing the wells appellant encountered substantial quantities of hard rock, mostly in the form of cobbles or boulders, that sometimes exceeded the width of the hole diameters. The presence of these materials in the unconsolidated and uncemented formations made it difficult to keep the holes straight,¹⁰ and damaged the drilling bit cutters by destroying their teeth,¹¹ and causing separation of the cones.¹² Contrary to appellant's anticipations, the cobbles and boulders tended to increase in size and percentage with the depth of the holes.¹³ Also contrary to its expectations, the deeper strata had not cemented or consolidated to a degree that would hold the rock material stable while being drilled.¹⁴

In attempting to measure the differences between the conditions that were, or should have been, anticipated and those that were actually present, the Board has given weight to a number of factors. Among them are the average rate of penetration achieved per each 8-hour drilling tour, the number of bits used in drilling, the thickness of the strata reported on the logs as containing rock or boulders, and the probable percentage of rock and boulders in the total depth penetrated. The conditions realized on the job have been compared with those revealed by the evidence as having been experienced on other comparable jobs. Thus, each of the factors mentioned above for each test hole or well driven under the subject contract has been compared with the corresponding factors for the Clearfield No. 1 and the Riverdale wells, after making allowance, to the same extent as appellant

⁸ Tr. p. 54.

⁹ Tr. pp. 103-4.

¹⁰ Tr. p. 111.

¹¹ Tr. p. 101.

¹² Tr. p. 70.

¹³ Tr. pp. 11, 87.

¹⁴ Tr. pp. 80, 82.

appears to have done, for the differences in distance from the Wasatch Front. Weight has also been given to appellant's half century of drilling experience, and to the fact that the Government's witnesses were unable to identify any pre-existing test hole or well in the work area at which the conditions appeared to have been as bad as those at some of the sites where drilling was performed under the instant contract.

Upon the basis of this evaluation, the Board finds that the physical conditions actually encountered by appellant at four of the seven sites covered by the subject contract fall within the range of physical conditions that, in the light of the information available at the time of bidding, were of sufficient probability of occurrence to be considered as normal for the work area. These four sites are Weber Delta No. 2, Weber Delta No. 3, Bountiful No. 1, and Well No. 24.¹⁵ The Board finds that at the remaining three sites the physical conditions encountered were materially worse than those which, judged in the same manner, could be considered as normal for the work area. These three sites are discussed below in greater detail.

Weber Delta Alternate Test Hole

This test hole proved to be exceptionally difficult to drill. The average rate of penetration was 19.4 feet per each 8-hour drilling tour and the number of bits used amounted to 43. The total depth of the hole was 1,208 feet, and strata containing rock or boulders are shown on the logs as occupying 694 feet of this depth.¹⁶ Because some of these large materials were embedded in formations containing other materials, the exact percentage of rock and boulders which appellant encountered while drilling the test hole cannot be precisely determined. The Board considers that about 35 percent of the depth of this hole consisted of rock and boulders.

Bountiful No. 2 Test Hole

Similar conditions were encountered in this test hole. The average rate of penetration was 28.7 feet per tour and 18 bits were used. The total depth was 1,005 feet, and strata containing rock or boulders are shown on the logs as occupying 739 feet.¹⁷ Here again, some of the rock and boulders were embedded in formations containing other materials. The Board considers that about 40 percent of the depth of this hole consisted of rock and boulders.

¹⁵ Appellant's geologist conceded that Well No. 24 involved no unanticipated conditions. Tr. p. 43.

¹⁶ App. Exs. 10, 18.

¹⁷ App. Exs. 10, 14.

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Well No. 34

Major difficulties were also experienced in connection with Well No. 34. The average rate of penetration achieved in drilling the test hole was 29.5 feet per tour and 17 bits were used. The reaming of the hole in order to accommodate the casing was also accomplished at low rates of penetration and with a high consumption of bits. Boulders projecting from the sides of the hole necessitated four reaming operations instead of the standard three. The total depth of the well was 1,005 feet, and strata containing rock and boulders are shown on the logs as occupying 740 feet.¹⁸ Taking into account the embedding of the larger materials, the Board considers that about 35 percent of the depth of this well consisted of rock and boulders.

Was There a Changed Condition?

The "Changed Conditions" clause applies to two categories of conditions. The first comprises "subsurface or latent conditions at the site differing materially from those indicated in this contract." Or in summary, "misrepresented conditions." The second comprises "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." In summary, "unexpected or unanticipated conditions." The terms are expressed in the alternative. Hence, a contractor is entitled to relief under Clause 4, if it succeeds in proving that it encountered a condition which falls within the scope of either category.

Appellant alleges that it encountered changed conditions within the meaning of both categories.

Misrepresented Conditions

One of the issues to which the parties have given much attention is whether paragraph 31 of the specifications, which described the geologic conditions in the work area, was a Government "misrepresentation" of subsurface materials likely to be encountered, particularly since it stated that the drilling would probably be through clay, sand and *gravel* formations, believed to be located in alluvial and lake deposits.

The expert testimony of a Government geologist—who had devoted three years to study of the area, and whose qualifications and demonstrated knowledge were impressive—was to the effect that, in geologic terminology, the term "gravel" is broad enough to comprehend cobbles,

¹⁸ App. Exs. 10, 20.

boulders and other large materials, when embedded in an alluvial formation along a mountain front. Numerous publications, treatises and documents in substantiation of this interpretation were proffered in evidence by the Government.¹⁹ Appellant's experts, on the other hand, placed a more restrictive connotation upon the term "gravel."

For the purposes of this appeal, it is unnecessary to resolve the technical issues of terminology thus presented. Appellant did not read paragraph 31 as meaning that no boulders at all would be encountered, but, instead, anticipated the presence of boulders in substantial quantities. Conversely, the Government does not argue that appellant should have expected that the formations might be composed solely of boulders, and, in view of the references to clay and sand in paragraph 31, could not have so argued successfully. It is thus obvious that the real question dividing the parties is: "What amount of boulders and other large materials should have been anticipated?" This is a question to which paragraph 31 does not purport to give an answer. There is nothing in that paragraph which says, either expressly or by necessary inference, that boulders and other large materials constitute 10 percent, 20 percent, 35 percent, 40 percent or any other given fraction of the formations to be drilled. The decisions under the "Changed Conditions" clause "are replete with warnings against reading into statements of physical conditions connotations or deductions as to which the statement itself is silent."²⁰ Since paragraph 31 did not purport to indicate what amount of large materials would be encountered, the Government did not "misrepresent" the geologic conditions of the work area, in so far as pertinent to this appeal, within the meaning of the first category of the "Changed Conditions" clause.

Unanticipated Conditions

Appellant admits that it encountered boulders in the drilling of the Clearfield No. 1 and Riverdale wells,²¹ but not in such number and intensity as were subsequently experienced in performance of the subject contract, as to which no major drilling problems had been foreseen by appellant. Its geologist testified also that the hard materials penetrated in these earlier wells were of smaller diameter than those encountered under the instant contract.²²

¹⁹ Gov. Exs. B-1 to B-12, inclusive.

²⁰ *Erhardt Dahl Andersen*, IBCA-223 (July 17, 1961), 68 I.D. 201, 217, 61-1 BCA par. 3082, 3 Gov. Contr. par. 505.

²¹ Tr. pp. 8, 72.

²² Tr. p. 66.

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One of the purposes of the "Changed Conditions" clause is to induce bidders not to presuppose that they will encounter the worst possible conditions—a presupposition which would be costly to the Government by increasing the contingency allowances included in the prices bid.²³ In keeping with that purpose, the standard that must be applied in determining whether a changed condition of the second category exists is the standard of normal conditions.²⁴ That standard has been followed by the Board in comparing, as previously explained, the conditions encountered on the instant job with those experienced on the Clearfield No. 1 and Riverdale job, as well as with those revealed by the logs of other test holes and wells driven prior to the making of the subject contract.

The Board is satisfied that the percentage of rock and boulders encountered and the drilling problems created by the presence of these objects materially exceeded, not merely the quantities and difficulties appellant expected, but also the quantities and difficulties that should reasonably have been expected under normal conditions, in the case of three of the sites, namely, the Weber Delta Alternate, Bountiful No. 2, and Well No. 34 sites. What appellant encountered at them can be fairly characterized as unknown, as unusual, and as differing materially from the physical conditions ordinarily encountered and generally recognized as inhering in drilling work in the area involved. We hold, therefore, that a changed condition of the second category, within the meaning of Clause 4 of the contract, was present at these three sites.

The physical conditions encountered at the other four sites, namely, Weber Delta No. 2, Weber Delta No. 3, Bountiful No. 1 and Well No. 24, were as the Board has found, within the range of normal conditions. We hold that no changed condition, within the meaning of Clause 4, was present at those locations.

Since the conditions at these four sites were within the range of normal conditions, the amount by which the actual and reasonable costs of the work accomplished at them is exceeded by the actual and reasonable costs of the comparable work accomplished at the Weber Basin Alternate, Bountiful No. 2, and Well No. 34 sites may properly be taken as the basic measure of the amount of the equitable adjustment to be allowed with respect to the changed conditions encountered at the three latter sites. In making this comparison account should be taken of the differences in the nature and amount of the work

²³ *Ruff v. United States*, 96 Ct. Cl. 148, 164 (1942).

²⁴ *Erhardt Dahl Andersen*, *supra* note 20, 68 I.D. at 215-16; *Urban Construction Corporation*, ASBCA No. 8742 (January 31, 1964), 1964 BCA par. 4082.

required by the contract at each site, such as, for example, the fact that some holes did not have to be reamed and cased, and the fact that some holes were drilled to lesser depths than others. Appropriate allowances for overhead and profit should, of course, be included in the equitable adjustment.

Remand

The parties have stipulated that the Board is to decide at this time solely the issue of whether appellant is entitled to an equitable adjustment of the contract price under the "Changed Conditions" clause, and that if the Board should decide this issue in favor of appellant and if the parties should fail to agree upon the amount of the equitable adjustment, any further testimony needed to resolve the issue of amount may be taken by deposition.

The Board, accordingly, remands the dispute to the contracting officer for ascertainment and establishment of the amount to be allowed as an equitable adjustment on account of the Weber Delta Alternate, Bountiful No. 2, and Well No. 34 sites. If the contracting officer and appellant are unable to agree upon the amount of the equitable adjustment to be made, the contracting officer should determine the amount and issue findings of fact showing the basis for his determination. If appellant is dissatisfied with the contracting officer's determination it may, within 30 days from the receipt thereof, take an appeal to the Board under the "Disputes" clause of the contract. If such a second appeal is taken it will be decided on the present record, supplemented by such further evidence as either party may present in deposition form pursuant to the stipulation.

Conclusion

The appeal is sustained to the extent indicated above with respect to the Weber Delta Alternate and Bountiful No. 2 test holes, and as to Well No. 34. The appeal is denied with respect to the Weber Delta No. 2, Weber Delta No. 3, and Bountiful No. 1 test holes, and as to Well No. 24. The dispute is remanded to the contracting officer for further proceedings consistent with the findings made and conclusions reached in this decision.

JOHN J. HYNES, *Member*.

WE CONCUR:

HERBERT J. SLAUGHTER, *Deputy Chairman*.

THOMAS M. DURSTON, *Member*.

APPEAL OF CHARLES T. PARKER CONSTRUCTION CO.

IBCA-328

Decided February 4, 1965

Contracts: Construction and Operation: Actions of Parties—Contracts: Performance or Default: Acceptance of Performance—Contracts: Disputes and Remedies: Burden of Proof

Where a contract contains the clause entitled "Permits and Responsibility for Work, Etc.," of Standard Form 23A (March 1953), the contractor is responsible for damages to all materials furnished and work performed and for replacement or repair thereof at his own expense, until completion and final acceptance, unless it is established by a preponderance of the evidence that such damages are due solely to wrongful acts or omissions of the Government.

Contracts: Construction and Operation: Actions of Parties—Contracts: Performance or Default: Inspection—Contracts: Performance or Default: Breach

Under a contract which provides that backfilling work shall be performed in a prescribed manner and then only in the presence of a Government inspector, after timely advance notice to the Government of the starting of such work, instructions issued by the Government inspector, to a contractor's employee who was performing improper backfilling in violation of the contract provisions, that such improper backfilling be stopped, and that backfilling be performed only in the presence of an inspector, do not constitute interference by the Government with the contract work and do not create any liability on the part of the Government for damage to transmission line towers occurring during a windstorm a few days after the issuance of such instructions.

BOARD OF CONTRACT APPEALS

The contractor-appellant has appealed timely from Findings of Fact and Decision of the contracting officer dated April 13, 1962. The dispute arises from the denial of the contractor's claim of \$33,846.79 for repair and re-erection of steel towers for an electric power transmission line. Five of the towers were blown down in a windstorm on October 23, 1960. At the time of the storm these five towers had not been completely backfilled. Five other towers that lacked completed backfill remained standing. The appellant alleges that the towers were blown down as a result of Government instructions to appellant to stop its practice of partially backfilling the tower footings in the absence of a Government inspector, and as a result of the failure of the Government to have an inspector usually available for supervising regular backfilling. Also, it is alleged that the towers were not sufficiently stable, because of a new design that involved smaller footings and a narrower spread of the tower legs.

The Government contends that the appellant's method of intermediate backfilling was in violation of the contract specifications and

was not adequate for stabilizing the towers; that Government inspection services were available for observing the backfill operations as required by the specifications; that the blow-down was caused by the contractor's delay in completion of backfilling; and that the new design was not to blame for the overturning of the towers.

The contract, dated June 15, 1960, was in the estimated amount of \$545,065, and included Standard Form 23A (March 1953). It provided for the construction of Schedule III of the Big Eddy-McLaughlin section of the Big Eddy-Keeler 345 KV Line No. 1, Schedule III being an electric power transmission line 22.3 miles long. The scope of the work included the placing of footings, assembly and erection of steel towers, and stringing of heavy conductor cable known as ACSR "Chukar" conductor. The claim considered here arose prior to the stringing of conductor. The contract was completed on time, including the repair of the towers.

Backfill requirements pertinent to the claim appear in Paragraphs 7-208-A, 7-208-C, 7-208-H, and 7-208-J of the specifications, which read, respectively, as follows:

7-208. **BACKFILL.** A. Backfilling shall be performed only in the presence of the contracting officer.

C. Backfill shall be clean and free from frozen earth, snow, ice, refuse, timber, vegetation or other foreign matter.

H. When backfilling pressed plate footings, the first operation shall be the complete covering of the plate to a depth of one foot with fine material which shall be hand-tamped during placement. When backfilling grillage footings, the first operation shall be the complete covering of the grillage to a depth of one foot with fine material which shall be hand-tamped around and under the flanges of all grillage members during placement. Backfilling shall progress in horizontal layers. Each layer shall be compacted and all voids filled with fine material which shall be compacted. Sharp rocks shall not be placed directly against footing and tower steel. During backfill operations, the position of the footing shall not be disturbed by undue pressure in any one direction. *Bulldozing backfill material against tower legs and diagonal braces will not be permitted.* (Italic added.)

J. The contractor may for his convenience postpone the completion of backfill of certain footings until just prior to stringing; provided the partial backfill is brought to a level such that, in the opinion of the contracting officer, the safety of the footing and tower is assured. As a rule, this level is the point of connection of the diagonal member of the footing stub angle.

There seems to be little or no dispute concerning what was done during the early stages of constructing footings and placing the initial backfill, or concerning tower assembly and erection. Where excavation in rock was required for footings, concrete was used to anchor the steel "footing stub angles," to which the tower legs were later attached.

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Where there was a sufficient depth of soil, a new type of square pressed-steel base plate was used for each tower leg foundation, each plate being about 48 inches square and $\frac{3}{8}$ of an inch thick. The steel stub angle was bolted to the center of each plate (Tr. 18). The previous type of base plate or pad, with which the appellant had been familiar, was known as a "grillage" footing, consisting of an assembly of 4 or 5 steel beams bolted together in the form of a rectangle, with cross pieces. This formed a heavy base with space between the several members where dirt could be placed, which, according to appellant, tended to reduce the extent of lateral movement (Tr. 22).

The excavation for the footings were 3 or 4 feet deeper for the steel plate than for the grillage type of footing, apparently in compensation for the lighter weight and smaller area of the new type of base plate, as well as for the narrower spread of the tower legs. The total depth of footings for a standard tower of the new design was about 10 feet.

The steel footing plates were installed by a footing crew which then backfilled the footings by hand shovels with about 1 foot of comparatively fine earth, tamping this backfill by hand. The 1 foot quantity was the minimum quantity of initial backfill required by Paragraph 7-208-H. The next step in the operation was the clearing and leveling of a landing strip for the tower erection crane. It was performed by a bulldozer or "Cat" having a steel blade about 11 feet wide and 4 feet in height (Tr. 36, 37). In the course of preparing the landing strip, Mr. Dell Sager, the contractor's Cat operator, in accordance with instructions of his foreman, Mr. Thomas H. Beltz, pushed an indeterminate amount of soil into many of the footing excavations. In some instances it was not feasible to bulldoze the dirt into all footings for each tower, because of the steep terrain. Next in the sequence of operations was the assembly and erection of the towers, painting of the tower legs, and completion of backfill.

The appellant considered that the intermediate step of pushing dirt into the footing excavations did not constitute a backfill operation. However, the Board concludes that it could not be considered otherwise, since there is no indication that appellant intended to remove this dirt and replace it with material handled in strict conformity with the pertinent requirements of the specifications.

This intermediate backfill operation, as performed by appellant, violated the specifications in several particulars. Neither the contracting officer nor any representative of his was present and, hence, there was no compliance with Paragraph 7-208-A, even when account is also taken of the statement in Section 2-105 of the Supplementary General Provisions of the contract that the contracting officer's inspec-

tion responsibilities will be performed by his construction and inspection officials. Moreover, the operator of the "Cat" did not have an unobstructed view of the material which he was pushing into the footing excavations, because of the large blade on the front of the machine. For this reason, as well as the fact that there was no other contractor employee or Government inspector present to assist or guide him, a certain amount of debris was occasionally pushed into the holes along with the earth material, contrary to Paragraph 7-208-C. Nor does there appear to have been any attempt to fill the voids with fine material and to compact each layer, as required by Paragraph 7-208-H.

This unofficial backfill operation was stopped by the Government's backfill inspector, Mr. Hugh E. Ross, on October 18, 1960, when he observed Mr. Sager leveling off a landing at the tower site numbered "fifty over three" (50/3), and noticed two bolt boxes and a four-foot tree root in the footing excavation. Mr. Ross advised Mr. Sager not to do any more backfilling without a helper or in the absence of an inspector.

At the time of Mr. Ross' instructions the regular backfill crew was about 15 towers behind the tower erection crew. On several occasions Government officials had expressed their concern to the contractor's supervisory personnel as to the necessity for more prompt completion of backfill. The first occasion was about two weeks after the contractor had commenced the construction of footings, in July 1960, when Mr. Robert E. Bramley, a Government construction inspector, had a conversation with Mr. Pat Doyle (James P. Doyle), the contractor's supervisor in charge of the contract work. Mr. Bramley testified (Tr. 77, 78) that Mr. Doyle's response to his inquiry (about the interval or lag between the initial one-foot backfill and the completion of the backfill operation) was to the effect that the contractor would not place any substantial amounts of backfill in the footing excavations prior to erection of the towers because such backfill would cause difficulty in adjusting the positions of the stub angles precisely enough to permit fastening them to the first leg extensions for the towers. Later, however, the contractor complained that with only one foot of backfill over the base plates, the latter had a tendency to move too much when the tower sections were being bolted to the stub angles. That tendency does not seem to have been a major difficulty. Some movement was necessary for proper adjustment, according to Mr. Doyle.

The Board finds no fault with the procedure outlined by Mr. Doyle. Paragraphs 7-208-H and 7-208-J of the contract specifications do not require the placement of more than one foot of backfill prior to erection of the towers. In fact, the latter paragraph expressly provides that

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complete backfill of certain footings may be postponed for the contractor's convenience until just prior to stringing.

There was no logical reason for placing heavy quantities of backfill at the time of placing the first one-foot layer, for the sole purpose of completely immobilizing the footings and the footing stub angles, prior to commencement of tower erection. However, if any intermediate backfilling was to be done, that stage would have been a more suitable occasion than was the landing Cat operation.

The real difficulty is that the contractor permitted delay (after tower erection)¹ on the part of its subcontractor's backfill crew, to the point where complete backfilling was about 15 towers behind schedule. In effect, the contractor thus took advantage of the permissive or convenience provisions of Paragraph 7-108-J with respect to postponement of backfilling, but failed to comply with the conditions precedent to such delay. It neither followed the opinion of the contracting officer's representative as to the level of partial backfill that would assure the safety of the footing and tower, nor brought the partial backfill up to the level of the point of connection of the diagonal number to the footing stub angle. Generally speaking, this point of connection was about 7 feet above the footing base plate and about 2 feet, 9 inches, below the normal ground surface.

The Government had anticipated the possibility of delay in backfilling and called it to the attention of the contractor about September 20 or 22, 1960, with stress on the advantage to the contractor of receiving more prompt partial payments. Such payments would not be forthcoming except as backfilling was completed for each tower, as provided by Paragraph 7-108-K. The testimony of Mr. Warren W. Ausland, the Government project engineer (confirmed by his assistant for inspection, Mr. Harold B. Johnston), concerning their conversation with Mr. Shirran, the contractor's representative stationed at the project site (Tr. 145-146), shows that Mr. Ausland had been particularly concerned because of the narrow spread of the towers, and feared that the contractor might hold up the backfill operation until the tower legs had been painted. Usually about two days would be needed for painting the tower legs, including drying of the two coats of paint. However, the paint line, below which the specifications did not require painting, was only 2 feet, 6 inches, below the normal ground surface, or, in other words, just above the point of connection of the diagonal number to the footing stub angle.

¹ Mr. Charles T. Parker, President of appellant, a graduate engineer with many years of experience in construction work (including 30 years in power line construction), testified that he was concerned about the backfill delay because of the danger of injury to farm livestock which might fall into the excavations. He also expressed the opinion that the necessity for deeper footings made the new design more expensive than the old type of tower.

The tower erection had commenced only a few days before Mr. Ausland's discussion with Mr. Shirran, and the first four towers were being backfilled or had been completely backfilled. Mr. Ausland testified that in order to ensure that no delay would be caused by painting, he asked Mr. Shirran to partially backfill each tower, as soon as it was erected, to a point just below the bottom of the paint line; advising Mr. Shirran that such partial backfill would be acceptable, until the backfill could be completed to the ground surface.

Mr. Ausland said he tried to make his request more emphatic by saying to Mr. Shirran:

I don't want to see the sun go down on a dam tower that's not backfilled that day.

The record does not indicate the nature of Mr. Shirran's reply to Mr. Ausland's request. In any event, Mr. Ausland's testimony has not been contradicted. Moreover, there is no evidence that either Mr. Shirran or any other official of appellant made any protest against the procedure requested by Mr. Ausland.² This procedure was consonant with Paragraph 7-208-J, but nevertheless, appellant did not follow it. On the contrary, appellant's normal construction procedure included only two steps for backfilling—the first step being the one-foot backfill over the footings and the second and last step being the completion of backfill after erection of the towers and painting of the tower legs. The only intermediate step taken by appellant in the backfill operation was the unauthorized bulldozing of dirt into some of the footing excavations, incident to the construction of landing strips.

As explained at the hearing and in appellant's post-hearing brief, the purpose of that unauthorized operation was to prevent undue movement of the footings during erection of the towers. It was clearly not sufficient for the purpose of complying with the prerequisite conditions for delay in completion of backfill, either as expressed in Paragraph 7-208-J or as implemented by Mr. Ausland, acting as the contracting officer's representative, in his conversation with Mr. Shirran. Such compliance would have resulted in additional expense to appellant.

As the work of erecting the towers progressed, the backfill completion portion fell steadily behind. According to the testimony of Mr. Ross (Tr. 172-173) all of the backfill operations prior to the blow-down were performed by a subcontractor, the Hoodland Distributing Company. Mr. Ross stated that he was always available for inspection of backfilling work, but that usually he would have to go looking for the backfill crew because of the lack of information (required by the

² Mr. Shirran was no longer employed by appellant at the time of the hearing, and did not appear as a witness.

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contract) as to whether any backfilling was being performed.³ Mr. Ross ascribed the backfill delay to Hoodland's inexperienced help, occasional absence from the project on other contracts, and the poor mechanical condition of one of the bulldozers (or Cats) used by that concern. That condition included deficiencies such as wornout clutches, defective friction control of the dozer blade, and brakes which would not hold up the blade. It was necessary to make frequent repairs to that machine (Tr. 174, 182).

In the first part of the week just prior to the storm, Mr. Ross testified that he spoke to Mr. Shirran about the delay and suggested the use of a different Cat or use of one of appellant's Cats. However, Mr. Shirran indicated that he would not take over the subcontractor's work. Again, on Friday of the same week, Mr. Ross suggested the use of the large landing Cat for backfill operations over the weekend, but Mr. Shirran ignored him. Nevertheless, on the same day, arrangements were made between Mr. Shirran and Mr. Johnston for working overtime Saturday and Sunday, October 22 and 23, 1960. Very little work was accomplished on Saturday, according to Mr. Ross, because the Cat broke down in the morning. No work at all was performed on Sunday, October 23, 1960, when the storm occurred. On that day there were 10 erected towers without complete backfill, of which 5 were blown down. Another tower was damaged but did not fall.

For some time prior to the storm, the work was proceeding in a westerly direction. Government's Exhibit No. 1 is a diagram which shows the approximate elevations of the tower sites and of the ground contours between the towers, in the area of the blow-down. In this area, the power line crosses a series of steep ridges, and the towers are, for the most part, necessarily located on the peaks of the ridges, where they are exposed to the full force of the wind. However, the towers which fell did not form a predictable pattern with respect to such exposure. Of the towers which are situated on peaks, 3 were blown over while several others remained standing.

One of the towers which remained upright was the 50/3 tower, where Mr. Ross had ordered the landing Cat operator, Mr. Sager, to discontinue the practice of pushing dirt into the footing excavations during construction of landing strips. This tower was on a side-hill, not as exposed as the towers on peaks. Only one tower to the west, 50/4 (adjacent to 50/3) was blown down. All of the 4 other blown-down towers were east of 50/3, and landing strips had been completed as to all such towers. According to the testimony of Mr. Vernon E. Taylor (Tr. 88, 89), Chief of the Branch of Construction for Bonne-

³ Paragraph 2-105-C provides that: "The contractor, his superintendent, or other authorized representative shall give notice of each work crew assignment sufficiently in advance so that suitable inspection can be provided."

ville Power Administration, who visited the site on October 24, 1960, the towers which were down had only the minimum one foot of backfill. Three towers which did not fall over each had about 4 feet of earth only in the 2 foot excavations on the upper side of the tower foundation. Apparently, the 4 feet of earth had been pushed into the holes by the landing Cat; but as to the 4 blown-down towers where landings had been constructed, no additional fill had been placed, perhaps because of inaccessibility.

After the storm, the appellant complied throughout the remainder of the contract with the Government's instructions to bring up the level of the backfill to the contract requirements, promptly after erection of each tower.

It is well established that under Clause 11 of Standard Form 23A, entitled "Permits and Responsibility for Work," the contractor is responsible for repairing at his own expense any part of the contract work which has been damaged before completion and final acceptance, even where the damage was caused by the forces of nature without the fault of either party.⁴ The pertinent sentence of Clause 11 is as follows:

He [the contractor] shall also be responsible for all materials delivered and work performed until completion and final acceptance, except for any completed unit thereof which theretofore may have been finally accepted.

Paragraph 2-108-C of the Supplementary General Provisions is even more explicit:

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

Under these provisions, and the applicable decisions, appellant could succeed in this appeal only if it could establish by a preponderance of the evidence that the damage was due solely to some fault on the part of the Government, without any intervening cause. This, appellant has not done.

Appellant claims, to be sure, that the failure of the towers to withstand the storm was due to the alleged interference by the Government inspector, Mr. Ross, who stopped the practice of pushing dirt into the footing excavations during the construction of landing strips. The evidence shows, however, that this practice was being conducted

⁴ *Charles T. Parker Construction Company*, IBCA-335 (January 29, 1964), 71 I.D. 6, 1964 BCA par. 4017, 6 Gov. Contr. 128; *Montgomery-Maeri Company and Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 279, 1963 BCA par. 3819, 5 Gov. Contr. 419; *Barnard-Curtiss Company*, IBCA-82 (August 9, 1957), 57-2 BCA par. 1373. *Of Boespflug-Kiewit-Morrison*, IBCA-320 (January 21, 1965), 72 I.D. 26.

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in a manner that was clearly in violation of the contract provisions for backfilling and advance notice thereof, and that it would also fail to satisfy the conditions permitting delay in backfilling after tower erection, as pointed out earlier. Under such circumstances the instructions issued by Mr. Ross to comply with the specifications cannot be viewed as an unauthorized interference with appellant's performance, nor could they constitute a change in the specifications.

Appellant's assertion of improper design of the towers likewise is not substantiated by the evidence. The more narrow structure and the smaller footings were fully compensated by the deeper footing excavations, as shown by the testimony of Mr. Milton W. Belsher, the head of the Research and Development Unit, Transmission Design Section. Mr. Belsher stated that the towers as designed had a safety factor of 175% when properly backfilled (Tr. 119, 120). In fact, appellant seems to have retracted its original claim that the design was inherently inadequate. As established in appellant's opening statement and during the testimony (Tr. 7, 24) the theory of appellant's argument is that the new design made the towers and footings less stable than towers and footings of an earlier design, with which appellant had had experience. This factor, it is alleged, made necessary a change in appellant's normal construction methods, because the footings moved too much during the first stage of bolting the tower legs to the footing stub angle. In order to prevent such movement, appellant adopted the method often referred to above (in violation of the specifications) of pushing some earth into the footing excavations during the leveling of the landing strip. However, as pointed out earlier, the discontinuance of that method, following Mr. Ross' instructions concerning tower 50/3, has not been established as the cause of the blow-down, since 4 of the 5 towers blown over had landing strips levelled prior to such discontinuance, without the improper backfill.

Even if the novelty of the design of the towers and footings required a change in the contractor's methods, the contractor would not be entitled to additional payment for the adoption of the needed changes in its methods, notwithstanding that these measures might be more costly than the contractor's customary procedures. To paraphrase our holding in *Montgomery-Macri Company and Western Line Construction Company, Inc.*,⁵ the contractor, by engaging to construct towers of a new design, assumed the responsibility to ascertain whether its prevailing methods of backfilling would be sufficient, and, if not, to find and adopt methods that would assure the safety of the towers.

⁵ IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 290-91, 1963 BCA par. 3819, 5 Gov. Contr. 419.

Delay in completing the backfill could have been made an inconsequential aspect of the contract performance if the admonitions of Government personnel had been heeded with respect to placing partial backfill to a point just below the paint line immediately upon erection of each tower. This requirement was in accordance with the essence of the contract specification in Paragraph 7-208-J, permitting delay in completion of backfilling only if partial backfilling should first be performed to the satisfaction of the contracting officer.

Appellant has failed to sustain its burden of proof by a preponderance of the evidence, in support of its allegations that the blow-down of the towers was due to the fault of the Government.⁶ Accordingly, the findings and decision of the contracting officer are affirmed.

Conclusion

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member.*

I CONCUR:

I CONCUR:

JOHN J. HYNES, *Member.*

HERBERT J. SLAUGHTER, *Deputy Chairman.*

ESTATE OF CHARLOTTE DAVIS KANINE

IA-828 (SUPP.) *Decided February 15, 1965*

Indian Lands: Descent and Distribution: Wills—Indians: Probate

Proof of testamentary capacity by witnesses to an Indian testatrix's will and by others closely associated with her remained unaffected by allegations that testatrix was ill, infirm, and mentally incompetent, that she could not use the English language, had no business capacity, and that she failed to show comprehension of her property interests and the objects of her bounty.

Indian Lands: Descent and Distribution: Wills—Indians: Probate

The fact that there may have been an opportunity to exert undue influence on an Indian testatrix is insufficient to establish the invalidity of a will where convincing proof has not been furnished that such undue influence was actually exerted or that testatrix's free agency in the testamentary act was influenced improperly.

APPEAL FROM AN EXAMINER OF INHERITANCE

Through their counsel, Howard Davis and the other appellants, claiming as heirs of Charlotte Davis Kanine, deceased Nez Perce allot-

⁶ *Boespflug-Kieubit-Morrison*, *supra* note 4; *Allied Contractors, Inc.*, IBCA-322 (August 10, 1964), 1964 BCA par. 4379.

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tee No. 434, of the Northern Idaho Agency, Lapwai, Idaho, have filed written arguments in support of an appeal from action by an Examiner of Inheritance, dated September 7, 1961, reaffirming an original decision by another Examiner, dated January 5, 1956, under which a will executed by the decedent was approved. In the original Examiner's decision appellants are named as decedent's nephew and nieces, and they were included among decedent's heirs at law, had she died intestate. Specifically, and in their brief filed on appeal, the appellants ask that (1) the Examiner's "Order reaffirming Original Finding," dated September 7, 1961, be reversed, (2) that the instrument of August 10, 1954, which was approved as the decedent's will, be declared invalid on the grounds that at the time of the making, drawing and execution of said will the decedent lacked testamentary capacity, that she was acting under the undue influence of others and not exercising her own free will, and (3) that the Examiner be directed to enter an order disapproving said will, or, in the alternative (4), that the Order Denying Petition for Rehearing, dated December 22, 1961, be reversed, and the cause remanded for a full and complete rehearing.

The will of August 10, 1954 has been the subject of a number of hearings conducted at various times by two Examiners of Inheritance. In an original decision, dated January 5, 1956, former Examiner A. F. Joy approved the will of August 10, 1954. From that action, as well as from that Examiner's denial of a petition for rehearing, presented by the appellants, a notice of appeal was filed under the applicable probate regulations.¹ That appeal was the subject of a decision by the then Deputy Solicitor of this office, dated January 8, 1959, on the basis of which the matter was remanded for further proceedings. Among other things, the Deputy Solicitor determined that because of discrepancies in the record, as well as the manner in which the original hearing was conducted, it was advisable to seek a full and complete rehearing on the proof of the will, allowing all parties an opportunity to present evidence and to cross-examine witnesses.

After notice to all of the interested parties, the further hearing was held on October 4 and 5, 1960.² At the conclusion of that hearing, copies of the testimony were furnished counsel, and an opportunity afforded them for the filing of briefs. Answers to interrogatories were

¹ 25 CFR 15.19.

² Unless otherwise indicated, whenever reference is made to portions of testimony, such reference will be to the 1960 rehearing. At this rehearing both the proponent and contestants of the decedent's will, through counsel, presented their respective sides of the controversy over the will. The proceeding consumed, in time, two days, and many witnesses testified. Some objection was made to the use by the Examiner of Caleb Whitman as an interpreter at the 1960 hearing, the claim being made that he had served as an agent for Bessie Williams, a beneficiary under the will. However, no prejudice is seen since it is noted that permission was granted the contestants to utilize the services of their own interpreter, Allen Slickpoo, who "listened" for contestants' counsel.

filed on behalf of contestants, to which objections were made by proponent's counsel, primarily on the ground of lack of opportunity for cross-examination. The Examiner's decision of September 7, 1961, reaffirmed the earlier approval of decedent's will. On December 22, 1961, the Examiner denied a petition for rehearing. On the basis of this latter action, the present appeal resulted, seeking review on the basis of the specifications of error listed above.

The decedent, Charlotte Davis Kanine, died on June 22, 1955, at the age of 80, leaving a trust or restricted estate appraised at the time of the original decision at \$73,750.09. Decedent was unmarried at the time of her death, leaving no issue, but survived by a half-brother, Wilson Davis, and the appellants, Howard Davis, Clara Davis Padilla, Helen Davis Alfrey, and Mary Davis Hayes. By her will of August 10, 1954, decedent devised a large portion of her estate to Bessie Williams,³ a Nez Perce Indian, with whom decedent made her home from August 1, 1953 to the date of her death. While this beneficiary claimed she was distantly related to the decedent, she could not trace such a relationship. The remainder of the estate was devised by decedent equally to Wilson Davis and the above appellants, excepting Mary Davis Hayes, who was not mentioned in the will. The attesting witnesses named in the will are Dr. Edward G. Hoffman, Oliver Frank, and James McConville. The scrivener of the will, Mr. Henry Felton, as well as Dr. Hoffman and Oliver Frank, testified at the hearing held on the will. The other attesting witness, James McConville, did not appear. He was in prison. Efforts to obtain his views through interrogatories submitted to him by counsel for contestants were unsuccessful since McConville refused to answer those interrogatories. He is reported to have died in prison some time after the 1960 hearing.⁴

I

The Point of Testamentary Capacity

The appellants have referred to various circumstances which they regard as a basis for their position that decedent lacked testamentary capacity when she executed the will of August 10, 1954. The point is made by appellants that decedent did not have, at the time of the making of her will, that testamentary capacity which the Idaho law requires. While this Department may, on occasion, adopt or utilize a rule which may closely parallel a State rule in the matter of wills, it is clear that State laws or rules are not binding upon this Department

³ Appellants' counsel has estimated that this devise represents approximately 60% of the decedent's estate, which appears to be substantially correct.

⁴ There is a narrative by James McConville of the circumstances relating to the will, found in his affidavit of March 6, 1956, produced by contestants' counsel.

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in the consideration of the wills of Indians devising their trust or restricted property.⁵

No serious objection is seen to the manner in which the formalities attending the execution of the will of August 10, 1954 were performed. While mention is made of the fact that such an instrument was not prepared and executed at the local agency office, which apparently is located within a short distance from where the decedent lived, but was prepared at a lawyer's office in Lewiston, Idaho, that circumstance itself is not significant.⁶ The probate regulations require the attesting of the will by two persons,⁷ but three were obtained in the present instance. While only two of the attesting witnesses testified at the hearing, we believe that their testimony and that of the scrivener of the will support a finding of the proper execution of the will.

Reference was made to a devise in the will of an interest in the allotment of decedent's grandmother. Appellants contend this should have been described as the allotment of an aunt. And also when referring to her relatives, decedent failed to mention the name of a niece, Mary Davis Hayes. But it is not surprising that the decedent, like many others who have reached her age, or perhaps when even younger, may have experienced those progressions of nature such as failing memory, forgetfulness, or absentmindedness. It is a common thing for dissatisfied relatives to be able to produce some evidence of failure of memory on the part of an ancestor. But a perfect memory is not an essential element of testamentary capacity. What is required is that a testator be of a mind that is able to remember the necessary facts, not that he remember them all. Thus, only a will prepared at the agency office probably could have achieved that complete degree of accuracy suggested by the appellants, since only at that office would there have been maintained a full description of decedent's restricted property interests and the sources from which they came. Notwithstanding the apparent mistake as to the identity of the ancestor from whom certain property came to the decedent, there seems to have been no difficulty in determining the devise intended, perhaps because of the apparent accuracy of the remainder of the decedent's description of the devise as being an allotment "now being farmed by Gordon Elliot."

Moreover, we do not regard the failure of decedent to name a niece, Mary Davis Hayes, as one of her relatives, or as a specific beneficiary, as being crucial on the point of whether decedent knew the objects of

⁵ *Blanset v. Cardin*, 256 U.S. 319, 326 (1921); *Homovich v. Chapman*, 191 F. 2d 761, 764 (D.C. Cir. 1951).

⁶ 25 CFR 15.28(b) obviously contemplates that there are instances other than those where wills are "executed and filed with the superintendent during the lifetime of the testator," since it is only with respect to the latter type that submissions for approval as to form are required.

⁷ 25 CFR 15.28(a).

her bounty. The possibility always exists that decedent may have had a reason for not naming Mary Davis Hayes in her will. Thus, in the testimony of the scrivener of the will (Felton, page 2) there are included the following question and answer regarding the will:

Q. Did Charlotte Davis make any comment after it was explained to her?

A. There was some comment in reference to a person claiming to be her niece whom she didn't include in the will, I think the name was Mary.

But aside from this, the decedent may have just forgotten Mary Davis Hayes, since it appears the latter did not live in the same community as the other relatives listed in the will. Then too, the parties concerned apparently had not been in close family relationship, and had not seen each other for a period of time.⁸ In any event, we cannot favor any possible suggestion that a testator, when remarking about his relatives in his will, do so correctly and without mistake, on penalty otherwise of having his will regarded as invalid. This Department does not regard such a standard as critically essential to testamentary capacity and the approval of an Indian's will. Thus, approval has been given to a will notwithstanding testator's statement that he had no close relatives, when in fact he had a daughter, not remembered in his will, but whose existence he had apparently forgotten.⁹

Emphasis has been placed by appellants upon the decedent's alleged lack of ability to handle her business and monetary affairs as affecting her testamentary capacity. Before proceeding to some of the appellants' specific arguments in this respect, we have noted a text writer's observation that testamentary capacity and contractual or business capacity are so different in their nature that it is impossible to use one as a test for measuring the other, or to say that the existence of one either proves or disproves the other's existence conclusively.¹⁰ In fact, in the making of a will, there is usually involved a donative, unilateral setting, whereas, the negotiation and entering into of a contract, by its very nature, involves a bilateral setting and the ability to engage in arms-length bargaining, with the possible importuning and pressures of the market place. Thus, it has been held that the ability to transact business is not the true or legal standard of testamentary capacity,¹¹ since a decedent may have possessed testamentary capacity, although unable to transact business.¹²

⁸ Mary Davis Hayes testified (page 3) that she had not seen decedent since the latter returned to Lapwai from Oregon, a period of at least one or two years before decedent died.

⁹ Cf. *Estate of Charles E. Adams*, A-24684 (November 17, 1950).

¹⁰ 1 Bowe-Parker, Page on Wills 602 (1st ed. 1959).

¹¹ *Estate of Estelle Christine Goddard*, 164 Cal. App. 2d 152, 330 P. 2d 399, 403 (1958); *In re Nitey's Estate*, 175 Okla., 389, 53 P. 2d 215, 218-219 (1935).

¹² *Schwartz v. Taeger, et al.*, 44 Ida. 625, 258 Pac. 1082, 1084 (1927); See also *Estate of Mowogah Jackson George*, IA-65 (October 5, 1951). "The lack of comprehension of an aged Indian testatrix of the full import of business transactions, her indulgence occasionally in emotional outbursts, and the lack of clarity in her motives for selecting the beneficiary to her estate are insufficient to establish that at the time of making her will she was in such a state of senile dementia as to lack testamentary capacity." (Syllabus)

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Appellants refer also to decedent's alleged inability to use the English language. Even assuming this, it is manifest, nevertheless, that the privilege granted Indians otherwise qualified, of effecting dispositions of their property after death by will is not confined to the skilled entrepreneur and the educated testator, including one who can use the English language with facility. Were the making of effective wills to be confined to such a group, many otherwise qualified Indians would be stripped of the privilege extended by the Indian Wills Act.¹³ Neither that Act, nor the probate regulations, impose any requirement in that respect. The important thing, where language difficulties should be found to exist, is that proper communication be maintained. In this respect two of the attesting witnesses, Oliver Frank and James McConville, appeared to be of the decedent's tribe and to have understood the Nez Perce language, and the former also acted as the interpreter for the decedent and the principals at the time of the execution of the will. In his testimony Oliver Frank stated (pages 2, 3) that he interpreted for the decedent at her request, that she gave an affirmative answer to the question whether she knew what a will was, and that he read the will in English and then interpreted it to decedent in the Nez Perce language, after which she acknowledged, upon questioning, that she was satisfied with the way she made the will.¹⁴

Another factor stressed by the appellants in support of their view that the decedent lacked competency because of her alleged inability to handle business affairs is the withdrawal by the then Northern Idaho Agency Superintendent, Melvin L. Robertson, of decedent's direct leasing and rental collection privileges. The materiality of this argument in relation to the execution by an Indian of her will is not readily apparent. The type of regulation which permitted direct leasing and collection privileges, as between Indians and their lessees,¹⁵ has nothing to do with the soundness of mind of those Indians regarding whom the regulation operates. In fact, Indians regarded as *non compos mentis* are specifically excepted from the regulation's application. The regulation obviously deals with a class of Indians, treated as above others in business acumen, to whom direct negotiation with their lessees may be entrusted. Without other proof, therefore, the withdrawal of privileges, from such Indians, of itself, can mean no more than that superior business sense may have diminished. Certainly, the Superintendent's action can have no greater connotation, and cannot be construed as supporting a conclusion that the decedent had become of unsound mind since she was permitted to sign a lease to Kirk Mc-

¹³ Act of June 25, 1910, as amended, 36 Stat. 855, 25 U.S.C. 373.

¹⁴ We find nothing in the affidavit of James McConville (ante fn. 4); contradicting the major import of decedent's will, or the manner of its interpretation to the decedent by Oliver Frank in the Indian language.

¹⁵ 25 CFR 171.8 (1949 ed.).

Gregor on September 16, 1954,¹⁶ over a month after she had executed her will.

We must conclude that the extent of the ability of an Indian to deal with lessees, many, or most, of whom are probably non-Indian, is no criterion of, neither has it relation to, that Indian's competence to execute a will.

We believe the record in this case generally establishes the testamentary competency of the decedent to make her will. We have not attempted to recount in support of this conclusion the pertinent portions of the considerable testimony given by the proponent's witnesses. But we wish to particularize to some extent regarding certain testimony given on cross-examination by contestants' witnesses. For instance, William A. Stevens, a tribal clerk at the Northern Idaho Agency, who had the opportunity on a number of occasions to deal with the decedent, believed (Testimony, page 6) that she was able to handle her own business after she returned to Lapwai from Oregon, and that subsequent to that time "To my way of thinking I just could not see anything wrong with her condition." Howard Davis, one of the appellants, and whose visits and discussions with the decedent were probably as frequent as those of any of her relatives, touched a theme found in the testimony of some other witnesses, to the effect that the decedent was aging and weakening, and that she had her good and bad periods. Further questioning of Howard Davis brought forth the following answers in his testimony (page 13) regarding the decedent's condition:

Q. Could you talk normally with Charlotte Davis?

A. Yes, for a little while.

Q. Then her mind was clear for a little while on each occasion?

A. I would say on each occasion.

Q. She would know what she was doing and saying for a little while on each occasion?

A. Yes.

Q. Now, from what I understand from you, there was nothing abnormal about her mind, she simply got tired like an old lady would?

A. Yes.

Q. She would talk normally for a while and then get weaker?

A. Yes.

The testimony given at the hearings by the attesting witnesses and the scrivener of the will gives positive support to the testimony of many others who have testified affirmatively regarding the testamentary capacity of the decedent. Moreover, the attesting witnesses, whose disinterestedness has not been seriously questioned, had the opportunity of observing the decedent at the precise time the will was executed. While there are portions of the testimony given by one of

¹⁶ Testimony of Kirk McGregor (page 5).

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the attesting witnesses, Dr. Hoffman, which are used by appellants as casting doubt upon decedent's ability to make a will, there are other portions of his testimony which support testamentary capacity.¹⁷ Thus, at the *original* hearing (page 4), Dr. Hoffman, who was decedent's family physician, stated as to what occurred on August 10, 1954, the day the will was executed :

* * * and I talked to Charlotte and asked her questions about her health and how she felt and a few leading questions so that she would answer me, and after I decided in my own mind that she knew what she was doing, we proceeded with the legal matter.

Dr. Hoffman testified again at the 1960 hearing, and the following questions and answers are found in his testimony (page 5) :

Q. In your opinion, Dr. Hoffman, on the day she made this will, was she of good sound mind?

A. In my estimation, at that time, she was.

Q. Do you believe from your acquaintance with her, as her doctor, that Charlotte Davis knew what she was doing?

A. Yes.

Q. Were there times when Charlotte Davis would be more lucid than at other times?

A. Yes.

Q. Would she be worse at some times?

A. Yes.

Q. At the time that Charlotte Davis made her "X" mark on this will in your office, was she in the better lucid period?

A. Yes, I think so.

After a review of the record, we have concluded that on August 10, 1954, when the will in question was executed, Charlotte Davis Kanine understood the business in which she was engaged, and that she then possessed testamentary capacity. Accordingly, we are not persuaded to disturb the finding of two Examiners that the execution by decedent of her will constituted a valid testamentary act, and that such will should be approved.

II

The Point of Undue Influence

The appellants contend that undue influence permeated the circumstances surrounding the will, induced by Bessie Williams and/or her husband, Dennis Williams, and that by reason of their domination of decedent, the latter's free agency was destroyed and the will of

¹⁷ In this, and other respects, where testimony is alleged or regarded to be conflicting, we have kept in mind the Departmental practice of giving weight to the conclusion reached by the Examiner on a particular factual point, since he had the opportunity to observe the witnesses and to assess first-hand the merit of their testimony. See *Estate of Elizabeth Chasing Hawk*, IA-117 (January 6, 1954); and *Estate of Ko-tay (Stephan)*, IA-48 (September 10, 1951).

other persons substituted for that of the decedent. As stated before, the decedent lived in the Williams' home approximately the last two years of her life, and Bessie Williams is a beneficiary under decedent's will to a large portion of the estate. Apparently it is because of the close association of the decedent with the Williamses as a member of their household, coupled with the decedent's age, her alleged infirmities and dependence upon the Williamses, as well as their alleged activities, that the charge is made that the will of August 10, 1954 is the product of undue influence.

It should be noted that the entrance of the decedent into the Williams' family apparently was the result of Superintendent Robertson's endeavor to find her a home, since there appears to have been no other available place for the decedent. Moreover, it also appears that the arrangements in this respect with Bessie Williams provided that the latter would be paid the costs of the decedent's care and support from the decedent's restricted account at the agency office. Both Bessie and Dennis Williams are Nez Perce Indians, and neither has established any blood relationship to the decedent. There is nothing to indicate that the decedent failed to receive the care which the local Superintendent endeavored to assure her by placing her in the William's home. In fact, there are indications that she was well taken care of.¹⁸ This indication that care was not only arranged, but received, is reflected by the will itself, which contains the statement that "Bessie Pinkham Williams has been taking care of me, and I wish to reward her for that."

Thus, by the circumstance of care and attention, a will made in recognition of such apparent kindness would seem to be just and natural.¹⁹ Furthermore, when considered with the situation that decedent, in her declining years, apparently had to be placed in the care of someone not of her own family, there can easily be created a different aspect of just who might be the natural object of her bounty. However, because of the fact that the decedent and the Williamses did live together in an apparent family relationship, we have carefully examined the allegations of improper influences arising because of that relationship, and which are alleged to have interfered with the free agency of the decedent to make her will. But convincing proof of the actual exercise of undue influence, nevertheless, would have to be shown since undue influence cannot be imputed simply because persons

¹⁸ Testimony of Mary Davis Hayes (page 2).

¹⁹ It has been said that where the next of kin are collaterals, as here, they are not "natural objects of bounty" as that term is used in the interpretation of wills, and in order to establish that a will making no provision for them is unnatural, they must show affirmatively that they had peculiar or superior claims to the decedent's bounty. See *In re Easton's Estate*, 140 Cal. App. 367, 35 P. 2d 614, 619 (1984).

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who have had close associations with a testator, or were kind to him, are named in his will to the detriment of testator's heirs.²⁰

Reference is made to the alleged role of Bessie Williams regarding the will itself, the circumstances which led up to its execution, and the execution of the will.²¹ The decedent appears to have been transported to the office of the scrivener of the will by Bessie Williams, who stated that the decedent wanted to "fix some papers." (Testimony of Bessie Williams, page 2). It was perfectly natural, moreover, that the decedent should have been brought to town by Mrs. Williams, since it was with Mrs. Williams that she made her home, and Mrs. Williams administered to her wants, including transportation when it was needed. Mrs. Williams stated that she did not know the decedent had made a will until after the latter's death. The point is whether the decedent acted freely, and whether it was her wish that the will be made as it was. In this respect the proof leads us to believe that Mrs. Williams did not participate in the preparation or procurement of the will. While one of the attesting witnesses, Dr. Hoffman, believed she was present when the will was executed, other principals at the scene expressed opposite views.

We find running throughout the record statements and implications which at most, merely refer to the opportunity of the Williamses to exert undue influence upon the decedent. Certainly, this factor, including the close relationship of the parties, should be considered in the review of any will made by a testator placed in such circumstances, and we have kept that in mind when reviewing the present matter. Nevertheless, we also adhere to the stated principle that suspicion or opportunity to influence the mind of a testator cannot sustain a finding of undue influence, where there is lacking convincing proof either that anyone actually did so or that there was pressure operating directly upon the testamentary act. Thus, it was stated in the case entitled *In re Lombardi's Estate*, 128 Cal. App. 2d 606, 276 P. 2d 67 (1955), at page 70:

Proof of mere opportunity to influence the mind of the testatrix, even though coupled with an interest or with a motive so to do, is insufficient. In order to warrant setting aside a will on this ground, there must be substantial proof,

²⁰ *Estate of Kaun-ty (Joanna)*, IA-1008 (November 23, 1959); *Estate of Anna-ne*, A-24225 (June 11, 1952). It is also stated in 94 C.J.S., Wills, Sec. 227: "Influence arising from mere acts of kindness, attention, and congenial intercourse, which operate to secure or retain the affection, esteem, or goodwill of the testator, and induce him to make the persons performing such kindly offices beneficiaries in his will, do not constitute undue influence, unless such acts are carried out with the purpose and design of subjecting the mind of the testator to the influence, * * * and thus deprive the testator of his free will, free act, and free agency. The application of this rule is not confined to relatives of the testator, but extends also to his friends." * * *

²¹ According to his testimony (page 10), Dennis Williams, the husband of Bessie, was nowhere near the scene of the execution of decedent's will on August 10, 1954, as he was then in the city jail in Pendleton, Oregon.

direct or circumstantial, of a pressure which overpowers the volition of the testator and operates directly on the testamentary act; also that mere suspicion that undue influence *may* have been used is not sufficient to warrant the setting aside of a will on that ground * * *²² (Italic supplied.)

We quote also from this Department's ruling in the matter of the Estate of An-na-rie:²³

No convincing evidence that undue influence played a decisive part in the execution of the will has been furnished. Prior to and at the time of the execution of the will, the testatrix was living in the home of Charles Williams, the sole beneficiary, and it appears that he obtained the services of Louis Guy to act as interpreter for the testatrix, who could not speak the English language. Although Charles Williams accompanied the testatrix and Mr. Guy to the office of the Indian Agency at Anadarko, Oklahoma, on the day the will was executed, it is clear that he was not present at any time during the execution of the will. Even though he may have been in a position to exert undue influence on the testatrix prior to the execution of the will, this would be insufficient to establish the invalidity of the will when convincing proof that he actually exerted undue influence is lacking. (Italic supplied.)²⁴

It should be noted also that the decedent lived almost two years after she executed the will, without any apparent steps being taken to revoke or to change her will. This too could be consonant with the view that there was no undue influence in the first instance.²⁵

In summary, therefore, and as already indicated, the decedent's will cannot be regarded as unnatural in the light of the association of the parties concerned, and the care which the beneficiary, Bessie Williams, extended to the decedent. There is no convincing proof that the decedent intended for her property to pass upon her death in any way other than by the testamentary disposition made on August 10, 1954, which disposition has been attested to as decedent's wish. Moreover, nothing substantial has been shown as having been inconsistent with the voluntary act of the decedent in that regard, or which constrained her to dispose of her estate in any manner contrary to her own inclination or judgment. While decedent was of an advanced age and required care, again it has not been shown that those factors were such as to have permitted a coercion of her freedom of will, or to have had any effective bearing upon the exercise by her of the testamentary act in question. It is our view that undue influence has not been proved.

Conclusion

We conclude that the consistent action taken by two Examiners of Inheritance in approving decedent's will, is correct and should be

²² See also *In Re Scott's Estate*, 191 Or. 90, 228 P. 2d 417, 426 (1951); *In Re Easton's Estate*, *supra*, at footnote 19.

²³ *Supra*, at footnote 20.

²⁴ See also *Estate of Henry Potiye*, IA-71 (April 2, 1952).

²⁵ See *Estate of Jennie Siers*, IA-23 (March 23, 1950).

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affirmed. Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior, 210 DM 2.2A(3)(a), 24 F.R. 1348, and redelegated to the Associate Solicitor (Solicitor's Regulation 19, 29 F.R. 6449), the order of the Examiner of Inheritance, reaffirming the approval of the will of Charlotte Davis Kanine, and denying the petition for rehearing from his order, are hereby affirmed, and the above appeal is dismissed.

H. E. HYDEN,
Associate Solicitor.

APPEAL OF KENNEDY CONSTRUCTION COMPANY, INC.

IBCA-437-4-64

Decided February 16, 1965

Contracts: Construction and Operation: Third Persons—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Suspension of Work

Under a standard "Suspension of Work" clause a contractor is not entitled to a price adjustment on account of delay by another Government contractor in preparing the site for the job, if the claimant contractor fails to sustain the burden of proving that the duration of any part of the job was necessarily protracted for an unreasonable period by such delay, or fails to sustain the burden of proving that the Government itself had caused the delay by an unexpected and unauthorized act taken in its contractual capacity, or had expressly or impliedly represented or promised that the delay would not occur. Entitlement to a price adjustment under such a clause is not established merely by showing that an extension of time on account of the delay was obtained by the claimant contractor.

BOARD OF CONTRACT APPEALS

This is a timely appeal from the contracting officer's denial of a request by the Kennedy Construction Company, Inc. (appellant) for additional compensation in the amount of \$6,195.

The appellant's claim is made on the theory that the cost of performance was increased because the Government delayed in making available a construction site in the Everglades National Park, Florida.

This Board heretofore denied Government Counsel's motion to dismiss the appeal on the ground that it constituted a claim for unliquidated damages arising out of an alleged breach of contract.¹ (January 1961 Edition), and incorporates the General Provisions of this decision on October 27, 1964, at Miami, Florida.

The contract is dated June 29, 1963, is on Standard Form 23 (January 1961 Edition), and incorporates the General Provisions of Standard Form 23-A (April 1961 Edition). The General Provisions

¹ *Kennedy Construction Company, Inc.*, IBCA-437-4-64 (September 17, 1964).

include a provision which authorizes a price adjustment for suspension, delay or interruption of the work for convenience of the Government (Clause 36). The original contract price of \$66,599 was increased in the amount of \$979.80 as the result of the issuance of Change Order No. 3, which provided for 16-foot instead of 12-foot foundation piling.

The contract called for the construction of a designated number of trail shelters and comfort stations in the Everglades National Park, the entrance to which is located approximately 39 miles south of Miami, Florida. The buildings were required to be built in four separate locations known as the Pineland, Royal Palm, Long Pine Key and Flamingo areas. The first three areas were located near the Headquarters, Visitor's Center of Everglades National Park, while the Flamingo area was located 35 miles distant in a southwesterly direction.

Work was to begin within 10 days after receipt of notice to proceed, and was required to be completed within 150 days subsequent to receipt of that notice. Receipt of the notice to proceed was acknowledged by appellant on July 22, 1963. Work began on August 1, 1963. The contract was completed on February 24, 1964. This was within the time required, as extended by the contracting officer through the issuance of the orders described below.

Work was suspended for one day as the result of the issuance of a Stop Order dated October 23, 1963, due to a threatened hurricane. Pursuant to a request contained in a letter dated August 21, 1963, which purported to be signed by appellant's president, the contracting officer extended the time for performance for a period of 30 days by Change Order No. 1, dated November 29, 1963. The cause of delay recited in this order was that a second Government contractor had failed to complete the necessary fill upon which the structures in the Flamingo area were to be constructed. The order stated that the contract price would not be changed. The extension of time granted by this change order was accepted by appellant's president on or about December 2, 1963, the acceptance being received by the Government on December 4. As the result of a request for additional time for performance contained in an undated letter—received by the Government on January 20, 1964—from appellant's superintendent, the time for performance was extended for an additional 35 days by Change Order No. 2, dated February 20, 1964. The cause of delay recited in this order was that a third Government contractor had failed to complete construction of an access road at the Long Pine Key area. No acceptance of this extension was executed by appellant.

The claim here presented by appellant is that the performance of the contract was delayed for a total of 65 days by lack of completion

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of the fill work in the Flamingo area, and that an adjustment in the contract price should be made by the Government on account of the increased cost of performance allegedly caused by that delay. The only provision of the contract under which such a claim could be considered by this Board is Clause 36 of the General Provisions, entitled "Price Adjustment for Suspension, Delay, or Interruption of the Work for Convenience of the Government."²

One reason assigned by the contracting officer for denying the claim was that appellant had not complied with the provision in Clause 36 which states that no claim shall be allowed thereunder unless the claim, in an amount stated, is asserted in writing "as soon as practicable after the termination of such suspension, delay, or interruption." The delay at Flamingo terminated, as will be later explained, sometime in September of 1963. No claim for a price adjustment was asserted in the letter of August 21, which led to the issuance of Change Order No. 1, although work at other sites had commenced three weeks before the date of that letter. No claim for a price adjustment was asserted when the time extension allowed by that change order was accepted by appellant on or about December 2.³ Appellant did not inform the Government that it desired monetary compensation because of the delay at Flamingo until January 13, 1964.

Appellant's president sought to excuse the failure to present the claim at an earlier date on the grounds that appellant's management was unaware of the delay at the Flamingo site until December 2, 1963,

² This clause reads as follows:

"(a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

"(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause."

³ Appellant's president testified that he had not signed the letter of August 21, 1963, which was on appellant's business stationery, saying "That is not my signature, I can't write like that." He also testified that when he accepted the time extension on or about December 2, he was aware of the delay at the Flamingo site. He did not at that time assert that the letter of August 21, which was expressly mentioned in Change Order No. 1, had been sent without authorization. In the circumstances we believe his acceptance of the time extension was a ratification of the statements contained in the letter of August 21.

and that computation of the amount of the claim necessarily required considerable time.⁴ Neither of these grounds is persuasive. Appellant's superintendent had actual knowledge of the delay from its inception, and, under well-settled principles of corporate law, his knowledge was imputable to appellant. Appellant's itemization of the claim reveals that the amount of each item could have been easily computed, from business records of the types usually kept by contractors, at almost any time after termination of the delay. All in all, it would be difficult to conclude from the record that the contracting officer erred in invoking the notice provisions of Clause 36.

The second reason assigned by the contracting officer for denying the claim was that there was no such delay as would authorize the making of a price adjustment under Clause 36. A suspension of work order related to the delay in availability of the Flamingo site was not issued by the contracting officer. Hence, the determinative issue is whether the work was delayed for an unreasonable period of time by an act or failure to act of the contracting officer to which Clause 36 is applicable.

There is no convincing basis for a conclusion that appellant was delayed for an unreasonable period because the fill work at the Flamingo site had not been completed before the issuance of the notice to proceed. Appellant seems to have been unready to start work at any of the sites until August 1, 1963. The record does not reveal exactly when the fill work was completed. However, the Government's project supervisor, an architect in private practice, testified that appellant worked at Flamingo during at least the last two weeks of September. Thus, the total delay at that site amounted to about six weeks or so.

During a portion of this period of delay appellant could not have worked at Flamingo even if the fill had been completed. This was because the foundation piles originally delivered proved to be too short, and new piles had to be ordered. Under the terms of the contract, the responsibility for obtaining piles of the proper length rested upon appellant, rather than upon the Government. The delay attributable to the piling continued during the first two or three weeks of August. Accordingly, the Board finds that the period of time during which appellant could not work at Flamingo solely because of delayed site availability was three weeks to a month.

Even this period was not one of complete idleness, from the standpoint of the job as a whole. The project supervisor testified that the contractor brought a limited work force to the job, and that at the

⁴ Appellant's president, Mr. A. F. Keller, was the appellant's only witness at the hearing. He had never been on the job. Mr. A. L. Johnson, who was the appellant's superintendent on the project throughout the work, was not made available at the hearing. It was explained by Mr. Keller that he was needed elsewhere to bid on another job.

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beginning of the work the superintendent informed him that appellant's schedule was first to work on the trails at Pinelands and Royal Palm, next to construct the comfort stations at Royal Palm, and then to proceed with the work at Flamingo. At a "pre-construction" conference the superintendent advised Government representatives that he would defer work at Flamingo until the fill was ready and commence work at one of the other areas. The superintendent appears to have considered that the delay in completion of the fill was not a matter of moment since he seems to have neither protested against it, nor filed a claim on account of it, nor even informed appellant's management of its occurrence. There is no specific evidence of discontinuance of work or idleness of men or equipment during the interval between delivery of the re-ordered piling and completion of the fill at Flamingo. Nor is there any specific showing that acceleration of performance to the degree necessary to make up for any time lost during that interval would have caused the job to be more expensive than it would have been if the site had been ready when the notice to proceed was issued. Appellant, in short, has failed to bear the burden of proving that the duration of any part of the job was necessarily protracted for an unreasonable period by the incompleteness of the fill at Flamingo.

There is a similar lack of proof with respect to the existence of such an act or omission on the part of the Government as is contemplated by Clause 36. A "Suspension of Work" clause is not a general "pay for delay" clause, and ordinarily may be invoked only when the delay, in addition to being unreasonable in duration, is caused by circumstances that amount to either an express or a *de facto* suspension of work by the Government.⁵ A contractor ordinarily is not entitled to payment under a "Suspension of Work" clause for a delay or hindrance caused by another contractor who has failed to perform work at the site on schedule, unless the Government has represented or promised that such delay or hindrance would not occur.⁶ A leading case, in which relief under a "Suspension of Work" clause was denied a contractor whose work had been delayed by site unavailability, states:

Appellant knew when it entered into this contract that it could not begin work until the site had been graded by another contractor. We think it assumed the risk of delays by that contractor not caused by an act of the Government in its contractual capacity.

* * * * *

As noted above, appellant was advised of a plan for accomplishing work to be done by many hands, which of necessity was subject to change as con-

⁵ *T. C. Bateson Construction Co.* (on motion for reconsideration), ASBCA No. 5492 (September 30, 1960); 60-2 BCA par. 2315.

⁶ *Paccon, Inc.*, ASBCA No. 8134 (February 21, 1963), 1963 BCA par. 3686, 5 Gov. Contr. par. 239.

ditions required. We are of the opinion that under its contract appellant assumed this risk, and that the contracting officer was not under any duty to issue a suspension of work order for the period in question.⁷

The contract involved in the present appeal contains no express promise or representation that the fill in the Flamingo area would be completed before the bid was accepted or notice to proceed given. The fact that the fill had not been completed would have been obvious to anyone investigating the site during the bidding period. Such a pre-bid investigation was, in fact, made by appellant's superintendent. No evidence has been offered to show that, at the time when the investigation was made, it would have been reasonable for appellant to contemplate that the site would be ready by the time of acceptance or notice to proceed. No evidence has been offered to show that after the making of the investigation the Government did anything which would tend to delay placement of the fill. These circumstances clearly negative the existence of an implied promise or representation that the fill would be completed before the bid was accepted or notice to proceed given. On the contrary, they lead fairly to a conclusion that appellant in submitting its bid assumed the risk that the contractor for the fill might not have the site ready by the time when appellant would want to initiate construction at Flamingo.

In the course of the hearing, frequent references were made to a 65-day delay in site availability. These references presumably combine the 30-day time extension granted by Change Order No. 1 and the 35-day time extension granted by Change Order No. 2. The latter order, however, extended the time for performance because of a supposed hindrance to the appellant caused by another contractor's construction of an access road at the Long Pine Key area, and makes no mention of any delay at Flamingo.

There is virtually nothing in the record to show how the appellant's work at Long Pine Key was affected by this other contractor's access road work. Paragraph 6, "Other Contracts," of the contract's Special Provisions reserves to the Government the right to let other contracts in the area, and requires each contractor (1) to afford other contractors reasonable opportunity for the execution of their work, and (2) to properly connect and coordinate his work with that of others. The Government's architect-supervisor apparently was very generous in making his recommendation for granting the 35-day time extension, since he testified, in response to questions by appellant's counsel, concerning that extension as follows:

A. In my opinion, the delays for the project were not the Government's problem. It is the way Mr. Johnson or the Kennedy Construction Company handled the work. Now, when he is running out of time he is seeking more time. Now,

⁷ *John A. Johnson & Sons, Inc.*, ASBCA No. 4403 (February 11, 1959), 59-1 BCA par. 2088, 1 Gov. Contr. par. 199.

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we know that in the course of constructing the comfort stations at Long Pine, we had another contractor in the field. We also know that he could have done his work, he could have brought somebody in there and he could have done his work, and gone over the road system to do this work.

So it was really not a big problem for him. But nevertheless, this was in the way. So Mr. Johnson agreed to stay out of that area. He didn't need to go into that area while he was doing the trail shelter.

So the time the contract began, the 23d, and the time that Redland got out of there amounted to approximately 35 days. So, again, because of the delay which in my opinion was the result of the contractor, we compensated again, letting him have this extra time.

Q Thirty-five days was on the Long Pine Key?

A Long Pine Key for the comfort stations, right.

Q And Redland was in there and hadn't finished its work?

A Hadn't finished it completely.

Q And so Kennedy agreed to stay out of there until they finished it completely?

A No, no. He was in there, even while the work was being done.

Q What was the delay about?

A It so happened that he needed time. He was delaying the job on his own and the fact that he was unable to complete the job, he was running over the contract time. He kept requesting, in two or three letters, kept requesting time. So we felt that we might compensate him by this particular problem of Redland being there.

Actually he was there. We have reports showing when he was there.

Q Without belaboring this point, you also wrote a letter of February 3d recommending they get an extension of time because of the delay of another contractor?

A We used that because he was delaying it, I feel, not able to handle the job efficiently as he should have.

Q Who is that?

A Mr. Johnson.

Q So, in order to help him out—

A Right.

Q You gave something which was somewhat questionable?

A Right. There was a question, and we gave him the benefit of the doubt. This is the type of thing that was agreed upon, in the course of construction, by your representative in the field, and by me representing in the field. This had to be worked out.

Q That is how you worked it out, on this basis?

A Yes, sir.

Q Then you wrote those letters to help him out?

A That is correct.

In any event the fact that extensions of time for performance were granted by the contracting officer is not a significant factor in this appeal. The standards prescribed by the contract for the granting of extensions of time are by no means the same as the standards applicable to the allowance of monetary compensation for delays of the Government.⁸ The foregoing excerpt from the testimony clearly

⁸ *Robert E. Lee & Co. v. United States*, Ct. Cl. No. 252-60 (January 24, 1964); *Electrical Builders, Inc.*, IBCA-406 (August 12, 1964), 1964 BCA par. 4377; see *Commonwealth Electric Co.*, IBCA-410 (October 12, 1964), 71 I.D. 365, 1964 BCA par. 4475.

shows that the considerations which induced the architect-supervisor to recommend that time extensions be granted were quite dissimilar from those which govern the allowance of monetary compensation under a "Suspension of Work" clause. In the circumstances, the mere granting of the time extensions is insufficient to make good the deficiencies in appellant's proof.

The Board concludes that there is no basis for a finding that either the incompleteness of the fill at the Flamingo site or the concurrent access road construction at the Long Pine Key site amounted to a suspension, delay or interruption of work within the meaning of Clause 36.

Conclusion

For the reasons set forth above, the appeal is denied.

JOHN J. HYNES, *Member.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

HERBERT J. SLAUGHTER, *Deputy Chairman.*

UNION PACIFIC RAILROAD COMPANY

A-29607

A-29686

Decided February 16, 1965

Oil and Gas—Railroad Grant Lands—Rights-of-Way: Nature of Interest Granted—School Lands: Mineral Lands

The Secretary of the Interior has authority under the act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Union Pacific Railroad Company pursuant to the acts of July 1, 1862, and July 2, 1864, even though the lands traversed by the right-of-way were later granted to a State as school lands.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Union Pacific Railroad Company has appealed to the Secretary of the Interior from decisions dated May 1 and June 12, 1962, by which the Division of Appeals of the Bureau of Land Management vacated one decision and reversed another of the land office at Cheyenne, Wyoming, inviting bids on royalty or compensatory royalty to be paid on production of oil and gas from railroad right-of-way land within the E $\frac{1}{2}$ and the SW $\frac{1}{4}$ sec. 36, T. 19 N., R. 99 W., and, among other lands, the N $\frac{1}{2}$ and the SW $\frac{1}{4}$ sec. 16, T. 18 N., R. 99 W., 6th P.M., Wyoming.

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The decisions of the Division of Appeals were based on the ground that the mineral estate in the right-of-way land is vested in the State of Wyoming by reason of the State's acquisition of other land in sections 36 and 16 not included in the right-of-way.

The land in section 36 was included in a plat of survey approved December 20, 1884, and the land in section 16 in a plat of survey approved September 8, 1877, both plats showing the center line of the proposed railroad to be built by the Union Pacific Railroad Company pursuant to the acts of July 1, 1862, 12 Stat. 489, and July 2, 1864, 13 Stat. 356. Thereafter, on July 10, 1890, the Territory of Wyoming achieved statehood, 26 Stat. 222, at a time when the land in the sections was not known to be mineral in character. Under the terms of the Statehood Act, the State took title to sections 16 and 36 in each township within the State as school sections. By deed dated April 15, 1950, the State of Wyoming conveyed to the United States the NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$, and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of section 36, reserving, however, all minerals to the State. By deed dated May 31, 1938, the State conveyed to the United States all of section 16 with a reservation of all minerals. On October 2, 1952, the State of Wyoming leased all of sections 16 and 36 for the removal of oil and gas to Raymond Chorney who assigned his lease to Gulf Oil Corporation. It appears that the lease made no mention of the Union Pacific right-of-way traversing the school sections and the acreages indicated are those of the full sections less exceptions not material here.

In 1954, the United States brought an action in the Federal district court for Wyoming seeking to enjoin the Union Pacific Railroad Company from using its right-of-way for the purpose of removing gas, oil, and other minerals and asking that title to minerals underlying the right-of-way be quieted in the United States. This litigation terminated in a decision of the United States Supreme Court holding that under the language of the granting act of July 1, 1862, *supra*, which excepts mineral lands, the grant of the right-of-way excepted the mineral interest. *United States v. Union Pacific R.R.*, 353 U.S. 112 (1957). In response to the subsequent request of the Union Pacific Railroad Company, proffered after the establishment of oil production in the Patrick Draw Field within which sections 36 and 16 are located, the land office in Cheyenne issued two separate invitations to the Union Pacific Railroad Company, as owner of the right-of-way, and Gulf Oil Corporation, as lessee of land adjoining the right-of-way, for bids on the amount or percentage of royalty to be paid on oil and gas production from the right-of-way in the event of an award of a lease to Union Pacific on the right-of-way land and on the amount or percentage of compensatory royalty to be paid by Gulf for extraction of oil and gas under the right-of-way from wells on the adjoining land under

the act of May 21, 1930, 46 Stat. 373, 30 U.S.C. §§ 301-306 (1958).

Union Pacific submitted a bid in the amount of the minimum royalty acceptable but Gulf appealed, asserting that the United States has no right, title, or interest in the minerals within the right-of-way because such minerals were vested in the State of Wyoming at the time of its admission to the Union. It contended that by the Statehood Act every incident of a fee simple title to the school sections held by the United States on July 10, 1890, vested in the State of Wyoming, that because the Supreme Court held in 1957 that Union Pacific has no estate in minerals underlying the right-of-way¹ and it is undisputed that sections 16 and 36 were surveyed and not known to be mineral on July 10, 1890, the minerals underlying the right-of-way passed to the State by virtue of the school grant in the Statehood Act. It asserted that the Department of the Interior cannot conclusively adjudicate the title of the State of Wyoming to the minerals but, nevertheless, requested that the Department disclaim all right, title, interest, claim, or demand to the minerals, including oil and gas, in the right-of-way land.

The Division of Appeals agreed that upon the admission of the State of Wyoming the State was vested with whatever rights in sections 16 and 36 the United States possessed at that time and that, since the United States had not divested itself of mineral rights in the right-of-way land, full title, both surface and subsurface, to sections 16 and 36 passed to the State subject only to the right-of-way held by Union Pacific.

In its appeal to the Secretary, Union Pacific contends that the United States has the full right, title, and interest in minerals underlying the right-of-way and thus has full authority to call for royalty bids and to issue leases. It predicates this conclusion upon the contentions that the Supreme Court did not hold in *United States v. Union Pacific R.R.*, *supra*, that Union Pacific has only an easement of the same nature as the grants of rights-of-way under the act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1958), and that there is no precedent for the assumption of the Division of Appeals that it follows as a matter of course that minerals in right-of-way land pass to the patentee or grantee of land traversed by the right-of-way.

The question thus presented by this appeal is whether the Secretary of the Interior has authority to dispose of oil and gas deposits in the Union Pacific right-of-way under the act of May 21, 1930, *supra*, as property of the United States, or whether the Secretary lacks such

¹ This litigation did not relate to coal and iron and the judgment entered pursuant to the decision of the Supreme Court declares expressly that it does not purport to determine the rights of the parties with respect to the ownership of or right to remove coal and iron deposits in and from the right-of-way and is without prejudice, as far as issues relating to coal and iron deposits are concerned, to the rights of either party. This reflects the language of section 4 of the act of July 2, 1864, *supra*, which expressly excludes coal and iron land from the term "mineral land" as used in the act. Subsequent references in this decision to minerals are to be read with this qualification as to coal and iron.

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authority because the minerals retained by the United States under the railroad grant subsequently passed to the State of Wyoming under the school grant to the State of the legal subdivisions traversed by the right-of-way.

Until the 1957 decision in *United States v. Union Pacific R.R.*, *supra*, the appeal would have presented no novel problem. The nature of a railroad's interest in its right-of-way had been the subject of extended consideration in cases which set out all the principles pertinent to the disposition of this conflict. It seemed settled that the railroad right-of-way acts gave the railroads a limited fee in their rights-of-way subject to a possibility of reverter to the United States; that neither the railroads under the grants of the rights-of-way nor the railroads, the States, or other grantees of the lands through which the railroad rights-of-way passed received the rights to exploit the oil and gas underlying the rights-of-way; and that the United States alone could dispose of the oil and gas and then only pursuant to the act of May 21, 1930, *supra*. *A. Otis Birch and M. Estelle C. Birch (On Rehearing)*, 53 I.D. 340 (1931); *State of Wyoming*, 58 I.D. 128 (1942); Solicitor's opinion, 58 I.D. 160 (1942); *Phillips Petroleum Company*, 61 I.D. 93 (1953), and cases cited therein.

It is true that in *Great Northern Ry. v. United States*, 315 U.S. 262 (1942), the Court held that rights-of-way granted under the act of March 3, 1875, *supra*, are easements only, not fees, and confer no right in a railroad to oil and other minerals underlying the right-of-way and that the United States was entitled to an injunction enjoining the railroad from using the right-of-way for the purpose of drilling for or removing oil and gas underlying the right-of-way insofar as it passed through tracts owned by the United States. The Department, however, held that that decision did not change the rights of a State to minerals underlying the Union Pacific right-of-way granted by the 1862 act in lands which had passed to the State under its school land grant. *State of Wyoming, supra*.

In *United States v. Union Pacific R.R.*, *supra*, the Court held that the United States was entitled to an injunction enjoining the railroad from drilling for oil and gas on the "right-of-way" granted to it by the acts of 1862 and 1864, *supra*. It held, contrary to the conclusions of the courts below, that in view of the exclusion of mineral lands from the grant to the railroad and the public policy of the times the grant did not include mineral rights. In disposing of the railroad's claim, it pointed out that, even though a right-of-way may at times be more than an easement, it did not follow in such a case that the owner of the right-of-way was given the mineral rights as against the United States. The dissent would have affirmed the decisions below holding that the grant of the right-of-way included the minerals.

The *Union Pacific* case has settled the conflict between the railroad and the United States over the rights to subsurface oil and gas and other minerals in favor of the United States. This appeal raises anew the issue of whether these rights remain in the United States or pass to the subsequent patentee or grantee of lands traversed by the railroad.

As we have seen, when the limited fee concept reigned unchallenged, the Department and the courts held repeatedly that a subsequent grantee or patentee of such lands took no right whatsoever in the right-of-way. The Supreme Court in *Northern Pacific Ry. v. Townsend*, 190 U.S. 267, 270, said:

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.

While this reasoning no longer applies to lands crossed by a right-of-way granted under the 1875 act, *supra*, and the Department recognizes in such cases that mineral rights go to the subsequent patentee subject to the dominant rights of the railroad right-of-way,² the *Union Pacific* case, *supra*, did not hold that a pre-1875 right-of-way had no more effect than one granted under the 1875 act.

On the contrary, a comparison of the *Great Northern* decision and the *Union Pacific* decision demonstrates that the *Union Pacific* case left unaltered the rule that a right-of-way obtained under the 1862 and 1864 acts, *supra*, separated the land from the public domain and that subsequent grantees of lands traversed by the right-of-way gained no rights in it.

In *Great Northern Ry.*, *supra*, the Supreme Court required the United States to show that it had retained title to certain tracts of land through which the right-of-way passed and limited its judgment to those tracts. 315 U.S. 262, 279-280 (1942).

The *Union Pacific* opinion, however, is devoid of any reference to a requirement that the United States own any land crossed by the right-of-way as a prerequisite to a judgment in its favor. This omission is particularly striking because the case was tried on stipulated facts, one of which was that the title to the minerals in the particular tract, the subject of the litigation, the N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 24, T. 13 N., R. 68 W., 6th P.M., Wyoming, which was crossed by the right-of-way, was in the United States. Yet, despite this limitation, the judgment of the district court, upon the judgment and mandate of the Supreme Court, enjoined the railroad from drilling for or removing oil and gas and

² See: *Northern Pacific Ry. v. United States*, 277 F. 2d 615 (10th Cir. 1960); *Chicago & Northwestern Ry. v. Continental Oil Co.*, 253 F. 2d 468 (10th Cir. 1958).

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other minerals in and underlying "the right-of-way granted * * * pursuant to the Act of July 1, 1862," and quieted the title of the United States to the oil, gas, and other minerals in and underlying "said right-of-way." The judgment was thus in terms applicable to the entire right-of-way and it has been so construed by the railroad. See appellant's brief, pp. 6-7.

That the Supreme Court did not intend to change the settled law governing the rights of subsequent grantees or patentees of lands traversed by the right-of-way seems apparent from its discussion of *Northern Pacific Ry. v. Townsend, supra*. There it was held that a subsequent homestead entry could not be established on the railroad right-of-way after the right-of-way had been located and the tracks laid, and that the railroad had in effect been granted a limited fee subject to an implied condition of reverter. While in *Union Pacific* the Court held that the *Townsend* case did not settle the question of ownership of the underlying minerals between the railroad and the United States, it did not say that the *Townsend* and other "limited fee" cases involving pre-1875 rights-of-way were wrong, a conclusion that would have enabled it to dispose of the major issue under the holding in the *Great Northern Ry.* case, *supra*. Having held that, under the granting act and the general policy of Congress, it could not conclude that the railroad had been given the mineral rights, the Court said only:

* * * The most that the "limited fee" cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes. 353 U.S. at 119.

It did not hold that the railroad had only an easement.

As we have noted, the Court pointed out that the limited fee cases involved conflicts between the railroad and third persons. Here the United States, having established its rights to the underlying minerals vis-a-vis the railroad, stands in its stead against the subsequent patentee or grantee.

Just as the Court held in *Townsend, supra*, that a subsequent homesteader cannot acquire rights against the railroad, so here the State, a subsequent grantee, can acquire no rights against the United States which holds all the interest in the right-of-way not held by the railroad.

Whatever the exact nature of the estate created by the 1862 and 1864 acts may be, it is clear that it is more than an easement and sufficient to take the lands covered by the right-of-way out of the category of public lands subject to further disposition to the State.³

³ That Congress assumed that no interest in the railroad right-of-way passed to a subsequent grantee or patentee is evident from the several statutes it enacted granting to such persons the lands in the rights-of-way upon forfeiture or abandonment by the railroad. Act of June 26, 1906, 34 Stat. 482; act of February 25, 1909, 35 Stat. 647, 43 U.S.C. § 940 (1958); act of March 8, 1922, 42 Stat. 414, 43 U.S.C. § 912 (1958).

The Solicitor's opinion, 67 I.D. 225 (1962), on which the decision below relied, is not to the contrary. It merely held that leaseable minerals other than oil and gas underlying rights-of-way could be disposed of pursuant to the Mineral Leasing Act, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1958), whether the right-of-way be construed as an easement or a "limited fee." It did not conclude that minerals underlying the "limited fee" rights-of-way passed with a patent of the lands crossed by such a right-of-way.

Gulf places great reliance upon the departmental decision in *Abilene Oil Company v. Choctaw, Oklahoma, & Gulf Railroad Company*, 54 I.D. 392 (1934), which held that a grant by the United States conveying a quarter section of public land over which a railroad right-of-way had previously been granted under the act of February 18, 1888, 25 Stat. 35, carried with it, in the absence of further exception or reservation, the entire interest left in the United States, so that the United States no longer had an interest in the oil and gas deposits under the right-of-way which it could lease under the act of May 21, 1930, *supra*. While the decision referred to prior departmental decisions holding that the grantee of lands crossed by a railroad right-of-way had no right to the minerals under it, it did not purport to overrule them, but found that in this instance Congress had intended to dispose of all of the interest of the United States in the right-of-way, including the possibility of reverter, and concluded that the United States had no interest in the right-of-way at all. Since it left intact prior rulings on the effect of a railroad right-of-way on subsequent patents of the lands crossed by the right-of-way and was not followed or even cited in later departmental considerations of the specific problem involved in this appeal (*State of Wyoming, supra*; Solicitor's opinion, 58 I.D. 160, *supra*), it cannot be considered to have been intended as a departure from the uniform view of the courts and the Department that the mineral rights under the Union Pacific Railroad right-of-way remained in the United States. It stands, rather, solely as an interpretation of the particular limited statute there under consideration.

Accordingly, it is concluded the *Union Pacific* case did not change the previously established law that only the United States had the rights to minerals underlying pre-1875 act rights-of-way, that the oil and gas deposits underlying the Union Pacific right-of-way are in the United States, and that the land office properly sought to dispose of them pursuant to the act of May 21, 1930, *supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions of the Bureau of Land Management dated May 1 and June

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12, 1962, are reversed and the cases remanded for further proceedings consistent herewith.

FRANK J. BARRY,
Solicitor.

**SUPERVISION OVER THE COLLECTION, CARE AND DISBURSEMENT
OF RENTALS PAYABLE DIRECTLY TO AN INDIAN LESSOR OR HIS
LEGAL REPRESENTATIVE UNDER AN APPROVED LEASE OF RE-
STRICTED LAND**

**Indian Lands: Leases and Permits: Generally—Indian Lands: Allotments:
Alienation—Indian Lands: Competency—Indians: Competency—In-
dians: Contracts—Secretary of the Interior**

Where an approved lease of individually owned restricted Indian land provides for the direct payment of rentals to the owner or his legal representative (guardian or conservator), the rental payments must be treated as unrestricted funds as of the time of payment, but future or anticipated rentals are classed as restricted property over which the Secretary of the Interior may recapture supervision over the collection, care and disbursement. Any action of the legal representative (guardian or conservator) or of the guardianship court to obligate such future or anticipated rentals would be ineffective unless approved by the Secretary of the Interior.

M-36671

February 17, 1965

TO: SECRETARY OF THE INTERIOR.

SUBJECT: SUPERVISION OVER THE COLLECTION, CARE AND DISBURSEMENT
OF RENTALS PAYABLE DIRECTLY TO AN INDIAN LESSOR OR HIS LEGAL
REPRESENTATIVE UNDER AN APPROVED LEASE OF RESTRICTED LAND.

We have been asked to review the Sacramento Regional Solicitor's office memorandum dated January 7, 1964, addressed to the Area Director of the Bureau of Indian Affairs, Sacramento, California. The memorandum replies to a question raised by the Director of the Palm Springs Indian Office on the application, if any, of R.S. § 2103, as amended, 25 U.S.C. § 81 (1958), to contracts made between individual Indians and real estate brokers. This question arises because of the great income producing value of certain restricted Indian lands belonging to members of the Agua Caliente Band of Mission Indians.

The General Allotment Act, 24 Stat. 388 (1887), 25 U.S.C. § 348 (1958), as amended, and the Mission Indian Act, 26 Stat. 712 (1891), as amended, provided for the allotment of lands on the Agua Caliente (Palm Springs) Reservation in California. These acts state, "and if any conveyance shall be made of the lands set apart as herein

provided, or any contract made touching same, * * *, such conveyance or contract shall be absolutely null and void.”

Also, in the Act for the Equalization of Allotments on the Agua Caliente (Palm Springs) Reservation in California, 73 Stat. 602 (1959), 25 U.S.C. § 956 (a) (Supp. V, 1959-63), it is stated:

Equalization allotments * * * shall not be subject to assignment, sale, or hypothecation or to any attachment or levy for claims or debts * * * without the written approval of the Secretary, and any such assignment, sale, hypothecation, attachment, or levy that has not been so approved by the Secretary shall be absolutely null and void.

It is also provided by statute that allotted Indian lands shall not be liable to satisfy debts contracted prior to issuing a patent in fee simple to an allottee;¹ and that moneys derived from lease or sale of trust lands shall not be liable for payment of any debt arising during the trust period without approval of the Secretary of the Interior.²

Recognizing that legitimate contracts have a place in carrying on and managing Indian affairs, Congress has by statute provided a set of rules under which valid contracts with Indian tribes and individual Indian allottees can be made.

25 U.S.C. § 81, *supra*, sets forth requirements for the execution and approval of contracts with Indians and provides: “All contracts or agreements made in violation of this section shall be null and void * * *.” However, the language of section 81 is limited to tribes of Indians and individual Indians not citizens of the United States. On May 15, 1964, the Regional Solicitor requested our view on the suggestion in his memorandum of January 7, 1964 that 25 U.S.C. § 81 is applicable to contracts made by individual citizen Indians or by their guardians. We do not interpret section 81 as having any application to contracts made by individual citizen Indians or by their guardians. It is the trust property that is subject to the plenary control of the Federal Government,³ not the contractual capacity of individual citizen Indians. However, the inapplicability of 25 U.S.C. § 81 to a real estate broker contract does not mean that the Secretary

¹“* * * *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. * * *” § 6 of the Act of Feb. 8, 1887, 24 Stat. 390, as amended, 25 U.S.C. § 349 (1958).

²“No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.” Act of June 21, 1906, 34 Stat. 327; 25 U.S.C. § 410 (1958).

³*Board of Commissioners of Creek County v. Seber*, 318 U.S. 705, rehearing denied, 319 U.S. 782 (1943), and *Spriggs v. United States*, 297 F. 2d 460, cert. den., 369 U.S. 876 (1962).

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lacks authority to invoke protective measures to safeguard the Indian interests.

We agree with the Regional Solicitor that (1) the appointment of a guardian or conservator under section 4 of the Act for the Equalization of Allotments on the Agua Caliente (Palm Springs) Reservation in California, *supra*, does not disturb the trust character of an allotment or the trustee responsibilities of the United States with respect to an allotment, and (2) any contract or approval thereof by court decree or any court decree which operates or purports to burden future income from an allotment in a way similar to the creation of a lien is ineffective under 25 U.S.C. §§ 348, 410 and 956(a) *supra*, without the approval of the Secretary of the Interior.

It was anticipated at the time of the enactment of the Act for the Equalization of Allotments on the Agua Caliente (Palm Springs) Reservation in California, *supra*, that some of the allottees could be expected to receive a sizable income from long-term business leases and that many of the allottees (a majority of whom are minors) lacked experience in handling their own affairs. The Secretary must invoke, to carry out the trust responsibility imposed by the various cited statutes, the appointment of a guardian or conservator under 25 U.S.C. § 954, which states:

The Secretary shall request the appointment of a guardian of the estate of all minor allottees and for those adult allottees who in his judgment are in need of assistance in handling their affairs in accordance with applicable State laws before making any equalization allotment or payment to such persons.

It is this provision which prompted the question raised by the Director of the Palm Springs Indian Office regarding payment to a guardian, with State court approval, of a real estate broker's fee to be taken out of future lease income to be derived from leases of trust lands.

A guardian or conservator appointed under 25 U.S.C. § 954 acquires no authority incompatible with or in derogation of the Secretary's responsibilities. The guardian has no authority to lease or to burden a trust allotment save as authorized and approved by the Secretary, and the only property of the ward that can be deemed to be within the control of the guardian or conservator, which derives from allotted trust lands, would be lease rentals or other income therefrom which has been paid to the guardian or conservator in accordance with the terms of a lease or other contract bearing the requisite approval of the Secretary.

In the case of *Chisholm v. House*, 160 F. 2d 632 (10th Cir. 1947), it was held that lease income paid directly to the lessor or his representative in accordance with the terms of an approved Indian lease of

restricted land must be classed as unrestricted property. The reasoning of the court was that the restrictions were removed by the Secretary's regulations, thus leaving the United States without standing to sue for an accounting of such income. The rationale of the decision is that the Secretary could provide by regulation for retention of the right to sue for breach and could also provide for recapture of Federal supervision over the collection, care and disbursement of lease income.

As a result of this case the Department's regulations were revised and now contemplate suit by the United States for breach of contract (25 CFR 131.5 (g) (1)) and also provide for discretionary recapture of supervision over the collection, care and disbursement of income (25 CFR 131.5 (h) (2)). The latter provision of the regulations, which is required to be contained in each lease, conclusively shows that a guardian's authority under a direct-pay lease cannot be extended to embrace future income without the approval of the Secretary. Otherwise stated, a guardian's authority over lease income attaches only upon its receipt by him in accordance with the terms of an approved lease. Future or anticipated income under a direct-pay lease is subject to Federal supervision and cannot, under 25 U.S.C. §§ 348, 410 and 956(a), be burdened or subjected to the satisfaction of any claim without the approval of the Secretary of the Interior. It is settled beyond debate, of course, that the direct income from a trust allotment partakes of the character of the corpus of the allotment itself and is subject to all the authorities and responsibilities of the trust undertaking relating to the allotment itself. *United States v. Capoeman*, 351 U.S. 1 (1956). It would necessarily follow that any action of the guardian or of the guardianship court which undertook to bind lease income not yet in the hands of the guardian would be ineffective unless approved by the Secretary.

To summarize, it is our view that income from individually owned trust property paid directly to a guardian in accordance with the terms of an approved lease must be treated as unrestricted funds; but that future or anticipated income, not yet paid into the hands of a guardian, is classed as restricted property. Among the remedies and procedures available to safeguard the Indian interests are the following:

1. The institution of appropriate proceedings to set aside any action which purports to create a burden against future income in violation of the statutes cited above.
2. Appearance in guardianship proceedings in connection with hearings on petitions for allowance of fees and expenses. This is the type of action to which reference is made in the Assistant Secretary's letter of July 9, 1963, to the Chairman of the House Committee on Government Operations.
3. Resumption of supervision over the collection, care and disbursement of lease income as authorized by 25 CFR 131.5 (h) (2).

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It is believed that the foregoing will serve as an aid in delineating the respective spheres of authority and responsibility of the guardian and the guardianship court on the one hand, and the Secretary of the Interior on the other. Manifestly, there are administrative decisions to be made which are beyond the scope of this memorandum.

FRANK J. BARRY,
Solicitor.

ROGER F. WARD

v.

GORDON C. HARRIS

A-29243

Decided February 23, 1965

Reclamation Homesteads: Generally—Reclamation Lands: Exchange

Under the act of August 13, 1953, a reclamation homestead entryman whose farm unit is found to be insufficient to support a family is entitled to relinquish his entry and to make a lieu entry on the same or another reclamation project or to obtain an amendment of his entry by the addition of sufficient adjacent irrigable land to constitute a farm unit which will support a family, and he may have his residence, improvements, and cultivation on the original entry credited as performance of the requirements of the homestead and reclamation law on the lieu or amended entry.

Reclamation Homesteads: Generally—Reclamation Lands: Exchange

Where a reclamation homestead entryman relinquishes his entry and subsequently contracts to sell the improvements but reserves the right to farm the entry during the following crop season, he is not disqualified from making an exchange entry under the act of August 13, 1953.

Reclamation Homesteads: Cancellation—Reclamation Lands: Exchange

Where a reclamation homestead entryman has met all the residence, improvement, and cultivation requirements under the homestead laws and then relinquishes his entry and makes an exchange entry under the act of August 13, 1953, it is erroneous to cancel the lieu entry on the ground that he is not living on the entry and does not have a bona fide intent to make the entry his home.

Reclamation Homesteads: Generally—Reclamation Lands: Generally

An entryman who first makes a proper entry in one reclamation project and then acquires another entry in a different project, both of which entries together have more than 160 irrigable acres, can dispel any possible objection to his first entry under the excess acreage provisions of the reclamation law by disposing of the second entry.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Gordon C. Harris has appealed to the Secretary of the Interior from a decision dated September 11, 1961, by which the Bureau of Land

Management affirmed a decision of a hearing examiner canceling his reclamation homestead entry in the North Side Pumping Division of the Minidoka Project in Minidoka County, Idaho.

The record shows that Harris held reclamation homestead entry on Farm Unit "C" in the Riverton Project in Fremont County, Wyoming, previous to March 5, 1954, when he relinquished that entry in order to qualify himself to make a lieu entry pursuant to the act of August 13, 1953, 67 Stat. 566, 43 U.S.C. § 451 *et seq.* (1958). On March 29, 1954, Harris and his wife, Ina Mae Harris, entered into a contract with Bures P. White for the sale of the improvements on Farm Unit "C" and White's assumption of their obligation on a water facility loan and charges for leveling on the farm unit, reserving, however, the right to farm the unit during the 1954 crop season, to pay all water charges, and to retain possession of the premises until December 20, 1954. White subsequently obtained an amendment of his adjoining farm unit, for which he had received a patent dated February 12, 1954, to include a portion of Harris' relinquished unit. The amended unit was designated as Farm Unit "H." A supplemental patent for the land added by the amendment was issued to White on August 14, 1956.

Meanwhile, Harris applied for a farm unit on the Minidoka Project, and on September 27, 1954, his entry on Farm Unit "B" was allowed.

In December 1954 it became apparent that White was unable to obtain a loan of the \$5,000 which he was obligated to pay the Harrises for their improvements on Farm Unit "H." Accordingly, Harris entered into a new contract with White on December 9, 1954, in which he agreed to purchase White's improvements on his original entry, to assume his obligations on a water facility loan, charges due for leveling, State and county taxes, and a sum due on a steel granary, and to proceed with the acquisition of the amended farm unit. There is no record of the cancellation of the earlier contract with White, but the parties seem to have regarded it as canceled by White's inability to perform. On December 14, 1954, White gave a warranty deed conveying to Ina Mae Harris Farm Unit "H" in Fremont County, Wyoming, containing the land in White's original farm unit and the land later listed in the patent issued August 14, 1956, to White.

Ward subsequently brought a contest against Harris' Idaho entry, charging that Harris' interest in the Wyoming reclamation farm unit on which construction charges had not been paid disqualified him from holding the Idaho reclamation farm unit and that Harris acted fraudulently and not for the purpose of making a home on the Idaho entry as alleged in his homestead application.

Harris answered, admitting the relinquishment of the Wyoming entry, the subsequent allowance of the Idaho entry, White's amendment of the Wyoming entry and the patents issued to him, the two

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contracts with White, the conveyance of Farm Unit "H" described as "certain of his patented lands" to Ina Mae Harris. He admitted that the land conveyed to Ina Mae Harris is in a reclamation project and that the construction charges on it have not been paid. He alleged, however, that this Wyoming land is the separate property of Ina Mae Harris and that both homestead entries are governed by the reclamation homestead laws of the United States, the act of August 13, 1953, the act of August 8, 1912, and other Federal laws.

A hearing was held at which Harris testified to the facts recited above and that he was then living on Wyoming Farm Unit "H" and farming it and had been doing so since 1955. He said that he had rented the Idaho entry for \$35 an acre since 1955, after an expenditure of \$1,500 to \$2,000 for clearing and leveling. He said he did not dig a well on the Idaho entry or place any buildings on it, but built a permanent home on the Wyoming entry in 1958. He said he thought he might sometime come to Idaho and farm the entry there, but that it all depended on what his boy wanted to do.

The hearing examiner found the acreage conveyed by White to Ina Mae Harris is 307 acres, 117 of which are irrigable; and that the Idaho entry contains 86 acres, 81 of which are irrigable; and that the Harrises as husband and wife are limited to 160 acres to which irrigation water may be delivered from Federal irrigation works. He found, however, that the Harrises could divest themselves of irrigable acreage in excess of 160 acres by relinquishing the excess or by paying all of the construction charges against either the Idaho entry or the Wyoming entry and thus concluded that the holding of acreage in excess of the limit does not invalidate the Idaho entry. He also found that under the act of August 13, 1953, an entryman who relinquishes a farm unit and accepts a lieu selection is entitled to credit for residence spent on the relinquished entry but that he has an obligation to make his home on the lieu unit. He concluded that Harris had not acted in good faith in maintaining his residence on the Wyoming entry in the face of his affidavit, submitted with the Idaho application to enter, that he was making the application for the purpose of making the new entry his home, and canceled the Idaho entry.

On appeal, the Division of Appeals affirmed on the ground that Harris was never entitled to allowance of the Idaho entry because he did not, in fact, divest himself of the Wyoming entry and that, therefore, the Idaho entry was thus properly canceled for want of compliance with the law.

Under the homestead law (Rev. Stat. § 2289 (1875), 43 U.S.C. § 161 (1958)) the privilege of homesteading is given to citizens who are 21 years of age or the head of a family and who do not own more than 160 acres of land. It is assumed that the allowance of Harris'

homestead application for the Wyoming entry indicates his qualification for homestead entry. And it is not disputed that, when his farm unit on the Riverton Project was found to be insufficient to support a family, he was entitled, under the act of August 13, 1953, to relinquish this entry and to select another in the same or another reclamation project under the exchange provision of the act or to obtain an amendment of his entry by the addition of adjacent land, after relinquishment of other units, under the amendment provision of the act. He chose the first course and did, in fact, relinquish his entry. His subsequent application on the Minidoka Project was proper and the allowance of the entry on that project was also proper. And he was, of course, entitled to sell his improvements on the relinquished entry to the entryman who obtained possession of them through amendment of his farm unit.

That Harris had the right to farm his original entry for the crop season of 1954 did not disqualify him from making an exchange entry under the 1953 act. When he applied for the lands on the Minidoka Project, he had already relinquished his farm unit and agreed to sell the improvements to White. The pertinent regulation provides:

* * * No exchange or amendment pursuant to the act will be permitted if the lieu unit or amended unit, together with other land *owned* by the applicant on any Federal reclamation project shall exceed 160 acres of irrigable land on which construction charges have not been paid. * * * 43 CFR 406-5. (*Italic added.*)

A right to farm not involving ownership did not, therefore, render Harris ineligible for the benefits of the 1953 act.

Accordingly, the conclusion reached in the Bureau of Land Management decision that Harris had exhausted his rights under the homestead and reclamation laws by his original entry and his transactions with White is incorrect.

The hearing examiner, as we have seen, found Harris' entry invalid for another reason, holding that an exchange entryman must "have a bona fide intent, coupled with physical presence to make his home on the new entry" and that Harris lacked such intent. However, as he noted, the 1953 act provides that an exchange entryman

* * * shall be given credit under the homestead laws for residence, improvement, and cultivation made or performed upon the original entry, and if satisfactory final proof of residence, improvement, and cultivation has been made on the original entry it shall not be necessary to submit such proof upon the lieu entry. 67 Stat. 566, 43 U.S.C. § 451 (1958).

It was stipulated at the hearing that Harris had complied with the residence requirements on his original entry (Transcript, page 4), and the hearing examiner found that Harris had completed the residence, improvement, and cultivation requirements on it. Thus Harris could transfer to his lieu entry credit for all he had performed on his original entry and, having satisfied all the requirements of the homestead law

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on it, he was not obligated to repeat on the lieu entry any of the requirements he had met on the original, including the establishment of a home. In other words, the lieu entry is to be treated as a substitution for the original entry and the entryman is to receive credit on the former for whatever he did on the latter.

Moreover, as the result of the relinquishment of the farm unit, and through the contract with White for sale of improvements, Harris had divested himself of all interests in his original entry when he applied for lands on the Minidoka Project. White was not able to perform his part of the contract requiring him to purchase the improvements. If White had been able to perform his part of the contract, Harris would not, in order to protect his investment in his improvements, have been required to reacquire title to the amended farm unit. The happenstance that Harris ended up with both an interest in lands in the Riverton Project and an entry on the Minidoka Project is not of itself sufficient to justify a finding of bad faith in the absence of proof that the result was intended from the beginning.

While it is obvious that the unscrupulous might attempt to pervert the exchange legislation and achieve unintended results, it is fundamental that the United States cannot countenance such practices. Each exchange alleged to be improper must be examined in light of its particular circumstances. Here, we do not find that the facts justify a finding that the outcome was part of a preconceived scheme for an entryman to use the exchange act as a vehicle to acquire multiple holdings on several reclamation projects.

There remains the problem raised by the fact that Harris might have had an interest in the Wyoming reclamation farm unit on which the construction charges were not paid at the same time he held his Idaho reclamation farm unit. As we have seen, the examiner held that, although the excess acreage provisions of the reclamation laws were applicable to the situation, the holding of excess acreage did not invalidate the Idaho entry since Harris could either relinquish the excess or pay all construction charges against the Wyoming entry.

Recent developments make a resolution of the excess acreage problem unnecessary. A statute, the act of March 10, 1964, sec. 1, 78 Stat. 156, authorizes the Secretary of the Interior to acquire from entrymen or owners, their lands within the third division of the Riverton Federal reclamation project in which Harris' Wyoming entry is situated. The Bureau of Reclamation has reported that the Harrisés have conveyed their land and improvements in the Riverton project to the United States and that the deed was recorded on January 29, 1965. Thus Harris no longer owns property in more than one reclamation project and any ineligibility that may have existed on that account has been removed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a) ; 24 F.R. 1348), the decision appealed from is reversed and the case is remanded for dismissal of the contest.

EDWARD WEINBERG,
Deputy Solicitor.

SOIL AND MOISTURE CONSERVATION PROGRAM

Soil and Moisture Conservation—Public Lands: Jurisdiction Over

The question whether the Department of the Interior may perform soil and moisture conservation operations pursuant to the Soil Conservation and Domestic Allotment Act of 1935 (49 Stat. 163, as amended; 16 U.S.C. §§ 590a-590e, 590f, 590g, 590h, 590i, 590j-590q (1958)), on a particular tract of land is answered by determining whether the Department has administrative jurisdiction over the tract. If the tract is under the Department's administrative jurisdiction, the Department may perform such soil and moisture operations on the tract, even though the benefits of such operations accrue in whole or in part to other lands not under the jurisdiction of the Department. Accordingly, the Department may conduct soil and moisture conservation operations on lands under its jurisdiction where the primary benefits from such operations accrue to lands in private ownership or to federally owned improvements which are under the jurisdiction of other Federal agencies. In addition, the Department of the Interior may perform soil and moisture conservation operations on lands not under the jurisdiction of the Department, provided that the operations have as their primary purpose the protection and benefit of lands which are under the jurisdiction of the Department.

Reorganization Plans

Section 6 of Reorganization Plan No. 4, effective June 30, 1940 (5 F.R. 2421; 54 Stat. 1234, 1235; note following 5 U.S.C. § 133t (1958)), transferred to the Department of the Interior the full power which was formerly vested in the Department of Agriculture, pursuant to the Soil Conservation and Domestic Allotment Act of 1935 (49 Stat. 163, as amended; 16 U.S.C. §§ 590a-590e, 590f, 590g, 590h, 590i, 590j-590q (1958)), with respect to lands otherwise under the jurisdiction of the Department of the Interior. The question whether the Department of the Interior may perform soil and moisture conservation operations pursuant to the Soil Conservation and Domestic Allotment Act of 1935 (49 Stat. 163, as amended; 16 U.S.C. §§ 590a-590e, 590f, 590g, 590h, 590i, 590j-590q (1958)), on a particular tract of land is answered by determining whether the Department has administrative jurisdiction over the tract. If the tract is under the Department's administrative jurisdiction, the Department may perform such soil and moisture operations on the tract, even though the benefits of such operations accrue in whole or in part to other lands not under the jurisdiction of the Department. Accordingly, the Department may conduct soil and moisture conservation operations on lands under its jurisdiction where the primary benefits from such operations accrue to lands in private ownership

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or to federally owned improvements which are under the jurisdiction of other Federal agencies.

Solicitor's Opinion M-36047 of August 28, 1950 (60 I.D. 436), will not be followed to the extent that it conflicts with these views.

M-36677

February 23, 1965

TO: ASSISTANT SECRETARY, PUBLIC LAND MANAGEMENT.

SUBJECT: SOIL AND MOISTURE CONSERVATION PROGRAM.

This is in response to your memorandum of November 23, 1964, in which you requested my opinion as to whether the Department of the Interior may conduct soil and moisture conservation operations on lands under its jurisdiction where the primary benefits from such operations accrue to lands in private ownership or to federally owned improvements which are under the jurisdiction of other Federal agencies.

Soil and moisture conservation operations by the Federal Government are authorized by the Soil Conservation and Domestic Allotment Act of 1935.¹ Section 1 of the act² provides that:

It is recognized that the wastage of soil and moisture resources on farm, grazing, and forest lands of the Nation, resulting from soil erosion, is a menace to the national welfare and that it is declared to be the policy of Congress to provide permanently for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of reservoirs, and maintain the navigability of rivers and harbors, protect public health, public lands and relieve unemployment, and the Secretary of Agriculture, from now on, shall coordinate and direct all activities with relation to soil erosion and in order to effectuate this policy is authorized, from time to time—

(1) To conduct surveys, investigations, and research relating to the character of soil erosion and the preventive measures needed, to publish the results of any such surveys, investigations, or research, to disseminate information concerning such methods, and to conduct demonstrational projects in areas subject to erosion by wind or water;

(2) To carry out preventive measures, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land;

(3) To cooperate or enter into agreements with, or to furnish financial or other aid to, any agency, governmental or otherwise, or any person, subject to such conditions as he may deem necessary, for the purposes of this chapter; and

(4) To acquire lands, or rights or interests therein, by purchase, gift, condemnation, or otherwise, whenever necessary for the purposes of this chapter.

Section 2 of the act³ provides that such operations may be performed—

¹ 49 Stat. 163, as amended; 16 U.S.C. §§ 590a-590e, 590f, 590g, 590h, 590i, 590j-590k (1958).

² 16 U.S.C. § 590a (1958).

³ 16 U.S.C. § 590b (1958).

(a) On lands owned or controlled by the United States or any of its agencies, with the cooperation of the agency having jurisdiction thereof; and

(b) On any other lands, upon obtaining proper consent or the necessary rights or interests in such lands.

Section 3 of the act⁴ provides that, as a condition to the extension of any benefits under the act to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of the act, require—

(1) The enactment and [sic] reasonable safeguards for the enforcement of State and local laws imposing suitable permanent restrictions on the use of such lands and otherwise providing for the prevention of soil erosion;

(2) Agreements or covenants as to the permanent use of such lands; and

(3) Contributions in money, services, materials, or otherwise, to any operations conferring such benefits.

By section 4 of the act,⁵ the Secretary of Agriculture is authorized to secure the cooperation of any governmental agency. Section 5 of the act⁶ directs the Secretary of Agriculture to establish the Soil Conservation Service to exercise the powers conferred on him by the act.

Section 6 of Reorganization Plan No. 4, effective June 30, 1940,⁷ provides as follows:

Sec. 6. Certain functions of the Soil Conservation Service transferred.—

The functions of the Soil Conservation Service in the Department of Agriculture with respect to soil and moisture conservation operations conducted on any lands under the jurisdiction of the Department of the Interior are transferred to the Department of the Interior and shall be administered under the direction and supervision of the Secretary of the Interior through such agency or agencies in the Department of the Interior as the Secretary shall designate.

The President's letter of transmittal accompanying the Reorganization Plan, explained to the Congress that the general purposes of the changes effected by the plan were (1) to reduce expenditures, (2) to increase efficiency, (3) to consolidate agencies according to major purposes, (4) to reduce the number of agencies by consolidating those having similar functions and by abolishing such as may not be necessary, and (5) to eliminate overlapping and duplication of effort. With reference to section 6 of the plan, the President stated as follows:

Department of the Interior: I propose to transfer to the Department of the Interior the activities of the Soil Conservation Service relating to soil and moisture conservation on lands under the jurisdiction of the Interior Department. With respect to private lands, the soil-conservation work of the Federal Government is primarily of a consultative character and can best be carried on by

⁴ 16 U.S.C. § 590c (1958).

⁵ 16 U.S.C. § 590d (1958).

⁶ 16 U.S.C. § 590e (1958).

⁷ 5 F.R. 2421, 54 Stat. 1234, 1235, note following 5 U.S.C., § 133t (1958).

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the Department of Agriculture through cooperation of the farmers throughout the country. In the case of Federal lands, this work includes the actual application by the Government of soil-conservation practices and is an appropriate function of the agency administering the land.

Further on in the transmittal letter, the following statement appears:

Economies: Functions may be transferred or consolidated under this Reorganization Act, but the abolition of functions is prohibited. Congress alone can curtail or abolish functions now provided by law. * * *

From the foregoing, it is clear that prior to the transfer of functions by the Reorganization Plan, the Secretary of Agriculture had full power to perform soil and moisture conservation activities pursuant to the Soil Conservation and Domestic Allotment Act on any lands, whether in private or Federal ownership, provided of course that the requirements of the act were complied with. Thus, he could perform soil and moisture conservation work on private lands not only for the benefit of the lands whereon the work was actually performed, but also for the benefit of federally owned lands or other privately owned lands as well. Moreover, there is nothing in the statute which would prevent the Secretary of Agriculture from performing soil and moisture operations on privately owned lands for the *sole* benefit of federally owned or other privately owned lands. Conversely, the Secretary of Agriculture could perform soil and moisture conservation activities on federally owned lands for the sole or partial benefit of privately owned lands or other federally owned lands.

The extent to which Reorganization Plan No. 4 transferred the authority of the Secretary of Agriculture to the Secretary of the Interior has previously been considered by this Office on two occasions.

In *Solicitor's Opinion M-30997*, of October 25, 1941 (57 I.D. 382), in answer to the question as to whether Reorganization Plan No. 4 authorized the Secretary of the Interior to conduct soil and moisture conservation activities on private lands, it was said that, so far as the responsibility and the authority for performing soil and moisture conservation activities in connection with lands under the jurisdiction of this Department are concerned, the Secretary of the Interior now enjoys all the former powers of the Secretary of Agriculture. From the language of the Reorganization Plan and the President's transmittal letter, the then Acting Solicitor reasoned that the transfer of authority thereunder must be viewed from the standpoint of a division of responsibility for the protection of lands, based primarily on jurisdiction over the lands to be protected, and that the responsibility for protection of lands under the jurisdiction of this Department is vested in this Department. He pointed out that:

Such responsibility, if properly to be assumed, must carry with it certain necessary incidents of authority. A holding that you are authorized to perform

soil and moisture conservation work only on lands under your jurisdiction and solely for the benefit of such lands would so limit you that it would be impossible, in the vast majority of cases, to accomplish satisfactory results. On the other hand, if you are to protect adequately the lands under your jurisdiction, you must have authority to do work on private lands if in any case it appears necessary, and to do work for the benefit of lands under your jurisdiction irrespective of the fact that some resultant benefit may flow to private lands.

When so considered, I have no difficulty in determining as a matter of law that you have certain authority to perform soil and moisture conservation work on private lands. * * *

I am of the opinion, therefore, that you are now vested with authority to determine the lands under your jurisdiction that are in need of soil and moisture conservation work, and to initiate and carry on such work regardless of whether the work is to be done on private or public lands. In other words, *your authority is limited to the performance of soil and moisture conservation work on lands under your jurisdiction, or which has as its primary purpose the protection and benefit of lands under your jurisdiction.* Once it has been determined that any such land is in need of soil and moisture conservation work, you may proceed to carry out that work regardless of the fact that any or even all of the actual operations must be performed on private lands, and of the fact that resultant benefits may flow to private lands. [Italic added.]

In *Solicitor's Opinion M-36047*, (60 I.D. 436 (1950)), the then Solicitor was asked whether this Department may properly perform soil conservation work on lands under its jurisdiction if the sole or chief benefit from such work will accrue to privately owned lands contiguous to, or situated in the same watershed with, the lands on which the work is done. He replied:

Although a literal reading of [section 6 of Reorganization Plan No. 4] might lead to the conclusion that all soil and moisture conservation activities on lands under the jurisdiction of this Department, including operations for the benefit of privately owned lands nearby or in the same watershed, are to be performed by agencies of this Department, I am of the opinion that it was the purpose of section 6 of the plan to transfer to this Department only those functions which relate to the protection of lands under the jurisdiction of this Department. Section 6, it seems to me, was designed to divide the authority for performing soil and moisture conservation activities between the two Departments on the following basis: Operations looking toward the protection of all lands other than those under the jurisdiction of this Department are to be performed by the Department of Agriculture, while operations for the protection of lands under the jurisdiction of this Department are to be performed by the Department of the Interior. This is borne out by the President's message in submitting the plan to Congress.

The same principles which led the Acting Solicitor in 1941 to conclude that this Department has authority to conduct soil and moisture conservation activities on privately owned lands (with the consent of the owners) only in those situations where the primary purpose of the operations is to protect lands under the jurisdiction of this Department lead me to conclude that this Department could not properly conduct soil and moisture conservation activities on lands under its jurisdiction if the primary purpose of such operations were to benefit privately owned lands.

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I do not mean to imply that soil and moisture conservation activities conducted by this Department must be solely for the benefit of lands under the jurisdiction of this Department and that such activities cannot be carried on by the Department if it appears that any benefits, however slight, will flow to privately owned lands. However, the chief objective of any soil and moisture conservation activities conducted by this Department on lands under its jurisdiction must be the protection of the Department's lands. The test, therefore, is not the quantum of benefits that may flow to privately owned lands, but the purpose for which the activities are conducted.⁸

As a consequence of this reasoning, the Solicitor then went on to conclude that this Department does not have authority to conduct soil and moisture conservation activities on lands under its jurisdiction for the purpose of protecting federally constructed reservoirs, irrigation works, and other related improvements which are under the jurisdiction of Federal agencies other than this Department. He further concluded that if the conservation of privately owned lands requires the performance of soil conservation work on Government-owned lands, the Soil Conservation Service is the proper agency to perform such work.

In the first of these two opinions, it was held, and I think correctly, that the Department of the Interior may (1) perform any and all soil and moisture activities on lands under the jurisdiction of the Department of the Interior and (2) perform soil and moisture conservation activities on lands not under the jurisdiction of the Department, provided that the activities on these other lands have as their primary purpose the protection and benefit of lands which are under the Department's jurisdiction. The Department's powers in the first category are expressly conferred upon it by the Reorganization Plan, while the powers in the second category are implied powers which are necessary and proper for the performance of the powers expressly conferred. It is axiomatic that functions performed under such implied powers must have as their primary purpose the furtherance of the powers expressly granted. Accordingly, it was the conclusion of the Solicitor that the functions performed under the powers implicitly conferred by the plan must have as their primary purpose the protection and benefit of lands under the Department's jurisdiction.

But, with regard to the powers expressly conferred by the plan, there is no necessity to apply the "necessary and proper" test. All that is required is to determine the meaning of the statute from its express terms or, if ambiguities obtain, from its legislative history.

In the second opinion, the correct reasoning of the first opinion was improperly applied. The question under consideration in the second

⁸ 60 I.D. 438. Footnote omitted.

opinion was not the extent of the Department's implied powers under the Reorganization Plan, but the extent of the express powers granted to the Department by the plan. Accordingly, the reasoning of the first opinion cannot validly be relied on as ground for the conclusion that the Department cannot engage in soil and moisture conservation activities unless such activities are for the primary benefit of lands under the jurisdiction of this Department. Such conclusion can only be reached if the language of the Reorganization Plan itself requires it, or, if the plan is ambiguous, the legislative history of the plan (the transmittal letter) clearly leads to that conclusion. There is no language in either the plan or the transmittal letter which requires such a conclusion to be reached.

As was previously stated, the Department of Agriculture, prior to the transfer of functions by the Reorganization Plan, had full power to perform soil and moisture conservation activities on lands otherwise under the jurisdiction of the Department of the Interior. This power included the power of constructing works on such lands for the benefit of other lands. Section 6 of the Reorganization Plan explicitly transfers this power to the Secretary of the Interior.

The functions of the Soil Conservation Service * * * with respect to soil and moisture conservation operations on any lands under the jurisdiction of the Department of the Interior are transferred to the Department of the Interior * * *.

Since the power of the Department of Agriculture is transferred to this Department and there are no limitations or reservations on that power in the Reorganization Plan, this Department now has exactly the same power as that previously enjoyed by the Agriculture Department, including the power to construct works on lands under this Department's jurisdiction for the full or partial benefit of other lands not under the jurisdiction of this Department. To interpret the plan as conferring lesser powers to this Department would be, in effect, to curtail or abolish functions authorized by statute, and, as is noted in the transmittal letter, such an interpretation is improper.

Inasmuch as the Soil Conservation and Domestic Allotment Act granted plenary power to the Department of Agriculture, and the Reorganization Plan transferred that power to this Department with regard to soil and moisture conservation operations on lands under the jurisdiction of this Department, I cannot subscribe to the view that anything less than the full power which was formerly vested in the Department of Agriculture was transferred to this Department with regard to operations on lands under this Department's jurisdiction.

The express language of the Reorganization Plan, reiterated in the transmittal letter, speaks of soil and moisture operations *on* any lands

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under the jurisdiction of this Department; it does not say "relating to" lands under the jurisdiction of this Department. The question whether the Department of the Interior may perform soil and moisture conservation operations pursuant to the Soil Conservation and Domestic Allotment Act of 1935 (49 Stat. 163, as amended; 16 U.S.C. §§ 590a-590e, 590f, 590g, 590h, 590i, 590j, 590q (1958)), on a particular tract of land is answered by determining whether the Department has administrative jurisdiction over the tract. If the tract is under the Department's administrative jurisdiction, the Department may perform such soil and moisture operations on the tract, even though the benefits of such operations accrue in whole or in part to other lands not under the jurisdiction of the Department.

I am of the opinion, therefore, that the Department of the Interior may conduct soil and moisture conservation operations on any lands under its jurisdiction for the benefit of the lands whereon the operations are performed or for the benefit of any other lands whether or not they are under the Department's jurisdiction. Put differently, the Department may conduct soil and moisture activities on lands under its jurisdiction even though quantitatively the benefits from such operations accrue in whole or in part to privately owned lands or to other Federal lands not under this Department's jurisdiction.⁹ *Solicitor's Opinion M-36047* of August 28, 1950 (60 I.D. 436), will not be followed to the extent that it conflicts with these views.

In addition, the Department may perform soil and moisture conservation operations on lands which are not under the Department's jurisdiction, provided that such operations have as their primary purpose the protection and benefit of lands under the Department's jurisdiction.

In response to your question, therefore, the Department may conduct soil and moisture conservation operations on lands under its jurisdiction where the primary benefits from such operations accrue to lands in private ownership or to federally owned improvements which are under the jurisdiction of other Federal agencies.

FRANK J. BARRY,
Solicitor.

⁹ In situations where soil and moisture activities are to be conducted on lands which are within the jurisdiction of this Department and such activities will benefit other lands not within such jurisdiction, it is necessary, of course, to obtain the prior consent of the private landowner or the agency having jurisdiction thereof before commencing such activities.

ALTON MORRELL AND SONS

A-29569

A-30094

*Decided February 24, 1965***Grazing Permits and Licenses: Generally**

Nothing in the Taylor Grazing Act or the Federal Range Code requires that one who leases land not qualified as base property must be accorded recognition on the Federal range because of his control of that nonqualifying land.

Grazing Permits and Licenses: Exchange of Use

Exchange-of-use is a method which permits livestock operators having ownership or control of non-Federal land interspersed and normally grazed in conjunction with the surrounding Federal range to agree with the grazing officials that he may graze on the surrounding land to an extent not to exceed the grazing capacity of his land in consideration of his granting to the Bureau of Land Management the management and control of his land for grazing purposes.

Grazing Permits and Licenses: Exchange of Use

Consummation of an exchange of use proposed by a livestock operator is discretionary on the part of the grazing officials; such an exchange may not be consummated unless it accords with the principles of good range management.

Grazing Permits and Licenses: Exchange of Use

The rejection of an application for exchange of use based on nonqualifying land does not deny the applicant any rights to which he is entitled under the Taylor Grazing Act.

Grazing Permits and Licenses: Trespass—Grazing Permits and Licenses: Cancellation and Reductions

In cases of wilful trespasses on the Federal range a reduction or suspension of grazing privileges may be imposed on the offender in addition to the assessment of monetary damages.

Grazing Permits and Licenses: Trespass—Grazing Permits and Licenses: Generally

A penalty for wilful trespass of a suspension of grazing privileges for five years will be reduced to a reduction of privileges by 40 percent for five years where the circumstances do not appear to warrant imposition of the more stringent penalty.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Alton Morrell and Sons,¹ hereinafter referred to as Morrell, have appealed to the Secretary of the Interior from two decisions of the Bureau of Land Management relating to their use of the Federal range in Utah Grazing District No. 7 under the Taylor Grazing Act, 48 Stat. 1269 (1934), as amended, 43 U.S.C. § 315 *et seq.* (1958), and the regulations of this Department governing the use of the Federal range.

Two distinct questions are presented by these appeals: first, the propriety of denying an exchange-of-use to Morrell, and, second, the

¹ Frank J. Hatt was recognized as an intervenor in A-29569.

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penalty to be imposed upon Morrell for trespasses. These questions were initially considered by different hearing examiners who presided at hearings on the various appeals of Morrell from decisions of the district manager of the grazing district and were considered separately by the Bureau. However, in his present appeals Morrell contends that the trespasses, which he admits, grew out of what he characterizes as the unlawful and unauthorized action of the district manager in refusing to grant him an exchange-of-use and that this factor must be taken into consideration in determining whether a penalty is to be assessed against him for the trespasses.

To bring both matters to an ultimate conclusion,² the two appeals will be considered together in this decision.

To put the matter in proper prospective and without attempting to summarize the evidence introduced at the three hearings, only ultimate facts necessary for a decision in this matter will be related.

Morrell has been a user of the Federal range within Utah Grazing District No. 7 for many years. In 1959, when he applied for the exchange-of-use, he had a Class 1 grazing license which entitled him to graze 699 cattle within Unit No. 15 of the district from October 15, 1958, to May 15, 1959. This privilege was based on land owned by him in Wyoming. Morrell, also, in 1959, had under lease from the State of Utah some 27,000 acres of school lands which are intermingled with the Federal range.

On March 6, 1959, Morrell filed the exchange-of-use application involved here. He stated that he had the school sections under lease and that the school sections were accessible and suitable for grazing during the same periods as the Federal range. He agreed, in the event the applications were allowed, that the Secretary of the Interior might exercise the same grazing regulations and control over the offered school sections as over the Federal range. He stated that he understood that the grazing use allowed could not exceed the grazing capacity of the offered land. He agreed to abide by the rules and regulations of the Secretary and to confine his livestock to the number, class, period or periods of time and areas of use, if authorized. In exchange for the grazing regulation and control of the school sections, Morrell applied to graze 400 head of cattle from May 15, 1959, to October 15, 1959 on intermingled and adjacent public lands.

That application was rejected by the decision of the district manager dated April 16, 1959, on the ground that the grazing privileges

² A large measure of the delay in reaching decisions in these matters, both by the Bureau and by this office, is attributable to the fact that the files had to be returned to the field for use by the grazing officials in connection with other applications and appeals by Morrell and for use in an action, framed under the Tort Claims Act, which Morrell brought against the United States involving the same lands as are involved here. Morrell was unsuccessful in that action. See *United States v. Morrell*, 331 F. 2d 498 (10th Cir. 1964); *cert. denied*, *Chournos et al. v. United States*, 379 U.S. 879 (1964).

then granted to Morrell were for winter use only and that to allow Morrell to place summer privileges on top of winter privileges would not make for good range management.

Morrell appealed from that decision on April 27, 1959. At the same time he requested, in view of the probability that a hearing on his appeal would not be held until after his current license expired, permission to keep his cattle on the Federal range in numbers not to exceed the carrying capacity of the State lands under his control until the appeal from the rejection of his exchange-of-use application had been finally disposed of.

By letter dated May 7, 1959, Morrell was informed that no exchange-of-use license for summer grazing privileges would be issued to him. His attorney, to whom the letter was directed, was advised that Morrell had been placed on notice on February 5, 1959, that no exchange-of-use would be allowed that summer and that Morrell had had plenty of time to arrange his operations so that this problem would not exist at the end of his regular grazing season.³

As noted above, his Class 1 license terminated on May 15, 1959.

Thereafter, and after several separate notices of trespass were sent to Morrell, two notices of violation and orders to show cause were issued to Morrell, charging him with having permitted his cattle to graze on the Federal range in violation of the terms of his grazing license. The first notice, dated July 8, 1959, covered periods beginning on or about June 5, 1959, to July 1, 1959. Pursuant to the provisions of 43 CFR 161.12(e), now 43 CFR 9239.3-2(e), Morrell was ordered to appear before a hearing examiner on August 12, 1959, and answer the charges and show cause why his license or permit should not be suspended, reduced, or revoked, or renewal thereof denied and satisfaction of damages made. The second notice, dated October 16, 1959, charged Morrell with having had cattle on the Federal range in violation of the terms and conditions of his license from July 1, 1959, to on or about October 15, 1959. That notice directed Morrell to appear before a hearing examiner on November 20, 1959.⁴

At the two hearings on the trespass charges, Morrell admitted the trespasses but attempted to introduce evidence concerning his exchange-of-use application and its rejection and evidence that the area in which the trespasses were committed was open for year-round use by other operators, in an apparent attempt to justify the trespasses. The hearing examiner at both hearings refused to permit the introduction of such evidence on the ground that the hearings were limited to the charges of trespass committed by Morrell.

³ The letter of February 5, 1959, informed Morrell that it was planned to close down two wells in the area in which Morrell sought to graze in order to give the areas around those two wells a chance to rehabilitate themselves a little during the summer months.

⁴ The hearing was continued until November 25, 1959, by order of the hearing examiner.

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In his decision of December 1, 1959, the hearing examiner dismissed without comment Morrell's argument that had the exchange-of-use been approved by the district manager Morrell would not have been in trespass, stating that this was not proper argument to be considered in connection with a trespass charge. He cited 43 CFR 161.12(e) (2) providing that the evidence at such a hearing shall be confined to the commission of the acts charged. He also referred to other provisions of the regulation which authorize the examiner to assess the amount of damages and to direct the district manager to suspend, reduce or revoke the license, permit, or base property qualifications or to deny renewal, if the facts so warrant.

In his decision the hearing examiner also found that Morrell had committed the trespasses charged, that Morrell had placed the cattle on the range in violation of the terms and conditions of his license, that Morrell's apparent indifference to compliance with the terms of the Federal Range Code could not be overlooked, and that the trespasses must be considered to have been willful. He held that the evidence produced at the hearing warranted a reduction in future grazing licenses of Morrell. After assessing damages on the basis of the rate charged by the Bureau for animal unit months on the Federal range for that year, the hearing examiner directed the district manager to refuse to issue any license or permit to graze livestock on the Federal range until Morrell had paid the sum of the damages assessed and thereafter to refuse to issue any license or permit to Morrell for Federal range use greater than 60 percent of the present Class 1 qualifications of Morrell's base property for a period of two years.

At the second hearing, before the same hearing examiner, it was stipulated that the testimony and evidence submitted at the first hearing would be made a part of the proceeding, since the issues, range, land status, and the parties were the same. It was further stipulated that the number of cattle on the range since the first hearing, as set forth in the notices of trespass issued since the August 12, 1959, hearing was correct. The hearing examiner held, in his decision of February 19, 1960, that no testimony was presented at the second hearing that would change, modify, alter, or mitigate the findings in the previous hearing, and that Morrell was guilty of willful trespass.

The examiner, after assessing damages for the trespasses on the same basis as that used in his earlier decision, directed the district manager to refuse to issue to Morrell any license or permit to graze livestock on the Federal range until he had paid the damages assessed and, thereafter, to refuse to issue to Morrell any license or permit for Federal range use for a period of five years.

On June 21, 1963, the Assistant Director of the Bureau of Land Management affirmed both of the decisions relating to the Morrell trespasses, holding that the action of the hearing examiner in refusing to consider evidence relating to the exchange-of-use was correct, since that matter is completely irrelevant to the issue raised by the charges of trespass. He found that the application for the exchange-of-use had been rejected, that Morrell's license expired on May 15, 1959, and that Morrell willfully continued to use the Federal range without authorization. The severity of the penalty, i.e., the suspension of grazing privileges for a period of five years, he found to be justified by the fact that Morrell had continued to graze cattle on the range in open defiance and in flagrant abuse of his privileges.

Meantime, on March 18, 1960, the hearing was held on Morrell's appeal from the rejection of his exchange-of-use application. The parties agreed that the issue was whether or not the district manager had discretion to reject the application in the circumstances presented and, if he did have discretion, whether he abused that discretion. The hearing examiner refused to permit the introduction of evidence by employees of the Bureau as to the condition of the range. An offer of proof was made to show that the rejection of the exchange-of-use was not an abuse of discretion because of the overburdened range and the harm which would be done to that range by the addition of more livestock during the summer months.

In his decision of July 12, 1960, the hearing examiner mentioned the Bureau's contention that to allow an additional summer grazing load on an area already over-grazed would be poor range management and while he held that approval of an exchange-of-use application is discretionary, he found that the district manager had arbitrarily rejected this particular application. He said:

The facts all indicate that this range was open for year-round grazing, that other licensees use the school sections of the appellant in both winter and summer, that he controls several sections near the waterholes that are over-grazed by admission of appellant, the Government, and the intervenor. The Bureau, by the admission of the district manager, would have granted appellant winter exchange of use but would not permit summer use although his controlled lands are grazed by licensees on an all-year basis and although the area is generally on an all-year licensing basis. I find this to be an arbitrary use of discretion and that appellant should be allowed a proportionate share of summer use along with those who graze his controlled sections. As for the words of the regulation, "consistent with good range management the district manager himself said it was not good range management to allow all-year grazing and that they were working on a means to correct this."⁵

⁵ The words quoted in the last sentence are not from the regulations but are to be found in the Secretary's decision dated June 6, 1946, in *Charles E. Kunster, et al.*, IGD 450, quoted earlier in the hearing examiner's decision, holding that an exchange-of-use license is not mandatory under the law or the Federal Range Code, when proposed by an interested party, but that it should not be denied arbitrarily in appropriate cases when consistent with good range management.

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The matter is therefore remanded and the appellant should be allowed an exchange of use license for the carrying capacity of his leased lands upon a showing of proper control of the lands submitted. The 1959 grazing season for which appellant's application was made has expired, and this decision will apply to future exchange of use applications so long as the range is classified for year-long grazing.

An appeal was taken from the July 12, 1960, decision by the State Supervisor for Utah, Bureau of Land Management, on the ground that 43 CFR 161.6(c), now 43 CFR 4115.2-(h),⁶ is clearly permissive and discretionary under the circumstances existing in the Morrell case and that the district manager had not abused that discretion.

By its decision of February 7, 1962, the Bureau reversed the hearing examiner's holding that the district manager's action had been arbitrary. The decision pointed out that the hearing examiner's action in remanding the case with instructions to allow an exchange-of-use application based on the carrying capacity of the leased lands placed the same preferential value on this exchange-of-use application as is enjoyed by holders of Class 1 privileges.

The decision said, in part:

In this connection, there was evidence to show that the range was in a severe state of depletion due to overgrazing, use during improper seasons (summer particularly), and climatic conditions, and that the Bureau was in the process of instituting measures to alleviate this condition. There was also evidence that the appellee had never used the range in this area except during the fall, winter and spring for which the range was classified. The evidence further showed that the Bureau would have considered the exchange of use application in a more favorable light if the use requested had been for the time that the appellee normally grazed in this area which excluded summer use.

The District Manager recognized that the range is being used by a greater number of livestock than the range can adequately support or for grazing seasons that are detrimental and has indicated that such use is not only preventing the range from improving but is causing greater deterioration. This in itself is sufficient to justify the district manager's refusal to permit more livestock to use the range during the critical season through the issuance of an exchange of use license. These considerations are the fundamental elements of good range management of which the District Manager has been endowed with the duty to exercise.

In his appeal from the Bureau decision on his exchange-of-use application, Morrell makes many statements which are not borne out by the record made at the hearing and attempts to interpret the Bu-

⁶ "Exchange-of-use agreements may be issued to any applicant having ownership or control of non-Federal land interspersed and normally grazed in conjunction with the surrounding Federal range for not to exceed the grazing capacity of such non-Federal land, without payment of grazing fees, provided that during the term of the agreement the Bureau shall have the management and control of such non-Federal land for grazing purposes."

reau decision to suit his argument which, as far as pertinent to the denial of the exchange-of-use, seems to be that while the Government allowed other licensees to use the range year-long it refused to allow him to do so, notwithstanding the fact, he alleges, that those other licensees graze on the State lands which he leases. He cites that provision of section 3 of the Taylor Grazing Act, 48 Stat. 1270 (1934), 43 U.S.C. § 315(b) (1958), which provides that preference shall be given in the issuance of grazing permits to those within or near a grazing district who are land owners engaged in the livestock business, *bona fide* occupants or settlers, or owners of water or water rights as may be necessary to permit the proper use of land, water, or water-rights owned, occupied, or leased by them.

He contends that under that provision he is entitled, as a preference-right applicant, to receive grazing licenses for the use of this public land which he has to graze to make any use of his own land (the leased State land) and that he offered to take only the quantity of forage which his own land produced, "interfering in no way with the quantity of forage which the public land produced." He contends that this would have interfered in no way with the operations of the other persons to whom the Government had contracted to sell its forage. "But the Government had contracted to, and did, sell the appellant's forage as well. For this, it seeks to fine appellant, and then to destroy his entire property right in the public lands. His livestock cannot stand for five years to come back into this range area, which the Department has thus far determined as a penalty against appellant for having left one-fifth the number of cattle on the range which his own lands will carry."

It seems obvious from the whole course of the proceedings relating to the exchange-of-use and the trespasses that Morrell refuses to recognize the function of an exchange-of-use and that he seeks to obtain special privileges on the Federal range through his control of the State lands.

Under the Taylor Grazing Act, the Secretary of the Interior is authorized to issue permits to graze on lands within grazing districts to those livestock owners who, under the Secretary's rules and regulations, are entitled to participate in the use of the range. The Federal Range Code for Grazing Districts sets forth the manner in which those who own or control land or water may qualify for grazing privileges. Neither the statute nor the Code vests in a livestock operator an absolute privilege to use the Federal range intermingled with his owned or controlled land.

Morrell has been recognized as a qualified user of the Federal range in this area for a specified period of the year, based on his property in Wyoming which must, under the Federal Range Code, be used in

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connection with his livestock operation to support his cattle during the remainder of the year. Morrell does not question the sufficiency of that recognition of the qualifications of his base property. Having been given this recognition in the form of a license which permits him to use the Federal range during that specified period, he has been recognized as a preference-right applicant and has received all of the privileges to which he is entitled under the act. One who has been granted all of the grazing privileges to which his base property entitled him does not have any standing to complain of the privileges awarded to others. Cf. *M. P. Depaoli and Sons*, IGD 552 (1951); *William Sellas*, IGD 677 (1958).

Morrell sought, by his exchange-of-use application, to change the pattern of his operation, to save himself the necessity of removing his cattle to his Wyoming property during the summer months. He did this by offering the grazing management of the State lands which he leases and which are so-called parallel-use lands, not qualified as lands dependent by use under the Federal Range Code. He contends that he can not make any use of the State lands without his cattle straying on the surrounding Federal range and that the animals of the licensed users of the Federal range consume the forage on his leased lands, winter and summer. This contention is supported by the evidence produced at the hearing. However, nothing in the Taylor Grazing Act or the Federal Range Code requires that one who leases land not qualified as base property must be given recognition on the Federal range because of his control of that non-qualifying land.

The Department does recognize that in an unfenced area containing both Federal and non-Federal land it is practically impossible for animals to graze the area without straying to some extent from the Federal land to the private land and from the private land on to the Federal range. In recognition of this situation which exists in many areas it has provided, by regulation, that exchanges-of-use may be entered into. However, since the Department has the duty of protecting the Federal range and of seeing that the range is not overgrazed, particularly in seasons where such grazing would do harm to the range, such agreements are discretionary with the Department and must be made in such a manner that the rights of all qualified users of the range will be protected. In other words, exchange-of-use is a method adopted by the Department which permits a livestock operator having ownership or control of non-Federal land interspersed and normally grazed in conjunction with the surrounding Federal range to agree with the grazing officials that he may graze on the surrounding land to an extent not to exceed the grazing capacity of his land in consideration of his granting to the Bureau the management and control of his land for grazing purposes. It is an entirely voluntary arrange-

ment agreed upon by the applicant and the Bureau and has nothing whatever to do with the order of preference established by the Federal Range Code for the issuance of regular licenses or permits.

Here Morrell proposed an exchange-of-use which would have permitted his cattle to remain on the Federal range during the five months of the year when, under his regular license, they were not entitled to remain there. When his proposal was rejected, he chose to defy the terms of his license and, according to the record, deliberately placed on the Federal range those cattle which he did not remove to Wyoming. There is no evidence in the record, and Morrell does not contend, that these animals strayed on to the Federal range from his State leased lands.

In view of the issue framed at the hearing on the rejection of his exchange-of-use application, and of the evidence presented at the hearing on that issue, I am convinced that it was entirely proper for the district manager to have rejected the application. The rejection of that application did not deny Morrell any rights to which he was entitled under the Taylor Grazing Act and its acceptance would not have been in accordance with good range management. The district manager was acting entirely within the scope of his authority in rejecting the application and his action in this respect was neither unlawful or unauthorized.

Accordingly it must be held that the district manager had discretion to reject the exchange-of-use application and that his exercise of that discretion was in accord with his duty to protect the Federal range.

The records made at the hearings on the trespass charges have also been carefully reviewed. Morrell admitted that he had not removed all of the animals which were licensed to remain on the Federal range until May 15, 1959, and that some of the cattle remained on the Federal range until October 15, 1959, without a license. The record fully supports the finding of the hearing examiner that the trespasses were willful and in violation of the terms and conditions of Morrell's license.

Other than to continue his contention that the trespasses would not have occurred had he been granted the exchange-of-use, Morrell does not seriously quarrel with the assessment of damages made by the hearing examiner for the consumption of forage on the Federal range during the time his cattle were there without a license but, in his appeal to the Secretary, he, for the first time, questions the authority of the Department to suspend his license for a period of five years. He contends that the Taylor Grazing Act provides that any willful-violation of the provisions thereof or of the Secretary's rules and regulations thereunder shall be punishable by a fine of not more than \$500. He states that the act contains no other provision relating to punishment or fine in connection with the use of the Federal range.

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Suffice it to say that Morrell has overlooked the fact that the same section of the act which contains the limitation on the amount of any fine for willful trespass clearly authorizes the Secretary to make provision for the protection of the range, to do any and all things necessary to accomplish the purposes of the act, to regulate the occupancy and use of the lands within grazing districts, to preserve the land from destruction or unnecessary injury, and to provide for the orderly use, management, and development of the range. 48 Stat. 1270 (1934), 43 U.S.C. § 315a (1958).

On March 16, 1938, a Federal Range Code was adopted. That first code⁷ outlined a procedure to prevent trespass and unlawful occupancy and use of the Federal range in violation of the provisions of the act and to enforce the regulations thereunder. Included among the provisions to enforce the regulations of the Secretary was one whereby disciplinary action, in the form of a revocation or reduction of a license or permit, was to be taken against those authorized to use the lands within a grazing district where it was clearly established that a trespass had been committed or there had been a violation of the terms or conditions of a license or permit or of the regulations under which the license or permit was issued. 43 CFR, 1940 ed., 501.22 and 501.23. The provision that a grazing license or permit may be suspended, reduced, revoked or renewal thereof denied for a clearly established violation of the terms and conditions of a license or permit is now spelled out in 43 CFR 9239.3-2.

Thus the Department has ever since the enactment of the Taylor Grazing Act exercised disciplinary control over its licensees for violations of the terms of their licenses or permits. See *J. Leonard Neal*, 66 I.D. 215 (1959); *Eugene Miller*, 67 I.D. 116 (1960); *Clarence S. Miller*, 67 I.D. 145 (1960); *Alvie E. Holyoak*, A-29805 (January 23, 1964); *L. W. Roberts*, A-29860 (April 23, 1964).

In no other way can the Department fulfill its obligation to protect the Federal range and to provide for the orderly use and management of that range. This disciplinary control is entirely apart from the imposition of a fine as punishment for willful violation of the provisions of the act or the rules and regulations prescribed by the Secretary. Were it otherwise, the Secretary would be completely at the mercy of licensees who could violate the terms of their licenses or permits at their pleasure secure in the knowledge that their only punishment would be the imposition of a fine.

In the circumstances surrounding the continuing and flagrant violation by Morrell of the terms and conditions of his permit, i.e., to remove the animals from the Federal range when his license expired

⁷ 43 CFR, 1940 ed., Part 501.

on May 15, 1959, the imposition of some disciplinary action on Morrell is fully warranted. The question remaining is whether the sanction imposed—not to issue Morrell any license for Federal range use for a period of five years—is too severe.

The examiner's first decision of December 1, 1959, directed a 40 percent reduction in Morrell's grazing privileges for a period of two years for his willful trespass in grazing 135 cattle from June 5 to July 1, 1959. In doing so, the examiner adverted to prior trespasses of Morrell in 1955 and 1958. For continuing to graze in willful trespass with 124 cattle from July 1, 1959, to October 15, 1959, Morrell was stripped of all grazing privileges for a period of five years by the examiner's second decision of February 19, 1960.

There is no doubt that Morrell's continuing trespass during the summer of 1959 became more and more aggravated as time went on since he was fully aware of the fact that he was in trespass. The period covered by the second trespass was also much longer (3½ months) than the period covered by the first trespass (slightly less than one month), although the number of cattle was a little less. It is proper therefore that the penalty assessed against Morrell for the second trespass should be more severe. However, the change from a 40 percent reduction for two years to a total suspension for five years seems to be unduly severe.

What we have here in essence is the question what single penalty should be imposed on Morrell for his willful trespass from June 5, 1959, to October 15, 1959, with from 124 to 135 cattle. It would appear a sufficient sanction, considering all the circumstances, to reduce his privileges by 40 percent for a period of five years. Cf. *Clarence S. Miller, supra*.

The reduction in grazing privileges should not prevent the district manager and Morrell from working out an agreement for an exchange-of-use involving the State lands and the surrounding Federal range if Morrell retains his leases on the State lands and if the terms of Morrell's leases with the State permit Morrell to enter into such an agreement.⁸ That is to say that in recognition of the fact, if it is a fact, that animals grazing on the State lands cannot be confined to those lands and animals grazing on the Federal range cannot be confined to that range, the parties may agree to the joint use of a given area by the lessee of the State lands and by those authorized to use the Federal range. Such an agreement would appear to be in the interest of good range management, all other considerations aside, since it would tend to eliminate constant friction among the users of the area.

⁸ It is understood that certain of Morrell's leases with the State provide that the State Land Board reserves the right to regulate the kind and number of livestock to be grazed on the lease lands.

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In working out an exchange of use, it should be borne in mind that while the extent to which the Morrell cattle can graze on the Federal range may not exceed the carrying capacity of the State lands which Morrell leases, there is nothing in the regulation which requires that Morrell shall be entitled to graze on the Federal range to the full extent of the carrying capacity of those leased lands. It should also be borne in mind that no agreement may be entered into which does not give full consideration to the rights of those now authorized to use the Federal range.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decisions of the Bureau of Land Management dated February 7, 1962 and June 21, 1963, are affirmed as modified without prejudice to the consideration, in the light of this decision, of any proposal which Morrell may make for an exchange-of-use covering the State school sections leased by him and the surrounding Federal range.

ERNEST F. HOM,
Assistant Solicitor.

HUGH S. RITTER

THOMAS M. BUNN

A-30415

Decided February 24, 1965

Desert Land Entry: Classification

It is proper to classify land in Imperial Valley, California, as not proper for disposition under the desert land law where a favorable classification would, contrary to the public interest, increase the pressure on the inadequate water supply available for use in California from the Colorado River.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Hugh S. Ritter and Thomas M. Bunn have each appealed to the Director, Bureau of Land Management, from separate decisions of the Riverside land office, dated May 8, 1963, rejecting their above identified desert land applications embracing the same tract. I have assumed supervisory jurisdiction over these appeals.

It is unnecessary to consider here the validity of the reasons offered by the Riverside land office in refusing to classify the land in question as suitable for desert land entry because, for an entirely independent reason, classification of the tract for disposal under the Desert Land Act, 19 Stat. 377, as amended, 43 U.S.C. § 321 *et seq.* (1958), would be contrary to the public interest.

The tract lies in the Imperial Valley. Its development requires Colorado River water.

California is presently using more than 5,100,000 acre feet of Colorado River water annually. This use substantially exceeds the 4,400,000 acre feet of annual consumptive use which is California's entitlement under *Arizona v. California*, 373 U.S. 546 (1963), when a total of 7,500,000 acre feet of Colorado River water is available for consumptive use in the lower Colorado River basin States of Arizona, California, and Nevada. Present California agricultural uses of Colorado River water crowd or exceed the 3,850,000 acre feet total of the first three priorities under the seven party California Colorado River water agreement.

Nor can the continued availability of 7,500,000 acre feet of mainstream water for consumptive use in the lower basin be anticipated. On the contrary, the Department estimates an assured availability of less than 7,500,000 acre feet by 1975 unless there is extensive salvage of water now being lost in and along the lower river itself. Even with such salvage, mainstream water available to the lower basin will, it estimates, fall to 7,725,000 acre feet per annum by 1975, and decline to 7,155,000 and 6,680,000 acre feet per annum by 1990 and 2000, respectively. See Table 16A, Page IV-13, Pacific Southwest Water Plan Report, Department of the Interior, January 1964. The Chief Engineer of the Colorado River Board of California predicts even greater deficiencies. For 1970, he predicts an availability of only 7,000,000 acre feet per annum. For 1990, only 5,900,000 acre feet per annum.¹

In these circumstances, it would be contrary to the public interest at this time to increase the pressure on the inadequate water supply available for use in California from the Colorado River by classifying the lands involved in these applications and other similar public lands as available for disposition under the desert land law.

Therefore, in exercise of the discretionary authority vested in the Secretary of the Interior under Section 7 of the Taylor Grazing Act, as amended, 49 Stat. 1976 (1936), 43 U.S.C. § 315f (1958), the land applied for is classified as not proper for disposition under the desert land law and the decisions appealed from are affirmed.

JOHN A. CARVER, JR.

Under Secretary of the Interior.

¹From Statement presented to Senate Fact Finding Committee on Water Resources, State of California, hearings August 13-14, 1964.

APPEAL OF TRAYLOR BROTHERS, INC.

IBCA-387

Decided March 15, 1965

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Conflicting Clauses—Contracts: Construction and Operation: Estimated Quantities

An agreement for the performance of extra excavation work which provides that such extra work will be performed at the contract unit price is not in conflict with, and does not supersede a clause of the original contract providing for adjustment of contract unit prices in the event that the actually performed quantities of work related to such unit prices shall exceed the estimated quantities thereof, as set forth in the contract, by more than twenty-five percent.

Contracts: Formation and Validity: Merger of Preliminary Agreements—Contracts: Construction and Operation: Intent of Parties

Where the terms of an agreement between the parties are integrated into a written contract, prior or contemporaneous oral negotiations between the parties cannot be referred to in order to ascertain what constitutes the agreement between them.

BOARD OF CONTRACT APPEALS

Traylor Brothers, Inc., on April 20, 1960, was awarded U.S. Department of the Interior Contract No. 14-10-0100-1163. (Under an interdepartmental agreement in existence for several years, the contract was funded and executed by the Department of the Interior, while the administration of the contract was the responsibility of the Bureau of Public Roads of the Department of Commerce.) The work called for was Project 2B1, construction of 2 abutments and 37 piers for a bridge over the Tennessee River on the Natchez Trace Parkway. In a letter dated September 19, 1962, the contractor made a claim for \$201,934.59, for asserted excess costs incurred in excavation of rock on the job. A tabulation of elevation, distances, and quantities was submitted with the claim.

On May 24, 1963, the contracting officer issued findings of fact and a determination which allowed \$54,274.37 of the claim, but denied the remainder of the amount requested. The contractor filed a timely appeal under the disputes clause of the contract.

Work on the project commenced in June 1960, and was completed on December 14, 1961, within the 500-day construction period specified in the contract. The unresolved disputes between the appellant and the Government involve contract pay items 103(2) and 16(1). At a hearing held on this appeal in late March 1964, certain stipulations were filed with the Board. The most important stipulations upon which this decision is based are as follows:

4. The Bid Schedule, Project 2B1, Part A, Natchez Trace Parkway designated Pay Item 103(2), Excavation for Structures (bridges) to be a major item of

the contract and called for a unit bid price of an Estimated Quantity of 8,800 cubic yards.

* * * * *
6. Traylor Bros., Inc. entered a Unit Bid Price of \$3.00 and a total Bid of \$26,400.00, for the Estimated Quantity of 8,800 cubic yards for Pay Item 103(2).

"7. The total amount excavated for Pay Item 103(2) was 13,124 cubic yards.

"11. Article 9.3 of the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-57 provides that an equitable adjustment shall be made in the basis of payment if any of the following conditions exist:

"1. The final contract amount or total quantity of a major item involves an increase or decrease of more than 25 percent from the original contract amount or original quantity of the major item, respectively. In the case of an increase, any adjustment in payment shall apply only to the related quantities of work performed in excess of the stated percentage.

* * * * *
"12. Traylor Bros., Inc. is entitled to an adjustment in price per cubic yard of excavation in accordance with Article 9.3(1) of the Standard Specifications as the final quantity of the major item (Pay Item 103(2)) exceeded the Estimated Quantity by more than 25 percent.

"13. An adjusted price of \$50.15 per cubic yard rock excavation is considered fair and reasonable in payment for blasting, removal, and disposal of the rock, providing, and understanding, that this adjusted price of \$50.15 is understood to refer to any quantity of contract item 103(2) that shall be deemed by the Appeals Board to be eligible for renegotiation, based on overrun of this contract item.

"14. Tentative elevations for the pier footings were indicated on the plans and the actual elevations were to be determined by the engineer during construction.

"16. Excavation into solid rock requires the use of explosives.

"17. Pay Item 16(1), 36 inch Calyx Holes, indicated that an Estimated Quantity of 1,330 Linear feet of work was to be performed.

"18. As indicated by Estimate No. 21—Final Payment of Contract and Claim, 1,129.0 linear feet of work was actually performed for Pay Item 16(1).

"19. Use of explosives to excavate rock to prescribed elevations oftentimes results in overbreak and overdepth excavation.

"22. The cost of the Class S concrete required for refilling the overbreak is not included in the computation arriving at the adjusted price of \$50.15 per cubic yard for rock excavation."

On October 18 and 19, 1960, representatives of the contractor and of the Government met to consider the appellant's lack of progress on the job, particularly the difficulty that the appellant was having in drilling calyx holes. Only a negligible amount of the estimated 1,330 linear feet of calyx drilling shown as a pay item on the contract bid schedule had been accomplished. Difficulty with calyx drilling was holding up contract operations with regard to progress on required cofferdams and piers.

The Government's Supervisory Bridge Engineer for the project testified that on October 18, 1960, there was a discussion on how proper embedment of the bridge piers could best be accomplished. In addition, he stated:

* * * it was at that time the consensus of opinion that explosives would have to be used to secure this embedment * * * it followed that by eliminating these

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short calyx holes, the bottleneck of the calyx holes would be broken and the contractor would be able to improve his progress.

The "short calyx holes" referred to above were 47 holes less than 5 feet in depth that were to be drilled in unsound rock and filled with concrete to support the bridge foundations. The "short" holes, which were eliminated subsequent to the October 18 discussion because of substitution of another method of embedment, were for piers 3, 4, 5, 9, 10, 11, 12, 13, 18 and 19.

Drilling of calyx holes for these particular piers was not a specific requirement of the contract as executed in the spring of 1960; instead this drilling was required by a series of directives issued in the fall of 1960. Issuance of these directives by the Government was allowable and contemplated under the contract. As Stipulations 17 and 18¹ show, the original estimated quantity for Pay Item 16(1), 36-inch calyx holes, was 1,330 linear feet, and only 1,129 linear feet of such work actually was performed as the job.

A day or so after the October 18, 1960, meeting, the Government referred to Palmer and Baker (a private engineering firm that acted in a consulting capacity for the Government on the project) the matter of advisability of eliminating the "short" calyx holes. Palmer and Baker apparently concurred in the proposal. In any event, Directive No. 2, issued on November 9, 1960, and Directive No. 5, issued on January 6, 1961, rescinded the requirement for drilling the 47 calyx holes at the 10 piers listed above. Instead, the appellant was authorized by such directives to excavate into rock to prescribed elevations in order to embed those piers. Stipulations Nos. 16 and 19 pertain to this work and state that "excavation into solid rock requires the use of explosives," and "use of explosives to excavate rock to prescribed elevations oftentimes results in overbreak and overdepth excavation."

The appellant's claim has been reduced, from the amount of \$201,934.59 originally sought, to \$145,071.48 on one theory, or to \$118,094.40 on an alternate theory. The request for the higher of the last two amounts is based on subsection (2) of Article 9.3 of the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-57, which provides for an equitable adjustment in amount when:

The change ordered by the engineer involves a substantial change in the character of the work to be performed under a contract pay item or items and results in materially increasing or decreasing the cost of its performance.

The alternate \$118,094.40 claim is based upon subsection (1) of Article 9.3 of FP-57, which is quoted in Stipulation 11, *supra*, and

¹ P. 3, *supra*.

provides for an adjustment when the quantity of a major item increases or decreases more than 25% from the original quantity.

The Claim Under Subsection (2)

The Board does not find that there was a substantial change in the character of the work to be performed under the contract pay item covering excavation for structures. Without doubt the 8,800-cubic-yard estimated quantity for this item shown on the bid schedule was calculated on the assumptions that cofferdams would be driven to neat limits and that the excavation (unclassified) would be performed within the cofferdams. However, the contract does not require that the work be performed in this manner. As to the piers, including those 10 piers where calyx hole drilling was eliminated and excavation into rock was substituted, the appellant was free to excavate in the open water, rather than within cofferdams.²

Much of the excavation for the piers was into solid rock, which requires the use of explosives. The parties were in agreement that blasting within cofferdams requires dewatering. The appellant concluded that because of fissures in the underlying rock and an insufficient clay cover over the rock, it was impractical to attempt to seal off and dewater the cofferdams.

The contract provides that vertical planes 18 inches outside of and parallel to the neat lines of the footings shall be used as limits in the determination of pay quantities of excavation for structures. Application of this provision resulted in about 1,900 cubic yards of increased excavation over the 8,800 estimate in the contract. The remainder of the difference between the 8,800 cubic yard estimate and 13,124 cubic yards (stipulated to be the total quantity excavated for structures) resulted from a general lowering of the 1-foot rock depth which was shown as a minimum on the plans and employed as an assumed depth for pier embedments in the calculation of the 8,800-cubic-yard original estimate. The appellant's chosen excavation method, and the increased depths of rock excavation that were found to be necessary for proper embedment as the job progressed, do not add up to a substantial change in the character of the work. Even if they did, the making of proper allowance for the fact that some of the increased depths could reasonably have been anticipated—a matter which is discussed at a later point in this opinion—would result in the amount allowable being substantially the same as that hereinafter allowed under subsection (1). Hence, the Board finds, as the stipulations of the parties clearly indicate, that this is a typical case calling for an equitable adjustment under subsection (1) of Article 9.3 of FP-57.

² Excavation in the open water was referred to during the hearing as open pit or "glory hole" excavation. In the glory hole method the cofferdam is placed after the excavation is completed. (Tr. 115.)

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The Equitable Adjustment Under Subsection (1)

The Government has stipulated that the appellant is entitled to an adjustment in its bid price per cubic yard for excavation, since the final quantity of Pay Item 103(2) exceeded the estimated quantity by more than 25 percent. The adjustment called for is the "equitable adjustment" specified in Article 9.3 of FP-57, subsection (1) of which hereinafter will be referred to as the "125 percent clause." In *John A. Quinn, Inc.*,³ this Board, in considering a claim under Clause 4 of Standard Form 23A, "Changed Conditions," stated:

The term "equitable adjustment" in itself precludes the idea of there being any one cut and dried method of arriving at the end desired * * *.

In addition, in the *Quinn* case, the Board cited with approval *Ensign-Bickford Company*,⁴ including its rule that in computing the work required by a change order, the costs that should be considered are those that will be reasonably experienced by the contractor, not the costs of the most efficient producer. The *Quinn* case applied these statements to Clause 3 of Standard Form 23A, "Changes," in addition to the "Changed Conditions" clause. It is the view of the Board that such rulings are applicable also to an equitable adjustment called for under the "125 percent clause."

The contracting officer determined, and Government counsel contend, that 972.9 cubic yards of rock excavation should not be taken into account in the calculation of the equitable adjustment for the 2,124 cubic yards which are in excess of 125 percent of the original estimated quantity. This is based on the Government's position that the appellant bound itself to a bid price of \$3 per cubic yard when it accepted Directives Nos. 2 and 5. One basis alleged in support of this position at an early stage of the dispute was that appellant "verbally agreed to excavate into rock, to a depth not to exceed five feet below plan elevation, at the contract unit price of \$3 per cubic yard. * * *"⁵ The appellant's president flatly denied at the hearing that such a verbal agreement was made, and the Government introduced no direct testimony tending to show that it was made; instead, an effort was made by the Government to show that it would have been to the appellant's best interest in October of 1960 to agree to take out the extra 972.9 cubic yards of rock at the \$3 price (although the reasonable value of such excavation was in excess of \$50 per cubic yard), in order to be assured that "short" calyx hole drilling at the 10 piers would be eliminated as a contract requirement. The Government's evidence falls far short of establishing that the parties so bargained. If the 972.9 cubic yards are to be excluded in calculation of the equitable

³ IBCA-174, 67 I.D. 430, 60-2 BCA par. 2851.

⁴ ASBCA No. 6214 (Oct. 31, 1960), 60-2 BCA par. 2817.

⁵ Last paragraph, p. 6, of the findings of fact issued by the contracting officer on May 24, 1963.

adjustment, it must be because of a commitment made by the appellant in accepting Directives Nos. 2 and 5.

The record shows that 7 change orders and 27 "directives" were issued under the contract. The superintendent or an officer of the appellant acknowledged receipt of some of the directives, but indicated that others were "accepted." Written acceptances of Directives Nos. 2 and 5 were given by the appellant's superintendent. These two directives state that excavation should be carried into rock to designated elevations for specified piers and that no calyx holes should be drilled at those piers (rescinding previously issued directives that had ordered calyx hole drilling). The Government's denial of a price adjustment for 972.9 cubic yards of rock excavation is keyed to the following sentence, which is included in both directives:

Payment for this work shall be made at the contract unit prices.

In Directive No. 2 the above-quoted sentence follows excavation instructions for five of the piers as to which "short" calyx holes were eliminated, plus Pier 6. Calyx holes had not been ordered for Pier 6, but Directive M had instructed that its subfooting be placed 1 foot into rock. Directive No. 2 provided that the excavation for Pier 6 should be deepened still further.

Directive No. 5 similarly includes (1) piers for which embedments were deepened and calyx holes were eliminated, together with (2) piers for which embedments were deepened from the 1-foot-into-rock minimum shown on the plans or from a 1-foot-into-rock depth required by an earlier directive, but for which calyx hole drilling had never been ordered. The statement that, "Payment for this work shall be made at the contract unit prices," follows instructions given for piers in both of the categories listed above. The contracting officer was not consistent in treating this statement as requiring rock excavation to be performed at \$3 per cubic yard, because as to the piers where the embedments were deepened but where there was no requirement for calyx hole drilling that he could eliminate, he treated excavation as eligible for consideration under the "125 percent clause." A later directive, No. 7, ordered excavation into rock for 12 piers in the group from Pier 25 to Pier 37, and lowered the elevations of subfootings for these piers. This had the effect of increasing substantially the rock excavation quantities at these piers, but the resulting additional quantity of excavation was not eliminated by the contracting officer in his calculation of an equitable adjustment under the "125 percent clause," even though a statement identical to that written into Directives Nos. 2 and 5—"Payment for this work shall be made at contract unit prices"—was made a part of Directive No. 7. It may be that the contracting officer considered Directive No. 7 to be different because "Receipt Acknowledged" is typed above the signature of the appellant's superintendent rather than "Accepted" which is on Directives

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Nos. 2 and 5; however, such a distinction loses much of its force when the following language on the signature sheet of Directive No. 7 is taken into account:

Please *indicate your acceptance* of this directive by dating, signing and returning the original * * *. (Italic added.)

The directive was dated, signed by the appellant's superintendent and returned, and thus was accepted as much as the earlier directives.

The Board does not find that Directives Nos. 2 and 5 have the effect of excluding any quantity of excavation for the piers from consideration when the equitable adjustment under the "125 percent clause" is determined. True, the contractor agreed to directives which had the effect of increasing excavation on the job, and of providing for payment at "contract unit prices." However, a specific contract unit price of \$3 per cubic yard was not referred to in the directives, and no language was added which placed the additional excavation in a special classification from the standpoint of price. The reference to "contract unit prices" (as applied to excavation) means to the Board a \$3 price per cubic yard with respect to the 8,800-cubic-yard original estimate plus 25 percent of that estimate (2,200 cubic yards). It also means that such price is subject to adjustment when the provisions of Article 9.3(1) come into play. If the Government had intended to put into writing a negotiated agreement under which the appellant, without limitation, assented to a price of \$3 per cubic yard for work that cost more than \$50 per cubic yard, change orders should have been issued containing definite conditions concerning price, including a specific exclusion of the applicability of Article 9.3(1) of FP-57.

The contracting officer's findings (pp. 6 and 7) assert that Directives Nos. 2 and 5 put "on the record" the asserted verbal agreement that payment for the increased excavation would be "at the contract unit price of \$3 per cubic yard." The latter five quoted words were not included in the directives. The Statement of Government's Position filed by Department Counsel expanded the wording of the directives in advising that it was agreed in them that excavation of 972.9 cubic yards "would be paid for at the contract unit *bid* price for this item." The appellant's bid price was \$3, but, in the Board's view, the *contract unit price* (the term used in the directives) was fixed with certainty at \$3 only so long as the total quantity of excavation performed remained under the original estimated quantity (8,800 cubic yards) plus 25 percent (2,200 cubic yards). Any alleged prior or contemporaneous oral negotiations cannot be referred to in order to ascertain what constituted the agreement of the parties, since the terms of the agreement were integrated into the written directives.⁶

⁶ *United States v. Croft-Mullins Electric Company, Inc.*, 333 F. 2d 772 (5th Cir., 1964).

At the times of issuance of Directives Nos. 2 and 5 it could not be ascertained definitely that the eventual quantities of excavation resulting from their performance would be in the area requiring adjustment under the "125 percent clause." The unrefuted testimony of the appellant's president was as follows:

At the time of the signing [of Directives Nos. 2 and 5] we had no way of knowing, we had no conception, that this excavation thing was going to increase to anything like the quantities and proportions and ratios to which it did.

The Board concludes that there is no ambiguity or conflict between the provisions of Article 9.3(1) and the terms of the directives for additional excavation. We have held on several occasions that where no ambiguity exists, there is no need to construe the contract.⁷

The Amount of the Equitable Adjustment

The appellant contends that all of the 2,124 cubic yards by which the actual excavation for structures exceeded 125 percent of the estimated quantity should be considered as rock excavation and that for this quantity there should be allowed the stipulated price of \$50.15 per cubic yard plus an additional \$5.45 per cubic yard for concrete, representing the cost of refilling voids that resulted from necessary and reasonable overexcavation.

The Government's plans for the project show in profile the approximate location of the bottom of the overburden at each pier, and indicate that the subfootings are to be embedded to a minimum depth of 1 foot into rock. Elevations on boring logs are also shown. The appellant relied to a considerable extent on this information provided by the Government, since the subfootings were to be placed underwater in the river, and there was little else upon which to base its calculations. Supplemental boring work was performed after the job started and the Government obtained advice on proper construction of the pier foundations from its consulting firm, Palmer and Baker, after information from this supplemental boring work became available. For example, the Government gave as a reason for Directive No. 2 that supplemental borings "* * * disclosed the presence of open seams and cavities in the rock immediately below the elevations of the pier subfootings at locations not disclosed by the preliminary borings" and, with respect to previously ordered calyx holes that "The shallow depths indicated for such calyx holes render their construction impracticable."

Rock excavation was not separated from earth excavation in the bid schedule, and for the 8,800-cubic-yard estimated quantity the appellant had to estimate (perhaps guess) how much of it would be rock

⁷ *Boespflug-Kiewit-Morrison*, IBCA-320 (Jan. 21, 1965), citing *Hongkong & Whampoa Dock Co., Limited v. United States*, 50 Ct. Cl. 213, 222 (1915); *R & M Contractors, Inc.*, IBCA-325 (Apr. 21, 1964), 71 I.D. 132, 135, 1964 BCA par. 4208, 6 Gov. Contr. 257, and cases cited therein.

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at a cost of more than \$50 per cubic yard and how much would be earth at a cost of \$1 per cubic yard. A \$3-per-cubic-yard price by appellant for the unclassified excavation (rock and earth) was the result.

There was a reasonable basis for the appellant's conclusion from the plans that the excavation for structures would be about 758.9 cubic yards of rock and 7,629.1 cubic yards of earth. These quantities were arrived at by taking into account the borings indicating the top of earth and the assumed top of rock and the dimensions for individual piers given on the plans. The Government apparently had added about 5 percent to the sum of the above two figures to arrive at the 8,800-cubic-yard estimated quantity. The appellant's president acknowledged, however, that because the bottom of the overburden was depicted as approximate only, and because the Government engineer had the right during the course of the job to determine and direct the actual elevations of the bottoms of the footings, the anticipated 758.9 cubic yards of rock might increase or decrease as to actual quantities within a reasonable margin. On the question of whether his company would have had to excavate only approximately 760 cubic yards of rock and approximately 7,700 cubic yards of earth, he said:

There is no certainty. Now I don't feel that in my direct testimony I stated that there is a certainty. * * * What I meant to imply, if I did not make it clear, was that the picture the Government gave us of the ratio of the rock to the earth was in the nature of one to ten.

In arriving at the equitable adjustment, the Board will attempt to leave the appellant in the same position cost wise as it would have been if the excavation had not exceeded 11,000 cubic yards. Applying 9.05 percent (the percentage of rock in the total quantity of 8,388 cubic yards of combined earth and rock that reasonably could have been expected from an analysis of the approximations and minimums on the plans) to 11,000 cubic yards gives 995.5 cubic yards as the rock to be expected in the original estimated quantity of excavation plus 25 percent. However, as noted above, the appellant has conceded that the percentage of rock in the quantity of earth and rock estimated from the plans could have been subject to an increase or decrease within reason. An increase in that percentage from 9.05 percent to 12.05 percent would have increased the rock volume from 995.5 cubic yards to 1,325.5 cubic yards. Ten inches of additional rock excavation within the neat lines of each subfooting would have increased the rock volume from appellant's original estimate of 758.9 cubic yards to 1,391.3 cubic yards. The Board concludes, in the light of all circumstances, that there is justification for considering 1,345.2 cubic yards as the rock portion of the 11,000 cubic yards of excavation that is not subject to adjustment.

An exhibit attached to the appellant's claim letter dated September 19, 1961, shows total excavation of 13,189.1 cubic yards, designating 9,821.9 cubic yards as earth and 3,367.2 cubic yards as rock. Adjusting these figures to come within the 13,124-cubic-yard stipulated total excavation quantity, the Board finds that a total of 3,345.2 cubic yards of rock was excavated under the contract, of which, as pointed out above, 1,345.2 cubic yards are not eligible for an equitable adjustment under the "125 percent clause." It follows that 2,000 cubic yards of rock should be paid for at the adjusted price, rather than the 1,151.1 cubic yards for which an increase was allowed in the contracting officer's decision. The remaining 124 cubic yards in excess of 11,000 cubic yards should be paid for at \$1 per cubic yard, a price indicated by appellant's president to be reasonable for earth excavation.

The appellant contends that the increased depth of rock excavation required by the Government resulted in many instances in overbreak and overdepth excavation, and that as part of the equitable adjustment the Government should pay for 915 cubic yards of concrete that were used to refill overexcavated areas. Exhibit B to the September 19, 1962, claim letter shows this concrete as having been placed at 24 of the 37 pier locations. It is stipulated that excavation into solid rock requires the use of explosives, that use of explosives to excavate rock to prescribed elevations often results in overbreak and overdepth excavation, and that the cost of the concrete required for refilling the overbreak is not included in the \$50.15 per cubic yard that was agreed to as the reasonable cost of blasting, removal, and disposal of the rock. The appellant's president conceded at the hearing that under the contract the Government could set the footing elevations and that appellant was "then and there bound to perform this work at the unit prices." The Board recognizes that the appellant was faced with a very difficult bidding problem in being forced to bid a composite price for earth and rock excavation. However, this is what the contract required, and the expense of refilling with concrete cannot be taken into account with respect to the 1,345.2 cubic yards of rock excavation (the quantity determined by the Board to be what the contractor reasonably could have anticipated within the 11,000 cubic yards that is subject to the \$3 fixed price). There is no unit price for such refill work, and the provisions of the Standard Specification (FP-57), pertaining to measurement and payment for excavation and backfill of structures and covering construction details of concrete structures, are consistent in stating that the contract unit price per unit of measurement for each of the pay items "shall be full compensation for all labor, equipment, tools, and incidentals necessary to complete the work * * *."

The refill of overbreak and overdepth excavation has been established by the appellant to be a necessary and reasonable part of the work involved in the removal of the 2,000 cubic yards of rock that,

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pursuant to this decision, are for equitable adjustment under the "125 percent clause." The Government ordered the excavation into solid rock, and it is stipulated that such excavation requires the use of explosives. The appellant has made a strong case that the blasting process was the one best adapted to obtain the required embedments. The Government has not disputed this, nor has it asserted that employment of the blasting process was unreasonable. The Government's Supervisory Bridge Engineer testified that it was the contractor's prerogative to accomplish the excavation in the manner that was actually employed; that is, by drilling rock with percussion drills from a stationary platform and by using the blasting process; in addition, he agreed that it was necessary to refill the overbreak voids that resulted from blasting with concrete. In the fall of 1960, when the question of payment for refill of overbreak came up in connection with work at Pier 5, the Supervisory Bridge Engineer consulted with the Division Engineer and it was their joint decision that the additional concrete at Pier 5 would be paid for. The Supervisory Bridge Engineer explained:

In taking it up with the Division Engineer, the Division Engineer decided that this was * * * an isolated incident and that we would pay Mr. Hennessey [an employee of the appellant] for the extra concrete at that particular pier, but subsequently we found that several other piers were low—two other piers, actually. We had no justification for making payment under our specifications. And so we said we will not pay you for this additional concrete.

Certainly, in making an equitable adjustment under the "125% clause," it would be more consistent to pay for all of the additional concrete required—a continuing, necessary expense at most of the piers—than there was to agree to pay for only one isolated instance of refilling overbreak. Due to the fissures and seams in the rock, and the fact that the work was being done in water depths of about 35 feet, the appellant could not blast the rock to the prescribed elevations with accuracy. The appellant's president testified that even the action of clam shell buckets digging 35 feet into water was difficult to control. His testimony that it is the normal practice of the construction industry to include the cost of refilling overbreak that results from excavation by blasting as "part and parcel" of the excavating costs was not controverted by the Government. Accordingly, it is determined that \$4.25, the quotient of \$14,219.10 (the appellant's cost for the refill work) divided by 3,345.2 (the number of cubic yards of rock determined herein to have been excavated on the project), should be allowed for each of 2,000 cubic yards of rock excavation in addition to the \$50.15-per-cubic-yard "blasting, removal and disposal" price in Stipulation 13.

Under this decision the total allowance for the 2,124 cubic yards of excavation performed in excess of 125 percent of the original estimated

quantity is \$108,924. On the assumption that the Government has heretofore paid \$3 per cubic yard for 2,124 cubic yards, plus an additional \$47.15 per cubic yard for 1,151.1 cubic yards (pursuant to the contracting officer's determination), the additional amount payable as an equitable adjustment under this decision is \$48,277.63.

Conclusion

The appeal is denied as to the claim for \$145,071.48 made under Article 9.3(2) of FP-57. The appeal is sustained with respect to the claim for \$118,094.40 made under Article 9.3(1) of FP-57 to the extent of \$48,277.63, as set forth above. The remainder of that claim is denied.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

I CONCUR:

THOMAS M. DURSTON,
Member.

HERBERT J. SLAUGHTER,
Deputy Chairman.

BERTHA MAE TABBYTITE

GLENN M. CLARKE v. BERTHA MAE TABBYTITE

A-29636

A-29938

Decided March 23, 1965

Alaska: Homesteads—Homesteads (Ordinary): Contests—Homesteads (Ordinary): Cultivation

A charge of failure to cultivate the required acreage within the second year of a homestead entry is not sustained where the evidence is merely that persons who had occasion to view and be on the land occasionally during the crucial period did not see any cultivation and the entrywoman testifies positively that the necessary cultivation was accomplished.

Indian Allotments on Public Domain: Generally—Alaska: Indian and Native Affairs

An enrolled member of the Comanche Tribe of Indians of Oklahoma is not entitled to an Indian allotment in Alaska under the act of May 17, 1906, as amended, which authorizes the Secretary of the Interior to allot land to Indian natives of Alaska.

Indian Allotments on Public Domain: Lands Subject to

Unappropriated public land in Alaska is subject to allotment under the General Allotment Act to Indians who are not natives of Alaska.

Homesteads (Ordinary): Relinquishment

A homestead entrywoman may relinquish a portion of her entry and receive a patent to the remaining portion of her entry, which must include her house, if she shows that she has met the cultivation requirements on the portion retained and otherwise complied with the homestead law.

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APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Bertha Mae Tabbytite has appealed to the Secretary of the Interior from two decisions of the Division of Appeals, Bureau of Land Management, affecting her claim to a 160-acre tract of land in sec. 30, T. 12 N., R. 2 W., S.M., Alaska. The first appeal, from a decision dated May 22, 1962, relates to her application for an Indian allotment on the land, and the second appeal, from a decision dated January 10, 1963, relates to the cancellation of her homestead entry, Anchorage 033425, on the same land as the result of a contest brought against the entry by Glenn M. Clarke.

The two appeals will be considered in this decision. However, because her homestead entry was a subsisting entry when Mrs. Tabbytite filed her application for an Indian allotment, her appeal relating to the contest against that entry will be considered first.

To place this appeal in its proper perspective, certain facts relating to the entry and discussed in a prior departmental decision (*Glenn M. Clarke v. Bertha Mae Tabbytite*, A-28531) dated February 2, 1961, will be recited.

Mrs. Tabbytite's entry was allowed on January 22, 1957, as a second entry under the act of September 5, 1914, 38 Stat. 712, 43 U.S.C. § 182 (1958), after Mrs. Tabbytite in her application, filed on November 27, 1956, had made a satisfactory showing that a previous entry on the same land had been lost because of matters beyond her control.

On June 17, 1958, Glenn M. Clarke initiated a contest against the entry pursuant to the act of May 14, 1880, 21 Stat. 141, as amended, 43 U.S.C. § 185 (1958), under which, if Clarke prevailed, he would obtain a preference right to enter the land. The charge brought was that Mrs. Tabbytite "has not established nor maintained residence on the land as prescribed by law." After noting that the contest should have been dismissed, since the charge did not appear to be a proper charge, stating only a conclusion without supporting facts, and after noting that the hearing examiner had dismissed that portion of the charge relating to the maintenance of residence, the Department affirmed the Director's holding that the charge that Mrs. Tabbytite had not established residence on the entry had not been sustained.

On June 29, 1959, during the pendency of his first contest, Clarke initiated a second contest against Mrs. Tabbytite's entry. That contest is the subject of this appeal. The charge brought was that Mrs. Tabbytite "has not cultivated the land in accordance with regulations."

Mrs. Tabbytite answered the complaint on August 7, 1959, denying the charge.

Nothing appears to have been done with respect to the contest complaint until February 13, 1961, immediately following the depart-

mental decision on the first contest, when Clarke filed an amended contest complaint. That complaint charged:

That no cultivation was done by the entryman during the second entry year; that the first clearing was done on June 18, 19, 20, and 21 of 1959; that nothing grew on the land. That the amount of land cleared in the third entry year was insufficient to satisfy the legal requirements for the third entry year.

Mrs. Tabbytite answered the amended complaint, and, thereafter, on October 24, 1961, a hearing was held. At the hearing, Clarke withdrew the last charge of his amended complaint relating to clearing in the third entry year (Tr. 5).

The hearing examiner, in his decision of April 27, 1962, stated that the single issue raised by the pleadings was whether or not the entrywoman complied with the requirements of the homestead law during the second entry year. He set forth the requirements of the law that an entryman must cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof (Rev. Stat. § 2291 (1875)), as amended, 43 U.S.C. § 164 (1958), and stated that since the entry consists of 160 acres and was allowed on January 22, 1957, Mrs. Tabbytite was required to cultivate 10 acres during the second entry year, January 22, 1958, through January 22, 1959.

He mentioned certain of the testimony given and concluded that the testimony given by Clarke's witnesses showed that there was no cultivation in evidence prior to January 1959. He found Mrs. Tabbytite's testimony that she had cultivated 10 acres with handtools during the summer of 1957 unconvincing. He stated:

* * * The term "cultivation" denotes more than a simple clearing of the land. Cultivation consists of the actual breaking of the soil followed by planting, sowing of seed and tillage of crops other than native grasses. (Ben F. Waters, 42 L.D. 80 (1912).) To place under experimental cultivation 10 acres of virgin rocky soil covered with an accumulation of natural vegetation by the use of simple hand tools would be a tremendous accomplishment, particularly in the face of the extreme weather conditions and short summer seasons encountered in Alaska. There is no credible evidence in the record to establish that the entrywoman actually so cultivated 10 acres during the first or second entry years.

The contestant has established by a preponderance of the evidence that the entrywoman failed to cultivate 10 acres of her entry before the end of the second entry year, January 22, 1959.

The entrywoman having failed to comply with the mandatory cultivation requirements of the homestead laws as aforesaid, homestead entry A-033425 is hereby canceled.

In affirming the hearing examiner's decision, the Division of Appeals held that the evidence presented at the hearing amply supports the findings of the hearing examiner.

Mrs. Tabbytite, in her appeal to the Secretary, attacks the finding on the ground that it is not supported by the evidence.

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We have considered the record made at the hearing and we agree that Clarke did not sustain his charge by a preponderance of substantial evidence that no cultivation was done by Mrs. Tabbytite during the second year of her entry.

We disagree with the evaluation made by the hearing examiner of the evidence presented on behalf of the contestant. Much of the testimony taken at the hearing is irrelevant to the issue. However, a great portion of what is relevant is as to the condition of the land in June 1959 and thereafter, and, while what the witnesses saw may have led them to infer that 10 acres within the entry had not been cultivated prior to January of that year, their testimony does not overcome Mrs. Tabbytite's positive testimony that she and her sons not only cleared that amount of land in the summer of 1957 but that they cultivated it during 1957 and 1958.

The contestant called eight witnesses, including Mrs. Tabbytite. The first, Dr. Edward E. Bach, contributed nothing to Clarke's case. He testified (Tr. 8-11) that he took two photographs from the air in 1961 and saw only one cleared area. He had not walked over the land in the entry (Tr. 15).

The next witness, Fred H. Winchester, testified that he cleared about 22 acres of land for Mrs. Tabbytite in June 1959; that there was a small cleared area around the cabin; and that to his knowledge there was no cultivation on the land cleared (Tr. 20). He admitted on cross-examination that he was guessing when he testified that there never had been any clearing done on the upper 80 acres of the entry but would say there had not been (Tr. 23), and that June 18, 1959, was the first time he was on the property.

Mrs. Tabbytite was called next, as an adverse witness for the contestant. He could not, however, shake her testimony that she had cultivated around 10 acres prior to January 22, 1959, by turning over (tilling) the soil and doing some experimental planting (Tr. 32-34).

Donald Rohaley testified that his property partially adjoins Mrs. Tabbytite's (Tr. 47). He has hunted in the vicinity of the homestead and has used the road which goes through the Tabbytite entry from 1955 on. He used the road in 1957 but did not observe any cleared cultivated land in the fall of 1957 (Tr. 49). He admitted that he was not looking for any cultivated land during his hunting trip but stated that if there was any cultivation around the cabin, "I am sure I would have noticed it." (Tr. 50.)

Craig C. Thomas used the road through the entry several times to go hunting. When he got to the top of the mountain, he could observe most but not all of the homestead. He did not see any clearing in 1957 except around her cabin. He does not believe he saw any clearing in

1957 and 1958 when he went hunting, but has observed a clearing on the land, which, he guesses, but does not know, was made in 1959 (Tr. 70). Thomas testified that he does not know if the road he built to use for his moose hunting trip was on the Tabbytite homestead or not, "because I do not know where your property lays, only that you had 160 acres up in there somewhere" (Tr. 82). He said he had not seen more than one-half acre cleared around the cabin (Tr. 70, 83).

Donald O. Spaulding testified that from his house, in which he began to live in 1959, he can see a great part of the east 80 acres of the Tabbytite homestead, that there was a clearing or cultivation in evidence on that east 80 acres in the fall of 1959 (Tr. 84). He testified that he thought there was one-half acre cleared separate from the 22 acres cleared in 1959 by Winchester but had only been there once, in 1960, trailing a moose—"I wasn't looking for clearings." (Tr. 89.) He admitted on cross-examination that he had no knowledge of the cultivation or clearing other than hearsay and his one time on the property chasing the moose (Tr. 92).

Howard L. Murray, whose homestead adjoins the Tabbytite property, has been acquainted with the area since June 1958. He stated that the cultivation was done toward the end of June 1959 (Tr. 99), while he was living on his homestead. He stated he did not see any cultivation when he was on Mrs. Tabbytite's homestead in 1958 and in the spring of 1959; that to the best of his knowledge there was no clearing on the homestead until the spring of 1959 (Tr. 99-100). He testified, on cross-examination, that he was not living in the area in the winter of 1957 and the summer of 1958 (Tr. 104). He testified, on re-cross-examination, that at any time he was on the homestead in 1958 and the spring of 1959 he did not see any cultivation and that there was no clearing there. He admitted that he had never viewed the area prior to June 1958 (Tr. 119).

James M. Boggan testified that in the latter part of the summer of 1958 he was on the top of the mountain overlooking the upper half of Mrs. Tabbytite's entry and that if there was cultivation there, "I never did see any." (Tr. 121.) "* * * if there was any cutting of timber and cultivation I can't recall it." (Tr. 122.) In going up a road, presumably on Mrs. Tabbytite's entry, in places he could see the land on both sides of the road, in other places he could not, "but everplace [sic] there was a view I certainly looked. * * * I still don't recall anything that was cut or cultivated." (Tr. 122.) His first trip in the area was in 1958 (Tr. 123). He later testified that he did not know where the road is and that he could not tell which part of the acreage that he saw was in the Tabbytite homestead (Tr. 125). He could not see the ground—just got a view from a distance, was not around the cabin, and did not inspect the ground (Tr. 126, 126-A),

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could not say whether the place had been disturbed by human hands or not (Tr. 127).

Mrs. Tabbytite testified in her own behalf that she and her sons hand cultivated 10 acres in 1957 and then in 1959 hired a man with a bulldozer to go over it again (Tr. 140-141, 146-149, 156-157).

Thus, while certain negative evidence was presented, it is obvious that the contestant's witnesses had, at best, only casual opportunities to observe the land. The fact that those who did, on occasion, view the land during the crucial period did not observe the cultivation of the 10 acres within the entry during 1957 and 1958 does not convincingly establish what Clarke charged, that no cultivation was done during the second year of the entry.

Accordingly, it must be held that, on the basis of the present record, the contestant did not sustain the burden of establishing his case by a preponderance of substantial evidence and that therefore it was improper to have canceled the entry.

Clarke, not having procured the cancellation of the entry by his contest, is not, of course, entitled to any preference right to enter the land.

However, although Clarke did not prove his charge against the entry, before Mrs. Tabbytite becomes entitled to a patent covering her entry under the homestead law, she must still prove to the satisfaction of the Department that she has met all of the requirements of that law, including proof that she cultivated at least one-eighth of the area within her entry, or 20 acres, during the third and succeeding years until the submission of final proof. Whether Mrs. Tabbytite can make the required showing is not indicated by the present record, since nothing therein indicates the extent of the cultivation which may have been accomplished on the acreage which is shown to have been cleared in June 1959. In this respect, Mrs. Tabbytite's attention is directed to a regulation of the Department, formerly 43 CFR 166.23, now 43 CFR 2211.2-3a, in which acceptable cultivation is defined. The Department has consistently held that, in order to constitute proper cultivation, the breaking of the soil, planting or seeding, and tillage for a crop must include such acts and be done in such manner as to be reasonably calculated to produce a profitable result. *United States v. Charles E. Stewart*, A-28966 (September 25, 1962); *Margaret L. Gilbert v. Bob H. Oliphant*, 70 I.D. 128 (1963); *George J. Sehm*, A-30129 (November 9, 1964).

Unless Mrs. Tabbytite can make the required showing as to cultivation, it would be futile for her to spend her efforts in attempting to acquire title to the 160 acres under the homestead law.

There would, of course, be no objection to the filing of a relinquish-

ment by Mrs. Tabbytite of one or more of the four legal subdivisions in her present entry. *Cf. Thomas G. Simmons, Jr., A-30076 (Supp.)* (November 19, 1964). This would reduce the amount of land which Mrs. Tabbytite must show to have been cultivated during the third and succeeding years of the life of her entry. If she chooses to relinquish one or more legal subdivisions, she must retain in her entry that subdivision which includes her house and cultivated land.

We turn now to Mrs. Tabbytite's appeal from the rejection of her application to acquire title to the land as an Indian allotment.

On January 12, 1962, prior to the examiner's decision on Clarke's second contest of the entry, Mrs. Tabbytite filed an application for an Alaska native allotment on the land embraced in her entry under the act of May 17, 1906, 34 Stat. 197, as amended, 48 U.S.C. § 357 (1958), alleging occupancy of the land since December 1954, when her first entry (Anchorage 028735) was allowed. Her application was rejected by the Anchorage land office by decision of February 6, 1962, on the ground that Mrs. Tabbytite does not qualify under the act, not being a native of Alaska. On appeal to the Director, Bureau of Land Management, Mrs. Tabbytite alleged that she had intended to apply for an allotment under section 4 of the General Allotment Act of February 8, 1887, as amended, 25 U.S.C. § 336 (1958), claiming to be an enrolled member of the Comanche Tribe of Indians of Oklahoma. She thereafter filed with the Director an application for the 160 acres under section 4 of the 1887 act, as amended.

In its decision of May 22, 1962, the Division of Appeals, Bureau of Land Management, affirmed the rejection of Mrs. Tabbytite's allotment application on the ground that Mrs. Tabbytite is not a native of Alaska and therefore not qualified for an Indian allotment under the act of May 17, 1906, and on the further ground that section 4 of the act of 1887 relates only to unappropriated public lands in the United States exclusive of Alaska, and that, in any event, the land is unavailable for further application so long as it remains in the uncanceled homestead entry of Mrs. Tabbytite. The Division of Appeals held that Mrs. Tabbytite cannot claim the land as a homestead entry and as an Indian allotment at the same time.

We agree with the Division of Appeals that Mrs. Tabbytite is not entitled to a native allotment under the 1906 act, as amended. That act authorizes the Secretary of the Interior to allot lands to those Indians, Aleuts, and Eskimos of full or mixed blood who reside in and are natives of Alaska. The legislative history of the 1906 act points strongly to the conclusion that it was the natives of Alaska only who were the concern of the Congress in the enactment of that legislation. Until that time those natives had had no legal protection against the white man in the occupancy of their homes and it was to afford this protection that the act was passed. Nothing is found in the legislative

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history which would suggest that Indians of the other States or territories were to benefit through its enactment or, conversely, that such Indians were to be deprived of any benefits that they might have in Alaska under other legislation. Therefore, even though Mrs. Tabbytite may be said to reside in Alaska now, she is not a native thereof and does not come within the scope of the 1906 act.

However, we do not agree that section 4 of the General Allotment Act of 1887, as amended, is not applicable to those Indians, not natives of Alaska, who may be entitled to allotment and who make settlement on unappropriated public lands of the United States in Alaska.

Section 1 of the General Allotment Act,

An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,

provided for the allotment of lands within reservations created for Indian use to individual Indians in the quantities set forth therein. 24 Stat. 388.

Section 4 provided in pertinent part:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; * * * and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. * * * 24 Stat. 388, 25 U.S.C. § 334 (1958).

Section 5 provided for the issuance of trust patents to those Indians to whom allotments are made and that—

* * * the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act. * * * 24 Stat. 389, as amended, 25 U.S.C. § 348 (1958).

Section 8 provided:

That the provision [sic] of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order. 24 Stat. 391, 25 U.S.C. § 339 (1958).

Section 1 of the 1887 act was amended by the act of February 28,

1891, 26 Stat. 794, to create five new sections. Insofar as pertinent, the new section 4 of that act provided:

That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children, in quantities and manner as provided in the foregoing section of this amending act for Indians residing upon reservations; * * *; and patents shall be issued to them for such lands in the manner and with the restrictions provided in the act to which this is an amendment. * * * 26 Stat. 795, 25 U.S.C. § 336 (1958).

Section 5 as created by the amendatory act provided—

* * * That the provisions of this act shall not be held or construed as to apply to the lands commonly called and known as the "Cherokee Outlet"; * * * 26 Stat. 796, 25 U.S.C. § 371 (1958).

The section 4 created by the 1891 statute was again amended by section 17 of the act of June 25, 1910, 36 Stat. 855, 859, to provide, instead of for allotments in quantities and manner as provided in the earlier legislation, that—

* * * such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; * * * 25 U.S.C. § 336 (1958).¹

There is nothing in the language of the General Allotment legislation which specifically excludes the public domain in Alaska from its application. On the other hand, it is obvious that the legislation applied when it was enacted to land within the then territories of the United States. It is also obvious that Congress provided specifically for those cases where the legislation was not to apply. The fact that Alaska was not organized as a territory until 1912, at which time the Constitution and laws of the United States not locally inapplicable were given the same force and effect within the Territory as elsewhere in the United States, 37 Stat. 512, 48 U.S.C. §§ 21 and 23 (1958), does not militate against the present application of this legislation to the public domain in Alaska. A careful consideration of section 4 of the General Allotment Act, as amended, discloses no reason to hold that its provisions are locally inapplicable to the public domain in Alaska. In this connection it is to be noted that the Congress had, by the act of May 14, 1898, 30 Stat. 409, 48 U.S.C. § 371 (1958), extended the provisions of the homestead laws of the United States to Alaska and that when the Congress intended to bar section 4 allotments on the public domain within a particular area it did so specifically. See also in this connection the act of March 1, 1933,

¹ For a general discussion of the allotment system, see Cohen, Handbook of Federal Indian Law, Sec. 1, ch. 11, at p. 206.

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47 Stat. 1418, 25 U.S.C. § 337a (1958), barring allotments of lands to Indians on the public domain in San Juan County, Utah.

Therefore, it must be held that such Indians who qualify may have land allotted to them in Alaska in such areas as may be deemed proper to the extent provided for in section 4 of the General Allotment Act, as amended, *i.e.*, 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.

Of course, before such an allotment may be allowed, the Indian must satisfy the requirements of the Department, set forth in 43 CFR Subpart 2212, including, among other things, the submission of a certificate from the Commissioner of Indian Affairs showing that the person desiring to file the application is an Indian entitled to allotment. In this respect, it is noted that no such certificate accompanied Mrs. Tabbytite's application. The statement dated March 28, 1962, signed by the Area Field Representative, Kiowa Area Field Office, Bureau of Indian Affairs, that the records of that office reflect that Mrs. Tabbytite is an enrolled member of the Comanche Tribe of Indians of Oklahoma, which Mrs. Tabbytite attached to her second application, does not seem to meet this requirement.

Furthermore, Mrs. Tabbytite's section 4 application describes the land as "nonirrigable-agricultural—for grazing land." If the land is nonirrigable agricultural land, Mrs. Tabbytite, if she can qualify for an Indian allotment, would be entitled to only 80 acres.

Finally, the decision below holds that Mrs. Tabbytite cannot claim the land under the homestead law and as an Indian allotment at the same time.

This is true. Mrs. Tabbytite contends that she was under the impression, when she filed her application for the Indian allotment, that her homestead entry had been canceled. Although Mrs. Tabbytite was in error in believing that her homestead entry had been finally canceled, we can see no objection to recognizing the fact that Mrs. Tabbytite has made settlement on the land. The fact that she made settlement at a time when the land was already within her allowed homestead entry should not preclude her, if she so desires, from relinquishing her homestead entry and pursuing her claim to the land as an Indian allotment.

Accordingly, and in order to bring this long drawn-out controversy as to Mrs. Tabbytite's right to remain on the land to a close, Mrs. Tabbytite should determine whether she wishes to pursue her efforts to acquire the land or a part thereof under the homestead law or whether she wishes to have her settlement on the land recognized as the basis for an Indian allotment. If she chooses the latter course, she must, of course, meet the requirements for a section 4 allotment

and relinquish her claim to all of the land under the homestead law. Mrs. Tabbytite should be given a reasonable opportunity to make this decision.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision below on the contest of Mrs. Tabbytite's homestead entry is reversed and the decision relating to her application for an Indian allotment on the land is affirmed as herein modified.

EDWARD WEINBERG,
Deputy Solicitor.

APPEAL OF CRAFTSMEN CONSTRUCTION CO., INC.

IBCA-360
IBCA-361

Decided March 25, 1965

Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Breach

Claims for extra costs of performance allegedly caused by the Government's excessive delay in approving shop drawings required by it pursuant to the terms of a construction contract are claims for breach of contract. Such claims are beyond the jurisdiction of the Board of Contract Appeals to decide, in the absence of an appropriate Suspension of Work clause or other provision authorizing a price adjustment for such a delay.

BOARD OF CONTRACT APPEALS

Department Counsel has filed a motion to dismiss two timely appeals from the contracting officer's denial of two separate claims involving the above-identified contract.

The motion is premised on the theory that the Board is without jurisdiction to grant an equitable adjustment of the contract price because the claims are for damages for breach of contract, and, therefore are beyond the administrative authority of this Board to determine.

Each claim is for the extra cost of performance which appellant attributes to prolonged delay by the Bureau of Indian Affairs in reviewing and approving shop drawings during the construction of facilities at Leupp, Ariz., on the Navajo Indian Reservation. Both appeals will be considered in this decision.¹

The contract, dated December 17, 1958, called for the construction of school and housing facilities at Leupp, Ariz., on the Navajo Reservation. The contract price was \$3,178,412. All work was required

¹ Each claim initially included a request for an extension of time for performance. However, the contract was completed within the time required, and, consequently, there was no assessment of liquidated damages. It will not be necessary, therefore, to discuss appellant's requests for extensions of time for performance.

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to be completed within 540 days after the date of receipt of notice to proceed. The contractor received notice to proceed on January 11, 1959, thus establishing the date for completion to be July 14, 1960. Performance by appellant under the contract was determined to be substantially complete on July 12, 1960.

The contract was executed on Standard Form 23 (revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953). These included the customary "Changes" and "Termination for Default—Damages for Delay—Time Extensions" provisions (Clauses 3 and 5, respectively). The contract did *not* contain a "Suspension of Work" clause.

Provision for the submission of shop drawings is made in Clause 13 of the General Conditions of Specification No. 65-58 and of Specification No. 66-58. Each clause reads in pertinent part as follows:

13. Samples, Shop Drawings and Catalog Data: In accordance with Clause 8, General Provisions, Standard Form 23A, the Contractor shall submit for approval such samples, shop drawings, and data as may be specified or as may be required whether mentioned specifically herein or not. * * *

The parties agree that the shop drawings in dispute were required by the terms of the contract.

Claim No. 1

IBCA-360

Appellant's first claim is for an equitable adjustment in the amount of \$4,940 for costs allegedly incurred as the result of excessive time used by the Bureau of Indian Affairs to review and approve shop drawings pertaining to foundation anchor bolts for pipe columns in the kitchen-dining hall building and to related setting plans for anchor bolts and other imbedded items.

Appellant contends that: (1) the Government's failure to timely approve the anchor bolts unreasonably delayed the "critical path" of construction because it was impossible to build any part of the superstructure of the building until the anchor bolts had been imbedded in the footings; that (2) a reasonable time for review and approval of these drawings would not have exceeded 7 to 10 days; and that (3) if these drawings had been approved within a reasonable period, the project would have been completed in a lesser time and at a lesser cost than was actually the case.

The time for approval of the shop drawings was not specifically set forth in the contract, and, hence, the Government was under an implied obligation to perform this function within a reasonable time. The record discloses that the anchor bolt drawings submitted for approval by appellant were retained by the Government from February 2, 1959, to March 11, 1959, or for a period of 38 days. The con-

tracting officer concedes in his findings of fact and decision that a reasonable period would not have exceeded 2 or 2½ weeks. However, he found that appellant did not, in fact, incur any additional costs because of the delay in approving the anchor bolt drawings.

The Board is in no position to determine the issues thus presented, since the dispute is one over which it has no jurisdiction.

The contract does not contain any provision, such as a standard form "Suspension of Work" clause, authorizing an equitable adjustment of the contract price for Government delay in performing its contractual obligations. Although the "Changes" clause (Clause 3) of the contract contains an equitable adjustment provision, it is well settled that the "Changes" clause does not extend to claims that are grounded solely upon delay of the Government in performing its contractual obligations.² Since appellant's first claim does not come within the scope of any provision of the contract specifically authorizing an equitable adjustment or other form of administrative payment for delay by the Government, it must necessarily be regarded as a claim for breach of contract. Our holdings have consistently treated claims for breach of contract as beyond the jurisdiction of the contracting officer or this Board to determine.³ Consequently, Department Counsel's motion to dismiss appellant's first appeal for lack of jurisdiction is granted.

Claim No. 2
IBCA-361

Appellant's second claim is essentially for an equitable adjustment of the contract price, in an unspecified amount, for the additional costs of performance allegedly incurred, as the result of the Government's unreasonable delay in reviewing and approving two plumbing shop drawings. The contracting officer rejected this claim in his findings of fact and decision.

The contracting officer did find, however, that appellant was entitled to an equitable adjustment of the contract price pursuant to the "Changes" clause (Clause 3) for furnishing and installing hot water heaters in each living unit of efficiency apartment buildings, and for engineering services required in connection with certain changes in the drawings. The amount of the equitable adjustment for this work was to be determined by negotiation between the parties. The record does not show whether such equitable adjustment has actually been made.

² *Hoak Construction Co.*, IBCA-353 (Jan. 27, 1965); *Electrical Builders, Inc.*, IBCA-406 (Aug. 12, 1964) 1964 BCA par. 4377; *Weardeco Construction Corp.*, IBCA-48 (Sept. 30, 1957), 64 I.D. 376, 57-2 BCA par. 1440.

³ *Clifford W. Gartzka*, IBCA-399 (Dec. 24, 1964); 71 I.D. 487, 65-1 BCA par. 4602; *Commonwealth Electric Co.*, IBCA-347 (Mar. 12, 1964); 71 I.D. 106, 1964 BCA par. 4136, 6 Gov. Contr. par. 262; *Allied Contractors, Inc.*, IBCA-265 (Sept. 26, 1962), 69 I.D. 147, 1962 BCA par. 3501, 4 Gov. Contr. par. 512; *Weardeco Construction Corp.*, *supra* note 2.

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Nothing in this opinion is intended to prejudice the rights of appellant with respect to the determination of the amount of such equitable adjustment by the contracting officer or this Board, if it has not actually been made.

The drawings in question consisted of two drawings only, CSH-P-1 and CSH-P-2, pertaining to plumbing for two- and three-bedroom houses and for efficiency apartments, respectively. They were originally submitted for Government approval on February 20, 1959. Approximately 1 month later, by letter dated March 20, 1959, the drawings were returned to appellant unapproved, with the requirement that they be resubmitted. Revised drawings were apparently submitted to the Branch of Plant Design and Construction sometime during the period between March 24 and April 10, 1959. Under date of April 24, 1959, directions for further revisions were given by the Branch of Plant Design and Construction. By letter dated May 2, 1959, corrected drawing CSH-P-1, and by letter dated May 4, 1959, corrected drawing CSH-P-2, were submitted for approval. Both drawings were approved by telegram on May 6, 1959. The approved shop drawings Nos. CSH-P-1 and CSH-P-2 were returned to appellant on May 9, 1959, and May 15, 1959.

As in its first claim relating to the delay in approval of anchor bolt drawings, appellant asserts that the plumbing drawings should have been reviewed and approved within no more than 7 to 10 days. Appellant also avers that the housing portion of the contract was suspended as a result of the delayed approval of the plumbing drawings, because plumbing lines had to be placed in the foundation area as one of the very first items of construction; and that additional costs of performance were incurred by reason of this suspension.

The contracting officer determined that about half of the delay in approval occurred incident to the consideration of contemplated changes in the specifications for the plumbing work. He further found that the delay did not result in a work suspension or increase the time required to perform the contract.

It is clear that appellant's second claim, equally with the first, falls within the scope of the principle that a claim for additional compensation on account of delay by the Government in performing its own obligations under a contract, in the absence of a provision specifically authorizing administrative payment for delay by the Government, is a claim for breach of contract over which neither the contracting officer nor the Board has jurisdiction. Consequently, Department Counsel's motion to dismiss appellant's second appeal for lack of jurisdiction is granted.

Conclusion

For reasons set forth above, both of appellant's appeals are dismissed.

JOHN J. HYNES, *Member*.

I CONCUR:

I CONCUR:

HERBERT J. SLAUGHTER, *Deputy Chairman*.

DEAN F. RATZMAN, *Chairman*.

STEPHEN H. CLARKSON

A-30438

Decided March 25, 1965

Desert Land Entry: Extensions of Time

Discretionary grants of extensions of time under the desert land laws will not be made by the Secretary of the Interior, where to do so would result in the agricultural reclamation of desert land in California with water from the Colorado River since it is contrary to the public interest to increase the pressure on the inadequate water supply in that river presently available for use in California.

Desert Land Entry: Relief Acts

Where a desert land entry has been assigned subsequent to March 4, 1929, the assignee is not entitled to the relief afforded by the act of March 4, 1929, as amended, 43 U.S.C. (1958 ed.) 339, or the act of March 4, 1915, as amended, 43 U.S.C. (1958 ed.) 338, which allow entrymen, under certain prescribed circumstances, to purchase the lands embraced within their entries.

APPEAL FROM DECISION OF LAND OFFICE

Stephen H. Clarkson has appealed to the Director, Bureau of Land Management, from a decision of the land office at Riverside, Calif., dated March 20, 1964, denying his application for a 3-year extension of time within which to make final proof in connection with the above-identified desert land entry, pursuant to the act of February 25, 1925, 43 Stat. 982, 43 U.S.C. (1958 ed.) 336. The decision also denied Mr. Clarkson's request for an immediate patent to the land, an extension of time to May 10, 1972, to make final proof, or a special departmental ruling similar to that provided for in *Maggie L. Havens* (A-5580), dated October 11, 1923. I have assumed supervisory jurisdiction over this appeal.

The subject entry was allowed to Thomas Morgan on June 13, 1913. He was granted a 3-year extension of time under the act of March 28, 1908, 35 Stat. 52, 43 U.S.C. (1958 ed.) 333, to June 3, 1920. The

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entry was suspended from January 27, 1920, to April 26, 1923, because of adverse action against the Mount Signal Canal Co. as a source of water supply. A further application for extension was made during this period; but no action was taken on it because of the suspension. Accordingly, on October 11, 1923, when the suspension of *Maggie L. Havens, supra*, was decreed as to her entry and all others similarly situated, the subject entry was erroneously considered as still in force and effect and, therefore, suspended. The entry was then assigned by Morgan's widow to Lester Hendrix, and the assignment was approved June 2, 1955.

On petition of Lester Hendrix the lands embraced in this entry were included within the boundaries of the Imperial Irrigation District, and within the Imperial Unit, by Resolution No. 187-61, dated September 19, 1961. Therefore, since water was then available to the entry within the meaning of the *Havens* decision, *supra*,¹ Hendrix was notified by land office decision dated October 5, 1961, that the *Havens* suspension was lifted. However, on October 17, 1961, an extension of time to May 9, 1964, under the provisions of the act of April 30, 1912, was granted to Mr. Hendrix. Mr. Hendrix made an assignment of the entry to appellant which was approved on November 8, 1961.

Since the appellant is an assignee of the entry subsequent to March 4, 1915, and March 4, 1929, he is not entitled to the relief by purchase afforded by the acts of March 4, 1915, and March 4, 1929, as amended, 43 U.S.C. (1958 ed.), Sections 337, 338, 339, and there is no other way by which he can be given an immediate patent.

Therefore, the only possible statutory relief available to the appellant is an extension of time under the act of February 25, 1925, 43 U.S.C. (1958 ed.) 336. This act authorizes the Secretary of the Interior, "in his discretion" to grant an additional period, not to exceed 3 years, to make final proof.

In the recent departmental decision *Hugh S. Ritter, Thomas M. Bunn*, 72 I.D. 111 (1965), involving applications for desert land entries, it was stated:

The tract lies in the Imperial Valley. Its development requires Colorado River water.

California is presently using more than 5,100,000 acre feet of Colorado River water annually. This use substantially exceeds the 4,400,000 acre feet of annual consumptive use which is California's entitlement under *Arizona v. California*, 373 U.S. 546 (1963), when a total of 7,500,000 acre feet of Colorado River water is available for consumptive use in the lower Colorado River basin States of Arizona, California, and Nevada. Present California agricultural uses of Colo-

¹ We do not find it necessary to consider whether water might be said to have been available prior to September 19, 1961.

rado River water crowd or exceed the 3,850,000 acre feet total of the first three priorities under the seven party California Colorado River water agreement.

Nor can the continued availability of 7,500,000 acre feet of mainstream water for consumptive use in the lower basin be anticipated. On the contrary, the Department estimates an assured availability of less than 7,500,000 acre feet by 1975 unless there is extensive salvage of water now being lost in and along the lower river itself. Even with such salvage, mainstream water available to the lower basin will, it estimates, fall to 7,725,000 acre feet per annum by 1975, and decline to 7,155,000 and 6,680,000 acre feet per annum by 1990 and 2000, respectively. See Table 16A, Page IV-13, Pacific Southwest Water Plan Report, Department of the Interior, January 1964. The Chief Engineer of the Colorado River Board of California predicts even greater deficiencies. For 1970, he predicts an availability of only 7,000,000 acre feet per annum. For 1900, only 5,900,000 acre feet per annum.

In these circumstances, it would be contrary to the public interest at this time to increase the pressure on the inadequate water supply available for use in California from the Colorado River by classifying the lands involved in these applications and other similar public lands as available for disposition under the desert land law.

Therefore, in exercise of the discretionary authority vested in the Secretary of the Interior under Section 7 of the Taylor Grazing Act, as amended, 49 Stat. 1976 (1936), 43 U.S.C. § 315f (1958), the land applied for is classified as not proper for disposition under the desert land law and the decisions appealed from are affirmed.

For the same reasons it would be contrary to the public interest to grant any of the discretionary relief afforded to entrymen under the desert land laws by way of extensions of time to make final proof or to purchase where the entry is situated in California and requires water from the Colorado River for its reclamation. Accordingly, the extension of time requested by the appellant was properly denied.

Finally, appellant has requested relief similar to that afforded in *Maggie L. Havens, supra*. In that case, Maggie L. Havens' entry along with all others similarly situated was suspended until water became available or until for some other reason the suspension was lifted. This meant that the requirements of the desert land law were waived as to those entries, at least until water became available for irrigation, as it did in the case of appellant's entry when it was included within the Imperial Irrigation District.² There was no express statutory authority for the suspension granted in the *Havens* case, and, at best, the action was entirely discretionary with the Secretary.³ For

² By letter decision dated Apr. 30, 1924, El Centro 01853, the Commissioner of the General Land Office held that lands embraced within the exterior boundaries of an approved irrigation district were not entitled to the relief afforded by *Maggie L. Havens* (A-5580), Oct. 11, 1923. This rule was applied by the Director, Bureau of Land Management, in a decision dated Feb. 27, 1962, *Betty Adams McCarty*, Los Angeles 039268, where appellant's entry was canceled because it was within the Imperial Irrigation District, water was therefore available, and it had long since expired by the running of time notwithstanding the Havens suspension.

³ It is unnecessary, at this time, to review the question of whether or not there was authority for this exercise of discretion.

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the reasons already stated, no discretionary relief will be afforded desert land entrymen who require water from the Colorado River to reclaim their entries. Appellant's request for such relief was, therefore, properly denied.

The decision of the Riverside Land Office of the Bureau of Land Management is affirmed, and the various forms of relief requested by the appellant are hereby denied.

Appellant has requested a hearing and oral argument. In view of what has been said, no useful purpose would be served by granting his request. Accordingly, it is denied.

This is a final decision of the Department.

JOHN A. CARVER, JR.,
Under Secretary.

UNITED STATES

v.

FORD M. CONVERSE

A-30177

Decided March 26, 1965

Administrative Procedure Act: Hearing Examiners—Rules of Practice: Hearings

A hearing officer is not disqualified nor will his findings be set aside in a mining contest upon a charge of prejudice and prejudgment of the case in the absence of a showing of bias.

Mining Claims: Determination of Validity

The Department of the Interior has been granted plenary power in the administration of the public lands, and, until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of the claim.

Mining Claims: Discovery

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit.

Mining Claims: Discovery—Surface Resources Act: Generally

A Government mineral examiner investigating a mining claim prior to a proceeding under the act of July 23, 1955, has no duty to test a claim for discovery beyond examining the discovery points made available by the mining claimant.

Mining Claims: Special Acts—Mining Claims: Surface Uses—Surface Resources Act: Generally

In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mineral claimant to the surface resources of his mining claim, the claim is properly subjected to the terms and limitations of section 4 of that act unless it is shown that there was a valid discovery within the meaning of the mining laws made within the limits of the claim prior to the date of the act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ford M. Converse has appealed to the Secretary of the Interior from a decision dated October 8, 1963, whereby the Assistant Director, Bureau of Land Management, affirmed a decision of a hearing examiner declaring the Paymaster No. 1 and Edith lode mining claims in sections 1 and 2, T. 12 S., R. 4 E., W.M., Willamette National Forest, Oreg., subject to the limitations and restrictions of section 4 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612 (1958).

A hearing was held at Portland, Oreg., on June 11, 1962, to determine the surface rights on the claims in a proceeding initiated by the Forest Service, U.S. Department of Agriculture, pursuant to section 5 of the act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (Supp. V, 1964). The sole issue at the hearing was whether or not a valuable deposit of minerals had been discovered on either of the claims prior to July 23, 1955. The hearing examiner did not attempt to determine whether or not a discovery had been made since that date, although much of the testimony produced at the hearing pertained to evidence of mineralization uncovered since that date.

At the outset of the hearing the mining claimant filed a motion to change the hearing examiner and filed an affidavit in support of that motion charging the hearing examiner with bias and prejudice. The motion was denied as not having been timely filed.

The record shows that the claims were owned in 1910 by the appellant's father. At that time a tunnel 130 feet long was excavated along a vein in the Paymaster claim and minerals were removed from an extensive stope. The claims were subsequently abandoned and were relocated by the appellant in 1951. In 1959 and 1960 the Forest Service constructed an access road to the area across the Edith claim. Prior to that time access to the claims was by a mountain trail, and in 1951 the closest road was 30 miles from the claims.

In the process of constructing the road across the Edith claim a number of cuts were made which exposed mineralization. Most of the

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appellant's evidence of mineral value and much of the testimony of his witnesses were based on minerals exposed in the road cuts and other workings and improvements constructed after 1955. Much of this evidence was excluded from the hearing over the objection of the appellant. A substantial portion of the admitted testimony was also related to minerals exposed after 1955 and could be related only indirectly to the question of discovery prior to 1955. This testimony was admitted over the objection of the contestant.

From the evidence adduced at the hearing, the hearing examiner found that minerals have been known to be in the area of the claims for half a century. He found that mineral samples showing substantial quality had been found but that the problem was to determine whether there was a sufficient concentration of minerals to justify the cost of development and that there was no evidence at the hearing that this determination had been made. He concluded that the most favorable finding which could be made for the mining claimant was that in 1955 there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was not sufficient evidence of mineralization as of July 23, 1955, to induce a prudent man to expend labor and means on either claim with a reasonable expectation of developing a valuable mine.

In his appeal to the Secretary, the appellant has reiterated essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management. In substance, he contends that: (1) a fair hearing was impossible because the hearing examiner, by his own admission, was prejudiced against the claimant and had prejudged the case; (2) the claimant is entitled to a jury trial, and an administrative hearing is a deprivation of property without due process of law; (3) the contestant failed to establish a prima facie case and affirmatively showed that a discovery had been made on each of the claims; (4) the Director erred in holding that assays of ore samples taken by the mining claimant after July 23, 1955, were inadmissible while those taken by the contestant after the same date were admissible; (5) the Director erred in holding that "exploration" and "development," as used in mining law, are not synonymous; (6) the Government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955; and (7) the Director either ignored or refused to accept the facts found by the hearing examiner.

The appellant's charge of admitted prejudice on the part of the hearing examiner is based upon an affidavit which the appellant filed at the commencement of the hearing in which he stated that he was a mining claimant and the hearing examiner in this case was the hearing examiner in the case of the *United States v. Santiam Copper Mines, Inc.*, A-28272 (June 27, 1960). He then stated:

That based upon the decision in that case and upon the conduct of the Examiner in that case, and upon my own independent investigation, I have concluded that said Hearing Examiner cannot try the above entitled case in an impartial manner, that he has pre-judged my case and is unable to grasp any evidence which does not harmonize with his preconceived opinion of the matter. That for me to have a hearing before said examiner is a vain and useless gesture. That I am informed and believe that no mining claimant has ever prevailed in the State of Oregon in a contest of this kind heard by * * * [the hearing examiner]. That I am convinced that if said examiner is permitted to hear my case, that he will ignore the facts, refuse to make findings in accordance with the evidence, and will decide the case against me to please his superiors; That he will exercise no independent judgment of his own but will subordinate the merits to politically dictated policy.

Upon the filing of the appellant's motion for a change of hearing examiners and the denial of the motion, the following dialogue took place between the hearing examiner and the appellant's attorney:

MR. MURRAY. Do I understand that the Hearing Examiner refuses to testify as a witness in support of the facts averred in the affidavit here?

HEARING EXAMINER HOLT. That's correct.

MR. MURRAY. And does the Hearing Examiner deny the offer of proof that we propose to prove by the testimony of the Hearing Examiner as to the facts averred in the affidavit?

HEARING EXAMINER HOLT. I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to. Tr. 4.

The hearing examiner's statement cannot reasonably be construed, as the appellant has attempted to do, as an admission of the truthfulness of all of the appellant's allegations. The hearing examiner admitted the first and only factual statement of the affidavit, that he and the appellant were participants in the *Santiam Copper Mines* case. This is hardly a showing of bias. The remainder of the allegations of the affidavit are merely conclusions and opinions of the mining claimant. By no stretch of the imagination could they be considered to be facts which were admitted by the examiner. In denying the appellant's motion, the hearing examiner, in effect, denied the truthfulness of those allegations.

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As stated in the Assistant Director's decision, it requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. *United States ex rel. DeLuca v. O'Rourke*, 213 F. 2d 759, 763 (8th Cir. 1954). The unsubstantiated allegations of the appellant fall far short of the substantial showing required to disqualify a hearing officer.

The authority of this Department to determine the validity of a mining claim in an administrative proceeding is well established and needs little comment. The Department has been granted plenary power in the administration of the public lands. Until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of a mining claim. Due process in such a case implies notice and a hearing, but it does not require that the hearing be in the courts, or forbid an inquiry and determination by this Department. *Cameron v. United States*, 252 U.S. 450 (1920); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Davis v. Nelson*, 329 F. 2d 840 (9th Cir. 1964). Thus, the appellant's charge that he has been deprived of property without due process of law is entirely without merit.

The remainder of the appellant's major contentions pertain to the test relied on by the hearing examiner in determining whether a discovery had been made and to the admission and exclusion of evidence and the conclusions drawn from the evidence admitted.

In support of his charge that the Director either ignored or refused to accept the factual findings of the hearing examiner, the appellant alleges that—

The assay of samples from the mineral-bearing lode structure on the Edith Claim of contestant's sample was \$31.10 per ton; the average of 22 of mining claimant's samples was \$56.64 per ton; a total average of 26 samples, both contestant's and mining claimant's of \$52.63. The assay averages of samples taken on the Paymaster Claim of the mineral bearing lode structure was \$29.57 per ton for contestant's sample, and \$122.25 per ton for 4 of mining claimant's samples, an average for the 5 samples of \$103.72 per ton. When one considers that the assay averages of the value of all ore mined in the United States for gold and silver is \$9.80 per ton, for lead and zinc, \$12.00 per ton, for copper, \$4.80 per ton, the mining claimant's certainly established a discovery of valuable minerals within the meaning of the mining law.

The fallacy of the appellant's argument, however, lies in his failure to recognize the applicability of other criteria for determining whether

there has been a discovery besides the unelucidated values of mineral samples.

The issue in this case is not whether there has been a discovery but whether a discovery was made upon either of the claims in question prior to July 23, 1955. As has been noted, the hearing examiner did not purport to determine whether or not a valuable deposit of minerals had been discovered at all but only whether such a deposit was discovered prior to July 23, 1955, for, if a discovery was not made prior to that date, the mining claimant has no right to use the land for other than mining purposes prior to the issuance of a patent. See *United States v. Carlile*, 67 I.D. 417, 421 (1960); *United States v. Clarence E. Payne*, 68 I.D. 250, 253 (1961). It was therefore necessary, in order to establish the fact of a discovery prior to July 23, 1955, to demonstrate such discovery on the basis of showings of mineral value from portions of the claims exposed prior to that date. It was for this reason that the hearing examiner rejected most of the appellant's evidence based upon mineral showings exposed at a subsequent time.

Contrary to the allegation of the appellant, the hearing examiner did not apply one rule of evidence to the contestant and a different rule to the mining claimant in admitting into evidence assays of samples of ore taken by the contestant after July 23, 1955. It was the date of exposure of the source of the ore sample and not the date of the taking of the sample that determined whether or not a sample was proper evidence.¹

With respect to the evidence itself, as to the Edith claim, the record shows that contestant's witness Suchy took samples from the discovery cut which was opened before 1955 and that the results of those samples disclosed little or no value (Tr. 44-45). Another sample from boulders along the creek indicated value of \$5.90 per ton, but there was no way of determining where the boulders came from (Tr. 46-47). Suchy concluded that a prudent man would not be justified in expending further time or means on the structures at the north end of the claim (Tr. 51), although, on cross-examination, he did advise the appellant to spend more money on exploration of the recently exposed structures at the southern end of the claim for the purpose of deter-

¹ It is noted that in his present computation of demonstrated mineral values, the appellant has lumped together the aggregate of samples taken from the claims without regard to whether they were taken from discovery points uncovered prior to 1955 or from those more recently exposed.

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mining the continuity and persistency of veins in those structures (Tr. 101).

Nearly all of the testimony and evidence on behalf of the appellant relating to the Edith claim pertained to areas of the claim that have been exposed since 1955, and, while some of the ore samples taken were found to contain significant quantities of minerals, the testimony of the appellant's witnesses is not substantially at variance with that of the contestant's witness.

Appellant's witness Leonard was asked by appellant's counsel:

Now, Mr. Leonard, from your experience as a prospector and mining man, a miner, and based upon your experience and studies of economic geology, could you give us your opinion as to whether or not there is a sufficient mineral showing on the Edith or the Paymaster Claim to warrant a reasonably prudent man in spending time and money to develop a paying mine?

To which he replied:

Yes, I would say that I would recommend it, and I would even go so far as to say that there are some places in there that look very encouraging. Whether they would turn out as encouraging as they look, I don't know. The record of the area in recent years has been poor. At one time, they did have a little success, but it's very difficult to guess what your result would be. I think it's worth some expenditure, however. I have always thought that. The area has been very poorly developed, but you're very fortunate to find ores on the surface, and some little development work might turn up much better ore here than we locally presume. (Tr. 171-172.)

On cross-examination, Leonard was asked by the contestant's counsel:

When you're talking about spending additional money, as I understand your use of the words, you believe that more prospecting should be done here because there's some encouraging showings, is that what you say?

He replied:

Yes, I think it's true of practically any mining district. If a mine has got, of course, lots of high grade ore showing, somebody is certainly going to be shipping it, and very many mines are worthwhile—that is, they have the environment to make ore, but no one has gone say two or three hundred feet deep on them or something to give them a chance to see whether they're a real big mine, or whether they're a fizzle, and the point of spending money arrives before you know that. (Tr. 172-173.)

Testimony of other witnesses for the appellant was to a similar effect.

With respect to the Paymaster No. 1 claim, contestant's witness Holmgren testified that he had taken ore samples from the claim, the

first of which showed no mineral value, and the second of which indicated a value of \$29.57 per ton. When asked if he had an opinion as to whether or not a reasonably prudent man would spend further time and means with a reasonable prospect of developing a paying mine on the claim, he replied:

Well, there's certainly nothing to be seen in the face, and the little remnant of ore that remained there at the end of the old stope was not conducive to spending any money on it in an effort to open the tunnel. The structure in the tunnel was extremely narrow and the stope was extremely narrow, and it probably had all been done by hand work at the time. (Tr. 109.)

On cross-examination, the following exchange took place between the appellant's counsel and Holmgren:

Q. Well, do you think this \$29.57 would justify a reasonably prudent person in spending some more money to see if there is some ore, more of that same grade of ore in that stope?

A. Well, I seriously doubt that there's any more in that stope. I think it was all taken out at the time it was stoped.

* * * * *

Q. And you don't think it would be worthwhile, or that a person would be justified in trying to find some more of that twenty-nine dollar rock in there?

A. From the indications here, there is very little alteration on the wall rock. It seems to be extremely tight. There's very little alteration, and I don't think it warrants any further work.

Q. It's not worth exploring, in your estimation?

A. I wouldn't think so.

Q. Or spending any money on exploration?

A. I wouldn't think so. (Tr. 113-114.)

Appellant's witness McInnis testified that he took two samples of ore at a point approximately 10 feet inside the tunnel on the Paymaster claim which indicated values of \$112.64 and \$122.68, respectively, per ton (Tr. 124-125). However, across the face of the assay report for the samples is written "These Samples Taken East of culvert in main vein of Edith." (Contestee's Exhibit 3.) The confusion is compounded by the fact that the contestee's exhibit 28, a diagram of the Edith claim, indicates that two samples, numbered "3" and coinciding in mineral content with those reportedly taken from the Paymaster, were taken from the newly-exposed area of the Edith claim, whereas contestee's exhibit 27, a diagram of the Paymaster claim, does not show any such samples. Thus, the probative value of these samples is nullified by the ambiguous evidence as to their place of origin.

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Appellant's witness Persons testified that he had taken a sample from the Paymaster across 12 inches of vein material which assayed \$71.51 (Tr. 140-141). There is nothing, however, in his testimony or in that of the other witness for the appellant that establishes the continuity or the quantity of such ore. There is no evidence in the record that any further values were found in the Paymaster than were known to exist at the time the claims were abandoned after their initial location. The testimony of witnesses for both parties is wholly consistent with the factual findings of the hearing examiner.

The primary dispute in this case, however, is not over the facts but over the legal significance to be given to the established facts. The appellant has consistently maintained that the term "development" may be equated with "exploration," and it is quite clear that it was in the latter sense that the former was used by the appellant's witnesses at the hearing.

The standard for determining whether or not there has been a discovery of a valuable mineral deposit, as set forth in *Castle v. Womble*, 19 L.D. 455 (1894), and adhered to in innumerable decisions since that time is that:

* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met. 19 L.D. at 457.

The Department, however, recognizes a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. *United States v. Clyde R. Altman and Charles M. Russell*, 68 I.D. 235 (1961); *United States v. Edgcomb Exploration Company, Inc.*, A-29908 (May 25, 1964), and cases cited therein.

The distinction recognized by the Department is not inconsistent with the case of *Charlton v. Kelly*, 156 Fed. 433 (9th Cir. 1907), cited

by the appellant as authority for the proposition that "exploration" and "development" mean the same thing. In that case, a contest between two mining claimants, the trial court instructed the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. The Court of Appeals stated that:

It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a mining claim must necessarily be greater than that which is necessary to justify the expenditure of money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word "development" a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim *to the extent of opening up the whole thereof* and acquiring an exhaustive knowledge concerning its resources. The word *as it was used by the court, and as in connection with the whole charge it must have been understood by the jury*, was equivalent to the word "exploration," and was used in the sense in which it was employed in *Chrisman v. Miller*, 197 U.S. 313, 323. * * * in which the court thus quoted with approval the language of Mr. Justice Field in a prior case:

The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist *in such quantities* as to justify the expenditure of money for the development of the mine *and the extraction of the mineral*. 156 Fed. at 436 [Italics added].

In that case and in *Chrisman v. Miller*, 197 U.S. 313 (1905), the courts recognized a difference in the standard to be applied in a contest between two mining claimants, where the principal issue is which of the claimants made a discovery first, and a contest by the Government, in which case the question is whether there has been a discovery which would justify disposition of the land from the public domain under the mining laws.

It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. * * * But even in such a case * * * there must be such a discovery of mineral as gives reasonable evidence

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of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining. 197 U.S. at 323.

If a greater showing of mineral value is required to take lands from the category of agricultural lands than is required in a contest between two mining claimants, *a fortiori*, a greater showing is also required to take lands from the jurisdiction of the United States. The test applied by the hearing examiner in this case is the one which the Department has consistently followed in contests between the Government and mining claimants in determining whether or not there has been a discovery of a valuable mineral.

I find the testimony of the two witnesses for the Forest Service adequate to establish a prima facie showing that there was not a discovery on either claim prior to July 23, 1955.² Suchy's opinion, elicited on cross-examination³ contrary to the assertion of the appellant, does not establish the fact of a valid discovery. At the most, it is a recommendation that further exploration be conducted on the claim, and from its context in the hearing, it is clear that this recommendation is based principally upon recently exposed mineral findings and not those exposed prior to 1955.

The testimony given in behalf of the mining claimant indicated that mineral samples of significant value have been taken from the claims. However, that testimony does not substantiate a finding that on July 23, 1955, a sufficient body of ore had been exposed to meet the requirements of the prudent man test. Indeed, the appellant's arguments do not suggest that he is convinced that he had satisfied the Department's requirements for showing a discovery prior to that date. His arguments are largely in the form of an attack on the test that was applied, a test that the Department has held to be proper.

The appellant has charged the contestant's witnesses with failure to sample fairly that portion of the Edith claim which was opened prior to 1955. The record shows that those witnesses were accompanied on each of their examinations of the claims by the mining claimant or by one or more of his employees. At those times it was possible for the claimant to point out specific areas from which min-

² The burden is then upon the claimant to establish by a preponderance of the evidence that a discovery has been made. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959).

³ After extensive cross-examination by the appellant's attorney, which included discussion of ore located in parts of the Edith claim exposed after 1955, witness Suchy was asked by the appellant's counsel if a reasonably prudent person would be justified in spending further time and money in developing the Edith claim. Suchy replied that—

"I think he's at the stage where he is justified in doing some exploration to try to determine the continuity of the structures he has exposed, and seeing what persistence there is to the veins or the structures that are present on the claims." (Tr. 80, 81.)

eral samples should be taken. The record does not indicate that the contestant's witnesses refused to take samples from any point suggested by the claimant or that any specific areas in the old workings were pointed out as being favorable for ore samples. Neither did the appellant submit assay reports on the pre-1955 workings that were adequate to rebut the findings of the contestant's experts. It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by the Government mining examiners, and those examiners have no duty to rehabilitate discovery points or to make a discovery for the claimant. *United States v. Hunt*, A-28189 (February 29, 1960); *United States v. Spar Mining Company et al.*, A-28786 (July 30, 1962).

The remainder of the appellant's contentions have been carefully reviewed, and I do not find any error in the conclusions of the hearing examiner or the Assistant Director. The claims were, therefore, properly held to be subject to the restrictions of the act of July 23, 1955.

If the appellant is convinced that he has satisfied the requirements of a discovery, he may, of course, apply for a patent to the claims. If, on the other hand, he does not wish to risk the possibility of an adverse ruling on that question, this decision does not bar further effort on his part to explore and develop the mineral deposits which may be found within the limits of the claims and then, upon making a discovery, apply for a patent. As long as the land remains open to the operation of the mining laws, the claimant is protected in his right to such deposits, but until a patent is issued, his use of the land embraced by the claims is limited to mining and other uses of the land incidental to mining.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

R. S. McKNIGHT

A-30237

*Decided March 29, 1965***Oil and Gas Leases: Applications: 640-acre Limitation**

It is proper to reject an offer for an oil and gas lease embracing less than 640 acres where the oil and gas deposits in contiguous land were reserved to the United States in a patent of the contiguous land and remain available for leasing under the Mineral Leasing Act despite inclusion of the land in a reservoir right-of-way.

Oil and Gas Leases: Patented or Entered Land—Oil and Gas Leases: Rights-of-Way Leases

Land patented with a reservation of the oil and gas deposits to the United States which is subsequently included within the outer limits of the boundary of a reservoir right-of-way thereafter granted is not affected by the right-of-way so as to make the oil and gas subject to disposal under the act of May 21, 1930, and the reserved deposits are subject to leasing only under the Mineral Leasing Act.

Rights-of-Way: Act of March 3, 1891

The grant of a right-of-way under the act of March 3, 1891, is a grant through the public lands of the United States and does not attach to the oil and gas deposits reserved to the United States in land patented prior to the grant of the right-of-way.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

R. S. McKnight has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated January 2, 1964, affirming a decision of the land office at Salt Lake City, Utah, which rejected his offer for a noncompetitive oil and gas lease pursuant to the provisions of section 17 of the Mineral Leasing Act, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226 (Supp. V, 1964), because the offer was for less than 640 acres and the tract sought was not surrounded by lands not available for leasing under the act. 43 CFR 3123.1(d), formerly 43 CFR 192.42(d).

The offer described the land applied for as

Township 7 South, Range 20 East, SLM

Section 27: W $\frac{1}{2}$ NW $\frac{1}{4}$, except that portion of SL 047698 (withdrawal for reservoir right-of-way), within the boundaries of said W $\frac{1}{2}$ NW $\frac{1}{4}$.

Total Area 80.00 Acres

In affirming the rejection, the Division of Appeals pointed out that land in the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 28, T. 7 S., R. 20 E., SLM, Utah, having a common boundary with the tract described in McKnight's offer, was available for leasing under the Mineral Leasing Act when McKnight filed his application.

In this appeal McKnight renews his argument made to the Director that the contiguous land, being within a reservoir right-of-way, is subject to leasing for oil and gas purposes only under the act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 *et seq.* (1958), and thus is not available for leasing under the terms of the mineral Leasing Act.

The records of the Bureau of Land Management show that the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 28 was patented in 1922 with a reservation to the United States of the oil and gas deposits therein. Thereafter, on May 2, 1929, the First Assistant Secretary of the Interior, acting pursuant to the provisions of the act of March 3, 1891, 26 Stat. 1095, 43 U.S.C. §§ 946-949 (1958), approved the map of definite location of the Ouray Valley Reservoir in T. 7 S., R. 20 E., "subject to all valid existing rights." The map, submitted by the Ouray Valley Irrigation Company, delineates an area of 1,694 acres and the certificate thereon states that the map is filed for the approval of the Secretary of the Interior in order that the company may obtain the benefits of the act approved March 3, 1891, *supra*, and that the right-of-way therein described is desired for the main purpose of irrigation. The map shows portions of the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 28 as being within the boundary line of the reservoir. Although some of the lands on the outer limits of the reservoir, including the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 28, were patented at the time the map was submitted for approval, there is no indication thereof on the map. The certificate sought approval of the map in order that the company might obtain the benefits of the 1891 act and, as noted above, the approval of the map was given "subject to all valid existing rights."

The 1891 act grants rights-of-way "through the public lands and reservations of the United States * * * to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof." It provides that any company desiring to secure the benefits thereof must file a map of its canal or ditch and reservoir "and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way."

As the act grants rights-of-way only "through the public lands and reservations of the United States," it is obvious that the approval of the map had no effect whatsoever on the patented lands within the boundaries of the proposed reservoir. The S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 28 and other land within the boundaries of the proposed reservoir as shown on the approved map which had theretofore been patented were not then "public lands of the United States" to which the act applied.

March 29, 1965.

The appellant argues that since the United States had, at the time of the approval of the map, a reserved interest in the oil and gas deposits in the patented land, it was necessary for the United States to grant the right-of-way over those mineral deposits in the patented land and that it did so by the approval of the map. However, the First Assistant Secretary purported to act only under the 1891 act, which did not authorize the granting of rights-of-way over the reserved mineral deposits in patented land but only through the public lands of the United States. Lands patented prior to the approval of the map were not, of course, public lands of the United States.

The act of May 21, 1930, *supra*, which the appellant states is the act under which the reserved minerals must be leased, provides that whenever the Secretary of the Interior deems it to be consistent with the public interest, he is authorized to lease deposits of oil and gas in or under lands embraced within rights-of-way "acquired under any law of the United States." Any right-of-way which may have been acquired over the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 28 was not acquired under any law of the United States. Thus it must be held that the conditions plainly stated in the 1930 act do not prevail in this case.

Therefore it is clear that the reserved oil and gas deposits in the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 28, T. 7 S., R. 20 E., SLM, Utah, are leasable under the Mineral Leasing Act, notwithstanding the fact that the lands in which such minerals may be found are within the boundaries of the reservoir right-of-way as shown on the approved map of location.

Accordingly, it must be held that since those deposits were available for leasing at the time McKnight filed his offer, the offer was properly rejected because the tract he sought contained less than 640 acres and it was not surrounded by land unavailable for leasing under the terms of the Mineral Leasing Act.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision of the Division of Appeals, Bureau of Land Management, dated January 2, 1964, is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

IDAHO DESERT LAND ENTRIES—INDIAN HILL GROUP

Rules of Practice: Government Contests

Where a stipulated record in a government contest filed against desert land entrymen raises more questions concerning the possible *mala fides* of the entrymen than it answers, the contest should not be dismissed.

Desert Land Entry: Assignment—Act of March 28, 1908

An agreement between a desert land entryman and a corporation, which gives that corporation the exclusive right to possess the entry and to grow and harvest crops thereon for a term of twenty years, is an assignment to or for the benefit of a corporation within the meaning of the prohibition in section 2 of the act of March 28, 1908.

Desert Land Entry: Assignment—Act of March 28, 1908—Words and Phrases

The term "assignment" as used in the act of March 28, 1908, applies to a transfer to a corporation of the rights of a desert land entryman to enter upon the lands and remain in exclusive possession thereof and to grow and harvest crops thereon for the primary benefit of the corporation.

Desert Land Entry: Generally—Desert Land Entry: Assignment—Act of March 3, 1891

Section 7 of the act of March 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands.

Desert Land Entry: Generally—Desert Land Entry: Assignment—Act of March 3, 1891—Words and Phrases

The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of March 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used.

Desert Land Entry: Generally—Act of March 3, 1891—Words and Phrases

A corporation which has acquired actual possession or the right of actual possession to more than 320 acres of desert land "holds" such acreage within the meaning of the prohibition of section 7 of the act of March 3, 1891.

Desert Land Entry: Cultivation and Reclamation—Act of March 3, 1891

In order to comply with the requirements of section 2 of the act of March 3, 1891, a desert land entryman must either expend his own money on the necessary irrigation, reclamation, and cultivation of the entry or incur a personal liability for any money so expended.

Desert Land Entry: Cultivation and Reclamation—Act of March 3, 1891

Section 2 of the act of March 3, 1891, is satisfied where the desert land entryman hires others to do the necessary work of irrigation, reclamation, and cultivation at the entryman's own charge and expense.

Desert Land Entry: Applicants—Desert Land Entry: Applications—Desert Land Entry: Cultivation and Reclamation—Act of March 3, 1877

Section 1 of the act of March 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land

April 5, 1965

for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted.

Rules of Practice: Supervisory Authority of Secretary—Desert Land Entry: Generally—Desert Land Entry: Final Proof—Patents of Public Lands: Effect

Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte*, into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements.

M-36680

April 5, 1965

To: Secretary of the Interior

SUBJECT: IDAHO DESERT LAND ENTRIES—INDIAN HILL GROUP.

You have asked me to investigate and report on the legality of the Indian Hill Group of Desert Land Entries in Idaho. Further proceedings should be initiated to bring out the facts of this highly complex situation and final departmental action should be deferred until such proceedings are had. However, this memorandum should serve to guide those in the field involved in these cases.

The twelve entries with which we are concerned are listed on Scheduled A attached. All have been allowed and five have actually gone to patent.

The lands are on the left bank of the Snake River in Owyhee County, Idaho, about 400 feet above the River. Water is lifted by pumps and is distributed to the lands of the entrymen. Irrigation is accomplished by sprinklers.

The entries vary in size from 200 to 328.06 acres and the total area of Federal land is 3,688.06 acres. In addition, entrymen Reed and Michener purchased section 16 from the State. It is included in the tract now being farmed.

The entries were allowed on March 13, 1963. Five of the entrymen made final proof on September 4, 1963. Before these proofs were accepted, a Mr. A. J. Jolley of Boise, Idaho, a private citizen, reported to our Land Office facts which, if true, cast a cloud on the legality of the project. Mr. Jolley was interviewed November 4, 1963, and subsequently submitted an affidavit.¹ His charge was that the entries had been taken over and were being operated as a unit by a "big moneyed interest," that the entrymen were "being used as pawns" by Reed and Michener, and that the entire project was illegal.

¹ Exhibit 14. The exhibit numbers refer to the record in the Contest proceedings hereafter described.

Mr. E. D. Barnes, Valuation Engineer (Mining) of the Bureau of Land Management, made an investigation early in 1964, interviewing all of the parties and checking records. Further investigations of and negotiations with the entrymen resulted in the submission of affidavits from each in May 1964 (Exhibits 23 to 32).

On July 2, 1964, Contests were filed alleging that the entries had been illegally assigned, that the entrymen had entered into agreements to sell them after patent, that they were held in a single holding in excess of 320 acres, and that the entrymen never intended to reclaim the lands.

On July 11, 1964, the contestees joined in a stipulation with the Government represented by the Acting State Director of the Bureau of Land Management and the Field Solicitor. By this stipulation, the entrymen² consented to "an immediate hearing of the case by the Secretary * * * without further notice and upon the record as set forth" therein. The stipulation further provided that all parties thereto were agreed "that the matters in dispute as set forth in [the] complaint and answer filed herein with respect to the desert land entries in question may be determined upon the record and evidence set forth" therein. Upon the record as so stipulated, the case was acted upon not by the Secretary but by the Director of the Bureau of Land Management who, in a Decision dated August 14, 1964, dismissed the Contest and remanded the case to the Boise Land Office for appropriate administrative action. The ten entrymen who had joined in the stipulation filed a waiver of right to appeal from the Director's Decision.

The Boise Land Office issued patents to five of the entrymen.³ On the remaining seven entries, final proofs were accepted and approved by the Land Adjudicator but although final certificates for patent were prepared, they have not been executed by the authorized officer in the Land Office and no patents have been issued thereon.

In this case it was unsound policy to evaluate the proofs and to dismiss the Contest on the basis of the stipulated record. The officer who took proof in each case appears to have been one of the attorneys for the entrymen. It does not appear that proof was taken as prescribed by the Regulations. Proof papers filed before the Contest do not disclose the interest of, nor indeed the existence of, the corporation which was operating all of the entries as a single farm.

Since the charges of the Contest allege lack of *bona fides*, the Director should not have issued his Decision on the record submitted without the benefit of facts which might have been developed in an adversary

² Not including the Shearmans who were not served. The contests proceeded as to the ten entrymen served.

³ Schedule A contains information in tabular form as to each entry.

April 5, 1965

proceeding conducted in the manner provided by our Regulations. This is not to say that the Director may not render a valid decision on a stipulation of facts. But where, as here, the record itself raises more questions than it answers, it would have been difficult to sustain charges of *mala fides* until all doubts were resolved. On the other hand, as long as the questions remain unanswered, doubt remains which only a hearing can dispel or confirm.

The record so submitted to and relied upon by the Director is defective. If, however, the facts disclosed in that record are true, the Director's Decision was incorrect on the law.

The facts stated in this opinion are gleaned from the record. If you accept my recommendation that the case be remanded for a hearing, then the facts stated herein are subject to correction by what might be developed at such a hearing.

The basic facts so shown are these:

Indian Hill Irrigation Company, a nonprofit corporation, was organized in 1961 to provide water for the entries. Each entryman owns one share of stock for each acre of his entry. On February 19, 1963, each entryman gave the Irrigation Company a note for \$100 per acre of his entry secured by a mortgage on the entry. For a 320-acre entry the principal amount of the note is \$32,000. The entryman has no personal liability on the note. In the event of default the only remedy of the holder is an action to foreclose the mortgage. The note is due one year after patent issues and bears no interest until the due date; thereafter interest is 8 percent per annum.

In addition, each entryman entered into an Agreement with the Irrigation Company dated February 19, 1963, by which the Irrigation Company agreed to supply water to his entry and the entryman agreed to pay his proportionate share of operation, maintenance, and depreciation, and of the payments required to be made annually to Hood Corporation, a pipeline construction company. Apparently the notes and mortgages were pledged by Indian Hills to Hood Corporation as security for repayment of the cost of the water system.

Early in August 1963, Hoodco Farms, Inc., was organized as an Idaho corporation. Hoodco is a wholly owned subsidiary of Hood Corporation. Hood Corporation was then owned in equal shares by Charles R. Shearman and Bernard M. Laulhere. Shearman was President and General Manager and had his home and offices in Boise, Idaho. Laulhere is apparently a California resident. Shearman is now deceased and Laulhere is the sole owner of Hood Corporation.

In mid-August 1963, each entryman gave a note and mortgage to, and signed an agreement with, Hoodco Farms, Inc. The note was for an amount equal to \$200 for each acre of the entry and was secured

by a second mortgage on the lands of the entry. The entryman has no personal liability on the note. These too, were nonrecourse notes, the only remedy of the holder being foreclosure of the mortgage. Each note is payable by a credit of 5 percent per annum for each year Hoodco farms the land. If Hoodco elects to discontinue farming, it may give notice to that effect and the entire balance of the notes is due one year later. There is no interest until notice is given; thereafter interest is 7 percent per annum.

In addition to agreeing to develop the lands of the entry Hoodco agrees to discharge all of the entrymen's obligations to the Irrigation Company under the Agreement with that company so long as it (Hoodco) continues to farm the land. The entrymen, as further security for their debt to Hoodco, have pledged their Irrigation Company stock and assigned their voting rights.

If these are the arrangements with Hoodco, they are contrary to the Desert Land Laws for the following reasons:

(1) The agreements, notes and mortgages between the respective entrymen and Hoodco Farms, Inc., would constitute prohibited assignments to or for the benefit of a corporation in violation of sec. 2 of the act of March 28, 1908, 35 Stat. 52, 43 U.S.C., sec. 324.

(2) Hoodco Farms, Inc., would hold more than 320 acres in violation of sec. 7 of the act of March 3, 1891, 26 Stat. 1097, 43 U.S.C., sec. 329.

(3) The entrymen would not have expended \$3 per acre in the necessary irrigation, reclamation and cultivation of their respective entries, as required by sec. 5 of the act of March 3, 1891, 26 Stat. 1096, 43 U.S.C., sec. 328.

(4) The entrymen would not have intended to reclaim the lands of their respective entries as required by sec. 1 of the act of March 3, 1877, 19 Stat. 377, 43 U.S.C., sec. 321.

Assignment to or for the Benefit of a Corporation

Section 2 of the act of March 28, 1908, restricts assignments of entries to individuals who are shown to be qualified to make entries and also provides that "no assignment to or for the benefit of any corporation or association shall be authorized or recognized."

The Agreement appears to give the operating corporation possession of the land, the right to farm it and the right to "receive all of the crops grown thereon for the year 1964 and each and every year thereafter until the end of the year during which the note given * * * shall be fully paid." (Exhibit 22, p. 3)

The operating corporation appears to have exclusive possession of all of the lands of all of the entrymen, and to be entitled to all of the crops of all of the entrymen. The entrymen appear to have transferred all of their rights in the land for a term of twenty years.

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In *In re Henderson*, 21 Hawaii 104 (1912), the Court considered facts similar to those just related. The laws of Hawaii allowed an individual to purchase land under a "free hold" agreement with the government. The purchaser was required to pay the price in installments, to plant certain trees, to maintain his home on the land and to comply with certain cultivation requirements. An assignment without the approval of the Commissioner of Public Lands was forbidden. Henderson, an entryman, or "freeholder," made a contract with a plantation corporation by which the corporation farmed the lands and the entryman received \$5 per acre per year. The entryman retained his right to obtain title from the government and to have title thereafter. The Court considered whether this amounted to an assignment and said:

Certain it is * * * that when the appellee for a valuable consideration gave to the plantation the right to enter upon the land and grow and harvest crops he transferred to the plantation, insofar as the limited nature of his estate permitted, an interest in the land which we hold amounted to an assignment of a part of his interest under the freehold agreement within the meaning of the prohibition contained in the agreement * * *

If the entrymen gave to Hoodco the right to enter upon the lands and to grow and harvest crops, they transferred to Hoodco, insofar as the limited nature of their estate permitted, an interest in the land which amounted to an assignment. Since Hoodco is a corporation this assignment would not be authorized by law and could not be recognized.

The Director's Decision concluded that these arrangements did not constitute prohibited assignments.

The purpose of sec. 2 of the 1908 Act is to prevent the benefits of the Desert Land Laws from being conferred upon persons not qualified to make an entry. The meaning of the words of a statute is to be determined from the sense in which they are used and the purpose to be accomplished.

The Director's Decision cites authority to define an assignment as "** * * a transfer or setting over of property or some right or interest therein, from one person to another and, unless in some way qualified, it is properly the transfer of one's whole interest in an estate, chattel, or other things.*" (Italics added.) This definition, in the next paragraph of the Decision, is construed to mean that the transfer must be "** * * of the entryman's entire interest in the entry * * **" to be an assignment. The definition does not support this construction. In the first place the definition would include the "** * * setting over of * * * some right or interest * * **" in property, i.e., less than the entire property, as an assignment. Sec-

only, the definition says that an assignment “* * * unless in some way qualified * * *” is a transfer of the “whole interest.” This does not say that the transfer may not be qualified and a lesser interest assigned.

Because the entryman may get his land back, the Decision argues that the transfer is not of the “entire estate” and therefore not an assignment. Such an interpretation can only invite evasions of the purpose of the law. If a 20-year lease is not a forbidden assignment, then neither is a 99-year lease. And if they are not assignments, a corporation, or other disqualified person, can get the benefits of the law contrary to the express conditions under which Congress makes the grant. The meaning of the word “assignment” is not so rigid as to require so absurd a result.

To assign need not mean that the entire interest of the assignor is transferred. One can assign a note for collection, assign his assets for the benefit of creditors, assign property in trust for certain purposes, and in all cases provide that he retain an interest. An assignment in fraud of creditors is not a transfer of the assignor’s interest in the property. Would he be heard to say that his act is not forbidden by law because he expected to get his property back? 4 *Words and Phrases*, Perm. Ed. 493, *et seq.*

Consider a covenant against assignments in a lease. Could a lessee transfer all except the last day of the term and, because he retained that small portion of his interest, contend he had not breached the covenant?

“Assignment” as used in the 1908 Act applies to any transfer of any part of the rights of an entryman to a corporation. Insofar as the Director’s Decision held otherwise, his holding was error.

The Holding in Excess of 320 Acres

Section 7 of the act of March 3, 1891, *supra*, provides that: “No person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands * * *.”

If the facts in the record are true, the operating corporation holds a total of 3,688.06 acres. This holding is by assignment. However, even if the arrangement were not an assignment, there is a holding of more than three hundred and twenty acres of desert lands. “As applied to property, the word (hold) is a technical one embracing two ideas, that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession.” *Balentine, Law Dictionary*, 1930. See also *Anderson’s Dictionary of Law, Black’s Law Dictionary*, 19 *Words*

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and Phrases, Perm. Ed., 370, 372. *In re Coe's Estate*, 33 Cal. 2d 502, 202 P. 2d 1022 (1949).

A tenant under a lease for a term of years has a leasehold just as one who has an estate in fee simple or a life estate has a freehold. In the standard form books, the conventional form of lease contains a habendum clause which recites that the lessee shall "have and hold" for the term of the lease. Each entryman in this case, on February 18, 1963, appears to have entered into a Lease and Land Development Contract with Indian Hill Irrigation Company. This instrument, after describing the lands leased, recites "to have and to hold the same to the lessee from the 18 day of February 1963, to the 18 day of February 1983."

Under the Agreement, the operating corporation appears to have acquired (1) actual possession and (2) the right of actual possession. Under the law a lessee has the right to possession and may properly maintain an action for damages to the leasehold for trespass. In *West v. Brenner*, — Idaho —, 396 P. 2d 115 (1964), both elements of the technical definition of the word "hold" are found to be satisfied in the case of a lease. Hoodco Farms, Inc., seems to have actual possession of the entries of the entrymen and to have the right to hold such possession against the world.

It is conceded in the Brief of Contestees "* * * that an outright lease of the lands by an entryman to a corporation for a long term might be construed as a device to avoid the assignment provisions of the Desert Land Statutes." It is argued, however, that the transaction here described is not a lease because (1) it is a part of a financing transaction and (2) because it can be terminated by the entryman at any time by tender of the unpaid balance on the Hoodco note. The opinion of the Director agrees and suggests that the interest of Hoodco Farms in the land "arises from a mortgage coupled with a development contract" and "does not appear to attain even the status of a lease."

It should be noted first that the prohibition in the statute is not a prohibition against leasing, but a prohibition against holding. The result would be no different merely because the documents do not attain the status of leases if they entitle Hoodco, Inc., to hold the property. In other words, if Hoodco Farms, Inc., has possession and the right to retain possession it "holds" the desert land entries.

The entrymen appear to have intended to enter into a lease. The agreement with Hoodco refers to the transaction in the following words: "It is understood and agreed that if the second party (Hoodco) continues to lease and farm said land for 20 years the indebtedness evidenced by said note shall be fully canceled and said mortgage shall be satisfied of record at the end of said 20-year period." (Exhibit 22)

The affidavits of the entrymen (Exhibits 23-32) describe the credit of one-twentieth of the total amount of the note for each year that Hoodco farms the land as "a rental" and also refer to the agreement with Hoodco as a leasing agreement.

The essential ingredients of a lease are a transfer of possession from the lessor to the lessee for a term and for a consideration. The consideration is called "rent." In this case the exhibits indicate that the entrymen have transferred possession to Hoodco Farms, Inc., in consideration for a 5 percent credit on their notes each year the corporation farms the lands.

Even if the arrangement could be terminated by the entrymen by payment of the balance due on the note, the arrangement could be a lease. That a lease may be terminated at the option of either party is not unusual. It is often provided in leases that the parties may terminate if the premises are destroyed by fire or if the lessor sells the fee or if some contingency occurs which changes the position of the lessee or lessor. Until the condition is satisfied, the tenant continues to retain actual possession and continues to have the right to possession.

But the Director's Decision also errs when it holds that the notes can be paid off at any time by the entrymen. The law does not permit the maker of a nonnegotiable note to accelerate payment against the wishes of the holder and contrary to the terms of the note. In *Peryer v. Pennock*, 95 Vt. 313, 115 Atl. 105 (1921), a vendee sought to accelerate annual payments in order to effect an early conveyance. The Court held:

* * * A creditor can no more be compelled to accept payments on a contract before, by the terms thereof, they are due, than can a debtor be compelled to make such payments before they are due. The time of payment fixed by the terms of a pecuniary obligation is a material provision, and each party has the right to stand on the letter of the agreement * * * (95 Vt. at 315-6).

See also 17 A.L.R. 866, cases cited therein, 70 C.J.S., sec. 5, p. 216. The underlying rationale for the *Peryer* ruling is applicable at least in part to the facts in the record in this case. In *Peryer* the creditor-vendor would lose possession of the property if the debtor-vendee had been allowed to accelerate the payment. Here, Hoodco would lose its possessory right, i.e., its twenty-year leasehold if the entrymen were allowed to accelerate payment.

The entrymen have expressed (Exhibits 38a-47) a willingness to enter into a Supplementary Agreement by which the notes would be modified to permit the makers to pay the balance at any time. It is alleged in the Brief of Contestees that Hoodco Farms, Inc., is also willing to enter into such agreement.

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Any such agreement would not make any difference. If Hoodco holds the entries where the notes cannot be accelerated it would continue to hold until they had been paid, if they could be accelerated. It is the holding which is forbidden. The fact that the entryman may or may not have the power to terminate it is immaterial.

If the documents placed in the record are intended to evidence the consent of Hoodco Farms, Inc., to enter into such Supplementary Agreement they fail to do so.

Hoodco's agreement to modify the note is contended to be established by the affidavit of W. C. Ryan, Secretary of Hoodco Farms, Inc. (Exhibit 37). The affidavit alleges that it has always been the understanding of the affiant and officers and agents of Hoodco that Hoodco could continue farming only so long as there was an obligation remaining to pay the notes. Such understanding is not inconsistent with the terms of the notes as written. The notes provide that the entrymen can pay only by permitting Hoodco to farm unless Hoodco elects to terminate the arrangement. W. C. Ryan does not own stock in Hoodco Farms, Inc., nor in Hood Corporation. He does not certify that the Board of Directors have agreed to sign the Supplementary Agreement. All he says is

That affiant has read a form of supplemental agreement dated July —, 1964, proposed to be entered into by and between Hoodco Farms, Inc., and the respective entrymen and that the terms and conditions of said supplemental agreement meet with the approval of your affiant.

Mr. Ryan's affidavit is not binding on Hoodco Farms, Inc. The Supplementary Agreement has not been executed and the record does not show that Hoodco has agreed to sign it.

Furthermore it does not appear that the execution of the Supplemental Agreement would give the entrymen the power to accelerate payment. Exhibit 38 is the unsigned Supplemental Agreement the entrymen have agreed to sign. It recites that Hoodco is endeavoring to obtain a long-term loan and that it intends to assign the entrymen's notes and mortgages to a life insurance company which has made a commitment to lend Hoodco over a million dollars. The Supplementary Agreement provides as follows:

Entrymen shall have the right upon their assuming and agreeing to pay their proportionate share of the indebtedness owing on any loan obtained by Hoodco attributable to the above described entry and upon entrymen being substituted as obligors on said loan * * *

to be restored to the possession of their entries. The entrymen can assume and agree to pay their proportionate share but the life insurance company must, and may not, agree to a substitution of obligors.

The life insurance company is not alleged to be willing to become a party to the Supplemental Agreement.

"Assignment," "hold" and "otherwise" are words of broad signification and their precise meanings depend on the context in which they are used. Sec. 1 of the act of March 3, 1877, *supra*, forbade entry of more than one tract by the same person. Sec. 5 of the act of March 3, 1891, speaks of the applicant for patent "or his assignors," and section 7 authorizes the issue of patent to the entryman "or his assigns." The 1891 Act removed the prohibition against assignment of desert land entries. *United States v. Hammers*, 221 U.S. 220 (1911). The acreage limitation provisions of the 1877 Act would be inadequate to prevent excess holdings under the 1891 Act. The intent of Congress to prevent excess holdings is manifested in section 7 of the 1891 Act which prohibits holdings in excess of 320 acres "by assignment or otherwise."

It is not difficult to divine the congressional purpose in these statutes. Congress did not want holdings larger than 320 acres. We can construe the language used to effect that purpose without any injury to the English language. The language of the statute does not leave us powerless to prevent frustration of congressional purpose.

The Brief of Contestees and the decision of the Director equate "assignment or otherwise" as "assignment." The language of the statute is said in the Director's Decision to be the same as a statement that no person may "by assignment or other arrangement tantamount to an assignment become in effect an entryman." Such a construction ignores the meaning of the word "hold" and disregards the usual meaning of the term "assignment or otherwise." 30 *Words and Phrases*, Perm. Ed., 500-501. This phrase is commonly found in the law and "otherwise" in the phrase means "in a different manner" or "in any other way." *In re Perry's Will*, 126 Misc. Rep. 616, 214 N.Y.S. 461, 463 (1926); *In re Iwers' Estate*, 225 Ia. 389, 280 N.W. 579 (1938).

Even if the arrangements described do not amount to an assignment, Hoodco "holds otherwise," that is, in another manner, more than 320 acres, in violation of the statute.

The excess land provisions of the Desert Land Law have the same purpose as the excess land provisions of other Acts, including the Coal Lands Act of March 3, 1873, 17 Stat. 607, 30 U.S.C., secs. 71-76, the Timber and Stone Act of June 3, 1878, 20 Stat. 89, and the Timber Culture Act of June 14, 1878, 20 Stat. 113, *United States v. Wells*, 192 Fed 870 (2d Cir. 1912).

In *United States v. Trinidad Coal and Coking Company*, 137 U.S. 160, 166-167 (1890), the Court considered an action to cancel patents issued upon fraudulent misrepresentations. The lands were coal lands. The Coal Lands Act provided that no association of persons could

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hold more than 320 acres of coal land. The officers and employees of the corporation entered separate tracts of coal lands which were being used by the corporation. It was argued that this was permissible under the statute. The Court replied:

* * * This contention cannot be sustained unless the Court lends its aid to make successful a mere device to evade the Statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the Statute. If the scheme described in the bill be upheld as consistent with the Statute, it is easy to see that the prohibition upon an association entering more than 320 acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever.

The Court held that patents secured in this manner were fraudulently obtained:

We say fraudulently obtained because, if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patents sought to be canceled could not have been issued without violating the Statute. The defendant would not have been permitted to do indirectly what it could not do directly.

See *J. H. McKnight Company*, 34 L.D. 443 (1906), a case dealing with desert land entries which cites *Trinidad*.

United States v. Keitel, 211 U.S. 370, 388, 390 (1908), also considers this problem:

The express command that the preceding sections [of the Coal Lands Act] shall be held to authorize only one entry by the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person, and as the right to purchase the coal land did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is both, in form and substance, a prohibition against the doing of such act

* * * * *

* * * It is a misconception to assume that there is any real identity between a purchase made by a qualified person in his own name and for himself with a purchase made by such person ostensibly for himself but really as the agent of a disqualified person. In the one case the person securing coal land from the United States for himself is free to dispose of the land after acquisition as he may deem best for his interest and for the development of the property acquired. In the other case the ostensible purchaser acquires with no dominion or control over the property, with no power to deal with it free from the control of the disqualified person for whose benefit the purchase was made.

In the *Keitel* case the Court held that a failure to disclose facts which, if disclosed, would have resulted in a denial of a patent renders the obtaining of the patent fraudulent under the criminal law. The *Trinidad* case had held to the same effect in a civil action.

In *United States v. Budd*, 144 U.S. 154, 163 (1892) the Court said:

* * * The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied.

The legislative history of the 1891 Act is very meager. The Act is entitled "An act to repeal timber-culture laws, and for other purposes." It dealt with a number of public land laws and included certain provisions amending the Desert Land law. The Senate Report does not deal with the specific provisions of the bill, and the matter was not extensively debated. The Senate debate indicates the general understanding that the Act reserved lands for individuals for their own use and benefit. 22 Cong. Rec. 3547, February 28, 1891.

It was the intent of Congress, when it enacted the 1891 Act, to continue the application of the acreage limitations of the desert land laws. It was intended that tracts of desert land should be made available in blocks not exceeding 320 acres each to individuals qualified to make entry. In this light, the prohibition against any person holding these lands in tracts larger than 320 acres was obviously an expression of congressional intent that it did not want these lands to get into the hands of individuals, associations or corporation in larger tracts. The arrangement in the case of the Indian Hill project frustrates that purpose and cannot be justified if a reasonable interpretation be placed on the language of the Statute.

Accordingly it is my conclusion that if Hoodco was entitled to the possession and the products of the entire tract of the Indian Hill entries, Hoodco held more than 320 acres of desert land by assignment or otherwise contrary to the provisions of section 7 of the act of March 3, 1891.

Entrymen's Failure to Reclaim Land

Section 5 of the act of March 3, 1891, *supra*, reads, in part, as follows:

* * * no land shall be patented to any person * * * unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least \$3 per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than \$1 per acre for the purposes aforesaid; and he shall in like manner expend the sum of \$1 per acre during the second and also during the third year thereafter, until the full sum of \$3 per acre is so expended. * * *

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This has been held to mean that the entryman need not himself do the work but may hire others to do it for him. In *Sanders v. Dutcher*, 168 Cal. 353, 143 Pac. 599 (1914), an applicant for a patent was challenged on the ground that the final proof showed that the work of reclamation had been done by someone other than the entryman. The court said: "The proof on this point was that she [the entryman] had not done so personally, but had procured these things to be done by others at her own charge and expense." (143 Pac. at 600)

It was held that the Statute is satisfied where the entryman hires others to do the work but at the entryman's own charge and expense.

In *United States v. Hammers, supra* the defendant had been indicted for perjury. He had been a witness on final proof submitted by a desert land entryman. He had sworn that certain work had been done by an assignor, and it was alleged in the indictment that he had sworn falsely.

He demurred to the indictment upon the ground that his swearing, even if false, was not material. He argued that the first part of the Statute indicates that the work may be done by either the original entryman or the assignor, but the latter part makes it clear that the work must be done by the entryman only. The Court carefully reviewed the language of the act and concluded that the ambiguity must be resolved in favor of permitting either the entryman or the assignor to do the work or to expend the sums required, and that therefore the swearing by Hammers to the fact that the work had been done by the assignor was material and if false constituted perjury. The importance of this case lies in the fact that the Court interprets the Statute to mean that if either the entryman or the assignee did the work or expended the funds, an oath to that effect would be material, but that swearing that the work was done or funds expended by persons not designated in the Statute would not be material because such work or such expenditure would not justify the issuance of a patent by the United States.

This question was directly dealt with in *In re Henderson*, 21 Hawaii 104, 117-118 (1912). The act by which Henderson was to have obtained the tract of land for which he applied in that case required that certain cultivation requirements be met. It appeared that by agreement with the plantation corporation, Mr. Henderson did not accomplish any of the cultivation of the land. The court said:

It has been argued that the clause in question does not provide that the cultivation shall be done by the freeholder, and that as the land was under cultivation at the time the appellee acquired it, the condition was at once fulfilled. Although the clause does not expressly so state, it must be construed to mean

that the cultivation is to be performed by the freeholder. We do not mean by this that it is necessarily to be done by the freeholder with his own hands, but that it must be done by him or by his servants or agents for him. The crops grown must be his crops and not those of another. A different construction would not accord with the spirit and intent of those portions of the Land Act of 1895 (R.L. Chap. 22) relating to the homesteading of public lands of which the provisions relating to "cash freeholds" are a part. The general purpose and intent of those portions of the statute may be briefly stated to be the settlement and occupation of agricultural and pastoral lands by citizen farmers, and the encouragement of the diversification of local industries, for the social, political and material benefit of the country * * *. To this end * * * he is expected and required to cultivate the land for it is for that very purpose that he is supposed to have applied for it. It is with that object in view that the government offers such lands to settlers at less than their full value and requires them to make oath that they apply for the land solely for their own use and benefit.

Here, the record appears to show that all of the cost of development has been paid for by Hoodco, and that the only sums expended by the entrymen were the filing fees and purchase price. The notes and mortgages said in the record to have been given by each entryman to Indian Hill Irrigation Company and to Hoodco expressly provide that the entryman shall have no personal liability and that the only recourse of the holders of the notes in the event of default is to foreclose upon the lands of the respective entries.

If this is indeed the case, the entrymen have not expended any of their own money nor incurred any personal obligation "in the necessary irrigation, reclamation, and cultivation" of the lands of their respective entries.

That this is the requirement of the law is plain from reading the Statute. But it is further reinforced by an examination of other sections of the Desert Land Law. Section 5 of the act of March 4, 1915, 38 Stat. 1161, 43 U.S.C. sec. 335, allows an extension of time within which proof may be filed if "* * * the entryman * * * has, in good faith, complied with the requirements of law as to yearly expenditures and proof thereof * * *." The act of February 25, 1925, 43 Stat. 982, 43 U.S.C. sec. 336, allows a further extension if "* * * the entryman * * * has in good faith complied with the requirements of law as to yearly expenditures and proof thereof * * *."

Salina Stock Co. v. United States, 85 Fed. 339 (8th Cir. 1898), was an action to vacate two desert land patents granted to Edward A. Franks and Nellie Franks. The facts are somewhat similar to those that appear in this record. The Franks resided in Salt Lake City, Utah, more than one hundred miles from the land—they were people of limited means. The facts were stated by the court, as follows:

* * * One Samuel H. Gilson, who was connected with this stock company, and perhaps its vice-president * * * suggested to Edward A. Franks the idea of locating this land. He * * * induced Mrs. Franks to enter into this scheme.

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Neither of the Franks had ever seen the lands at the time of their application, and from that day to the making of the final proofs they were never on the land.⁴ When the time arrived for making the final proofs they were taken to the lands by one Ferons, who was the surveyor for the Salina Stock Company. On arrival at the lands they met Mr. Ireland, who was one of the promoters of the defendant company, its manager, and later its treasurer. They were hauled about over the land, and shown some irrigating ditches, into which some water was turned for exhibition, to enable the Franks, without much strain of conscience, to swear that they had seen water running in the ditches. The land was then fenced and in the control of Ireland, and the ditches, whatever were there, had been made without the knowledge of the Franks, and without any expense to them. The evidence does not show that they had ever obtained any water rights, by grant or otherwise. They were on the land but a few hours. They were then taken back to Salt Lake City, where they made the required affidavits for final entry, swearing to everything according to the form of the depositions requisite to perfect the entry. When they left the lands said Ireland gave Edward Franks a letter to one Chambers, directing Chambers to pay Franks. The sum so received by Franks amounted to about \$215, which covered his and Mrs. Franks' expenses in going to and from the land, and presumably to compensate them for the use of their names and their trouble. Taking the whole testimony together, there can be no doubt that the Franks never paid one dollar of the money on the entry of this land. Afterwards they made to the company quitclaim deeds to the lands, with a nominal consideration expressed therein. (85 Fed. at 341)

In *Ware v. United States*, 154 Fed. 577 (8th Cir. 1907) (*cert. den.* 207 U.S. 588), the court reviewed a conviction of individuals for conspiracy to defraud the United States. There was a conflict in the evidence and the lower court had refused to give an instruction which said that if the jury believed the defendant Ware's story it would have to acquit. The indictment charged Ware with having induced qualified persons to make homestead entries, having paid their expenses, including the expenses of proving up on their homesteads and of having entered into an executory contract with them by which they would convey title to him when patent issued.

Ware testified that he had solicited them to make their entries, paid their expenses, but that there was no agreement to convey to him after patent. The entrymen were to receive full title without encumbrance after patent. In consideration for his agreements, Ware testified, he was to be permitted by the entrymen to have the use of their entries for grazing purposes until they proved up.

⁴ It appears that at least one of the entrymen in the Indian Hill Project had never seen the lands of the entry prior to the middle of January 1964, over ten months after her application had been allowed. There is no evidence that any entryman participated in the development of the land. It appears by the record that all of the work, how it was done, what was done, etc., was directly by Hoodco and its agents, and that the entrymen had nothing to do with it and will get nothing from it for 20 years. They live in the vicinity of Idaho Falls, about two hundred miles from Indian Hill.

The Court of Appeals affirmed the conviction :

* * * an agreement to procure homesteaders to make entries of public lands in order that third persons may obtain such use from them is an unlawful agreement. It is a contract to induce homesteaders to make applications to enter lands, not for their exclusive use and benefit, but for the use and benefit of another in violation of the oaths they are required to take when they make their applications to enter, and there was no error in the refusal of the court below to instruct the jury that such a contract was not an unlawful conspiracy. If qualified homesteaders could lawfully lease or grant the use of the lands they might enter to others, without restriction or reservation, until they should prove up or dispose of their holdings, third parties might appropriate to themselves by the use of successive homesteaders, who would dispose of their holdings before they made proof of title, large tracts of the public domain for indefinite periods, and might thereby retard or prevent the use or sale of these lands by the United States.

Applying these principles to what appears to be the arrangement between Hoodco and the Indian Hill entrymen, the entrymen have given possession and control of the property to Hoodco, for its use and benefit, in consideration of Hoodco incurring all of the expense and doing all of the work to permit the entrymen to secure patents from the United States. Under the desert land laws the entry must be made for the use and benefit of the entryman. *Chaplin v. United States*, 193 Fed. 879 (9th Cir. 1912), *Cert. den.* 225 U.S. 705.

The obligation is on the entryman or his assignee to expend the sums required to be expended by the terms of the statute. The record shows that all of the money spent for the development of the entries in the Indian Hill project was spent either by Hoodco or by Hood Corporation.

The Brief of Contestee and the opinion of the Director cite *Sanders v. Dutcher, supra*, as authority for the proposition that the compliance shown by Hoodco is sufficient. In *Sanders v. Dutcher* the question was whether the entryman had to do the work himself or whether he could hire others at his own expense. The Court held that he could hire others to do the work at his "own cost and expense." This is far from a holding that would support what is shown in this case. As is stated in each of the affidavits of the entrymen (Exhibits 23-32): "Thus the affiant was able to obtain the necessary financing to develop the land, was able to lease the land for a cash rental to meet the payments as they came due to Hoodco Farms and Indian Hill Irrigation Company without risking your affiant's personal assets beyond the desert entry land itself * * *"

The Director's Decision was wrong in approving what appears in the record of this case. This record shows that the entrymen have not expended the sums required by law and their final proofs must be rejected.

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The Entrymen did not have the Necessary Intent to Reclaim

Section 1 of the act of March 3, 1877, 19 Stat. 377, 43 U.S.C. sec. 321, reads, in part, as follows:

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter. * * *

The applications for entry contain the representations of the applicants as of the time they were sworn to by them and at all times subsequent thereto until the date of allowance of entry. This is the necessary consequence of the language in *Trinidad, supra*, and *Keitel, supra*, holding that it is fraud for the entrymen to fail to disclose facts which if disclosed would result in a denial of their entry.

Originally the entrymen intended to secure a loan under the Small Reclamation Projects Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. sec. 422a, *et seq.* Such a loan would have financed the irrigation system. An association of entrymen "in the construction of canals and ditches * * *" is expressly permitted by sec. 2 of the 1891 Act.

Apparently the entrymen finally concluded that they would be unable to secure approval of their application for Small Reclamation Projects loan.

The affidavits of the entrymen show that they were discouraged by their failure and that they authorized the promoters, Michener and Reed, to act as general managers on their behalf to secure the development of the lands. The entrymen have all stated that they were willing to assign their entries, although no specific agreement was entered into to that effect. When they were in this state of mind they could not have intended to reclaim the land. This change of mind, if it was a change, occurred late in 1962 or early in 1963 before the entries were allowed.

A meeting of the entrymen was held about this time and Reed and Michener were designated as managers by the others and seem to have understood that they were to sell the entries. At least they appear to have tried to sell them and what they did is some evidence of what they were told to do.

The record reflects that on September 23, and again on September 30, 1962, advertisements were placed in the Idaho *Statesman* of Boise, Idaho, offering lands in the project for lease. The advertisements refer to 960 acres of land which must have included at least some of

the entered lands. In January negotiations were opened with Mr. Jolley who with Mr. Masterson owned Ore-Ida Motors, Inc. Mr. Jolley stated that Reed and Michener offered to sell him 3,900 acres. On February 6, 1963, presumably as a result of the negotiations which had taken place over the preceding month, Mr. Jolley signed a Lease-Option Agreement with Reed and Michener. This Lease-Option Agreement clearly expresses the intent of those who drafted it that the land described therein, which included lands of the entrymen, could be purchased by Ore-Ida Motors, Inc., at their option at a stated price.

With respect to the entries of Michener and Reed the Lease-Option Agreement shows that they intended then to sell their entries, and that they did not intend to reclaim their entries. With respect to the other entrymen, it is reasonable to infer that Reed and Michener had been given to understand that such an arrangement would be acceptable. It is also reasonable to infer from these facts that the other entrymen did not intend to reclaim.

Ore-Ida subleased to Paul Stewart, Douglas Stewart and C. J. Stewart, who lived at Indian Cove in the immediate neighborhood of the Indian Hill Project. The Stewarts were in possession of the land for some period during 1963. Some work may have been done by them on the lands. The Lease-Option Agreement provided for the cultivation of 1,000 acres in 1963. It was formally terminated by a Termination Agreement (Exhibit 19) on May 31, 1963, which provided that Michener and Reed "shall repay to the first parties [Jolley, *et al.*] the expenses of hauling and spreading of insecticides and fertilizer in the sum of \$860, and such payment shall be made from the proceeds of the 1963 potato crop, if any." Mr. Masterson on March 24, 1964, in an affidavit which is filed in the record (Exhibit 33) acknowledges that the sum of \$860 had been paid in full. The final proofs show 840 acres were cultivated in 1963.

If crops were raised and work was done on the lands in 1963 under the Lease-Option Agreement, it is difficult to understand how it was that the entrymen did not know about it, unless they were in fact strawmen for the promoters. They allege that they were unaware of the existence of the Lease-Option Agreement until after it had been made. If they ever knew their entries were being farmed they must have discovered the terms under which the land was occupied and they must have discovered the agreement to sell. It is not unlikely that some of them did not know about the agreement until after it was terminated.

This episode illustrates the inadequacy of the record as support for the Director's Decision.

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The Lease-Option Agreement was executed by the lessees on February 6, 1963. For some reason which the record does not disclose Reed and Michener did not sign until after February 19, 1963. This, however, creates an additional confusion since on February 18, 1963, Reed and Michener entered into a 20-year lease and development contract with Indian Hill Irrigation Company by which the company had agreed to develop the lands for \$200 an acre. This is identified as the Lease and Land Development Contract (Exhibit 20) in the record. It is also alleged that this agreement provided there would be no personal liability and no recourse against the entrymen, but only against their entries in the event of their default. However, the Lease and Land Development Contract provides that the entrymen will pay for the cost of development and the Company will pay a stipulated amount of rent. There is no mention of \$200 per acre and no agreement of nonrecourse.

Subsequently, say the affidavits, someone remembered that Indian Hill Irrigation Company was a nonprofit corporation and that it could not engage in business for profit. Accordingly, some documents were destroyed and new agreements were entered into with Indian Hill Irrigation Company by which it only undertook to provide the irrigation system and the entrymen mortgaged their lands for only \$100 per acre. The mortgages were dated the 19th of February.

A complete investigation will be required to untangle the confusion created by the documents and the affidavits.

As further evidence of what the intent of the parties was in February of 1963, it should be noted again that each of the entrymen made affidavits that at this time “* * * affiant did not desire to risk his personal assets other than the lands involved in the desert entry to pay the cost of such development * * *.”

Some threads run through the confusing tangle of the affairs of the entrymen just prior to the allowance of their entries on March 13, 1963, which suggest that Hood Corporation became involved financially earlier than appears on the record. Charles R. Shearman was the general manager and President of Hood Corporation in February of 1963. He secured the involvement of Hood Corporation and Hoodco in the business of the Indian Hill Project.

Two days after the date of the note, mortgage and agreement with Indian Hill Irrigation Company, on February 21, 1963, Mr. Shearman applied for an entry which had formerly been applied for by Charles H. Sargent and relinquished on February 25, 1963, by Mr. Sargent. At about the same time Mr. Warren J. Bendixen, also an entryman, relinquished and Ollie May Shearman filed her applica-

tion for Mr. Bendixen's entry. When interviewed by Mr. Barnes of the Bureau of Land Management in July 1964, Mr. Sargent stated that "his reason for dropping out was that it appeared to him that the deal with Hoodco Farms gave that firm too much control and that he would be squeezed out." Hoodco Farms had not yet been organized, but Mr. Shearman and Hood Corporation were on the scene. Mr. Bendixen stated that "he was willing to be a part of the venture so long as the Reclamation Small Projects loan was in the offing, but became discouraged when new arrangements were made whereby he would have to commit himself to leasing and mortgaging for private development." Mr. Barnes had learned that the Stewarts, the subtenants of Ore-Ida Motors, claimed to have gone in debt on the project. When Mr. Shearman was asked about this "he stated that most of the indebtedness accumulated by the Stewarts was actually his money." (Exhibit 15)

Chaplin v. United States, 193 Fed. 879 (9th Cir. 1912), *cert. den.* 225 U.S. 705, was an appeal from a conviction of conspiracy to defraud the United States in connection with the promotion of a desert land project.

The defendants argued that their conviction was in error because there was nothing wrong with an entryman making an entry when he had the intent not to develop the entry himself. The court cited that portion of the 1877 Act which requires that a declaration be filed under oath stating that the applicant intends to reclaim the land and that portion of the 1891 Act which requires the entryman, when he files his declaration, to file a map exhibiting his plan of contemplated irrigation, and said—

These two provisions clearly mean that the entryman can make no entry except a bona fide entry with the intention to reclaim the land, that he shall not only have bona fide such definite intention, but that he shall have in mind a plan of contemplated irrigation, as well as an adequate source of water * * * It was clearly not the intention of Congress to offer the desert lands to entry to persons who were to be dummies for others, or to persons who had no intention to occupy the land for the purposes for which it was offered, but whose intention was to hold it temporarily merely for the purposes of speculation or for the benefit of some other person. Why does the act of Congress require the entryman to take the solemn oath that he intends to reclaim the land, unless that intention is of the very essence of the condition upon which his entry is permitted? * * * There is substantial basis for requiring good faith in the entryman in the resulting security to the government that its purpose of reclamation shall not be frustrated by the acquisition of colorable rights. The desert lands are not offered to settlers for speculation, nor for what money they will bring to the government, but they are offered to settlement by Congress in the exercise of authority to provide for the common welfare, and in the discharge of a duty to develop the agricultural resources of the United States. Will it be asserted

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that an entry of desert land may lawfully be made without the oath required by the statute, or that Congress intended that an entryman, in order to secure his right to make an entry without the intention to reclaim the land, should first commit perjury by taking a solemn oath that he intended to reclaim it? (193 Fed. at 881-2)

The record does not show that on the day the entries were allowed, March 13, 1963, the entrymen intended to reclaim their lands. Because their intent to reclaim “* * * is of the very essence of the condition upon which [the] entry is permitted * * *,” and because they have not met that condition, the evidence must establish this fact before patents can issue.

Conclusion

Before making recommendations, it is well to dwell briefly upon your authority to take further administrative action on these cases.

It is settled beyond doubt that until patent issues, the Secretary of the Interior retains jurisdiction to inquire into an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements. The many authorities to this effect, both judicial and administrative, are collected in Assistant Secretary Ernst's decision in *State of Wisconsin et al.*, 65 I.D. 265 (1958) setting aside a contrary holding of the Director of the Bureau of Land Management and remanding for contest proceedings.

That no appeal has been taken from the Director's decision is immaterial. The Secretary may act *sua sponte*. *Knight v. U.S. Land Association*, 142 U.S. 161 (1891).

The facts in *Knight* are on all fours with those in the cases here in which patent has not issued. There a determination had been made by the Commissioner of the General Land Office approving a survey which defined a grant. No appeal was taken and the right of appeal was expressly renounced. The Secretary of the Interior nevertheless “sent for the papers in the case, and, upon an elaborate examination of the points involved, reversed the action of the Commissioner * * *.” *ibid.*, p. 171. A new survey was directed, which upon approval resulted in the issuance of a patent. The validity of this patent came under judicial attack on the ground that the Department's authority had been exhausted by the action of the Commissioner from which no appeal had been taken. The position was rejected in these words:

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The

Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands. (142 U.S. at 181).

The Court quoted with approval from the Opinion of the Secretary of the Interior when the matter was before him and the Secretary had said (5 L.D. 494) :

* * * When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether or not these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter. (142 U.S. at 178).

It is, however, the rule that where equitable title has passed through patent remains unissued, a due process permits the disposal to be set aside only upon proper notice and opportunity for hearing. *Orchard v. Alexander*, 157 U.S. 372 (1895) ; *Cameron v. United States*, 252 U.S. 450 (1920). Equitable title passes if there has been compliance with the requirements of the law and the entryman has done all that is required for issuance of a patent under a particular statute. *State of Wisconsin, et al., supra*, p. 272. In *Orchard*, the rule was thus stated :

Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius v. Kessel*, 128 U.S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson v. Towsley*, 13 Wall. 72. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed * * *. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department. (157 U.S. at 383).

In the cases before me, the final proofs have been offered and accepted. Final payment has been received, but the final certificate has not been executed. Whether this fact alone would preclude the neces-

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sity for a hearing need not be determined, for my recommendation is that if these cases are to be reopened, it be done on notice and hearing.

Likewise, I do not consider whether the entrymen have, by their stipulations waived a further hearing. The record as stipulated requires testing in the crucible of an adversary proceeding.

Recommendation

I recommend that, in the exercise of your supervisory authority, you direct that:

(1) The Director's Decision be set aside;

(2) The cases in which patent has not issued be remanded to the Bureau of Land Management for reinstatement of contests; that the contests be conducted upon due notice before an examiner in accordance with the Regulations; that the contests be initiated by the filing and service of amended complaints charging prohibited assignment of entries, holding in excess of 320 acres, failure of the entrymen to reclaim the lands of their respective entries, lack of intent on the part of the entrymen to reclaim the lands of their respective entries, and such other grounds as may, upon consideration by the Bureau of Land Management, be appropriate; and

(3) That Ollie May Shearman and the Estate of Charles R. Shearman be included as Contestees,

The cases where patent has already issued are beyond your administrative reach. I recommend that you defer a decision, as to whether said cases should be referred to the Attorney General to institute proceedings to cancel patents, until the conclusion of the contest proceedings I have recommended.

FRANK J. BARRY,
Solicitor.

SCHEDULE "A"

Name	Entry No.	Acreage	Date of application	Date entry allowed	Status
Raymond T. Michener	Idaho 012234	320	1/18/61	3/13/63	Application pending.
Wallace Reed	" 012235	320	1/20/61	3/13/63	Patented 9/3/64 No. 1236706.
Marjorie K. Michener	" 012241	200	1/20/61	3/13/63	Application pending.
Joseph L. Nielson	" 012242	320	1/23/61	3/13/63	Patented 9/12/64 No. 1236707.
Robert R. Schwarze	" 012243	320	1/23/61	3/13/63	Patented 9/3/64 No. 1236708.
Myrtle M. Reed	" 012244	280	1/23/61	3/13/63	Patented 9/3/64 No. 1236709.
George L. Crapo	" 012299	320	2/ 2/61	3/13/63	Patented 9/3/64 No. 1236710.
Norma E. Barnes	" 012342	320	2/ 4/61	3/13/63	Application pending.
Charles E. Barnes	" 012343	320	2/ 4/61	3/13/63	Do.
Blaine L. Garn	" 012349	320	2/ 6/61	3/13/63	Do.
Ollie Mae Shearman	" 013911	328. 06	2/21/63	10/28/63	Do.
Estate of Charles R. Shearman	" 013912	320	2/21/63	10/29/63	Do.

M-36680 SUPP.

April 6, 1965

TO: SECRETARY OF THE INTERIOR

SUBJECT: INDIAN HILL GROUP, DESERT LAND ENTRIES—AMENDED RECOMMENDATIONS.

Following the issuance of my opinion "Idaho Desert Land Entries—Indian Hill Group," M-36680, April 5, 1965, and further discussions with you and Under Secretary Carver, I agree that my recommendations should be modified as follows:

I therefore recommend that, in the exercise of your supervisory authority, you direct that:

(1) The Director's Decision be set aside;

(2) The case of Ollie Mae Shearman, I-013911, and of the Estate of Charles R. Shearman, I-013912, be remanded to the Bureau of Land Management for institution of contests; that the contests be conducted upon due notice before a hearing examiner in accordance with the Regulations; that the contests charge prohibited assignment of entries, holding by a person or association of persons in excess of 320 acres, failure of the entrymen to reclaim the lands of their respective entries, lack of intent on the part of the entrymen to reclaim the lands of their respective entries, and such other grounds as may, upon consideration by the Bureau of Land Management, be appropriate; that if a hearing is held, the hearing examiner shall submit a recommended decision to the Secretary;

(3) That the Director issue an order directed to each of the other entrymen who have not received patents to file with the Secretary, within 30 days after service, a response showing cause, if any he has, why his proof should not be rejected and his entry canceled upon the grounds stated in paragraph (2); said order to tender an opportunity for hearing by a hearing examiner if desired by the entryman; and if hearing is held, the hearing examiner shall submit a recommended decision to the Secretary. The entrymen referred to in this recommendation are Raymond T. Michener, I-012234; Marjorie K. Michener, I-012241; Norma E. Barnes, I-012342; Charles E. Barnes, I-012343; and Blaine L. Garn, I-012349; and

(4) That we transmit the cases in which patents have issued to the Department of Justice for institution of actions to cancel the patents. The cases referred to in this recommendation are Wallace Reed, I-012235; Joseph L. Nielson, I-012242; Robert R. Schwarze, I-012243; Myrtle M. Reed, I-012244; and George L. Crapo, I-012299.

FRANK J. BARRY,

Solicitor.

April 9, 1965

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT.

SUBJECT: IDAHO DESERT LAND ENTRIES—INDIAN HILL GROUP.

On August 14, 1964, you issued a Decision entitled *Raymond T. Michener, et al.*, Idaho 012234, *et al.*, involving certain desert land entries on lands located in Owyhee County, Idaho, near the Snake River.

Your Decision dismissed contests against these entries initiated by the Land Office and remanded the entries to the Boise Land Office for further appropriate administrative action. Following the Decision, five of the entries were patented in September 1964. On seven other pending applications, final proofs appear to have been accepted but they have not been certified for patent and no patents have been issued.

Action on the latter applications has been withheld pending a further review of the matter by the Solicitor.

The Solicitor has submitted the attached memoranda (Opinion M-36680 and M-36680 Supp.)

I direct that your said Decision be and the same hereby is set aside.

I direct further that contests be instituted against Ollie Mae Shearman, I-013911, and the Estate of Charles R. Shearman, I-013912; the contests should be conducted upon due notice before an examiner in accordance with Regulations; the contests should charge prohibited assignment of the entries, holding by a person or association of persons in excess of 320 acres, failure of the entrymen to reclaim the lands of their respective entries, lack of intent on the part of the entrymen to reclaim the lands of their respective entries, and such other grounds as may, upon consideration by the Bureau of Land Management, be appropriate. If a hearing is held, the hearing examiner shall submit a recommended decision to the Secretary.

I direct further that you issue an order to the following named entrymen directing each of them, within 30 days after service, to file a response with the Secretary showing cause, if any he has, why his final proof should not be rejected and his entry canceled upon the grounds referred to in the preceding paragraph. Said order shall tender an opportunity for hearing before a hearing examiner if desired by the entrymen. If a hearing is held, the examiner shall submit a recommended decision to the Secretary. Said order shall further give notice that upon failure to respond or to request a hearing, the Secretary shall render a final decision upon the record. The entrymen referred to in this paragraph are: Raymond T. Michener, Idaho

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012234; Marjorie K. Michener, I-012241; Norma E. Barnes, I-012342; Charles E. Barnes, I-012343; Blaine L. Garn, I-012349.

STEWART L. UDALL,
Secretary of the Interior.

UNITED STATES *v.* PAUL F. BENNEWITZ ET AL.

A-30222

Decided April 29, 1965

**Mining Claims: Special Acts—Mining Claims: Surface Uses—Mining Claims:
Power Site Lands**

It is proper under the Mining Claims Rights Restoration Act of 1955 to prohibit placer mining operations on mining claims located on a segment of a river in a State park which has high recreational value for fishing where such operations have the potential for destroying or severely damaging the fish habitat and population although the limited operations presently contemplated by the claimants might not have an appreciable deleterious effect.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The New Mexico State Park Commission and the New Mexico State Game Commission have appealed to the Secretary of the Interior from a decision of the Assistant Director of the Bureau of Land Management, dated December 13, 1963, which affirmed a decision of a hearing examiner forbidding all mining operations on placer mining claims Virginia No. 3 and Cindy No. 2 and granting permission for unrestricted placer mining on the Virginia Nos. 1 and 2 and on the Cindy Nos. 1 and 3 placer claims. The appeal is from the portion of the decision permitting mining on the four claims. The claims were located by Paul F. Bennewitz and five others. They were located in a line extending 5 miles along the Rio Grande River, including land in the river bed and on both sides. All the land is included in power site reserves and the claims were located pursuant to the Mining Claims Rights Restoration Act of 1955, 69 Stat. 681, 30 U.S.C. §§ 621-625 (1958), which opens public land in power sites to mining location.

Section 2 of the act provides, however, that the locator of a placer claim shall conduct no mining operations for 60 days after filing his notice of location in the land office and that

* * * If the Secretary of the Interior * * * notifies the locator * * * of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an

appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. * * * 69 Stat. 682.

Following the filing of the location notices for the six claims in question, notice of a public hearing was issued. At that time the six locators filed notices that they had quitclaimed their interests in the claims to Southwest Underwater Recovery and Salvage, Inc.

In response to the notice of hearing the New Mexico State Park Commission and the New Mexico State Game Commission filed protests against the allowance of placer mining operations on the six claims. The Park Commission stated that the claims were located in the Rio Grande State Park, that the Virginia No. 3 and the Cindy No. 2 occupied land in proposed recreational sites B-11 and B-3, respectively, and that mining operations on the other claims would also substantially interfere with park uses of the land on the claims. The Game Commission stated that the mining operations would substantially damage or destroy the fishing in the river which is nationally known and very popular with fishermen.¹

At the hearing Robert L. Johnson, one of the original claimants and secretary of Southwest Underwater Recovery and Salvage, Inc., testified that the company planned to mine placer gold from the river bed. The mining would be done by using small portable dredges which would suck material from the river bottom, precipitate the gold in a box, and discharge the remaining material back on the river bottom. (Tr. 9-30.)

The examiner concluded that placer mining on the Cindy Nos. 1 and 3 and the Virginia Nos. 1 and 2 "with the type of machine the claimants state they would use" would not substantially interfere with other uses of the land within the claims, and, therefore, that general permission to engage in placer mining should be granted. He found that mining operations on the Virginia No. 3 and Cindy No. 2 would interfere with the recreational use of sites B-3 and B-11 and should be prohibited.

The State Park Commission and State Game Commission appealed from the decision as to the four claims on which mining was not prohibited. Southwest did not appeal. The Assistant Director, Bu-

¹ Protests were also filed by the United States Forest Service, Plains Electric Generation and Transmission Cooperative, Inc., and New Mexico Wildlife and Conservation Association, Inc. However, for one reason or another, they are no longer involved in the case.

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reau of Land Management, found that evidence was lacking that placer mining operations would substantially interfere with other uses of the land in the four claims and affirmed the examiner.

The six claims are located along the Rio Grande in the following order descending down the river: Virginia Nos. 3, 2, and 1 and Cindy Nos. 3, 2, and 1. (Forest Service Exh. 1). Since State park site B-11 conflicts with Virginia No. 3 and site B-3 with Cindy No. 2, three of the four remaining claims lie between the two sites, and the Cindy No. 1 lies just south of site B-3. It appears that the Rio Grande flows through a 50-mile gorge, including the area where the claims are located (Tr. 58). Access to the bottom of the gorge is limited (Tr. 38) but exists at sites B-3 and B-11 where the Park Commission plans shelters, picnic tables, and sanitary facilities above high-water level (Tr. 42-43). There is little evidence as to access to the river through the other four claims or as to any development planned for those claims by the Park Commission. There was only general testimony by witnesses for the Park Commission that mining operations would be incompatible with usage of the area for park purposes (Tr. 52, 56).

The testimony was much more detailed with respect to the effect of mining operations upon fishing. The Rio Grande is a very fine trout fishing stream; it is the State's best nationally known trout water (Tr. 63, 76, 94). The river is regularly stocked by the State (Tr. 63) with thousands of pounds of fish (Tr. 75-76). Fry is planted in the river at the Cindy No. 2 and Virginia No. 3 since there is access to the stream at those locations (Tr. 73). Most of the fry planted is brown trout although some rainbow fry has been planted (Tr. 75).

Roy E. Barker, Chief of Field Management for the State Department of Game and Fish, testified that direct and indirect effects of placer mining would destroy the trout habitat and population in the stream section mined and that such mining would destroy or severely damage the habitat and trout for many miles below the mining site through causing siltation (Tr. 76). More specifically he testified that the sucking of material would destroy the river bottom and, where there were spawning beds, probably destroy the eggs; that the silt stirred up would cut the sunlight to aquatic plants to the point that they would not produce, affecting the food for the fish; and that the silt would settle on other spawning beds, suffocating the eggs (Tr. 77).

Douglas B. Jester, fishery biologist for the State Department of Game and Fish, testified that he had been on the Virginia No. 3 and on the river at a number of points below. He went there to run tests on the factors known to be of major importance to fisheries and found

further evidence of what was already known, that the river there is excellent for brown trout from the standpoint of food and physical factors and that it is a natural spawning area (Tr. 87). He testified that the normal spawning period would include the greater part of October and November (Tr. 93).

Jester ran tests indicating that placer mining operations would stir silt from the river bottom (Tr. 90) and he testified that siltation could substantially interfere with the fish through covering sources of food, suffocating eggs of the brown trout and newly hatched fish, destroying cover where the fish rest and feed, and upsetting the heat budget of the stream by causing higher average water temperature, which gives trash fish an opportunity to become the dominant species (Tr. 91-93). He said that picking up the bottom and processing it would destroy microscopic plants and animals which are the basis of food for the fish (Tr. 92). He stated that a large operation could destroy the entire fish habitat in the claim area and destroy or damage it for some distance downstream, there being instances where severe damage has carried downstream for six or seven miles (Tr. 93-94).

In describing the proposed mining operations, Johnson stated that dredges came in all sizes, usually determined by the opening of the nozzle which ranges from two to eight inches (Tr. 11-12). He stated that the material sucked up would be redeposited about 10 feet from where it was picked up (Tr. 16). He said that the small dredge that Southwest intended to use would probably move three cubic yards of material per hour but that an 8-inch dredge could move 91 yards per hour (Tr. 20). He stated that it was possible Southwest would be working several dredges at the same time but not in the same place (Tr. 21). His company would not use the large dredges but would buy three 3-inch dredges in preference to one 8-inch one (Tr. 22). Because the Rio Grande is murky and muddy after spring runoffs, late summer and early winter would be the only periods when operations could be conducted (Tr. 24). Johnson said that areas could be reworked year after year and it was contemplated that this would be done (Tr. 25).

Johnson asserted that the operation of five dredges for five months would not begin to stir up as much silt as one runoff (Tr. 112). He said that Southwest had never considered any plan of operation other than to use small dredges but conceded that it was possible, although not likely, for others to acquire control of the company and to change the policy (Tr. 115-116). He did not foresee ever having more than three dredges in operation but again admitted that the company's policy could change (Tr. 119).

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A witness for the Game Commission conceded that one small dredge operation might not cause substantial damage to the fish but felt that if the operation proved profitable many machines would be put in use (Tr. 64, 66).

The New Mexico Wildlife and Conservation Association, Inc., stating that it represents the interests of 100,000 State hunting and fishing licensees and tens of thousands of nonresident fishermen, filed a statement that those interests would be seriously impaired by any placer mining operations in the Rio Grande Canyon. It said that the Rio Grande from Velarde to the Colorado State line, a distance of 70 miles (which includes the 5-mile stretch involved here), constitutes New Mexico's largest and best trout fishing water. Its value is enhanced by the fact that it flows through a highly scenic gorge. Thousands of tourists and residents are attracted for fishing and recreation. Placer mining operations would greatly impair the esthetic and scenic value of the portion of the river involved and destroy the trout habitat. The Association recommended that all placer mining on the claims be prohibited. (Tr. 99-105.)

This review of the evidence shows that there was little evidence submitted on behalf of the State Park Commission that the mining operations contemplated by Southwest would substantially interfere with the park values of the four claims in question. There was specific evidence that the proposed mining operations would damage the river bed in the four claims as a habitat and propagation area for brown trout. The severity of the damage would vary with the magnitude of the operations; the use of numerous or large dredges could destroy or substantially damage the river bed in the claims as a habitat or spawning area for the brown trout.

This would suggest that carefully controlled placer mining operations restricted to the use of a small dredge or two would not substantially interfere with the uses of the claims for recreational, scenic, and sportfishing purposes. The Mining Claims Rights Restoration Act does not, however, permit such a solution. It paints only in broad strokes. It permits the Secretary only to (1) prohibit all placer mining, (2) permit all placer mining, or (3) permit mining on the condition that the miner restore the surface to its previous condition after completing mining operations. The last course is obviously inapposite here since the very movement of the material on the river bottom would cause the damage testified to and restoration of the bottom surface, even if physically possible, would not repair the damage. Furthermore, Southwest plans to rework the bottom year after year, performing its operations during the same period that the brown trout is spawning. The only alternatives left then are complete prohibition or unrestricted permission to mine.

The statute gives but one criterion for determining which alternative should be adopted, namely, "whether placer mining operations would substantially interfere with other uses of the land included within the placer claim." Again the statutory language is not specific. It does not say whether it contemplates only the particular type of operation planned by the claimant or whether it encompasses all possible types of operations. The examiner and the Assistant Director took the first view.

We do not believe this is a sound interpretation of the statute. The statute permits the Secretary to act only once. He cannot issue an order now allowing unrestricted mining on the basis of a one or two dredge operation and then, if additional dredges are added or larger ones are substituted or a totally different type of operation is adopted, issue an order prohibiting mining. He can act only once, either to permit or prohibit. Because his course of action is so limited, to avoid defeating the purpose of the act, he should be able to base his decision not only on what the claimant proposes to do but also on what the claimant or his successor may be able to do in the way of placer mining.

Adopting this view of the statute, it is clear that the record contains substantial evidence that if Southwest's dredge operations were expanded to any extent substantial damage to the fishery resources on the four claims would result. Any placer operation which would require moving of the gravel and other material on the river bottom would have a deleterious effect, depending on the extent of the processing. Southwest does not refute this but rests its case wholly on the proposition that its use of one to three small dredges would not cause any appreciable damage. However, it concedes that there is a possibility that the plan of operations could change. If it does, the fishery resources of the 5-mile stretch of the Rio Grande included in the six claims could be severely damaged, if not destroyed. Damage would probably also be inflicted on the stretch of the river below the claims.

In the face of this potential danger to the recreational uses of a substantial portion of the Rio Grande river the only order that may properly be issued is to prohibit placer mining operations on all the six claims. The only other alternative, to permit unrestricted mining, could prove to be a disaster to a valuable natural resource.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the Assistant Director's decision is reversed and the case is remanded for issuance of an order prohibiting placer mining operations on the six claims in question.

EDWARD WEINBERG,
Deputy Solicitor.

April 29, 1965

RUBY COMPANY

A-30278

Decided April 29, 1965

Phosphate Leases and Permits: Permits—Phosphate Leases and Permits:
Rental

An application for a phosphate prospecting permit is properly rejected when the application is not accompanied by payment of the first year's rental as required by regulation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ruby Company has appealed to the Secretary of the Interior from a decision dated February 20, 1964, whereby the Division of Appeals, Bureau of Land Management, affirmed a decision of the Idaho land office rejecting its phosphate prospecting permit applications, Idaho 014872 and 014873, filed pursuant to section 9(b) of the Mineral Leasing Act, as added by the act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211(b) (Supp. V, 1964), because the applications were not accompanied by payment of the first year's rental as required by departmental regulation at the time the applications were filed. 43 CFR 196.5(a), now 43 CFR 3161.3-1(a).

The appellant's applications were filed in the land office on November 12, 1963. On December 4, 1963, a protest was filed against the issuance of any permits in response to the applications because of the applicant's failure to submit the rental payments. The applications were rejected by the land office by a decision of the same date.

In its appeal to the Director of the Bureau of Land Management the appellant contended that the requirement of submission of the first year's rental with the applications should not be mandatory in view of the legislative history of the act of March 18, 1960, *supra*, that the failure of the land office to promptly advise the appellant of the defects in its applications was dilatory, arbitrary, capricious and contrary to established practice; and that since there was no requirement for the payment of rental in the case of prospecting permits for coal or for sulfur, the rejection of the appellant's application appeared to be erroneous, inequitable and unwarranted.

The Division of Appeals, after discussing the legislative history of the act of March 18, 1960, *supra*, held that notwithstanding any intent disclosed by the legislative history, the act clearly granted the Secretary discretion to determine the conditions upon which permits are to be granted. It further held that, in the circumstances, special notice

of the fatal defect in the applications was not required by law or by regulation to be given.

In its appeal to the Secretary, Ruby Company has repeated essentially the same contentions as those made to the Director.

The act of March 18, 1960, for the first time, authorized the Secretary of the Interior to issue phosphate prospecting permits under the Mineral Leasing Act. Although the act does not require the payment of rent for such permits, it does not prohibit the charging of rent.

While the report of the Senate Committee on Interior and Insular Affairs (S. Rep. No. 879, 86th Cong., 1st Sess. (1959)) stated, as the appellant has pointed out, that the bill (S. 2061) which, upon enactment, became the statute, requires no payment of rental during the life of the permit, the Committee also stated:

* * * Although the Department of the Interior recommended that adoption of the permit system to phosphate should include a rental payment provision of not less than 25 cents per acre during the term of the permit, the committee is of the opinion that since there is now no such condition governing permits for coal, sodium, sulfur, and potash, it would be inequitable to apply rents solely to phosphate.

While the report, by itself, might possibly be construed to mean that the committee did not intend to permit the Secretary to charge any rental on phosphate permits, a more reasonable interpretation is that the committee did not wish to establish a statutorily required rental for phosphate permits when there was no statutorily required rental on coal, sodium, sulfur, and potash permits. That the latter is the proper interpretation seems evident from a statement by the House Committee on Interior and Insular Affairs in its report on H.R. 7987, a companion bill to S. 2061. It stated.

The committee adopted the amendment to H.R. 7987 recommended by the Department of the Interior except that it omitted the provision regarding a rental charge at a minimum of 25 cents per acre per year. * * *

The omission of the rental provision was occasioned by two considerations: First, the committee is of the opinion that since there is now no such requirement in the law governing permits for coal, sodium, sulfur, and potash, it would be inconsistent and might be inequitable to impose such a requirement for phosphate permits. This is a matter that more properly may be examined by the Congress when the matter of rental payments for various types of permits is under direct consideration. Second, it was represented to the committee by witnesses for the Department that the Secretary is authorized to establish a reasonable rental charge for phosphate permits, should he desire to do so, even though it is not specifically provided for by law. Mention was made of the fact that an annual rental of 25 cents per acre was established for potassium permits by a regulation of the Department issued on September 30, 1959 (43 C.F.R. 194.8(b)).

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Clearly the committee recognized that the Department claimed the right to charge rental on prospecting permits. Nothing to indicate a disapproval of this assertion was said by the committee. It is wholly unrealistic that if either committee had believed that rentals should not be charged it would not have added to the statute a prohibition against the charging of rentals.

Accordingly, Assistant Secretary of the Interior Roger Ernst, in expressing no objection to the approval of the enrolled bill S. 2061, stated to the Director of the Bureau of the Budget on March 14, 1960:

* * * We recommended that there be a minimum annual rental of 25¢ per acre, but the enrolled bill contains no rental provision. However, we interpret the bill, since it contains no prohibition on rentals, as authorizing the Secretary to charge rentals if he deems it desirable. Under similar circumstances rentals are now charged for potassium permits. 43 C.F.R. 194.8(b). Accordingly, we interpose no objection to the enrolled bill because of the omission of this one provision recommended by us.

In accordance with the departmental construction of the act, that nothing therein prevented the Secretary, if he deemed it desirable, to charge rentals for phosphate prospecting permits, the Secretary, on June 5, 1961, 26 F.R. 5262, issued regulations requiring such rentals.¹

Those regulations require not only that such rentals must be paid but that full payment of the first year's rental *must* accompany an application for such a permit.

The regulations had been in effect some two and one-half years when the appellant in this case filed its applications. The appellant states that its applications complied with the requirements of 43 CFR 196.5 in every regard, with the single exception that the first year's rental did not accompany the applications. Yet it seems to feel that its omission in this respect must be disregarded. Its contention that the requirement should not be enforced because of the legislative history of the act is somewhat hard to follow. Appellant apparently does not contend that the Secretary may not charge rental since it attacks the land office for not calling its omission to its attention at an earlier date. At the same time it seems to feel that because it overlooked the requirement of the regulation that the first year's rental must accompany an application its failure in this respect must be excused on the basis of the legislative history of the act. However, nothing in that legislative history deals with the requirement made by the Secretary that the first year's rental must accompany an application for a permit.

¹ Rentals are now imposed on prospecting permits for coal (43 CFR 3133.3), for potassium (43 CFR 3142.1(b)), and for sodium (43 CFR 3152.1(h)).

Having determined that rental is to be charged for phosphate prospecting permits, the Secretary determined that the first year's rental must accompany an application. This is a requirement which the Secretary had full authority to impose.

Failure to submit the rental caused the applications to be defective and while the applicant could have at any time submitted the rental and thus cured the defect, the applications, for purposes of priority, would have been entitled to consideration only from the date on which the rental was paid. See *Celia R. Kammerman et al.*, 66 I.D. 255 (1959); *Genia Ben Ezra et al.*, 67 I.D. 400 (1960); *James E. Menor*, A-29006 (November 15, 1961); *Ernest O. Tullis*, A-29678 (December 27, 1962).

Nor was the land office under any obligation to examine the applications when filed for possible defects. The responsibility for filing an application free from defects rests on the applicant and he alone must bear the consequences of his failure in this respect.

The appellant implies that if prospecting permits are not issued in response to its applications the lands applied for will be held for speculative rather than exploratory purposes. The appellant's self-serving statements are not supported by any showing of fact and, even if true, would afford no basis for disregarding the clear and unmistakable requirement of the regulation. In any event, the mere filing of an application for a prospecting permit does not vest in the applicant any rights in the land. It is a request that a license be granted and nothing more. Cf. *Roy W. Swenson et al.*, 67 I.D. 448 (1960). The fact that in this case the one who protested Ruby's applications may have achieved priority of consideration for her own applications does not establish her right to prospecting permits. Only if her applications are proper in all respects, the land applied for is properly subject to prospecting, and a determination is made that prospecting permits should be issued, will her applications be allowable.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF VINSON CONSTRUCTION COMPANY

IBCA-364

Decided May 6, 1965

Contracts: Construction and Operation: Changed Conditions

Under the standard form of Changed Conditions Clause, a theory that the contractor was bound to assume the worst possible conditions consistent with the information disclosed by the contract, is not compatible with the basic purposes of the clause.

Contracts: Construction and Operation: Changed Conditions

Where the subsurface conditions disclosed by the contract and by drill logs indicated the presence of water tables and of water in sandy materials at levels above the grades where the excavation work was to be performed, but did not contain any direct indication of hydrostatic pressure, the encountering of large quantities of water under hydrostatic pressure as exhibited by water flowing upward through the subgrade of the excavation and having a velocity sufficient to develop unstable conditions of quicksand and sand boils, is a changed condition of the second category, within the meaning of the standard form of Changed Conditions clause.

Contracts: Construction and Operation: Changed Conditions

Where the contract did not present any direct indications of subsurface conditions as to a specific work site because of the absence of logs of borings with respect to such specific location, and there were no other direct indications of hydrostatic pressure revealed by the logs of borings with respect to nearby similar locations in the vicinity, and where there was no evidence of the presence of hydrostatic pressure at any other place in the general area of the project, the encountering at such work site of conditions of hydrostatic pressure generating a flow of water from below the subgrade of the excavation and having sufficient velocity to develop unstable conditions of quicksand and sand boils, is a changed condition of the second category within the meaning of the standard form of Changed Conditions clause.

BOARD OF CONTRACT APPEALS

The contractor-appellant has presented a claim based on alleged changed conditions, in the amount of \$117,648.66. In his Findings of Fact and Decision dated December 3, 1962, the contracting officer denied the claim on the ground that no changed conditions were encountered. The contractor filed a timely appeal.

The contract was executed June 23, 1960, and included Standard Form 23A (March 1953). For a total estimated price of \$3,826,244.90 (derived in the main from estimated quantities and unit bid prices) the contractor agreed to construct pipelines, earthwork and structures for Foss aqueduct and Clinton, Bessie and Cordell laterals as part of the Washita Basin Project in Oklahoma. The contract work was completed within the time required. The claim of changed conditions concerns excavation for and laying of the main pipeline, or principal conduit of the aqueduct at certain river crossings. The plan of the pipeline required that it be laid in trenches across several stream beds,

including six crossings of the Washita River in the course of a few miles, due to the meanderings of the river.

A hearing of the appeal was conducted by the Board on June 29 and 30, 1964, at Denver, Colorado. It was stipulated by counsel at the hearing that the issues in this appeal would be limited to the question of liability. In the event that the Board should find that the appellant is entitled to recover any portion of its claim, the Board would remand the case to the contracting officer for the making of an equitable adjustment. If the appellant and the Government should not agree on such adjustment, appellant would have the right of further appeal from the contracting officer's decision concerning the dispute over the equitable adjustment.

The essence of appellant's claim of changed conditions, is that in excavating trenches in the river beds at Crossings No. 1 and 3, quicksand and sand boils were found in the bottom grades; that these conditions increased the amount of work, with a corresponding increase in costs; that such conditions were not disclosed by the contract or by the Government drill logs; and that such conditions could not reasonably be anticipated or expected as a result of a careful examination of such drill logs or of the site of the work.

The Government counters appellant's charges by asserting that the drill logs for Crossings No. 1 and 3 showed wet or very wet sand at the levels of the bottom grades of the trenches, and that such data was indicative of the possibility of quicksand. Further, the Government alleges that the bottom grades of the trenches were about 15 feet below the water table, as shown on the drill logs; that this situation, being known to appellant, was a foreseeable cause of the quicksand and sand boils. It is also contended by the Government that the appellant's construction procedures and dewatering methods were responsible for the increased costs.

The Washita River, except when in flood, is quite shallow, being only about 12 to 18 inches in depth at the places where it was crossed by the aqueduct. Nevertheless, some diversion of the water was required in order to excavate the trenches in the river bed. This was accomplished by the construction of earth dikes upstream and downstream from the work area, with one and sometimes two corrugated metal pipes of 36-inch diameter, which carried the river water from the upstream dike above and beyond the work area to a point below the downstream dike, where the water was discharged. Although several floods occurred during the work of crossing the river, no claim is made on account of such events.

Crossing No. 6

The crossings have been numbered 1 through 6 for convenient reference, but the direction of the work was from Crossing No. 6 to Cross-

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ing No. 1. Crossing No. 6 was at Clinton Lateral, station 527 plus 20, where work began February 15, 1961. No serious difficulties were encountered at this crossing. Some dewatering of the excavation was necessary but this operation was successfully carried out, principally by means of sump pumps in the bottom of the trench, and to a much lesser extent, by a system of well points. The materials found in excavation of the trench were similar to those represented in the drill logs, sand, silt, and clay. The water table was high, and it was necessary to protect the slopes of the excavation with sand bags and crushed stone, to reduce sloughing caused by water seeping through the sides of the trench.

In the lower portions of the excavation, near the center of the river, the bottom grade was in clay material, which afforded a suitable foundation for the pipe. The contract specifications for this crossing required the use of 30-inch steel pipe coated inside and out with concrete, with further encasement in reinforced concrete at the time of laying the pipe in the trench. Concrete for encasement of the under-side of the pipe was placed in the subgrade. As the pipe-encasement proceeded up the river banks, the bottom of the trench was in wet sand. This condition required that crushed stone be placed for a foundation before concrete for encasement of the pipe was poured.

Crossing No. 5

The methods used in excavating for and laying the pipe at Crossing No. 5 were similar to those just described as to Crossing No. 6, and the same type of pipe was used. Hard clay or shale was found in the bottom of the trench, requiring blasting to provide a sufficient depth for the concrete encasement foundation. Near the river banks there was some sloughing, as in Crossing No. 6, and the excavation was sloped back in order to minimize the effect of the sloughing.

Crossing No. 4

After Crossing No. 5 had been completed, appellant determined that the well points did not remove water at a sufficiently rapid rate to justify the expenses of renting and constructing the well point system in the work area. Subsurface water would continue to seep through the line formed by the series of well points and into the sides of the excavation. Sump pumps were much more efficient in the circumstances, being credited with removal of about 75 percent of the water at Crossing No. 6, compared with about 25 percent for the well point system at that crossing, according to the testimony of Mr. Evan J. Wisley, the Acting General Superintendent for appellant on this project. In any event, well points were not used on Crossing No. 4, and no serious difficulties ensued with respect to dewatering. Sand was

found in the upper portions of the excavations and hard materials in the subgrade, as indicated by one of the drill logs for Crossing No. 4. Blasting of the hard material was necessary to provide space for the subgrade foundation of crushed rock. In this case (and at Crossings No. 3, 2 and 1) the contract specified 42-inch reinforced concrete pipe with a crushed rock foundation.

Crossing No. 3

Conditions were notably different at Crossing No. 3. Rain and high water flooded the work area during construction of the protective dikes and cofferdams. This apparently caused little delay, however. After completion of the dikes and diversion pipe, excavation of the trench for the reinforced concrete pipe proceeded (beginning near the center of the river bed and progressing toward the south bank) until the depth was reached at which the pipe was required to be installed. At that level, quicksand (water and sand in a very fluid state) was encountered. Also sand boils (consisting of water and sand under pressure) bubbled up from below, gushing through the crushed rock foundation which had been placed in an effort to stabilize the loose and fluid mass of sand and water below. These sand boils were up to 3 feet in height continuing for about 20 minutes at a time. Each boil resembled a "real small sized Yellowstone Park Geyser, on a small order," according to the testimony of Mr. Ronald Harper, Project Engineer for appellant. Sand from these boils accumulated in mounds about 2 to 4 feet high on top of the crushed rock foundation.

Another serious matter was the apparent great depth of the unstable mixture of water and sand. During this period, there was considerable settling of the wooden piles supporting the 36-inch metal diversion pipe, which leaked into the trench as a result. Mr. Robert C. Bostwick, appellant's superintendent for river crossings, testified that he "secured a thirty-foot pole and put a two-inch pipe on it and jettted that down to try to find something solid to hold it. The piling underneath the tin whistle [metal diversion pipe] kept sinking as work progressed. This pole I jettted down, I never did hit anything solid."

In connection with the sinking of the wooden piling supporting the metal diversion pipe, Mr. Wisley observed that in the space between the excavation and the upstream dike, the ground level had sunk at least 1 foot over an area about 60 or 70 feet in diameter. Crushed stone was dumped into the bottom of the trench in large quantities, greatly exceeding the contract requirements for supporting the concrete pipe. The crushed stone soon sank out of sight, as the concrete pipe was being laid, or after it had been laid, in some instances. Sump pumps were used, including a larger type of 4-inch capacity which would pump sand, mud and debris to an extent not possible with ordinary pumps. French drains were used, and well points were also tried,

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although unsuccessfully, for the sand saturating the underground water clogged the well points. A form of cribbing was used to prevent wet soil from invading the excavation, consisting of 2-inch pipes in two rows, driven into the foundation, with timbers placed outside each row of pipes.

Mr. Wisley ordered a carload of used steel sheet piling from Oklahoma City, the nearest source obtaining all of the sheet piling available in that locality. The piling was driven in two parallel rows, one on each side of the pipe, each row being about 5 feet from the center line of the pipe. The piling was of the interlocking type but was, of course, not water tight. It was of varying lengths (18' to 27') and was driven to a depth of about 6 to 8 feet below the subgrade for the concrete pipe. The double line of piling extended about two-thirds of the way across the river bed toward the south bank. The combination of measures used finally contributed sufficient stability to the underlying ground to permit the establishment of a firm crushed stone base and the laying of the concrete pipe, without apparent danger of excessive movement.

The trench was then backfilled and all of the sheet piling was pulled out except for a few sections near the center of the river bed. A flood then interrupted further work for a few days. When the flood had subsided, appellant used the piling which had been pulled from the north side to drive similar protective lines of piling from the center of the river bed to the south bank. Upon recommencing excavation, it was discovered that the pipe already laid was out of tolerance. Appellant thereupon shut down the work. Because of the difficulties encountered in constructing the south portion of Crossing No. 3, appellant requested advice and suggestions of the Government officials in charge of the project, concerning corrective measures or changes required with respect to the remaining dewatering problems related to completion of Crossing No. 3. While awaiting such suggestions and advice, appellant's forces moved to Crossing No. 2.

Crossing No. 2

Except for several floods and accompanying delays that occurred during construction of Crossing No. 2, the progress of the work was comparatively uneventful. The absence of any major difficulties was due to the presence of clay (as indicated by the drill logs) in the lower portions of the excavation, rather than quicksand and water under pressure as had been the case at Crossing No. 3. Appellant used sump pumps and drove sheet piling in Crossing No. 2, the latter measure being a precaution taken because of its experience at Crossing No. 3. No well points were used in this crossing. The sheet piling was removed after the crossing was completed. The pipe was found to be

undisturbed following one or more floods which occurred after completion of backfill.

Crossing No. 1

The Government had been unable, in advance of bidding, to secure permission from the owner of the land at Crossing No. 1 for entry upon the premises to perform drilling tests. Hence, there were no drill logs available to any of the bidders with respect to this crossing. After the contract had been awarded and before commencing work, appellant engaged a local well digger to drill test holes at all of the river crossing sites, including Crossing No. 1, for the stated purpose of ascertaining whether excessive quantities of rock were present in the areas concerned. The reports of these tests were of no value in his review of this matter, according to appellant's expert witness, Mr. William A. Clevenger. The results of the tests were not offered in evidence by the appellant and are not a part of the record, but in any event, information obtained after award is not relevant to the issue of whether appellant should have, prior to bidding, anticipated the conditions complained of in this appeal. Upon excavation of the pipe trench, after going through a stratum of clay, quicksand and water under pressure, with sand boils, were found in the bottom grade, conditions very similar to those discovered at Crossing No. 3.

Again, as in Crossing No. 3, appellant used several sump pumps, sheet piling and large quantities of crushed stone. Well points were not used. The specifications and drawings require that over-excavation be performed as directed where the soil material in the bottom of the trench is unsuitable. At this crossing, in the low elevations near the center of the river, the depth of the crushed stone varied from 3 to 5 feet, although the over-excavation did not reach that depth. On one occasion several truckloads of crushed stone were dumped into the quicksand in the bottom of the trench, in a large heap, in order to provide a more stable foundation for the pipe.

The work of constructing Crossing No. 1 was discontinued for about 2 weeks because of cold weather. At another time, when about one-third of the pipe had been laid from the center of the river toward the west bank, and had been partially backfilled, about 20 feet of the westerly end of the pipeline, and the sheet piling adjoining it, shifted about 2 feet downstream. This lateral movement required reexcavation, jacking the pipe over and relaying several sections.

The piling had been driven to a point about 5 or 6 feet below the bottom grade of the pipe. The shifting movement also required removal and redriving of the sheet piling, after an extra protective line of piling had been driven outside the original row of piling and had been braced with walers. This extra sheet piling was removed after the pipe was realigned. On another occasion there were vertical move-

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ments of the pipe, up and down, before backfilling, requiring resettling of the first few sections of pipe to be laid.

Eventually, the construction of the pipeline at Crossing No. 1 was completed. Because of the unstable conditions at Crossing No. 1, the sheet piling was not pulled out, but was left where it had been driven to assure that no further damaging movements of the pipe would occur.

Return to Crossing No. 3

Following the completion of Crossing No. 1, the appellant's forces constructed the pipeline at a creek crossing and then moved back to Crossing No. 3. New and longer piling was obtained and driven for the northerly portion, with more satisfactory results than with the somewhat shorter piling used previously in the southerly side of Crossing No. 3 and at Crossing No. 1. The piling was also extended further up the bank than had been the case on the south side. Excavation was begun near the north bank and was extended downward to the center of the river in order to avoid disturbing the end of the previously laid pipe in the middle of the river. Two templates or guides were used in driving the longer sheet piling instead of one template in previous piling, for more accurate alignment of the longer sheet piling. No well points were used. Large quantities of rock were used to stabilize the foundation and sump pumps were necessary to remove water in the bottom of the trench. However, less difficulty was experienced in the construction of the northerly half of Crossing No. 3 than had been the case in the southerly portion or at Crossing No. 1.

Testimony of Expert Witness for Appellant

Mr. William A. Clevenger, a consulting engineer, whose firm specializes in soil mechanics, testified on behalf of the appellant. His qualifications as an expert were conceded by the Government. The drill logs forming a part of the contract did not, in his opinion, reveal the existence of a quicksand condition. Further, it was Mr. Clevenger's opinion that the drill logs should have shown factual data or, at least, word descriptions concerning the firmness of the material, as well as cementation and hardness. The in-place strength of the material tested by drilling was indicated only with respect to Crossings No. 4 and 5, where drill logs described certain material as "too tough to power auger." In other areas of the work under the same contract,¹ Mr. Clevenger noted that a standard penetration resistance test was used. This test is made by driving a standard-size cylinder into the ground by means of a hammer of a certain weight, and recording the number of hammer blows required to drive the cylinder a depth of 1 foot. In Mr. Clevenger's opinion such a test would have been very

¹ E.g., for surge tank footings, Drawing No. 854-D-162.

informative as to the subsurface conditions at the crossings. Cores of borings are not obtainable with the use of augers.

Quicksand is a condition which occurs when water flowing upward through loose sand causes the sand to go into suspension as the water is forced out of the soil. The evidence introduced at the hearing indicated that such a condition existed in this case, where the loose material flowed into the excavation and the bottom slopes of the excavation moved into the trench. Under such circumstances there is very poor stability for a foundation; crushed rock merely sinks into the quicksand. Under such an unstable condition, the pipe would tend to settle, especially with the added loads imposed by the placement of backfill over the pipe. This could cause opening of the pipe joints and failure of the pipe.

Information obtained from penetration resistance tests should have revealed, as to Crossing No. 3, the low strength and instability of the foundation. These tests were not made at the crossings. Mr. Clevenger viewed them as essential and advised that information from such tests would have affected the design of the pipe line in the areas where there was hydrostatic pressure.

On cross-examination, Mr. Clevenger acknowledged that the aqueduct was being constructed in an alluvial river basin, with random layers or lenses of clays, silt, and sand occurring throughout the area. He conceded that where the logs show that the work to be performed is below the existing water table, the contractor should be concerned about the probable degree of stability of material in the bottom of the excavations and side slopes, and whether the excavation will be under water.

As to methods of dewatering, Mr. Clevenger stated that pumping out the excavation was the preferred method where possible, even in sandy materials and with a head of water pressure such as was encountered in performance of this contract. The fact that subsurface material is below water table does not necessarily mean that it would be wet. The disturbance of the soil as a result of construction operations could be one cause of initiating an upward flow of water under pressure. When sand has more than 12 percent silt size particles, the possibility of quicksand is reduced. The chances of sand becoming quick with water under pressure are reduced as the density of the sand increases. If the sand is very silty but loose, it is possible for it to become quick under hydrostatic pressure.

Mr. Clevenger stated that the logs do not contain sufficient information to enable him to form any judgment as to whether the sand was dense or not.

The sand boils, described in the testimony of other witnesses, are caused by the velocity of the water percolating upward through the sand and carrying the sand particles with it. Sheet piling tends to

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dissipate the velocity of the water and laying back the slopes of the excavation would have a similar effect. The removal of a significant amount of water by the use of well points would not necessarily reduce the velocity of the water, except as to those zones where the well points are located. The lenticular structure of the subsurface material permits water to select several paths or zones, while well points are effective only in a limited area.

In this case, the piling could not reach a firm foundation, which otherwise would have been the best solution. But, when sheet piling is driven to a sufficient depth, the water in the surrounding area is obliged to travel a greater distance downward in order to reach a point below the sheet piling. This tends to reduce the velocity of the water when it comes back up (a correspondingly greater distance) between the rows of piling. However, the primary purposes of the piling is to keep out the soil. It was indicated that the method of excavating to a point just below the bottom grade of the pipe and refilling the excavation with crushed rock, and removing the water with the use of sump pumps, should provide the best chances of obtaining a stable foundation.

Mr. Clevenger further stated that if he were making a prebid analysis, the logs, drawings and specifications would not lead him to believe that he should be overly pessimistic about the project, and that he would advise a contractor to the same effect.

It was Mr. Clevenger's opinion that under the conditions prevailing, the vibration caused by removal of the piling would have resulted in substantial movement of the pipe.

Expert Testimony on Behalf of Government

Mr. Robert Sailer, a consulting engineer, was formerly employed by the Bureau of Reclamation from 1933 until 1962, and was the supervising engineer for the design of the Foss Aqueduct. His qualifications as an expert were well established on the basis of length of experience, education, recognition by professional societies and published articles on aqueduct construction.

Although Mr. Sailer testified concerning the bearing loads on the pipe as illustrated by Government's Exhibit S, and as to the weight of the soil that the pipe replaced on cross-examination he stated that the design of the profile is the primary design function. He stated further that he did not actually take into consideration the soil bearing loads when making the design, but relied on his previous experience in designing many of the river crossings.

In Mr. Sailer's opinion, the use of epoxy cement in the pipe joints was not desirable because such epoxy cement would make the joints inflexible.

The appellant's procedure for excavating and laying pipe (except for the northerly half of Crossing No. 3) was to excavate from the center of the river upgrade toward the banks and also to lay the pipe from the center of the river to follow the direction of the excavation. The specifications (paragraph 84(a)) require that:

On grades exceeding 10 percent, pipe shall be laid up hill (sic).

The above-quoted requirement applied to all of the river crossings involved, since the design of the pipe line required grades exceeding 10 percent between the center of the river and the banks of each river crossing. Further, appellant claimed that its procedure was required by the additional specification in paragraph 36, which reads in part as follows:

Pipe laying and backfilling shall follow trench excavation as closely as practicable * * *.

With respect to the specification requiring that pipe be laid uphill where grades exceed 10 percent, Mr. Sailer stated that the specifications were prepared under his direction and that it was not his intention, by providing that pipe be laid uphill, to preclude the excavation of the trench from the banks toward the center of the river. One of the Government's arguments is that appellant should have excavated from the banks toward the center of the river, and then should have proceeded to lay the pipe in the opposite direction. It is claimed by the Government that such procedure would have reduced the dewatering difficulties, and as proof of this theory, the Government points to the final operations for completion of the northerly portion of Crossing No. 3, which were performed in that manner, within a shorter time and with less water in the trench than was the case with the southerly half of Crossing No. 3 or Crossing No. 1. This may be correct reasoning as to the northerly half of Crossing No. 3, but it does not necessarily follow that excavating downward from the banks would have worked as well on Crossing No. 1 or in the first attempt at Crossing No. 3. There were several other factors that made for more favorable working conditions in the completion of Crossing No. 3.

First, the southerly half of the foundation for the pipe had been finally stabilized some time earlier, sufficiently so that water from that direction was no longer as serious a problem. Second, appellant was able to secure new and greater quantities of sheet piling, substantially more water tight and longer than it had previously obtained. The new piling could be driven several feet deeper, thus reducing the pressure of the water from below. Third, as the Government points out, appellant was able (with the additional piling) to extend the piling further up the slope of the river bank, eliminating the muck slides which had invaded the trenches in the other areas, at the ends of the rows of piling. Consequently, in our opinion the Government's theory that

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appellant should have reversed the direction of excavation in prior construction is not supported by sufficient evidence.

Moreover, we consider that appellant's method of performing excavation was based upon a reasonable interpretation of the specifications—that the excavation work should proceed in the same direction as the laying of the pipe, in order that backfilling might “follow trench excavation as closely as practicable.”

Mr. Sailer testified that the primary purpose of obtaining boring data is to inform the contractor as to the type of material he will encounter. The Government, however, uses the boring data only for information as to costs of excavation, for estimating purposes. Hence, penetration tests (which should have been of value to bidders, according to Mr. Clevenger's testimony), were not necessary for the Government's purposes. Mr. Sailer stated that he did not know whether the logs indicated a quicksand condition at any of the crossings.

Mr. Wesley G. Holtz, another expert witness who testified on behalf of the Government, was eminently qualified to furnish opinion evidence, being a member of several professional or honorary societies, and having published a number of articles on various aspects of soil mechanics in the course of about 30 years' experience in that field as a graduate engineer. As an employee of the Bureau of Reclamation, his capacity in connection with the Foss Aqueduct was supervisory, as Chief of the Soils Engineering Branch. He had been in the general area near Clinton, Oklahoma, in 1940 and 1942, but had never visited the site of the project here involved.

Mr. Holtz' testimony with respect to the drill logs, was, in essence, that the presence of sand, especially wet or “very wet” sand indicated that in certain circumstances, including water pressure, a “quick” condition and loss of stability could develop. In his opinion, it could be anticipated that the sandy materials at Crossing No. 3 could become quick, because of the height of the water table. The height of the water table gave the water a sufficient “head” to provide the pressure and velocity necessary to cause water to flow upward from below or outward through the slopes of the excavation.

The only indication of density of the sand, as shown by the logs, was the notation that in one boring at Crossing No. 2, Station 187 plus 80, the hole had caved. None of the other logs indicated that caving had occurred, therefore, Mr. Holtz said he would be led to believe that the materials revealed by other logs were sufficiently stable to maintain a vertical hole wall in place. Either loose or dense materials can become quick if they are disturbed, according to Mr. Holtz, but loose materials would become quick more readily than dense materials.

In order to perform the excavation at Crossing No. 3, in accordance with good working conditions, it was Mr. Holtz' opinion that the

water table should be drained to a point 1 to 3 feet below the bottom grade. In order to accomplish this result Mr. Holtz suggested the possible use of well points, but conceded that because of the fines in the sandy materials, well points were a "borderline" means of drainage, and might require special supplemental methods such as enlarged holes with gravel filters. Pipe drains below grade, tile drains, sump pumps and deep wells would be possible means of controlling the water. In the absence of drainage methods, piling of sufficient length to check the upward flow of water should furnish sufficient control.

Mr. Holtz was of the opinion that removal of the sheet piling after completion of the crossings would have a very small disturbing effect on the stability of the pipe.

Other Evidence

During the presentation of the Government's case, counsel for the respective parties agreed to the following stipulations, in lieu of taking further testimony on the matters involved:

1. That a dispute exists as to whether or not epoxy cement was used by appellant in the pipe joints at Crossing No. 1.
2. That testimony by a Government witness would be to the effect that no epoxy cement was used by appellant or authorized by the Government as to Crossing No. 1.
3. That testimony on the part of appellant would be to the effect that epoxy cement was used in the pipe joints at Crossing No. 1, but that appellant is unable to offer testimony that such use of epoxy cement was authorized by the Government at Crossing No. 1.
4. Both parties agree that epoxy cement was used in the pipe joints at Crossing No. 3, with the consent of the Government.
5. That on July 11, 1961, an earth slide occurred at the south and west side of the excavation at Crossing No. 3, and that such earth slide inundated the area that had been prepared for the placement of one section of pipe.
6. That during the night shift on January 27, 1962, two Government inspectors were checking the line and grade of the first two joints of pipe that had been laid at Crossing No. 1; that after they had checked the first joint of pipe and while they were checking the second joint, a slide of earth came around the ends of the rows of sheet piling and invaded the space between the rows of piling.
7. That a Government witness was prepared to testify that on one occasion he measured the flow of water being pumped by one of the two well point header pipes at Crossing No. 6, by the use of a means of measurement known as the T-square method, which is based on a chart showing the diameter of the pipe

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opening from which water is flowing, and the distance or length of the flow of water from the end of the pipe; that his calculations concerning that one pump indicated that a flow of approximately 200 gallons of water per minute were being pumped from this well point header pipe; that from this result he estimated the flow from the pump which was attached to the other header pipe for the remaining well points, and arrived at a total of about 350 to 400 gallons of water per minute being pumped at that time from all well points at Crossing No. 6.

Mr. Vern Garntham, a graduate engineer who was Chief Field Employee for the Bureau at the aqueduct project until the end of August 1961, identified several Government photographs as being illustrative of conditions during construction of the crossings.

Mr. Robert A. McCarty was Chief Superintendent of the Bureau project office during the performance of the contract. He identified a number of Government photographs and described the conditions and construction activities which were portrayed in the photograph.²

Mr. Lee Malcolm was a Government inspector on the project. He testified that about the last of January 1962, appellant constructed a ramp at Crossing No. 1, across the trench where a number of sections of pipe had been laid. In effect, this ramp consisted of an isolated section of backfill of the trench, and it was about 12 feet wide at the top, or ground level. It had been constructed by the night shift during Mr. Malcolm's absence from the site. On his return to the site the following day, Mr. Malcolm rechecked the inside of the pipe (which had been checked prior to the construction of the ramp) to the west of the ramp and found that some of the joints had openings in excess of the specification tolerances. Appellant was using this ramp or section of backfill as a road for moving its equipment from one side of the excavation to the other side.

Mr. Burt Levine, a graduate engineer with 24 years' experience, was the Project Construction Engineer for the Foss Aqueduct at the time of its completion. Prior to his eventual assignment on the project he had been Resident Engineer at Foss Dam and later Assistant Project Manager. He testified that he had observed the sheet piling that had been installed at Crossings Nos. 1 and 3, and stated that there were a number of instances where the piling was not properly interlocked. In some cases, where the alignment of the piling had gone awry, it was necessary to drive a separate piling, in the same row

² Appellant introduced 5 photographs in evidence.

The Government photographs received in evidence numbered about 40. Generally speaking, the photographs, taken by both parties, tended to prove that, as to Crossings No. 1 and 3, construction work was very difficult because of the presence of muck or of large volumes of water (except for the completion of work at Crossing No. 3), and that the conditions prevailing at Crossings Nos. 2, 4, 5, and 6 were fairly good, with moderate quantities of water or muck.

but not interlocked with the adjoining piling, in order to bring the row of piling back to proper alignment. This permitted water to leak through from the sides. Mr. Levine also observed sloughing of silty wet material or muck at the ends of the rows of piling.

On cross-examination, Mr. Levine conceded that he did not believe that the appellant's construction methods during the difficult period of construction of Crossing No. 3 (July 1961) and of Crossing No. 1 (fall of 1961) were such as to endanger the safety of employees of the stability of the pipe.

The Issues

The principal issue, of course, is whether there was a changed condition within the meaning and intent of the contract clause.³ There is no issue with respect to the requirement of prompt notice to the contracting officer. If the condition complained of was a subsurface or latent physical condition at the site, which differed materially from the conditions represented by the contract, it would be a changed condition sometimes described as one of the first category. If the contract made no representations as to the particular condition, but the condition was unknown to the contractor and was of an unusual nature, differing materially from those ordinarily encountered and generally recognized as being an inherent element of the kind of work to be performed, then the condition complained of is known as a changed condition of the second category.

Crossing No. 3—Changed Condition

In our opinion, the hydrostatic pressure encountered at Crossing No. 3 was a changed condition of the second category. Admittedly, the drill log (Government Exhibit B) indicated the presence of very wet sand on the south side of the river, at AP 243 plus 86. It does not, however, contain any indication of flowing water in large quantities nor of any hydrostatic pressure. The drill hole at that location extended to a depth of 33 feet below natural ground. The sand first reached by the auger extended from a depth of about 14 feet down to the bottom of the hole, or about elevation (EL) 1519 where it was

³ "4. CHANGED CONDITIONS"

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

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at about the same elevation as the lowest designed elevation of the pipe.

At the end of the word descriptions in this log is the following: "NOTE: SANDSTONE outcrops of Sta. 260+00." The boring did not penetrate to an elevation comparable to the designed subgrade of the pipe at its lower elevations in the river bed itself. For a distance of about 50 feet in the middle portion of the river, the subgrade for the bedding or foundation of the pipe was designed to be at a level ranging from about elevation 1518 down to about elevation 1516, depending on the thickness of the bedding required by the contracting officer. On Government's Exhibit R, the bedding requirement is shown to be 9 inches to 30 inches for Crossing No. 3, and 6 inches to 42 inches at Crossing No. 1.

The remaining drill test site for Crossing No. 3 was at AP 242 plus 48 on the opposite bank of the river, or about 138 feet distant from its companion boring on the south side. Each of the borings for the 6 river crossings is shown to be located several feet back from the edges of the river bank. Apparently, no attempt was made to make boring tests at a point between the river banks, with respect to any of the 6 crossings. At AP 242 plus 48 the drill penetrated to a depth of 34 feet below ground level or to about elevation 1517. The material in this critical area was shown as moist, silty clay, with traces of sand, first reached at a depth of 26 feet or at about elevation 1525 and extending to the bottom of the hole. Wet sand and more clay was indicated in the upper levels. As in the case of other drill log for Crossing No. 3, there was no indication of water in large quantities, nor of any hydrostatic pressure. In neither of these logs, as the testimony showed, was there any indication that tests had been made for resistance to penetration, and there was no caving of the hole (as had been noted in one of the logs for Crossing No. 2, where no water under pressure was encountered).

The mere presence of a water table (as shown at all of the crossings where test borings were made) does not, of itself, indicate that water will be encountered in quantities sufficient to cause serious difficulties. This was the considered opinion of expert witnesses for both parties, and it was borne out by appellant's actual experience at Crossings Nos. 2, 4, 5, and 6. A combination of several factors must be present (in addition to the general area conditions stressed by the Government, such as the alluvial character of the region, the random lenticular structure and cross-fingering of strata consisting of sand, silt, and clay). Moreover, at the levels where the pipe foundation was excavated, hard clay or shale and sandstone were indicated by several of the logs, and some blasting of the subgrade was necessary at Crossings Nos. 5 and 4.

The opinion evidence submitted on behalf of appellant differed from that offered by the Government in only minor particulars. Mr. Clevenger and Mr. Holtz were in substantial agreement that the logs showed no indication of hydrostatic pressure; that even where such water pressure was present, it would have to be accompanied by a condition of very loose sand in the foundation level and subgrade (which loose condition was not revealed by the logs at Crossing No. 3) in order to establish even a potential head of water under pressure that could rise through the subgrade and bottom slopes of the excavation. Even this combination might not provide an actual quicksand or unstable condition, in the absence of a disturbance of the subgrade by outside influence, such as excavation activities.

Mr. Clevenger reached the conclusion, on the basis of the evidence of the contract drawings, specifications, and logs, that he would not have been pessimistic in advising a contractor with respect to the conditions to be expected; and that "the conditions that we found there are much different than I would have anticipated from the logs."

We consider this approach to be close to the middle-of-the-road concept, reflecting neither undue pessimism nor undue optimism, that underlies the Changed Conditions clause, as discussed *infra*.

Mr. Holtz, in his testimony as an expert witness for the Government, took a most pessimistic approach to the question. His method of arriving at an opinion is exemplified by his statement at Tr. 244 that:

But, on the other hand, you must always think of the worst condition where you would have a more continuous flow of water in producing a condition like this.

At Tr. 232, Mr. Holtz stated the opinion he had reached after examination of the drill logs:

A. In the first place, these are alluvial fan deposits. They undoubtedly have been reworked considerably. Stream channels have eroded and refilled. They would be assumed to be highly lenticular, highly crossfingered, and so that any borings in this type of material are not reliable for any great distance.

The logs show the sand, silt and clay layers, and they also, in some of the holes, show high water table above the sand.

Therefore, one would anticipate that the sand would be wet and could, under certain conditions, become unstable when you were working in this material.

The "certain conditions," according to both experts, were disturbance of the material (e.g., by excavation), permeable or loose sand, and a sufficiently high velocity of water under pressure flowing upward through the sand. Disturbance of the material by excavation is obviously unavoidable. The two remaining conditions, however, while they were possibilities, were not present or apparent in the data available to bidders in the contract specifications, drawings and drill logs, nor were those conditions ascertainable from an examination of the site.

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The rationale of the Changed Conditions clause was well stated by this Board in *Erhardt Dahl Andersen*:⁴

* * * This concept is that the long-run interest of the Government, in seeking to induce bidders to hold allowances for unforeseen contingencies to a minimum, justifies it in assuming the risk that subsurface conditions will conform to those described in the contract or, if not there described, to normal conditions. * * *

* * * * *

In the instant case appellant's expert seems to have based his opinions on the theory that appellant was entitled to assume the best possible conditions consistent with the data contained in the drawings, whereas the principal expert for the Government seems to have based his opinions on the theory that appellant was bound to assume the worst possible conditions consistent with such data. Neither of these theories is compatible with the objectives of Clause 4.

These basic concepts and guidelines have their origins in *Ruff v. United States*, 96 Ct. Cl. 148, 164 (1942), wherein the Court said:

If this situation is not within the contemplation of Article 4, the alternative is that bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered. Such a practice would be very costly to the defendant. We suppose that the whole purpose of inserting Article 4 in the defendant's contracts was to induce bidders not to do that.

We conclude that appellant was not so optimistic in its appraisal of the conditions revealed by the contract as to be deprived of the equitable adjustment provided by Clause 4. Appellant expected to find water, and did encounter water in varying amounts, in Crossings Nos. 2, 4, 5, and 6. It does not complain because water was encountered in those crossings, nor even in Crossings No. 1 and 3. It does complain that water in large volumes under hydrostatic pressure was found in the Crossing No. 3, and we find that its complaint is justified. There were no indications of hydrostatic pressure of large volumes of subsurface water at any point in the entire area of the project. We conclude that the condition found was unknown and unusual, and was not to be expected from examination of the data available or a review of information generally obtainable.

Crossing No. 1—Changed Condition

No test borings or drill logs were provided by the Government with respect to Crossing No. 1. Hence, the Government did not present to prospective bidders any explicit indications of subsurface conditions at that location. Nevertheless, in weighing the factors to be considered in the design of the aqueduct, the Government considered that it should assume that subsurface conditions at Crossing No. 1 would be similar to the conditions indicated by logs of borings made at the

⁴ IBCA-223, IBCA-229 (July 17, 1961), 68 I.D. 201, 215, 216, 61-1 BCA par. 3082. Cf. *Otis Williams Company*, IBCA-324 (September 5, 1962), 69 I.D. 135, 1962 BCA par. 3487, 4 Gov. Contr. 433(j).

other five crossings (Tr. 209). Mr. Clevenger testified that if penetration tests had been made at the river crossings as to in-place strength of the subsurface materials (similar to the tests that had been performed by the Government at other locations on the project), the information provided by such tests would have affected the design of the aqueduct (Tr. 164, 166). We do not consider that the inference to be drawn from the Government's design for Crossing No. 1, or from the reliance by the Government on the logs for the other five crossings is sufficient to constitute a representation as to Crossing No. 1. It is, however, one of the elements which must be taken into account in determining whether the conditions actually encountered at Crossing No. 1 were usual for the general area of the project or whether those conditions were unknown and unusual within the meaning of the contract definition of a changed condition of the second category.

Another element for our consideration is the absence of any indications in the logs or in other portions of the contract that water in excessively large quantities or under hydrostatic pressure should be expected in the general area. As previously stated, the presence of a high water table is not *per se* an indication of hydrostatic pressure. In *Erhardt Dahl Andersen, supra*, the known conditions were strikingly similar to those in the instant appeal. That contract was performed in an alluvial valley, with a water table considerably higher than the levels of excavation to be performed, with random stratification of clay and sand, and with many indications of water in the pervious sand material, but little or no positive indication of hydrostatic pressure. As we stated in that decision, “* * * the stratification was sufficiently variable to admit of the possible presence of a clay barrier or other obstruction which would impede the free movement of water from the river to the formations that would be penetrated by the excavation or the bearing piles.”

Here, there was no positive indication of any hydrostatic pressure at any location in the entire project area. We are convinced that the amount of water pressure, the volume of water, and difficulties created thereby at Crossing No. 1 materially exceeded, not only those expected by appellant, but also the quantities and difficulties that should reasonably have been expected under normal conditions.⁵ Accordingly, the Board finds that the hydrostatic pressure encountered in excavation of Crossing No. 1 was unknown and unusual, and differing materially from the physical conditions ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. Hence, we conclude that the hydrostatic pressure which developed at Crossing No. 1 was a changed condition of the second category, within the meaning of Clause 4 of the contract.

⁵ Cf. *Layne Texas Company, IBCA-362* (January 29, 1965), 72 I.D. 39, 47, 65-1 BCA par. 4658.

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Piling Left in Place.

A subsidiary issue is the dispute as to whether appellant was justified in not pulling out the sheet piling which had been driven at Crossings Nos. 1 and 3. As related earlier, after the first half of Crossing No. 3 had been completed, and the pipe had been backfilled, a flood occurred, after most of the piling had been removed except for a small amount in the center of the crossing. When the flood had subsided, it was found that the pipe had been disturbed and was out of alignment.

Appellant attributes the damages to the fact that the piling had been pulled, and that the vibration of the piling while being removed had re-established the fluid quicksand condition which had persisted during excavation of the subgrade and laying of the pipe. This view was supported by the expert opinion of Mr. Clevenger.

The Government's position, that it was unnecessary to incur the additional expense of leaving the piling in place, was supported by its expert witness, Mr. Holtz, to the extent that in his opinion the disturbance caused by the vibration would have been very slight. Also, other Government testimony suggested that the flood caused the pipe to move. There is no evidence concerning the amount of disturbance that would be required to upset the balance of stability achieved by the measures appellant used in constructing the foundation and laying the pipe. But the testimony shows that there was no movement of the pipe at any crossing in other instances of floods that occurred after backfilling. Accordingly, the Board is persuaded that appellant's practice of leaving the sheet piling in position at Crossings Nos. 1 and 3 was a reasonable precaution involving the exercise of good construction judgment in the face of conditions that could jeopardize the safety of the pipe.

In our opinion, the precautions so taken were a direct consequence of the changed conditions at Crossings Nos. 1 and 3, and the cost of piling left in place may be taken into account in the equitable adjustment to be made with respect to such changed conditions, subject to credit for any savings resulting from not pulling out the piling.

Construction Methods

We do not attach any substantial importance to the evidence in support of the Government's defense, tending to show that appellant's construction practices and dewatering methods were responsible for the difficulties encountered at Crossings Nos. 1 and 3. Under the adverse conditions existing at those locations, the Board considers that appellant performed as well as could be expected. Moreover, no criticism seems to have been leveled at the procedures used at the crossings where lesser difficulties were encountered. Appellant com-

pleted the work required at all of the crossings, and with results which have fulfilled its 3-year warranty under the contract. Hence, its methods have proved to be successful, even though attended by difficulties. These difficulties (except for floods and cold weather) were, in our opinion, attributable to the changed conditions encountered in construction of the aqueduct at Crossings Nos. 1 and 3.

Epoxy Cement

The stipulations described *supra* concerning the disputed use of epoxy cement in the pipe joints at Crossing No. 1, lead to the conclusion that appellant has not established, by a preponderance of the evidence, that epoxy cement was used at Crossing No. 1. Accordingly, appellant has not sustained its burden of proof on that issue,⁶ and we find that appellant is not entitled to an equitable adjustment with respect to its claim for cost of epoxy cement allegedly used in the pipe joints at Crossing No. 1.

Conclusion

The appeal is sustained. The appeal file is remanded to the Contracting Officer for making the equitable adjustment required by Clause 4 Changed Conditions subject to the limitations described *supra*. If the parties are unable to agree on such adjustment, a further appeal may be taken from the Contracting Officer's decision with respect thereto.

THOMAS M. DURSTON, *Member*.

I concur:

JOHN J. HYNES, *Member*.

I concur:

DEAN F. RATZMAN, *Chairman*.

UNITED STATES

v.

BARANOF EXPLORATION AND DEVELOPMENT COMPANY

A-29914

Decided May 14, 1965

Mining Claims: Discovery—Mining Claims: Patent

When in a direct proceeding against a mining claim it is found that no discovery has been made, the claim cannot survive as a valid claim even though the decision determining that no discovery has been made merely rejects the patent application.

⁶ *Charles T. Parker Construction Co.*, IBCA 328 (February 4, 1965), 72 I.D. 49, 65-1 BCA par. 4663.

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Secretary of the Interior—Rules of Practice: Supervisory Authority of Secretary—Mining Claims: Determination of Validity

In the exercise of his supervisory authority over the public lands, the Secretary of the Interior may, without further notice and hearing, declare mining claims to be null and void where, after adversary proceedings brought against the claims, a hearing examiner has found that there has been no discovery within the limits of the claims and has rejected patent applications for the claims.

Secretary of the Interior—Rules of Practice: Supervisory Authority of Secretary

In the exercise of his supervisory authority over the public lands, the Secretary of the Interior may, after a hearing examiner's decision has become the decision of the Department, issue a clarifying decision when it becomes apparent that the parties affected do not understand the import of the earlier decision.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Baranof Exploration and Development Company has appealed to the Secretary of the Interior from a decision by the Assistant Director, Bureau of Land Management, dated December 26, 1962, which affirmed a decision of a hearing examiner, dated February 16, 1962, amending his decision of December 19, 1961, to hold null and void 15 mining claims situated on Chichagof Island in the Sitka Recording Precinct, Alaska, within the Tongass National Forest.¹

Baranof filed mineral patent applications Anchorage 030491, 030492, and 030494 covering these claims. Thereafter, the United States on the recommendation of the Forest Service, Department of Agriculture, instituted a contest proceeding against the claims on the ground, among other charges, that valuable minerals had not been found within the boundaries of the claims, or any of them, in sufficient quantities to constitute a discovery. The prayer of the complaint was that "contestee's applications for patent to said claims be rejected and mineral entries to said claims be canceled."

A hearing was had on this contest on November 9, 1960. At the hearing the representative of the Forest Service called attention to the prayer of the complaint and stated that the Forest Service in its recommendation that a contest be brought had not asked that the claims be declared null and void. The contestee thereupon stated that the words in the complaint "and mineral entries to said claims be canceled" meant, to the contestee, to cancel its right to hold the claims, whereupon the hearing examiner struck from the prayer of the complaint the above-quoted words. The parties stipulated that the hearing should be enlarged to cover the matter of a determination whether

¹The mining claims are: Baranof Nos. 1 through 7, inclusive; Dandy, Dandy Nos. 2, 3, 4, 6; Andy Extension; Handy Extension; and Handy Fractional Lode.

the claims are subject to the limitations and restrictions of the act of July 23, 1955, 69 Stat. 367, as amended, 30 U.S.C. § 601 *et seq.* (1958). There was no change as to the charge regarding a lack of discovery of valuable minerals.

The hearing examiner rendered his initial decision on December 19, 1961, finding that there had not been a discovery of a valuable mineral deposit within any of the claims. He rejected the patent applications and held the claims subject to the limitations and restrictions of section 4 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612 (1958) which provides, among other things, that rights under mining claims thereafter located shall be subject, until the issuance of patents, to the right of the United States to manage and dispose of the surface resources. No appeal was taken from this decision.

Thereafter, by the decision of February 16, 1962, the hearing examiner amended his earlier decision by declaring that because of the finding of fact of no discovery in his first decision, the claims are null and void. He relied on two departmental decisions. In the first decision, *United States v. Carlile*, 67 I.D. 417, 427 (1960), it was held that where in a contest brought against an application for a mineral patent it is determined that no discovery has been made on the claim, the necessary result of this determination of a lack of discovery is that the mining claim is invalid even though the Department purports only to reject the application for patent. The second decision, *United States v. New Park Mining Company*, A-28530 (January 25, 1961), applied the *Carlile* decision and declared mining claims to be invalid upon finding that there had been no discovery, even though the parties in advance of the hearing had stipulated that the charges and relief would extend only to the appellant's right to a mineral patent.

The appellant contends that the hearing examiner had no authority to issue his amendatory decision in view of that provision of section 8(a) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007 (1958), which provides that in the absence of an appeal within the time allowed the decision of the hearing examiner "shall without further proceedings then become the decision of the agency." It contends, further that the amendatory decision goes beyond the scope of the issues presented at the hearing which, it says, was limited to the right to mineral patent and surface rights. It contends, finally, that the amended decision would have the effect of depriving the appellant of property rights without due process.

While we do not agree that the amendatory decision has the effect which appellant attributes to it, we find it unnecessary to decide whether the hearing examiner was prevented by section 8(a) of the Administrative Procedure Act from rendering that decision.

Assuming that the hearing examiner's decision of December 19, 1961, became the final decision of the Department, the results of that

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decision are as set forth in the so-called amendatory decision of February 16, 1962, i.e., that the claims are null and void.

This is so because, contrary to the assertion of the appellant, the issue at the hearing, as set forth in the complaint, was whether valuable minerals have been found within the boundaries of the claims, or any of them, in sufficient quantities to constitute a discovery. The hearing examiner specifically found that there had been no discovery and rejected the patent applications.

A finding of no discovery means that the claimant has established no rights in the land as against the United States. *Union Oil Co. v. Smith*, 249 U.S. 337 (1919).

Although the Department did not until the latter part of 1960 in the *Carbide* case, *supra*, adopt a uniform procedure with respect to specifically declaring mining claims to be null and void when it rejected, on the ground of no discovery, applications for mineral patents covering those claims, the legal effect of rejecting a patent application for a lack of discovery has always been that the claim is without validity. The *Carbide* case, *supra*, merely pointed out the confusion which had resulted from the past actions of the Department when, in some instances, it merely rejected the patent application without specifically declaring the claim to be null and void and, in other instances, not only rejected the patent application but declared the claim invalid for lack of discovery.

The Department said:

* * * The *Union Oil* case plainly states that until discovery a mining claimant has no rights against the United States or in the land in the claim. If, then, in a direct proceeding against a patent application the Department finds that no discovery has been made, it is impossible to see how the claim can survive as a valid mining claim despite the fact that the Department purports only to reject the patent application. I am not aware that, save for such implication as may exist in the *Clipper* cases, any different standard of discovery has been required to sustain the validity of a claim merely because a patent is applied for. A claimant cannot rely upon a lesser discovery to sustain the validity of his claim than is necessary to entitle him to patent.

To put it another way, in order, as in this case, to reject an application for patent on the ground of lack of discovery, the Department must find that there has not been found a valuable mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success in developing a valuable mine. But if the Department so finds with respect to a claim, it seems it has necessarily found that there is no discovery to give the claim validity.

A mining claimant has the ultimate burden of establishing by a preponderance of the evidence that his claim is valid. *Poster v. Seaton*, 271 F. 2d 836 (D. C. Cir. 1959). If upon application for patent he is unable to prove that he has made a valid discovery, there seems to be no logical basis for holding that, although he must be refused a patent because of lack of discovery, nevertheless his claim will still be considered to be a valid claim.

It is my conclusion, therefore, that the ruling in the *Clipper Mining Company* cases should no longer be regarded as sustainable, in view of the decision in *Union Oil Co. v. Smith* and the numerous later cases that clearly and unequivocally hold that a claim has no validity in the absence of a discovery, and should no longer be followed.

* * * * *

To summarize up to this point, it is my opinion that where in a contest against a mining claim it is found that a valid discovery has not been made, it necessarily follows that the claim is invalid, or null and void, without regard to whether the contest was brought as the result of an application for patent or in the absence of an application for patent. The consequences of the invalidation are as described earlier.

Thus it was not essential for the hearing examiner to render his second decision in this case.

However that may be and assuming that the examiner's first decision of December 19, 1961, became the final decision of the Department, the Secretary of the Interior, in the exercise of his supervisory authority over the public lands,² may, when it becomes apparent that a party to a Departmental decision does not understand the effect of that decision, issue a clarifying decision in order that the party and others who may be interested in using the public domain may be put on notice as to how the Department interprets its own decision in the matter. That a clarifying decision is necessary in this case is shown by the appellant's apparent belief that it has been deprived of rights by the declaration that its claims are null and void.

Therefore, in the exercise of that authority, the decision of December 19, 1961, finding no discovery of valuable mineral deposits within the claims and rejecting the patent applications, is declared to have the effect that the claims are without validity, null and void, and that the claimant has established no rights in the lands embraced in the claims as against the United States. However, so long as the land in the claims remains subject to the operation of the mining laws, the claimant (appellant), like anyone else, is free to attempt to make a discovery on the land and to locate new claims. Until discovery, it has only the right of *pedis possessio*, as outlined in *Union Oil Co. v. Smith, supra*. As stated in that case:

* * * Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives in persistent and diligent prosecution of work looking to the discovery of mineral. (P. 348)

There is nothing unfair to the appellant in this construction of the decision of December 19, 1961.

² It has long been established that until patent issues the Secretary has supervisory authority to review all actions taken with respect to public lands, whether the matter is called to his attention by appeal or in any other wise and to take any corrective action that may be necessary. *Knight v. U.S. Land Association*, 142 U.S. 161 (1891); *State of Wisconsin et al.*, 65 I.D. 265 (1958). The power is reserved to the Secretary under the Department's rules or practice. 43 CFR 1840.0-9(d).

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Although the appellant argues, in effect, that the declaration that the claims are null and void enlarges the issue presented at the hearing and deprives it of property rights without due process of law, this is simply not so. The issue at the hearing was whether there has been a discovery of valuable minerals within the claims. The proof of discovery necessary to sustain a patent application is the same as the proof of discovery necessary to hold a claim without patent. Therefore when the appellant failed to sustain its burden of proof that discovery had been made, it necessarily failed to sustain the validity of its claim. It had no rights in the lands as against the United States. Thus the declaration that the claims are null and void deprives the appellant of nothing to which it would have been entitled under a decision merely rejecting its patent applications.

No further notice and opportunity to be heard is required in order to declare a claim null and void when the fact of no discovery has been established at a hearing, after notice.

Accordingly, and in order that there may be no question by the appellant as to its rights in the mining claims after the decision of December 19, 1961, rejecting its patent applications on the ground that no discovery of valuable mineral deposits had been found within the limits of the claims, the claims are by this decision declared to be null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), in order to clear the record, the decision of the hearing examiner of February 16, 1962, and the affirming decision of the Assistant Director, Bureau of Land Management, are set aside and the decision of December 19, 1961, as clarified by this decision, will stand as the final decision of the Department in the matter.

ERNEST F. HOM,
Assistant Solicitor.

UNION OIL COMPANY OF CALIFORNIA

A-30308

Decided May 17, 1965

Alaska: Oil and Gas Leases—Oil and Gas Leases: Royalties

A noncompetitive oil and gas lease in Alaska issued prior to July 3, 1958, and extended thereafter for a five-year term must pay royalty, when due, at the rate of 12½ percent, the rate for leases covering similar lands in the other States of the United States.

Oil and Gas Leases: Extensions

Where a noncompetitive oil and gas lease is segregated during its primary term into separate leases by commitment of a portion of the original lease to a unit agreement, the holder of the nonunitized lease may elect to have his

lease extended for a period of five years upon the expiration of its primary term rather than to accept the two-year extension granted to the segregated nonunitized lease, but once the election is made and the five-year extension is granted the lessee cannot rescind the election.

APPEAL FROM THE GEOLOGICAL SURVEY

The Union Oil Company of California has appealed to the Secretary of the Interior from a decision, dated April 1, 1964, by the Director of the Geological Survey, affirming a determination by the Acting Regional Oil and Gas Supervisor in Anchorage, Alaska, that the royalty due the United States on production from oil and gas lease Anchorage 050114 must be computed at the rate of 12½ percent.

The Shell Oil Company has filed a brief as an *amicus curiae*.

The basic facts as set forth in the Director's decision¹ are as follows: Lease Anchorage 028063 was issued October 1, 1955. A portion of the lands in the lease was committed to the Kenai unit as of July 30, 1959, and in accordance with regulation 43 CFR 192.122(c), now 43 CFR 3127.4(c), the lease was segregated into two leases, effective July 30, 1959, with the unitized portion retaining the original serial number, and the lease covering the nonunitized lands designated as Anchorage 050114. During July 1960, the lessee of Anchorage 050114, the Ohio Oil Company, applied for an extension of the lease pursuant to 43 CFR 192.120, now 43 CFR 3127.1. This extension was granted on October 12, 1960, for a period of 5 years ending September 30, 1965. Later lease Anchorage 050114 was committed to the Sterling unit agreement, approved effective July 7, 1961. The appellant, Union Oil Company of California, is the operator for that unit. About July 27, 1961, in the initial test well drilled on the Sterling unit, a discovery of gas in commercial quantities was made. A portion of the land in lease Anchorage 050114 is included within the approved initial participation area.

The appellant on this appeal simply incorporates its reasons and arguments made to the Director. Basically it contends that the royalty rate should be 5 percent instead of 12½ percent, citing a provision of the lease as it was issued which stated that for 10 years following the first discovery of oil or gas in commercial quantities, the royalty rate would be 5 percent, including all land to which production is allocated under a unit or cooperative plan. Appellant also cited section 22 of the Mineral Leasing Act of 1920, 41 Stat. 446, the so-called "Alaska Oil Proviso," in effect when the lease was originally issued. This section provided that rental and royalties for leases in Alaska "shall be fixed by the Secretary of the Interior and specified in the lease." Appellant also referred to the regulations in effect when the lease issued, 43 CFR, 1954 rev., 192.82(a) (1), providing the same

¹The case record did not accompany the appeal and has not been checked; however, there has been no dispute as to the facts.

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royalty as that designated on the lease form, 5 percent for the first 10 years following discovery and 12½ percent thereafter. It contends that these provisions govern the royalty rate and that the Director was wrong in holding that the rate was governed by the act of July 3, 1958, which amended section 22 (the Alaska Oil Proviso) of the Mineral Leasing Act of 1920, to read in pertinent part as follows:

* * * *Provided*, That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field and the royalty payments from production of oil or gas sold or removed from such lands shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant to applications or offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of 25 cents per acre as lease rental for the first year of such leases; but the aforesaid exception shall not apply in any way to royalties to be required under leases which may issue pursuant to offers or applications filed prior to May 3, 1958.

The Secretary of the Interior shall neither prescribe nor approve any cooperative or unit plan of development or operation nor any operating, drilling, or development contract establishing different royalty or rental rates for Alaska lands than for similar lands within the States of the United States. 72 Stat. 324, 30 U.S.C. § 251 (1958).

The Director held, in effect, that this provision eliminated the Secretary's discretionary authority to establish different royalty and rental rates in Alaska and constituted a change in the rules regarding lease royalty rates so that, when the 5-year extension was granted, the lease as extended was subject to the regular rate of 12½ percent. He held that the regulation under which the 5-year extension was applied for and granted, 43 CFR 192.120, now 3127.1, and the act authorizing the extension, the third paragraph of section 17 of the Mineral Leasing Act of 1920, as amended by the act of July 29, 1954, 68 Stat. 584, and section 4 of the act of September 2, 1960, 74 Stat. 789, 30 U.S.C. § 226-1 (Supp. V, 1964), provided that the extended leases would be subject to rules and regulations in effect at the end of the 5-year primary term of the lease.

It is unnecessary to go into the details of appellant's objections to this ruling of the Director and to those of the Shell Oil Company in its *amicus curiae* brief. Generally, the arguments of the Shell Oil Company regarding the alleged retrospective and unconstitutional application of the 1958 act follow those advanced by it and set forth in *Richfield Oil Corp., Shell Oil Co.*, 71 I.D. 294 (1964), pertaining to the applicability of the 1958 act with respect to rentals. That case and the case cited therein, *Colorado Oil and Gas Corporation*, 71 I.D. 284 (1964), held that an oil and gas lease in Alaska extended for a five-year term after July 3, 1958, must pay rental at the same rate as

similar leases for lands in the other States.¹ The reasoning in those cases is as applicable to the question of royalty rates as it is to the rate for rentals. Therefore, the determination by the Director with respect to which royalty rate must be applied is correct.²

There is one problem in this case which needs to be mentioned here. It was discussed in the Director's decision in response to an argument by appellant that at the time there was production upon the unit to which lease Anchorage 050114 had been committed, the lease was in an automatically extended primary term. This, it is contended, resulted because Anchorage 050114 was segregated from Anchorage 028063 effective July 30, 1959, and, in accordance with 43 CFR 192.122(c), now 43 CFR 3127.4(c), the segregated nonunitized lease was continued in force and effect "for the term thereof but for not less than two years from the date of segregation, and so long thereafter as oil or gas is produced in paying quantities." That regulation embodies the provision in the fourth paragraph of section 17(b) of the Mineral Leasing Act, as amended by the act of July 29, 1954, 68 Stat. 585.³ The appellant contends that this 2-year extension was in effect when lease Anchorage 050114 was placed within the Sterling Unit and when discovery was made within the unit prior to the expiration of that 2-year extension on July 30, 1961. The logic of appellant's argument apparently is that the lessee's application for a 5-year extension should be ignored, and that the royalty rates are governed by the rates set forth in the lease as it issued rather than by the 1958 act which did not affect leases which were in extensions of their primary terms by automatic extensions provided by the lease and regulations in effect when the lease issued.

The Director agreed that appellant's argument on this point might have some merit were it not for the fact that the lessee had applied for and was granted the 5-year extension. He considered the filing of the extension application as an election to have the lease under the 5-year extension rather than the 2-year extension, and that any right the lessee may have had with respect to the 5-percent royalty rate was relinquished by it when it applied for and was granted the 5-year extension.

¹ *Kenneth J. Kadow et al.*, A-30053 (October 5, 1964), which reached the same conclusion, is now the subject of litigation. *Kenneth J. Kadow et al. v. Udall*, Civil No. A-165, in the United States District Court for the District of Alaska.

² The legislative history of section 10 of the 1958 act on which the Department relied to support its conclusion is as applicable to royalty as it is to rental payments. In its report (S. Rept. No. 1720, 85th Cong., 2d Sess., 6-8 (1958)), the Senate Committee on Interior and Insular Affairs, which initiated the section, said

"* * * Those who have leases in effect as of the date of the act would be entitled to maintain their leases at the previous rental and royalty figure during the original term of the lease. However, the amendment causes a change in the rules and regulations; so any extended term hereafter granted on such existing leases will be subject to the increased rental and royalty figure."

³ The same provision now appears in section 17(j) of the act, as amended by the act of September 2, 1960, 74 Stat. 784, 30 U.S.C. § 226(j) (Supp. V, 1964).

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To consider whether this conclusion of the Director was correct, it is first necessary to decide whether or not the lessee in this case was entitled to make the election to have the lease extended under the provisions of section 17 for 5 years rather than for the shorter extension provided under section 17(b). This has not been decided before. However, the question as to whether the unitized portion of a lease may be granted a 5-year extension under section 17, or whether it is subject only to those extensions applicable to leases while they are committed to units and when they are excluded from units, has been considered in a Departmental decision, *Seaboard Oil Company*, 64 I.D. 405 (1957). In that decision a review was made of the pertinent statutes and it was concluded that Congress intended the 5-year extension to apply only in those cases where a lease could not be extended because of production. It was held that, because a lease committed to a unit would be extended when there was production within the unit, the placing of a lease in a producing unit gave it a producing status and therefore the 5-year extension which was intended for non-producing leases was not available.

As to the nonunitized portion of a lease which has been segregated by the unitization of another portion of the leased lands, its status as a nonproducing lease is not changed unless or until actual production is attained on the segregated nonunitized land in that lease. The reasons for holding that the 5-year extension does not apply to the unitized portion of the lease, therefore, do not apply to the nonunitized portion. Although the legislative history of the 1954 act sheds little information or light on the reasons for providing the 2-year extension for the nonunitized portion upon the segregation of a lease by unitization of part of the lands therein, it does generally show an intent to ameliorate hardships and difficulties then obtaining under the Mineral Leasing Act and to provide opportunity for a lessee for lands outside the unit plan to drill so that if oil or gas is discovered in paying quantities the lease can be continued indefinitely so long as there is production. See the reports on S. 2380, the bill which became the 1954 act, H. Rept. No. 2238 and S. Rept. 1609, both 83d Cong., 2d Sess. Upon the segregation of the lease, the nonunitized portion was entitled to be continued from that time for the entire term of the lease and the extension was intended to be applicable to all leases "whether in their primary term or secondary term or of whatever nature." See *Solicitor's Opinion*, 63 I.D. 246, 247 (1956). Thus, since at the end of the primary term of the nonunitized lease a lessee would be entitled to a 5-year extension if he applied for it timely, it would not appear to be consistent with the manifested intent of Congress to hold that the lessee could not elect to choose the extension for the longer term of years rather than that provided in section 17(b) which could be no

longer than 2 years. Indeed, such a holding would be harsh and would deny a lessee rights provided under the lease, statutes, and regulations. Such an interpretation will not be made. *Cf. Ann. Guyer Lewis et al.*, 68 I.D. 180 (1961). We must conclude, in the absence of any apparent reasons for denying a lessee such an election, that the lessee in this case was entitled to make the election which it made.⁴

With this conclusion the question remains as to what effect should be given to the election. The position of the appellant appears to be that it recognizes that an election could be made but also that there can be a subsequent opportunity by the lessee to state, with the wisdom of hindsight, that the lease was actually extended under the other statutory provision now that there is some reason why to do so might be advantageous to it. The important condition with respect to the 5-year extension which would not be pertinent to the other extension is that the extended lease would be subject to all rules and regulations in effect at the expiration of the first 5-year term. By requesting to have the extension under that condition, the lessee made an offer which was accepted by the Department upon approval of the extension application. There was thus then in effect a new lease contract incorporating all new rules and regulations. We do not believe that the lessee, or anyone claiming under the lease, can unilaterally alter that contract by later repudiating it to claim rights which may have existed prior to the acceptance of the offer. To recognize such a second election would be inconsistent with sound principles of contract law and with sound principles of administering oil and gas leases.

This situation may be compared to several other circumstances where the lessee makes an election affecting the lease. In one case where the lessee voluntarily filed a written relinquishment of the lease, it was held that the lessee had no power to rescind his relinquishment. *Thomas F. McKenna, Forrest H. Lindsay*, 62 I.D. 376 (1955). The *McKenna* decision also discusses, at 379, another case, *Seaboard Oil Company of Delaware*, A-26246 (January 18, 1952), where an oil and

⁴In *Seaboard Oil Co.*, *supra*, it was said: "In addition to the 5-year extension, the 1946 act provided for a number of other extensions. Extensions were provided in cases of payment of compensatory royalty (sec. 17, 5th par.), subsurface storage (sec. 17(b), 6th par.), segregation of leases by partial assignments (sec. 30(a); 30 U.S.C., 1952 ed., sec. 187a), and, of course, unitization. The 1946 act, however, did not correlate the various extension provisions. It did not say, in the event two or more extension provisions were applicable, which one should control. The answer, therefore, is a matter of statutory construction based upon what seemingly was the Congressional intent. Thus, as we have seen, it appears quite plain that the 5-year extension provision does not apply to producing leases. On the other hand, in the case of a partial assignment of a lease as to land not on a producing structure, where the assigned lease is entitled to a 2-year extension following a discovery on the retained portion of the lease, which extension would carry the assigned lease past its primary term, there seems to be no reason why the holder of the assigned lease may not elect to take the 5-year extension at the end of the primary term instead of the 2-year extension. It has so been held by the Director of the Bureau of Land Management. *Stanolind Oil and Gas Company et al.*, BLM-A 013349, etc. (April 30, 1956); *Clinch Drilling Company*, BLM-A 013337, etc. (November 16, 1956)." (Pp. 410-411.)

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gas lessee filed a statement under an amendatory act electing to have its lease governed by the provisions of the amendatory act rather than the law in effect before then, and later the lessee requested that its election be disregarded. It was held that once an election is made, the authority of the act is exhausted and that the election cannot be revoked. Further, in a case where the lessee filed a consent to have the lease made subject to section 31 of the Mineral Leasing Act, as amended by the act of July 29, 1954, 68 Stat. 585, 30 U.S.C. § 188 (Supp. V, 1964), providing for the automatic termination of oil and gas leases upon nonpayment of rentals, and assignments of parts of the lease and of undivided interests in the lease had been filed but not approved at the time the lessee filed his election, it was held that after the assignments had been approved and rentals were not paid timely, the lease automatically terminated because the election by the lessee had subjected the lease to the provisions of the act, and that the election when made could not be undone either by the lessee or by the Department. *Champlin Oil and Refining Co., et al.*, 66 I.D. 26, 31 (1959). We believe that the principles of these cases apply here although it was necessary that the 5-year extension application here be approved by this Department whereas the election in the other cases was made by the unilateral act of the lessee, without the necessity of departmental approval. We conclude that the election was binding as of the time it was approved and became effective.

Therefore, as the lease became subject to the terms and conditions of the 5-year extension provision, including rules and regulations in effect at the expiration of the first 5-year term, we sustain the determination of the Director that the increased royalty rate as required under the 1958 act is applicable to the lease involved here.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES

v.

C. F. SNYDER ET AL.

A-30292

Decided May 26, 1965

Mining Claims: Determination of Validity—Mining Claims: Discovery

A decision declaring lode mining claims null and void for lack of discovery is proper where evidence at a hearing supports the conclusion that there has not been a discovery of minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his

labor and means with a reasonable prospect of success in the development of the claims.

Mining Claims: Discovery

A mining claimant has the burden of proving, in a contest against his claim, that a discovery has been made after the Government has made a prima facie case that the claim is invalid for want of a discovery of a valuable mineral deposit.

Mining Claims: Hearings

A request to reopen a hearing proceeding in a contest against a mining claim to produce further evidence will be denied where there is no showing that further evidence of a discovery will be produced.

Mining Claims: Discovery—Mining Claims: Determination of Validity

An allegation of surprise by mining claimants in a contest against their claims, alleging that they were unprepared for the geological theories presented by the Government at the hearing, is properly disregarded when the theories presented related only to the manner of formation of mineral deposits in the claims involved and the critical question as to whether a discovery has been made does not depend upon consideration of the theories but can be answered on the basis of factual data presented at the hearing.

Mining Claims: Discovery

When a mining location is made and the workings on the claim consist only of surface explorations, the land in the claim is then withdrawn from mineral entry, and subsequent to the withdrawal there is a substantial mineral discovery at depth on the claim, the claim is properly declared null and void for lack of discovery when it cannot be shown that there was any physical or geological relationship between the surface deposits which are of a low mineral value not constituting a discovery and the subsequent substratum showings.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

C. F. Snyder, J. F. Allison, Max Sitton, and F. A. Sitton have appealed to the Secretary of the Interior from a decision of the Assistant Director, Bureau of Land Management, dated March 13, 1964, which affirmed a decision of a hearing examiner, dated June 15, 1962, declaring invalid the DeLuxe and Master DeLuxe lode mining claims, situated in secs. 22 and 27, T. 44 N., R. 19 W., N.M.P.M. (Lower San Miguel Mining District, San Miguel County, Colorado). The basis for the decision was that no discovery of a valuable mineral deposit had been made on the claims within the meaning of the United States mining laws prior to the effective date of Public Land Order No. 459, 13 F.R. 1763, which withdrew the lands embraced by the claims from mineral entry as of March 30, 1948, and reserved them for the use of the Atomic Energy Commission.

A hearing was held at Denver, Colorado, on May 16 and 17, 1961. According to location certificates introduced at the hearing, the claims involved were located September 10, 1941, by C. F. and C. A. Snyder,

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the discovery mineral apparently being vanadium. The issue framed by the examiner was whether the claims involved were valid existing claims on March 30, 1948, and thus within the provision of Public Land Order 459 which excepted from the withdrawal "valid existing rights." To be valid claims as of that date, there must have been a discovery of a valuable mineral deposit within the meaning of the mining laws on the claims as of that date.

Appellants submitted on appeal to the Director six affidavits by professional mining engineers, a geologist, and miners familiar with the area, allegedly contravening the Government's testimony. These affidavits were submitted to support their request for a further hearing. The Assistant Director denied the request.

On appeal to the Secretary, the appellants repeat several contentions made below. They contend, *inter alia*, that the case should be remanded for the taking of further testimony because they were allegedly surprised at the hearing by a novel geological theory presented by the Government; they contend that since they were not professional geologists they were not then able to refute the Government's testimony. The appellants also repeat their contention that the law of discovery was not properly applied in this case. They contend further that the Government did not make out a *prima facie* case of absence of discovery—that the Government's case was based upon unproved geological theory and information derived after 1955, which was thus not available to a miner in 1941 or 1948.

They contend that when the contestant in a mining case makes out a *prima facie* case the burden of going forward shifts to the contestee but the burden of proof remains upon the contestant to prove absence of discovery.

The last contention is contrary to well established law. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959), states at pages 837-838:

Appellants' third allegation of error is that the Secretary failed to hold the Government to the standard of proof required by the Administrative Procedure Act, which states that "the proponent of a rule or order shall have the burden of proof." 60 Stat. 241 (1946), 5 U.S.C.A. §1006. The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only "taken the initial steps in seeking a gratuity from the Government." * * * Until he has fully met the statutory requirements, title to the land remains in the United States. * * * Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit

existed. We do not think that Congress intended to place this burden on the Secretary.

See also *United States v. Kelly Shannon et al.*, 70 I.D. 136 (1963); *United States v. Robert G. and Orpha B. McMillan*, A-29456 (July 26, 1963).

As to the rule of discovery, the correct rule was applied in this case as set forth by the hearing examiner in his decision:

The time-honored test to be applied in determining whether a discovery has been achieved on a lode claim is that set forth by the Department in *Jefferson-Montana Copper Mines Company*, 41 L.D. 320 (1912):

1. There must be a vein or lode of quartz or other rock in place.
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit.
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

It is clear that many factors may enter into the third element: The size of the vein as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

"In other words, to constitute adequate discovery under the mining laws it must be conclusively established by competent evidence that a mineral deposit has been actually *found* and physically *uncovered* within the limits of *each* mining claim located, *and* that the situation and formation of the mineral so found and uncovered are such as to justify a prudent man in the further expenditure of time and money, with a reasonable prospect of success, in developing a valuable mine."

See also *Castle v. Womble*, 19 L.D. 455 (1894); *Chrisman v. Miller*, 197 U.S. 313 (1905); *Cameron v. United States*, 252 U.S. 450 (1920); *Best v. Humboldt Placer Mining Company*, 371 U.S. 334 (1963); and *Mulkern v. Hammatt*, 326 F. 2d 896 (9th Cir. 1964).

A showing of isolated bits of material, not connected with or leading to substantial values, does not constitute a discovery. *United States v. Frank J. Miller*, 59 I.D. 446 (1947); *United States v. Richard L. and Nellie V. Effenbeck*, A-29113 (January 15, 1963). Nor is it sufficient to constitute a discovery that the mineral showings indicate only that more exploratory work is warranted. *United States v. Clyde R. Altman and Charles M. Russell*, 68 I.D. 235 (1961). Nor may a discovery be based upon geological inference since geological inference, no matter how strong, cannot be substituted for discovery and the showing of mineralization on nearby claims cannot serve to establish discovery. Cf. *H. Leslie Parker et al.*, 54 I.D. 165 (1933); *United States v. John R. and Pearl S. Dodson*, A-27905 (July 31, 1959).

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Further, the mere hope or expectation, based upon a general belief, that values will increase at depth is not sufficient to validate a claim. *United States v. Duvall and Russell*, 65 I.D. 458 (1958).

Particularly applicable to this case is the long-established rule of the Department, stated in the case of *Rough Rider and Other Lode Claims*, 41 L.D. 242 (1911), as follows (syllabus):

The exposure of substantially valueless deposits on the surface of a lode mining claim, in themselves insusceptible of practical development, but which taken in connection with other established geological and mineralogical conditions in the district lead to the hope or belief that a valuable mineral deposit exists within the claim, does not constitute the discovery of a vein or lode within the meaning of the law nor afford a valid basis for a lode location.

In subsequent consideration of the *Rough Rider* case, *supra*, the Department held that since the Department had for years allowed mining locations to be made in the area and to go to patent on the basis of the showings held to be inadequate in the *Rough Rider* decision, *supra*, it would not give the ruling quoted a retroactive effect. *Rough Rider and Other Lode Mining Claims*, 42 L.D. 584 (1913). However, the rule has been applied to all claims located after the date of the first *Rough Rider* decision. *Gonzales v. Stewart*, 46 L.D. 85, 88 (1917); *United States v. Bunker Hill and Sullivan Mining and Concentrating Company*, 48 L.D. 598 (1922); *United States v. Arizona Manganese Corporation*, *United States v. Chapin Exploration Company*, 57 I.D. 558 (1942); *United States v. Wallace A. Schwartz et al.*, A-7673 (June 20, 1933); *Emil Marks et al.*, A-7671 (November 11, 1933); *Ellen T. Gasson*, A-9897 (November 11, 1933).

Upon a careful review of the evidence, I am of the opinion that the Government clearly made out a prima facie case that there was no discovery here within the requirements of the mining laws on the date of the withdrawal or prior thereto and that the Government's case was not successfully refuted by the appellants.

The evidence at the hearing shows that the two claims in question are located on the Morrison formation which consists of the Brushy Basin member and the Salt Wash member, the latter immediately underlying the Brushy Basin member. (Apparently the term "Morrison formation" is used also to refer only to the Salt Wash member (Tr. 257). The Brushy Basin member is exposed on the surface of the claims. (Tr. 22.) The principal minerals in the area are uranium and vanadium which are mainly found in the Salt Wash member, although they are also found in the Brushy Basin member. The minerals occur in the Salt Wash member in tabular-shaped ore bodies or rolls which rarely exceed 20 feet in thickness. (Tr. 23-24, 100, 196-197.)

There is no evidence that prior to the effective date of Public Land Order 459 any holes were drilled or shafts sunk on the claims to the Salt Wash member (Tr. 276). The first holes were drilled in 1958,

approximately 10 years later, and in 1959 and 1960 (Tr. 249). Uranium ore was struck at a depth of 201 feet in the Salt Wash member (Tr. 251) and approximately 2,500 tons of ore have been removed (Tr. 255).

Ralph Spengler, a geologist and mining engineer, testified for the Government that he took four samples from surface points on the claims, two from each claim, and that only one sample showed ore grade material. He said it was a high grade sample which was not representative of the entire radioactivity outcrop that he sampled. (Tr. 57.) He concluded:

My opinion is that a person of ordinary prudence would not be justified in the further expenditure of his time and money with a reasonable prospect of developing a paying mine on these claims. I base this opinion upon the evidence that I have observed on the surface of the claims. I base it upon the assays that I have taken; upon the size of this mineralization, which I believe has no appreciable extent, and I base this opinion upon my knowledge of the occurrence of uranium in the Morrison formation, of its characteristics, of its relation to various geological structures * * *. (Tr. 122.)

James McIntosh, also a mining engineer testifying for the Government, took two samples which he had assayed. He said that the assay signified to him that

* * * the material I sampled is low grade uranium-vanadium bearing material, and * * * the places I sampled deserve of some more exploratory work, but they do not deserve the commencing of mining operations. (Tr. 212).

He concurred in Spengler's conclusion stated above (Tr. 222).

The appellants do not appear to contend seriously that their alleged discovery is based upon their surface explorations; rather they attempt to link their surface findings with their subsequent discovery in the Salt Wash member in 1958, over 10 years subsequent to the withdrawal of the land from mineral entry.

This is the critical issue in this case, whether the mineralization found in the surface of the claims in the Brushy Basin member as of the effective date of the withdrawal may be considered as a discovery of the mineral deposits found 10 years later at depth in the Salt Wash member. Appellants contend, in effect, that their surface findings constitute such a discovery because they are indicators of and part of the greater values at depth.

At the hearing, F. A. Sitton was the only one to testify for the appellants on this issue. He testified that he had engaged in mining since 1937, that he had mined from the Morrison formation in the area, that in four different groups of claims on which he found mineralization in the surface Brushy Basin formation, he also found paying ore in the "Morrison" (Salt Wash) formation below. On the basis of this experience he stated that there is a definite relationship between the two. (Tr. 242-247; 247 is incorrectly paginated 248.)

Sitton, however, did not testify that there was any physical con-

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nection between the surface mineralization and the ore body found below. In fact, in describing his experience in striking ore in the Salt Wash member in the four groups of claims where he first found surface mineralization in the Brushy Basin member, he testified that he found nothing of interest between the surface mineralization and the ore body at depth. The only indication of mineralization below that he relied on was the fact that in each instance he was drilling in a "soft" formation. (Tr. 258-265). When asked whether the material in the soft formation was distinguishable from the surrounding material, he simply said that it was "softer"; that he had not paid any attention to or noticed whether it differed in any other way, such as color; that he did not particularly know whether the material was soft until it was drilled (Tr. 259). In other words, he found no vein, lode, fissure, or other geological structure connecting the surface mineralization with the ore deposits below. They were completely disconnected.

The six affidavits introduced by the appellants in support of a new hearing also do not establish that there is any geologic relation between the Brushy Basin and Salt Wash formations. The affidavit of Elbert E. Lewis states that he is familiar with 11 mines in the Colorado Plateau Region which have produced vanadium and uranium and have reported production from the Brushy Basin, and that many of these "began from outcrops with similar surface mineralization to that found on the DeLuxe claims." This affidavit posits no relation at all between the Brushy Basin and Salt Wash formation. It indicates only other possible mineralization in the Brushy Basin. The affidavit of E. V. Reinhardt merely indicates that both formations contain mineralized areas. The affidavit of Blair Burwell states that there exists confusion as to where the Brushy Basin ends and the Salt Wash begins but that the occurrence of a mineralized conglomerate on the Brushy Basin is evidence of mineralization in the Salt Wash. Burwell's affidavit, although attempting to establish a connection between these two formations, has not pointed to any definitive factual evidence establishing such connection. The affidavit of W. Everett Haldane stated that other claims with which he was familiar had commercial production from the Brushy Basin. The affidavit of Max L. Sitton contains nothing establishing a relationship between the formations. The affidavit of F. A. Sitton states that on a number of claims where he has found surface mineralization on the Brushy Basin, he has then found further commercial mineralization in the Salt Wash. But, again as at the hearing, he has not established any definite physical or geological linkage between the two.

The testimony of the Government witnesses clearly stated that there was no relation. Spengler testified—

I see no relation between slight shows of mineralization in the Brushy Basin member, and any hope of finding ore in the Salt Wash member. (Tr. 122.)

In response to the question asked of Spengler whether in his study of the mining activity in the Uravan Mineral Belt which includes this claim, he had "discovered any references to any mines which follow directly through a vein or some other similar path, mineralization from the Brushy Basin member of the Morrison formation to the Salt Wash member of the Morrison formation in this area?" Spengler responded—

I know of no such mines which follow from the Brushy Basin member into the Salt Wash member in this area. (Tr. 99.)

Spengler reaffirmed several times his opinion that no connection existed (Tr. 132, 148, 166, 172-173, 179-184). He stated—

I found no publications written connecting the Salt Wash with the Brushy Basin. (Tr. 185.)

McIntosh, the other Government witness, agreed that there was no correction (Tr. 214).

On the basis of this testimony by the Government's witnesses and the absence of countervailing evidence by the appellants, I conclude that no physical or geological connection has been shown to exist between the surface mineralization in the claims and the mineral deposits found 10 years later to exist at depth in the claims. The fact that experience in the area might have indicated that ore bodies at depth might be found where surface mineralization existed does not satisfy the requirement of a discovery. The situation here is precisely that ruled on in the *Rough Rider* case, *supra*.

In this connection, only brief note need be taken of appellants' claim that they were surprised by the testimony of the Government witnesses as to the geological theories concerning the manner in which the vanadium and uranium deposits may have been formed in the area. While the theories were advanced for the purpose of showing lack of connection between the mineralization in the Salt Wash member and that in the Brushy Basin, they were admitted to be unproved (Tr. 31-32). Disregarding them completely, as we have done up to now, we have ample evidence of lack of connection upon which to base a decision here. There is no necessity, therefore, to examine the theories advanced.

This leaves for consideration only the belated efforts made in the affidavits submitted to the Director to show that the mineralization existing prior to the withdrawal on the surface of the claims was sufficient to constitute a discovery. At the hearing no serious attempt was made by appellants to claim that their surface findings were sufficient to constitute a discovery. F. A. Sitton did testify that he examined the discovery cuts on the claims in 1944 and that in his opinion they showed mineralization that would have caused a reasonably prudent person to proceed further (Tr. 251). However, he sampled

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only one claim, the DeLuxe; the sample assayed at 1.85 percent vanadium ore (Tr. 251-253). Despite this testimony as to value in 1944, Sitton did not attempt to lease the claims at that time because he did not have a drill rig that would go over 18 to 20 feet. He waited until 1958, 14 years later, before he bought a half-interest and leased a half-interest in the claims and then he drilled his first hole 201 feet deep to find the ore body in the Salt Wash member.¹ Thereafter he drilled another 46 holes to depths varying from 50 to 230 feet. (Tr. 249-251.) These delayed acts are scarcely indicative of a belief in 1944 that a valuable mine could be developed out of the surface mineralization found on the claims at that time.

C. F. Snyder, one of the locators and appellants, testified that, aside from the discovery work that he did, he did no actual mining on the claims prior to about 1958 and that he did no drilling or other exploratory work at all on the claims (Tr. 275-276). This inactivity from the location of the claims in 1941 to the commencement of drilling operations in 1958 to a lower formation is scarcely evidence of a discovery of a valuable deposit in the surface cuts prior to the withdrawal in 1948.

At the hearing there was evidence that in the 1940's vanadium ore had to average 1.25 percent vanadium pentoxide to be sold (Tr. 255). There was also indication that the lowest grade of uranium ore that could be sold was .10 percent uranium oxide (Tr. 113). While this was questioned by the contestees (Tr. 117), they offered no evidence that uranium ore of a lower grade was salable. Of the six samples taken by the Government witnesses only one, described by Spengler as not representative, assayed over .92 percent vanadium pentoxide and .097 percent uranium oxide. The others were much lower (Contestants' Exhibits 17 and 37). An assay certificate submitted by the contestees showed two samples from the claims assaying .05 and .09 percent uranium oxide and .07 and .81 percent vanadium pentoxide (Contestees' Exhibit D).

Looking at the affidavits submitted on appeal to the Director, we find that Lewis sampled an outcrop on the DeLuxe claim which assayed at .04 and .105 percent uranium oxide and .41 and .96 percent vanadium pentoxide. Reinhardt cut three samples which showed .062, .014, and .021 percent uranium oxide and .61, .29, and .35 percent vanadium pentoxide. Haldane took a grab sample on the DeLuxe claim which ran .66 percent vanadium pentoxide. The other affiants did not sample. However, F. A. Sitton attached a statement of the

¹ It is interesting and significant to note that according to the abstract of title furnished with the contestees' answer to the contest complaint, the lease to Sitton, executed September 8, 1958, provided that within 20 days from that date lessee was required to start a drilling program and drill no less than 3000 feet and to start a mining operation within 30 days after completion of drilling "providing Lessee shall discover on leases property an ore body of commercial grade and quantity [sic] that is amenable to treatment."

ore sold from the Deluxe claim, presumably from the Salt Wash deposit, in the period 1959-62. This statement showed that the ore averaged 1.59 percent vanadium pentoxide and .2178 percent uranium oxide, far higher percentages than those shown by the surface samples taken by the affiants and the Government witnesses.

In short, the great preponderance of the evidence, including that submitted by the contestees, is that the mineralization found on the surface of the claims, even as of this late date, is of such a low grade as to have no commercial value.

In this connection, it is to be noted that, except possibly for the affidavit of Reinhardt, no evidence has been submitted at any time as to the possible or probable size of the vein, lode, or deposit claimed to have been discovered on the surface of the claims. (See Tr. 96, 98.) Thus, even a high-grade sample of an isolated bit of material would be meaningless in itself without a showing of the probable size of the deposit from which the sample was taken. Reinhardt's affidavit refers to sampling a 200-foot outcrop which had evidence throughout of vanadium minerals and in two places of ore-grade mineral. However, he sampled the two points with the negligible results listed above.

Thus, although the affiants expressed their opinion that a prudent man would have been justified in 1941 or 1948 in spending time and money on the claims with the reasonable expectation of developing a paying mine, not one stated his belief that the mineralization found on the surface in the Brushy Basin member *constituted in itself* a discovery of a valuable deposit. Rather the affiants were saying no more than that the mineralization found warranted a prudent man in proceeding further to find a valuable deposit which could reasonably be inferred to exist at depth but *which had not yet been reached* when the withdrawal became effective on March 30, 1948.

To summarize, the only valuable mineral deposit shown to exist on the claims is the deposit found by drilling in 1958 to exist at a depth of 201 feet in the Salt Wash formation. There is no evidence that any portion of *this deposit* extends to the surface and was uncovered on March 30, 1948.

Accordingly, it must be concluded that no discovery of a valuable mineral deposit has been shown to have been made as of March 30, 1948, and no showing has been made that a further hearing would be productive of evidence that such a discovery had been made.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the Assistant Director's decision is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

HUGH MacCALLUM WOODWORTH

A-30285

*Decided May 5, 1965**

Mining Claims: Generally—Mining Claims: Surface Uses—Surface Resources Act: Generally—Surface Resources Act: Verified Statement

Although the alienage of a mining claimant may not provide a ground for collateral attack upon his possessory title by other claimants, it is a ground upon which the United States, as sovereign, may reject the alien's verified statement filed under the act of July 23, 1955, asserting surface rights to a mining claim; because the mining laws authorize the occupancy and purchase of public lands for their minerals only by United States citizens or those who have declared their intent to become citizens.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Hugh MacCallum Woodworth has appealed to the Secretary of the Interior from a decision by the Division of Appeals, Bureau of Land Management, dated February 20, 1964, affirming a Spokane land office decision rejecting his verified statement filed after notice to him of proceedings initiated by the United States Forest Service under section 5(a) of the act of July 23, 1955, 69 Stat. 369, 30 U.S.C. §613 (1958), on the ground that the verified statement did not contain the dates of location of the mining claims listed in the statement as required by the act. The land office had also stated another ground for rejection, that the claimant is not a citizen of the United States. The Division of Appeals, however, stated that the question of the claimant's citizenship is pertinent to patenting the claims and did not need to be determined in this proceeding.

A notice requiring mining claimants to file verified statements in accordance with section 5(a) of the act of July 23, 1955, *supra*, was first published on May 8, 1957, at the request of the Forest Service. Appellant's affidavit was timely filed on July 31, 1957, setting forth a portion of the required information. The information held to be lacking was data setting forth the dates of location of the claims and recording information. Appellant in his affidavit as to the date of location and book and page of recordation of the notice or certificate of location simply stated:

Unknown, as records were destroyed by a fire at Ellensburg (then County Seat) about 1889.

Appellant in his present appeal refers to this statement and asserts that it "at least places the dates as 'prior to 1889'." He contends that the "act of God which removed the official records from all human access" should excuse him from supplying them more precisely.

*Not in chronological order.

The act of July 23, 1955, requires a verified statement to set forth the date of the mining location and the book and page of recordation of the notice or certificate of location, together with other information. The argument implied in appellant's statement on appeal regarding the information given in his verified statement is that he furnished all the information available to him because of the impossibility of furnishing the explicit information due to the destruction of the records.

Although it is likely that the appellant could have given more information than he chose to, even assuming that literal compliance with the requirements of the statute and notice was not possible, it is not necessary to decide the appeal on this ground because the decision below must be affirmed for another reason. This reason is the second ground given by the land office, the appellant's lack of citizenship. The appellant has not denied his lack of citizenship in the United States but indeed has affirmatively stated in a letter to the land office that he is a citizen of Canada and has not declared his intention of becoming a citizen of the United States. He contended in his appeal from the land office decision that the absence of citizenship could not be a defect in his statement because United States citizenship was never stated as a requirement. He also stated that the State of Washington recognizes possessory title to mining claims by aliens and that he has not been informed of any "overruling of this" by the Federal Government.

The Division of Appeals suggested that the issue of citizenship need not be raised as to a verified statement because it is pertinent only to the patenting of claims. This suggestion overlooks the fact that the proceedings brought under the 1955 act raise a question of superior right and title in mining claims, so far as surface uses of the claims are concerned, as between the claimant or claimants and the United States. The 1955 act provides a means whereby the usage of surface resources on mining claims can be limited solely to that necessary for mining purposes by permitting the owner of a mining claim to waive any rights to surface resources, either expressly, or by failing to file timely the required verified statement. If the statement is filed a hearing is held to determine the validity and effectiveness of any right or title to, or interest in or under, the mining claim contrary to rights of the United States to manage and dispose of surface resources other than mineral deposits subject to location under the mining laws. See the discussion regarding the necessity of proving a discovery in order for a claimant to prevail at such a hearing. *United States v. Clarence E. Payne*, 68 I.D. 250 (1961).

The mining law, particularly Rev. Stat. § 2319 (1875), 30 U.S.C. § 22 (1958), provides that lands having valuable mineral deposits shall be free "and open to occupation and purchase by citizens of the

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United States and those who have declared their intention to become such." See also Rev. Stat. § 2321 (1875), 30 U.S.C. § 24 (1958). Patent may be issued to any person authorized to locate a claim under that provision. Rev. Stat. § 2325 (1875), 30 U.S.C. § 29 (1958). In cases applying these provisions where there have been questions of alienage, the general rule that has been followed is that the incapacity of a person to take and hold a mining claim by reason of his lack of citizenship is open to question by the government only and not by others except in behalf of the government. See *Manuel v. Wulff*, 152 U.S. 505 (1894). In that case the naturalization of a Canadian alien was held to have a retroactive effect giving validity to his mining location "so as to be deemed a waiver of all liability to forfeiture and a confirmation of title." *Id.* at 511.

As stated in another case, the meaning of *Manuel v. Wulff* is that the "location by an alien and all the rights following from such location are voidable, not void, and are free from attack by anyone except the government." *McKinley Mining Co. v. Alaska Mining Co.*, 183 U.S. 563, 572 (1902); see also *Billings v. Aspen Mining & Smelting Co.*, 51 Fed. 338 (8th Cir. 1892), *rehearing denied*, 52 Fed. 250, *appeal dismissed*, *Aspen Mining & Smelting Co. v. Billings*, 150 U.S. 31 (1893), and other cases listed under the notes on citizenship in 30 U.S.C.A. following sec. 22. These cases generally involve disputes among private claimants and not a dispute between an alien and the United States. In the cases, there is the recognition that, although the possessory title of an alien may not be subject to collateral attack because of his alienage by citizens, it is defeasible by the sovereign, the United States.

Thus, although the appellant as an alien may have a possessory interest in the mining claims which would be recognized in any disputes between him and other claimants, he is here attempting to assert a possessory right and title superior to the United States. The fact that he acquired his interest in the claim from his father who acquired it through a sheriff's sale, which was recognized in the Washington courts, does not matter here. The essential factor is that by filing the verified statement under the 1955 act, although it is not a request for a patent, nevertheless, the appellant is asserting rights superior to those of the United States as to the surface resources of the claim. Because appellant has admitted his lack of citizenship and also that he has not filed a declaration of intent to become a citizen, there are no essential facts in dispute which require a hearing to resolve.

The question then remains: what rights, if any, does the appellant, as an alien, have against the United States with respect to this mining claim? As mentioned previously, the mining laws declare that public lands are open to "occupancy and purchase" by citizens and those who

have declared their intent to become citizens. The appellant, not falling into either of those categories, thus is not qualified to purchase a claim from the United States nor can he hold a claim under possession or occupancy against the United States. This being the case his verified statement cannot be accepted as giving him a right superior to the United States to the use and management of the surface resources on the claims.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision is affirmed as to the rejection of the verified statement but for the reasons above given.

ERNEST F. HOM,
Assistant Solicitor.

**RAMPART ENTERPRISES
JOSEPH ROSCOE LEWIS**

A-30317

Decided June 7, 1965

Alaska: Homesteads—Alaska: Possessory Rights—Alaska: Trade and Manufacturing Sites—Applications and Entries: Priority

A protest filed by one who has filed a notice of occupancy and settlement of a trade and manufacturing site alleging superior rights of possession against a homestead entry, for which notice of submission of final proof has been published, is properly dismissed when the protestant fails, as required by section 10 of the act of May 14, 1898, to commence an action within 60 days in a court of competent jurisdiction.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Rampart Enterprises has appealed to the Secretary of the Interior from a decision dated May 1, 1964, of the Division of Appeals which affirmed a decision of the Anchorage land office dismissing its protest against the reinstatement of homestead entry Anchorage 033375 of Joseph Roscoe Lewis.

Lewis' original entry was allowed on January 4, 1957, for the S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 33, T. 16 N., R. 3 W., S. M. Alaska, followed by the allowance on May 31, 1957, of his additional entry Anchorage 034167 for the N $\frac{1}{2}$ of the same NE $\frac{1}{4}$. The original entry was closed on the records of the land office on November 21, 1960, when a letter to Lewis dated October 10, 1960, requiring him to file a mineral waiver or take other action lest his claim be canceled and the case closed on land office records was returned undelivered.¹ On January 16, 1962, Lewis filed

¹ It appears that Lewis had notified the land office on October 29, 1958, of his change of address for his additional entry, but had neglected to mention his original entry in his letter as he was required to do. *Keweenaw Oil Company*, 67 I.D. 305 (1960); cf. 43 CFR 221.93, now 43 CFR 1840.0-6(c).

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final proof, and on March 7, 1962, after notice from the land office of the cancellation of his entry, he filed a request for the reinstatement of his original entry.

Meanwhile on August 25, 1961, Rampart Enterprises filed a "Notice of Location of Settlement Or Occupancy Claim In Alaska" pursuant to section 5 of the act of April 29, 1950, 64 Stat. 95, 48 U.S.C. § 461a (1958), stating that it settled on or occupied the S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 33 as a trade and manufacturing site under section 10 of the act of May 14, 1898, 30 Stat. 413, as amended, 48 U.S.C. §§ 461, 462 (1958). The land office rejected Rampart's notice as unacceptable in a decision dated November 29, 1961, on the ground that the proposed use, a garbage dump, did not come within the terms of the trade and manufacturing site act, *supra*. On appeal the Division of Appeals, Bureau of Land Management, on March 5, 1962, vacated that decision and remanded the case for further proceedings.

Thereafter, a field examination was made to determine whose improvements were on the land. On April 29, 1963, the land office issued a decision, allowing reinstatement of Lewis' original entry and again rejecting Rampart's notice, this time on the grounds that Rampart had not appropriated the land at all and that the reinstatement of Lewis' entry had a retroactive effect to the entry's original date of allowance so that the land was not available for occupancy by Rampart. Rampart filed a protest against the land office's determination.

The land office meanwhile continued to process Lewis' final proof. Pursuant to a land office notice of September 27, 1963, publication of submission of final proof was made in the Anchorage Daily Times on October 2, 9, 16, 23, and 30, 1963, as required by the pertinent regulation, 43 CFR 2211.9-7(b)(2). The notice stated, in conformity with a provision of section 10 of the act of May 14, 1898, as amended, *supra*, 48 U.S.C. § 359 (1958):

* * * Any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

In a decision dated October 24, 1963, the land office dismissed Rampart's protest against its decision of April 29, 1963. The land office concluded that upon the reinstatement of Lewis' homestead entry Rampart's claim became ineffective, and that the entry, having on it a 20' x 24' frame house and a cultivated area of 7 to 8 acres was not

"vacant" land open to occupancy as a trade and manufacturing site. It then quoted the notice of publication, *supra*, and noted that Rampart might wish to follow the procedure it described. Rampart made no attempt to comply with the terms of the statute, but instead filed an appeal from the land office decision.

On appeal, the Division of Appeals held that since an examination of the land revealed that no improvements had been placed on the land by Rampart it gained no rights to it merely by filing a notice of occupancy and that the land was open to other entry, citing *Loran John Whittington, Chester H. Cone, A-28823* (August 18, 1961).

On appeal, Rampart argues that Lewis' entry could not be reinstated because the filing of its notice and its doing of concurrent and subsequent acts of appropriation constituted an intervening claim which severed the land from the public domain; that if it is to be deprived of its rights, there first must be a contest; and that, in any event, Lewis filed his final proof after the five-year period for filing such proof had elapsed.

This extended examination of the record demonstrates how intensively interwoven have been the proceeding under the two claims and that the rival claimants were aware of each other's interests no later than April 29, 1963, the date of the land office letter to Rampart.

In a recent decision the Department considered in detail the resolution of conflicting claims to public lands in Alaska. After discussing the last paragraph of section 10 of the act of May 14, 1898, as amended, *supra*, and court and Departmental decisions interpreting it, the Department held that a protest filed by an applicant for a homesite against an application to purchase a headquarter site within 30 days after publication of the latter application, based on the assertion of a superior right to part of the land included in the headquarter site application, is properly dismissed if the homesite applicant fails, as required by section 10, *supra*, to commence an action within 60 days in a court of competent jurisdiction to quiet title to the land in conflict. *John Martin Pearson, 70 I.D. 523* (1963). It then concluded that the appellant's failure to comply with the statute lost him his right to claim possession of the disputed land superior to the rival claimant. *Id.*

This decision disposes of Rampart's rights. As it held, Rampart not only lost its right to assert rights to the land in conflict superior to Lewis', but also to raise by protest before the Department the issues it should have litigated in a court action. Therefore Rampart's protest was properly dismissed.

There remains appellant's contention that Lewis filed his final proof late. The land office decision of October 24, 1963, held that as the entryman did not submit final proof until January 18, 1962, amended

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on July 8, 1963, while the entry was allowed on January 4, 1957, the proof was not submitted during the 5-year period allowed by the homestead statute (Rev. Stat. § 2291 (1875), as amended, 43 U.S.C. § 164 (1958)), made applicable to Alaska by section 1 of the act of May 14, 1898, 30 Stat. 409, as amended, 48 U.S.C. § 371 (1958). It said, however, that the case would be subject to equitable adjudication, all else being regular. This is a proper disposition, considering that the delay extended for only a few days and that there are no intervening rights.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Division of Appeals is affirmed for the reasons stated.

ERNEST F. HOM,
Assistant Solicitor.

CLAYTON E. RACCA

A-30305

Decided June 7, 1965

Alaska: Trade and Manufacturing Sites—Rules of Practice: Hearings

Where an applicant to purchase an 80-acre trade and manufacturing site claim asserts that he has occupied and used all the acreage in meeting the requirements of section 10 of the act of May 14, 1898, and requests a hearing to prove the extent of the acreage so claimed after the Bureau has required him to amend his application by filing a new description to include no more than 10 acres, the case will be remanded for a hearing to resolve the factual issues raised relevant to the issue of whether the requirements of the act have been satisfied and, if so, what acreage the applicant may be entitled to purchase.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Clayton E. Racca has appealed to the Secretary of the Interior from a decision by the Division of Appeals, Bureau of Land Management, dated March 23, 1964, affirming an Anchorage land office decision which rejected in part his application to purchase an 80-acre tract as a trade and manufacturing site, by holding that a 10-acre tract would be sufficient to include the maximum acreage occupied and actually used for trade, business or other productive industry. The decision allowed the claimant time within which he could furnish a description to include 10 acres as his claim.

Appellant objects to the Bureau decisions. He states that the Bureau has apparently agreed that he has complied with the laws and regulations pertaining to the acquisition of trade and manufactur-

ing sites and that the only dispute is to the amount of acreage which should be allotted to him. He states that there was no showing by the Bureau as to how the 10-acre figure was reached and he asserts that the determination as to how much land he is entitled to must be settled at a hearing and cannot be arbitrarily established by the Bureau or by himself. He therefore repeats a request for a hearing which was denied in the decision below on the ground that there is no likelihood that a hearing would develop facts decisive of any issue and no showing had been made that evidence to controvert the facts of record could be produced by the appellant. However, appellant swears on appeal under oath that the 80-acre tract is actually being used and occupied as a necessary part of a bona-fide trade and productive industry, that the type of business he will conduct will require somewhere near 80 acres or his business will have to be reduced proportionately, and that he cannot conduct the business within a 10-acre site. He asserts that he has placed improvements throughout the claim consisting of cabins and other structures, camp sites along the frontage of the lake which his claim adjoins, and riding trails. He also asserts that much of his time spent on improvements was spent in building a road to the claim and he contends that this should be considered as part of the improvements.

Appellant's application and claim were made under section 10 of the act of May 14, 1898, 30 Stat. 413, as amended, 48 U.S.C. §§ 461, 462 (1958), which permits the purchase of not more than 80 acres by one:

* * * in possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * *

Provided, That no entry shall be allowed under this Act on lands abutting on navigable water of more than eighty rods.

* * * * *
As amended further by section 5 of the act of April 29, 1950, 64 Stat. 95, 48 U.S.C. § 461a. (1958), notice of occupancy under this act is required to be filed in a land office within 90 days from its initiation in order for the claimant to receive credit for such occupancy, and an application to purchase the claims along with the required proof or showing must be filed within five years after the filing of the notice of claim.

Appellant's notice of location of settlement or occupancy under the act was filed on May 13, 1958. The notice stated that there were no buildings or improvements on the land, and also that the claim was desired "as a hunting-fishing resort, lodge, boat and cabin rentals, and other relative operations." His application to purchase was filed on

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May 7, 1963. It listed the following improvements with their costs: log cabin 20 x 12, \$1500; frame cabin 10 x 20, \$800; frame cabin 10 x 18, \$800; trailer house, \$950; barn 22 x 12, \$800; road \$3600; trails, clearing and dozing, \$2000; with an estimated total value of the improvements of \$10,450. It also stated that a cabin was "contracted last year" at \$1500 but had not yet been built and that its value was not included in the value of improvements. The nature of the trade, business or productive industry was given as a "resort, horse boarding, riding stables, and Const. Company Headquarters."

The decision below found that although it was intent of the appellant to use the 80-acre tract for boarding horses, promoting a riding stable and providing riding trails for prospective paying guests and for certain other purposes to develop a recreational area, it appeared from appellant's own assertions that other than slight use for a resort and construction company headquarters, the business was simply prospective and that only 10 acres would be the maximum amount of acreage occupied and needed for the business which was in operation prior to the expiration of the 5-year life of the claim. It concluded that the prospective business could not be considered as meeting the requirements, citing 43 CFR 81.6(a), now 43 CFR 2213.1-2(d).

The difficulty with the appellant's position, as was noted in the decision below, is that he has not made an offer of specific proof to dispute specific facts mentioned in the decisions below. He has in this appeal generally asserted usage and need for the entire 80-acre tract and he desires a hearing to delineate the exact acreage to which he is entitled. The Bureau did indicate that there were improvements at various places throughout the tract but did not indicate which improvements could be those which constituted a business as meeting the requirements of the act.

The case which is before us is unsatisfactory insofar as both the Bureau and the appellant are concerned because of this denial and dispute as to the pertinent facts regarding occupancy and the interpretations which should be drawn from those facts which show some occupancy. Therefore, a hearing in this case is desirable to clarify whether or not the facts of improvement and occupancy are sufficient indeed to meet the requirements of the act, and, if so, the extent of the acreage which did meet the requirements. Also, there needs to be a determination as to whether the lake adjoining the claim is navigable, for it appears from the record that appellant's claim comprises more than eighty rods abutting the lake, and the act permits an entry to abut only eighty rods on navigable water.

We may point out that insofar as the decisions below indicated that there must be actual occupancy and use for the purposes mentioned in

the act before purchase may be permitted, they are correct. See *Wilbur J. Erskine*, 51 L.D. 194 (1925).¹ They were also correct in indicating that the requirements had to be satisfied before the filing of the final proof, within the 5-year life of the claim, since the 1950 amendment requires the application to purchase, with the required proof, to be filed within 5 years after the filing of the notice of claim.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions appealed from are set aside and the case is remanded to the Anchorage land office so that a hearing may be held for the purpose of resolving the issues stated above as to whether there were sufficient acts of possession and occupancy in good faith to meet the requirements of the act of May 14, 1898, and, if so, the extent of land so occupied and used which may be allowed to the claimant. If need be, there should also be appropriate action taken regarding the question as to the validity of the claim or any part of the claim with respect to the question of whether the claim abuts navigable water and may be in violation of the act insofar as the proviso forbidding a claim of more than eighty rods in such circumstances is concerned.

ERNEST F. HOM,
Assistant Solicitor.

PETER PAN SEAFOODS, INC.

v.

WILLIAM SHIMMEL

June 7, 1965

A-30280

**Contests and Protests: Generally—Rules of Practice: Private Contests—
Alaska: Trade and Manufacturing Sites—Soldiers' Additional Home-
steads: Generally**

A private contest against a trade and manufacturing site claim cannot be instituted by a person seeking a preference right of entry pursuant to the acts of May 14, 1880, or March 3, 1891, since those acts relate only to contests against homestead and desert land entries.

**Contests and Protests: Generally—Rules of Practice: Private Contests—
Alaska: Trade and Manufacturing Sites—Soldiers' Additional Home-
steads: Generally**

¹ Note that the *Erskine* case followed rulings made under an earlier act, section 12 of the act of March 3, 1891, 26 Stat. 1095, authorizing purchase of lands by one "in possession of and occupying public lands in Alaska for the purpose of trade or manufacture," and held that the 1891 act was substantially similar to the 1898 act insofar as the requirements of occupancy and use for the purposes stated in the acts. It is clear that in cases under the 1891 act the Department did not permit a claimant to obtain more lands than were actually improved and used for trade and manufacture. See *John G. Brady*, 26 L.D. 305 (1898), and cases cited therein; *Alaska Improvement Co.*, 27 L.D. 451 (1898); *Price et al. v. Moore*, 30 L.D. 397 (1901).

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A private contest against a trade and manufacturing site claim cannot be instituted by a soldiers' additional homestead applicant not claiming present title to or an interest in the land involved; however, the defective contest may be considered to be a protest and adjudicated accordingly.

**Alaska: Trade and Manufacturing Sites—Soldiers' Additional Homesteads:
Lands Subject to**

When notice of location of a trade and manufacturing site claim has been filed and subsequent thereto a soldiers' additional homestead application is filed for the land, and the trade site applicant admits that he has made no improvements on the land or done anything else in furtherance of establishing a trade and manufacturing site beyond filing a notice of location, no right to the land has been acquired by the trade and manufacturing site applicant, and the land is properly subject to the filing of the soldiers' additional homestead application.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Peter Pan Seafoods, Inc., has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated January 24, 1964, which affirmed as modified an Anchorage, Alaska, land office decision, dated May 8, 1963, summarily dismissing appellant's contest complaint No. 1658 against the Alaska trade and manufacturing site claim of William Shimmel on the ground that no authority exists for a private party to initiate a contest against an Alaska trade and manufacturing site claim.¹

The Division of Appeals affirmed dismissal of the contest on the same ground. It then proceeded to consider the complaint as a protest and dismissed it on the ground that, since the trade and manufacturing site claim was recorded, a prima facie valid entry on the land had been established and no subsequent application for the land could be filed. It therefore rejected the soldiers' additional homestead application filed by the appellant subsequent to the filing by William Shimmel of his notice of location of his trade and manufacturing site. It held that the land within Shimmel's claim is not subject to further application or entry unless and until his claim is canceled, after investigation into his compliance with the settlement provisions of the trade and manufacturing site law, 30 Stat. 413 (1898), 48 U.S.C. § 461 (1958).

The appellant contends on this appeal that it was entitled to bring a contest against Shimmel's claim.

The Department's regulations provide that a private contest may be brought by any person (1) "who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land" or (2) "who seeks to acquire a preference right pursuant

¹ The land office decision also noted that there was an issue as to whether a corporation is a "person" capable of initiating a contest under 43 CFR 1852.1-1 but did not rule on this issue, because of the manner in which it disposed of the case. The Division of Appeals decision held that a corporation is a proper party and erroneously stated that the land office decision had held to the contrary.

to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329) * * *." 43 CFR 1852.1-1. Because appellant stated in its contest complaint that it was seeking to gain a preference right on the land in Shimmel's claim, the Bureau assumed that appellant was seeking to qualify as a contestant in category (2). Since the acts of May 14, 1880, and March 3, 1891, cited in the regulation, provide only for a preference right of entry in the case of contests against homestead and desert land entries, the Bureau correctly held that appellant could not qualify as a contestant in category (2).

However, it was error to dismiss the contest without considering whether appellant qualified under category (1). As to this, the regulation permits a contest to be initiated only by a person who claims title to or an interest in land. This means the assertion of a *present* title to or a *present* interest in land and excludes one who, like appellant, is merely seeking to acquire title to land. Compare the former regulation, 43 CFR, 1954 rev., 221.1. Accordingly, appellant was not qualified as a contestant under category (1) so that its contest complaint was properly dismissed.

Nonetheless, appellant's defective contest complaint may be considered as a protest (43 CFR 1852.1-2) against Shimmel's claim and will be adjudicated as such.

The record shows that on August 15, 1961, Shimmel filed with the land office his notice of location under the trade and manufacturing site law, as required by 43 CFR 2213.1-1(a), indicating that settlement or occupancy was made by him July 29, 1961. On December 19, 1962, appellant filed its soldiers' additional homestead entry application for the same land. Item 4 of that application stated that the land "is unoccupied, unimproved, and unappropriated by any person * * * other than myself." On March 8, 1963, the appellant filed its contest complaint against Shimmel's claim, paying the requisite fees on March 12, 1963, which is taken as the date of initiation of the contest. The complaint alleged in part that Shimmel was not on August 15, 1961, when he filed his location notice, actually using and occupying the land for trade or manufacture, that he had placed no improvements on the land and that he had made the location as a site for a prospective business, which he had not established. The appellant alleged that it, not Shimmel, was occupying the land on August 15, 1961, and prior and subsequent thereto.

Shimmel, in his answer to the complaint on April 8, 1963, stated that he had "been on the property many times" but admitted that he had not yet moved any buildings or supplies onto the property because of lack of access and that he had not yet begun any business on the property. He stated that he intended to use the property to good advantage but would have to get access to it at all times.

June 7, 1965

The Department has consistently held that the right to acquire a trade and manufacturing site is limited to land which is actually occupied and used for purposes of trade and manufacture and that an application for a prospective business site is not within the law. *Wilbur J. Erskine*, 51 L.D. 194 (1925). The Department has specifically held that the mere filing of a notice of location of a trade and manufacturing site claim, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection. *Loran John Whittington, Chester H. Cone*, A-28823 (August 18, 1961). Since by his own admission Shimmel had done nothing other than to file his notice of location and to visit the land, without making any improvements or commencing any business on the land, appellant's application for the land was properly filed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision appealed from is affirmed to the extent that it dismissed appellant's contest complaint but is reversed to the extent that it rejected appellant's application and the case is remanded for further consideration of appellant's soldiers' additional homestead application.

ERNEST F. HOM,
Assistant Solicitor.

**WESTLANDS WATER DISTRICT CONTRACT
CENTRAL VALLEY PROJECT, CALIFORNIA—
EXCESS LAND LIMITATIONS**

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Recordable Contracts

Under section 46 of the act of May 25, 1926 (44 Stat. 649, 650; 43 U.S.C. 423e) the Secretary may allow purchasers of lands which are excess or which become excess upon the purchase to execute recordable contracts for the breakup of such lands after the execution of a water service or repayment contract, but only with respect to lands which are excess before the initial delivery of water to the irrigation block in which the excess land lies.

M-36613 distinguished and limited.

M-36666

June 16, 1965

TO: REGIONAL SOLICITOR, SACRAMENTO, CALIFORNIA

SUBJECT: WESTLANDS WATER DISTRICT CONTRACT, CENTRAL VALLEY PROJECT, CALIFORNIA—EXCESS LAND LIMITATIONS

By letter dated June 4, 1963, to you, the Manager-Chief Counsel, Westlands Water District, requested our opinion as to whether persons

who purchased lands subsequent to the execution of a water contract with the District, but prior to the date of initial water delivery, will be eligible to receive water for such after-purchased lands as are excess in their hands by executing recordable contracts. The question was asked in reference both to lands which were excess at the time of the execution of the District contract and to lands which would become excess only in the hands of the purchaser by reason of having been purchased subsequent to the execution of the District contract. The basic question is whether such lands are excess within the meaning of the term "excess" as used in the third sentence of section 46 of the Omnibus Adjustment act of May 25, 1926 (44 Stat. 649, 650; 43 U.S.C. 423e) so that the owner thereof may execute a recordable contract for the sale of such lands and therefore receive water.

After careful consideration of the facts in respect to Westlands Water District and the applicable law, I have concluded that the Secretary has discretion to declare such lands to be eligible in the hands of the purchasers for the execution of a recordable contract.

Factually, it appears that even though a water service contract with the Westlands Water District was executed on June 5, 1963, and a distribution system construction contract on April 1, 1965, it is unlikely that water will become available through the distribution system for the district earlier than 1968. It is not likely that the system will be totally finished until 1972. There is, thus, a period of several years during which project benefit will not, in fact, be available in the Westlands Water District.

Section 46 of the Omnibus Adjustment Act of 1926 states in respect of recordable contracts that "* * * no [such] excess lands so held shall receive water from any project or division if the owner thereof shall refuse to execute valid recordable contracts * * *." In *Kings and Kern River Projects*, 68 I.D. 372 (1961), a distinction was drawn between those excess lands which were considered to be pre-existing, with which the recordable contract provision of section 46 deals, and the so-called coalescence of holdings. The point of distinction is the date of initial water delivery. The prohibition on coalescence is effective only after water delivery.¹ See also *id.*, p. 296, n. 63 and 374 (syll.). Adherence to this distinction will more readily bring about a principal objective of the excess land provisions of Reclamation law—the breaking up of large units into family-sized irrigated farms. The placing of excess lands under recordable contract is the initial step in

¹ Permitting recordable contracts to be executed for excess lands acquired to the date of initial delivery of water has no effect upon the anti-speculation provisions of section 46 because after the execution of a district contract, any lands which fall into the category of excess at any time are subject to sale only at a price fixed by the Secretary on the basis of appraisal.

CENTRAL VALLEY PROJ., CALIF.—EXCESS LAND LIMITATIONS

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breaking up large land-holdings into family farms. While this fact obviously cannot serve as an excuse for establishing an eligibility date not authorized by law, it is nevertheless a relevant factor in considering which interpretation will best comport with the statute's underlying objective.

This conclusion is supported also by the fact that the United States could defer execution of a repayment (or water service) contract under section 46 until it is ready to deliver water. In such a case, obviously, the cutoff date for determining for what excess land an owner may sign a recordable contract would be the water delivery date. That repayment contracts are in practice entered into earlier is because of a policy of the appropriations committees of the Congress, strongly supported by the Commissioner of Reclamation and the Secretary, that expenditure of funds for construction of single purpose irrigation facilities should have the security of a firm water user repayment commitment in the form of an executed contract. See the Statement of the Managers on the Part of the House included in the Conference Report on the Public Works Appropriation bill, 1957 (H.R. Rep. No. 2413, 84th Cong., 2d Sess., June 25, 1956).

We do not believe that, on its facts, *Acting Solicitor's opinion*, M-36613² dated July 18, 1961, "Lands Eligible to be Placed under Recordable Contracts" is inconsistent with this opinion. In M-36613, the Acting Solicitor held that recordable contracts were not available in respect to lands voluntarily acquired after the execution of the governing water service or repayment contract and which were excess in the hands of the purchaser. In that case it appears that water was available and that initial deliveries had been made prior to the time the questioned transfer of land took place. Therefore, the decision therein was correct in relation to the facts of that case, but the statements made therein should be given no wider application.

In Westlands Water District, on the other hand, the concern is with lands which are excess before the initial delivery of water even if they do not remain in the same ownership, and which are subject to sale at an approved price while excess during the period of time before initial deliveries of water to the irrigation block. The recordable contract, when executed, carries out the fundamental objective of section 46 in securing the breakup of the excess holdings after project benefits have become available. I, therefore, conclude that such lands in the hands of the purchaser are eligible for recordable contracts.

EDWARD WEINBERG,

Deputy Solicitor.

² 68 I.D. 433 (1961).

HERBERT H. BLAKEMORE ET AL.

A-30253

*Decided June 22, 1965***Confidential Information—Public Records—Mining Claims: Contests**

Reports of examinations of mining claims by Government examiners are generally considered as confidential intra-departmental communications and will not be made available to mining claimants; however, in an exceptional case where the Government flooded the land in a claim before initiation of a contest challenging the mineral character of the flooded land and there appears no obvious detriment to the public interest, the reports will be made available to the mining claimants.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Herbert H. Blakemore, Barry E. Froman, and Margareta W. Marker have appealed to the Secretary of the Interior from a decision by the Associate Director, Bureau of Land Management, dated January 7, 1964, denying a request made in their behalf by their attorney for copies of reports made by Bureau mining engineers regarding the appellants' Little Papoose placer mining claim.

An earlier request had been made by appellants' attorney to the Sacramento land office for copies of maps, mineral surveys, reports and other documents in the Bureau files relative to the Little Papoose placer mining claim for his use in preparing a defense to a contest brought by the Government against the mining claim. The charge made in the contest complaint was that certain enumerated subdivisions within the claim are nonmineral in character and should be excluded from the claim. The land office informed the attorney that no survey of the claim had been necessary and denied the request for copies of mineral reports on the ground that it had long been the practice of this Department to treat reports of mineral examinations as confidential and not open to public inspection. The denial was based on a determination that the "disclosure of the record would be prejudicial to the interests of the Government." 43 CFR 2.2(a). Thereafter, a further request for copies of the reports was made to the Director of the Bureau, which was denied in the decision being appealed.

In this appeal, the appellants contend that they are entitled to see the reports, that denial of their request would be an abuse of executive privilege, and that the refusal of the Bureau of Land Management to release these reports to them is unfair and would cause them great hardship in defending against the contest brought against the claim, in view of the action previously taken by the Department with respect to this claim and the fact that the land has now been inundated by Trinity Lake.

Because of the circumstances of this case, and without attempting

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to answer appellants' arguments in detail,¹ I feel that the appellants may, without prejudice to the Government, be furnished with copies of the two reports made by a Bureau mining engineer respecting the claim which, to date, have been denied them.

The circumstances which lead to this conclusion are these:

By decision dated October 20, 1958, the acting manager of the Sacramento land office declared that part of the Little Papoose mining claim in the SE $\frac{1}{4}$ sec. 14, T. 34 N., R. 8 W., M.D.M., California (the land which is now the subject of the contest), to be invalid on the ground that the SE $\frac{1}{4}$ sec. 14 was included in Power Project Withdrawal No. 247 of September 1, 1922, and that the records of the Sacramento land office failed to indicate that the owner of the mining claim filed a notice of his location within one year from August 11, 1955, as required by section 4 of the act of August 11, 1955, 69 Stat. 683, 30 U.S.C. § 623 (1958). This holding was based on a Solicitor's opinion of October 30, 1957, 64 I.D. 393. The 1958 decision declared that part of the claim in the S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 14 (10 acres) to be a valid claim. The land office decision was affirmed on appeal to the Director, Bureau of Land Management, by a decision dated July 8, 1960 (*United States v. Edward M. Sorenson et al.*, Sacramento 10-10 etc.).

However, on July 14, 1960, the United States District Court for the Northern District of California, in *Frank McDonald v. Raymond R. Best et al.*, Civil No. 7858, held that the act of August 11, 1955, does not provide for, or authorize, the forfeiture of mining claims for failure of the claimant to file notice of location in the land office. The court discussed and disagreed with the Solicitor's opinion of October 30, 1957. In a supplemental decision rendered on October 4, 1960, in *B. E. Burnnigh*, 67 I.D. 366, the Secretary, in the exercise of his supervisory authority, said:

Although this Department does not agree with the court's interpretation of the 1955 act, the Department is accepting the court's decision because the question presented has been determined not to be of great administrative importance. In view thereof, the Solicitor's opinion of October 30, 1957, will no longer be followed.

Shortly thereafter, on January 3, 1961, the Director of the Bureau of Land Management, vacated his decision of July 8, 1960, and returned the case record of the Little Papoose placer mining claim to the field for such further action as might be deemed appropriate in the premises.

It was apparently during the interval between the land office de-

¹ These arguments are for the most part fully answered in *United States v. Julius S. Foster et al.*, A-28252 (January 25, 1961), and in *Appeal of Vitro Corporation of America*, 71 I.D. 301 (1964).

cision of October 20, 1958, and the Director's decision of January 3, 1961, during which period that part of the Little Papoose claim was considered to be invalid for failure to record, that the land in question was inundated as a result of the Trinity River project.

The charge now brought against that part of the claim is that each subdivision thereof is nonmineral in character and not, as appellants seem to believe, that no discovery was made within the limits of the claim.²

Although the Department holds, generally, that reports of examinations of mining claims by Bureau personnel are considered as confidential, intra-departmental communications which are not to be made available to mining claimants, I have examined the reports in question and I find nothing therein which it would be prejudicial to the interests of the Government to disclose.

The Department is now challenging that part of the Little Papoose claim which it at one time held to be invalid on an entirely different ground and, in view of the fact that action by the Government has prevented the appellants from making a physical examination of the land at this time, it seems only fair that the appellants be permitted to see the reports made before the land was inundated. Thus, I believe that, in view of the unusual position in which the appellants are placed by the bringing of the contest against these lands, after the lands have been inundated, no unnecessary obstacles should be placed in the way of their preparing their defense. *Cf. United States v. Julius S. Foster et al., supra, fn. 1.*

Therefore, the reports of Lewis S. Zentner dated August 10, 1956, and October 7, 1958, relating to the Little Papoose placer mining claim, will be made available to the appellants. These are the only mineral reports that have been made of the claim.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior, 43 CFR 2.2(b), the decision of the Associate Director, Bureau of Land Management, dated January 7, 1964, is reversed and the case is remanded to the Bureau of Land Management for making the two reports available for inspection or copying by the appellants.

EDWARD WEINBERG,
Deputy Solicitor.

² The complaint states that the S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 14 was deeded to the United States on April 25, 1960, and that that land is not involved in the contest proceeding.

SAM K. VIERSEN, JR.**A-30063***Decided June 30, 1965***Accretion—Oil and Gas Leases: Lands Subject to**

Where land is added by accretion to a surveyed lot of public land riparian to a nonnavigable body of water in which the United States has title to the bed to its medial line, and oil and gas lease of the upland lot described according to the plat of survey covers only the land in the original lot to the meander line.

Boundaries—Submerged Lands—Oil and Gas Leases: Lands Subject to

Where a surveyed lot of public land riparian to a nonnavigable body of water is leased according to the plat of survey, the area covered by the original lot remains in the lease even though part of the lot is later covered by water.

Oil and Gas Leases: Description of Land—Oil and Gas Leases: Applications: Description

Where a metes and bounds description in an oil and gas offer refers to land applied for as being in a river bed, but the tract described as plotted on an aerial photograph made part of the offer, the acreage applied for and the rental paid makes it plain that the land applied for covers some land formerly in the river bed but now fast land as the result of accretion, a lease issued pursuant to the offer covers the described accreted land as well as the land still remaining in the river bed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Sam K. Viersen, Jr., has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated May 2, 1963, which affirmed a New Mexico land office decision dismissing his protest against the issuance of oil and gas lease New Mexico 088586 (Okla.), effective August 1, 1960, as to certain lands allegedly in conflict with Viersen's oil and gas lease New Mexico 020990 (Okla.). Viersen's lease was issued effective January 1, 1959, pursuant to his offer filed September 8, 1955.

Oil and gas lease New Mexico 088586 (Okla.) is currently held by the Ashland Oil and Refining Company (hereafter referred to as Ashland) as to the lands in question here. It was issued pursuant to an offer filed March 28, 1960, by Cresap P. Watson. Both leases were issued under the authority of section 17 of the Mineral Leasing Act of 1920, as amended, 60 Stat. 951 (1946), and as further amended, 30 U.S.C. § 226 (1958).

Viersen and Ashland both requested of the land office that there be a determination by this Department as to which of these two oil and gas leases included a tract of land, totalling 22.95 acres, which had accreted to two lots shown on the latest official plat of survey, approved in 1874, as bordering the left bank of the Canadian River. Both lessees

allege that their leases include this tract, Viersen, because his lease offer and lease describe the lots by number, and Ashland, because the metes and bounds description of riverbed lands in its offer and lease includes the tract in the calls.

In order to resolve the legal questions raised by appellant, the basic facts upon which both parties appear to agree and upon which the Bureau's decisions are premised must be set in perspective. Apparently since the 1874 survey, when certain lots were shown as meandered along the bank of the Canadian River, the course of the river has gradually shifted, resulting in the eroding away or inundation of some of the lots and adding an increase by way of accretion to other lots. Viersen's offer and the lease issued pursuant to it described by legal subdivision the following lots: lot 4, sec. 17, lots 1, 2 and 3, sec. 19, and lot 1, sec. 20, T. 17 N., R. 17 W., Indian Meridian, Oklahoma, in Dewey County. The stated total acreage for the lease was 113.3 acres, which would be the total acreage of the lots as indicated from the acreage shown on the survey plat of 1874. The land office decision indicated that all of lot 1, sec. 20, is completely inundated and has become river bed riparian to land not in Government ownership; that also because of inundation and loss by erosion lot 4, sec. 17, contains only 5.22 acres out of an original 26 acres (the lease as to that lot has been assigned and designated as lease New Mexico 020990-A, which is not in question here); that, likewise, lot 1, sec. 19, contains only 10.5 acres out of an original 37.68; that lot 2, sec. 19, has 12.1 acres out of an original 25.87, with .25 acre being added by accretion; and that lot 3, sec. 19, has had added to it by accretion 22.7 acres to the original 11.5 acres (actually the original acreage shown on the plat is 11.75 acres). Thus the small accretion to lot 2 and the rather substantial accretion to lot 3 constitute the 22.95 acre tract in controversy here.

Ashland's lease was issued for lands as they were described by metes and bounds in the offer and as pertinent here included a tract designated as "Tract 3a." Before giving the calls of the metes and bounds description which includes the disputed tract, the offer described "Tract 3a" as "an unsurveyed tract of land lying in the bed of the Canadian River riparian to Lots 1, 2, and 3, Sec. 19, T. 17 N., R. 17 W., Indian Meridian, Oklahoma." The appellant has submitted a copy of a private survey plat prepared by the Sinclair Oil and Gas Company showing the lots and tract in question here in relation to the original survey with the course of the river then shown and in relation to the present course of the river. Appellant has also submitted a copy of an agreement which he and Ashland entered into regarding the development of the tract in dispute pending a final determination as to which lease covers it, and in which he agreed that the lands described in his

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lease which have been inundated and which have been included in Ashland's lease, should be allocated to Ashland's lease.¹

The Bureau decisions held that Viersen's lease did not include the accreted lands because the accretions occurring after the 1874 survey were unsurveyed lands, and an offer for unsurveyed lands had to describe them by metes and bounds, citing regulation 43 CFR 192.42 (d), in effect when his offer was filed.²

Appellant contends that the Bureau decisions are erroneous because they ignore the general rule of law with respect to accretions that has been widely followed in this country in the Federal and State courts. He quotes the following statement of the Supreme Court in *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 188 (1890):

* * * Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to the fixed side lines; so that, as long as the doctrine of accretion applies, the water line, no matter how much it may shift, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

He then contends that grants by the United States of its public lands bounded by streams or other waters, navigable or nonnavigable, made without reservation or restriction are to be construed as to their effect according to the law of the State in which the land lies, citing *Hardin v. Shedd*, 190 U.S. 508 (1903). He cites several cases involving Oklahoma law on accretions, including *Braddock v. Wilkins*, 182 Okla. 5, 75 P. 2d 1139 (1938), to the effect that the general common law rule is followed when a conveyance of land by lot numbers contains a stated number of acres within the meander line as it existed at the time of the government survey, and such a statement as to acreage does not limit the extent of the grant, but the water line remains the boundary and all accretions existing at the time of the execution of the instrument are conveyed. He calls special attention to another case, *Pasotex Petroleum Co. v. Cameron*, 283 F. 2d 63 (10th Cir. 1960),

¹The record shows that the Geological Survey by memorandum of September 7, 1961, to the land office reported that a productive well had been established in the area and that effective August 8, 1961, certain lands, including those involved here, were added to the West Valley Center undefined known geologic structure, and that the State of Oklahoma Corporation Commission has established section 19 described above as a drilling and spacing unit.

²The regulation then provided in pertinent part that:

"Each offer must describe the lands by legal subdivision, section, township, and range, if the lands are surveyed, and if not surveyed, by a metes and bounds description connected with a corner of the public land surveys by course and distance * * *" 19 F.R. 9013.

The pertinent provisions now appear in 43 CFR 3123.8(a) and provide:

"If the lands have been surveyed under the public land rectangular system, each offer must describe the lands by legal subdivision, section, township, and range. If the lands have not been so surveyed, each offer must describe the lands by metes and bounds * * *."

where reformation of an oil and gas lease between private parties was authorized upon a showing that the parties had not intended accreted lands to be included in the lease, but had made a mutual mistake of law not knowing that under Oklahoma law the lease describing a legal subdivision bordering a nonnavigable stream conveyed accreted lands by operation of law. Therefore, he contends that if these general principles with respect to boundaries and accretions as stated in *Jefferis v. East Omaha Land Co.*, *supra*, and *Braddock v. Wilkins*, *supra*, are adhered to in this case, the accreted lands became "surveyed land" by operation of law." He states that the boundaries of lots 2 and 3, sec. 19, have not been constant nor have the number of acres remained the same because of the gradual change in the course of the Canadian River, but that this does not preclude additions to the lots taking on the "attributes of surveyed land." He states that a prime effect of the operation of the general rule of law on accretions is to permit the description of accreted lands by reference to the legal subdivision to which they have accreted and become a part and to eliminate the necessity for making what would amount to perpetual surveys as the process of accretion takes place. He states that the accreted tract in question is surveyed land as the term is intended and contemplated in the regulations mentioned above, and that his offer and lease properly describes it by legal subdivision. He contends that, in any event, his lease description is better than that in Ashland's lease since there is an ambiguity in Ashland's lease in that the disputed tract is generally described as lying in the bed of the river whereas the metes and bounds description purports to describe it as upland.

In response, Ashland states that the authorities and decisions cited by appellant are not in point because the eastern boundary of the surveyed lots in 1959 was the meandered survey line and the disputed tract was unsurveyed public land. It refers to Item 5 (e) of Viersen's offer to lease whereby he certified that he had "described all surveyed lands by legal subdivisions and unsurveyed lands by metes and bounds." Ashland refers to the regulations cited by the Bureau and contends generally that the Bureau's decisions are correct.³

One point which must first be clarified is the question of the applicability of State law which the appellant has suggested. *Hardin v. Shedd*, *supra*, which he cites, simply followed the leading case, *Hardin v. Jordan*, 140 U.S. 371 (1891), which ruled in effect that where the uplands adjoining nonnavigable water bodies have been conveyed by the United States, the question as to whether the patentee or the State

³ Ashland also contends that Viersen's notice of appeal was not filed within 30 days after service of the Director's decision upon him and that thus the case should be closed. This contention is fallacious since the record shows that the Director's decision was served on Viersen on May 9, 1963. His notice of appeal and filing fee were timely filed on June 7, 1963.

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has title to the water bed adjoining the uplands is dependent upon State law. It is not clear but it appears that appellant thus desires State law to be applicable in construing a conveyance under the Mineral Leasing Act. However, construing a lease under that act is a different proposition from construing the effect of a patent in the circumstances obtaining in *Hardin v. Shedd*, *supra*, because a lease issued under that act does not give the lessee "anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals." *Boesche v. Udall*, 373 U.S. 472, 478 (1963). In considering the applicability of particular State laws as affecting ownership interests in oil and gas leases (i.e., community property laws with respect to acreage limitations and requirements upon lessees) this Department has expressly held that the question whether title to Federal land has passed must be resolved by the laws of the United States, for it is only after title has passed that property becomes subject to the operation of State laws. Solicitor's opinion, 64 I.D. 44, 47 (1957). Therefore, apart from the question here of whether the ownership of the oil and gas deposits is in the United States, it is abundantly clear that in construing the extent of the area conveyed by a lease issued under the Mineral Leasing Act, principles of Federal law must be applied. Cf. *Producers Oil Co. v. Hansen*, 238 U.S. 325, 338 (1915), which viewed Federal law to determine whether accretions to lands were included in patents issued by the United States. Nevertheless, the references by appellant to cases applying Oklahoma law are of interest here for two reasons. First, they show that Oklahoma purports to follow the general common law rule with respect to boundaries of tracts bordering waterways and the effect of conveyances of such tracts. Second, they show that a grantee of the fee title to lots shown on survey plats as bordering rivers would be considered the owner of the accretions. There is thus no question but that a patentee from the United States would be considered under State law as the owner of the accretions.

One fact not mentioned by the parties or the Bureau but which is revealed by the land status records is that the two lots in question here, to which there have been accretions, were patented on September 19, 1939, with the oil and gas deposits reserved to the United States under the act of July 17, 1914, 38 Stat. 509, as amended, 30 U.S.C. §§ 121-123 (1958). There is no information in the record to show whether or not the accretions occurred prior to patent of the lots or after or possibly constantly both before and after patent. It does appear that there is no likelihood that these accretions occurred before the survey and that they were omitted from the survey because of error or fraud, thus bringing into operation the exception to the general rule as given in *Producers Oil Co. v. Hansen*, *supra*, that where it

appears that water bodies were not actually meandered because of fraud or mistake, the boundary of a conveyance will be the meander line, rather than the water line, with the accreted lands being considered as Federal lands. If the general rule of the *Jefferis* case, quoted *supra*, is followed in considering the patent, any accretions then existing would be considered as conveyed under the patent describing the lots, and the patentee would also take title to subsequent accretions to the lots. For the purpose of this appeal, we shall assume and take the position that the reservation of the oil and gas deposits by the United States applies to all of the lands which the patentee acquired by virtue of its conveyance from the United States, either before or after the patent.

Before considering the effect of the oil and gas lease which described the lots as legal surveyed subdivisions as did the patent, two further cases should be mentioned since they bear upon the question of how conveyances (patents) by the United States should be construed where accretions have occurred after the survey of the lands but before patent. In a Departmental decision, *Madison v. Basart*, 59 I.D. 415 (1947), a homestead entryman entered and acquired patent for one surveyed lot containing 34.98 acres. However, before entry was made and patent obtained for the lot, which at the time of the survey had bordered the river, a substantial accretion had formed of more than $3\frac{1}{2}$ to 4 times that area, and the meander line was more than a half mile from the river. It was emphasized that the entryman was aware of these facts when he made his entry, yet he paid money only for the acreage of 34.98 acres. It was held that, in these circumstances, the entryman received what he was entitled to receive and that the area conveyed was confined to that within the meander line. Mention was made of one of the reasons for the rule using the water line as the boundary, that a person who stands to lose land by erosion should have the opportunity to gain by accretion, but it was felt that this reason did not apply in those circumstances.

The *Madison v. Basart*, case *supra*, was criticized by a Federal district court in *United States v. 11,993.32 Acres of Land, etc.*, 116 F. Supp. 671, 677-679 (D. N.D. 1953), which refused to follow it in construing patents in somewhat similar circumstances. The court attempted to distinguish cases relied on in *Madison v. Basart* (in footnote 14, at 422) in its finding that another so-called exception to the general rule that the water line rather than the meander line governs where a substantial accretion occurs after survey but before patent, could be explained on other bases and involved situations where other facts were relied on as creating an estoppel or waiver of rights, etc. One rationale for the decision in *Madison v. Basart* was that the ruling it made would avoid the prohibition against the

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making of an entry on unsurveyed lands. However, this point overlooks the fact that the Supreme Court in the *Jefferis* case and other cases and this Department before that decision (see cases listed in *State of Utah*, 70 I.D. 27 (1963), with the appended decision by the Director, Bureau of Land Management, dated May 31, 1961, at 31, on page 35) apparently did not consider lands which have accreted as being unsurveyed in the sense that the prohibition against entry and patent applied. With respect to an argument that the accreted lands are unsurveyed, the court in *United States v. 11,993.32 Acres of Land, etc.*, at 679, stated that this must be "weighed against the fact that the general area within which the tract lies had been surveyed." It noted further that "Exactness in the survey of rivers was, as a practical matter, impossible; stability of such a survey could not have been contemplated. Therefore, approximation must have been the resolution intended." In discussing the intention of the parties the Court stated that if there was any intent to limit the conveyances by excluding the accretions, this could easily have been done by including the words "without accretions" in the patents, but since that was not done, in view of the rule of the *Jefferis* case, and because it appeared that the intent was that the lands bordered by the river as shown by the survey would be conveyed, the water line would govern rather than the meander line in determining the extent of land owned by patentees.

This leads to the precise issue which this appeal has raised, as to whether the appellant's failure to describe the accreted lands as unsurveyed lands with a metes and bounds description, precluded the oil and gas deposits in those lands from being conveyed by the lease describing the lots which the survey showed as bordering the river. The foregoing discussion shows that except for those circumstances where by fraud or error lands were omitted from a survey, or in exceptional cases such as *Madison v. Basart* where a substantial accretion formed after survey but before the conveyance, courts and this Department have failed to make any technical distinction as to the status of lands beyond the meander line of surveyed lots, but have looked to the water line as the boundary. This application of common law principles to lands surveyed under our rectangular survey system has as one of its bases the following oft-quoted statement from *Railroad Company v. Schurmeir*, 74 U.S. (7 Wall.) 272, 286 (1868):

Meander-lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

In preparing the official plat from the field-notes, the meander-line is repre-

sented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary.

The purposes of any survey or requirement regarding land description are of course, to enable the land to be readily identifiable and to ascertain the quantity of acreage for purposes of payment. The rule stated above fulfills the first purpose since the water line or border line of the stream is a boundary which may be easily identified. The second purpose is more difficult to achieve when lands border streams or other waterways which are constantly changing their direction, since rules with respect to the ownership of the beds of rivers and other waterways may depend upon various factors such as whether the waterway is navigable or nonnavigable, whether the uplands has been conveyed by the United States or not or some other party, and whether a peculiar State law or the general common law rules are applicable. For an extended discussion of rules applicable to the beds of waterways and to accretions and the applicability of Federal or State law, see *State of Utah, supra*. Thus the ownership of river-bed lands may or may not be in the owner of the uplands and consequently the quantum of land he owns will change with the course of the river.

The difficulties this presents have been mentioned before. Since, however, in areas where rectangular surveys have been made, the meander line is not generally considered as run as a boundary but, rather the waterway is considered the boundary, it is questionable whether the regulations requiring oil and gas lease offerors to describe unsurveyed lands by metes and bounds and surveyed lands by legal subdivision should be viewed as not being complied with in a situation such as obtains here. The Division of Appeals cited only the regulations in reaching its conclusion regarding the limits of appellant's lease. The land office cited also an Acting Assistant Solicitor's opinion of July 9, 1954, which, in response to questions whether a noncompetitive oil and gas lease offer for surveyed riparian lands must be construed as including unsurveyed accretions thereto and whether the United States could lease such accreted area separately, ruled that an oil and gas lease need not be construed as including unsurveyed accretions and that such accretions should be leased separately.

The appellant contends that this is erroneous. The respondent contends that the opinion is correct with respect to construing leases and refers to certain cases cited therein, namely, *Henry C. Trigg*, A-17559 (October 31, 1933), and *William Erichson*, 50 L.D. 281 (1924). Those cases and a more recent case, *Emily K. Connell*, 70 I.D. 159 (1963), involved applications for leases or permits under the

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Mineral Leasing Act for the beds underlying bodies of water. It was pointed out in the *Connell* case, with reference especially to the *Trigg* case, that the Congressional scheme manifested in the Mineral Leasing Act of leasing oil and gas deposits on a per acre basis abrogates the applicability of the doctrine of riparian rights of uplands owners to river bed lands, since an offeror would get a tract of land larger than that applied for and paid for. Thus, the Department refused to accept an offer describing meandered lots bordering the Canadian River in Oklahoma as also including river bed lands where the latter were not described and rental had not been submitted for them.

The concern manifested in the *Trigg* and *Connell* cases, *supra*, is that a lease or permit issued under the Mineral Leasing Act would convey to an applicant a larger tract than that applied for and paid for. Of course, this problem does not obtain in the facts of the present case because it is clear that the total acreage charged to and for which rental was paid by Viersen is much more than the acreage actually existing in all of the lots applied for. Ashland contends that this fact has no relevance and, in effect, that the lease should not be viewed as describing a whole tract but, rather, that each lot must be treated separately and that laws applicable to accretions must be applied where accretions have taken place and the law applicable to eroded lands must be applied where erosion has taken place. It states that the correct law as to accretions here is that a lease for unsurveyed lots along a meandered river does not include any accretions unless they were applied for and specifically included with a metes and bounds description.

The appellant, on the other hand, contends in effect that the established principles governing the riparian rights of the owner in fee of an upland lot should be applied to an oil and gas lessee of the same land so that the accretion to it should be considered part of and within his lease.

Basic to this position is the concept that there are no substantial differences between grantees of the fee (or surface) and an oil and gas lessee. Although there has been some difficulty in formulating a theoretical justification for the rule that accretion or reliction works a change in the ownership of land, it is ordinarily said to rest upon a belief that a riparian or littoral owner who bears the risk of losing all or part of his land by erosion should be given the benefit of any accretions to it. 4 *Tiffany, Real Property* § 1219 (3d ed. 1939).⁴

⁴*Tiffany* concludes, however, that the better view is that the doctrine of accretion is not a rule of law, in which intentions are immaterial, but a rule of construction, a rule for the ascertainment of boundaries, that if the boundary of land is determinable with reference to the sea or any body or stream of water, the boundary is presumably intended to vary as the water line varies, provided the variation is gradual. *Id.* § 1220.

Antithetically then a person who does not stand to lose by erosion ought not to gain by accretion.

One who owns or has the right to use the surface of land suffers a marked change in circumstances when his holdings gradually disappear under water or when new land builds up against the old. To the lessee of mineral rights, however, except for some possible problems in operations, it makes little difference whether the surface over the deposits he seeks is dry land, shallow water, or the ocean depths. He has bargained for minerals deep in the earth, not land for farming or building, and dry land or water above are of relatively minor concern to him. Thus, the justification for giving accretion to a surface owner does not apply to a mineral lessee.

There do not appear to be any cases concerning the exact issue.

Viersen cites *Pasotex Petroleum Company v. Cameron, supra*, as holding that an oil and gas lease describing lands by legal subdivision conveys accreted land by operation of law. It, however, was concerned with the Oklahoma law and the cases relied upon by the court, moreover, all involved ownership of the entire fee in the uplands. *Braddock v. Wilkins*, 182 Okla. 5, 75 P. 2d 1139 (1938); *Johnson v. Butler*, 206 Okla. 632, 245 P. 2d 720 (1952); *The Choctaw and Chickasaw Nations v. Cox*, 251 F. 2d 733 (10th Cir. 1958).

Although there are apparently no Departmental decisions on the point at issue in this appeal, the Department has a well established rule governing a related situation which emphasizes the difference between fee or surface dispositions and oil and gas leases. Just as the right to accretions is one of the riparian rights of an upland owner so too is his claim to the lands underlying a nonnavigable body of water, for as has often been held:

Under the common law, a grant of land bounded on a non-navigable river by a grantor who owns to the center or thread of the stream conveys to the grantee the land to the center or thread of the stream, unless the terms of the grant and the attendant circumstances clearly denote an intention to stop at the edge or margin of the river. *Choctaw & Chickasaw Nations v. Seay*, 235 F. 2d 30, 35 (10th Cir. 1956), *cert. denied*, 352 U.S. 917 (1956).

When the Department first came to consider the extent of rights granted by prospecting permits of uplands riparian to a meandered nonnavigable body of water, it held that:

Ownership by the Government of lands abutting upon a meandered nonnavigable body of water carries with it the same rights with respect to the submerged land opposite thereto that private ownership does, and such rights pass by permit or lease of the Government-owned uplands as well as by patent to such lands. A prospecting permit or permit application, therefore, covering land abutting upon a meandered nonnavigable body of water embraces the adjacent submerged area, as well as the upland.

The lake being thus completely surrounded by tracts covered by patents and

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a prospecting permit or applications therefor which attach to the entire bed of the lake, the Department would clearly in no event be warranted in granting a permit for any portion of the lake bed as such. *Clayton Phebus*, 48 L.D. 128, 131-132 (1921).

A few years later the Department considered an application for a permit to prospect for sodium limited to parts of beds of several small nonnavigable lakes abutting uplands owned by the United States. It held that so long as the United States owned the uplands it could issue prospecting permits and leases for lands below the meander lines of nonnavigable bodies of water separate from the upland. *William Erickson, supra*. The decision, however, also repeated the holding of *Phebus, supra*, that "A prospecting permit issued pursuant to the leasing act of February 25, 1920, *supra*, would carry with it a riparian right to prospect the appurtenant portion of the lake bed." 50 L.D. at 283.

The next time the Department examined the issue it cited the *Phebus* and *Erickson* cases, *supra*, and it quoted the case of *Henry C. Trigg, supra*, as follows:

From the general tenor of the leasing act it is evident that Congress intended that all operations under oil and gas prospecting permits or leases should be conducted upon a per-acre basis. Rentals are to be paid by the acre; individual applicants are limited to a certain number of acres on a known geologic structure and to a certain number of acres within the bounds of a particular State. It is evident that it was not within the intention of Congress that any person whose application called for a specific tract of land, including a certain number of acres, should receive rights on any larger tract containing a great number of acres. Congress, then, has, in effect set up a scheme for the exploitation of public lands containing oil and gas, which of necessity excludes the applicability of the common-law concept granting to riparian owners rights in a stream bed to the center thereof.

Apparently it did not accept the doctrine in the *Trigg* case as that of the Department, for it rested its decision on other grounds and stated it was not necessary to determine whether the lake beds were subject to an application for prospecting permit or were embraced in an outstanding permit covering uplands by virtue of riparian rights. *A. W. Glassford, et al.*, 56 L.D. 88 (1937).

Despite this hesitancy the Department thereafter adopted as final the view that a lease of uplands riparian to Federally owned river bed lands does not give the lessee any rights to such lands. *The Texas Co., et al.*, A-24562 (November 29, 1948); Hoffman, *Oil & Gas Leasing on the Public Domain*, 27-28 (1st ed. 1951).

In a recent decision the Department reviewed the pertinent cases and held:

That quotation [from the *Trigg* case, *supra*] clearly answers appellant's contention that the common law riparian rights doctrine should be applied to Federal

oil and gas lease offers, by showing that the intent of Congress abrogates the applicability of that doctrine to leases under the Mineral Leasing Act. Insofar as the *Phebus* case, *supra*, and the *Glassford* case, *supra*, may imply anything to the contrary, they are overruled. As in any conveyance the intent of the grantor governs what actually is conveyed. Appellant, in effect, construes her offer as one for the river bed lands also since she cannot be construing a lease which has not been granted. However, this Department in applying the Congressional scheme for oil and gas leasing cannot accept an offer as including the riparian rights to the river bed unless such lands are properly described and rental is submitted for the acreage involved. Cf. *Sidney A. Martin, C. C. Thomas*, 64 I.D. 81 (1957).

Emily K. Connell, supra, at 162⁵

From this survey it is plain that the Department has carefully considered the application of the doctrine of riparian rights to oil and gas permits and leases under the Mineral Leasing Act and has concluded that, at least for river beds and other bottoms under non-navigable bodies of water, the intention of Congress that a lessee should receive only a specific acreage is so dominant that there is no room for the common law doctrine of riparian rights.

The issue, then, is whether the same considerations apply to lands accreting to upland lots. It is our opinion that they do. For example, the acreage of the upland lot as shown on the plat of survey is fixed and the rental due can be computed accurately and definitely. To hold otherwise would be to introduce unnecessarily a factor of uncertainty into a situation amenable to ordinary straightforward disposition.⁶

Furthermore, it is questionable whether the doctrine of accretion ought to apply to lands riparian to a nonnavigable body of water where the title of the upland owner extends to the medial line of the river or stream. Where the uplands abut a navigable body of water, the United States does not own the bed of the river and lake and it must determine, in accordance with the rules relating to accretion, whether the accreted land passed with the lease of the upland or, for one of the reasons stated above, did not. In this situation the water's edge is the limit of the United States ownership and the extent of its ownership varies with the changes in the water boundary. Therefore, in each case, the Department must decide whether the accretion, which is land newly added to United States jurisdiction, goes with the upland or not.

For lands bordering nonnavigable waters, the situation is quite different. Here the limit of United States ownership is not the water's edge, but the medial line of the stream. Accretions (or relictions) on

⁵ Accord: *Senemea, Inc., et al.*, A-29195 (June 10, 1963).

⁶ This is the conclusion reached in a memorandum of the Acting Assistant Solicitor, Bureau of Land Management, "Leasing Procedure in cases involving accretions to riparian public lands," July 9, 1954, for accretions occurring along the Mississippi River in Louisiana.

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the shore line work no change in United States ownership unless the medial line of the stream is changed. Thus the lands added to or subtracted from United States ownership are not on the water's edge but those under water at midstream.

It has been recognized that the doctrine of accretion is not logically applicable to a riparian owner whose title extends to midstream. One leading text states:

* * * On the other hand, if the owner of the bank or shore does own the bed of the stream or body of water, or any part thereof, any vertical addition to the bed, whether or not sufficient in depth to appear above the water, belongs to him, not by reason of the doctrine of accretion, but because his ownership extends upward as well as downwards, as it does in the case of land absolutely disassociated from water. In other words, such new land belongs to him merely because it is within the boundaries of his land, the limits of his ownership. * * * 4 Tiffany, Real Property § 1221 (3d ed., 1939), cited in *Nephi Irr. Co. v. Bailey et al.*, 111 Utah 402, 181 P. 2d 215 (1947).

Since the United States leases submerged lands separately from the uplands and since for leasing purposes there is no apparent reason to give a lessee of the uplands any riparian rights (access to water is unimportant for nonnavigable streams), the reasons for the rule that the water's edge, not the meander line, is the limit of the conveyance do not apply.

In other words, the meander line for nonnavigable bodies of water is not the dividing line between land owned by the United States and land owned by others. The ownership of the accretions is no issue because the underlying lands already belong to the United States. For leasing purposes the meander line is simply a line between two tracts of land owned by the United States and there is no reason to hold that any lands beyond it pass with a lease of the tract it borders.

A lease is to be distinguished even from a disposition of the surface. There the rights to the submerged lands pass from the United States with a grant of the upland unless the grant specifically provides otherwise so that the United States retains nothing. Therefore to hold that the meander line is the boundary in a surface disposal case would have consequences quite different from those involved in the leasing situation. If, in a surface disposition, the meander line were held to be the boundary there would be narrow strips of land left for disposition which would be meaningless for purposes of the surface acts. Since a lease of the upland, however, carries with it no right to the submerged lands, which remain in the United States, it seems desirable to treat the meander line as the boundary line between two parcels of land belonging to the United States. Whatever narrow strips remain would be leased with the river bed.

In fact, since an applicant for the river bed would of necessity have

to tie his description to the meander corners, which would form one boundary of the land he was applying for, it would be difficult for him to describe river bed lands without including some fast land.

Finally, there is another advantage to treating the meander line as the limit of upland acreage covered by a lease bordering on a non-navigable body of water. It reduces the number of changeable boundaries. Since the limit of United States ownership is the medial line of the stream, the extent of the land owned by the United States varies as the medial line shifts. Thus dispositions of land extending to the medial line cannot help but increase and decrease in area as the medial line fluctuates. But, as we have seen, the meander line merely separates two tracts of land owned by the United States and the leased tracts, upland and submerged, sharing it as a common boundary, need not alter as land accretes or relicts. It can remain a fixed boundary at least until the former medial line of the river shifts so far towards formerly fast land that it impinges on the original meander line. In other words, if the meander line, as well as the medial line of the stream, are both shifting boundaries, then the submerged land tract will have boundaries varying on two sides and the upland tract, one wandering margin. On the other hand, if the meander line is held to be a fixed boundary only one boundary of one tract is subject to variation.

It is interesting to note that Louisiana has adopted by statute the rule that changes in ownership of land or water bottoms due to accretion resulting from the action of a navigable stream, bay or lake shall not affect any existing oil, gas or mineral lease covering such land or water bottoms, but that the new owner shall take the same subject to the mineral and royalty rights of the lessors and lessees. 9 LSA-RS. 1151 (Supp. 1963); 5A Summers, Oil and Gas, 1965 Supp., sec. 973.2 (Perm. ed. 1951).

A corollary of the conclusion that a lease of an upland lot does not carry with it accretions accruing thereafter is that the acreage going with a lease of an upland lot part or all of which has been washed away by reliction since the date of the survey consists of the acreage shown on the plat undiminished by the encroachment of the water. So long as the title to the mineral deposits is in the United States, an oil and gas lease of a lot carries with it the acreage shown on the plat of survey regardless of whether the river has moved onto it or away from it. Of course, if a prior lease of the river by metes and bounds encompassed a portion of the former fast land, a subsequent lease of the upland by lot would not override the area covered by the prior lease.

This conclusion works no hardship on the lessee of the upland lot.

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He gets what he paid for, his lease acreage is much less subject to variation, and his title is more secure.

In essence, it is our view that the doctrines of accretion and reliction are not desirable tools for determining the coverage of oil and gas leases of riparian, accreted, and water covered lands where the entire area is owned by the United States and that they are pertinent only when they affect a boundary between areas owned by the United States and others.

Accordingly, Viersen's lease did not include the accretions to lots 2 and 3, sec. 19, but it does cover the portions of lots 1 and 2, sec. 19, lot 1, sec. 20, and lot 4, sec. 17, which are now part of the river bed so long as the median of the river has not encroached upon them⁷ and so long as the oil and gas rights in them remain in Government ownership.⁸

There remains Viersen's contention that Ashland's lease covers only lands in the river bed and cannot include accreted lands because, while the accretions fall within the metes and bounds set out in the lease, the description refers to "Tract 3a" as "an unsurveyed tract of land *lying in the bed of the Canadian River* riparian to Lots 1, 2 and 3, Sec. 19, T. 17 N., R. 17 W., Indian Meridian, Oklahoma" (italics added). Viersen argues that underlined phrase limits the area applied for only to lands in the river bed and excludes by its terms other lands within the metes and bounds description which are not in the river bed.

Watson's offer, however, in item 2 described the land applied for as "Tract 3a * * * as described by metes and bounds in Exhibit 'A' attached hereto and made part hereof, and plotted on aerial photographs CTX-2T-83 * * * submitted herewith."

The area plotted in the photograph as Tract 3a includes the accreted lands. Furthermore the metes and bounds description ends with the statement that the acreage in Tract 3a amounts to 99.60 acres, more

⁷ The parties' agreement to the contrary is not binding on the Department.

⁸ As stated at the outset of this decision the land office has indicated that all of lot 1 sec. 20, has been inundated and has become riverbed land riparian to land not in Government ownership, and that the major part of lot 4, sec. 17, has also been inundated. The case files contain information indicating that this may be true and that the uplands opposite all or part of the inundated portions of lot 1, sec. 20, and lot 4, sec. 17, are patented lands without an oil and gas reservation to the United States. This apparently was the situation prior to the issuance of Viersen's lease. In a letter dated September 29, 1961, to Ashland, a copy of which was later sent to Viersen, the land office expressed the view that the leases issued to Ashland and Viersen might become extinguished if, because of continued westward movement of the river, the lands in the leases became submerged and riparian to upland which had been patented without a mineral reservation. The land office, however, did not consider the status of Viersen's lease in light of the complete or partial inundation of lot 1, sec. 20, and lot 4, sec. 17, at the time of issuance of the lease. We do not rule on this question as it is a matter outside the scope of the appeal and one that properly should first be considered by the Bureau of Land Management.

or less, a figure which can be reached only by adding the accreted lands to the river bed lands. The rental submitted is consonant with total acreage applied for.

Thus the only inconsistency arises from the reference to the land applied for as being in the bed of the river. However, the metes and bounds description, the acreage stated, the rental paid, and the area plotted on the photograph combine to make it abundantly clear that the description intended to cover all of the land within the metes and bounds description and that the reference to the river bed was not a limitation on the land applied for. Cf. *Edgar Paul Boyko, Milton H. Lightwood*, A-28049 (October 30, 1959). Accordingly, it is our conclusion that lease N.M. 088586 (Okla.) includes the accretions in Tract 3a lying beyond the meander line of the original survey.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM2.2A(4) (a); 24 F.R. 1348), the decision of the Division of Appeals is affirmed insofar as it dismissed Viersen's protest against lease N.M. 088586 (Okla.) and the case is remanded for further proceedings in accordance herewith as to the remaining lands in conflict with lease N.M. 020990 (Okla.).

ERNEST F. HOM,
Assistant Solicitor.

THOMAS D. CHACE

A-30262

Decided June 30, 1965

Accretion—Boundaries—Submerged Lands—Oil and Gas Leases: Lands Subject to

Where a surveyed lot of public land riparian to a nonnavigable body of water is leased according to the plat of survey, the area covered by the original lot remains in the lease even though part of the lot is thereafter covered by water.

Oil and Gas Leases: Discretion to Lease

Whether small areas of public lands are to be leased for oil and gas development is to be determined according to the circumstances of each case.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Thomas D. Chace has appealed to the Secretary of the Interior from a decision, dated January 27, 1964, of the Division of Appeals, Bureau of Land Management, affirming the rejection of his non-competitive oil and gas lease offer New Mexico 0292752, filed on June 21, 1962, pursuant to section 17 of the Mineral Leasing Act of 1920, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226 (1964). Chace's

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offer covers five tracts of land, totalling 110.70 acres, described by metes and bounds as unsurveyed land lying in the bed of the San Juan River in Ts. 29 N., Rs. 15 & 16 W., N.M.P.M., New Mexico. Each of the tracts, which vary in size from 2.70 to 47.65 acres, is stated to be riparian to surveyed lots on the north or right descending bank of the river.

It appears that the river in this area has generally moved northward, partly eroding the lots on its north bank, but it has in a few places moved southward, adding new land to riparian lots on the north bank by accretion. Where the lots have eroded away, appellant's offer gave as the north boundary of the tracts applied for the *present* bank of the river, thus including in the tracts portions of the lots as shown on the plat of survey. Where the lots have enlarged by accretion, appellant's offer gave as the north boundary of the tracts applied for the bank of the river as shown on the plat of survey, thus including the accreted land. In all instances the south boundary of the tracts is given as the present medial line of the river. Thus appellant's offer encompasses land previously part of a riparian lot but now part of the river bed as well as accretions to the riparian lots. The original riparian lots are now covered by existing oil and gas leases.

The land office decision pointed out that great changes had taken place in the position of the river in the area, but that it was not clear whether the land described was a result of avulsion or accretion, and that the medial line of the river separated Navajo Indian lands to the south from public domain lands to the north, that avulsive changes would leave title to the land where it was, that aerial photographs submitted by the appellant were four years old, and that it would require an on the ground survey to determine the true conditions that exist at this time.

The Division of Appeals affirmed, holding that an oil and gas lease for a riparian lot as originally surveyed continues to embrace the original area and that even though part of it is now part of the river bed an oil and gas lease offer for land in an outstanding lease must be rejected.

On appeal, Chace alleges that 60 to 80 acres of the land he applied for are not in oil and gas leases, and that, in any event, a lease of a riparian lot is diminished by erosion of the lot unless the lease states otherwise. He submits several sketches showing the areas in three of the tracts which he alleges were never part of any of the original riparian lots but are lands which have accreted to them or which are river bed to the medial line of the river.

In a decision decided today, *Sam K. Viersen, Jr., et al.*, 72 I.D. 251 (1965), the application of the laws of accretion and reliction to oil and gas offers and leases covering lots riparian to nonnavigable rivers was discussed in detail. It was held that accretion attaching to a lot leased in accordance with the plat of survey does not go with the lease but remains for separate disposition and that the area covered by the original lot remains in such a lease so long as the title to the oil and gas is in the United States.

Applying these conclusions to Chace's offer, we find that his offer was properly rejected for so much of each tract that was part of an original lot and is now river bed owned by the United States, but that the other lands he described were available for leasing.

Whether they ought to be leased, however, depends on other considerations. The remaining areas consist of a very small portion of tract 4a (which as described in the offer forms a contiguous area with tracts 4b and 4c), apparently amounting to not more than 10 acres, two separate portions of tract 5, totalling about 20 acres, and almost all of tract 3, covering about 45 acres.

In several recent decisions the Department discussed the criteria to be used in determining whether small areas of public lands are to be leased for oil and gas. It concluded that there is no general policy of refusing to issue leases and that each case is to be disposed of according to its own circumstances. *Eloise L. Beckworth*, A-28967 (May 26, 1964); *Richfield Oil Company*, A-29697 (October 23, 1958). Although the small size of the unleased areas in tracts 4 and 5 and their location abutting other public land oil and gas leases militates against the desirability or necessity for leasing them, the unleased area of tract 3 seems to be substantial enough, in the absence of other factors, to warrant leasing. It is also noted that Chace alleges that the land office included some of the lands he applied for in the list of lands posted for leasing in March 1964. If this assertion is accurate, there would be no reason not to lease them to Chace, all else being regular, rather than to a junior offeror.

These problems, however, are better examined in the first instance by the land office.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Division of Appeals, Bureau of Land Management, is affirmed in part, set aside in part and remanded for further proceedings consistent herewith.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF ELECTRICAL CONSTRUCTORS

IBCA-479-1-65

Decided July 9, 1965

Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction and Operation: Labor Laws—Rules of Practice: Appeals: Dismissal

Under construction contracts incorporating the provisions of the Davis-Bacon Act covering minimum wage rates, where the principal disputes concern the question of whether or not work was performed "directly upon the site of the work" as provided in the Act, and where current interpretations of the Department of Labor and the Comptroller General are in conflict, the Board will decline to exercise jurisdiction over the appeal, pursuant to the doctrine of *forum non conveniens*, and the appeal will be dismissed.

BOARD OF CONTRACT APPEALS

Government counsel has moved to dismiss two appeals taken under transmission line construction contracts between the above-named contractor and the Bureau of Reclamation. The motion to dismiss is based on the contention that the Board does not have authority to grant the requested relief. The appeals involve a point upon which the Comptroller General of the United States and the Department of Labor are in complete and long-standing disagreement. The Board is unable to state flatly that it lacks jurisdiction over the appeals; however, under the equitable doctrine of *forum non conveniens* we decline jurisdiction because the disputes can be more expediently and appropriately tried elsewhere.

There is no serious difference of opinion between the parties concerning the facts. The contracts provide for construction of 230-kv transmission lines. One, the Glen Canyon-Shiprock transmission line, is approximately 182 miles long, and the other, the Cortez-Curecanti transmission line, is approximately 101 miles long. After award of the contracts, the appellant purchased steel towers, stub angles and fabricated reinforcing steel from Creamer Industries, Inc., a Fort Worth, Texas supplier. The greatest part of this steel was fabricated at the Creamer plant in Fort Worth. The contracts required that the reinforcing steel be fabricated into "cages" in accordance with approved drawings, including the welding of a steel angle stub into each "cage." The "cages" were used to reinforce concrete foundations for the steel towers, and the towers were attached to the steel angle stubs.

These disputes involve only the steel reinforcing steel that was made into foundation "cages." The steel members for the towers were manufactured at the Fort Worth plant, packaged, and transported to the transmission lines.

In March 1962, Creamer Industries, Inc. established a fabrication facility near Shiprock, New Mexico, and its employees began to pro-

duce the steel "cages" from bar reinforcing steel. These "cages" were for use on the Glen Canyon-Shiprock transmission line. The reinforcement bars were obtained from a company at Pueblo, Colorado, and brought by truck to the Shiprock fabrication facility. The contracting officer's explanation of the work on the "cages" is as follows:

* * * The reinforcement steel thus obtained was cut, bent, formed into "cages" by use of a "jig," and spotwelded with the stub angle welded into place in the fabrication facility. Completed "cages" were placed in a storage yard for delivery to the transmission line tower locations between Shiprock Substation and Glen Canyon Powerplant Switchyard as required. * * *

The appellant took delivery from Creamer Industries, Inc., at Shiprock and brought the "cages" to the transmission line right-of-way. The closest point of the right-of-way was about 8 miles from the Shiprock fabrication facility. The portion of the right-of-way most distant from the Shiprock facility was in the Glen Canyon area, approximately 180 miles from Shiprock.

The Creamer auxiliary facility at Shiprock was relocated to allow its use for fabrication of "cages" needed for the Cortez-Curecanti transmission line. It first was moved to Cortez, Colorado, and placed in operation at a location approximately four miles from the nearest point of the Cortez-Curecanti transmission line. Fabrication of "cages" was started there in early 1963. In June 1963, it was moved to an area near Placerville, Colorado. Later in the summer of 1963, it was moved to Montrose, Colorado.

The appellant states that the auxiliary plant was set up by Creamer Industries, Inc., because Creamer elected to fulfill its purchase agreement in this manner in order to save unnecessary freight charges on the reinforcing steel being transported to Fort Worth and then back to a location near the transmission lines for delivery.

Schedules of classifications and minimum wage rates, as predetermined by the Secretary of Labor under the Davis-Bacon Act, as amended,¹ were incorporated in the specifications of both transmission line construction contracts involved in this appeal. In reviewing the payrolls and inspecting the work on both jobs, the contracting officer's authorized representative concluded that the "cage" fabrication facilities of Creamer Industries, Inc., were "on site" under the terms of the Davis-Bacon Act. On the Glen Canyon-Shiprock transmission line the dispute arose when the appellant was asked to modify its purchase order with Creamer to include Davis-Bacon Act labor standards provisions, and to require Creamer to submit payrolls for the work at the Shiprock "cage" fabrication facility. On the Cortez-Curecanti transmission line, the dispute arose when the Project Construction Engi-

¹ Act of August 30, 1935, 49 Stat. 1011; 40 U.S.C. sec. 276(a).

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neer directed the appellant to pay welders at the "cage" fabrication facility wage rates that the Project Construction Engineer considered to be proper under the Davis-Bacon Act classification and wage schedules. The appellant had been submitting payrolls for the work performed by Creamer employees on the "cages" for the Cortez-Curecanti project from the time work began. Presumably this was because previously the appellant had been required to submit payrolls on the Glen Canyon-Shiprock project.

The contracting officer and Government counsel have treated the Cortez-Curecanti line dispute principally as a classification dispute. However, as to both projects, counsel for the appellant directly asserts that the Davis-Bacon Act is restricted in its applicability to "mechanics and laborers employed directly upon the site of the work," and, in reliance upon rulings of the Comptroller General, that the Creamer employees at the "cage" fabrication facilities were not subject to the requirements of that Act. There is a good deal of justification for this reliance. The contracting officer appears to be equally justified in relying on decisions of the Department of Labor which directly and specifically support his determinations under both contracts. If the appellant is correct in its contentions, equitable adjustments may be due under Clause 3, "Changes," of the General Provision of the contract.

The Solicitor of the Department of Labor in his Opinion DB-30, dated October 15, 1962, reviewed the operations of Creamer Industries, Inc., at Shiprock, New Mexico (Glen Canyon-Shiprock transmission line). In that opinion he agreed with the Bureau of Reclamation's decision that Creamer, with respect to the Shiprock facility, was performing as a subcontractor to the appellant, stating:

* * * The fabrication facility operations, although not physically located on the particular property where the completed transmission line is to be erected, are conveniently located close to and within the general area of this transmission line construction work and are so closely integrated with it as to be a part of it. Furthermore, Creamer set up the fabrication facility for the primary and express purpose of performing its contract with the prime contractor and its contract for furnishing steel cages for the footings relates exclusively to the performance of work called for by the prime contractor's contract with the Bureau. Under these circumstances, it would appear to follow that the laborer and mechanics employed at this Shiprock facility are within the coverage of the Davis-Bacon and related Acts, and of the contract terms.

An opinion on the Cortez-Curecanti transmission line dispute was also furnished by the Labor Solicitor, on November 5, 1963. It found that the earlier operations by Creamer employees at the Shiprock site were "substantially identical" to the work on "cages" for the Cortez-

Curecanti line by Creamer employees at three sites in Colorado. The decision in the Glen Canyon-Shiprock case was deemed to control the Cortez-Curecanti case in view of the similarity of the facts in both cases.

Decisions of the Comptroller General showing his view of the applicability of the Davis-Bacon Act are 40 Comp. Gen. 565 (B-144901, April 10, 1961) and 43 Comp. Gen. 84 (B-148076, July 26, 1963). In the latter decision, after discussing the legislative background of the Davis-Bacon Act, the Comptroller General stated:

Even without this legislative background, it seems clear that the express designation of "all mechanics and laborers employed directly upon the site of the work," * * * serves the purpose of defining accurately the extent to which observance of contract wage conditions is required, whether by contractors, subcontractors or materialmen. * * * With obvious aforethought the legislators utilized a physical distinction based upon the precise location where the work was being performed to shut off both responsibility for the payment of, and protection afforded through, minimum wage conditions of performance. * * *

* * * * *
 * * * The distinction made in the act between covered and noncovered work is specific. The meaning of "site of the work" is not left open to construction but is restrictively qualified by the term "directly upon," which in accordance with the usual meaning of the word "directly" identifies an exact location or place. Thus, broader definition of the word "site" than as the exact confines of the place of performance of the construction work would vary the plain direction of the statute and would add an indeterminateness, and indefiniteness where none exists. In this connection, it appears clear that the Congress was well aware that it was common practice to process and fabricate materials and structural elements off the site and that it did not attempt to bring this portion of the work under the coverage provided. It follows that such practices, particularly when conducted by a supplier, are not an evasion of minimum wage requirements, although it is recognized that instances might be found in which "across the street" construction activities by a contractor or subcontractor would be questionable.

In our considered opinion the Davis-Bacon Act does not undertake to provide minimum wage coverage for work off the site, whether by contractors, subcontractors, or materialmen, *even though performed in the immediate community.* * * * (Italics supplied.)

In the same decision the Comptroller General observed:

* * * Neither the Davis-Bacon Act nor the Plan [Reorganization Plan of 1950; 5 U.S.C. 133z-15] evidences any legislative intention to modify or restrict the established contract settlement procedures of Federal agencies, or to empower the Secretary of Labor to do so. Insofar as the provisions of section 5.11² contemplate the making of authoritative determinations in such areas, they obviously overreach the bounds of authorized regulation and are not controlling. * * *

It is obvious that these conflicting positions place a contracting officer in a difficult position when he must consider wage rate questions of

² The reference is to 29 CFR sec. 5.11, which stated that "All questions arising in any agency relating to the application and interpretation of the regulations contained in this part and of the Davis-Bacon Act, as amended. * * * shall be referred to the Secretary of Labor for appropriate ruling or interpretation. The rulings and interpretations of the Secretary shall be authoritative * * *."

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the type involved in this appeal. The reliance in this case by the contracting officer upon rulings of the Department of Labor is supported by decisions of the Armed Services Board of Contract Appeals.³ These decisions were issued prior to the time the Comptroller General took issue with the Department of Labor's assertion of authority and interpretation.

At this point, the settling judgment of a court is needed on these questions rather than an opinion from this Board. The United States Court of Claims held recently that where an appeals board has refused jurisdiction in a case, an action may be maintained in court without any further administrative proceedings.⁴ The doctrine of *forum non conveniens* (not of statutory origin) may be a basis for declining jurisdiction whenever considerations of convenience, efficiency and justice indicate that a tribunal other than the one chosen by a party would be the most appropriate to consider a proceeding.⁵ It is determined that the same considerations should control the Board's ruling in this appeal.

Decision

The appeal is dismissed.

DEAN F. RATZMAN, *Chairman.*

WE concur:

HERBERT J. SLAUGHTER, *Deputy Chairman.*

THOMAS M. DURSTON, *Member.*

³ *Noonan Construction Company*, ASBCA No. 4335 (June 10, 1958); 58-2 BCA par. 1833; *Grannis and Sloan, Thompson, Street and Wattinger Company*, ASBCA No. 4968 (May 27, 1959), 59-1 BCA par. 2213.

⁴ *Anthony Grace & Sons, Inc. v. United States*, No. 133-61, Ct. Cl. May 14, 1965.

The Court of Claims also pointed out recently that the legislative history of the Davis-Bacon Act does not give an exact definition of "materialmen" and does not "reveal whether a supplier of the material is exempt from the provisions of the Act because he is not a 'sub-contractor' as mentioned in the statute, or because his work is not performed 'directly upon the site' or because his function is not a part of the construction contract." The court, in what was termed "a logical extension of the congressional intent to exclude employees of materialmen from the coverage of the Davis-Bacon Act," held that employees of a distributing and transporting company who delivered standard materials to the site by truck were excluded from coverage of the Davis-Bacon Act and the Eight Hour Laws. A dissent by Judge Davis contains the following comment on rulings with respect to Davis-Bacon Act coverage:

* * * I would put aside the administrative decisions, whether they be one way or the other. In this sector of its Davis-Bacon Act interpretations the Labor Department's varied rulings recall the Minotaur's labyrinth in the complexity of their turnings. Unlike Theseus, I have been unable to find the golden thread through the maze and must therefore escape onto the higher and easier ground of the statute itself. * * * *H. B. Zachry Company v. The United States*, No. 332-61, Ct. Cl., April 16, 1965.

⁵ *United States v. National City Lines, Inc., et al.*, 7 F.R.D. 456 (S.D. Cal. 1947), reversed (upon a ruling that the doctrine of *forum non conveniens* did not apply to actions under an anti-trust statute) 334 U.S. 573 (1948); *Id.* 80 F. Supp. 734 (S.D. Cal. 1948), affirmed 337 U.S. 78 (1949). *Accord, Lunn v. United Aircraft Corporation*, 26 F.R.D. 12 (Del. 1960).

FRED E. BUCKINGHAM ET AL.

A-30295

A-30296

*Decided July 12, 1965***Grazing Permits and Licenses: Appeals—Grazing Permits and Licenses:
Apportionment of Federal Range**

An appeal from a district grazing manager's decision reducing a Federal range user's grazing privileges to conform with the carrying capacity of his range allotment is properly dismissed where the user has accepted the same allotted area for 17 years without protest or appeal and does not question the necessity for the reduction but objects to the apportionment of the range as inequitable.

**Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses:
Apportionment of Federal Range**

Where a grazing allotment has been accepted without appeal or protest for 17 years, an allottee is precluded from seeking a reapportionment of a unit of the Federal range upon an allegation that the range has never been equitably apportioned.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Fred E. Buckingham, Lewis E. and Ruby M. Miller, and Lyman and Norma Schwartz have appealed to the Secretary of the Interior from two decisions dated March 19, 1964, whereby the Acting Assistant Director, Bureau of Land Management, affirmed decisions of a hearing examiner dismissing their appeals from decisions of the manager of the Winnemucca Grazing District (Nevada No. 2) reducing their grazing privileges to conform with the carrying capacity of their allotments as authorized by 43 CFR 161.6(f), now 43 CFR 4111.4-2. All of the appellants are users of the Singus Creek allotment in the South Paradise Unit of the grazing district.

By decisions dated July 17, 1962, the appellants were advised by the district manager that it was necessary to impose a 73 percent Federal range use reduction on all qualified users of the Singus Creek allotment in order to reach the grazing capacity of the available range and that it was necessary to impose a 52 percent reduction on Buckingham's qualified use of the Buckingham individual allotment, also in the South Paradise Unit.

All of the affected parties appealed from the district manager's decisions, and although the parties did not all seek identical relief, the appeals to the Secretary present a single issue, and the cases are consolidated in this decision.

A hearing was held at Winnemucca, Nevada, on July 10, 1963, for the purpose of determining the merits of the appellants' appeals, at which

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other users of the South Paradise Unit intervened.¹ The appellants did not challenge the manager's determination as to the carrying capacity of the range, but they did question the propriety of subjecting their allotments to such drastic reduction without equitably apportioning the reduction among the members of the South Paradise Group. In essence, Buckingham contended that he is entitled to have a portion of his authorized grazing rights recognized in the South Paradise Unit and deducted from his Singus and individual allotments, subject to any reduction imposed on the South Paradise Unit. The other appellants contended that the reduction should have been imposed upon a unit-wide basis rather than by allotments. The end result sought in either event is to alleviate the loss of grazing privileges suffered by the users of the Singus Creek and individual allotments.

After opening statements, but prior to the introduction of evidence by the appellants at the hearing, the Government and the interveners moved to dismiss that portion of the appeal directed to the reduction imposed on an allotment basis. All of the parties consented to have a ruling on the motion for dismissal with the understanding that if the motion were upheld the balance of the points appealed would not be pursued at the hearing.

The hearing examiner stated that it was agreed that the division of the South Paradise Unit into allotments had been made in 1945 and that since that time all of the appellants had accepted licenses and had grazed their livestock within the restrictions of their allotted areas of use. He concluded that the appellants and their predecessors had accepted these allotments without protest or appeal and were now precluded by the grazing regulations from challenging the established allotments.²

¹ The intervening parties of the South Paradise group were: Joseph M. Boggio, Gerhard Miller, Alvin Miller, Gavica and Zatica, Rockingchair Cattle Co., Elmer Miller, Edith B. Ferraro and Mrs. George Miller. They are referred to herein as the South Paradise Group.

² The motion for dismissal was predicated upon 43 CFR 161.6(e)(13)(i), now 43 CFR 4115.2-1(e)(13)(i), which provides that:

"No readjudication of any license or permit, including free use license, will be made on the claim of any applicant or intervener with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim."

The hearing examiner found that the meaning of this regulation was not entirely free of doubt as applied to this situation but that the appellants' challenging of their allotments was precluded by 43 CFR 161.5(d)(1) and 161.10(a)(2), now 43 CFR 4111.3-2(a)(1) and 1853.1(b), which provided that:

"The District Manager, after recommendation by the advisory board, may make a simultaneous classification under § 161.4 of all offered base properties within a single administrative unit or grazing area and may allocate in a single action the available Federal range within the unit or area upon which such base properties are dependent."

"Any applicant for a grazing license or permit or any other person who, after proper notification, fails to protest or appeal a decision of the district manager within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in such final decision."

In affirming the hearing examiner's decision, the Assistant Director held that the appellants' privileges and areas of use were adjudicated in 1945, and they should have objected through protest or appeal at that time, but since they did not, they could not at this time complain when action was taken to conserve the forage in an area of the Federal range. He further noted that as the range recovers the appellants' privileges will be restored.

The substance of the present appeals to the Secretary is that the Bureau has ignored the requirements of an "adjudication," that there never was an adjudication of the appellants' grazing rights prior to July 17, 1962, that until the district manager's decisions of that date there had been no basis for an appeal, and that the grazing reduction imposed upon the appellants endangers their continuation in the livestock business.

The grazing regulations define "adjudication of grazing privileges" as—

* * * the determination of the qualifications for grazing privileges of the base properties, land (§ 4110.0-5(k)(1)) or water (§ 4110.5(p)(1)) offered in support of applications for grazing licenses or permits in a range unit or area and the subsequent equitable apportionment among the applicants of the forage production within the proper grazing season and capacity of the particular unit or area of Federal range, and acceptance by the applicants of the grazing privileges based upon the apportionment or its substantiation in a decision by an examiner, the Director, or the Secretary upon appeal. 43 CFR 4110.05-(r), formerly 43 CFR 161.2(r).

The appellants' principal contention is that in this allotment there has never been an equitable apportionment of the Federal range, as required by the regulation and, therefore, there has not been an adjudication.

The record does not show precisely upon what basis the present allotments within the South Paradise Unit were determined in the first instance. Neither does it afford any basis for finding one way or the other on the appellants' allegation that their allotments are permanently incapable of supporting their authorized grazing privileges. The sole issue, however, is, if all of the appellants' allegations of fact are assumed to be true, *i.e.*, that the grazing burden imposed on the Singus Creek allotment and the individual Buckingham allotment is inequitable in comparison with that imposed on the balance of the unit, that the present reduction endangers the appellants' operations and that the allotted range is permanently incapable of satisfying the appellants' base property qualification, would the appellants be entitled to the relief they are seeking? The Bureau has twice answered that question in the negative, and a careful review of the case is persuasive that the Bureau's answer is correct.

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It is undisputed that the appellants have accepted their present grazing allotments since 1945 without prior protest. It is also clear from the record that those allotments were made upon the basis of the appellants' base property qualifications,³ although, the record does not indicate the basis upon which the grazing capacity of the range was determined or the principle by which the appellants' allotted grazing lands were related to their authorized grazing privileges. This does not mean, however, that there was not an equitable apportionment of the range.

The allotment of the Federal range to individuals or to groups of individuals is predicated upon the proposition that the allottee accepts a designated area of the range in satisfaction of his grazing privileges. This may or may not be the same area in which he has previously exercised grazing privileges. See *National Livestock Company and Zack Cox*, IGD 55, 59 (1938); *G. A. Jarrell*, IGD 214 (1941). Changing conditions of the range may permit in some years more grazing than the allottee's base authorization or may require a reduction in his privileges in other years, but in either event the allottee accepts the assigned area as his fair share of the available range. He may accept this allotment without dissent or he may appeal the allocation of the range to its final affirmation or amendment, but when finally determined, the allotment must be accepted as the user's fair share of the range. In no other way can stability in administration of the range be achieved.

The record does not contain adequate information to serve as a basis for determining whether or not there was an equitable apportionment of the range in 1945. Certainly, the appellants have not offered any evidence that the initial assignment of their allotments was not, in fact, based upon an equitable apportionment of the range. Neither does the record indicate whether or not sufficient data could now be obtained from which it might fairly be determined whether or not the initial apportionment was equitable. However, it is not necessary to consider this question, for the merits of the appellants' position can be determined by the application of well-established principles governing grazing administration and of presumptions that necessarily arise.

The only basis for challenging an allotment of the Federal range is that the allotment does not, in fact, have the grazing capacity found by the Bureau to exist and that it will not support the use authorized, for if an allottee will receive all of the grazing privileges to which he

³ Buckingham claimed in his initial appeal from the district manager's decisions that he is authorized 765 AUMs rather than the 738 AUMs upon which the manager determined his present grazing privileges. This issue, apparently, has not been resolved but is not an issue in the present appeal and would not affect this decision.

is entitled, he may not complain about either the area of use assigned to him or the grazing privileges granted to another. *Harold Babcock et al.*, A-30301 (June 16, 1965), and cases there cited.

It must be concluded that in 1945 the appellants' allotments were adequate, or they were not adequate, to satisfy their qualified use of the Federal range. If they were adequate, there was not, and is not now, any basis for challenging those allotments or for complaining because of the allotments given to others even if the capacity of the latter may have exceeded the qualified use of the allottees. The fact that the appellants accepted those allotments for 17 years without protest strongly indicates that prior to notice of the reduction in grazing privileges they at least believed the allotments to contain sufficient forage to meet their qualified demands. If, on the other hand, the allotments were inherently inadequate in 1945, the appellants should have been the first to become aware of that fact. Their apparent acceptance, at the present time, of the Bureau's findings as to range capacity would indicate that they already recognized that there was an inadequacy of forage for their grazing demands. Having failed to protest any inequity or inadequacy during the 17 years, however, the appellants are rightly precluded from seeking a reapportionment of the range at this time at the expense of the users of other allotments upon the basis of such alleged inequity.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions appealed from are affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF GENERAL ELECTRIC COMPANY

IBCA-442-6-64

Decided July 16, 1965

Contracts: Performance or Default: Inspection

A defect in the manufacture of a bracket for a tap changer in an auto-transformer—which at the time of acceptance was not known to the Government and which could not have been discovered through reasonable methods of inspection—is a latent defect within the meaning of the Inspection clause of a standard form supply contract.

Contracts: Construction and Operation: Warranties

The legal principle of cumulation of warranties enunciated in the Uniform Sales Act and the Uniform Commercial Code forms part of the general Federal common law applicable to Government contracts.

July 16, 1965

**Contracts: Performance or Default: Acceptance of Performance—Contracts:
Construction and Operation: Warranties**

The expiration of an express guaranty period in a Guarantee clause does not preclude the Government from exercising the remedies specified in the standard form of Inspection clause, which excepts latent defects from the conclusive effect of acceptance and payment.

Contracts: Disputes and Remedies: Equitable Adjustments

Where a bracket for a tap changer in an autotransformer fails more than four years from the date of its activation, and has performed more than 14,000 operations of a guaranteed 50,000 operations, a proportional adjustment will be made of the total cost of repair to arrive at the amount properly chargeable to the contractor.

BOARD OF CONTRACT APPEALS

This is a timely appeal from a decision of the contracting officer asserting that contractor-appellant is indebted to the Government in the amount of \$3,103.53. This sum represents the cost of repairing an autotransformer furnished by appellant, which failed in operation subsequent to inspection, acceptance and final payment, and after expiration of the guaranty period specified in the contract.

The contracting officer determined that the failure of the autotransformer (hereinafter sometimes referred to as "transformer") was due to a latent defect in the manufacturing of a contact support bracket (for the transformer's tap changer) which fractured while in operation.

Appellant contends that the total cost incident to restoring the transformer's tap changer should be borne by the Government, on the ground that the guaranty period specified in the contract had expired prior to the time of the equipment's mechanical failure.

The matter is submitted on the record without an oral hearing.

The contract, dated January 10, 1957, called for the manufacture and installation of four single phase autotransformers for the Bonneville Power Administration at its substation at Toledo, Oregon. The contract price was \$90,672.50 each for a total of \$362,690. It was executed on Standard Form 33 (Revised June 1955) and incorporated the General Provisions of Standard Form 32 (November 1949 Edition), which included a standard Inspection clause (Clause 5). Paragraph (d) of that clause reads as follows:

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. *Except as otherwise provided in this contract, final acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.* (Italics supplied.)

The Supplementary General Provisions contained a clause relating to responsibility for the equipment following acceptance, which reads as follows:

108. *Acceptance Does Not Relieve Contractor of Responsibility.* The acceptance of material or equipment or parts thereof or waiving of inspection will in no way relieve the contractor of responsibility for furnishing material or equipment or parts thereof meeting the requirements of these specifications.

The Supplementary General Provisions also included a clause which required, among other things, that all materials should be free from defects. It reads as follows:

109. *Material and Workmanship.* Material and workmanship shall be of the type and grade most suitable for the application and as far as practicable shall conform, unless otherwise specified, to the latest applicable standards, specifications, recommended practices, and procedures of such standardizing bodies as the Federal Specifications Board, ASTM, AIEE, ASME, NEMA, and ASA. All materials shall be of recent manufacture, unused and *free from defects*. (Italics supplied.)

The Guarantee Clause of the Supplemental General Provisions provided, in pertinent part, that:

112. *Contractor's Guarantee.* A. The contractor guarantees that equipment furnished under the contract meets all the requirements of these specifications.

B. The contractor hereby agrees to repair or replace any equipment or part thereof which fails in operation during normal and proper use within one year from date of completion of installation due to defects in design, material or workmanship, notwithstanding that final acceptance and payment, may have been consummated; Provided, however, that in each case the contracting officer shall have promptly forwarded written notice of such failure to the Contractor and Provided Further, that in case installation is delayed for more than six (6) months after the date of preliminary acceptance at destination by conditions beyond the control of the contractor, this guarantee shall remain in full force and effect for a period of eighteen (18) months from date of preliminary acceptance at destination regardless of the date of completion of installation. All replacements of equipment or parts thereof as a result of failures after final acceptance shall be made promptly and free of charge f.o.b. destination. The cost of installing these replacements after final acceptance shall be borne by the Government.

Paragraph 309 of the General Technical Requirements for the type of transformers procured under the contract contained specific duties with respect to the ability of the tap changer to meet operational requirements. It reads in pertinent part:

c. All parts of each completely assembled tap-changer shall be mechanically capable of performing 50,000 operations, without the necessity of replacing or rebuilding any of the parts. Each completely assembled tap-changer shall be capable of withstanding without damage the maximum short circuit stresses which would be imposed upon it when the transformer itself is subjected to short circuit currents in accordance with the requirements of ASA Transformer Standard C57.12, Paragraph 12,050, 1954.

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Although the contract called for supplying the Government with four autotransformers, we are concerned here only with one (No. 1-1117, Manufacturer's Serial No. C-658397), which was delivered to the Bonneville Power Administration's substation at Toledo, Oregon, on July 26, 1957. The transformer was energized and placed in operation on December 19, 1957. Final payment was made on June 16, 1959.

The transformer failed in operation on March 22, 1962—after more than four years of service, and following 14,696 operations of the tap changer—due to the breaking of one of the contact support brackets in the tap changer mechanism.

A spare transformer (T-1118) was substituted for the failed transformer (T-1117). On the following day the support bracket was removed from the tap changer, and the compartment opened for inspection in the presence of appellant's representative. The inspection revealed that the break in the 90° bend of the support bracket was at a point where the bracket was weakened by two holes. The movement of the contacts, permitted by the broken bracket, had resulted in considerable damage to the tap changer mechanism. One contact on the main contactor of the knife-switch type, was burned and the end of the stationary harp was burned away. Some burning occurred on the inside of the bakelite board supporting the gear mechanism. Fifty gallons of oil were thrown out through the relief vent.

The fractured contact support, and companion contact supports for the tap changer, together with two unused contact supports (for comparison) were thereafter on May 23, 1962, sent to an independent Laboratory for a metallurgical investigation of the failure of the contact support. The laboratory investigation included a history of the operation of the unit; a record of as-received condition by photography, sketches and writeup; flow detection inspection, both visually and by dye-penetration inspection; metallographic, microscopic, and fractographic examinations; hardness surveys and a limited design analysis.

By comprehensive detailed analysis, the laboratory report, dated June 29, 1962, concluded that the failure of the contact support was caused by the faulty manufacture of the contact support bracket of the tap changer, for reasons as follows:

1. The contact support bracket failed by progressive (fatigue) type fracture. The fatigue failure nucleated from the inside radius of a 90° cold bend in the contact support. The three used contact supports which were submitted with the failed support, were also found with insipient cracks in this inside radius of the same bend.

2. No cracks were found in the two unused contact supports submitted to us. We found no indication that cracks were present in the used contact supports from the time of manufacture.

3. The fatigue failure was due to faulty manufacture. The copper contact support was locally worked near the limit of its strength in forming the cold bend area so that they reduced the effective cross-section by fifty percent. It was this combination of severe, local cold-working and the low effective cross-section which induced the fatigue failures from relatively short-time operation. We found no evidence of a stress-relieving treatment designed to reduce the deleterious residual stresses from the bending operation. * * *¹

From the foregoing laboratory report and the hidden location of the faulty contact support bracket within the transformer, the Board finds that the defect was latent and could not have been discovered by a reasonable inspection of the equipment upon acceptance.

The cost of removing the failed transformer (T-1117) and installing a spare transformer and a new tap changer amounted to \$3,103.50 for which amount claims is made by the Government.

Although admitting that its own investigation disclosed that failure of the contact support bracket was due to an error in workmanship caused by improperly locating the mounting holes with respect to the bend in the contact support, appellant asserted originally by letter of November 11, 1963, that its liability is limited exclusively to the replacement of parts, and that the costs of installing replacement should be borne by the Government. By brief filed herein, however, appellant's counsel denies any liability on the grounds that the sole remedy available to the Government is the one year or eighteen-month periods specified in the contractor's Guaranteed clause (Clause 112), *supra*.

In order to resolve this dispute, it is necessary for the Board to determine whether appellant or the Government should bear the expense of repairing the autotransformer, considering the fact that it failed while in operation subsequent to the expiration of the guaranty period specified in the contract. The failure occurred on March 22, 1962, which was more than four years from the date of its being placed in operation on December 19, 1957.

More specifically, we must determine (1) whether the Government's remedies under the Inspection clause (Clause 5) survived the final acceptance of the transformer by virtue of the specific exception for latent defects in paragraph (d) of that clause; and (2) whether the express guaranty appearing in the Guarantee clause (paragraph 112) provided an exclusive remedy for defects discovered after final ac-

¹ It was also determined that the contact support failed prematurely, having performed 14,000 operations, whereas it was required to be mechanically capable of 50,000 operations.

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ceptance which—the time limitations of that clause having expired—precludes any recovery by the Government.

Appellant admits that the failure of the contact support bracket of the tap changer was caused by an error in workmanship. Documentary and photographic evidence establishes the fact that the contact support bracket failed because of faulty manufacture, which could not have been discovered before final acceptance by any customary or reasonable procedures of visual inspection. Nor is it likely that any defect could have been discovered before final acceptance through any customary or reasonable performance tests, particularly since the failure occurred subsequent to more than 14,000 operations. The defect was not actually discovered, by either appellant or the Government, until after the failure of the transformer to perform. We do not hesitate to conclude that the defect in the contact support bracket was “latent” within the meaning of that word as used in the Inspection clause.²

Appellant asserts (1) that the language of paragraph (d) of the Inspection clause pertaining to either patent or latent defects has no application here, because it refers expressly to defects or other failures from which the contractor is relieved by reason of inspection, tests and final acceptance, (2) that this clause does not purport to add to a remedy which is already provided for elsewhere in the contract, namely, in paragraph (B) of the Guaranty clause, (3) that Clause 5(d) does not in any way state that there shall be an extension of the warranty period beyond the one year or eighteen-month period specified therein, and (4) that implied warranties are inconsistent with the expressed period of warranty.

The Government contends, on the other hand, that the Guarantee clause does not eliminate or limit the Inspection clause, and that the Government is entitled to rely here not only on the remedies specifically enumerated in the Inspection clause, but also on the remedies prescribed by the general law of sales for breach of warranty. It maintains that the Guarantee clause should not be construed as disturbing a subsisting obligation as to latent defects, that this clause provides a cumulative remedy in addition to the ones contained in the Inspection clause, and that the two clauses are consistent.

Paragraph (d) of the Inspection clause states that “final acceptance shall be conclusive except as regards latent defects.” By prefacing this

² For a discussion of “latent defects” see Whelan, *Warranties Under the General Law of Sales—Some Relationships to Government Contract Law*, George Washington University, *Government Contract Warranties* (Government Contracts Monograph No. 2), pp. 3, 16 (1961).

language with the words "Except as otherwise provided in this contract," the paragraph recognizes that other provisions of the contract may either narrow or widen the area of conclusiveness resulting from final acceptance. The Guarantee clause expressly narrows that area by excepting from it any defect, whether latent or patent, which results in the occurrence of an operating failure during the guaranty period. On the other hand, the Guarantee clause contains no intimation of an intention to widen the area of conclusiveness by excluding or modifying the exception for latent defects. No intimation of such an intention is to be found in other provisions of the contract. To the contrary, paragraph 108, which amplifies the Inspection clause, and paragraph 109 which includes a warranty that all materials shall be "free from defects," are indicative of a purpose to enlarge rather than limit the rights of the Government under the Inspection clause.

The rule that warranties are to be construed as cumulative, wherever reasonable, is a well-established principle of the law of sales. Section 15(b) of the Uniform Sales Act, which has been adopted by 36 States and District of Columbia, states that:

An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Section 2-317 of the Uniform Commercial Code, which has been adopted by 33 States,³ the District of Columbia and the Virgin Islands, states in pertinent part that:

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant.

Numerous decisions recognize and apply the rule of cumulation of remedies to which these provisions give expression.⁴

A recent decision of this Board, *Federal Pacific Electric Company*,⁵

³ Utah, Texas, North Carolina and Hawaii were the last four states to enact the Uniform Commercial Code. Code bills have been introduced in the legislature of other states and it is reasonable to believe that the Code will eventually be adopted by all 50 states. See Hensen, *The Problem of Uniformity*, and four other articles following in *The Business Lawyer*, pp. 689-727 (April 1965).

⁴ *Applemen v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, 174 N.E. 2d 892 (1961); *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W. 2d 655 (1960); *Inland Products Corp. v. Donovan, Inc.*, 240 Minn. 365, 62 N.W. 2d 211 (1953); *Greenland Development Corp. v. Allied Heating Products Co.*, 184 Va. 588, 35 S.E. 2d 801 (1945); *Ford Motor Co. v. Cullum*, 96 F. 2d 1 (5th Cir. 1938), cert. denied 305 U.S. 607 (1938) (dictum); Annot., 164 ALR 1321, 1325, 1334 (1946); *Feeney & Brenner Co. v. Stone*, 89 Ore. 360, 171 Pac. 569, 174 Pac. 152 (1918); *John A. Roebblings' Sons Co. v. Southern Power Co.*, 142 Ga. 464, 83 S.E. 138 (1914).

⁵ IBCA-334 (October 23, 1964), 71 I.D. 384, 1964 BCA par. 4494, 6 Gov. Contr. par. 473. See *Reeves Soundcraft Corp.*, ASBCA Nos. 9030 and 9130 (June 30, 1964), 1964 BCA par. 4317, 6 Gov. Contr. 406; *J. R. Simplot Co.*, ASBCA No. 3952 (January 30, 1959), 59-1 BCA par. 2112, modified (August 11, 1959); 59-2 BCA par. 2306; *F. W. Lang Co.*, ASBCA No. 2677 (June 28, 1957), 57-1 BCA par. 1334; *Whitin Machine Works v. United States*, 175 F. 2d 504 (1st Cir. 1949); cf. *Cudahy Packing Co. v. United States*, 109 Ct. Cl. 833 (1948).

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involving the failure of a circuit breaker caused by an improperly laminated insulator column, subsequent to inspection, acceptance and expiration of the expressed guaranty period is dispositive of the instant appeal. We held there that the legal principle of cumulation of warranties enunciated in the Uniform Sales Act and the Uniform Commercial Code forms part of the general Federal common law applicable to Government supply contracts. There is no Federal Uniform Commercial Code.⁶

Appellant's assertion by letter dated November 11, 1963, that its sole liability is for replacements of parts and not for their installation—presumably pursuant to paragraph (b) of the Guarantee clause—must be rejected, because the Inspection clause contains no exclusion of installation costs.⁷

Under paragraph (B) of the Inspection clause (Clause 5),⁸ the Government is entitled to charge appellant for the costs reasonably incurred in repairing the transformer's tap changer.

Appellant does not affirmatively question or contest the Government's itemized statement of costs in the total amount of \$3,103.53, which included the cost of removal of the failed transformer, and the installation of a substitute transformer, to be used while the failed transformer's tap changer was tested and ultimately replaced. Appellant's defense to the Government's claim is predicated solely on the theory of nonliability in any amount because the time specified in the Guarantee clause had long since expired at the time of the mechanical failure of the tap changer.

⁶ See Braucher, *Federal Enactment of the Uniform Code*, Duke University, 16 Law & Contemp. Prob. 100 (1951); Dean, *Conflict of Laws Under the Uniform Commercial Code: The Case for Federal Enactment*, 6 Vand. L. Rev. 479 (1953).

⁷ This paragraph reads in pertinent part:

"All replacements of equipment or parts thereof as a result of failures after final acceptance shall be made promptly and free of charge f.o.b. destination. The cost of installing these replacements after final acceptance shall be borne by the Government."

⁸ "(b) In case any supplies or lots of supplies are defective in materials or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer, by and at the expense of the Contractor promptly after notice, and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer, and to proceed promptly with the replacement or correction thereof, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled 'Default.' Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such a reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.'"

Notwithstanding appellant's concession that there was an error in workmanship, and our conclusion that the defect in the manufacture of the tap changer was latent, some consideration should be given to the fact that the tap changer failed after more than 4 years of service and 14,696 of a required 50,000 operations.

In our opinion the reasonable costs of replacing the tap changer should be computed on the basis of the relationship which 14,696 operations bears to the required 50,000 operations. The amount of repair costs properly chargeable to appellant is accordingly computed to be \$2,191.33.⁹

We find therefore:

1. That there was a defect in the manufacture of a support bracket for the autotransformer's tap changer which caused its premature failure;
2. That the defect was not discernible by the Government through reasonable methods of inspection, and was a latent defect within the meaning of the Inspection clause (Clause 5) of the contract;
3. That the provisions of the Guarantee clause (paragraph 112) of the contract are not inconsistent with, and do not override the portion of the Inspection clause pertaining to latent defects;
4. That the failure of the autotransformer after its final acceptance entitled the Government to the remedies specified in the Inspection clause; and
5. That the amount of appellant's indebtedness to the Government is reduced from \$3,103.53 to \$2,191.33.

Conclusion

The appeal is sustained to the extent set forth above and is otherwise denied.

JOHN J. HYNES, *Member.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

⁹ For a discussion of the limitations imposed by normal depreciation, etc., concerning the measure of the contractor's liability for latent defects, and for an examination of the effect of the new ASPR provisions on warranties, see Borden, *Government Contract Warranties Under the New ASPR Provisions*, 25 Fed. B.J. 248, 257 (Spring 1965).

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A-30072

*July 26, 1965***Oil and Gas Leases: Cancellation**

The Secretary has authority to cancel any lease erroneously issued whether the error was fraudulently induced or resulted from inadvertence by his own subordinates and whether or not there is a proceeding timely instituted by a competing applicant.

Oil and Gas Leases: Cancellation

The Departmental policy of sometimes not canceling a lease issued in violation of a provision of the oil and gas regulation where there are no intervening rights will not be applied to a lease issued to one who was involved in a plan designed to give others associated with him an unfair advantage in the drawing held to determine priority of filing.

Rules of Practice: Hearings:

Where an appellant has never requested a hearing and has been given every opportunity to submit whatever evidence on his behalf he desired, he cannot rightfully complain that he has been denied an opportunity to be heard.

Rules of Practice: Generally—Public Records

Where the request of an appellant for a copy of the record is not answered by inadvertence but the appellant makes no attempt to inspect the record in accordance with Departmental procedure, asks for no extension of time within which to file a statement of reasons for the appeal on the ground that the record has not been made available to him, and his attorney has been fully apprised in a Departmental decision in which he was counsel of a document in the record which he desires to have copies of, the failure to respond to his request for copies of the record is not prejudicial.

Oil and Gas Leases: Bona Fide Purchaser

An assignee of a lease, who may himself be a bona fide purchaser, loses the protection of the bona fide purchaser provisions of the Mineral Leasing Act if his agent who acts for him in procuring the assignment has knowledge which would disqualify the agent as a bona fide purchaser.

Oil and Gas Leases: Bona Fide Purchaser

The subassignee of an assignee of an oil and gas lease whose assignment has not been approved holds only an equitable interest in the lease and cannot be a bona fide purchaser.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

W. H. Bird and others¹ have appealed to the Secretary of the Interior from a decision of the Division of Appeals of the Bureau of Land Management, dated May 31, 1963, which held for cancellation

¹ R. J. Burnside, Carroll A. Rice, and Herbert A. Webber. As pointed out later, the appeals of Burnside and Rice are limited in scope, and Webber failed to perfect his appeal. Therefore, the term "appellant," as used in this decision, refers only to Bird.

noncompetitive oil and gas lease Fairbanks 021360 and denied that he has the status of a bona fide purchaser of the lease.

The lease, issued in response to an offer filed October 1, 1958, by Herbert A. Webber, was effective as of April 1, 1959. On March 12, 1962, Webber assigned the lease to Bird. On March 16, 1962, Bird filed the assignment in the Fairbanks land office for approval and on March 19, 1962, made timely payment of the rental for the fourth year. On April 26, 1962, Bird assigned the lease to BP Exploration Company (Alaska) Inc., which filed a request for approval of the assignment on May 18, 1962. Bird then assigned, on June 30, 1962, out of the 2.425 percent overriding royalty he retained, overriding royalties of 0.375 percent each to R. J. Burnside, Robert A. Foley, Melvin A. Mailloux and an overriding royalty of 0.300 percent to Carroll A. Rice. These assignments were filed on July 16, 1962.

Previous to Bird's request for approval of the assignment from Webber to him, the Bureau of Land Management had made an extensive investigation of the filing in the Fairbanks land office of 59 oil and gas lease offers for each of 39 tracts of land on October 1, 1958, by 59 persons who gave their addresses as P.O. Box 1161, Dallas, Texas. In its decisions of September 2, 1961, and March 16, 1962 (*Duncan Miller*, Fairbanks 022139 *et al.*), the Division of Appeals, Bureau of Land Management, concluded that, since the successful offerors and their alternates, who were part of this group, were disqualified to hold oil and gas leases because of the collusive manner of their filing, leases should not be issued to them even though their offers had been awarded first priority in the drawing of simultaneously filed offers.

This ruling was affirmed by the Department as to Fairbanks 022139 and six other offers in *Evelyn R. Robertson et al.*, A-29251 (March 21, 1963), which held (1) that, since the agreements between Transwestern Investment Company and each of its clients established Transwestern as an agent for the offerors, the statements required by the regulation then in effect (43 CFR, 1954 rev., 192(e) (4)) had to be filed, and that the requirement not having been met, the offers earned no priority, and (2) that the facts established Transwestern and John J. King as the real parties in interest in the offers, that a party in interest can submit only one offer for participation in a drawing, and that Transwestern and King had created an inherently unfair situation which disqualified them from participating in the drawing.²

In conformity with the Bureau of Land Management decision in the *Robertson* case, *supra*, the Fairbanks land office noted that Web-

² The Department's decision was recently affirmed in *Robertson v. Udall*, No. 18,781, D.C. Cir., June 30, 1965.

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ber's lease was subject to the same infirmity as the offers considered in the earlier decisions and held that because the lease in question had been awarded in response to one of a number of offers filed simultaneously with the view of obtaining an unfair advantage over other offerors in a drawing, it was subject to cancellation under the doctrine of *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955), unless it could be saved under the bona fide purchaser provisions of section 27(h) (2) and (i) of the Mineral Leasing Act, as amended by section 3 of the Mineral Leasing Act Revision of 1960, 74 Stat. 788, 30 U.S.C. § 184(h) (2) and (i) (1964).

The land office noted that the Department had interpreted these statutory provisions to mean that the cancellation of a lease will be suspended or set aside until the validity of a pending assignment of the lease, the status of the assignee as a bona fide purchaser, and the applicability of the statutory provisions saving the rights of bona fide purchasers have been determined, *J. Penrod Toles*, 68 I.D. 285 (1961). Accordingly, the land office gave notice to the "assignees"³ of the protection afforded by the statute and allowed them 60 days to submit evidence of their bona fide purchaser status, and announced deferral of its approval of the assignments until the validity of the assignments and the status of the assignees were determined.

On appeal to the Director of the Bureau of Land Management, Bird submitted a copy of his check showing that he had paid Webber \$1,339, which, he said, was for the assignment of the lease. He also showed that he had paid the required \$10 filing fee with his request for approval of the assignment and the lease rental for the fourth lease year. He contended that, in the absence of an attack on the validity of the Webber lease, the land office acted arbitrarily in requiring him to furnish evidence that he was a bona fide purchaser of the lease since section 30(a) of the Mineral Leasing Act, as amended, 60 Stat. 955 (1946), as amended, 30 U.S.C. sec. 187a (1964), authorizes the Secretary of the Interior to disapprove an assignment of an oil and gas lease only for lack of qualification of the assignee or lack of sufficient bond.

BP Exploration made no attempt to furnish any evidence of its bona fide purchaser status or to appeal⁴ but, on March 11, 1963, wrote to the Director indicating that it had prospected extensively for oil and would like approval of the assignment to it in order to commence drilling operations on the leased premises.

³ Although the land office decision gave notice to the assignees, presumably including BP Exploration, the decision named only Bird as having a right of appeal and he only was served with a copy of the decision by certified mail. A copy was sent to BP Exploration by ordinary mail.

⁴ See footnote 3.

The Division of Appeals obtained from Webber a copy of his agreement with Transwestern which was identical with the agreements signed by other offerors in the Transwestern-King "Box 1161" group, discussed in *Evelyn R. Robertson, supra*. On the basis of this evidence, the Division concluded, in its decision of May 31, 1963, that King and Transwestern were the real parties in interest in Webber's offer so that it suffered from the same infirmities as the lease offers invalidated in the *Robertson* decision and that the lease issued to Webber should, therefore, have been held for cancellation by the land office subject to Bird's right to offer proof of his bona fide purchaser status. It thereupon held the lease for cancellation and determined that Bird was acting as an agent for King and Transwestern in receiving the assignment from Webber, in assigning to BP Exploration, and in assigning the overriding royalties to persons who were officers of Transwestern and an associate of King, the fees for which were paid by the company of which King is president, so that Bird was not a bona fide purchaser of the lease.

It also held that Bird was not a qualified assignee because he had failed to disclose that the real party in interest in the assignment was his principal, King-Transwestern, for whom he had acted as agent.

It then considered the assignment to BP Exploration. It held that the bona fide purchaser provisions of the Mineral Leasing Act, as amended, *supra*, apply only to those who buy from one who has title and that BP, having purchased from Bird before the assignment to him had been approved, could not qualify as a bona fide purchaser.

On appeal to the Secretary, Bird charges that the decision appealed from is outrageously arbitrary and capricious and plainly wrong; that it ignores established principles of law, flouts departmental regulations and violates the Fifth Amendment by seeking to confiscate valuable property rights firmly established by contract without an opportunity to be heard or to understand the basis of the charges made. He contends, specifically, that the Secretary has no authority to cancel a lease administratively because of fraud preceding its issuance and that, in the absence of intervening rights, the Secretary should not disturb a lease because of a violation of a regulation prior to its issuance.

The Bureau's decision stated that Webber and each of the assignees were allowed the right of appeal. Bird filed a proper appeal. Webber filed a notice of appeal but did not file a statement of reasons. BP Exploration, Foley, and Mailloux, although served with copies of the decision, made no response. Rice and Burnside each filed a notice of appeal and a statement saying that he had acquired the overriding royalty assigned to him as fees for services as an accountant and

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geologist, respectively, and claiming protection as a bona fide purchaser.

The appeals raise several issues. The first is whether Webber's lease was properly canceled. Since Webber's offer was in all aspects similar to the offers considered in *Evelyn R. Robertson et al., supra.*, it ought not to have ripened into a lease and presumably would not have if all the facts had been seasonably known. Even after a lease has been issued, it may still be canceled by the Secretary if it has been granted in violation of the Mineral Leasing Act, as amended, *supra.*, or the regulations issued under it. *Boesche v. Udall*, 373 U.S. 472 (1963). The appellant contends that the Supreme Court limited its holding to "cancellation of leases in proceedings timely instituted by competing applicants for the same land," *id.*, p. 485.

The secretary, however, had taken a broad position before the court. In his brief, p. 14, the Secretary argued that he had authority to rescind leases *erroneously* granted, whether the error was fraudulently induced or resulted from inadvertence by his own subordinates. The claim, in sort, is restricted to the correction of errors which affect the *initial validity* of the lease. He conceded, however, that for the purposes of the particular case, it was necessary to establish only that a lease issued on a defective application can be cancelled by the Secretary upon the timely appeal of a competing applicant taken from the denial of his application. Although the court restricted its holdings to the narrower ground, it did not go further and hold that the Secretary was without authority to cancel a lease improvidently issued in the absence of a competing applicant. Indeed, the sweep of the court's opinion, based as it was on the Secretary's general powers of management over the public lands and citing as it did the Secretary's historical authority to cancel invalid mining claims and other similar interests in public lands, where there was not necessarily a competing claimant, was so broad that it could not reasonably be read as negating the authority of the Secretary to cancel a lease issued in violation of his regulations merely because there is no competing applicant for a lease. Since that question did not have to be decided to reach a decision, the court simply did not rule on it.

In the circumstances the Department will stand upon its position that it has authority to cancel a lease erroneously issued whether or not a competing applicant files a timely appeal.

That this is the Department's position is emphasized by the appellant's next contention, i.e., that the Secretary has sometimes held that in the absence of intervening rights he will not disturb an oil and gas lease because of a violation of a regulation which occurred prior to the issuance of the lease. If the Secretary has no authority at all

to cancel where there are no competing applicants, as appellant urges, then it would, of course, be unnecessary for him to determine whether in any particular case he ought or ought not to cancel a lease. A corollary of the statement that

* * * in the absence of intervening rights the Department has often held that it will not cancel a lease, otherwise regular, because it has been issued in violation of some provision of the regulations which, if made known prior to the issuance of the lease, would have required that the offer be rejected. * * * (*Stephen P. Dillon et al.*, 66 I.D. 148, 151 (1959)),

is that the Department has the authority to cancel a lease if the situation warrants such an action, even if there are no intervening rights.

Webber's lease does not merit the protection of that equitable policy. His offer was subject to rejection not only for failure to file the prescribed agency statement and a copy of the agreement between the offeror and his agent, but also because under the circumstances Transwestern and King were the real parties in interest in the offer and a party in interest can submit only one offer for participation in a drawing and because Transwestern and King had created an inherently unfair situation which disqualified them from participating in the drawing. *Evelyn R. Robertson et al.*, *supra*. Even assuming that failure to comply with the agency provisions of the regulation might be a violation the Department would overlook in the absence of intervening rights, the plan put into effect and carried out by Transwestern and King, cannot be ignored. It is not a relatively minor defect, causing no detriment to a subsequent offeror or giving the offeror no unfair advantage over others. On the contrary, it frustrated the purpose of the drawing and deprived many other offerors of a fair and equal opportunity to win first priority. It is so serious an attack upon a major objective of the Department's leasing procedures that it cannot be given any semblance of success so long as the Department has power to strike at it.

The appellant also complains that he has not had an opportunity to be heard. There is nothing in the case file to indicate that the appellant ever requested a formal hearing as provided by regulation 43 CFR, 1964 rev., 221.6, now 43 CFR 1843.5. He has had every opportunity to submit whatever evidence he desired on his behalf and has, in fact, submitted affidavits and other material to support his contentions. This procedure has given appellant ample opportunity to be heard.

He also alleges that the record on which the case was decided was not available to him, apparently because his attorney's request of June 28, 1963, to the Bureau of Land Management for copies of the record

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"went unanswered." While undoubtedly some reply should have been made to the request, the failure to respond need not have seriously inconvenienced the appellant. Apparently he was not very disturbed, for he did not even request an extension of time in which to submit his statement of reasons for appeal on the ground that copies of the record had not been supplied him. Furthermore, although the case record has at all times been available in this office for inspection by the appellant or his attorney, neither one, so far as we are aware, ever sought to avail himself of this procedure. Finally, Bird says that neither he nor his attorney has ever seen the "alleged agreement" between his assignor, Webber, and Melvin Mailloux, upon which special emphasis was placed in the decision appealed from.

Although, as we have said, a response should have been made to appellant's request for copies of the record, the fact is that appellant was not prejudiced in any way by the failure to respond. The agreements referred to in the Division of Appeals' decision as being in the record, which were the object of appellant's request, were clearly identified as the agreements which were entered into between the "Box 1161" offerors and Transwestern and which were described and set forth in the *Robertson* decision of March 21, 1963. The Division of Appeals' decision stated that Webber had entered into such an agreement with Transwestern and that Webber's offer therefore suffered from the same infirmities as the other "Box 1161" offers. Webber's offer, in fact, was a Box 1161 offer.

Bird's attorney was counsel in the *Robertson* case. He was sent a copy of the *Robertson* decision on March 21, 1963, three months before he requested copies of the record in the present case. He therefore knew or should have known exactly what agreement between Webber and Transwestern was referred to in the Division of Appeals' decision. He is therefore in no position to complain that appellant was adversely affected by matter in the record of which he was not furnished knowledge.

The appellant also asserts that the lease ought not to be canceled because the requirement in the regulation for agency statements was not so clear that there was no basis for disregarding noncompliance. The Department held, in effect, in the *Robertson* case that the regulation clearly required the filing of such statements. The court agreed in *Robertson v. Udall*, *supra*, saying:

The merits of the Secretary's action do not, in our view, call for much comment. Like him, we think that there was a patent failure to comply with the requirements relating to the disclosure of an agency interest and relationship; and that this failure rendered appellants' lease offers ineffective from the first.

Had the facts been known at the time, the offers could—and presumably would—have been rejected at the moment of submission for filing. That their defects—which were not apparent on their face—necessarily became known only after subsequent investigation does not make them any less irregular, nor does it estop appellee in any way from asserting that irregularity.

Appellants contend that there is some evidence of a departmental practice in the past to apply the agency regulation only in those cases where the lease offer purports on its face to be signed by an agent *and* where the agent is shown to have made the selection of the lands. In this latter respect, it is claimed that there has been no opportunity to show that appellants did in fact select their own lands. But the regulation does not, in our reading of it, say or fairly imply that these conditions attach; and, whatever may have been their recognition within the Department on other occasions, we do not think that the Secretary was disabled from applying the regulation in this instance in what clearly appears to have been not only its letter but its spirit. * * *

Furthermore, appellant's argument as to the regulation also blandly ignores the fact there is another equally imperative justification for canceling Webber's lease—that is, the unfair advantage given in the drawing to Transwestern and King by the stratagem they concocted of which this offer of Webber was but a small part.

The appellant finally urges that the conclusion that he acted as an agent for "Transwestern-King" and therefore could not be a bona fide purchaser is arbitrary, capricious and plainly wrong. This problem need not be resolved because of other facts which make it plain that Bird cannot be a bona fide purchaser.

As has been set out above, one of the moving parties in conceiving and carrying out the arrangements for what the Department held to be an improper scheme was John J. King. In his statement to a Bureau of Land Management investigator on June 2, 1961, he stated it was his idea, and he revealed an intimate knowledge of all the steps leading to the filing of the offers. He was shown a copy of the agreement that Mailloux, the then Vice-President of Transwestern, had said was signed by the 59 individuals who signed the offers as offerors. Thus it is indisputable that King knew all the details of the plan and that, at least from the date of the Bureau of Land Management decision of September 2, 1961, which was decided on appeal to the Secretary as *Evelyn R. Robertson et al., supra*, he knew that the Bureau of Land Management considered the arrangement and the multiple filings grossly irregular. With this knowledge King, of course, could not himself be a bona fide purchaser of any lease flowing from an offer filed by one of his "clients."

Although King did not purchase Webber's lease himself, he played a role in the transaction. Bird, in the words of his attorney in his statement of reasons (p. 11),

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was advised of the availability of the subject lease by a friend and neighbor,⁵ John J. King, *who represented him in the transaction.* (Italics added.)

In plain language King acted as an agent for Bird, a situation which immediately raises the question of whether King's knowledge is to be charged to Bird. The answer is quite clear. In a case which turned on whether one bank was a bona fide purchaser of a usurious note exacted by another bank where the two banks had two officers who were directors and members of the executive committees of both banks and who knew of the usury but the remaining members of the executive committee and the board of directors of the purchasing bank did not, it was said:

The District Court found as a conclusion of law that the Savings Bank purchased the note without notice. We cannot agree with that conclusion. The knowledge of Baden and Donaldson must be imputed to the bank under the rule that "notice to the agent is notice to the principal not only as to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and still in his mind at the time of his acting as such agent, if the agent is at liberty to communicate such knowledge to the principal (*Distilled Spirits [Harrington v. United States]* 11 Wall. 356, 20 L. Ed. 167)." * * *

* * * * *

The real reason for the rule which charges a principal with his agent's knowledge is simply the injustice of allowing the principal to avoid, by acting vicariously, burdens to which he would become subject if he were acting for himself. The so-called presumption that the principal knows what the agent knows is irrebuttable; it cannot be avoided by showing that the agent did not in fact communicate his knowledge. It should follow that it cannot be avoided by showing that the agent had such an adverse interest that he would not be likely to communicate his knowledge. In general, "Notice should be imputed wherever there is agency or ratification." * * * Certainly where, as in this case, it does not appear that the agent acted unfairly toward his principal, or even that he would have derived any advantage from doing so, the principal should be charged with the agent's knowledge. Where an agent common to two parties betrays one in favor of the other the second, of course, cannot charge the first with the agent's knowledge. *Herdan v. Hanson*, 182 Cal. 538, 189 P. 440. The present case differs from such cases not only in that here no one was betrayed, but also in that appellants never employed the Bank's agents, Baden and Donaldson, and are in no way responsible for their acts. The Supreme Court has held that if a company's agents withhold knowledge from it, even fraudulently, that fact "cannot alter the legal effect of their acts or of their knowledge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated." * * * In such case the rule imputing knowledge to the company by reason of the knowledge of its agent remains." *Bowen v. Mount Vernon Savings Bank*, 105 F. 2d 796, 798, 799 (D.C. Cir. 1939)⁶

⁵ In a statement designated "Appellant's Showing of Bona Fides" signed by Bird's attorney, King is described as Bird's next-door neighbor.

⁶ Accord: Restatement of Agency (2d) §§ 272-283.

Thus Bird is bound by King's knowledge and can no more be a bona fide purchaser than King could have been.

There remain for consideration the assignments to BP Exploration and to Burnside, Foley, Mailloux and Rice. Although the Bureau of Land Management decision did not specifically hold these assignments for rejection, it did hold that Webber's lease was to be canceled, that Bird was not a bona fide purchaser, that BP could not qualify under the bona fide purchaser provisions of the Mineral Leasing Act, as amended, *supra*, and that the other assignees of Bird were connected "beyond peradventure" with Transwestern and King. It then stated that each of the seven parties was allowed the right of appeal to the Secretary and each was served by certified mail with a copy of the decision. This combination of unfavorable holdings with a statement that a party has a right to appeal can mean only that the application each had pending before the land office was rejected.

The response of the parties named varied. Bird filed a proper appeal. Rice and Burnside filed a notice of appeal but gave as a reason for appeal only a claim that they were bona fide purchasers. Webber, after filing a notice of appeal in time failed to file a statement of reasons. BP, Foley and Mailloux made no response at all.⁷

Accordingly, the Bureau of Land Management decision has become final as to Webber, BP, Foley, and Mailloux.⁸ However, since it was necessary to consider Webber's interest in disposing of Bird's appeal and the BP, Foley and Mailloux assignments must be rejected for the reasons requiring the rejection of Rice's and Burnside's interest, their claims will not be disposed of solely because of their failure properly to appeal.

Burnside and Rice, as well as BP, Foley and Mailloux, derive their interest from assignments made by Bird while Webber's assignment to Bird was awaiting Departmental approval, which has not and cannot, as we find the law, be given.

The issue, then, becomes whether one who derives his interest from an assignor whose own assignment has not been approved can stand in any better position than his assignor. It is our view that he cannot.

The Department has held that an assignee of a lessee whose interest is subject to cancellation may be entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act, as amended, *supra*, all else being regular, even though his assignment

⁷ BP, however, filed a request for an extension of the lease on March 11, 1964.

⁸ *Colorado Land Management, Inc.*, A-30195 (February 5, 1964); *Benson-Montin-Greer Drilling Corp.*, A-29966 (March 30, 1964), which held, respectively, that an appeal to the Secretary will be dismissed when the appellant fails to file a statement of reasons in support of his appeal, 43 CFR 1844.3, and that an oil and gas lessee who fails to appeal from a decision declaring his lease terminated, loses his rights in the lease, 43 CFR 1844.2.

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has not been approved. *Southwestern Petroleum Corporation*, 71 I.D. 206, 209-210 (1964).⁹ It has not, however, found that the protection extends to one who purchases from an assignee whose own assignment has not been approved.

The statutory provision controlling assignments provides:

* * * [a]ny oil and gas lease * * * may be assigned or subleased * * * subject to final approval of the Secretary * * *. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. * * * Section 30(a), Mineral Leasing Act, as amended, 60 Stat. 955 (1946), as amended, 30 U.S.C. 187(a) (1964).

The lease in turn provides:

Sec. 2. The lessee agrees:

* * * * *
(m) *Assignment of oil and gas lease or interest therein*.—As required by applicable law, to file for approval within 90 days from the date of final execution any instrument of transfer made of this lease, or any interest therein, including assignments of record title, working or royalty interests, operating agreements and subleases, such instrument to take effect upon the final approval by the Bureau of Land Management as of the first day of the lease month following the date of filing in the proper land office.

The assignment from Webber to Bird begins:

The undersigned, as owner of record title in the above-designated oil and gas lease, does hereby transfer and assign to: [Bird] * * * the record title interest in and to such lease * * *.

The instructions on the back of the form refer several times to the necessity that the assignment be approved before it becomes effective.

Bird's assignment to BP was made on the same form and contains the same provisions.

Thus at the time of the last assignment, Bird, though both he and BP knew, or are presumed to have known, that he was not the record title holder, stated that he was and attempted to convey the record title to BP. It is plain, then, that BP knew it was not purchasing from the record title holder, but only from one who might become the record title holder if the Secretary or his delegate gave his approval. In other words, the legal title to the lease was still in Webber and the most that Bird had to convey was his right to have the lease assigned to him.

One who does not have legal title but who does have the right to have it conveyed to him is said to hold the equitable title. *Hendriksen v. Cubage*, 309 SW 2d 306 (Ark. 1958): Since the original lease and

⁹ Affirmed in *Southwestern Petroleum Corporation v. Udall*, C.A. No. 5773, United States District Court for the District of New Mexico, March 8, 1965.

the assignment in BP's chain of title establish that assignments were not to become effective without the approval of the Secretary, BP could not acquire legal title until the Secretary gave his approval.¹⁰

The most it bought was an equitable title and as the purchaser of an equitable title, it cannot be a bona fide purchaser. In an extensive review of court and Departmental decisions involving this issue, the Supreme Court has stated:

As shown by the above statement of the provisions of the act of June 3, 1878, 20 Stat. 89, c. 151, known as the Timber and Stone Act, a purchaser of the surveyed public lands, in California, Nevada, Oregon and Washington, Valuable chiefly for timber but unfit for cultivation, or valuable chiefly for stone, was required in his sworn application to state that he did not seek to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract with any person or persons by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself; and if the applicant swore falsely in the premises, he became liable to the penalties of perjury, and would forfeit the money he paid for the lands; and all right and title to the same and any grant or conveyance he may have made, "except in the hands of bona fide purchasers," would be null and void.

Who, within the meaning of the act, are to be deemed bona fide purchasers? Could the appellants, against whom, in respect of these lands, no charge of fraud was made, be deemed bona fide purchasers, if it appeared to the Land Department, before a patent issued, that the original entryman made the application to purchase "on speculation" and not in good faith to appropriate the lands to his own exclusive use and benefit?

The words "bona fide purchasers," as applied to purchasers of public lands, did not appear for the first time in the Timber and Stone Act of 1878. The first section of the act of June 22, 1838, granting preemption rights to settlers on the public lands, contains substantially the same provisions as to the effect of a false oath by the applicant and the same saving for the benefit of bona

¹⁰Cf. *Torgeson v. Connelly*, 348 P. 2d 63, 72 (Wyo., 1959), wherein the court held:

"There was also justification for the court to have found that paragraph twenty-one of the operating agreement, which provided that further assignment should be effective only upon the obtaining of the written approval of the Department of the Interior prevented title from having reposed in defendant under the facts stated. It is argued with some force that 30 U.S.C.A. § 187, 41 Stat. 449, providing that no lease by the Government for oil and gas lands shall be assigned or subleased except with the consent of the Secretary of the Interior, is for the benefit of the Government and a party can take no advantage of the regulation to defeat an assignment. *Aronow v. Bishop*, 107 Mont. 317, 86 P. 2d 644, and *Dougherty v. California Kettleman Oil Royalties, Inc.*, 9 Cal. 2d 58, 69 P. 2d 155, are cited to substantiate this view which is contrary to that expressed in *Oasis Oil Co. v. Bell Oil and Gas Co.*, D.C. Okla., 106 F. Supp. 954, holding that until the approval of the Department of the Interior was forthcoming an assignee did not receive an interest in a controverted lease. It is, however, unnecessary for us to determine the correctness of this rule since the provisions in an instrument by which one attempts to take title undoubtedly establish obligations which are effective independently of any statutory provision, and the statement in paragraph twenty-one of the operating agreement may well have motivated the trial court in its judgment.

* * * Moreover, defendant's evidence failed to establish affirmatively any right which he had to the leases and discloses that the interest of any assignee was not to be effective until the approval of the Department of the Interior has been obtained."

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fide purchasers. 5 Stat. 251, c. 99. Like provisions were made in the act of September 4, 1841, appropriating the proceeds of the sales of the public lands and granting preemption rights. 5 Stat. 453, 456, c. 16, § 13. And the provisions of the last act were preserved in section 2262 of the Revised Statutes.

The contention of appellants is that as between themselves and the United States they must be deemed to have been *bona fide* purchasers from the moment they bought in good faith from Bailey, the vendee of Hackley (although no patent had been issued), and that, under the act, they could not be affected by the fraud of the original entryman or his assignee.

While the mere words of the act of Congress furnish some ground for this contention, the interpretation suggested cannot be approved. In *Root v. Shields*, 1 Wool. 340, 348, 363, Mr. Justice Miller had occasion to consider who were to be regarded as *bona fide* purchasers under the preemption laws when no patent had been issued by the United States. He said: "It is further insisted on behalf of the defendants that they are *bona fide* purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some at least of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers, for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons. They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed and decided against by the land office. But that is a circumstance not material to this consideration. Until the issue of the patent the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary." *Hawley v. Diller*, 178 U.S. 476, 484-485 (1900).

The court, after discussing at length several Departmental decisions¹¹ in which the rule was applied, concluded—

We are of opinion that the rule announced in *Root v. Shields*, above cited, and which has been steadily followed in the Land Department, is consistent with the words of the statute. If any doubt existed on the subject, the construction so long recognized by the Interior Department in its administration of the public lands should be not overthrown, unless a different one is plainly required—as it is not—by the words of the act. *United States v. Philbrick*, 120 U.S. 52, 59; *United States v. Johnston*, 124 U.S. 236, 253; *United States v. Alabama Great Southern R.R. Co.*, 142 U.S. 615, 621. Id. 490.¹²

¹¹ *Traveler's Insurance Co.*, 9 L.D. 316 (1889); *United States v. Allard*, 14 L.D. 392 (1892).

¹² *Accord*, *Thayer v. Spratt*, 189 U.S. 346, 352 (1903); *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311 (1917). See, *United States v. Certain Parcels of Land, etc.*, 85 F. Supp. 986, 1007-1010 (S.D. Calif. 1949).

United States v. Detroit Lumber Co., 200 U.S. 321 (1906), and *United States v. Clark*, 200 U.S. 601 (1906), are not to the contrary, for, as held in *United States v. Kennedy*, 206 F. 47, 50 (5th Cir. 1913):

"It is a general doctrine of equity that one who purchases from a vendor who has only an equitable title, and who is chargeable with notice that another holds the legal title,

Therefore, under the well-established rule, BP is not a bona fide purchaser and cannot avail itself of the protection afforded by section 27 of the Mineral Leasing Act, as amended, *supra*.

While there is some disagreement in the decisions as to whether private parties can take advantage of the fact that an assignment has not been approved by the Secretary, the cases all seem to agree that the provision is for the benefit and protection of the United States and is available to the government. Compare *Recovery Oil Co. v. Van Acker et al.*, 180 P. 2d 436 (Cal. 1947); with *Oasis Oil Co. v. Bell Oil and Gas Co.*, 106 F. Supp. 954 (W. D. Okla. 1952). See, generally, Files "Recording of Instruments Affecting Oil and Gas Interests In Federal Lands" in 3 Rocky Mountain Mineral Law Institute 553, 579-587 (1957). Since the Department is seeking in this case to prevent the abuse of its procedures which are designed to accomplish the purposes of the Mineral Leasing Act, as amended, there is additional reason to refuse to allow a subassignee who takes from an assignee whose own assignment has not been approved by the Secretary to profit from the bona fide purchaser amendment to the Mineral Leasing Act.

Therefore, neither BP nor anyone else whose interest derives from Bird is a bona fide purchaser within the meaning of the act and the assignments from Bird to each of them and from two of them to King,¹³ are denied approval or recognition.

The land covered by lease Fairbanks 021360 is accordingly found to be free from any interests created under the lease and will be made available for further leasing in accordance with regular procedure.

takes only such rights as his vendor had, and cannot defend against the holder of the legal title as a bona fide purchaser. It is not in conflict with, but confirmatory of, this rule to hold, as was held in the *Detroit Lumber Company Case*, *supra*, and in *United States v. Clark*, 200 U.S. 601, 607, 26 Sup. Ct. 340, 50 L. Ed. 613, that one who purchases from an entryman holding a certificate that carries only an equitable title, but who, subsequent to such purchase, obtains a patent conveying the legal title, may defend as a bona fide purchaser, because, by the doctrine of relation, the title is treated as taking effect at the date of the entry.

If the final certificate had not been canceled, and the patent had been issued to the entryman or his transferee, in the instant case, then a different rule would prevail, and a sale of the land, or an interest in the timber on it, although made before the issuance of the patent, would be effective, because the patent operates to transfer the title, not only from its date, but from the inception of the equitable right upon which it is based. A purchaser, therefore, from one holding a final certificate which is never canceled, but on which ultimately a patent is duly issued, may defend a suit to cancel the patent, on the ground that he is a bona fide purchaser. *United States v. Detroit Lumber Company*, *supra*." *Accord*, *Moses v. Long-Bell Lumber Co.*, 206 F. 51, 55 (5th Cir. 1913).

¹³ On November 1, 1963, King filed assignments to him by Mailloux and Foley of their overriding royalty interests in oil and gas lease Fairbanks 021360. This assignment is ineffective for the same reason, if for no other.

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Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF PAUL A. TEEGARDEN

IBCA-419-1-64

Decided July 27, 1965

Contracts: Performance or Default: Suspension of Work—Contracts: Construction and Operation: Contracting Officer

Under a contract incorporating provisions for suspension of work when ordered by the Contracting Officer because of periods of unsuitable weather, where work without doubt could not be performed for a substantial period because of such weather but the Contracting Officer failed to issue an order suspending the work for that period, the contractor is entitled to an extension of time therefor.

Contracts: Performance or Default: Substantial Performance—Contracts: Disputes and Remedies: Damages: Liquidated Damages

A contract has been substantially performed when the work remaining to be performed is a relatively minor quantity and is of such an inconsequential nature as to not impair the utility of the project; liquidated damages may not be assessed for periods after that point has been reached.

BOARD OF CONTRACT APPEALS

The appeals considered in this opinion were taken because the contracting officer denied requests for extensions of time, and assessed liquidated damages for 96 days at \$150 per day. The contract called for placing hot bituminous concrete pavement on an existing gravel base (plus related work) on a portion of the Natchez Trace Parkway. A National Park Service project is involved, but the Bureau of Public Roads of the Department of Commerce prepared the specifications and administered the contract pursuant to an arrangement between the agencies. The contract was prepared on standard construction contract forms, including Standard Form 23-A (General Provisions). It also cited and incorporated many provisions of the Standard Specifications for road and bridge construction (FP-57) of the Bureau of Public Roads.

The notice of appeal first challenges the contracting officer's determination that the appellant is entitled to no more than a 15 days' time extension because of rainy and cold weather during the period for October 1, 1960 through February 4, 1961. The appellant asserts

that almost all of this period should be disregarded in the computation of the time required for completion of contract work.

The notice of appeal also states that the contracting officer incorrectly refused to consider or allow a time extension for the delay caused when the appellant's hot mix asphalt plant was made inoperable by flood waters. This happened when high water broke a levee in the spring of 1962. The appellant requested a minimum of 51 days' extension of time for this cause. The contracting officer's "Determination" on this request is as follows:

Your request for additional (51 days) time under the terms of the contract is therefore denied as untimely, beyond the terms of the contract, and entering the area of delay and unliquidated damages for which the Government cannot be responsible under this (your) contract and the facts as noted above.

The above discussion of "delay and unliquidated damages for which the Government cannot be responsible" is inappropriate. The only matter to be resolved is whether or not the contractor is entitled to an extension of time. The above "Determination" actually may not be that of the contracting officer's authorized representative, since the copy furnished to the Board shows that it was written by an attorney for the Bureau of Public Roads and one F. T. Burgess. The attorney for the Bureau of Public Roads in his Amended Statement of Position, dated June 16, 1964, revealed that the Government has information concerning the flood by advising:

* * * And in fact the flood complained of occurred on April 10, 1962, any how.

On May 18, 1962, about five weeks after the flood damage, the appellant wrote to the contracting officer's authorized representative, asserting that the project was substantially complete; in addition, the letter stated:

We also request consideration for a time extension due to the recent flood at Tupelo which covered much of our equipment including our Asphalt Plant and which has caused us considerable delay in completing the final stages of our contract. * * *

The contracting officer's representative has not asserted that the late formal notification of the cause of the delay prejudiced the Government and has not set forth facts that would indicate prejudice. Therefore, the Board will consider the appellant's claim on its merits.

The parties have agreed that the Board's decision should be issued on the basis of a review of submitted documents; therefore, no oral hearing has been held.

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*Weather Conditions, October 4, 1960
Through February 4, 1961*

The contract originally allowed 375 days for completion of the work. The first "counting" day was June 14, 1960. The inspection reports show that in September 23, 1960, when more than 25 percent of the contract period had elapsed, the appellant had completed only about 2 percent of the work. On September 30, 1960, the appellant's Project Manager met with contract administration personnel of the Government and agreed to start items such as grading parking areas, constructing access connections, placing and mixing filler for blending, and shaping the road for reconditioning.

During October, November and December the contractor had only a small work force on the job and made very little progress; however, this situation was no different than that existing during the first three months of the job. By a letter dated November 25, 1960, when 43 percent of the contract time had elapsed and the amount completed was still only 2 percent, the appellant's Project Manager proposed the following construction program:

1. Increase our present forces that are now engaged in the installation of Drainage and Incidental Items, and complete all drainage items by 1 February, 1961, all incidental items to be 50% complete by 1 February, and 100% complete by 1 April, 1961.
2. Place on the project not later than 1 December, 1960, forces and equipment to reactivate the construction of Roadway items, of which 50% to be completed by 1 April, 1961 and 100% by 1 June, 1961.

All work in this contract to be completed by the last week in June 1961.

The reference to "the last week of June 1961" seems to be tied to the originally established completion date—June 23, 1961. There is no mention made in this letter or elsewhere in the record prior to early January 1961 of the position now taken by the appellant, i.e., that there had been a suspension of work, commencing about October 4, 1960, under Article 8.7 of FP-57 which provides:

8.7 Suspension of Work. The engineer may, by written order, suspend the performance of the work either in whole or in part for such period as he may deem necessary due to unsuitable weather, to conditions considered unfavorable for the suitable prosecution of the work, or to failure on the part of the contractor to correct conditions unsafe for the workmen or the general public, to carry out orders given by the engineer, or to perform any provisions of the contract.

Suspension of work on some but not all items, as ordered in writing by the engineer; shall be considered "partial suspension." The number of elapsed calendar days during partial suspension to be charged against contract time shall be

computed by multiplying the number of calendar days allowed for performance of the work shown in the contract as awarded by the ratio of the amount earned during the period of partial suspension to the original contract amount.

Suspension of work on all items, as ordered in writing by the engineer, shall be considered "total suspension." No charge shall be made against contract time for calendar days elapsing during such total suspension. Work of an emergency nature ordered by the engineer for the convenience of public traffic and minor operations not affected by or connected with the cause of suspension, if permitted by the engineer, may be performed during a period of total suspension.

On January 5, 1961, the appellant advised the Bureau of Public Roads that production on the job had been "considerably reduced" due to adverse weather conditions, and gave notification that an extension of time would be requested under Article 8.7 (quoted above).

The determinations appealed from in this case refused to substitute an earlier date for February 4, 1961, which was established in Directive No. 2 as the time for suspension of all construction activities. The contracting officer's authorized representative found, by comparing weather records for the 1960-1961 winter with similar records compiled during the eight years immediately preceding 1960, that there had been 15 days of unusually severe weather between October 4, 1960 and February 4, 1961. On the basis of this finding a 15-day time extension was granted under Clause 5(c) of the General Provisions, which authorizes time extensions for delays due to unforeseeable causes beyond the control and without the fault or negligence of the contractor. There appears to be no reason for the Board to disturb the findings relating to unusually severe weather.

With respect to the request for additional time under Article 8.7 of FP-57, the findings state:

At the preconstruction conference on June 10, 1960, you were informed that shutdown orders would not be issued for short periods of bad weather. Furthermore, analyses of your performance record, the contract provisions, and Exhibit "A" (climatological data) does not show that any time was lost (other than days already recognized and granted due to "unusually severe weather") * * * because of weather "unfavorable for the suitable prosecution of the work." Even if there had been such lost time, the contractor, in estimating for his contract bid, is deemed to have taken into account a reasonable number of days of unfavorable weather. * * *

It is obvious that the contracting officer's authorized representative viewed the power to issue a suspension order under Article 8.7 of FP-57 as discretionary. The Board, considering a similar clause in *Urban Plumbing and Heating Co.*, 63 I.D. 381, 391 (1956), 56-2 BCA par. 1102, observed:

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* * * This provision would permit the engineer to enter even now a work suspension order covering the two periods of unsuitable weather, since he would normally have entered such an order retroactively at some time after a period of unsuitable weather had commenced or, quite possibly, when the period had ended and its duration had become susceptible of determination. The existence of weather conditions justifying such an order would, in turn, form a basis for the allowance of a commensurate extension of the time for performance.

In the absence of any factual support or indication of empirical knowledge on the part of the Board as to what steps are usually taken in actual practice to stop work because of unsuitable weather, one of the premises stated in the *Urban* case is questionable. This is the statement, quoted above, that a Government engineer "would normally have entered such an order retroactively at some time after a period of unsuitable weather had commenced," etc. A suspension clause of the type under consideration should not be construed as a general assurance to a contractor that a major portion of the winter season will not be counted in the period for performance established in the contract. The clause is included principally for the Government's protection—to provide to the contracting officer the express right to halt operations when proper results cannot be obtained because of the weather or the other stated reasons. The portion of the *Urban* decision which relates to suspension for "unsuitable weather" will not be regarded by the Board as a justification to exclude extended periods from the "counting" contract time merely because the contractor demonstrates that the weather during such periods was less than ideal for construction work. The record in this appeal has been reviewed by the Board in an effort to establish a date when without doubt the job should have been shut down because of "unsuitable weather."

Taking into account the general lack of prosecution of the job by the appellant during 1960, the proposals made in the appellant's letter dated November 25, 1960, and the data in the appeal file on weather and ground conditions, it is found that the suspension order should have been entered at the end of the working day on January 12, 1961. The contracting officer should recalculate the time required for performance of the contract, using that date as the effective date of the suspension, but not including in the additional non-counting time any days or portions thereof which previously have been allowed.

Substantial Completion: The Flooded Asphalt Plant

Liquidated damages may not be assessed for periods after the point of substantial completion has been reached.¹ In considering whether

¹ 5 McBride and Wachtel, *Government Contracts*, sec. 34.130, pp. 34-54 (1963).

a project is substantially complete it is necessary to take into account (1) the quantity of work remaining to be done, and (2) the extent to which the project was capable of adequately serving its intended uses.² At the time the appellant's asphalt plant was inundated, approximately 85 percent of the total project work was complete. A report covering an inspection made about one month after the flood (May 11, 1962) shows that 14 percent of the project work remained to be performed at that time. The bituminous paving that could not be finished because of flood damage to the asphalt plant was only a minor portion of the uncompleted work. Less than half of the work required by Change Order 10 had been performed on May 11, 1962—ninety additional calendar days had been allowed for that work when Change Order 10 was approved by the Government on March 6, 1962. Thus, the appellant's inability to complete the small amount of paving in April and May of 1962, is not of great importance when the propriety of assessment of liquidated damages is reviewed. Other unfinished work on the project was of such value and significance that the project could not be classified as substantially complete at any time during those months.

By June 22, 1962, this was no longer the case. The report covering an inspection made on that date shows that approximately 92 percent of all work had been completed, and states:

(1) With the exception of some minor topsoiling, seeding, sodding and completion of work ordered by Change Order No. 10, the project is complete. * * *

The exact percentage of completion of Change Order 10 on June 22 is not shown on the inspection report. However, the May 11 inspection report includes a reference to a statement by the appellant's Superintendent that "50 percent of Change Order No. 10 would be completed by the end of the month." It is likely that most of that work required by that change order had been accomplished by June 22.

The Board concludes that the project was substantially complete on June 22, 1962, and that liquidated damages should not have been assessed between that date and July 27, 1962, used as the completion date by the contracting officer's representative. The amount of liquidated damages withheld should be correspondingly reduced.

Conclusion

The appeal is sustained to the extent that liquidated damages should not be assessed for the period between (and including) January 13, 1961, and February 4, 1961, or for any day subsequent to June 22,

² Appeal of *Elmer A. Roman*, IBCA-57 (June 28, 1957), 57-1, BCA par. 1320.

1962. The appellant's requests for time extensions beyond those specifically allowed herein are denied.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

UNITED STATES v. AUGUST HERMAN

A-30336

Decided July 30, 1965

Mining Claims: Discovery

To constitute a valid discovery upon a mining claim there must be a discovery of such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine.

Mining Claims: Discovery

The finding of high mineral values by a mining claimant is properly denied substantial weight when the samples from which these values are obtained are shown to be in areas of high concentration not representative of the claims.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

August Herman has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated June 11, 1964, which affirmed a decision of a hearing examiner, dated October 24, 1963, declaring null and void the Betty Jean No. 1, Betty Jean No. 2, A. Lily No. 2, and Red Devil placer mining claims, situated in the NE $\frac{1}{4}$ sec. 32, T. 33 N., R. 6W., M.D.M., Shasta County, California, and rejecting the appellant's patent application Sacramento 065525, because the appellant failed to show that a discovery of a valuable mineral deposit has been made on any of the contested placer mining claims.

The appellant contends, *inter alia*, that a hearing should be held to permit him to present evidence that the decision of the Office of Appeals and Hearings was incorrect. He contends that the samples obtained by the Government mineral examiner constituted less than $\frac{1}{5}$ cubic yard of the material on all the claims and were not representative of the values on the claims. He contends that no effort was made to test areas of concentration. He also contends that the hearing examiner was prejudiced against him and that the examiner acted improperly in issuing an oral amendment to a joint sampling order

he had previously issued, prejudicing the defendant by not reducing to writing an order that could guide both parties, without disagreement as to its meaning. The appellant further contends that the cost of mining the claims would be approximately 35 cents per cubic yard and the value of the minerals on the claims (gold) averages approximately 60 cents per cubic yard.¹

The transcripts of the hearings in this case, the exhibits, sampling orders, and the entire record, have been carefully examined,² and I am of the opinion that the contentions of the appellant are without merit.

A hearing was held before a hearing examiner at Redding, California, October 17, 1962, and a further hearing was held before the same examiner on June 19-20, 1963. At the conclusion of the first hearing, the examiner issued a joint sampling order to resolve the disparity in values between the samples obtained by the Government and the appellant. Subsequently, a disagreement arose between the parties as to the method of accomplishing the sampling and a conference was held with the hearing examiner at which both parties were represented, resulting in an oral amendment to the sampling order being issued by the examiner November 14, 1962. Joint sampling, however, never did take place. The appellant now asserts that he was prejudiced by the fact that this amendment of November 14, 1962, was not reduced to writing because the terms of the sampling were never made clear.

This contention is without merit. There is no indication that the appellant ever requested that the amended order be reduced to writing or protested the failure of the examiner to do so, though, admittedly, a written amendment would have been preferable. However, if the appellant did not protest at the time, it would appear too late for him to suddenly assert prejudice at this point. Further, the hearing examiner indicated that the mining engineers of the Government and the appellant were to come to an agreement between themselves as to "what is necessary to get representative samples" (Tr. 260), and the appellant's mining engineer, John X. Murphy, testified that he and the Government's mineral examiner, George W. Nielsen, were in substantial agreement as to method and area (Tr. 254). However, the reason that joint sampling did not in fact ever occur appears to be well stated by Mr. Murphy:

¹ In an additional statement of reasons subsequently submitted the appellant contends that the cost of mining would be approximately 15 cents per cubic yard and that the value of the minerals on the claim averages \$1 per cubic yard.

² The additional statement of reasons subsequently submitted has been considered as well as the attachments thereto, which included a document entitled, "A Report on the Red Devil, A Lilly, Betty Jean No. 1, Betty Jean No. 2 Placer Claims." This document had previously been submitted as an exhibit at the hearing. Also submitted were supplemental reports on costs and methods of mining the claims. Of course, these latter reports are *ex parte* and must be considered as such. However, they have been examined.

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* * * there was a massive distrust on both sides, by Mr. Nielsen and Mr. Herman. One was afraid he was going to be salted and one afraid the bill was going to run up so high that he couldn't pay it. That's where it ended. (Tr. 255.)

It is apparent that it was this area of mutual distrust between the appellant and Nielsen that was responsible for the failure of joint sampling, and the reduction of the terms of the amended order to writing probably would not have substantially ameliorated this situation. Therefore, I cannot see how the failure to reduce the order to writing prejudiced the appellant, particularly in view of the fact that the order left the agreement as to sampling procedures rather much up to the mining engineers and there was apparently substantial agreement between them, and, in the end, it was the appellant himself who refused to go ahead with the amended order.

The appellant contends also that a hearing should be held to permit him to present evidence that the decision of the Office of Appeals and Hearings was incorrect since that decision states:

* * * If an appeal is taken the appellant will have the burden of proving, by presenting substantial affirmative evidence, that this decision is erroneous.

This statement, appearing in the closing paragraph of the decision describing the procedure to be followed on appeal, is apparently inserted as a matter of form. It has no pertinence to an appeal from a decision rendered after a formal evidentiary type hearing, such as was held in this case. The Director, and after him the Secretary, reviews the record of the hearing *de novo* and in each case the burden of proof remains the same. The United States, as contestant, must make a *prima facie* case and thereafter the mining claimant bears the burden of proving by a preponderance of the evidence that his claim is valid.

After the hearing no evidence in the usual sense can be submitted to prove that the decision appealed from is erroneous. Error can be demonstrated only by analysis of the record made at the hearing and argument based on it.

The appellant contends further that the hearing examiner is prejudiced against him. Having carefully reviewed this allegation, I cannot agree with it. This case was not an easy one to administer or adjudicate and an air of ill feeling did pervade the atmosphere. However, I am convinced that the actions of the hearing examiner demonstrated a genuine attempt to be fair and reveal no prejudice against the appellant. A substantial showing of bias is required to disqualify a hearing officer in an administrative proceeding or to justify a ruling

that the hearing was unfair. *United States v. Ford M. Converse*, 72 I.D. 141, 145 (1965). No such showing has been made here.

Finally, the appellant contends that he ascertained the cost of mining the claims involved to be 35 cents per cubic yard and the value of the minerals on the claims to average approximately 60 cents per cubic yard.³ He alleges that he has made a discovery within the meaning of the United States mining laws and that the samples obtained by the Government mineral examiner were not representative of the values on the claims, that they constituted less than 1/3 of a cubic yard of the material on the claims, and that no effort was made to test areas of concentration. Again, after a very careful review of the evidence, I must reject these contentions.

The mining law requires a discovery of a valuable mineral deposit to validate a mining claim but does not define "discovery." However, the standard applied by the Department in *Castle v. Womble*, 19 L.D. 455, 457 (1894), was expressly approved by the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). This standard is that:

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." * * *

See also *Foster v. Seaton*, 271 F. 2d 836, 838 (D.C. Cir. 1959); *Adams v. United States*, 318 F. 2d 861, 870 (9th Cir. 1963); *Mulkern v. Hammitt*, 326 F. 2d 896, 897 (9th Cir. 1964); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336 (1963).

Where the value of the gold found is so slight in relation to the cost of extracting it that a person of ordinary prudence would not be justified in the further expenditure of labor and means, with a reasonable prospect of success in developing a valuable mine, there has not been a valid discovery within the meaning of the mining laws. *United States v. Eric North*, A-27936 (July 1, 1959); *United States v. Robert W. Carnes*, A-28178 (May 23, 1960); *United States v. Richard L. and Nellie V. Effenbeck*, A-29113 (January 15, 1963); *United States v. Robert G. and Orpha B. McMillan*, A-29456 (July 26, 1963); and *Adams v. United States*, *supra*, at 870.

I find no error in the hearing examiner's evaluation of the evidence relating to gold values disclosed by the samples. The sampling methods of the Bureau of Land Management engineer was in conformity

³ Or 15 cents cost and \$1 value as contended in his additional statement of reasons.

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with the recognized standards in such work and the amount of and places of sampling were proper.

The hearing examiner's decision fully describes the 38 samples taken from points indicated or pointed out to Nielsen, the Government mineral examiner, by the appellant. Nielsen testified that he

sampled exactly where the claimant suggested I sample in my first sampling of the claims. I continually asked him to point out his discovery to me. (Tr. 358.)

He stated that on the basis of his examination and sampling the mass of minable gravels upon the claims would average 2-3 cents per cubic yard of gold and that there was no practical method of economically mining material of such low value. He stated that handling costs for the minerals would be approximately \$1 a yard (Tr. 59-60). He stated at both the first and subsequent hearings that it was his opinion that there does not exist on the claims a discovery of a valuable mineral of such quantity and quality as would justify a prudent man in the further expenditure of money and effort with a reasonable expectation of developing a paying mine and that the claims have been completely mined out (Tr. 34, 345, 354, 355, 360).

Nielsen testified further that the samples taken by the appellant were representative of practically insignificant quantities of material found under special conditions, which were not prevalent thought [sic] the claim or the mass of material found on the claim. (Tr. 26-27.)

He stated that due to the manner in which appellant's samples were taken and the insignificance they represented in the formation he attributed no significant value to these samples and thus could make no logical application of the assay results obtained from them which contained a number of high gold values (Tr. 28).

August Herman, the appellant, testified that he thought there was sufficient mineral value in quantity and quality on the mining claims to justify further expenditure of money and effort in developing the property (Tr. 417).

John X. Murphy, a mining engineer employed by the appellant, testified that he thought the value of the minable material was over \$1 a yard (Tr. 232) and that a small operation could be established profitably (Tr. 234). He had no personal knowledge as to how appellant took his samples (Tr. 243) and based his evaluation of Herman's samples on what Herman told him was the amount of material he extracted (Tr. 243-244).

E. M. Clark, a dragline dredging operator (Tr. 279), was hired by the appellant to take part in the joint sampling (Tr. 283) and did actually sample for the appellant (Tr. 284) though there was no

joint sample. He stated that he thought the claims warranted further expenditure of time and money to develop, that the average value per cubic yard of the gravels would exceed 35 cents a yard, and that he thought he "could make a dime or two" on the mining operation were he the claimant (Tr. 303).

The conclusion of the hearing examiner sustaining the testimony of the Government mineral examiner and holding that the cost of processing the material on the claim would exceed recovery values on the claims appears correct, and his conclusion that the appellant's samples were taken from selected areas in which gold would be highly concentrated and that his calculations do not reflect overall values on the claims would also appear accurate. Therefore, his determination that there has been no discovery within the meaning of the United States mining laws here is correct, the appellant's patent application properly denied, and the mining claims declared null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNION OIL COMPANY OF CALIFORNIA ET AL.

A-29560 (Supp.)

*Decided July 30, 1965***Mining Claims: Determination of Validity—Mining Claims: Contests—
Rules of Practice: Appeals: Service on Adverse Party**

In contest proceedings initiated under Circular No. 460 and the Rules of Practice in effect in the early thirties, service of notice of contest by registered mail was proper and effective and may be proved by a post office return receipt under the following circumstances: (1) Where the signature of the person signing the post office return receipt is identical with the name of the mining claimant; (2) Where the signature of the addressee is consistent with the surname and given names or initials of the claimant; (3) Where the surname of the signature on the return receipt is different than the name of the locator but the record shows that the claimant has married and that she has signed with her married name; and (4) Where the receipt is signed by an agent of the addressee and there is written evidence of the agent's authority to sign for the addressee.

**Mining Claims: Determination of Validity—Mining Claims: Contests—
Rules of Practice: Appeals: Service on Adverse Party**

In contest proceedings initiated under Circular No. 460 and the Rules of Practice in effect in the early thirties, a post office return receipt for letters bearing notices of contest is not sufficient proof of service if it bears a signature clearly different and inconsistent with the name of the claimant and there is no evidence showing that the party signing the receipt had written authority to sign for the claimant.

**Mining Claims: Contests—Rules of Practice: Appeals: Service on Adverse
Party**

Service of notice of contest by registered mail is a form of notice reasonably calculated to give a party knowledge of administrative proceedings and an opportunity to be heard and, consequently, where authorized by statute and the rules of an administrative agency, it satisfies the requirements of due process.

Mining Claims: Determination of Validity—Mining Claims: Contests

Where the name and address of a mining claimant are not of record in the Department when the validity of a claim is questioned, the Department merely assumes the task of ascertaining the name and address of the claimant from other sources and may then serve the notice of contest by registered mail in accordance with the applicable regulations.

**Mining Claims: Contests—Rules of Practice: Appeals: Service on Adverse
Party**

Unless it is affirmatively shown to the contrary by the mining claimant, the presumption of identity between the claimant and the recipient of a notice of contest in adverse proceedings before the Department is not overcome by minor discrepancies in the use of given names or initials of the parties in the notice of contest and the post office return receipt.

Mining Claims: Determination of Validity—Mining Claims: Contests

There is nothing in the law or the regulations requiring posting of an oil shale placer mining claim as a condition precedent to service of notice of contest.

Mining Claims: Generally—Mining Claims: Location

When two or more persons participate in the location of a mining claim, a tenancy in common arises and each locator has the same rights in respect to his share as a tenant in severalty, but he holds his interest independently of the other and may transfer, devise or encumber it separately without the consent of the other co-tenants.

APPEAL FROM LAND OFFICE DECISIONS

The Union Oil Company of California and others, listed in the attached Appendix A, appealed to the Director, Bureau of Land Management, from decisions issued by the Manager, Denver Land Office, on February 16 and 23, 1962, rejecting their mineral patent applications for the reason that the association placer oil shale claims they sought to patent had been previously declared to be null and void as a result of contest proceedings initiated by the Government between 1927 and 1931. These proceedings were based on a charge that the mining claimants had failed to perform annual assessment work on the claims.

On April 17, 1964, the Solicitor issued a decision (*Union Oil Company of California*, 71, I.D. 169 (1964)), affirming the Manager's decisions as to those claims previously canceled in proceedings "in which the requirements of notice were definitely met prior to the cancellation of the claim, the then owners of the claim having participated in the contest proceedings." As to the remaining cases,¹ the decision provided that the patent applicants would "be granted 60 days within which to submit materials relating solely to their contentions that their claims were canceled without compliance with the requirements of notice."

The two basic issues raised by the appellants in their submissions are (1) whether service of notice of contest by registered mail was valid and effective, and (2), if so, what constitutes proper and sufficient proof of such service.

In connection with the second issue, the contest records contain some post office return receipts signed by persons with the same names as claimants. Other return receipts bear signatures which are not identical with names of claimants but are similar, having the same surnames and corresponding given names or initials. Other receipts bear the signatures of claimants who, according to the record, had been married, and had signed receipts with their married names. In such cases, the question is whether a return receipt is sufficient proof

¹ See page 23 *et seq.*, *infra*.

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of service in the absence of additional proof that the mining claimant and the person signing the receipt are one and the same person.

The record also contains return receipts signed by persons purporting to be the agents of the claimants, but there is no evidence that the alleged agents had been authorized, in writing, by the claimants to sign such receipts. The question in such cases is whether a return receipt signed by the ostensible agent is sufficient proof of service of notice on a mining claimant, in the absence of written evidence that such agent had been authorized to receive notice of contest.

I have concluded, for the reasons which follow, that service of notice of contest by registered mail was proper. I have also concluded that such service may be proved by a return receipt under the following circumstances:

- (1) Where the signature of the person signing the post office return receipt is identical with the name of the mining claimant;
- (2) Where the signature of the addressee is consistent with the surname and given names or initials of the claimant;
- (3) Where the surname of the signature on the return receipt is different than the name of the locator but the record shows that the claimant has married and that she has signed with her married name; and
- (4) Where the receipt is signed by an agent of the addressee and there is written evidence of the agent's authority to sign for the addressee.

Each of these circumstances, of course, merely raises a presumption that service of notice of contest was properly made by registered mail.

I have further concluded, for the reasons stated in *Union Oil Company of California et al., supra*, that the decisions issued in the 1930's canceling, in whole or part, the mining claims involved in the decision are final as to those claimants who were served with notice of contest in this manner, and as to the successors in interest of such claimants. However, I have concluded that a return receipt is not sufficient proof of service if it bears a signature clearly different and inconsistent with the name of the claimant and there is no evidence showing that the party signing the receipt had written authority to sign for the claimant.

Joinder of claimants

In addition to their arguments regarding proof of service of notice of contest, which is the question for which they were granted time to brief, the appellants contend that, because the community of interest of the co-owners of a mining claim made them indispensable parties in the contest proceedings rendered any resulting decision null and void.

In the case of *State of Washington v. United States*, 87 F. 2d 421, 427-28 (9th Cir. 1936), the court sets forth the tests used to determine whether an absent party is a necessary party as distinguished from an indispensable party. It states that if all of the following four questions are answered in the affirmative with respect to an absent party's interests then such absent party is a necessary party. The tests are:

- (1) Is the interest of the absent party distinct and severable?
- (2) In the absence of such party, can the court render justice between the parties before it?
- (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?
- (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

Applying these tests to the contests under consideration, I find that each of the above-quoted questions can be answered in the affirmative. When two or more persons participate in the location of a mining claim, a tenancy in common arises. *Lindley Mines*, sec. 788 (3d ed.). As such, each has the same rights in respect to his share as a tenant in severalty, but he holds his interest independently of the other and may transfer, devise or encumber it separately without the consent of the other co-tenants. Thompson, *Real Property* (1961 ed.), sec. 1793. He may also abandon his interest separately. *American Law of Mining*, Vol. 2 sec. 8.7; *Badger Gold Mining & Milling Co. v. Stockton Gold and Copper Mining Co.*, 139 Fed. 838 (9th Cir. 1905); *Conn v. Oberto*, 32 Colo. 313, 76 Pac. 369 (1904). Thus, it is generally held that a tenant in common is a necessary, not an indispensable party to a suit. *Glover v. McFaddin*, 99 F. Supp. 385, 390 (1951), aff'd, 205 F. 2d 1 (5th Cir. 1953), cert. denied, 346 U.S. 900 (1953); *McComb v. McCormack*, 159 F. 2d 219 (5th Cir. 1947).²

Service by Registered Mail

Service of notice by registered mail is a form of notice reasonably calculated to give a defendant knowledge of administrative proceedings and an opportunity to be heard and, consequently, where authorized by statute and the rules of an administrative agency, it satisfies the requirements of due process. *National Labor Relations Board v. O'Keefe and Merritt Mfg. Co.*, 178 F. 2d 445 (9th Cir. 1949); *National Labor Relations Board v. Wiltse*, 188 F. 2d 917 (6th Cir. 1951), cert. denied, *Ann Arbor Press Inc. v. National Labor Relations Board*, 342 U.S. 859 (1951).

While there was no statute that specifically provided for service of

² The manner in which the interests of those claimants who were not a party to the contests is partitioned is set forth in *United States v. T. E. Bailey and James Doyle*, Contest No. 12155 (Unreported issued by the General Land Office, and approved by the Department, November 1, 1932; *Rooney v. Barnette*, 200 Fed. 700 (9th Cir. 1912); *Cook v. Klonos*, 168 Fed. 700 (9th Cir. 1909).

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notice of contest by registered mail in the contests to which the Manager referred, paragraph 6 of the special instructions of February 26, 1916 (44 L.D. 572), issued as Circular No. 460, which were in effect when the contests were initiated, specifically provides for such service.³ In *Standard Oil Co. of California v. United States*, 107 F. 2d 402 (9th Cir. 1939), the court took judicial notice of Circular No. 460 holding that it had the force and effect of law. Moreover, in the case of *Gabbs Exploration Company*, 67 L.D. 160 (1960), aff'd, *Gabbs Exploration Company v. Udall*, 315 F. 2d 37 (D.C. Cir. 1963), it was held that a mining claimant who had been served with notice of contest by registered mail in a contest governed by Circular No. 460 had been properly notified.

Circular No. 460 was issued as a special instruction to Special Agents and Registers and Receivers to govern the conduct of proceedings in contests initiated upon a report by a representative of the General Land Office. But Circular No. 460 was not intended to supplant the general Rules of Practice. (See *Rules of Practice*, 51 L.D. 547 (September 1, 1926)). In fact, paragraph 14 of Circular No. 460 specifically provides that * * * [t]he above proceedings will be governed by the rules of practice." * * *

The Rules of Practice which were in effect at the time of the subject contest proceedings and which were incorporated by reference in Circular No. 460, set out on the specific requirements for perfecting service either personally by registered mail or by publication.⁴ Rule 6 (51 L.D. at 548) provided:

Notice of contest may be served on the adverse party personally or by publication.

Rule 7 (5 L.D. at 548) sets out the following requirements respecting personal service of notice of contest:

Personal service of notice of contest may be made by any person over the age of 18 years, or by registered mail; when served by registered mail, proof thereof must be accompanied by post-office registry return receipt, showing personal delivery to the party to whom the same is directed; when service is made personally, proof thereof shall be by written acknowledgment of the person served, or by affidavit of the person serving the same, showing personal delivery to the

³ Paragraph 6 reads as follows:

"Notice of the charges may in all cases be served personally upon the proper party by any officer or person or by registered letter mailed to the last address of the party to be notified, as shown by the records, and to the post office nearest to the land. When it is necessary to serve notice on the unknown heirs of a person in interest, the same must be addressed to that person at his address of record and also at the post office nearest the land. Proof of personal service shall be the written acknowledgement of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place, and manner of service. Proof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices, accompanied by the post-office registry receipts, or the returned unclaimed registered letters."

⁴ No attempt was made by the Land Office in the subject contest proceedings to meet the requirements of the Rules of Practice in serving notice of contest by publication.

party served; except when service is made by publication, copy of the affidavit of contest must be served with such notice.⁵

There was, therefore, adequate provision in the applicable Rules of Practice for obtaining service of notice of contest by registered mail.

The appellants contend that registered mail service could not be employed in the contest of a mining claim if the claimant had not previously furnished a "record" address.⁶ This contention is without merit since the Secretary of the Interior, or his authorized subordinate, may inquire into the validity of a mining claim at any time before legal title to the claim passes from the United States. *Cameron v. United States*, 252 U.S. 450 (1920); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963). I have concluded that, if the name and address of a mining claimant are not of record in the Department when the validity of a claim is questioned, the contest proceeding does not abate. The Department merely assumes the task of ascertaining the name and address of the claimant from other sources and may then serve the notice by registered mail in accordance with the applicable regulations.

The appellants also contend that the early contest decisions are void because the Land Office uniformly failed to mail notice-bearing registered letters to the mining claimants in care of the post office nearest to the contested mining claims as provided in paragraph 6 of Circular No. 460, *supra*. It is true that no attempt was made by the Land Office to meet this requirement. However, it is apparent from a reading of the Rules of Practice, that mailing a copy of the notice to the post office nearest the land is only required where the Land Office sought to obtain service by publication.⁷ There was no similar requirement when personal service was sought pursuant to Rule 7 (51 L.D. at 548) and under paragraph 6 of Circular No. 460.

In any event, such a technical defect, if it be one, did not render the

⁵ Rule 7 further provided that:

"When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir. If the heirs of the entryman are nonresident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under 14 years of age or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee, of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge."

⁶ " * * * A mining location is not of record before or connected with the Land Department, and is not so connected or usually within the latter's knowledge until application for patent is filed or it is properly called in question by another. * * * " *The Clapper Mining Co. v. The Eli Mining and Land Co.*, 34 L.D. 401, 410 (1906).

⁷ For example, see Rule 10 (51 L.D. at 549-50) which sets out the procedural requirements for serving notice by publication and reads, in part, as follows:

"Copy of the notice as published, together with copy of the affidavit of contest, shall be sent by the contestant within 10 days after the first publication of such notice by registered mail directed to the party for service upon whom such publication is being made at the last address of such party as shown by the records of the land office and also at the address named in the affidavit for publication, and also at the post office nearest the land. (Italics supplied.)"

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contest proceedings invalid. See *Olin Industries, Inc. v. National Labor Relations Board*, 192 F. 2d 799 (5th Cir. 1951), cert. denied, 343 U.S. 919 (1952); *Village of Sebring v. Smith*, 123 Ohio 547, 176 N.E. 221 (1931); *Entre Nous Club v. Toronto*, 4 Utah 2d 98, 287 P. 2d 670 (1955); 2 Am. Jr., *Administrative Law*, Sec. 350, Cf., Restatement, Judgments, Sec. 6. The Rules of Practice (Rule 12, 51 L.D. at 550) specifically provided that:

No contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; * * *

Proof of Service

The appellants contend that the Department has the burden of showing affirmatively that the contestees named in the earlier contests were actually the persons who signed the post office return receipts even if their names and the signatures are the same. However, decisions of an administrative agency are presumed correct and valid in the absence of evidence to the contrary and the burden of proof in all issues raised by a proceeding for review of such decisions rests with the party attacking their validity. *United States v. Jones*, 336 U.S. 641 (1949); *United States ex rel. Colman v. Bullock*, 110 F. Supp. 126 (N.D. Ill. 1953.) See also *Hodges v. Atlantic Coast Line Railroad Co.*, 310 F. 2d 438 (5th Cir. 1962); *Parker v. Illinois Central Ry Co.*, 108 F. Supp. 186 (N.D. Ill. 1952).

In *Shushereba v. Ames*, 255 N.Y. 490, 175 N.E. 187 (1931), the court held that the transmission of notice by registered mail is "a method which, with almost absolute certainty, insures delivery to the place of address," and that a post office return receipt "affords, at least, reasonable certainty that the notice has been delivered to the proper person." The opinion further states that:

* * * it might be urged that the filing of a return receipt which purports to be signed by the defendant does not prove the genuineness of the signature * * * there may be a possibility that * * * the notice was not received by the defendant or his agent. That possibility is not so great that the court may not assume, at least, in the absence of contrary assertion by the defendant, that the notice was delivered by the Post Office Department to the person to whom it was addressed or to one authorized to receive mail in his behalf.

As stated previously, the records contain some return receipts bearing a signature containing the same surname and similar or corresponding given names or initials as that of a claimant. The appellants assert that in these cases there is no presumption of identity, and that the burden rests with the Department to show that claimant and recipient are one and the same. To support this contention, they cite the case

of *Gepford v. Burge*, 5 F. 2d 829 (D. Colo. 1925).⁸ But, certainly the prevailing and more reasonable rule is stated in *Vanderwilt v. Broerman*, 201 Iowa 1107, 206 N.W. 959, 963 (1926):

* * * It is a matter of general knowledge that the initial of the second Christian name is frequently omitted, and by the great weight of authority its omission, in the absence of special circumstances raising doubt about identity, is immaterial.⁹ * * *

See also *Scott v. Kirkham*, 165 Kan. 140, 193 P. 2d 185 (1948), and *Miller v. Penwell*, 112 Okla. 163, 239 Pac. 651 (1925).

I have, therefore, concluded that, unless it is affirmatively shown to the contrary, the presumption of identity is not overcome by minor discrepancies in the use of given names or initials of the locators and that, all else being regular, effective service of notices of contest was made notwithstanding such minor discrepancies.

We come then to the question presented in those cases in which the party signing the return receipt is clearly not the addressee of the notice of contest. In this regard, the courts have recognized a presumption that one who signs a post office return receipt as the agent of the addressee had authority to do so. See *Shushereba v. Ames*, *supra*, and *Miller v. Penwell*, *supra*. However, the Department has consistently held in cases involving private contests,¹⁰ that such service is invalid unless there appears in the record some written evidence of the agent's authority to receive mail for the addressee. For example, in the case of *McGraw v. Lott*, 44 L.D. 367, 370 (1915), the Department held as follows:

Delivery to "any responsible person to whom the addressee's ordinary mail is customarily delivered," as authorized by paragraph (d) of section 935 of the Laws and Regulations of the Post Office Department, with respect to registered letters generally, does not meet the requirements of the land department, for the reason that, while the postmaster may know that the person to whom he delivers the letters, and who signs the receipt, is one "to whom the addressee's ordinary mail is customarily delivered," the land department has no such knowledge, and can only recognize delivery to a person other than the addressee himself when such person produces written evidence of such authority which can be filed with the record in the case as proof that notice has been properly given. * * *

⁸ In *Gepford v. Burge*, *supra*, the court held that a vendor of land had not produced a marketable title where the abstract disclosed in the chain of title a conveyance of the land by J. C. Miller and L. D. Sergeant, while title to it was held by Joel C. Miller and Luman D. Sergeant and a conveyance of the tract by John F. Werner while title to it was recorded in the name of John Werner. The court refused to recognize any presumption of identity of the persons names appearing in an abstract of title even though the surnames of the two persons were the same and the initials corresponded with the given names.

⁹ In *Vanderwilt v. Broerman*, *supra*, where a Homer Wharton conveyed as Homer F. Wharton and a George Prine conveyed as George S. Prine, the court held that there was no reason for questioning the identity of the parties.

¹⁰ *i.e.*, contests involving claimants competing for the same land as distinguished from contests initiated by the United States challenging the validity of a claim or entry on public lands.

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See also *Tracy v. Johnson*, 41 L.D. 124 (1912); *Kennedy v. Severance*, 44 L.D. 373 (1915); and *Bjorques v. Heihn*, 50 L.D. 165 (1923). Although none of the reported cases cited above involved contests initiated by the Land Office pursuant to Circular No. 460, each of these cases arose under the same general Rules of Practice (51 L.D. 547) which were applicable to the contest proceedings in the cases involved in this appeal. The requirements of these rules (specifically Rule 7) were clearly spelled out in *McGraw v. Lott, supra*, where the Department held that the following would be recognized as valid service of notice of contest:

1. Delivery of the registered letter containing the notice to the contestant himself, which must be evidenced by his signature on the registry return receipt.
2. Delivery of the registered letter to someone *duly authorized* by the contestant, in writing, to receive and receipt for the same, which must be evidenced by the signature on the return receipt of the party so authorized, as attorney or agent for the contestant.¹¹ (Italics supplied.)

It appears also that the Land Office applied the same rule in contests initiated under Circular No. 460. In an unreported case (Fred Schwartz, Denver 1412485 "N" (May 7, 1943)), the Commissioner held that:

* * * A registry return receipt signed by an addressee's agent is not acceptable service unless it is accompanied by a power of attorney from the addressee in favor of the agent.

In a case where evidence of service is had by an agent of a mineral claimant, the Register should write the mineral claimant by ordinary mail and ask him if he received the notice. If he admitted that he did, the service is satisfactory; if he did not receive the service, then the Register should issue a new notice of the proceedings allowing the claimant 30 days after receipt of notice within which to file an answer.

In view of this practice and of the prevailing rule regarding service of notice of contest in contest proceedings conducted under the applicable Rules of Practice, I have concluded that a return receipt is adequate proof of service of notice on the mining claimants named in the contests upon which the Manager based his decisions when it was signed by the mining claimant himself, by an agent he had authorized, in writing, to receive such notice, or, by the statutory guardian or committee of a claimant under the age of 14 years or of unsound mind, or if there were no committee or guardian, by the person who had such a claimant in charge.

Posting of Claims

It is argued that it was necessary for the United States to post a claim, as evidence that it had taken possession of the land for its own

¹¹ The opinion also sets out a third method for obtaining service under this rule. However, this method is applicable only to cases involving the exercise of a preference right and is not pertinent here.

uses, before service of notice of contest could be made on the claimants. There is, however, nothing in the law or the regulations requiring the posting of an oil shale claim as a condition precedent to service of notice of contest. What was required was a challenge to the validity of the claim before the claimant had resumed the performance of annual assessment work. See the Instructions of June 17, 1930, *supra*.

Analysis of Contests

In the following analysis the claims for which patents are sought are grouped under headings identifying the various patent applicants and the effect of the prior contests on the claims is discussed in detail. The following factors, however, apply in general in all cases.

First, it should be noted that, unless otherwise specified, the mining claimants failed to file answers to contest complaints alleging a failure of assessment work and the claims were declared to be null and void on the ground that the failure to answer was tantamount to an admission of the truth of the charges in the complaints.

It should also be noted that many of the contest records show that adverse proceedings were first initiated in the late 1920's before the Supreme Court's decision in the case of *Wilbur v. Krushnic*, 280 U.S. 306 (1930). After the issuance of that decision, the Commissioner, General Land Office, ordered the initiation of new proceedings¹² based on charges which would, it was felt, satisfy the Court's objection to the original adverse proceedings.

These post-*Krushnic* proceedings superseded the original proceedings and provide the basis for the Manager's rejection of the patent applications in the instant case.

It should be noted that, as to cases hereinafter remanded for further action and processing by the Bureau of Land Management, this decision is not intended to be the final administrative determination of the possessory rights now claimed by the patent applicants. The patent applications have yet to be examined by the Bureau for the purpose of determining, among other things, whether locations were validly made, whether the claims were validly maintained, and whether the claims were abandoned.

The Bureau must also determine, assuming the claims are otherwise valid, whether the present patent applicants have acquired all of the outstanding uncanceled possessory interests in the claims for which they seek patents. Specifically, there remains open the question whether the Department is bound to accept a State court's determination regarding the relative rights of possession of alleged co-owners of an association placer mining claim. See *Turner v. Sawyer*, 150 U.S. 578 (1893); *Nowell v. McBride*, 162 Fed. 432 (9th Cir. 1908);

¹²Instructions, 53 I.D. 131 (1930).

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cert. denied, 215 U.S. 602 (1909); *Stevens v. Grand Central Mining Co.*, 133 Fed. 28 (8th Cir. 1904); *Davidson v. Fraser*, 36 Colo. 1, 84 Pac. 695 (1906); *Thomas v. Elling*, 25 L.D. 495 (1897); *Coleman v. Homestake Mining Co.*, 30 L.D. 364 (1900); *E. J. Ritter*, 37 L.D. 715 (1909).

If it is not bound by such decisions, an additional question to be determined is whether the Department will recognize an asserted title to an association placer oil shale mining claim where the patent applicant's title is based in part on interests allegedly acquired since 1920 by means of forfeiture notices published in accordance with Rev. Stat. 2324 (30 U.S.C. 28 (1958 ed.)). See *Hamilton v. Ertl*, 146 Colo. 80, 360 P. 2d 660 (1960). Since these questions are not properly before us in this appeal, no ruling is made thereon. We have assumed the validity of all post-1920 forfeiture proceedings for the purposes of this decision only, in order to show the extent to which the applicant's asserted title has been canceled as a result of the contest proceedings upon which the Manager relied in rejecting the patent applications involved herein.

Colorado 07667

Union Oil Company of California

Betty Nos. 1-8 Claims ¹³

According to the record, the above identified claims were declared null and void by the Commissioner, General Land Office, September 21, 1931, as a result of contest No. 12574. At that time, title to these claims was in L. M. West, H. M. Carthy, and Chris C. Dere, each of whom had a one-eighth interest and Joseph M. Schneider, who had the remaining five-eighths interest. L. M. West, H. M. Carthy and Chris C. Dere were not served with notice of contest No. 12574. A contest complaint naming Joseph Schneider as the sole owner of the claims was mailed to him at Kewaskum, Wisconsin. A post office return receipt shows that J. M. Schneider personally signed for the registered letter on May 1, 1931. Hence, the Commissioner's decision was effective only as to the Schneider interests.

Tell Ertl purchased the interest of H. M. Carthy in 1952 and conveyed it to the appellant, who, in 1952 and 1953, purchased the interests of the heirs of Chris C. Dere and published a forfeiture notice by means of which it claims to have acquired the interest of L. M. West. Accordingly, assuming the claims are otherwise valid,¹⁴ the appellant possesses, at most, an undivided three-eighths interest in the Betty Nos. 1 through 8 claims.

¹³ Situated in secs. 21 and 22; T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

¹⁴ See discussion on page 20, *supra*.

*Grace Nos. 1-8 Claims*¹⁵

The above-identified claims were also declared null and void by the Commissioner on September 21, 1931, as a result of contest No. 12574. At that time title to these claims was in Joseph M. Schneider, who was served with notice of contest.¹⁶ For this reason, the Commissioner's 1931 decision was a final administrative action as to the Grace Nos. 1 through 8 claims. The appellant, therefore, has no valid interest in these claims.

*Edna Nos. 1-4 Claims*¹⁷

The Edna Nos. 1 through 4 claims were declared null and void by the Commissioner on September 21, 1931, as a result of contest No. 12574.¹⁸ At that time, title to the claims was in Chris C. Dere and Joseph M. Schneider each of whom had an undivided one-half interest, but only Joseph M. Schneider was served with notice of contest. Hence, the Commissioner's 1931 decision was final only as to his interest.

As the appellant purchased the interests of the heirs of Chris C. Dere in 1952 and 1953, it has, assuming the claims are otherwise valid, an undivided one-half interest in the Edna Nos. 1 through 4 claims.

*Louise Nos. 1-6 Claims*¹⁹

The above-identified claims were also declared null and void by the Commissioner on September 21, 1931, as a result of contest No. 12574. At that time, title to these claims was in H. M. Carthy, who had an undivided one-eighth interest and Joseph M. Schneider, who had an undivided seven-eighths interest. Only Joseph M. Schneider was served with a notice of contest. The Commissioner's 1931 decision was, accordingly, final only as to his interests. For this reason, the appellant, who has purchased the interest Tell Ertl acquired from H. M. Carthy in 1952, has an undivided one-eighth interest in the Louise Nos. 1 through 6 claims, assuming the claims are otherwise valid.

*Madge Nos. 5-8 Claims*²⁰

The records show that the Madge Nos. 1 through 8 claims were declared null and void by decisions issued by the Commissioner on September 22, 1931, and June 24, 1932,²¹ as a result of contest No. 12717.

¹⁵ Situated in secs. 25 and 26, T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

¹⁶ See the discussion of the Betty Nos. 1 through 8 claims, *supra*.

¹⁷ Claims in sec. 27, T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

¹⁸ See the discussion of the Betty Nos. 1 through 8 claims, *supra*.

¹⁹ Situated in secs. 23 and 24, T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

²⁰ Situated in sec. 34 T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

²¹ The decision of September 22, 1931, purported to invalidate the interests of five of the six persons reported as having an interest in the claims. The June 24, 1932, decision purported to invalidate the interest of the sixth claimant.

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At that time, title to the claims was in Chris C. Dere, who had an undivided five-eighths interest, and Joseph M. Schneider, who had an undivided three-eighths interest. A post office return receipt shows that a notice-bearing registered letter addressed to Joseph Schneider at Kewaskum, Wisconsin, was received by Mrs. Alex Theisen on June 1, 1931. As there is no evidence to show that Mrs. Theisen was authorized to receive notice of contest for Joseph M. Schneider, or a return receipt showing service of notice on Chris C. Dere,²² the claims were not properly invalidated by the Commissioner's 1931 decision.

The appellant has purchased the interests Tell Ertl had purchased from the heirs of Joseph M. Schneider in 1951, and in 1952 and 1953 it purchased the interests of the heirs of Chris C. Dere. Hence, assuming all else is regular, the appellant has the whole possessory title to the claim.

*Patricia Nos. 1-8 Claims*²³

The Patricia Nos. 1 through 8 claims were declared null and void by decisions issued by the Commissioner on September 22, 1931, and June 24, 1932,²⁴ as a result of contest No. 12717. At that time, title to the claims was in Joseph M. Schneider for whom there is no proper showing of service of notice.²⁵ Accordingly, the Commissioner's decisions had no effect on these claims.

Tell Ertl purchased the interests of the heirs of Joseph M. Schneider in 1951. In 1952, he conveyed the claims to the appellant, which has the entire possessory title, assuming all else is regular.

*Lucy Agnes Nos. 1 and 2*²⁶

The records of contest No. 11750 show that a complaint dated December 28, 1927, was sent to Ida Dere, who was considered to be sole owner of these claims at that time. She responded to the contest complaint with a letter, but was advised that the letter was not a sufficient answer and that she should file a proper one. No further response was made, however, and the Commissioner declared the claims null and void on October 8, 1928.

In a letter dated May 1, 1930, the Commissioner advised the Register of the Denver Land Office that his office had received a report from one of its field representatives stating that title to the Lucy Agnes Nos. 1 and 2 was in the Universal Shale Oil and Refining Company, a

²² There is in the record of contest No. 12717 a return receipt which may be for the notice-bearing registered letter addressed to Chris C. Dere. There is, however, no signature on the line designated for the signature or name of the addressee, and the signature on the line provided for the signature of the addressee's agent is illegible.

²³ Situated in secs. 35 and 36, T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

²⁴ See footnote 21.

²⁵ See discussion of the Madge Nos. 5 through 8 claims, *supra*.

²⁶ Situated in sec. 4, T. 5 S., R. 95 W., 6th p.m., Garfield County, Colorado.

common law trust. He directed the Register to initiate new adverse proceedings against these claims and told him to serve notice on the trustees. This new proceeding identified as contest No. 12372 superseded the earlier contest of the Lucy Agnes Nos. 1 and 2 and is controlling here.

On August 18, 1930, the Commissioner issued a decision in which he claimed notice of contest No. 12372 had been served on four of the six trustees of the Universal Shale Oil and Refining Company, none of whom responded. He held their failure to answer was an admission of the truth of the charge in the contest complaint and that the Lucy Agnes Nos. 1 and 2 were, therefore, null and void.

The record shows that, in 1930, title to the Lucy Agnes Nos. 1 claim was in James Judge²⁷ and Edward Tancl, each of whom had an undivided one-eighth interest, and Ida Dere,²⁸ who had an undivided three-fourths interest. Title to the Lucy Agnes No. 2 claim was, at that time, in Mrs. Jennie London,²⁹ Max J. London³⁰ and Elis Bern, each of whom had an undivided one-eighth interest, and Ida Dere,³¹ who had an undivided five-eighths interest. None of these claimants was served with notice of contest No. 12372. Accordingly, the Commissioner's decision of August 18, 1930, was without effect.

The appellant purchased the interests of Ida Dere in 1952. It subsequently published a forfeiture notice pursuant to Rev. Stat. 2324, *supra*, by means of which it purports have acquired all of the other outstanding interests. Hence, assuming the claims are otherwise valid, appellant may have the entire possessory title to them.

Colorado 09072

Union Oil Company of California

*Fay Nos. 1-8, Florence Nos 1-8, and Hazel Nos. 1-8 Claims*³²

The records show that the above-identified claims were declared null and void by the Commissioner, General Land Office, on June 30, 1931,

²⁷ A quit claim deed dated March 5, 1920, purported to convey the interest of James Judge to Frank Sefcik Trustee for the Universal Shale Oil and Refining Company. The deed was, however, neither signed nor acknowledged by James Judge.

²⁸ A quit claim deed dated November 5, 1923, stated that the Universal Shale Oil and Refining Company, Trustee of a Trust Estate, conveyed the Lucy Agnes Nos. 5 and 6 claims, to Ida Dere, but the deed described the land conveyed as the N-½ sec. 4, T. 5 S., R. 95 W., which comprises the Lucy Agnes Nos. 1 and 2 Claims. The abstract of title shows that Chris C. Dere claimed to have performed the assessment work for Ida Dere on the N-½ section 4 for two years immediately following the conveyance of the claims to her.

²⁹ A quit claim dated November 5, 1920, purported to convey the interest of Jennie London to John C. Hoff. The deed was signed Jennie London and by J. London and acknowledged Jennie London by Joe London. There is nothing in the record to show Joe London was authorized to act for Jennie London.

³⁰ A quit claim deed dated November 5, 1920, purported to convey the interest of Max London to Edward P. Hoff. The deed was signed and acknowledged Max London by Joe London. There is nothing in the record to show Joe London was authorized to act for Max London.

³¹ See footnote 28.

³² Situated in secs. 19, 20, 29, 30, 31 and 32, T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

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as a result of contest No. 11848, initiated by a complaint dated August 6, 1930.

During the contest proceedings, title to the claims was in P. N. McCarthy and Ramon (Raymon) Solis. P. N. McCarthy was not made a party to the contest and, consequently, was never served with notice of contest. Ramon Solis was made a party to the contest but was not properly served with notice.³³ Hence, the Commissioner's decisions of June 30, 1931 were without effect.

In 1951 and 1952, Tell Ertl purchased the interests of P. N. McCarthy and all of the heirs of Ramon Solis. In 1952, he conveyed his interest to the appellant, which has the entire possessory title, assuming the claims are otherwise valid.

*Gold Bug Nos. 1-4 Claims*³⁴

The records of contest No. 11925 show that in 1930 the title to the Gold Bug Nos. 1 through 4 claims was in the following listed persons.

Claimant	Date received	Return receipt signed by—
Cecelia M. McCarthy, Pueblo, Colorado.	August 9, 1930----	Imelda McCarthy.
Edward Rausch, Pueblo, Colorado	August 8, 1930----	Selma Rausch.
Selma Rausch, ³⁵ Pueblo, Colorado.	August 8, 1930----	Selma Rausch.
J. W. Hess, Pueblo, Colorado	August 8, 1930----	J. W. Hess.

³⁴ Situated in sec. 36, T. 4 S., R. 96 W., 6th p.m., Garfield County, Colorado.

³⁵ The 1930 complaint was addressed to Selma not Selma Rausch.

Claimant	Date received	Received by—
Chris C. Dere, ³⁶ Grand Valley, Colorado.	August 12, 1930---	Edria Morrow.
Anna Dere, ³⁷ Grand Valley, Colorado.	August 11, 1930---	Fred Dere.
Philip Dere, Grand Valley, Colorado.	August 11, 1930---	Fred Dere.
Kate F. West, 723 East 8th Street, Long Beach, California.	Returned marked	"Deceased."

³⁶ The 1930 complaint was addressed to Chris Dere not Chris C. Dere.

³⁷ The appellant contends this claimant died March 3, 1923, and has submitted a certified copy of the death certificate of Annie Dere, wife of Phillip Dere.

³⁸ A copy of the 1930 complaint was sent by registered mail to Ramon Solis in care of L. D. Crump. A post office return receipt shows it was delivered to Mrs. S. D. Crump on August 9, 1930. There is nothing to show Mrs. S. D. Crump was authorized to sign for this notice.

On August 24, 1931, the Commissioner issued a decision declaring the Gold Bug Nos. 1 through 4 claims to be null and void to the extent of the parties deemed served with notice of contest; all but Kate F. West or her heirs. The record shows, however, that Cecelia M. McCarthy, Edward Rausch, Chris C. Dere and Philip Dere, as well as Kate F. West or her heirs, were not properly served. Hence, the Commissioner's decision was without effect as to the interests of these claimants. There are, on the other hand, post office return receipts which show that J. W. Hess and Selma Rausch personally signed for notice-bearing registered letters. As to these claimants, the Commissioner's decision of August 24, 1931, was a final administrative determination and was binding as to their interests.

The appellant argues that the decision was without effect as to Selma Rausch in any event because the complaint was addressed to *Selina* Rausch. However, as Selma Rausch did receive a registered letter containing notice of contest No. 11925, which notice advised her of the claims to be contested, the charges asserted by the General Land Office, and the effect of a failure to respond, the misnomer did not render the service of notice fatally defective. See *Uppendahl v. White*, 7 L.D. 60 (1888); *Cole v. Ralph*, 252 U.S. 286 (1920); *Van Buren v. Posteraro*, 45 Colo. 588, 102 Pac. 1067 (1909).

The appellant purchased the interests of the heirs of Chris C. Dere in 1952 and 1953. It subsequently published a forfeiture notice in accordance with Rev. Stat. 2324, *supra*, by means of which it purports to have acquired the interests of Edward Rausch, Anna Dere, Philip Dere, and Kate F. West, or the successors to the interests of these claimants. The appellant also purchased from Tell Ertl the interest Ertl had acquired from Cecelia M. McCarthy in 1952. Therefore, assuming the claims are otherwise valid, appellant has, at most, an undivided three-fourths possessory interest in the Gold Bug Nos. 1 through 4 claims.

Madge Nos. 1-4 Claims ³⁸

These claims were not properly invalidated in the prior contest proceedings, and the appellant has apparently acquired all of the outstanding interests from the original claimants or their successors in interest. See the discussion of the Madge Nos. 5 through 8 claims, *supra*.

Edna Nos. 5-8 Claims ³⁹

The appellant has apparently acquired an undivided one-half interest in these claims. See the discussion of the Edna Nos. 1 through 4 claims, *supra*.

³⁸ Situated in sec. 33, T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

³⁹ Situated in sec. 28, T. 4 S., R. 95 W., 6th p.m., Garfield County, Colorado.

July 30, 1965

*Mary Ann Nos. 1-40 Claims*⁴⁰

According to the record of contest No. 12165, the above-identified claims were declared null and void by the Commissioner on May 15, 1930. The Commissioner stated that title to the claims was in the trustees of the Universal Shale Oil and Refining Company, a common-law trust. The names and addresses of the trustees named by the Commissioner are listed below.

Trustees	Received	Return receipt signed by—
George C. Wiles, 4539 Lake Park Avenue, Chicago, Illinois.	Returned marked "moved left no address."	
Frank Sefcik, 1642 South Austin Blvd., Chicago, Illinois.	March 3, 1930	Alma F. Sefcik.
John C. Hoff, ⁴¹ 3343 Carroll Avenue, Chicago, Illinois.	Returned	
Frank Hitzelburger, 1456 South Peoria Street, Chicago, Illinois.	March 4, 1930	May Hitzelburger.
Eric Bowman, ⁴² 6219 North Fairfield, Chicago, Illinois.	Returned	
August C. Rabe, 5918 South Peoria Street, Chicago, Illinois.	March 3, 1930	Mrs. Helen Rabe.

⁴¹ In a letter dated March 3, 1930, a *John C. Huff* of 3343 Carroll Avenue, Chicago, Illinois, advised the Denver Land Office that he was not the right party to be served.

⁴² In a letter dated March 6, 1930, the employer of Eric Bowman of 6219 North Fairfield Avenue, Chicago, Illinois, advised the Denver Land Office that he had been asked by Mr. Bowman to return the contest complaint because he had no knowledge of the contested claims.

The Commissioner held that these facts showed service of notice on four of the six trustees, and he declared the claims to be null and void. It is evident, however, that none of the named trustees were properly served. Hence, even if it is assumed that they were the proper parties to be notified⁴³ the Commissioner's decision had no effect on the claims.

The abstract of title for the claims shows that Frank Sefcik,⁴⁴ individually, conveyed the claims to Tell Ertl on February 27, 1951, and

⁴⁰ Claims in secs. 22-28, 33-35, T. 4 S., R. 96 W., 6th p.m., Garfield County, Colorado.

⁴³ The appellant contends that pursuant to Colorado statutes in effect as of 1921, now found as sections 118-1-8, 118-1-9 and 31-6-1, of Colorado Revised Statutes, 1953, title to the claims was in the Board of Directors last acting at the time of the dissolution of the Universal Shale Oil and Refining Company, a corporation, as trustees of its creditors and stockholders. If this was the case, service on *all* of the trustees would have been necessary in order to proceed with a contest. See 53 I.D. 562 (1931).

⁴⁴ The appellant's published forfeiture notice states that Frank Sefcik was a director of the defunct Universal Shale Oil and Refining Company. The Commissioner considered him to be a trustee of the Universal Shale Oil and Refining Company, Trustee of a trust estate.

that Ertl conveyed his interest to the appellant on May 11, 1951. From August 31, 1951, to November 30, 1951, and from December 5, 1952, to March 6, 1953, the appellant published forfeiture notices as provided by Rev. Stat. 2324, *supra*, naming the Universal Shale Oil and Refining Company as a defunct corporation and as the trustee of a trust estate, various trustees and officers of these organizations, and various persons having, or thought to have, an interest in the claims, by means of which it purports to have acquired all outstanding interests in the claim. Hence, assuming the claims are otherwise valid and that the forfeiture proceedings were proper, the appellant has the entire possessory title to the claims.

Colorado 014671
Weber Oil Company
*Sunset Nos. 1-31 Claims*⁴⁵

The above-identified claims were declared null and void by the Commissioner on May 9, 1930, as a result of contest No. 12128. At that time, possessory title to the claims was in the following listed persons.

Claimant	Notice received	Return receipt signed by—
D. Kirk Shaw, Durango, Colorado---	February 14, 1930	D. Kirk Shaw.
Herbert Gordon, Meeker, Colorado---	February 21, 1930	Mrs. Herbert Gordon.
C. J. Wilson, Meeker, Colorado----	February 13, 1930	C. J. Wilson.
R. C. Graham, Meeker, Colorado---	February 13, 1930	R. C. Graham.
C. H. Farthing, Meeker, Colorado---	February 13, 1930	Mrs. C. H. Farthing.
E. A. Wilson, Meeker, Colorado----	February 15, 1930	Mrs. C. L. Tucker.
H. A. Wildhack, Meeker, Colorado---	February 13, 1930	H. A. Wildhack.
J. S. C. Shepherd, Meeker, Colorado.	February 13, 1930	J. S. C. Shepherd.

As D. Kirk Shaw, C. J. Wilson, R. C. Graham, H. A. Wildhack and J. S. C. Shepherd personally signed post office return receipts for registered letters containing notice of contest No. 12128, the Commissioner's decision was final as to them. As the remaining claimants did not sign such a receipt, and there is nothing to show that the person who did sign was authorized, the Commissioner's decision could not affect their interests.

Weber Oil Company purchased in 1955 and 1956, the interest of Herbert Gordon and the interests of the heirs of C. H. Farthing and E. A. Wilson. It has, therefore, an undivided three-eighths interest

⁴⁵ Situated in Secs. 5-8, 17-20, T. 3 S., R. 99 W., 6th p.m., Rio Blanco County, Colorado.

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in the Sunset Nos. 1 through 31 claims if the claims are otherwise valid.

Colorado 016334
Tell Ertl
*Tom Boy Nos. 1-12*⁴⁶

The records of contest No. 11760 show that title to the Tom Boy Nos. 1 through 12 claims was in the following listed persons in 1930.

Claimant	Received	Received by—
William Post, 229 N. First Street, Grand Junction, Colorado.	July 13, 1931-----	Beatrice Post.
Ida L. Anderson, ⁴⁷ Shiprock, New Mexico.	-----	-----
Charles Anderson, Shiprock, New Mexico.	On or before Au- gust 26, 1930.	Charles Anderson.
Stephen A. Post, ⁴⁸ 229 N. First Street, Grand Junction, Colorado.	On or before Au- gust 25, 1930.	E. Elizondo.
W. H. Post, ⁴⁸ 229 N. First Street, Grand Junction, Colorado.	July 13, 1931-----	Beatrice Post.
Beatrice Post, ⁴⁹ 229 N. First Street, Grand Junction, Colorado.	July 13, 1931-----	Beatrice Post.
W. B. Blythe, Eighth and Struthers, Grand Junction, Colorado.	On or before Au- gust 25, 1930.	E. Elizondo.

⁴⁷ There are two post office return receipts signed by Charles Anderson on the line for "Signature and names of addressee," but no return receipt signed by Ida L. Anderson or by Charles Anderson as the agent of Ida L. Anderson.

⁴⁸ Heirs of Emma J. Boyd, one of the original locators. The appellant's abstract of title shows that Emma J. Boyd died intestate September 24, 1921, possessed of an undivided one-eighth interest in the claims, and that her heirs were Stephen A. Post and W. H. Post, each of whom took one-half of her interest.

⁴⁹ Also known as Beatrice Post.

The Commissioner, General Land Office, declared the Tom Boy Nos. 1 through 12 claims to be null and void to the extent of the interests of four⁵⁰ of the eight claimants of record. On November 3, 1931, the Commissioner declared null and void the interests of William Post, W. H. Post and Beatrice Post, who were reportedly served with notice of contest after the July 3, 1931, decision was issued.

In 1954, Tell Ertl purchased the interests of William Post, one of the original locators. He subsequently published a forfeiture notice in accordance with Rev. Stat. 2323, *supra*, by means of which he

⁴⁶ Situated in secs. 6, 7, and 18 T. 4 S., R. 95 W., sec. 1 T. 4 S. R. 96 W., 6th p.m., Rio Blanco County, Colorado.

⁵⁰ W. B. Blythe, S. A. Post, Charles Anderson and Ida L. Anderson.

claims to have acquired the interests of the other claimants. However, as Charles Anderson and Beatrice Post personally signed for notice-bearing letters, their interests were finally extinguished by the Commissioner's 1930 decision. Hence, assuming the validity of the forfeiture proceedings, Ertl possesses, at most, an undivided three-fourths interest in the Tom Boy Nos. 1 through 12 claims if the claims are otherwise valid.

Colorado 016671

Tell Ertl, Henry L. Price, Silmon Smith, Charles Holmes

Liberty Bell Nos. 1-12⁵¹

The records of contest No. 11758 show that title to the Liberty Bell Nos. 1 through 12 was in the following listed persons in 1930:

Claimant	Notice received	Received by—
H. R. Post, 229 N. First Street, Grand Junction, Colorado.	July 11, 1930.....	Mrs. H. R. Post.
Lee Schull, 1521 Humboldt Street, Denver, Colorado.	April 5, 1933.....	Lee Schull.
Henry L. Price, 129 South 7th Street, Grand Junction, Colorado.	July 11, 1930.....	Henry L. Price.
Milo Brown, 735 Road Avenue, Grand Junction, Colorado.	July 11, 1930.....	Milo Brown.
Gaylord Hallock; ⁵² 3418 Hope Street, Huntingdon Park, California.	May 26, 1933.....	Mrs. G. Hallock.
Lee Sparks, Paonia, Colorado.	April 6, 1933.....	Clifford Sparks.
Stephen A. Post, 229 N. First Street, Grand Junction, Colorado.	On or before July 21, 1930.	E. Elizando.
Charles Anderson, Shiprock, New Mexico.	-----	-----

⁵² A copy of the July 9, 1930, complaint was sent to Hallock at 401 South Ford Boulevard, Los Angeles, California. A letter to the Register from the Acting Chief of Field Division dated March 21, 1933, reported that Hallock had died about two years previous and that an effort was being made to determine if heirs survived him. This report was not confirmed. A letter to the Register from a special agent, dated May 18, 1933, reported Hallock as living at the address in "Huntingdon" Park, California.

On July 21, 1931, the Commissioner declared the Liberty Bell Nos. 1 through 12 claims to be null and void to the extent of the interests H. R. Post, Henry L. Price, Milo Brown and Stephen A. Post. Of these claimants, Henry L. Price and Milo Brown had per-

⁵¹ Situated in secs. 5, 8, 17 and 18 T. 4 S., R. 95 W., 6th p.m., Rio Blanco County, Colorado.

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sonally signed for notice-bearing registered letters. In subsequent letters to the Commissioner, to which were attached post office return receipts, the Register of the Denver Land Office claimed service of notice upon Lee Schull, who personally signed for his letter, and Gaylord Hallock and Lee Sparks. The Commissioner did not, however, issue any decisions declaring null and void the interests of these claimants. The Register never claimed to have served notice of contest upon Charles Anderson, the eighth claimant. Accordingly, as no decision canceling the interests of Lee Schull, Lee Sparks, Gaylord Hallock and Charles Anderson was ever issued, regardless of the validity of service, and as there is no evidence that Mrs. H. R. Post and E. Elizando were authorized to receive notice of contest for H. R. Post and Stephen A. Post respectively, it cannot now be said that the interests of these six mining claimants were invalidated.

In 1954 Tell Ertl purchased the interests of H. R. Post and Milo Brown. He subsequently published a forfeiture notice in accordance with Rev. Stat. 2324, *supra*, from July 15 through October 7, 1955, by means of which he claims to have acquired the interests of all the remaining claimants but H. L. Price, who contributed his proportionate share, one-eighth, for the assessment work Ertl had done. On September 23, 1955, Price conveyed one-half of his interest in the claims to Silmon Smith and Charles Holmes. However, as Price had personally signed for a notice-bearing registered letter on July 11, 1930, he had no valid interest either to protect by contributing for Ertl's assessment work or to convey to Smith and Holmes. Thus, assuming there is no agreement not of record and that the claims are otherwise valid, Price, Smith and Holmes have no interest in the Liberty Bell Nos. 1 through 12 claims while Ertl has, at most, an undivided three-fourths interest in each of these claims.

Colorado 018673

*Gabbs Exploration Company*⁵³

Greeley Nos. 1-6 and 8 Claims

As a result of contest No. 12278, the Greeley No. 1 claim was declared null and void, to the extent of 10 of the 11 persons considered to have an interest in it, by decisions issued by the Commissioner on June 21, 1930, and July 8, 1931. The abstract of title shows that, at that time, title to the claim was in the following listed claimants.

⁵³ Claims in secs. 27 and 34, T. 4 S., R. 99 W., 6th p.m., Garfield County, Colorado.

Claimant	Notice received	Return receipt signed by—
W. R. Adams, 1427 9th Avenue, Greeley, Colorado.	April 14, 1930	Mrs. W. R. Adams.
Frank H. Young, 1027 5th Street, Greeley, Colorado.	April 14, 1930	Mrs. H. Galland.
Pierce Apel ⁶⁴ -----		
V. W. Conner, 40 Greeley Abstract Co., Greeley, Colorado.	April 14, 1930	V. W. Conner.
E. H. Luark, c/o Frank H. Young, 1027 Fifth Street, Greeley, Colorado.	April 14, 1930	Mrs. H. Galland.
Harold Young, Route 5, Box 244, Greeley, Colorado.	April 14, 1930	Mrs. Harold Young.
Otto Bailey-----		
O. H. Ward, Route 6, Box 97, Greeley, Colorado.	April 16, 1930	Mrs. O. H. Ward.

⁶⁴ The contest complaint was addressed to *Pierre* Apel.

In a letter to the Register, dated March 31, 1930, the Commissioner stated that "Otho" Bailey was deceased and that the following listed persons, to whom notices were sent, were his heirs:

Claimant	Notice received	Return receipt signed by—
Theodore Bailey, Greeley, Colorado....	April 14, 1930	Blanche Fuhrken.
Harvey C. Williams, Route 1, Box 74-B, Kersey, Colorado.	July 14, 1930	H. C. Williams.
Perry L. Williams, Kersey, Colorado....	April 14, 1930	Alta B. Williams.

As the record shows that V. W. Conner and H. C. Williams personally signed return receipts for notice-bearing registered letters, the Commissioner's decision was a final administrative determination regarding their rights. As the remaining claimants did not personally sign for such a letter, and there is nothing to show that the persons who did sign for them had been authorized, the decision did not affect their interests.

On June 30, 1955, V. W. Connor, also known as V. W. Conner, quit claimed whatever interest he had in the Greeley No. 1 claim to Joe T. Juhan.

The Greeley Nos. 2 and 8 claims were declared null and void by the Commissioner on June 21, 1930, the Commissioner claiming service of notice of contest No. 12277 on the eight claimants reported as having an interest in the contested claims. According to the

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abstract of title, the possessory title to the claims was in Williams Lodwick and Henry Pearce. Post office return receipts show that notice-bearing registered letter addressed to Lodwick was received on April 14, 1930, by Bessie Schneider, and that such a letter addressed to Pearce was received by John P. O'Brien on April 11, 1930. There is nothing to show that either of the persons signing the return receipts had been authorized to receive the notice-bearing letters for the addressees. In the absence of evidence of proper service of notice of contest, the Commissioner's decision had no effect on these claims.

On June 30, 1955, Byron William Lodwick, also known as William Byron Lodwick, quit claimed whatever interest he had in the Greeley Nos. 2 and 8 claims to Joe T. Juhan.

On June 21, 1930, the Greeley No. 3 claim was declared null and void by the Commissioner as a result of contest No. 12272. At that time, title to the claim was in the following listed persons.

Claimant	Notice received	Return receipt signed by—
M. C. Stoddard, 5776 Campo Walk, Long Beach, California.	April 14, 1930.....	M. C. Stoddard.
Verne O. Stoddard, 5776 Campo Walk, Long Beach, California.	April 14, 1930.....	Verna O. Stoddard.
C. F. Foster, 921 2d Street, Fernando, California.	April 15, 1930.....	Gertrude Foster.
Gertrude M. Foster, 921 2d Street, Fernando, California.	April 14, 1930.....	Gertrude Foster.
Warren C. Ward, 4738 University Way, Seattle, Washington.	April 15, 1930.....	Warren C. Ward.
Leona B. Ward, 4738 University Way, Seattle, Washington.	April 15, 1930.....	Leona B. Ward.
Perry Murray, Box 698, Needles, California.	On or before April 14, 1930.	Irma Webber.
Jennie Murray, Box 698, Needles, California.	On or before April 14, 1930.	Irma Webber.

In a letter dated April 18, 1930, Leona B. Ward stated she had received a contest complaint and asked if there were a way she could still hold the claim. She was advised in a letter dated April 24, 1930, that she could file or answer denying the charge in the complaint, and that there was no other way, at that time, to protect the claim. No answer was filed, however, either by Mrs. Ward or by any other claimant.

As the record shows that M. C. Stoddard, Verna O. Stoddard, Gertrude Foster, Warren C. Ward and Leona B. Ward personally signed for notice-bearing registered letters, the Commissioner's June

21, 1930, decision was a final determination regarding their rights. As C. C. Foster, Perry Murray and Jennie Murray did not personally sign for such a letter, and there is nothing in the record to show that the person receiving their letters was authorized to do so, the Commissioner's decision could not affect their interest.

On June 30, 1955, M. C. Stoddard quit claimed whatever interest he had in the Greeley No. 3 claim to Joe T. Juhan.

According to the records of contest No. 12273, the Commissioner declared the Greeley No. 4 claim to be null and void to the extent of six of the seven persons reported as having an interest in it on June 21, 1930. At that time, title to the claim was in the following listed persons.

Claimant	Notice received	Return receipt signed by—
Belle Adams, 119 13th Street, Greeley, Colorado.	April 12, 1930	George Adams.
Alexander Adams ⁵⁵ -----	-----	-----
O. H. Ward, Route 6, Box 97, Greeley, Colorado.	April 14, 1930	O. H. Ward.
John H. Son, 923 6th Street, Greeley, Colorado.	April 12, 1930	Lou Crete Son.
Cabell Son, 923 6th Street, Greeley, Colorado.	April 12, 1930	Lou Crete Son.
William Lodwick, Fayette, Iowa-----	April 14, 1930	Bessie Schneider.

⁵⁵ This claimant was not listed as a contestee.

Claimant	Notice received	Received by—
Charles Kneip, Long Beach, California. ⁵⁶	-----	-----
Ernest Fagerberg, Route 6, Box 185, Greeley, Colorado.	April 12, 1930	Ernest Fagerberg.

⁵⁶ A registered letter addressed to Charles "Kneippe" at Long Beach, California, was returned marked "Insufficient Address, not in Directory." Apparently, no further effort was made to serve this claimant.

The Commissioner's decision was a final administrative determination regarding the rights of O. H. Ward and Ernest Fagerberg, who personally signed for notice-bearing registered letters. It had no effect, however, on the interests of the balance of the claimants.

On June 30, 1955, Byron William Lodwick, also known as William Byron Lodwick, quit claimed whatever interest he had in the Greeley No. 4 claim to Joe T. Juhan.

The Greeley Nos. 5, 6, and 7 claims were declared null and void by the Commissioner on June 21, 1930, as a result of contest No. 12276.

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At that time, title to the Greeley No. 5 was in Paul Newton Lodwick, and possessory title to the Greeley No. 6 was in Fred Grainger, neither of whom was named as a contestee in contest No. 12276. Hence, the Commissioner's decision had no effect on these claims. Paul Newton Lodwick quit claimed his interest in the Greeley No. 5 claim to Joe T. Juhan on June 30, 1955. The interest Fred Grainger had in the Greeley No. 6 claim passed at his death in 1945 to Mrs. Catherine Conine and Howard Chambers both of whom conveyed their interests in the claim to John P. Akolt on February 4, 1957.

On April 14, 1956, Joe T. Juhan conveyed whatever interest he had in the Greeley Nos. 1 through 5 and 8 claims to Gabbs Exploration Company. Since, however, V. W. Conner's interest in the Greeley No. 1 claim and M. C. Stoddard's interest in the Greeley No. 3 claim had been finally canceled in 1930, Juhan acquired nothing when he purchased their interests and could not therefore convey any interest in these claims to Gabbs Exploration Company. Nevertheless, Gabbs Exploration Company subsequently published forfeiture notices as provided by Rev. Stat. 2324, *supra*, calling for contributions for assessment work it had done as a co-owner of the Greeley Nos. 1 through 5 and 8 claims. On June 14, 1957, the Garfield County District Court issued a decree quieting title to these claims in Gabbs Exploration Company.

The right to give notice of a claim for contribution pursuant to Rev. Stat. 2324, *supra*, is limited to a co-owner. *Turner v. Sawyer*, 150 U.S. 578 (1893). For this reason, Gabbs Exploration Company had no standing to publish a forfeiture notice for the Greeley Nos. 1 and 3 claims. As it acquired no interest in these claims by purchase from a co-owner whose interest had not been previously canceled, and could therefore acquire nothing by publishing a forfeiture notice, it now has no interest in these claims. Accordingly, assuming the claims are otherwise valid, Gabbs Exploration Company has acquired the full possessory title to the Greeley Nos. 2, 5, 6 and 8 claims and an undivided three-fourths interest in the Greeley No. 4 claim.

Colorado 022459

Dwight S. Young, John W. Savage, Charles H. Prien
*Kent Placer Mining Claim*⁵⁷

The record of contest No. 12064 shows that contest proceedings were initiated against the above identified claim by a complaint dated June 24, 1930. At that time, title to the claim was in D. S. Young. A copy of the contest complaint was mailed by registered mail to Dwight S. Young, Sr., at 2050 South St. Paul Street, Denver, Colo-

⁵⁷ Situated in sec. 8, T. 5 S., R. 99 W., 6th p.m., Garfield County, Colorado.

rado. A post office return receipt shows that the complaint-bearing registered letter was received by Helen L. Young on June 27, 1930. There is no evidence that this person was authorized to receive mail for Dwight S. Young. Nevertheless, on September 5, 1930, the Acting Commissioner, General Land Office, declared the claim to be null and void. In the absence of proper evidence of serving of notice, however, the Acting Commissioner's decision was without effect.

*Hydrocarbon No. 1*⁵⁸

By decisions of June 30 and August 1, 1931, the Commissioner, General Land Office, declared the above-identified claim to be null and void as a result of contest No. 12031. The record shows, however, that title to the claim was, at that time, in D. S. Young who was neither named as a contestee or served with notice of contest. Accordingly, the Commissioner's decision were without effect.

*Pollak Nos. 1-4 Claims*⁵⁹

By decisions dated September 5, 1930, and July 21, 1931, the Commissioner declared the Pollak Nos. 1 through 6 claims null and void on the ground that the persons claiming title to them had been served with notice of contest No. 12076 but had failed to respond. The record shows that D. S. Young was the sole owner of the Pollak Nos. 1 through 4 claims at the time of contest. In the record are two post office return receipts showing receipt, on May 22, 1930, by Mrs. D. S. Young and on June 26, 1930, by Helen L. Young, of notice-bearing registered letters addressed to Dwight S. Young. There is, however, nothing in the record to show that Dwight S. Young had authorized either Mrs. D. S. Young or Helen L. Young to receive registered letters for him. Thus, the Commissioner's decision had no effect.

*Emma No. 5 Claim*⁶⁰

By decisions dated August 1, 1931, and September 5, 1930, the Commissioner declared the Emma Nos. 1 through 5 claims to be null and void on the ground that the claimants had been served with notice of contest No. 12074 but had failed to respond. The record shows that the Emma No. 5 claim was located by eight persons on what was then designated as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 10, N $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 15, T. 5 S., R. 100 W. 6th p.m. The eight locators conveyed the claim to D. S. Young in 1921. In 1922 D. S. Young conveyed the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 5 to the Petroleum Lands Company, a Colorado Corporation. Title to the claim was vested in these two claimants at the time of contest. Both were included, among others, as contestees.

⁵⁸ Situated in sec. 7, T. 5 S., R. 99 W., 6th p.m., Garfield County, Colorado.

⁵⁹ Association placer claims in secs. 8, 9, 16, and 17, T. 5 S., R. 99, 6th p.m., Garfield County, Colorado.

⁶⁰ Situated in sec. 7, T. 5 S., R. 99 W., 6th p.m., Garfield County, Colorado.

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On June 25, 1930, S. C. Hoel signed a post office return receipt as President of Petroleum Lands Company for a notice-bearing registered letter addressed to that Company. On June 26, 1930, Helen L. Young signed such a receipt for such a letter addressed to Dwight S. Young, Sr. There is, however, nothing to show Helen L. Young had been authorized to receive such a letter. Hence, the interest of Dwight S. Young was unaffected by the Commissioner's decisions.

Apparently, the appellants' patent application does not include the portion of the claim which Young conveyed to Petroleum Lands Company.⁶¹ It should, however, be noted that the Commissioner's letter of July 15, 1929, to the Register states that the Petroleum Lands Company was dissolved at that time. If this is correct, jurisdiction could have been obtained only by serving notice of contest on each of the directors or trustees of the Company acting last before the time of its dissolution. 53 I.D. 562 (1931).

On January 27, 1956, Dwight S. Young conveyed an undivided one-half interest in the Kent, Hydrocarbon No. 1, Pollak Nos. 1 through 4 and Emma No. 5 claims to John W. Savage and Charles H. Prien. Accordingly, if the claims are otherwise valid, Dwight S. Young has an undivided one-half possessory interest, and John S. Savage and Charles H. Prien each have an undivided one-fourth possessory interest in the claims included in the mineral entry patent application Colorado 022459.

Colorado 022460

Dwight S. Young, John W. Savage, Charles H. Prien

*Hydrocarbon Nos. 2-14 Claims*⁶²

The Hydrocarbon No. 2 claim was declared null and void as a result of contest No. 12031. This declaration was without effect as the sole owner of the claim was not served with notice of contest. See the discussion under Hydrocarbon No. 1, *supra*.

The Hydrocarbon Nos. 3 through 14 were declared null and void by the Commissioner on September 5, 1930, and July 29, 1931, as a result of contest No. 12073. At the time of that contest, title to the claims was in D. S. Young who was neither named as a contestee nor served with notice of that contest. Hence, the Commissioner's decisions had no effect on the claims.

⁶¹ The appellants have applied for the Emma No. 5 claim "insofar as it relates to Section 7, E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$, [T. 5 S., R. 99 W., 6th p.m.] being a total of 120 acres."

⁶² Situated in secs. 4-9, T. 5 S., R. 99 W., 6th p.m., Garfield County, Colorado.

*Brush Creek Coils Nos. 2 and 3 Claims*⁶³

The Brush Creek Coils Nos. 1 through 3 claims were declared null and void by the Commissioner by decisions dated September 5, 1930, and July 21, 1931, as a result of contest No. 12072. The sole owner of the Brush Creek Coils Nos. 2 and 3 claims at that time was D. S. Young. The record shows that Dwight S. Young, Sr., and others, were named as contestees in a complaint dated June 24, 1930. A post office return receipt shows a receipt of a complaint bearing registered letter addressed to Dwight S. Young, Sr., by Helen L. Young, on June 27, 1930. There is nothing to show Helen L. Young was authorized to receive such a letter for Dwight S. Young, Sr. Hence, the Commissioner's decisions had no effect on these claims.

*Denver Nos. 1 and 4 Claims*⁶⁴

The records of contest No. 12064 and contest No. 12069 show that the Denver Nos. 1 through 12 claims were declared null and void by the Commissioner on September 5, 1930. According to the abstract of title, the sole owner of the claims at that time was D. S. Young. The record of contest No. 12064 shows that a complaint-bearing registered letter addressed to Dwight S. Young, Sr., was received by Helen L. Young on June 27, 1930. There is nothing in the record to show Helen L. Young had been authorized to receive such a letter. For this reason, the Commissioner's decision was without effect.

On January 27, 1956, Dwight S. Young conveyed an undivided one-half interest in the Hydrocarbon 2 through 14 claims, the Brush Creek Coils Nos. 2 and 3 claims, and the Denver Nos. 1 and 4 claims to Charles H. Prien and John W. Savage. Hence, assuming the claims are otherwise valid, Dwight S. Young has an undivided one-half possessory interest, and John W. Savage and Charles H. Prien each have an undivided one-fourth possessory interest in the claims included in mineral entry Colorado 022460.

Colorado 022461

Dwight S. Young, John W. Savage, Charles H. Prien

*Denver Nos. 2, 3, 5-12 Claims*⁶⁵

*Emma Nos. 3 and 4 Claims*⁶⁶

Contest decisions purporting to invalidate the Denver Nos. 2, 3 and 5 through 12 claims and the Emma Nos. 3 and 4 claims have been previously discussed in this decision.⁶⁷ For the reasons stated, the attempted invalidation of these claims was without effect.

⁶³ Situated in secs. 5 and 8, T. 5 S., R. 99 W., 6th p.m., Garfield County, Colorado.

⁶⁴ Situated in sec. 6, T. 5 S., R. 99 W., 6th p.m., Garfield County, Colorado.

⁶⁵ Situated in sec. 6, T. 5 S., R. 99 W., and secs. 1 and 12, T. 5 S., R. 100 W., 6th p.m., Garfield County, Colorado.

⁶⁶ Situated in secs. 6 and 7, T. 5 S., R. 100 W., 6th p.m., Garfield County, Colorado.

⁶⁷ See the discussion of the Emma No. 5 claim under Colorado 022459 and the Denver Nos. 1 and 4 claims under Colorado 022460.

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On January 27, 1956, Dwight S. Young conveyed an undivided one-half interest in these claims to Charles H. Prien and John W. Savage. Accordingly, if the claims are otherwise valid, Young has an undivided one-half possessory interest, and Prien and Savage each have an undivided one-fourth possessory interest in the claims included in mineral entry Colorado 022461.

Colorado 029427 and 029428
Bute Nos. 20 and 29⁶⁸

The records show title to the Bute Nos. 20 and 29 was in the following listed persons in 1930.

Claimant	Notice received	Return receipt signed by—
Mrs. Evelyn Canon, 406 Oak Avenue, Ithaca, New York. ⁶⁹	October 30, 1930..	Mrs. Evelyn Canon.
Helen Canon, 406 Oak Avenue, Ithaca, New York. ⁷⁰	October 30, 1930..	Mrs. Benton Canon.
Eva T. Canon, 406 Oak Avenue, Ithaca, New York.	October 30, 1930..	Mrs. Benton Canon.
Charles Anderson, Shiprock, New Mexico.	On or before August 26, 1930.	Charles Anderson.
Ethel McGahen, 1114 W. 4th Street, San Pedro, California. ⁷¹	July 18, 1931.....	Ethel McGahen Lawrence.
Mrs. Harry Kelley, ⁷² R.R. No. 4, Grand Junction, Colorado.	July 17, 1931.....	Mrs. Harry Kelly.
Colleen Moore, R.R. No. 4, Grand Junction, Colorado.	July 17, 1931.....	Mrs. Harry Kelly.
W. S. Furman, Burbank, California.	August 13, 1930...	G. H. Furman.
James Murphy, Burbank, California.	August 14, 1930...	Mrs. James Murphy.
Frank Jackson, c/o Stephen A. Post, 329 Ute Avenue, Grand Junction, Colorado.	On or before August 26, 1930.	E. Elizondo.
Stephen A. Murphy, Burbank, California.	August 14, 1930...	Mrs. Murphy.

⁶⁹ A letter dated October 21, 1930, stated that Benton Canon, one of the original locators, died December 29, 1927, and that his will was probated February 24, 1928. His heirs were identified as Mrs. Evelyn Canon, Eva Canon, and Helen Canon, all of whom were reported as living at 406 Oak Avenue, Ithaca, New York.

⁷⁰ A letter dated October 28, 1930, stated that Eva T. Canon, heir of Benton Canon, was then receiving mail in care of the free Public Library, Council Bluffs, Iowa, at which place service should be attempted. There is no evidence that any attempt was made to send a registered letter to her at that address.

⁷¹ In a letter dated July 3, 1931, the Commissioner stated that information he had received from the file disclosed that this locator had married and that her married name was Lawrence.

⁷² Reports from the field stated that J. C. Moore one of the original locators of the Bute claims was deceased and that his heirs were Mrs. Harry Kelly, his widow, and Colleen Moore, a minor daughter, both of whom resided at R.R. No. 4, Grand Junction, Colorado.

⁶⁸ Situated in secs. 10, and 16, T. 4 S., R. 96 W., 6th p.m., Rio Blanco County, Colorado.

On July 3, 1931, the Commissioner declared the Bute Nos. 1 through 48 claims null and void to the extent of the interests of the claimants who had been served with notice of contest No. 11757. Subsequently, on November 3, 1931, the Acting Commissioner stated that notice of contest No. 11757 had been served on the remaining claimants and declared the Bute Nos. 1 through 48 claims null and void.

Energy Resources Technology Land, Inc., purchased the Bute Nos. 20 and 29 claims from Tell Ertl in 1957 and 1959. In 1954 Tell Ertl had purchased the interests James Murphy, Stephen A. Murphy and R. L. Lawrence had in these claims. Subsequently, Ertl published a forfeiture notice pursuant to Rev. Stat. 2324, *supra*. By means of this forfeiture notice, published July 15, through October 7, 1955, Ertl claimed to have acquired all of the remaining interests in the Bute Nos. 20 and 29 claims. Ertl could not, however, acquire the interests of Ethel McGahen Lawrence, Charles Anderson, Mrs. Evelyn Canon, and Mrs. Harry Kelly, the widow of J. C. Moore, and possibly Eva and Helen Canon, as these claimants, or their guardians, personally signed for registered letters bearing notice of contest No. 11757.

It is not possible to state the extent of the appellant's interest in the Bute Nos. 20 and 29 claims as there remains the question of the validity of service of notice upon Eva and Helen Canon and Colleen Moore, heirs of Benton Canon and J. C. Moore, whose ages at the time of the contests are unknown. Also remaining is a determination of the interest each of the above-named heirs had acquired in the Bute claims.

As concluded above, the showing of service by registered mail in contests originated by the General Land Office under the special instructions of February 26, 1916, *supra*, is no less than that imposed by Rule 7 of the Rules of Practice, *supra*, which governed all other contest. Thus, it must affirmatively appear in the record that Eva and Helen Canon and Colleen Moore were infants under the age of 14 years and in the care of their mothers in order to hold that service of notice of contest No. 11757 was effective as to these persons. The burden of making such a showing rests with the contestant, in this case the Government. *Kennedy v. Severance, supra*. Upon the receipt of the record of the mineral entries Colorado Nos. 029427 and 029428, the Bureau of Land Management will be required to make such a showing. If it is determined that some of these heirs were not properly served, the appellant will then be required to show the extent of their interests.

July 30, 1965

Colorado 031342

Energy Resources Technology Land, Inc.

Atlas Group⁷³

According to the abstract submitted by the appellant title to the Atlas claims was distributed as follows in 1931:

Claimant	Claim number								
	4	5	6	8	11	13	14	15	16
Ethel McGahen	4	5	6	8	11	13	14	15	16
Heirs of Emma J. Boyd	4	5	6	8	11	13	14	15	16
Albert C. Coleman	4	5	6	8	11	13	14	15	16
Harry U. Longwell	4	5	6	8	11	13	14	15	16
Stephen A. Post	4	5	6	8	11	13	14	15	16
J. C. Moore	4	5	6	8	11	13	14	15	16
W. S. Furman	4	5	6	8	11	13	14	15	16
Marcedus Murphy	4	5	6	8	11	13	14	15	16
Iris Campbell	4	5	6	8	11	13	14	15	16

The following, compiled from the records of contest No. 11759, shows the names and addresses of the persons to whom copies of the contest complaint dated July 13, 1931 were directed.

Claimant	Notice received	Return receipt signed by—
Ethel McGahen, ⁷⁴ 1114 W. 24th Street, San Pedro, California.	July 18, 1931	Ethel McGahen Lawrence.
Albert C. Coleman, Oxford Hotel, Grand Junction, Colorado.	July 17, 1931	Mrs. A. J. Smith.
Harry U. Longwell, 218 Sunset Boulevard, Modesto, California.	July 20, 1931	Harry U. Longwell.
Stephen A. Post, ⁷⁵ 229 North First Street, Grand Junction, Colorado.	July 17, 1931	Stephen A. Post.
W. H. Post ⁷⁵		
J. C. Moore ⁷⁶		
Marcedus Murphy, ⁷⁷ 144 South Cedar Street, Glendale, California.	July 18, 1931	Catherine Murphy.

⁷⁴ See footnote 71.

⁷⁵ Heirs of Emma J. Boyd, one of the original locators. See footnote 41.

⁷⁶ J. C. Moore was not considered to be an owner of the claim by the General Land Office. Records of contest No. 11757 show he was deceased at this time and that his heirs were his widow, Mrs. Harry Kelly and Colleen Moore, a minor daughter. No attempt was made to serve his heirs with notice of contest No. 11759.

⁷⁷ The Commissioner's letter of July 3, 1931, stated that Marcedus Murphy's married name was Furman. The appellant has submitted a statement signed by Marcedus Murphy in which she states that in 1930 she was living with her parents, James and Catherine Murphy in Glendale, California. She states that she was 39 years of age and had not authorized her parents in writing to receive mail for her. She does not recall receiving any letters from the Department of the Interior at that time regarding her oil shale interests, although she remembers receiving one from an individual interested in her oil shale interests.

⁷⁸ The Atlas Nos. 4, 5, 6, 8, 11, 14, 15, and 16 association placer claims situated in secs. 10, 11, 14, and 15, T. 4 S., R. 95 W., 6th p.m., Rio Blanco County, Colorado.

Claimant	Notice received	Return receipt signed by—
Iris Campbell, 78 2358 E. 70th Street, Chicago, Illinois.	July 17, 1931.	Iris C. Robinson.

⁷⁸ The Commissioner's letter of July 3, 1931, stated that the locator Iris Campbell had married and that her married name was Robinson.

On October 8, 1931, the Acting Commissioner, General Land Office declared the Atlas Nos. 1 through 18 claims to be null and void to the extent of the interests of seven of the eight parties reported as having interests in the claims.

In 1957 and 1959 Energy Resources Technology Land, Inc., purchased whatever interests Tell Ertl and H. A. Dutton, Jr. had in the Atlas claims. Ertl had purchased, in 1954, the interests of Iris Campbell Robinson, Marcedus Murphy, and R. L. Lawrence, who is, apparently, an heir of Ethel McGahen Lawrence. Ertl subsequently published a forfeiture notice in accordance with Rev. Stat. 2324, *supra*. By means of such a forfeiture notice, Ertl claimed to have acquired the interests of all other claimants. However, as Harry U. Longwell, Stephen A. Post, Ethel McGahen Lawrence, and Iris Campbell Robinson personally signed the return receipts for registered letters containing notice of contest No. 11759, the Acting Commissioner's decision of October 8, 1931, was a final administrative action which extinguished their interests.

It should be noted that the abstract shows that although Tell Ertl claimed to have acquired the interest of H. A. Dutton by means of the forfeiture notice published in 1955, Energy Resources Technology Land, Inc., purchased Dutton's interests in the Atlas claims on July 13, 1959. Dutton had acquired his interest in the claims by purchases from Beatrice Post, an heir of W. H. Post, who was an unserved heir of Emma J. Boyd, and from George D. Post, an heir of Stephen A. Post. Thus, Energy Resources Technology Land, Inc., does not have the whole possessory title to each of the Atlas Claims for which it has applied for a patent. If the claims are otherwise valid, and the forfeiture proceedings were available to it, the appellant has, at most, an undivided $\frac{1}{16}$ interest in the Atlas Nos. 4, 5, 8, 13 and 14; an undivided $\frac{1}{2}$ interest in the Atlas Nos. 6 and 15; and an undivided $\frac{7}{16}$ interest in the Atlas Nos. 11 and 16.

July 30, 1965

Colorado 034270 and 034271

John W. Savage

Hoffman Nos. 20 and 46 claims⁸⁰

As a result of contest No. 12588, the Hoffman No. 20 claim was declared null and void on October 15, 1931, as to the interests of seven of the eight parties reported as having interests in it. At that time, possessory title to an undivided thirteen-sixteenths of the claim was in L. M. (Lillian) Phillips whose address was listed as c/o J. F. Timmis, 6343 Halstead Street, Chicago, Illinois, and W. D. Phillips, whose address was listed as 4540 West Broadway, Louisville, Kentucky, possessed the remaining three-sixteenths interest. Return receipts show receipt of a notice-bearing registered letter by Mrs. L. M. Phillips on May 19, 1931, and receipt of such a letter addressed to W. D. Phillips by someone named Seabrook on May 11, 1931. As there is nothing to show Seabrook was authorized to receive such a letter for W. D. Phillips, service of notice of contest was effective only as to Mrs. Lillian Phillips. The Commissioner's decision was, accordingly, finally only as to her interest in the Hoffman No. 20 claim.

In a decision dated September 17, 1931, the Commissioner declared the Hoffman No. 46 claim to be null and void to the extent of the interests of seven of the eight parties reported as having an interest in it. The record shows that at the time of that contest, No. 12596, the possessory title to the claim was vested in L. M. (Lillian) Phillips, who had a thirteen-sixteenth interest undivided and W. D. (W. Dedrick) Phillips, who had an undivided three-sixteenth interest. A contest complaint was directed, by registered mail to Mrs. L. M. Phillips at 6343 S. Halstead Street, Chicago, Illinois, and to W. D. Phillips at 4540 West Broadway, Louisville, Kentucky. Return receipts show that Mrs. L. M. Phillips signed for a notice-bearing letter on May 19, 1931, and that W. D. Phillips signed for such a letter on May 14, 1931. Accordingly, the Commissioner's decision of September 17, 1931 was final as to the Hoffman No. 46 claim.

Lillian Phillips died intestate in 1948 leaving W. Dedrick Phillips, her son, as her sole heir. W. Dedrick Phillips quit claimed all his interest in the Hoffman Nos. 20 and 46 to John Savage on October 11, 1955. Accordingly, assuming the claims are otherwise valid, John Savage has an undivided three-sixteenths possessory interest in the Hoffman No. 20 claim.

Conclusions

The Manager's decisions are affirmed to the extent of the asserted possessory rights which were finally canceled as a result of the con-

⁸⁰ Situated in secs. 3 and 5, T. 5 S., R. 95 W., 6th p.m., Garfield County, Colorado.

tests of the 1930's, there being proof of service of notice of contest on the claimants who held such rights at that time. Specifically, the decisions are affirmed to the extent of the interests derived from the following claimants:

Colorado 07667

Joseph M. Schneider, who had an undivided five-eighths interest in the Betty Nos. 1 through 8 claims, the entire interest in the Grace Nos. 1 through 8 claims; an undivided one-half interest in the Edna Nos. 1 through 4 claims; an undivided seven-eighths interest in the Louise Nos. 1 through 6 claims.

Colorado 09072

J. W. Hess, who had an undivided one-eighth interest in the Gold Bug Nos. 1 through 4 claims.

Selma Rausch, who had an undivided one-eighth interest in the Gold Bug Nos. 1 through 4 claims.

Joseph M. Schneider, who had an undivided one-half interest in the Edna Nos. 5 through 8 claims.

Colorado 014671

D. Kirk Shaw, C. J. Wilson, R. C. Graham, H. A. Wildhack, and J. S. C. Shepherd, each of whom had an undivided one-eighth interest in the Sunset Nos. 1 through 31 claims.

Colorado 016334

Charles Anderson and Beatrice Post, each of whom had an undivided one-eighth interest in the Tom Boy Nos. 1 through 12 claims.

Colorado 016671

Henry L. Price and Milo Brown, each of whom had an undivided one-eighth interest in the Liberty Bell Nos. 1 through 12 claims.

Colorado 018673

V. W. Conner, who had an undivided one-eighth interest and Harvey C. Williams, who had an undivided one-twenty-fourth interest in the Greeley No. 1 claim.

M. C. Stoddard, Verna O. Stoddard, Gertrude Foster, Warren C. Ward and Leona B. Ward, each of whom had an undivided one-eighth interest in the Greeley No. 3 claim.

O. H. Ward and Ernest Fagerberg, each of whom had an undivided one-eighth interest in the Greeley No. 4 claim.

July 30, 1965

The rejection of Gabbs Exploration Company's patent application for the Greeley Nos. 1 and 3 claims must, however, be affirmed for the reasons stated in the previous discussion of these claims.

Colorado 022459, 022460 and 022461

None.

Colorado 029427 and 029428

Bute Nos. 20 and 29

Mrs. Evelyn Canon and Mrs. Harry Kelly, each of whom had undetermined undivided interests in the Bute Nos. 20 and 29 claims.

Charles Anderson and Ethel McGahen Lawrence, each of whom had an undivided one-eighth interest in the Bute Nos. 20 and 29 claims.

Colorado 031342

Ethel McGahen Lawrence, who had an undivided one-eighth interest in the Atlas Nos. 4, 6, 8, 11, 13, 15 and 16.

Harry U. Longwell, who had an undivided one-eighth interest in the Atlas Nos. 4, 5, 6, 11, 13, 14, 15 and 16.

Stephen A. Post, who had an undivided three-sixteenths interest in the Atlas Nos. 4, 5, 6, 8, 11, 13, 14, 15 and 16.

Iris Campbell Robinson, who had an undivided one-eighth interest in the Atlas Nos. 5, 6, 11, 14, 15 and 16.

Colorado 034270 and 034271

L. M. (Lillian) Phillips, who had an undivided thirteen-sixteenths interest in the Hoffman Nos. 20 and 46 claims.

W. D. Phillips, who had an undivided three-sixteenths interest in the Hoffman No. 46 claim.

The Manager's decisions are reversed to the extent of the asserted possessory rights which were not finally canceled as a result of the contests of the 1930's, there being no evidence that the claimants who held such rights at that time were properly served with notice of contest. The cases are remanded to the Bureau of Land Management for a consideration of the merits of the appellants' patent applications insofar as these uncanceled asserted rights are concerned. The Bureau's consideration will include, but will not be limited to, a verification of the existence on each claim of a discovery within the meaning of the mining laws of the United States as of February 25, 1920, the time when oil shale lands were withdrawn from location. See 41 Stat. 451, 30 U.S.C. 193 (1958).

FRANK J. BARRY,
Solicitor.

APPENDIX A

<i>Patent Application No.</i>	<i>Applicant</i>
Colorado 07667 and 09072	Union Oil Company of California.
014671	Weber Oil Company.
016334	Tell Ertl.
016671	Tell Ertl, Henry L. Price, Silmon Smith and Charles Holmes.
018673	Gabbs Exploration Company.
022459, 022460 and 022461.	Dwight S. Young, John W. Savage and Charles H. Prien.
029427, 029428 and 031342.	Energy Resources Technology Land, Inc.
034270 and 034271	John W. Savage.

CLAIM OF FRANCES T. MCGREGOR

T-1436-5-65

*Decided August 9, 1965***Torts: Licensees and Invitees**

In the District of Columbia, those using the public parks and adjoining sidewalks which are under the jurisdiction of the United States are doing so at the invitation of the Government, and therefore, are licensees by invitation. The duty owed to licensees by invitation by the Government is to use reasonable and ordinary care for their safety and to provide reasonably safe premises, and to protect them or warn them against any danger known to the Government which a careful person might not discover.

Torts: Licensees and Invitees

The duty owed by the Government to a licensee by invitation in the District of Columbia includes the duty to warn of obstructions on sidewalks adjoining public parks on United States Reservation.

Torts: Contributory Negligence

From the mere fact that a claimant was hurrying at the time of the accident, it cannot be concluded that the claimant was contributorily negligent, and not reasonably careful.

ADMINISTRATIVE DETERMINATION

Mrs. Frances T. McGregor, 3900 16th Street NW., Washington, D.C., by and through her attorneys, Galiher, Stewart & Clarke, Washington, D.C. has presented a claim for personal injuries in the amount of \$2,500. This claim arose as a result of a fall over a garden hose on the Mount Pleasant Street sidewalk near Harvard Street NW., Washington, D.C. The scene of this accident is on United States Reservation 309C, and is under the jurisdiction of the National Capital Region of the National Park Service. The claim will be considered under the Federal Tort Claims Act.¹

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

August 9, 1965

The fall occurred on Thursday, June 4, 1964, at approximately 11:35 a.m. At this time it was daylight, the weather was clear and the sidewalk was dry. Mrs. McGregor's claim describes the incident as follows:²

While hurrying south on public pedestrian sidewalk adjacent to U.S. Government Park located at Mt. Pleasant, Harvard and Columbia Road, she was caused to trip over a garden hose stretched across public sidewalk (which constitutes a nuisance) and attached to hydrant. Said hose was placed in this position, without warning signs, by employees of the United States who were watering the park, and hose was then left unattended. Claimant did not see hose because attention directed toward a bus and foot tripped over hose and she fell forward to ground, breaking her arm.

The liability of the United States for injuries to persons as a result of falls on sidewalks under its jurisdiction was considered in *Smith v. United States*.³ In that case, Judge Holtzoff stated:

The Federal Tort Claims Act provides that the United States shall be liable for negligence of its employees as a private individual under similar circumstances under the law of the jurisdiction where the accident occurs. This Court has had occasion to hold in *Gilroy v. United States*, 112 F. Supp. 664, 666, that:

"The words 'as a private individual,' are not used as words of art or as a limitation, but, rather, in a descriptive manner to indicate that the United States should be liable in the same manner and to the same extent as anyone else."

This Court further stated that:

"A municipal corporation may be considered for the purposes of that provision as a private individual, and, therefore * * * the liability of the United States in respect to defects in the streets that it controls is the same as the liability of a municipality in the same jurisdiction, or the liability of any other political subdivision in control of streets."

This statement was quoted with approval by Judge Forman, then United States District Judge for the District of New Jersey, now a United States Circuit Judge, for the Third Circuit, in *Pennsylvania R. R. Co. v. United States*, D.C. 124 F. Supp. 52, 66. Accordingly, it is the view of this Court that the liability of the United States in respect to sidewalks that it controls in the District of Columbia should be governed by the same rules as apply to sidewalks controlled by the District of Columbia Government and the liability of the local government.

* * * The District of Columbia is under a duty to keep the streets in a reasonably safe condition, and is liable in damages to any person who is injured for its failure in the performance of this duty, *District of Columbia v. Woodbury*, 136 U.S. 450, 10 S. Ct. 990, 34 L. Ed. 472; *Booth v. District of Columbia*, 100 U.S. App. D.C. 32, 33, 241 F. 2d 437, as well as many other cases that might be cited. The District of Columbia, however, is not an insurer of the safety of the streets and is responsible only in case of failure to use reasonable care.

It is questionable whether or not Judge Holtzoff's opinion can be reconciled with *Rayonier, Inc. v. United States*,⁴ and *Indian Towing Co. v. United States*,⁵ wherein the Supreme Court of the United States

² Standard Form 95, Claim for Damages or Injury, submitted by claimant.

³ 237 F. Supp. 675 (D.D.C. 1965).

⁴ 352 U.S. 315 (1957).

⁵ 350 U.S. 61 (1955).

holds that the liability of the United States under the Federal Tort Claims Act is to be equated with that of a "private person" and not with that of a "municipality." However, this is academic here since a private person also would be liable for failure to use reasonable care to maintain the sidewalk in a reasonable safe condition. In *Firfer v. United States*,⁶ the United States Circuit Court for the District of Columbia Circuit ruled that a visitor to the Jefferson Memorial in the District of Columbia was a "licensee by invitation" and as such was entitled to expect the Government to use reasonable and ordinary care "for her safety" and to provide "reasonable safe premises." In *Firfer*, the court did not rely upon any law of municipal liability, rather, it relied upon the laws governing the relationship between a possessor of land and those who visit the land. In that case, the court states that "licensees by invitation" are:

* * * usually regarded as * * * persons invited upon the land not for the benefit of the landowner but by him either by some affirmative act or by appearances which would justify a reasonable person in believing that such landowner (or occupant) had given his consent to the entry of the particular person or of the public generally. If the licensee by direct or implied invitation is within the scope and the chronological and geographical limits of the invitations, he may expect the owner and his agents to exercise reasonable and ordinary care and to provide reasonable safe premises, *Gleason v. Academy of the Holy Cross*, 1948, 83 U.S. App. D.C. 253, 168 F. 2d 561; Restatement, Torts sec. 342 (1934), * * *.

Those using the parks and adjoining sidewalks are doing so at the invitation of the Government since appearances justify a reasonable person in believing that the Government has given its consent to the entry of the public generally. The reason for the existence of these places is for public use.

As a licensee by invitation, Mrs. McGregor was entitled to reasonably safe premises. A hose stretched across a sidewalk without any warning sign is an obstruction, maintained in an unnecessarily dangerous manner⁷ and as such is a violation of the Government's duty to provide reasonably safe premises. The Government employees were negligent.

There remains the question of whether or not the claimant was contributorily negligent. The hose over which she fell was black and was approximately 1½ inches in diameter. It was open to view. The *Gleason* case cited in the quotation from *Firfer*, deals with a fall on steps. In *Gleason* the Court stated:

* * * Dangers that reasonably careful people are likely not to discover are latent and hidden. The step was such a danger. It is immaterial that the step was open to view in the sense that it might have been discovered by an extraordinarily prudent person. Appellee knew of the danger and made no effort

⁶ 208 F. 2d 524 (D.C. Cir. 1953).

⁷ *Thompson v. Barab*, 16 A. 2d 549, 125 N.J. L. 461 (1940).

August 9, 1965

to protect or warn appellant against it. Occupiers of premises have long been liable, even to gratuitous licensees, for injuries that result from this sort of negligence. "If it could be found that [the step] was a danger which the careful visitor might not discover, and that the proprietor should have realized the fact, the court could not rule as matter of law either that there was no breach of duty by the proprietor, or that there was contributory negligence or an assumption of risk by the visitor." *Recreation Centre Corporation v. Zimmerman*, 172 Md. 309, 191 A. 233, 234.

The claimant was "hurrying south" on the sidewalk. However, from the mere fact of haste, we cannot conclude that the claimant was not being "reasonably careful."⁸ It was not necessary that she keep her attention and her eyes constantly focused on the sidewalk.⁹ The administrative record does not support a conclusion that Mrs. McGregor was negligent.

The injury to the claimant was the proximate result of the negligence of Government employees, acting within the scope of their employment.

Mrs. McGregor sustained a fracture of the right elbow. In a letter dated November 5, 1964, her attorneys state her special damages as follows:

* * * enclosed are photostatic copies of reports from Dr. Milton Cobey under date of June 6, 1964 and August 25, 1964, along with copy of his bill in the amount of \$120.00.

In addition to these items, the following expenses were incurred by Mrs. McGregor: Medicine \$19.20; X-rays \$20.00 (enclosed is radiologist's report and bill of Dr. Diley in the amount of \$20.00); Black patent leather handbag \$10.00; One pair of nylon hosiery \$1.35; Taxi cab fares to work during June \$23.50; Manicures during June and July, \$12.25; X-rays by Groover, Christie & Merritt on date of accident \$20.00 (copy of bill enclosed); all for a total of \$106.30.

The total special damages as listed above are \$226.30. However, since the claim form¹⁰ submitted by the claimant through her attorneys claims "2,500" for "personal injury," and "none" for "property damage," the \$11.35 property damage (handbag \$10 and hosiery \$1.35) cannot be considered. To consider the \$11.35 property damage claim with the \$2,500 personal injury claim would make the total claim exceed the jurisdictional limit of \$2,500¹¹ for the administrative determination of claims under the Federal Tort Claims Act.

⁸ *Blaine v. United States*, 102 F. Supp. 161 (E.D. Tenn. 1951). At page 165, the Court stated: "Her being in a hurry, rushing about, and failing to keep her eyes focused on the sidewalk do not make out a case of negligence per se. * * * The Court will not imply negligent causation except possibly in a remote sense; for the reason that a person may be in a hurry and yet move about in a careful manner, and that moving along a sidewalk in a careful manner does not require keeping the eyes constantly focused thereon."

⁹ *Blaine v. United States*, *supra* note 8; *City of San Diego v. Perry*, 124 F.2d 629 (9th Cir. 1941).

¹⁰ *Supra* note 2.

¹¹ 28 U.S.C., 1958 ed., Supp. I sec. 2672.

Therefore, special damages in the amount of \$214.95 are allowed. The claimant is entitled to an award for the pain and suffering which she underwent as a result of the accident, and an award of \$600 is made for this.

Accordingly, the claim of Mrs. Frances T. McGregor is allowed in the total amount of \$814.95.

DEAN F. RATZMAN,
Assistant Solicitor.

B. M. WILLIAMSON ET AL.

A-30322

Decided August 24, 1965

Withdrawals and Reservations: Stock-Driveway Withdrawals

The Secretary of the Interior may revoke a stockdriveway withdrawal or reduce its dimensions when the conditions which justified its establishment cease to exist.

Withdrawals and Reservations: Stock-Driveway Withdrawals—Taylor Grazing Act: Generally—Grazing and Grazing Lands

Section 1 of the Taylor Grazing Act provides that lands withdrawn for a stock driveway may be added to a grazing district and made subject to the Taylor Grazing Act.

Withdrawals and Reservations: Stock-Driveway Withdrawals—Rules of Practice: Hearings

No formal evidentiary type hearing is required by statute prior to a reduction in the size of a stock driveway, but if a formal or informal hearing is held, the Secretary, in whom the final authority rests, may make such use of it as he desires.

Withdrawals and Reservations: Stock-Driveway Withdrawals

A stock driveway is to be reduced in length and width where the use of it for trailing purposes has decreased so substantially that only 7 percent of the available forage is used for that purpose and 48 percent for a type of winter grazing under a local practice; a driveway which allows 4 times the forage consumed in trailing and which provides adequate width for the current use is sufficient even though it is greatly reduced in length and width.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

B. M. Williamson and others¹ have appealed to the Secretary of the Interior from a decision of the Chief, Office of Appeals and Hear-

¹The other appellants are Fletcher Green, J. Calvin LeSueur, Myrtle Cox, Roger B. Candelaria, Mrs. C. E. Turner, Hedekin Whitley, Paul Lund, Larry Sherwood, C. R. Turner, Robert E. Moore, E. M. Moore, Fred McKinley, Frank A. Hubbell Co., R. L. Cox, Cliff W. Lynch, T. J. Lynch, Earl G. Johnston, Farr Cattle Co., Elizabeth McNierney, Esther G. Gutierrez, Bill G. Green, Bill F. Grossie, Ellis McPhaul, Tom H. Bates, Ed. H. Farr, Tom Curtis, T. J. Curtis, Al H. Goesling, Jeff Tietgen, and Jacob Barth.

August 24, 1965

ings, Bureau of Land Management, dated May 22, 1964, which affirmed a decision of a hearing examiner, dated August 8, 1963, upholding a decision by the district manager, Socorro Grazing District (New Mexico No. 2), dated June 19, 1962, reducing the size of the Magdalena Stock Driveway, in accordance with Public Land Order 2450 dated July 28, 1961, 26 F.R. 7015.²

The Magdalena Stock Driveway was established by Stock Driveway Withdrawal No. 9, New Mexico No. 3, dated February 28, 1918, which was an order issued by the Secretary of the Interior under the authority of section 10 of the Stockraising Homestead Act of December 29, 1916, 39 Stat. 865, 43 U.S.C. sec. 300 (1958).

Pursuant to the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. sec. 315 *et seq.* (1958), the Secretary of the Interior, on March 27, 1936, established New Mexico Grazing District No. 2, which included the Federal lands surrounding the Magdalena Stock Driveway. The grazing district lands were subject to the regulations issued by the Secretary under the act. Since the Magdalena Stock Driveway constituted withdrawn lands, it was not a part of the grazing district and not subject to the Taylor Grazing Act or the Federal Range Code for Grazing Districts issued thereunder, 43 CFR, Part 4110, formerly 43 CFR, Part 161, until P.L.O. 2450, *supra*, was issued on July 28, 1961.

Public Land Order 2450 thus added the Magdalena Stock Driveway to the grazing district and specifically made the land subject to the Taylor Grazing Act, *supra*, and the Federal Range Code for Grazing Districts, *supra*, except

to the extent that the primary purpose for which the withdrawals were made is not adversely affected by such use, regulation, and administration * * *.

The hearing examiner conducted hearings on November 27 and 28, 1962, at Socorro, New Mexico, and on the basis of these hearings upheld the reduction of the size of the driveway decided upon by the district manager.

² P.L.O. 2450 provides: "By virtue of the authority vested in the Secretary of the Interior by section 1 of the act of June 28, 1934, as amended, it is ordered that all public lands under the jurisdiction of the Secretary of the Interior and administered by the Bureau of Land Management are, to the extent not previously provided for, hereby added to grazing districts when such lands are located within the exterior boundaries of such districts. This order includes, but is not limited to, public lands withdrawn under the act of December 29, 1916 (39 Stat. 862; 43 U.S.C. 300) for stock driveways, and the act of June 25, 1910 (36 Stat. 847; 43 U.S.C. 141), as amended, for public watering purposes, for classification or in aid of legislation, and power site reserves. All lands added to grazing districts by this order are hereby made subject to use, regulation, and administration in accordance with the applicable provisions of the act of June 28, 1934 (48 Stat. 1269; 43 U.S.C. 315-315m, 315n-315o-1), as amended, and the Federal Range Code for Grazing Districts (43 C.F.R. 161), to the extent that the primary purpose for which the withdrawals were made is not adversely affected by such use, regulation, and administration and not contrary to any express conditions or limitations in the withdrawal order."

The history of the driveway is set out in detail in the hearing examiner's decision and need not be restated. Its recent extent and use were summarized by the hearing examiner as follows:

By 1961, the driveway was approximately 70 miles in length, varying in width from between one-half mile and five miles. It included approximately 71,800 acres. Starting at Magdalena, it ran west through Ranges 4, 5, 6, 7, 8, and 9 West, Townships 2 and 3 South, New Mexico Principal meridian. In Range 9 West, the driveway branched. The Datil Fork ran northwest through Townships 9 and 10 West, to the town of Datil. The longer Horse Springs Fork ran southward through Ranges 9, 10, 11, 12, 13, 14 and 15 West.

For the past twenty or more years, economic factors have caused a general decline in use of the area as a stock driveway. The driveway has been unable to compete with the truck as the most economic method of delivery of livestock to the Magdalena railhead. The shift in many livestock operations from sheep to cattle and the comparative advantage in selling calves, which cannot be driven, has resulted in a greater use of mechanical means of transportation. As a consequence, less of the driveway forage has been used for trailing use and more has been available and used for winter grazing.

The total authorized use of the driveway for the past seven years has been:

Year	Animal-unit months	Year	Animal-unit months
1956	8147	1961	7646
1957	5893	1962	9884
1958	5243		
1959	8333	Average	7927
1960	10342		

Of this total, trailing use has been:

Year	Animal-unit months	Percent of total use
1956	1757	22
1957	1158	20
1958	793	15
1959	1158	14
1960	868	8
1961	863	11
1962	838	8
Average	1061	13

Seasonal or winter use for this period under temporary nonrenewable license has been:

Year	Animal-unit months	Percent of total use
1956	6390	78
1957	4735	80
1958	4450	85
1959	7175	86
1960	9474	92
1961	6783	89
1962	9046	92
Average	6865	87

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Range surveys conducted by the Bureau indicated that the driveway annually produced a total of 14,300 animal-unit months of usable forage. During the past seven years an average of 7 percent of the total forage available on the driveway has been used by trailing livestock and 48 percent by livestock for winter grazing. Approximately 45 percent has been unused. This prompted the district manager's decision reducing the size of the driveway.

That decision reduced by approximately 20 miles the length of the Horse Springs Fork. The remaining portion to the junction with the Datil Fork was reduced in width to one-quarter of a mile. The Datil Fork was reduced in width to one-half mile. From the junction of the two branches to the Magdalena railhead the width of the reduced driveway varies between one-half mile and one mile. The area of the reduced driveway is about 21,100 acres. Its annual grazing capacity is 4,020 animal-unit months which is approximately four times the average use for trailing for the past seven years.

The hearing examiner also described the plan under which the excess forage was used thus:

The Magdalena Stock Driveway Association was organized in 1946 by stockmen who customarily used the driveway for the purpose of cooperating with the Bureau of Land Management in its administration and maintenance. On September 11, 1946, a cooperative agreement was entered into between the Bureau of Land Management and the Magdalena Stock Driveway. The initial cooperative agreement was extended on May 12, 1950, and on August 7, 1956, for periods of five years.

Under this agreement, the Association recommended to the Bureau of Land Management the season of use for temporary grazing, the need for improvement, a grazing fee rate to be paid to the Association for use of Association lands and improvements, an Association fee which included the fees to the Bureau of Land Management to be charged for any temporary grazing license issued pursuant to the agreement, and any other matters regarding the management of the driveway. * * *

After the end of the fall trailing drive, temporary licenses were issued for unused forage remaining on the driveway. The nontrailing use usually began the first of December and extended to the end of March. These temporary licenses were issued for not to exceed 100 cattle to any one applicant or their equivalent in sheep upon a preference basis. Applicants holding regular licenses issued by the Bureau and not having winter use on the stock driveway in the previous year were given first preference. Applicants having a regular license issued by the Bureau and having had a license for winter use of the stock driveway the previous year were given second preference. Any remaining forage was then awarded to other applicants (Tr. 247). Under this system the forage available upon the stock driveway in excess of the requirements for trailing use was used to alleviate the licenses and permittees in distress because of local drouth or other adverse conditions. This enabled the smaller operators to maintain their breeding herds which they might otherwise have had to market.

While the appellants are concerned with the adequacy of the proposed driveway for present and future uses, they seem equally determined to maintain the established method of disposing of the forage left after the trailing use has been satisfied. Although the two issues

are obviously somewhat interwoven, the primary problem of this appeal is to determine the adequacy of the proposed driveway for trailing stock. The disposition of the excess forage can then be examined in another proceeding if it becomes material.

It may be well to begin with a glance at the Secretary's authority in relation to the driveway and how he exercised his authority.

Section 10 leaves the creation of a stock driveway to the discretion of the Secretary, subject to some specific limitations of width in relation to length and to a general one that it not be wider than "clearly necessary for the purpose proposed."

Whether the restrictions relate only to the establishment of a driveway or whether they run with the driveway so long as it exists³ need not be determined now, for it is plain that the Secretary may revoke the withdrawal or reduce its dimensions when the conditions which would justify its establishment cease to exist.⁴

The Secretary, however, did not purport to revoke the Magdalena Stock Driveway in whole or in part. The width and length of the driveway remains just as it was before July 26, 1961. All P.L.O. 2450 did was add it to the grazing district and make it subject to the Taylor Grazing Act and the regulations issued under it.

The appellants contend that the Secretary has no authority to do so because section 1 of that act limits the land that the Secretary may place in a grazing district to "unreserved" lands which, they assert, do not include lands withdrawn for a stock driveway. This argument overlooks the proviso in the same section which reads:

* * * *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. * * *

Or, stated in other words, the Secretary may place reserved or withdrawn lands in a grazing district if the head of the department having jurisdiction over them approves of the Secretary's action. Since the stock driveway is under the jurisdiction of the Secretary, his assent to its inclusion in the grazing district is implicit in his action directing that it be done.

Public Land Order 2450, however, excluded from the stock-driveway lands it made available for use under the Taylor Grazing Act and the pertinent regulation

* * * to the extent that the primary purpose for which the withdrawals were made is not adversely affected by such use, regulation, and administration and not contrary to any express conditions or limitations of the withdrawal order.

³ Land included in a driveway remains withdrawn from disposal even though it is no longer used as a driveway. *R. O. Sewell*, A-28908 (July 30, 1962); *Bessie S. Lynn*, A-28055 (October 12, 1959).

⁴ This is evident in the many partial revocations of the withdrawal that have been made since the withdrawal was effected in 1918.

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The substantive issue in the appeal, then, is whether the area as reduced by the manager is sufficient to permit its use as a stock-drive-way under contemporary conditions.

Before this problem is taken up, it may be well to examine the procedure followed up to now. Public Land Order 2450 gave no indication of who was to decide or how it was to be decided what land was to become available for disposition under the Taylor Grazing Act. The range manager apparently assumed that the initial determination was to be made by him in accordance with the regular procedure governing disposition of grazing privileges. 43 CFR Subpart 4615. He called a meeting of the advisory board, notified it of what the problem was, received its recommendation, and issued his decision. (Tr. 161-172.) Upon appeal the case was referred to a hearing examiner and in due course a hearing was held. 43 CFR Subpart 1853.

That this procedure might not have been required was recognized at the beginning of the hearing when the hearing examiner raised the question of whether he had jurisdiction to decide the problem (Tr. 4). The attorney representing the Bureau of Land Management agreed that hearing examiners have no jurisdiction over appeals that "involve strictly stock-drive-way matters," but pointed out that the large number of persons interested in the issue made a hearing advisable. (Tr. 7-9.) Thereupon the hearing, decisions, and appeals proceeded without a resolution of the question of the hearing examiner's jurisdiction.

Even if a hearing of the type held is not legally required, no possible objection can be based upon the fact that one was held, for the Secretary, or his delegate, may direct that one be held if he deems it proper to do so. There may, however, be issues which turn upon whether or not a hearing before a hearing examiner was required. For example, in that type of formal evidentiary hearing the decision must be based solely upon the record as defined in the regulation, 43 CFR 1853.9. If, on the other hand, a hearing is held as a matter of executive discretion, the Secretary is free to take into account whatever considerations he finds material, whether or not offered as evidence at the hearing. *LaRue v. Udall*, 324 F. 2d 428, 431-432 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

In the case cited, *LaRue*, a grazing licensee, objected to a proposed exchange of public land licensed to him under the Taylor Grazing Act for privately owned lands, which would not be available for his use. In disposing of one of appellant's arguments the court held:

Another point on appeal is thus stated by the appellants:

"Appellee Udall acted unlawfully and deprived appellants of due process (a) by denying a full and fair hearing in derogation both of the provisions of the

Taylor Grazing Act and the Fifth Amendment; (b) by denying access to the full record on which appellee Udall's decision was based; and (c) by denying appellants the protection afforded by the Administrative Procedure Act."

As appellants were heard at length on their protest against the proposed exchange, it is apparent their real complaint is that no formal evidentiary hearing was held. We find nothing in the Taylor Grazing Act which requires a hearing on such a protest. Section 8, dealing with exchanges, merely requires publication of notice of a contemplated exchange. Where Congress intended a hearing to be held, it provided therefor in express terms, as it did in §1 of the Taylor Grazing Act (43 U.S.C. §315):

"* * * Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held * * *."

The *LaRue* case, *supra*, also holds that the section 5, Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1964), does not require a hearing unless there is agency action which the statute provides must be preceded by a hearing. *Id.* p. 432. Since there is nothing in the Stock Driveway Act which requires a hearing before a driveway is established or reduced in extent, it would seem that no hearing at all was required as a preliminary to Departmental action.

Another consequence of the conclusion that holding a hearing is only a matter of discretion is that the Secretary has complete freedom in deciding what use to make of the hearing and what weight to give the decisions of the hearing examiner and the Director. Even where a statute requires a formal evidentiary hearing to be held under the Administrative Procedure Act, *supra*, the agency (for our purposes, the Secretary) on review or appeal has all the powers it would have had in making the initial decision. *N.L.R.B. v. A.P.W. Products*, 316 F. 2d 899, 904 (2d Cir. 1963). Thus, it is plain that where no hearing is required the Secretary need give only such consideration as he desires to the conclusions reached before his review is undertaken.

This discussion, I believe, removes from the appeal the arguments directed to the authority of the range manager to make the initial determination, to whether his decision was arbitrary or capricious, to the scope of review by the hearing examiner of the range manager's decision and by the Director of the hearing examiner's,⁵ or whether the various findings of fact suggested by the parties were or were not properly adopted or rejected.

⁵ In light of the discussion, *supra*, the Director in limiting his review to a determination of whether the hearing examiner's decision was supported by substantial evidence on the record as a whole unnecessarily restricted the extent of his function which is the same as that of the Secretary.

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The issue simply is whether the stock driveway in the length and width proposed by the manager should be accepted, rejected or modified. In reaching his conclusion the Secretary may consider the testimony and exhibits offered at the hearing or any other matter he deems pertinent.⁶ However, there has been no necessity to consider other sources to dispose of this appeal.

The hearing examiner summarized the testimony of the dozen witnesses who testified in opposition to the reduction of the driveway as follows:

The livestock operators testifying on behalf of the appellants stated that the driveway in its original form was necessary, or desirable, for driveway purposes and as a winter use area to stabilize the livestock industry in the grazing district. Many of these witnesses claimed that a driveway of one-half mile width would be too narrow to permit passage of sheep bands traversing the driveway by the faster moving cattle and that this would cause undesirable congestion. They also asserted that the original driveway was necessary as a protection against contingencies such as a change in the relative market price of calves and mature cattle or an increase in the trucking rates which would again make cattle drives economically feasible. The State Fish and Game Department employee testified that there were numerous antelope in the area and that the narrowing of the driveway could increase the antelope kill by hunters during the hunting season. Antelope being caught inside the narrower fences of the driveway would have greater difficulty escaping hunters.

There apparently was no question that the statistics set out above detailing the forage available on the driveway and its use for trailing and "winter grazing" were accurate. The range manager testified that on the basis of the actual feed used in trailing and the need for trailing cattle to market the proposed driveway would be adequate (Tr. 32-33); that narrowing the driveway would not affect its purpose because the demand for trailing use has diminished (Tr. 34), and that there would be grass for 5 or 6 herds of 1500 sheep each using the driveway (Tr. 50). He described the use being made of the driveway (Tr. 183), that cattle and sheep use have not been in conflict (Tr. 185); that the proposed driveway from the Divide Well to Magdalena, at the eastern end of the driveway, was a mile wide and could support 100 head of cattle year long, a capacity sufficient to care for livestock held up for shipping (Tr. 186); that the use of the driveway was so light that trampling was no problem (Tr. 187); that the fence was so constructed that the possibility of lightning traveling down the fence was very slim (Tr. 188); and that winter use had been as hard on the grass

⁶ In *LaRue v. Udall*, *supra*, the court quoted *Safarik v. Udall*, 304 F. 2d 944, 950 (D.C. Cir. 1962), *cert. denied sub. nom. Hansen v. Udall*, 371 U.S. 901 (1962), as follows:

"It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong."

as trailing (Tr. 188). On cross examination he testified that the driveway could be even narrower and still handle the same number of cattle (Tr. 207-208).

A livestock operator testifying in favor of the reduction also said that so few cattle were driven over the driveway that trampling would not be a problem even on the narrowed driveway (Tr. 258); and that the trailing was done before and after the growing season so that trampling was not a problem (Tr. 259). Another livestock operator who has been closely connected with the use made of the driveway from 1930 on pointed out that, as late as 1935, 60,000 sheep and 14,000 cattle had used the driveway,⁷ and that the present use was very small, that the area left for trailing after the proposed reduction would be "amply adequate for all the stock moved over it at present" (Tr. 267); that he had observed the use of the driveway for years and that the proposed width would be wide enough (Tr. 273); and that a driveway 300 or 400 yards wide would be adequate for a band of 1,000 sheep (Tr. 280).

Another operator who was familiar with the use of the trailway for 42 years and had used it himself for years said the proposed driveway would be ample for future use for trailing (Tr. 283-284).

The uncontradicted evidence of the great decline in the use of the driveway and of the small percentage of the forage now used for trailing purposes leads only to the conclusion that some reduction, and a substantial one, in the area reserved for trailing must be made. In evaluating the extent of the reduction, I am again particularly impressed with the fact that the range manager's proposal will still make available about four times the average amount of forage eaten by trailing livestock during the past seven years. This excess, as the hearing examiner found, should provide a margin sufficient to take care of any forage lost by trampling. In view of the greatly decreased use of the driveway for trailing, I cannot find that any difficulties will arise from sheep and cattle using the narrower passages. Therefore, after careful consideration of all the testimony and exhibits presented, I have concluded that the area proposed by the manager for trailing use is adequate for the present and foreseeable demand and that the proposal should be put into effect as soon as practicable.

Accordingly, the decision appealed from is affirmed as modified herein.

HARRY R. ANDERSON,
Assistant Secretary.

⁷ Two of appellants who testified said that they trailed 8,000 sheep and about 1,000 cattle, respectively, in 1962 (Tr. 67, 104). The range manager gave the names of all those who used the driveway but did not state the numbers of livestock each user drove (Tr. 183). Since only 838 AUMs were used for training purposes in 1962, the other trailing use must have been quite limited.

NAVAJO TRIBE OF INDIANS

v.

STATE OF UTAH

A-28670

Decided August 25, 1965

**Indian Tribes: Generally—Indian Lands: Generally—Rules of Practice:
Hearings—School Lands: Grants of Land—School Lands: Particular
States**

Where the Navajo Tribe of Indians has protested against issuance of a patent to the State of Utah under the act of June 21, 1934, to numbered sections which the State claims as having vested in it pursuant to the grant for school purposes under its Enabling Act and the Tribe has requested a hearing alleging that the vesting of title in the State under the grant was precluded by occupancy of the sections by Navajo Indians and that title is now in the Tribe pursuant to acts of Congress, a hearing will be ordered for the purpose of receiving evidence as to the full extent and nature of the occupancy alleged by the Tribe in order to make an informed and definitive determination of the question as to when, if ever, title did vest in the State.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Navajo Tribe of Indians has appealed to the Secretary of the Interior from a decision by the Acting Director, Bureau of Land Management, dated September 23, 1960, which affirmed a Salt Lake City land office decision of February 3, 1959, dismissing the Tribe's protest against an application by the State of Utah, pursuant to the act of June 21, 1934, 48 Stat. 1185, 43 U.S.C. sec. 871a (1958), for patent as evidence of title to sections 16 of T. 40 S., R. 24 E., and T. 40 S., R. 26 E., S.L.B.M., Utah.

The State's patent application was filed on June 10, 1958. By a decision of November 21, 1958, the land office held that title to the two sections had vested in the State pursuant to the grant of school lands in section 6 of the Utah Enabling Act of July 16, 1894, 28 Stat. 109, the vesting date being February 17, 1900, when plats of survey covering the townships were approved. The State was required to publish a notice of its application to allow persons having any claims to the lands to file a protest or notice of such claims. Thereafter, on January 20, 1959, the Navajo Tribe filed a document, captioned "Complaint," in the land office together with certain affidavits made by Indians to support the contention made in the complaint that Indian occupancy of the two sections for which the State had applied precluded title from vesting in the State under its school lands grant. The Tribe requested that it be allowed to prove its allegations and that a hearing

be held. The land office manager in the decision of February 3, 1959, denied the Tribe's application to contest the State's title to the land and dismissed the "Complaint" as a protest for the stated reason that the land office records showed that the right to the lands had vested in the State upon survey.

In its appeal to the Director, the Tribe reiterated its request for a hearing, alleging that the manager's action in dismissing the Tribe's claim without a hearing amounted to a denial of due process. This further request was denied by the Acting Director, who viewed the complaint and supporting affidavits as alleging occupancy of the land by Navajo Indians only until 1918. He held that, assuming the allegations of the complaint to be true with respect to occupancy of the land and that the State acquired no vested right during such occupancy, the State's title attached, in the absence of any obstructions, in 1918 when the Indians abandoned the sections in question.

The two Bureau decisions thus give two different possible dates as to the vesting of the State's title. The act of June 21, 1934, *supra*, requires that patents issued thereunder "shall show the date when title vested in the State and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any. In all inquiries as to the character of the land for which patent is sought the fact shall be determined as of the date when the State's title attached."

Therefore it is essential that, before any patent may issue to the State, the date when title vested in the State be determined.

Since the two school sections in question were not surveyed when Utah was admitted to the Union (January 4, 1896), title to the sections vested in the State upon the acceptance of the surveys of the sections on May 1, 1900 (not February 17, 1900), unless some factor prevented the vesting on that date. 43 CFR 2222.3-2. The Tribe contends basically that the vesting of title on May 1, 1900, was defeated by the occupancy of the two sections on that date by individual Navajo Indians. This occupancy, the Tribe asserts, barred the State's title from ever attaching even though the occupancy might have ceased at some time after May 1, 1900. The reasoning behind the assertion is that section 6 of the Utah Enabling Act, *supra*, excluded from the school grant to the future State "any sections or any parts thereof [which] have been sold or otherwise disposed of by or under the authority of any Act of Congress." The Tribe claims that the occupancy of the two sections by the individual Navajos made them "otherwise disposed of" and therefore forever excluded from the grant.

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The Tribe asserts as a subsidiary or alternative contention that by section 3 of the Utah Enabling Act, 28 Stat. 108, the proposed State agreed to * * * "forever disclaim all right and title * * * to all lands * * * owned or held by any Indian or Indian tribes" and that the two sections in question, being occupied by individual Navajos, fell within the disclaimer.

The State answers that to prevent the State's grant from attaching on May 1, 1900, the individual Indian occupancy on that date must have met the requirements of individual Indian occupancy held by the Supreme Court in *Cramer v. United States*, 261 U.S. 219 (9th Cir. 1923), to defeat the vesting of a railroad land grant and by the Department in *Schumacher v. State of Washington*, 33 L.D. 454 (1905), to defeat the vesting of a State school land grant. In *Cramer*, the Indian occupants had lived on the lands with their parents from a date prior to the railroad grant and had resided there continuously since; they had fenced the lands, had irrigated and cultivated portions of the lands, had constructed and maintained houses and outbuildings on the land, and had resided upon and improved the land for the purpose of making themselves a home. In *Schumacher*, the details of occupancy were not given but the occupancy appeared to be of the general nature of that in *Cramer*. The State contends that the nomadic type of occupancy by individual Indians claimed by the Tribe and described in the affidavits submitted by the Tribe falls far short of the occupancy involved in *Cramer* and *Schumacher* and therefore did not prevent Utah's grant from attaching on May 1, 1900, either under the exclusion in section 6 or the disclaimer in section 3 of the enabling act.

The State further asserts that even if the individual Navajo occupancy did prevent the State's title from vesting on that date, the grant to the State was simply held in abeyance, to attach as soon as the occupancy ceased. The State contends that the occupancy did cease around 1918, as the Acting Director held, or at some other time subsequent to May 1, 1900, so that the State's title has vested in any event.

The Tribe replies that in determining the standard of individual occupancy which will prevent the vesting of a State's title the habits and customs of the Indians involved must be considered, that the Navajos were herdsmen and foragers for food from wild sources who moved about from location to location rather than farmers or inhabitants of villages who remained in one location. The Tribe asserts nonetheless that the individual Navajos on whose occupancy it relies

always returned to the two tracts in question, looking upon them as their homes. The Tribe concludes that this occupancy satisfies the principles of *Cramer* and *Schumacher*.

The Tribe further contends, without conceding, that if occupancy after May 1, 1900, is material, such occupancy has continued without interruption from that date to the present time. Therefore, even if the State's argument is assumed—that the individual occupancy on May 1, 1900, did not forever foreclose the vesting of the State's title but merely held it in abeyance until the occupancy ceased—the Tribe contends that title has never vested because the occupancy has never ceased.

In any event, the Tribe asserts, the occupancy had not ceased when on March 1, 1933, the area encompassing the lands in question was withdrawn by the act of that date, 47 Stat. 1418, "for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon" or on September 2, 1958, when the act of that date, 72 Stat. 1686, 1687, declared that all public lands within the boundaries of certain areas which had been added to the Navajo reservation, including the area added by the 1933 act, were "to be held in trust for the benefit of the Navajo Tribe of Indians."

The State rejoins that the 1933 act applied only to "vacant, unreserved, and undisposed of public lands" and that the declaration made by the 1958 act was "subject to valid, existing rights." The States argues that if the two sections were occupied by individual Indians on March 1, 1933, they were not "vacant, unreserved, and undisposed of public lands." Likewise, the individual occupancy rights were "valid, existing rights" which were saved from the operation of the 1958 act. In other words, the State contends, the Tribe cannot have it both ways; it cannot avail itself of the individual occupancy rights and at the same time interpose them as a bar to the vesting of the State's title.

This summary of the basic contentions of the Tribe and of the State discloses a series of factual and legal issues. However, whether all the issues need resolution depends upon the answer to be given to each issue as it arises in progression. The first issue presented is a legal one, whether individual Indian occupancy of a lesser degree than that involved in the *Cramer* and *Schumacher* cases, *supra*, will prevent the vesting of the State's title on the date when it would otherwise vest, in this case, May 1, 1900. The Tribe appears to concede that if the *Cramer-Schumacher* type of occupancy is required, it has no case because, concededly, the individual occupancy alleged by the Tribe to

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have been in existence on May 1, 1900, does not meet that standard. If, however, the Tribe is correct that the proper standard of occupancy is to be determined in light of the habits and customs of the particular Indians involved, then a factual issue is presented as to whether the standard so determined was met on May 1, 1900. This is a factual issue.

A careful reading of the *Cramer* decision, *supra*, does not disclose an attempt by the court to define the full extent of individual Indian occupancy which would defeat the vesting of a grant such as the grant with which we are concerned. The setting of limits is to be implied only from the following statements of the court:

It is urged that the occupancy of land by individual Indians does not come within the exceptive provision of the grant.¹

* * * Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. * * * It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life.

* * * * *

The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well understood desire of the Government which we have mentioned. To hold that by so doing they acquired no possessory rights to which the Government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation. (Pp. 226, 227, 228-29.)

It is possible to read in these statements, as the State contends, the intent of the court that only individual Indian occupancy of a fixed settlement nature will have an exceptive effect. However, such intent is not so clearly evident as to preclude the argument of the Tribe that a lesser degree of occupancy may also have an exceptive effect.

We do not, however, believe that the issue should be resolved at this time in the abstract. We believe that it is of primary importance to establish first the factual situation. The overriding consideration for this is that most of the witnesses upon whom the Tribe must rely to

¹ That is, the provision of the railroad grant act which, like the Utah Enabling Act, excepted from the grant to the railroad lands "reserved * * * or otherwise disposed of."

establish the facts of occupancy around May 1, 1900, are of advanced years. If we were to agree with the State that the occupancy alleged by the Tribe, if proved, would not be sufficient to defeat the vesting of the State's title on May 1, 1900, and litigation were instituted by the Tribe to reverse that determination, in all probability it would be two or three years before a final decision could be reached. If the Tribe were successful, a hearing would then have to be held but by that time a loss of witnesses would be a definite probability. The preservation of testimony therefore is of the utmost importance.

Moreover, the resolution of legal principles in areas which have not been clearly staked out is better done with full knowledge of the facts involved.

Accordingly, the case will be remanded for a hearing as to the facts of occupancy on May 1, 1900, of the two sections in question by individual members of the Navajo Tribe. Whatever evidence is available should be presented to show the full extent and nature of the occupancy, including such matters as the extent of improvements placed on the land in the form of hogans, corrals, fences, etc., the extent of actual residence and the extent of grazing or cultivation. To be meaningful, residence and improvements on, and usage of, the land should be related to residence, improvements, and usage by the same occupants on other lands. For example, it would be significant that an Indian used one of the sections for a summer camp only, having his principal residence and conducting his grazing principally on other lands. Extent of residence on and usage of the school sections by Indians of other tribes or by non-Indians would also be material to show the nature and extent of the occupancy by the Navajo.

Although the Tribe's case rests primarily on proving individual occupancy on May 1, 1900, it may become essential, as noted earlier, to determine whether such occupancy continued thereafter up to the present time. Evidence therefore should be submitted as to all occupancy subsequent to May 1, 1900, showing who all the occupants were and their relationship to the occupants on May 1, 1900. In other words, so long as a hearing is to be held, all the facts pertaining to occupancy which may be relevant should be developed.

The hearing will be conducted in accordance with the provisions of 43 CFR, Subpart 1852, applicable to a private contest except that the hearing examiner shall make only a recommended decision to the Director, Bureau of Land Management, as provided in 43 CFR 1852.3-8(c). The burden of proof will be on the Tribe. Adminis-

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trative Procedure Act, sec. 7, 60 Stat. 241 (1946), 5 U.S.C. sec. 1006 (1958); *State of Utah, Pleasant Valley Coal Company, Intervener v. Braffet*, 49 L.D. 212 (1922).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision of the Acting Director is set aside and the case is remanded for the conduct of a hearing as provided in this decision.

FRANK J. BARRY,
Solicitor.

UNITED STATES

v.

INDEPENDENT QUICK SILVER COMPANY

A-30338

Decided September 21, 1965

Administrative Procedure Act: Hearing Examiners—Mining Claims: Hearings—Rules of Practice: Hearings—Surface Resources Act: Hearings

There is no basis for ruling that a hearing examiner in a proceeding to determine surface rights to mining claims under the act of July 23, 1955, was personally prejudiced against the mining claimant and that the claimant was denied any rights, where a motion for a change of examiner filed under section 7 of the Administrative Procedure Act was not timely filed and the accompanying affidavit alleging bias simply asserted that the examiner had never decided a case in favor of mining claimants in Oregon, since such an assertion is insufficient to show bias by the examiner against the particular claimant, and further where there is nothing in the record showing any evidence of bias or prejudice by the examiner.

Mining Claims: Discovery—Mining Claims: Surface Uses—Surface Resources Act: Generally

In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mining claimant to the surface resources of his claims in order to prevent the claim from being held subjected to the terms and limitations of section 4 of that act, it must be found that there was a discovery of valuable mineral deposits within the claims at the date of the act and that the claim is still valuable for the mineral deposits; after the Government presents evidence to show *prima facie* that there has been no discovery, the burden of proof shifts to the claimant to show by a preponderance of the evidence that there has been a discovery, and that the claims are valuable for the mineral deposits.

Mining Claims: Discovery—Mining Claims: Location

Not only must a mining claimant properly mark mining claims on the ground to have a valid location, but the claimant also bears the responsibility of

maintaining markings for mining claims and discovery points within them so that when the Government raises a question affecting title to the claims, its examiners may be able to inspect, and examine the claims and discovery points.

Mining Claims: Discovery—Mining Claims: Surface Uses—Surface Resources Act: Generally

When in a proceeding under section 5(c) of the act of July 23, 1955, the Government establishes a *prima facie* right to the surface resources of mining claims located for cinnabar by evidence that Government examiners found no cinnabar in any of the workings that could be examined and sampled so far as the examiners could ascertain from advice by the mining claimant's representatives and from their inspection of the claims hampered by insufficient markings of the claims, evidence by the claimant was insufficient to sustain its burden of proving with a preponderance of the evidence a discovery on each claim where it simply showed that conditions might be favorable for the formation of cinnabar, and that some cinnabar ore was found in the past, but which primarily shows that further exploration and development of the claims to establish the locus of ore-carrying veins has been recommended by claimant's mining engineer consultants, and there is no probative evidence establishing the existence of ore bodies of sufficient value that would justify an expectation that a profitable mine might be developed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Independent Quick Silver Company has appealed to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated June 23, 1964, which affirmed a decision by a hearing examiner, dated February 6, 1963, insofar as it held that 21 lode mining claims held by the company were subject to the surface restrictions and limitations provided by section 4 of the act of July 23, 1955, 69 Stat. 367, 30 U.S.C. § 612 (1964), but which reversed the hearing examiner's finding that one claim, the Bonanza, was not subject to such provision of the act.¹

The mining claims are situated in sections 17, 19, 20 and 21, T. 14 S., R. 20 E., W.M., Oregon, within the Ochoco National Forest in Crook County. In accordance with section 5 of the act of July 23, 1955, 69 Stat. 369, 30 U.S.C. § 613 (1964), providing a means by which surface rights in mining claims can be determined as between the United States and mining claimants, the manager of the Portland land office, at the request of the United States Forest Service, Department of Agriculture, published a notice including the above-described lands.

¹ The 21 claims, other than the Bonanza, are listed in the proceedings as follows: Happy Chance, Prospect, Crystal, Pioneer, Ruby, Grub Stake, Zero, Good Luck, New Era, Lost Claim, Green Back, Columbia, Eastern Star, Cosmopolitan, Princess, Commodore, Aetna, Ajax, Aztex, Cornucopia, and Jewell lode mining claims.

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Within the required time, the appellant filed a verified statement setting forth certain information regarding the claims.

A notice of the hearing to be held on charges brought by the Forest Service through the Bureau of Land Management was issued by hearing examiner Graydon E. Holt on February 14, 1962. It stated that the Forest Service would offer evidence at the hearing to prove that:

(a) Sufficient minerals have not been found within the limits of the claims to constitute a discovery of a valuable mineral deposit.

(b) The boundaries of the claims are not distinctly marked on the ground.

After the hearing the hearing examiner sustained the first charge, ruling that there was not a discovery on the claims, except as to the Bonanza claim. As to the second charge, he stated, "although the claimant's evidence showed that there are two known corner posts for the 22 claims, they are insufficient to distinctly identify the claims on the ground." However, it is not clear what significance, if any, he gave to the second charge because, in ruling that there was a discovery within the Bonanza claim, he stated that since the vein crossing the claim passed through the side lines of the claim instead of the end lines, thus making the side lines the end lines, it was necessary for the claimant to remonument the claim corners so that the original end lines would be brought in so as to run 300 feet on each side of the vein.² Thus, apparently, in spite of any defect in the markings on the ground, he did not consider it sufficient to affect the validity of the claim insofar as he determined it to be valid.

The Division of Appeals reversed the hearing examiner's decision on the finding of a discovery within the Bonanza claim but stated that it was unnecessary to consider the second charge since it found there was no discovery within any of the claims.

Before considering issues raised by those two charges other issues raised by appellant will be considered. Appellant contends that the hearing violated due process of law because the hearing examiner had prejudged the case against it and was biased. This contention was first raised in a letter dated five days before the hearing was held in which the claimant made a motion for a change of hearing examiner. In support of the motion an affidavit sworn to by the president of the claimant company stated that hearing examiner Holt "has never de-

² A claim can not extend more than 300 feet on each side of the middle of the vein at the surface. See *United States v. Alaska Empire Gold Mining Co.*, 71 I.D. 273 (1964)

cided a mining case in favor of mining claimants with respect to the question of sufficiency of mineral discovery in any case involving Oregon lands. That the members of my company are not agreed and feel that they can not have a fair and impartial trial of their case before Graydon Holt, Hearing Examiner." The motion also stated that the claimant proposed to prove the examiner's prejudice by the examiner's own testimony. At the hearing, claimant's attorney called hearing examiner Holt to testify regarding the motion and affidavit, but the examiner refused. Appellant contends that the record shows that had Holt testified he would have testified that he had prejudged the case, and that his refusal to do so is a "tacit admission" of the truthfulness of the charge. It asserts that a tribunal "who has made up his mind in advance and pre-judged a case is prejudiced within the meaning of the Administrative Procedure Act * * * [sec. 7, 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1964)]."

The appellant reads much between the lines of the colloquy between the examiner and the claimant's attorney at the hearing, William B. Murray. This colloquy is set forth below.³

³ The testimony begins with the examiner's response to the claimant's request to call him to testify:

"Hearing Examiner HOLT: Your request to call the Hearing Examiner is denied. The motion was not timely filed. So, I am afraid I will have to deny the motion, also.

Mr. MURRAY: Then, we make the offer of proof to prove that had Graydon Holt, the Hearing Examiner, testified, that he would have admitted that he had pre-judged the case and, therefore was prejudiced.

Hearing Examiner HOLT: Very well. Is there anything further?

Mr. MURRAY: Is the offer of proof denied, too? The record should show that.

Hearing Examiner HOLT: Well, I am not going to comment on the offer of proof. You have made your offer of proof.

Mr. MURRAY: Yes.

Hearing Examiner HOLT: And it is a matter of record.

Mr. MURRAY: Yes." (Tr. 3-4.)

However, what the appellant seems to read between these lines is fiction. The fact that the examiner refused to testify does not compel the conclusion which appellant draws that his testimony would have shown he was biased and had prejudged the case. Although the examiner could have made a statement denying the charge, if he had desired, his refusal to testify and his denial of the motion served the same purpose. Indeed, it was not incumbent upon the examiner to make any rulings or comments upon claimant's purported offer of proof. The Supreme Court has indicated that it is unnecessary for an administrative official to make a denial of a charge of bias, even in a case where the official had written a letter criticizing a court decision regarding a previous administrative action taken by him in

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the same case. *United States v. Morgan*, 313 U.S. 409 (1941).⁴ The Court emphasized at 421 that, although administrative officials may have an underlying philosophy in approaching a specific case, they should be assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. It also emphasized at 422 that the administrative official should never have been subjected to an inquiry into his disregarding a memorandum from a subordinate because the proceeding had the quality of a judicial proceeding and that, as a judge cannot be subjected to a probing of his mental processes, "so the integrity of the administrative process must be equally respected." Likewise, in the present case, we do not believe that the hearing examiner should have been subjected to any probing of his underlying philosophy regarding mining cases or any reasons for any previous decisions he may have made.

Nevertheless, appellant contends that there was prejudice and not an impartial hearing as guaranteed by section 7(a) of the Administrative Procedure Act, *supra*. The relevant provision of this section is as follows:

* * * The functions of all presiding officers and of officers participating in decisions in conformity with section 8 [5 U.S.C. § 1007 (1964)] shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

It is apparent that since examiner Holt did not withdraw from the hearing in accordance with this provision, he did not deem himself disqualified for any reason, including personal bias or prejudice.

The provision quoted requires an agency to determine issues raised of personal bias or disqualification of a hearing examiner *if* there is a "timely and sufficient" affidavit. The words "timely" and "sufficient" are not defined in the act, but have been described as words in "common use in the law" which must take their meanings from the general law and adjudicated cases. *Long Beach Federal Sav. and Loan Ass'n*

⁴ In this case, the Secretary of Agriculture was acting as an administrative tribunal in determining rates under an act requiring a full hearing of facts relevant to the rate determinations. He made a written denial after being charged as biased following a letter he wrote criticizing a court decision in the rate-fixing proceeding. There are obvious factual differences between the *Morgan* case and the present case; however, the discussion of the court comparing an administrative official and a judge in a court of law is relevant to this case perhaps even more so, since the hearing examiner here is clearly acting in a quasi-judicial function.

v. *Federal Home Loan Bank Bd.*, 189 F. Supp. 589, 611 (S.D. Cal. 1960), reversed on grounds not challenging the discussion regarding these words, *Federal Home Loan Bank Bd. v. Long Beach Federal Sav. and Loan Ass'n*, 295 F. 2d 403 (9th Cir. 1961). The examiner ruled that the affidavit and motion were not timely filed. The appellant alleges that the motion was made as soon as it was known that Holt was to be the hearing examiner, and it could not have done so any sooner. The Forest Service denies this allegation, pointing out that the contestee by a letter of March 8, 1962 (more than five months before the hearing), had requested a postponement of the hearing as first scheduled and that the letter was addressed to Holt, that the notice of rescheduling was dated August 21, 1962, by Holt, but the motion was not mailed by contestee until its letter dated September 26, 1962, five days before the hearings started.

What may be timely in one circumstance may not be in another, for "timely" has been defined as being "at the first reasonable opportunity after discovery of the facts tending to show disqualification * * * in time to avoid useless costs" and even "after commencement of trial or other proceeding when facts upon which the affidavit is based were not known prior thereto." *Long Beach Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd.*, *supra*, at 611. The facts stated by appellant as to its knowledge that Holt was to be the examiner are controverted by the record. No other facts have been presented. Therefore under the above criteria, the delay was unreasonable and thus it does not appear that its motion was made timely. Therefore, the examiner's denial of the motion was proper for that reason.

Also, it appears that a discussion of the sufficiency of the motion should be made to clarify this issue. "Sufficient" has been described as meaning "allegations of fact as distinguished from conclusions. And the facts must be such that, taken to be true as stated, they would be sufficient to convince an unbiased, unprejudiced, and disinterested mind." *Long Beach Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd.*, *supra*, at 612. The only alleged facts stated in the affidavit are that the hearing examiner had never decided a mining case in favor of mining claimants as to Oregon lands. The Forest Service denies the truthfulness of this allegation. In any event, the statement is by itself insufficient to show prejudice or bias against appellant. Even were the allegation to be true, there would have to be some showing that the previous decisions made by the hearing examiner were erroneous and not supported by the facts or law or that his rulings in those cases were arbitrary and unreasonable and not

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within the bounds in which reasonable men might differ, and that there was some more tangible relationship between the examiner's past rulings and his role involving the claimant. The Supreme Court has specifically held that an examiner was not disqualified to preside at a second hearing to receive evidence which he had refused to receive at the first hearing and which was held by a court to have been improperly excluded, merely because of a feeling that he might not be impartial because of his earlier participation. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219 (1947). See also to the same effect, *Pangburn v. C.A.B.*, 311 F. 2d 349 (1st Cir. 1962). Those cases are certainly much stronger cases to support an argument of bias than the present case.

Even though it is not necessary to make any further determination in this matter since we conclude that the affidavit was neither timely nor sufficient, it is apparent from reviewing the entire record in this case that there is nothing which would warrant any finding that the hearing examiner was prejudiced or biased against the claimant in his conduct of the hearing.

Appellant contends as a corollary to this contention regarding bias and prejudice that the decision below erred in holding that the hearing was not a denial of "due process" and "equal protection" and did not represent a "taking without just compensation." In addition to saying that it was forced to stand trial before a hearing examiner who had prejudged the case, it also states that trial before one who sits in judgment and who also brings the charges is a travesty of our system of laws, and that the combination of judge and prosecutor in the one bringing the charges is contrary to all precepts of Anglo-American jurisprudence. Appellant's contention is premised on the allegation that the examiner brought the charges against the claims. This is completely specious. It was not the examiner who brought the charges against the mining claims. It was the Forest Service. This is clear from the notice of the hearing which stated that the charges were asserted by the Forest Service. The fact that the hearing examiner issued this notice did not place him in the role of being the prosecutor or party making the charges.

Appellant further contends that due process has been violated because the first charge in the complaint, that "sufficient minerals have not been found within the limits of the claims to constitute a discovery of a valuable mineral deposit," was inadequate to support the decision. It contends that this charge presents an issue as to whether or not there

was a discovery within the outer boundaries of the 22 claims but not as to whether there has been a discovery on each of the claims. Otherwise, it argues, the charge should have read that there were not sufficient minerals within the limits of "each claim, or the limits of any claim." The Forest Service contends that the appellant is merely indulging in a play on words by this argument and that it knew what the charges were as evidenced by the case it put on.

A notice in such an administrative proceeding as was conducted here is adequate if it reasonably apprises the party of the issues in controversy and there is no showing that a party was misled. *United States v. Pearl Clarke et al.*, 70 I.D. 455, 456 (1963), and cases cited therein. As that decision points out, if a party has any uncertainty as to the scope of the issues raised by the notice, it can move for a pre-hearing conference to resolve any questions (see 43 CFR 1852.3-1, formerly 43 CFR 221.69). The provisions of the mining laws pertaining to lode claims expressly state that no location of a mining claim shall be made until the "discovery of the vein or lode within the limits of the claim located." Rev. Stat. § 2320 (1875), 30 U.S.C. § 23 (1964). Anyone familiar with the mining laws realizes that as to both lode and placer mining claims there must be a discovery of a valuable mineral deposit within the limits of each claim and that a discovery on one claim does not inure to the benefit of an adjoining claim. *United States v. Henrikson*, 70 I.D. 212, 215 (1963), *affd. Henrikson v. Udall*, 229 F. Supp. 510 (D. Cal. 1964), appeal pending. Appellant's attorney is an experienced attorney in mining cases and it is extremely doubtful that one of his acumen misunderstood the charge.

He asserts that the Forest Service did not present evidence showing a lack of discovery on each claim. Yet, he also seems to argue that a discovery on any one of the claims prevents the rest of the claims from being subjected to the limitations of section 4 of the act of July 23, 1955, *supra*. He contends that it is unnecessary to discriminate as to particular evidence received as exhibits in the hearing in relating them to a particular claim. Thus, he considers the mere submission of records of appellant company containing assay reports, drill hole logs, certain maps purporting to show the location of ore bodies and other such information to be sufficient without their specific applicability to a given claim being shown. Nevertheless, despite these contentions, after reviewing the record made at the hearing it is apparent that appellant's attorney attempted to produce as much evidence as possible to show a discovery on as many of the claims as possible and

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that the failure to relate some of the reports to a particular claim was because of the inability of the witnesses to lay a proper foundation to show their relevance to a given claim. We must conclude that the record fails to show that the appellant was misled by the first charge.

With respect to the second charge, appellant contends that the decisions are not in accordance with the hearing examiner's findings. It states that the examiner adopted its requested findings 1 and 2 listing the names of the claims with their recordation information, and a statement that its Exhibit "G", a map of the claims, properly showed the boundaries of the claims. The Forest Service disputes these assertions and contends that there is no evidence in the case that the claims were ever properly marked on the ground. It adds that, even if they had been, it was the duty of the mining claimant to preserve the markings; otherwise, no decision could ever be made as to the exact place where the government has surface management rights and where it does not. Appellant contends that the boundaries of each claim had been marked and that once this has been done and the claims perfected by discovery they cannot be lost for failure of the claimant to keep the claims marked distinctly on the ground because it is impossible to maintain markers as they can be destroyed by claim jumpers.

The requirement for marking claims is contained in Rev. Stat. § 2324 (1875), 30 U.S.C. § 28 (1964), which provides that the "location [of a claim] must be distinctly marked on the ground so that its boundaries can be readily traced." This statute also requires that the records of mining claims shall include a "description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." Most of the discussion of these requirements has come in cases involving controversies between two conflicting mining claimants rather than in cases involving the United States. In cases of the former type, it has been held that claims which have not been marked on the ground are invalid regardless of the fact that descriptions in recorded locations notices may have been adequate. *Vevelstad v. Flynn*, 230 F. 2d 695 (9th Cir. 1956), cert. denied, 352 U.S. 827. This rule would appear to be even more apt where the controversy is between the United States and a claimant rather than between conflicting claimants. However, where there are conflicting claimants, it has also been held that if it is proved that the claims were once marked upon the ground the fact that after a lapse of time the markings may have become obliterated or destroyed through no fault of the locator does not divest him of his right of

possession to the claim so that others may gain rights by locating the same area. See the instructions approved in *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 209, 217, 218 (9th Cir. 1903), *cert. denied*, 194 U.S. 631 (1904); also see *Larned v. Dawson*, 90 F. Supp. 14 (D. Alaska 1950). In these cases there is the underlying factor that one person may be permitted to benefit from someone else's labors and that this should not be sanctioned where the first claimant is not at fault.

Where the conflict is between the United States and a claimant, the underlying factors are different because the question of possessory rights of the claimant is dependent completely upon his compliance with statutory requirements and this necessitates a determination by this Department as to whether they have been met. In the record of this case there is insufficient evidence to show whether or not the claims here were ever properly marked. There is evidence to show that at the time the Forest Service examiners visited the claims there were inadequate markings to identify the claims properly. Even if we assume that the claims were once properly marked, there remains the problem of how the Government may ascertain whether the requirements of the statute have been satisfied as to each claim if the boundaries of the claims cannot be readily established. In a dispute between the Government and mineral locators as to the positioning of a claim or claims, it has been held that the locators must bear the burden of showing that the claims are in fact positioned as they assert rather than as asserted by the Government. *United States v. Willard Christensen et al.*, A-27549 (May 14, 1958). Also, as the decision below pointed out, the locators of a claim have a duty to keep discovery points open on claims so that they might be inspected by Government examiners when there must be a determination as to compliance with the statutes. *United States v. Spar Mining Company et al.*, A-28786 (July 30, 1962). In considering whether a mining claim was properly invalidated in a contest proceeding one court has stated that the claimant must make a discovery "whose existence is in such condition that the government may confirm it by examination." *Henrikson v. Udall*, *supra* at 511. These cases thus demonstrate that it is the burden of the mining claimant to maintain its claims adequately enough so that when an issue of title is raised by the Government, as has been done with respect to surface rights in this proceeding, the claims and the discovery points may be examined and evaluated by the Government examiners.

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Both parties have discussed the examination of the claims in this case by the two Forest Service mineral examiners. Appellant disputes testimony by these examiners as to the length of time certain of appellant's representatives or agents were with the examiners (see Tr. 41, 42) and also attempts to discredit the motives and veracity of an employee of a mill on the property, despite the fact that one of claimant's witnesses at the hearing admitted that the employee was familiar with the property and that he himself, had asked him to accompany the examiners over the property (Tr. 162-3). We must conclude that the evidence shows that the examiners were diligent in their efforts to cooperate with the officials of appellant company and that any failure by them to receive records and other information which may have helped them in their examination of the claims is attributable to the lack of diligence on the part of appellant's officials. The claimant was aware that the examination was going to be made, had officials there during part of the examination, and requested an acquaintance to accompany them on part of their examination. Claimant is not in a position to challenge the examination by the Forest Service personnel on the ground that they should have done more than they did, although this is what it contends in its appeal.

The claims were located for and are alleged to be valuable for mercury (or quicksilver) found in cinnabar ore. The Forest Service examiners testified that they spent three days examining the claims (Tr. 6), that they examined all the places shown to them by the claimant's representatives and took samples of all the cuts that were open (Tr. 9, 14). They also testified that the workings shown to them were the only ones they found on the claims with the exception of one tunnel on the Columbia claim which had completely caved in (Tr. 20). They testified that they knew of no other places on the property that justified sampling and considered it improbable that additional work would find something (Tr. 43), and that they did not trace any relationship between veins on adjoining properties because they had examined the contestee's claim and could see no veins exposed on their property nor any structural conditions that might be favorable for cinnabar ore (Tr. 52).

In addition to trying to discredit the help of the mill employee and of disrupting the time representatives of the company spent with the examiners, appellant urges that the sampling done by the examiners was not valid because they took samples from country rock rather than from places where the ore was. However, the testimony of the exam-

iners indicates that the samples were taken in the places where the work had been done and which the contestee's representatives had shown them. Appellant also asserts that some of the samples were taken from places not within any of the claims. This would appear to be so from the map, Exhibit 1, presented by the contestant. If this is so it is apparent that any sampling off the claims was taken because these places were pointed out to the examiners, and it is directly attributable to the claimant's failure to maintain the markings for the claims and other discovery points.

Although the hearing examiner accepted the designation of the positioning of the claims reflected in appellant's Exhibit G which differed from that shown on Exhibit 1, the Office of Appeals and Hearings correctly noted that the hearing examiner should have determined the location of the Bonanza claim rather than assumed the correctness of its positioning since it found the claim to be valid by discovery. We believe that the conclusion of that office was correct that the hearing examiner erred in finding a discovery even assuming the positioning of the claim is as claimant asserts. We may note that in comparing Exhibits 1 and G there are differences as to the location of roads, cabins and other improvements. However, there are enough similarities so that if we assume that Exhibit G showed the correct positioning of the claims it is apparent in relating the improvements and places where samples were taken as shown on Exhibit 1 that all of the sampling taken by the Forest Service examiners would be within the claims. This does not help appellant's case because the samples and the investigation by those examiners failed to reveal any cinnabar ore of value.

Thus, even in giving the appellant the benefit of the doubt and making the same assumption that the hearing examiner did as to the location of the claims, we find that the Government presented sufficient evidence to establish a *prima facie* case that there was not a discovery of a valuable mineral deposit on any of the claims. Appellant disputes this conclusion, which was also reached in the decision being appealed. It asserts that the evidence it presented at the hearing is sufficient to show a discovery. On this question of sufficiency of evidence, appellant has raised some issues concerning burden of proof and admissibility of certain evidence. Appellant seems to admit that after the Government establishes a *prima facie* case by satisfactory evidence the mining claimant has the duty of going forward with the evidence, but contends, nevertheless, that the Government in a mining contest case has the burden of proof which never shifts. A more accurate

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statement of the rule regarding burden of proof in mining cases is to be found in *United States v. Clyde R. Altman and Charles M. Russell*, 68 I.D. 235, 238 (1961) :

* * * with respect to the proof required to establish the validity of a mining claim. The law is, as recently affirmed by the United States Court of Appeals for the District of Columbia in *Foster v. Seaton*, 271 F. 2d 836 (1959), that when the Government contests a mining claim it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.

The decision then pointed out that, although a contest is subject to dismissal where the Government fails to make out a *prima facie* case, "nevertheless a mining claimant must have made a discovery within the limits of his claim in order to gain any right in the land as against the United States and where such a claimant applies for a mineral patent he must submit proof of discovery to be entitled to a patent." *Id.* Since in a proceeding under the 1955 act the claimant is also asserting a right to the land—that is, to manage and control the surface resources—and since the test as to whether or not it or the United States has the right is the same test as that to determine whether patent should issue for a claim, i.e., whether or not there has been a discovery of a valuable mineral deposit within the claim (*United States v. Clarence E. Payne*, 68 I.D. 250 (1961)), it follows that the same rules as to the burden of proof apply in such a proceeding under the 1955 act as apply in other cases where the Government contests a claim. There is nothing in the 1955 act to suggest anything to the contrary.

Some of the above reasons regarding the assertion of the claimant's right against the United States in a proceeding under the 1955 act are also relevant in considering the issue appellant has raised as to the admissibility of assay reports on samples taken by the Government after 1955. Appellant contends that such samples are not relevant to the issue of whether there was a discovery on the claim in 1955 and should not have been allowed. It refers to the language of the hearing examiner as stating that the "issue is whether or not there was a discovery after 1955" as being erroneous. The statement then went on to say that "the Government may offer evidence of sampling taken after that date in order to prove the status of that claim as of that time."

It is not exactly clear what the hearing examiner meant, other than that he did permit the submission of the Government's assay reports.

We see no error in his admission of those assay reports although his statement of the issue as reflected by the transcript is not completely accurate. The admission of the assay reports (as well as some other evidence) may serve two functions. One is to prove whether or not samples taken from cuts exposed prior to the 1955 act contained a valuable mineral deposit, thus evidencing a discovery prior to the 1955 act; the other is to prove whether or not there still are minerals in the claim and the claim retains its validity because a valuable mineral deposit remains within the claim. It is this last function of the evidence which appears to have been misunderstood in this proceeding. However, in a proceeding under the 1955 act there are basically two questions which must be resolved. The first is whether or not there was a discovery of a valuable mineral deposit prior to or as of July 23, 1955, the date of the act. The second is whether the mining claim is still valid when the verified statement is filed asserting a right superior to the United States. Appellant overlooks this second test in making its arguments. However, this question or test must be considered if there is any doubt about the continuing validity of a claim for any reason, such as having been worked out, or the mineral deposit becoming invaluable because of a change in economic conditions. See *United States v. Irving Rand and John M. Balliet*, A-30036 (October 19, 1964). Thus, under the 1955 act in order for the mining claimant to have control over the surface other than simply for mining purposes, it is necessary that the claimant had made a discovery prior to the act and that the claim has retained its validity when challenged.

Having concluded that the Government established a *prima facie* case against the mining claims by showing absence of a discovery as of July 23, 1955, the final question is whether or not the claimant met its burden of proof of showing that there was in fact a discovery under the tests described above in order to retain its surface rights to the claims. Appellant contends that the decision appealed from did not consider all of the testimony and evidence presented by it at the hearing. Simply because the decision did not mention each exhibit and each witness's testimony does not mean that such evidence was not considered. We have reviewed all of the evidence submitted at the hearing—only some of which will be mentioned. Officials of claimant company testified and discussed certain business records which the company had regarding the claims. These included photographs depicting improvements and workings on the claims (Exhibits X 1-23),

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title information about the claims (Exhibit S), letters and assay reports dated 1931 and 1932, some giving names of claims, others not (Exhibit R), which could not be related by the witness to any method of sampling or to location of the sampling (Tr. 126), and reports by a mining engineer, Westman, made in 1951 (Exhibit V) and 1952 (Exhibit W), including drill hole reports of the Bonanza claim (Exhibit U), and a report by an engineer, Byram, made in 1932 (Exhibit L). None of the officials of the company who testified appeared to have technical knowledge which would qualify them as experts, nor did their testimony reflect more than that the company had spent a substantial amount of money in working the claims (\$80,000). Their testimony did not identify any particular discoveries of valuable mineral deposits within the claims.

The claimant did have an expert witness, George C. Hogg, a mining engineer who had examined the claims and made reports for the company a number of times. Those reports were submitted as evidence at the hearing. The first report was made in 1930 (Exhibit P) and described the development work which had been done so far on the claims and recommended the expenditure of \$25,000 on further development work. The next report was made in 1940 (two copies submitted as Exhibits I and J) in which he discussed the development work on mines in the vicinity and discussed the work done within the company's claims. It is this report apparently upon which the hearing examiner based his finding that there was a discovery on the Bonanza claims. The report describes cuts and workings which failed to reveal any cinnabar ore, but it also stated that cuts designated F, C, and A on the Bonanza claim and G on the New Era Claim (see pages 16, 19 and 21 Exhibit J) revealed commercial cinnabar ore. Diagrams attached to Exhibit I, one copy of the 1940 report, purport to show the extent of the cuts and the probable ore areas. Larger copies of three of the diagrams were also included as Exhibits K, M and N. In the report Hogg estimated that there was a probable commercial ore zone of 18,600 tons having a value of 5.2 pounds per ton based on the average value of samples taken. The report also recommended further specific development work. It concluded that although only ore of a low commercial grade has been encountered on the claims, the history of other mines in the area where there were similar type of vein structures indicated that higher grades of ore have been encountered and that it was expected that "positive ore of sufficient tonnage will be developed to keep the property in continuous operation."

(Pages 25-26, Exhibit J.) Exhibit Q, reports on drill holes purportedly those to which Hogg's 1940 report relates, was received in evidence. Although Hogg at the hearing identified those reports he could not explain the diagrams purporting to show the area of ore structure, and, understandably, he could not remember much detail about some of the material presented. It was apparent that he did little of the panning and that notes he took on drill hole sheets in Exhibit Q reflected information he received from someone else. Most of the sheets reflected no showing of colors of cinnabar; some gave some numbers of colors but Hogg could not explain their significance.

Another report by Hogg, a letter dated June 29, 1955, was submitted by the claimant as Exhibit O. It indicated that all his recommendations in a report of May 15, 1942, had been completed. There was no submission of any evidence of a report of May 15, 1942. It is probable that the reference to 1942 was in error and should have been 1940. See Tr. 106. The letter mentions that one tunnel was driven about 90 feet on the vein system of the Mother Lode property and suggested that a tunnel be driven on the Independent property to explore possibilities. It was stated that such tunnel would encounter a vein about 50 feet under the vein exposed and then a crosscut should be driven east to cut the Onka vein and mineralization in one of the tunnels. It stated that on the Onka vein a hole was drilled in the fracture zone which assayed 8.6 lbs, that the drill hole was logged and merchantable ore was encountered, and that some other holes showed merchantable ore. Hogg concluded in the letter that this exploratory work indicates that the Independent property is on the Johnson Creek fracture which is favorable to cinnabar accumulation and that two systems of veins pass through the company's property which should enhance their value.

Upon examination at the hearing Hogg stated that he thought this report proved that there were two systems of veins from the Mother Lode property adjoining the claims that went into the company's property (Tr. 112). Upon being asked whether a reasonably prudent person would be justified in spending time and effort and money in further developing the claims, he answered "to find out whether they actually are good, yes." Upon further inquiry as to his opinion in this regard he stated that "I think here they've [officials and shareholders in the company] spent a lot of money, and they certainly should spend a little bit more to see if they can't prove what I think exists." Tr. 113, also, see Tr. 118.

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In evaluating Hogg's testimony and his reports it is apparent that he considered the conditions favorable for finding cinnabar ore, and also that he thought that there was one body of low grade ore within an area which had been pinpointed through drilling and sampling of the drill cores. However, this delineating of an ore body was based more on his assumptions than upon actual proofs as to its existence. None of his testimony or reports show more than that further exploratory work should be done in order to maintain an operation on the claims. There is no evidence that the ore body he described was ever actually proved by further work or by any development.

The 1932 report by Byram, Exhibit L, discussed the geological conditions of the claims and geological conditions for the finding of cinnabar ore. It stated that the company's property is crossed by at least two ore carrying channels and suggested that prospecting be continued along those lines with an expenditure of \$5,000. Aside from Hogg's 1955 letter, the most recent information submitted by the claimant are the reports by Westman in 1951 and 1952, Exhibits V and W. The 1951 report discussed a geophysical report prepared by United States Geological Survey personnel in 1949 of part of the Johnson Creek Area, Ochoco Quicksilver District. This Geological Survey report was submitted as Exhibit B. Westman stated in his report that he was surprised that the Geological Survey report and other reports and investigations that had been made of the property gave little or no significance to extensive springs which he thought reflected a zone of weakness where cinnabar should be found. He described certain work stating that because of difficulties with a bulldozer which would mire down in soft earth little excavating was done. He described a study of mineralization in one area where he was impressed by the mineralized showing. The evidence does not identify just where this mineralized area is located. He suggested that further exploration be confined to this mineralized zone. He stated that "following shear zones that will contain the ore will thoroughly prospect the region. Attempting to cut across country to intersect shear zones has been expensive without compensating results." (Exhibit V, p. 4.)

Westman's 1952 report states that in meetings with members of the company it had been stressed that:

every exploratory move upon the Independent Quicksilver Property would have to be made primarily with development of the geologic structure picture. In an area so adversely [sic] covered with overburden this can be the only approach to commercial ore indirect as it may seem at times. (Exhibit W, p. 1.)

He described certain work which had been done. Some cuts and drill-holes revealed some cinnabar but others did not. He stated that certain cross veins were found carrying varying cinnabar values whereas the enclosing shear zone is relatively barren. He mentions the development work apparently done by Hogg with Hogg's conclusion that there were 18,600 tons, average 5.2 pounds, stating that at current prices this would be equivalent to 1270 flasks of mercury valued at around \$254,000. He suggests certain geological possibilities which might reflect a finding of cinnabar ore, and then recommended further development steps for the property. He concluded that this development program can produce "considerable ore providing that the records are kept accurate and up-to-date." (Exhibit W, p. 9.)

Since, with the exception of Hogg, the writers of the reports submitted by claimant could not be cross-examined at the hearing, some of the significance of their statements and conclusions could not be probed satisfactorily. It is apparent after considering all of the evidence submitted, however, that there is agreement that the claims are located in an area in which geological conditions would favor the deposition or formulation of cinnabar ore. It is also apparent that the geological conditions on the claims are such that the depositions of ore are difficult to establish because of extensive overburden, difficult working conditions in some places due to soft earth, and other difficulties inherent in locating the precise veins where the ore will occur. The reports submitted by claimant reveal several different theories or ideas by the writers of the reports as to where the ore will be located and the best method of finding it. Although some ore was encountered, the writers of the reports apparently did not consider their findings adequate to support extended mining operations but in each report recommended further exploration. As discussed before, one ore body was defined by Hogg, but there was no evidence other than mention of that by Westman, apparently based on his reading of Hogg's report, otherwise verifying that it constituted a mineral deposit which might have value. The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value.

To conclude, the evidence submitted by the claimant was more quantitative than qualitative. There was a lack of specificity which

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would relate the information to a particular claim or claims. Much of the evidence was general in nature and much of it, especially specific information, was hearsay where there was no opportunity for cross-examination and proper delineation of the purported facts shown. In some instances there was no foundation for some of the information. At the most, even as to the purported ore body on the Bonanza claim, it is apparent that further developmental and exploratory work was recommended. Appellant did not present evidence which would show that any ore bodies supposedly found prior to 1955 constituted valuable mineral deposits as of July 23, 1955, by establishing that a prudent man could expect that the value of the ore would exceed costs in developing the mine and hence could expect that a profitable mine might be developed. This is the test for establishing a discovery in this case. Cf. *United States v. Adams*, 318 F. 2d 861 (9th Cir. 1963). On the basis of the present state of the record, we must hold that the claimant failed to meet the burden of proof which it had to establish that there was a discovery of a valuable mineral deposit on any particular claim, properly delineating where the discovery is, under the tests discussed previously.

We may note that a determination under the 1955 act that the Government has surface rights for the claims will not preclude the claimant from carrying on further exploratory work to establish a mine if it desires.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEALS OF R & R CONSTRUCTION COMPANY

IBCA-413

IBCA-458-9-64 *Decided September 27, 1965*

Contracts: Formation and Validity: Authority To Make—Contracts: Construction and Operation: Contracting Officer—Contracts: Disputes and Remedies: Equitable Adjustments

Where a prospective bidder relies upon erroneous assurances given by a subordinate of the contracting officer not authorized to give them, and as a con-

sequence erroneously fails to include in its bid the cost of performing certain work required by the Invitation for Bids, it is not entitled, after award, to an equitable adjustment of its bid price for performing the work so required, even though not contemplated by its bid.

Contracts: Construction and Operation: Subcontractors and Suppliers—Contracts: Performance or Default: Excusable Delays—Contracts: Disputes and Remedies: Burden of Proof

In order to be entitled to an extension of time for excusable delay under Clause 5 of Standard Form 23A (April 1961), the contractor must establish by a preponderance of evidence that the failure of its subcontractor to complete the contract within the time required was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of the contractor and its subcontractor.

BOARD OF CONTRACT APPEALS

The paramount question raised by these consolidated appeals is whether a prospective bidder may receive an equitable adjustment of price, based upon oral statements of a Government representative made prior to bidding and purporting to reduce the scope of the work, but plainly contrary to the unambiguous terms of the Invitation for Bids. A separate but closely related question to be considered is the propriety of the contracting officer's assessment of liquidated damages for delayed contract performance. A hearing upon the appeal in IBCA-413 was held in St. Louis, Missouri, on May 18, 1964.

IBCA-413

Contract No. 14-16-0003-6111, as awarded under date of June 28, 1963, called for the "Construction of two concrete water pumping structures, earthwork, riprap, pipe and appurtenances at the Batchtown and Calhoun Unite of the Mark Twain National Wildlife Refuge, Calhoun and Jersey Counties, Illinois." The estimated cost of all work to be performed amounted to \$46,714.

The \$46,714 figure was comprised of a lump sum bid of \$21,479 on the Batchtown Structure (Item 1) and a lump sum bid of \$18,715 on the Calhoun Structures (Item 3). The remaining \$6,520 represents the unit prices bid for the estimated amount of riprap work required in connection with the Batchtown and Calhoun structures.

The dispute with which these appeals are concerned involves only Item 3. The Government contends that under the clear terms of the specifications Item 3 covers not only the pumping structure itself but also includes the placement of an embankment consisting of certain

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dike construction with road surfacing as specified. The contractor has not denied that the contract specifications require the performance of such work. The contractor asserts, however, that such work should not have been required of it, and that since it was required, provision should be made for additional compensation. Such contentions are based upon the fact that at a work site inspection prior to bidding a Government representative had advised the contractor that the work in question would not be the contractor's responsibility.

The contractor has estimated that the amount omitted from its bid in reliance upon such advice is approximately \$708.

The contract, which was on Standard Form 23, January 1961 Edition, provides for the work to be started "within ten (10) calendar days after receipt of notice to proceed" and to be completed "within 150 calendar days after receipt of notice to proceed." On this basis the contract was scheduled for completion by December 24, 1963. Change Order No. 1 extended the contract performance time by two days resulting in a contract completion date of December 26, 1963.

In its letter to the contracting officer of November 25, 1963, the contractor sets forth its position respecting the dispute in the following terms:

During our pre-bid inspection at the job sites, your Mr. Willis D. Vasse instructed our Mr. Alan Rhea and Mr. Don Wallace that earth work and road surfacing required for the levee on the Calhoun site (Grafton) was to be excluded from our portion of this Contract. Our Proposal was based upon the verbal instructions given to us at this time.

In the Findings of Fact of December 9, 1963, the contracting officer reviewed in detail the requirements of the contract specifications. He concluded that the terms of the controlling specifications and drawing were so clear as to unquestionably put the contractor on notice of the scope of the work involved. The requirements of these specifications and drawing are considered by the Board to be clear and to amply support the conclusion reached that the embankment and road surfacing in question were clearly a requirement of the written contract.

In its appeal the contractor avers: "The Contracting Officer is attempting to ignore an *admitted error* by a member of his organization acting as his agent." As to this the contractor makes two points. First, it stresses the fact that prior to bidding it was told to contact Mr. Vasse for the purpose of ascertaining the location of the work and answering any questions that it might have. Second, it refers to an apparent recognition by the contracting officer that "the work

in question was actually *under contract* with another firm" at the time the instant contract was received.

While in the findings the contracting officer appears to concede this latter point, the evidence of record is to the contrary. It is true that a notice of award covering the work in dispute was issued to another firm under date of May 29, 1963 (Government Exhibit No. 2). Such notice was conditioned, however, upon the contractor in question executing and returning the formal contract accompanied by the required performance and payment bonds acceptable to the Government. Due to what was described at the hearing as "bond troubles," these conditions precedent to the coming into existence of that construction contract were not satisfied until early October of 1963. This was more than two months after the instant contract duly executed by the Government and accompanied by the notice to proceed were received by the contractor on July 27, 1963.

The notice of award of May 29, 1963 was the genesis, however, of the error made by the Government representative at the site inspection on June 24, 1963. At the time of the site inspection with the contractor's representatives, Mr. Vasse knew that another firm had bid upon and been notified of the acceptance of its bid for work including that portion now in dispute. This caused him to conclude that the inclusion of the same work in the advertisement upon which the contractor was being requested to bid was in error, and prompted him to advise the contractor that the work in dispute "was not to be bid on."

Unfortunately, Mr. Vasse's conclusions were not well founded. The construction engineer (who had participated in drafting the controlling specifications) testified that the work in dispute was consciously included in the invitation to which the appellant responded in order to avoid the possibility of a conflict resulting from two contractors occupying the same jobsite at the same time.

Authority of Government Representative

The question remains as to whether Mr. Vasse was, in fact, acting as the agent of the contracting officer in reference to the matter in controversy, as is contended by the contractor. Insofar as showing the worksite to the contractor is concerned, there is no question but that Mr. Vasse was acting in an official capacity on behalf of the Government. In his testimony the contracting officer so acknowledged. He also testified that Vasse could discuss any questions that the contractor might have on the specifications but denied that he had any authority to make decisions. In his testimony the contracting officer made it

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clear that he considered Vasse's authority to be that of an inspector.¹

It is noteworthy that in the findings the contracting officer expressly found that Vasse had not been required to make a decision on the matter in question. The testimony of both the contractor and Mr. Vasse corroborate this finding of the contracting officer. Speaking of the "instructions" to delete the disputed work from the bid submitted, the contractor's General Superintendent stated that Vasse brought the matter up "of his own volition, no one asked him." This is in accord with the testimony given by Mr. Vasse at the hearing.

There is no evidence that in acting upon his own authority Vasse considered that he had any power to delete any work required by the terms of the invitation. According to his testimony Vasse knew that the work in question "was in the contract at the time the bid was submitted" but he "expected it to be removed"; he "thought it was an error." Perhaps because the Special Conditions of the invitation identified Vasse as Refuge Manager, the contractor seems to have acted upon these expectations and to have uncritically accepted Vasse's representations. In any event, it appears to have put nothing in its bid to cover the disputed work. Although acknowledging that it was aware of the variance between the terms of the invitation and Mr. Vasse's "instructions," the contractor did not raise a question with the contracting officer as to such variance before submitting its bid; nor did it raise any question as to such variance before proceeding with the execution of the contract.

From its appeal and the testimony offered by the appellant at the hearing, it appears that the contractor had hoped to establish that Mr. Vasse, in giving the "instructions" relied upon, was the agent of the contracting officer. The contractor offered no evidence to show that the contracting officer had authorized Vasse to make the representations in question, or to show that the contracting officer in any way ratified such representations upon discovering that they had been made.

¹ Vasse appears not to have been officially designated as an inspector until the notice to proceed was issued by letter under date of July 25, 1963, which specifically called attention to Section 18 of the General Conditions of the contract. This was exactly a month after the contractor's bid was submitted and over three weeks after the Government's notice of award of June 28, 1963, and the execution of the contract by the contractor on July 2, 1963. In these circumstances it is doubtful that knowledge of Vasse being an inspector can be imputed to the contractor at the crucial times. For cases emphasizing the marked limitations upon an inspector's authority, however, see *Jefferson Construction Company v. United States*, 151 Ct. Cl. 75 (1960), affirming the decision of the Armed Services Board of Contract Appeals in *Appeal of Jefferson Construction Co.*, ASBCA 2249 57-1 BCA par. 1330 (1957), and citing *Woodcraft Corporation v. United States*, 146 Ct. Cl. 101, 173 F. Supp. 613 (1959), and *James McHugh Sons, Inc. v. United States*, 99 Ct. Cl. 414 (1943).

On this record there is no doubt that the contractor has failed to establish a case of express agency. It is at least highly doubtful that it has established a case of implied agency under the general principles of the law of agency. Irrespective of the decision on that question, however, it is clear that the contractor has failed to do so in a case where, as here, an agent of the Government is involved. In such circumstances the doctrine of apparent authority² has no application. See *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). In *Montana Power Co. v. Federal Power Commission*, 185 F. 2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1950), the rationale of the doctrine was explained in the following terms:

* * * The Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials.

Based upon the evidence of record and the application of long established legal principles governing agents of the Government in their dealings with others,³ we find that Willis D. Vasse was without authority to change the scope of the work in an advertised procurement for whatever reason. We further find that oral "instructions," admittedly issued by him in advance of the award of the contract and affecting the contractor's obligations, could neither diminish such obligations nor entitle the contractor to remuneration over and above that provided for in the contract.

Lack of Jurisdiction in Board

Assuming, arguendo, that Vasse did possess the authority contended for by the contractor, the question would then become what relief could be provided to the contractor. It is well established that the authority of this Board is limited to deciding cases in accordance with the terms of written contracts. *Korshoj Construction Co., Inc.*, IBCA-9 (May 2, 1956), 63 I.D. 129, 6 CCF 61,867. While the Board does have authority to interpret contracts,⁴ there is no need to construe the contract where no ambiguity exists. *Barkley Pipeline Construction, Inc.*, IBCA-291 (February 25, 1963), 1963 BCA par. 3664,

² Under the doctrine of apparent authority, an agent without actual authority may bind his principal to a third party in circumstances where the principal has manifested to the third party his consent to the agent's contract or representation. Restatement, Agency, sec. 8; Méchem, Agency, sec. 90 (4th ed. 1952).

³ *Floyd Acceptance*, 74 U.S. (7 Wall.) 666 (1868); *Pierce v. United States and The Dover Five Cent Savings Bank*, 19 L. ed. 169 (1869).

⁴ Appeal of *Framtau Corporation*, IBCA-228 (November 1, 1961), 68 I.D. 324, 61-2 BCA par. 8198.

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5 Gov. Contr. 183(j) ; nor does the Board have any authority to substitute a different agreement for that made by the parties, as it is without authority to either rescind or reform contracts. *Duncan Miller*, IBCA-305 (April 18, 1962), 69 I.D. 25, 1962 BCA par. 3339, 4 Gov. Contr. 310.

Comparatively early in its history this Board had occasion in the *Korshoj* case, *supra*, to consider questions similar to those raised in the instant appeal. In that case the Board concluded that the Government would not be bound by any assurances orally given prior to bidding by a subordinate of the contracting officer not authorized to give them. Even if such assurance had been given, however, the Board found that they would have had no effect unless embodied in the written contract. This finding was based upon the well-settled rule that the written contract merges all prior negotiations and is presumed to express the final understanding of the parties. To the extent that the claim may have been based upon misrepresentations made prior to bidding, the Board concluded that it would not be a matter within its cognizance, being a claim for breach of contract.

Conclusion

Except for separate questions involved in the liquidated damages assessed for delayed performance, the reasoning employed and the authorities cited⁵ in *Korshoj*, *supra*, are considered to be dispositive of the issues raised by these appeals. Accordingly, for the reasons stated, the contractor's appeal in IBCA-413 is hereby denied.

IBCA-458-9-64

This appeal concerns the propriety of liquidated damages assessed by the contracting officer in his Findings of Fact of July 29, 1964. As previously noted, the contract specified a completion date of December 26, 1963. It was found to be substantially complete on July 21, 1964.

⁵The continuing vitality of the Parole Evidence rule is well illustrated by the recent case of *United States v. Croft-Mullins Electric Co., Inc.*, 333 F. 2d 772, 779 (5th Cir., 1964), in which the Court stated: "The contract was plainly executed by the parties for the purpose of embodying in a single instrument all of the arrangements between them. This is apparent from an examination of the contract itself. The terms of the agreement were thus integrated in the manner referred to by Mr. Wigmore. See 9 Wigmore on Evidence, secs. 2425 *et seq.* (3d ed. 1940). It follows that the prior or contemporaneous oral negotiations between the parties cannot be referred to for the purpose of ascertaining what constituted the agreement between the parties. * * *"

Respecting the liquidated damages assessable for the time intervening between these two dates, the contracting officer found that "the period from December 12, 1963 to May 19, 1964, or 160 days, should not be counted in computing the delay." While noting that the disputed work (the same as involved in IBCA-413) could have been completed prior to December 12, 1963, the contracting officer concluded that it was appropriate for the contractor to await the contracting officer's decision before proceeding with the work in question. That decision was not received by the contractor until on or about December 12, 1963. On that date, according to the inspector's daily logs, freezing conditions existed. This would have precluded the contractor from proceeding, since the specifications did not permit the use of frozen earth for the embankment. The same logs show that "frozen earth conditions prevailed throughout the winter and rain and wet earth prevailed throughout the spring," but that on May 19, 1964 suitable working conditions existed. There were the several factors underlying the contracting officer's determination that the aforementioned period should not be counted in computing the delay.

The liquidated damages assessed reflect the contracting officer's determination that the work in question should have been completed by June 3, 1964. In this connection he refers to the contractor having testified that the work could be done in a period of two weeks. He also refers to "the 15 days' remaining time from December 12, 1963." Projecting this period of 15 days forward from May 20, 1964 (the date on which work could have been resumed), results in the timely completion date as found of June 3, 1964.

With respect to the above determination it is noted that in the decision of December 9, 1963, the contractor was formally advised of his obligation to perform the disputed work. In the same decision the contracting officer called the contractor's attention to the following provision from Clause 6 of the General Provisions:

* * * Pending final decision of a dispute hereunder, *the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.* (Italics supplied.)

Subsequently, by certified letter of February 26, 1964, the contracting officer specifically requested the contractor "to proceed with the work as soon as ground conditions permit." Thus, there is no doubt that the contractor was well aware that it had the obligation to continue with the work regardless of the dispute. At the hearing the President of the contractor testified that he had specifically so acknowledged to the contracting officer.

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The contracting officer found that "the delay in performance consists of the period from June 4, 1964 to July 21, 1964, or 48 days and liquidated damages shall be assessed accordingly at \$40 per day, or a total of \$1,920." In support of that determination he stated:

The Inspector's logs show that delays beyond June 3, 1964 were those of a subcontractor and, in the absence of a showing at this time to the contrary, these delays are not found to be excusable.

A timely appeal was taken from this finding on two grounds, viz: (i) "The contracting officer is obviously attempting to assess the Contractor for a mistake made by a subordinate under his administration"; and (ii) certain difficulties related to the location of the borrow pit and other work impeded the selected subcontractor in proceeding with the work in question.

As to the first ground, it is noted that the 160 days of delay found to be excusable reflect a recognition by the contracting officer of the delay in contract performance related to the "mistake made by a subordinate under his administration." In neither the appeal nor in the testimony at the hearing, however, did the contractor ever address itself to the question of why it was not in position to commence performance of the disputed work as soon as ground conditions would permit in the spring of 1964. Certainly the failure of the contractor to be in a position to so proceed was not due to the contracting officer's neglect to inform the contractor of its obligations in this respect.

It is noted that under the language of General Provision No. 5 (Standard Form 23-A, April 1961 edition), liquidated damages are assessable until the work is completed or accepted, unless "the delay in completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor"; and that if the delays are attributable to subcontractors, they must be due to "unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors."

Because of the circumstances involved in the instant appeal, consideration should be given also to the decisions of this Board which have set forth the quantum of proof required in order for the contractor to establish an excusable cause of delay. This Board has held that a contractor who seeks an extension of time under a standard form of construction contract has the burden of proving that the alleged cause of delay actually existed, *Larsen-Meyer Construction Co.*, IBCA-85 (November 24, 1958), 65 I.D. 463, 58-2 BCA par. 1987 (1958); and

that in order for a contractor to prevail, it must allege and prove specific facts to show that the failure to complete the contract work on time was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of the contractor and its subcontractor or supplier, *Industrial Service & Engineering Company*, IBCA-235 (July 28, 1960), 67 I.D. 308, 2 Gov. Contr. 432, 60-2 BCA par. 2701 (1960); *Eagle Construction Corporation*, IBCA-230 (July 18, 1960), 67 I.D. 290, 2 Gov. Contr. 422, 60-2 BCA par. 2703 (1960).

As noted above, the contractor has asserted a second reason to justify its delayed performance. It has offered no evidence, however, to support the allegations made in the notice of appeal respecting the delays of its subcontractor. Mere allegations are not sufficient to overcome findings made by a contracting officer. *Refer Construction Company*, IBCA-267 (February 28, 1962), 1962 BCA par. 3299.

On the basis of the evidence of record the Board finds that the contractor failed to proceed diligently with the performance of the disputed work in accordance with the decision of the contracting officer pending the resolution of the dispute, as required by General Provision No. 6 of the contract. The Board also finds that the contractor had ample opportunity to prepare itself to commence performance of the disputed work on or about May 20, 1964, and that if it had done so, the work in question could have been completed by June 3, 1964.

Accordingly, the Board finds that the delays in contract performance occurring after June 3, 1964, were not unforeseeable and beyond the control and without the fault or negligence of the contractor and its subcontractor.

Conclusion

The appeal in IBCA-458-9-64 is hereby denied.

WILLIAM F. MCGRAW, *Member.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

THOMAS M. DURSTON,
Deputy Chairman.

APPEAL OF CONTRACTORS, INC.**IBCA-339***Decided September 29, 1965.***Contracts: Construction and Operation: Changes and Extras—Contracts: Performance or Default: Excusable Delays**

Where delay on the part of the Government in the issuance of a change order causes an interruption of the work, the contractor is entitled to an extension of time for performance of the contract, within the meaning of Clause 5 of Standard Form 23-A (March 1953 edition).

Contracts: Performance or Default: Excusable Delays—Contracts: Disputes and Remedies: Damages: Liquidated Damages

Liquidated damages are properly assessed pursuant to contract provisions therefor with respect to unexcused delay resulting from the removal of the contractor's personnel and equipment from the project site during periods when substantial progress could otherwise have been made in the performance of the contract.

BOARD OF CONTRACT APPEALS

The appellant, hereafter referred to as the contractor, under date of February 24, 1960, entered into a contract with the Federal Government on Standard Forms 23 and 23-A (March 1953 edition). Under this contract the contractor was to erect a reinforced concrete bridge underpass, and to grade the approaches thereto on a portion of the Natchez Trace National Parkway, in Hinds County, Mississippi, known as Project 3R6 (one of five inter-related "3-R" projects on which the contractor was working at the time). This contract performance was administered by the Bureau of Public Roads for the National Park Service.

Notice to proceed was received by the contractor on March 21, 1960. Work was scheduled to be completed within 300 days thereafter, or on January 15, 1961. The contract provided for liquidated damages of \$100 per day for unexcused delay beyond the required completion date.

Work was not completed until August 8, 1961; therefore, there was an overrun of 205 days in contract time. By letters dated January 16, and July 5, 1961, addressed to the Bureau of Public Roads, extensions of contract time were sought to cover the delays discussed therein. On July 13, 1962, the Regional Engineer issued a letter to the contractor, including findings of fact. In this letter he allowed 99 days for delays due to unsuitable weather conditions and for delay in pile delivery; but he assessed the amount of \$10,600 for the remainder of 106 days overrun.

The contractor appealed timely on August 10, 1962, from the decision of the Regional Engineer. On December 14 and 15, 1964, in

Washington, D.C., a formal hearing was held before a member of this Board. The contractor's president appeared as its only witness. The Federal Government relied upon the testimony of the Regional Engineer and the Project Engineer.

The Board has carefully reviewed the record, the exhibits, and the correspondence pertaining to this claim. It appears therefrom that the contractor advances five (5) reasons as to why he believes he should not have been assessed liquidated damages of \$10,600. These reasons are as follows:

I. Government failure to expedite issuance of Change Order Number 1.

II. Design changes resulting in restaking of a detour road, and excessive time required for curing of bituminous material on the detour road.

III. Government delay in decision pertaining to use of excavation material from Project 3R6 for possible use as fill material on other separate but related projects in the "3-R" series.

IV. Government delay in furnishing a pile driving plan with subsequent delay in pile delivery.

V. Additional delays experienced as a result of unsuitable weather.

The contractor's contentions will be discussed in the order listed above.

Claim Item I

Change Order Number 1, dated May 6, 1960, accepted by the contractor on May 13, 1961, involved the procuring and installation of a 24-inch corrugated metal pipe at Station 9+50 on the project temporary detour road.

The contractor made a token start of performance of the contract on March 28, 1960, when its superintendent and two or three laborers began cutting brush with saws and axes on the Natchez Trace right-of-way where it was to be crossed by the detour road. This area had been staked by the Government on March 22, 1960. The contractor brought bulldozer equipment to the site on April 11, 1960, and completed the clearing and grubbing work about April 15, 1960. The contractor removed its equipment and personnel about April 16, 1960, and did not return until sometime in the last week of May 1960.

In the meantime, the Government forces under Mr. B. B. Pickering, Assistant Resident Engineer, had been staking the detour road. It was necessary that the contractor complete the detour road prior to starting the construction of the bridge over the Natchez Trace Parkway, because the highway (Mississippi Route No. 27), of which the bridge was to be a part, could not be used while the bridge was being constructed, and would be closed to traffic. The staking of the detour was completed about March 31, 1960.

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On or about April 1, 1960, it was recognized by Mr. Pickering that it would be necessary to provide a culvert pipe under the detour road. The contract plans did not require such a culvert. Mr. Pickering called this proposed change to the attention of Mr. Brannan, the contractor's superintendent, about April 1, 1960. Change Order No. 1, directing the construction of the culvert, was not issued until May 6, 1960, and it was not received by the contractor until May 13, 1960. According to the Resident Engineer on the project for the Bureau of Public Roads, the reason for the delay was the understanding on the part of Government officials that there was no urgency, because the contractor had not secured a subcontractor to perform the rough grading of the detour road. The Board considers that this was not a sufficient justification for delaying the issuance of the change order. The Government had the responsibility to move promptly on this matter. The change order reasonably could have been issued by April 15, 1960, when the site was ready for the pipe to be installed.¹

It is contended by the contractor that it had equipment available for the grading work but, knowing that the culvert pipe would be required, it did not start the grading until the culvert work and the grading could proceed at the same time. Otherwise the grading would necessarily stop where the culvert pipe was to go, and the grading equipment would thereafter be idle or would have to be removed from the site until the culvert pipe could be delivered. In our opinion, however, the contractor failed to carry out its responsibilities adequately when it did not perform the rough grading promptly and to the greatest extent possible. On receipt of Change Order No. 1, the contractor ordered the culvert pipe and it was delivered and installed about May 27, 1960. The rough grading had been started about May 24, and was completed on June 11, 1960. The Board concludes that a time extension should be granted for 16 of the 28 days of Government delay in delivery of the change order. The Board has subtracted from that 28-day period the additional time (May 28 to June 11, 1960), used by the contractor to complete the rough grading after installation of the pipe culvert, less two days considered to be adequate for adjustment in the grading work due to the fact that the order for the culvert work was delayed.

Claim Item II

The contractor contends there was delay arising out of changes in design resulting in a restaking of the detour road, and that the

¹ *Allied Contractors, Inc.*, IBCA-265 (September 26, 1962), 69 I.D. 147, 1962 BCA par. 3501, 4 Gov. Contr. 512; *Wyle Maddox*, IBCA-248 (December 20, 1961), 61-2 BCA par. 3254, 4 Gov. Contr. 36.

contractor could not start work prior to April 1, 1960.

The contractor's payroll records indicate the work commenced on March 28, 1960. The initial stake-out was completed March 28, 1960, to mark the clearing-grubbing limits on the detour portion of the project. A minor revision was made on March 31, 1960, because a proposed turn was too sharp for the safety of the traveling public. The limited extent and minor nature of the revision is shown in Government Exhibit "B." This revision appears to be nothing more than a normal and expected adjustment that does not result in entitlement to additional time or money, as referred to in Changes Article 4.2 of Standard Specifications FP-57, to which the contract involved was subject.

The same reasoning applies to a grade revision which was made on or about May 31, 1960. The grade was lowered, and the contractor has admitted that the order which revised the grade was of benefit to him from an operational standpoint because he had less dirt to haul over a shorter distance. But the contractor complained of the timing of the order. It does not appear that the timing of the order caused the contractor any delay because at that time he was occupied with other work and was not ready to perform the change. Not every Government delay will entitle the contractor to an extension of time. The delay, in order to justify an extension, must have been such as to cause an appreciable delay in the completion of the contract.²

The curing period for the asphalt prime coat on the detour was dependent upon the opinion of the engineer-in-charge. Article 310-3.5 of FP-57 provides in pertinent part as follows:

310-3.5 Maintenance and Opening to Traffic. Traffic shall not be permitted on the primed surface until the bituminous material has penetrated and dried, and in the opinion of the engineer, will not pick up under traffic. Where the engineer deems it impracticable to detour traffic, the contractor shall spread the minimum quantity of sand or other approved material necessary to avoid picking up, and traffic shall be allowed to use areas so treated. * * *

The engineer required a curing period of 7 days, and it is asserted by the contractor that about 4 hours would have been sufficient if sand or similar blotting material had been used, as provided in Article 310-3.4 with respect to alternate treatment of roads having two or more lanes. However, it is conceded by the contractor that it did not use such blotting material and did not request permission to use it. Moreover, both specifications seem to apply principally to construction of highways where it is necessary to allow traffic to proceed as soon as practicable while work is going on, and in the absence of a detour, rather than to the construction of the detour road itself. This claim of excusable delay is denied.

² *Rasmussen Construction Company, IBCA-358 (August 20, 1964), 1964 BCA par. 4388.*

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Following the curing period of August 2 to August 9, 1960, there was a spell of unusually rainy weather until August 24, 1960, for which the contracting officer allowed 15 days' extension of time. On August 24 or 25, 1960, the contractor applied the final surface treatment, completing the construction of the detour road. Again there was a curing period of about 1 day followed by a period of apparent misunderstanding which lasted until about September 6 or 7, 1960. The contractor claims that the Government representative, Mr. Pickering, was to notify the contractor when the detour road could be opened to traffic. The Government denies this. Mr. Pickering testified that he told Mr. Brannan on August 25, 1960, "that it was up to them" to open the detour, and that Mr. Brannan indicated "that there was not any hurry for it." As will be discussed *infra*, it would have been of little or no value to open the detour road to traffic until the contractor received from the Government certain data with respect to the locations where excavation was to be performed so that test piles could be driven at the bridge abutments. The Government points to the specifications in Article 4.3 of FP-57 requiring the contractor to take the initiative in opening the detour road and in placing signs and barricades to close the main highway. Moreover, the specifications in Article 314-3.4 of FP-57 indicate that immediately after the surface treatment has been applied, the road may be opened to traffic. In any event, the contractor removed its personnel and equipment from the site after applying the surface treatment and did not make inquiry of the Government with respect to the possibility of opening the detour road. Mr. Pickering again called it to the attention of Mr. Brannan about September 6, 1960, and the contractor thereupon closed the highway with barricades and posted signs opening the detour road.

It is concluded that there is no justification for the issuance of time extensions for the causes listed in Claim Item II of the claim.

Claim Item III

On August 12, 1960, the contractor had requested permission to use material it expected to excavate for the bridge (and which was required by the specifications to be wasted) in work undertaken at nearby projects (3R5 and 3R7) by its affiliated companies. The Government refused to grant such permission unless the Government received consideration commensurate with the savings to the contractors that would result by reason of the reduction in cost to them of borrow material that was required for 3R5 and 3R7.

The change order, if issued on the basis sought by the contractor, would have been solely for the contractor's benefit. The Government

was under no obligation to issue it. The contractor claims that it incurred costs of about \$2,000 by reason of the fact that its affiliates were obliged to secure fill material elsewhere, and that it was delayed 30 days during negotiations. No evidence was offered in support of such alleged costs. This claim is denied, both as to the monetary aspect and the alleged delay.

Claim Item IV

The Government issued Directive A on July 8, 1960. The directive required that one test pile be driven at each of the two bridge abutments, in such a manner that the piles could be used as foundation piles. Previously, the test piles were not required to also function as foundation piles. The contractor obtained surplus test piles from Project 1F2 on or about July 12, 1960, but the specifications³ required that the ground first be excavated to the bottom of the footing at the points where test piles were to be driven. The excavation could not be started until the detour road had been completed. Commencement of excavation also depended on receipt by the contractor of information concerning the pile locations. The contractor complained that it did not receive the revised foundation pile layout until September 16, 1960, apparently in response to the contractor's written request of September 12, 1960 (which was preceded by several verbal requests, according to the contractor). The contracting officer's findings state that the pile layout was in the hands of the Project Engineer on August 26, 1960, and that he could have furnished the proper locations for the test piles on or after that date, if the contractor had requested the information. Mr. Pickering testified to the same effect.

It has been shown that the detour road could have been opened for traffic on or about August 26, 1960. Hence, it seems to the Board that the Government, knowing the state of readiness of the detour and having the pile layout available on the same date (the contractor apparently did not know this) should have advised the contractor immediately concerning the locations of the test piles. This could have expedited performance of the excavation work and pile driving operations that were prerequisites to the construction of the bridge. There was a delay of approximately 20 days which might have been avoided by prompt notification to the contractor by the Government. It is not a sufficient defense to say that the Government officials knew that the contractor's personnel and equipment were engaged on other neighboring projects. It was the prerogative of the contractor, and not of the Government, to decide how soon equipment and personnel should be brought back after receipt of information concerning locations for the test piles.

³ Article 400-1.2 of FP-57.

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The contractor claims that its equipment and personnel could have been returned from other projects to Project 3R6 on 8 hours' notice. However, it used 3 or 4 days to bring back its forces on this occasion. The Board finds that the contractor is entitled to a time extension of 16 days for excusable delays resulting from the Government's failure to furnish promptly the information on location of test piles.

On September 19, 1960, the contractor re-assembled his equipment and personnel on Project 3R6 and commenced excavation for the test piles. The driving of test piles was completed on September 30, 1960. Based on these tests the Government, on October 5, 1960, issued Directive B, providing the contractor with data concerning the required lengths of structural steel piling to be ordered by the contractor. The order was placed the same day but due to scarcity of warehouse stocks of steel, resulting from the steel strike of 1959-1960, the contractor was notified by its supplier that delivery of the piling would be delayed until November 2, 1960. The contractor claims that except for the steel shortage the normal delivery time should have been 6 days. The steel was actually delivered on November 2 and 3, 1960.

The contracting officer found that the additional excavation required for the piling that was on order was not completed until October 26, 1960. Therefore, the contracting officer allowed only 7 days additional contract time for delay due to the steel shortage. The contractor explained that it did not complete the excavation work earlier because of the knowledge that the steel piling could not arrive until November 2, 1960. The contractor asserts that in such circumstances it would have been poor construction practice to excavate footing holes several weeks in advance of the arrival of piling, because of the probability of cave-ins and filling of the holes with water. Hence, it used its equipment and men on another project from October 3, 1960 to October 19, 1960, when the time to prepare for arrival of the piling was appropriate. This action appears to have been well-timed, for (after unloading) the contractor began driving the piling on November 4, 1960, and completed it by November 11, 1960. The Board finds no fault in the contractor for utilizing its equipment and personnel as economically as possible, when such use on other projects did not delay its work under the contract for Project 3R6.

It appears that after completion of the piling operation there were no further substantial delays in performance except such interruptions as were caused by unsuitable weather conditions, for which time extensions were granted by the contracting officer. Hence, the delay occasioned by the late delivery of piling had a direct effect upon the date of final completion of the contract.

The Government did not controvert the contractor's assertion that, except for the steel shortage, it could have obtained delivery of the piling 22 days earlier than November 2, 1960. However, of that period, 6 days were granted by the contracting officer because of unsuitable weather. Accordingly, we find that the contractor is entitled to an extension of time of 9 days in addition to the 13 days allowed by the contracting officer (7 for the steel shortage and 6 for weather).

Claim Item V

The contracting officer allowed a total of 92 days for unsuitable weather, 77 days of this total having occurred during the period from December 14, 1960 to April 11, 1961, both inclusive. In addition to the allowances made by the contracting officer the contractor has claimed additional periods of excusable delay because of weather, the first being for "approximately four weeks" out of the period from April 1 to the first week in May 1960, because of rain. However, the contracting officer found in substance that during the period in question the rainfall was considerably less than the average for the previous 11 years. The contractor seems to have abandoned this claim, for it was not discussed in the testimony at the hearing, nor in appellant's post-hearing brief. Moreover, it appears that the contractor's forces were actively engaged in clearing and grubbing at the site of Project 3R6 from April 1 to April 16, 1960, and from the later date until about May 22, 1960, the contractor's equipment was located at other projects, so that no time was actually lost at Project 3R6 on account of weather.

The remaining issues relative to weather resolve about the fact that certain time extensions or stop work orders were granted with respect to other projects during the winter months, but that as to Project 3R6, time extensions for unsuitable weather were denied for periods falling within those granted for the neighboring projects. The Government showed, however, that the other bridge projects were further advanced, and that the cold weather had a more serious effect on the bridge superstructures being constructed on those projects than was the case with respect to the lower level work in progress on Project 3R6. Moreover, the contractor was able to make considerable progress in spite of the weather conditions.

Additionally, it appears that the contracting officer excused the contractor for virtually every day when no work was performed because of severe weather from December 14, 1960 through April 11, 1961. The Board concludes that the contractor has failed to sustain its burden of proof with respect to its claims for additional excusable

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delay because of unusually severe weather. It is obvious that a certain amount of delay because of weather should be anticipated.⁴

Conclusion

The appeal is sustained to the extent that 41 days are hereby granted for excusable delay in addition to those granted by the contracting officer.

The appeal is denied as to all other claims.

CLARENCE EYNON, *Alternate Member.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

THOMAS M. DURSTON,
Deputy Chairman.

CHEMI-COTE PERLITE CORPORATION

v.

ARTHUR C. W. BOWEN

A-30404

Decided September 30, 1965

Notice—Mining Claims: Patent

The 60-day period of publication required by section 2325 of the Revised Statutes on application for mineral patent is complete when the notice has been inserted in nine successive issues of a weekly newspaper and the full statutory period has elapsed.

Mining Claims: Generally

A conflict between a lode claimant and a placer claimant is an adverse claim within the meaning of Revised Statutes sections 2325 and 2326 and is properly resolved by the filing of an adverse claim and the institution of judicial proceedings as provided therein.

Mining Claims: Patent—Mining Claims: Possessory Right

Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered unless filed within the required time.

Mining Claims: Patent—Mining Claims: Possessory Right

An adverse claim filed out of time, and subsequent judicial proceedings based thereon but not begun within the period prescribed by Revised Statutes sections 2325 and 2326, do not preclude the allowance of a mineral entry, nor does the pendency of such proceedings bar the issuance of a patent on such entry.

⁴ *Caribbean Engineering Company v. United States*, 97 Ct. Cl. 195, 229 (1942); *Allied Contractors, Inc.*, *supra*, see footnote 1; *Triangle Construction Company*, IBCA-232 (March 14, 1962), 69 I.D. 7, 1962 BCA par. 3317, 4 Gov. Contr. 316(c).

Mining Claims: Patent—Rules of Practice: Protests

A protest against allowance of an application for patent to a placer mining claim is properly dismissed where the protestant fails to show that the placer applicant has not complied with the requirements of the law for obtaining a patent.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Chemi-Cote Perlite Corporation has appealed to the Secretary of the Interior from a decision dated November 16, 1964, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Arizona land office dismissing its protest against the issuance of a patent to Arthur C. W. Bowen to land embraced in the Mary T and Sandy 2 lode mining claims in T. 2 S., R. 12 E., G.&S.R.M., Arizona.

Bowen filed application Arizona 030706 on June 5, 1961, for mineral patent to the Superior Perlite Nos. 1, 2, 3 and 4 placer mining claims in secs. 8, 9 and 16, T. 2 S., R. 12 E. Notice of the application was published in the *Superior Sun* newspaper for 9 consecutive Thursdays commencing on September 21, 1961. On November 30, 1961, Bowen filed an affidavit of continuous posting of notice of the mineral patent application on the subject claims from March 21, 1961, to and including November 20, 1961.

On December 29, 1961, the appellant filed a protest against the issuance of a patent to Bowen, alleging that (1) the 60 days' publication requirement of the statute (Rev. Stat. § 2325 (1875), as amended, 30 U.S.C. § 29 (1964) was not complied with, since the period from September 21, the date of first publication, to November 16, the date of last publication, was only 56 days; (2) any patent issued pursuant to Bowen's application should exclude land embraced in the appellant's Mary T and Sandy 2 lode mining claims; and (3) the application is contrary to departmental regulation 43 CFR 185.24 (now 43 CFR 3416.1) in that it describes more than 160 acres, since the applicant is applying for 440 acres, and transfers to the applicant of claims by others were by less than 22 persons.

By a decision dated February 28, 1964, the land office dismissed the protest for the reasons that (1) proper compliance with the publication requirement was made by the applicant, since the 60-day period of publication is determined by excluding the first date of publication and adding four days after the last date of publication; (2) the patent applicant stated that to date no lode vein with mineral had been found in the glassy deposit, and two corroborating witnesses

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stated that they were well acquainted with the land and that the property has no vein or lode within the body of volcanic glass known as perlite; and (3) the certified copies of the original and amended location notices reveal that there were adequate locators for the placer claims.

In affirming the dismissal of the appellant's protest the Office of Appeals and Hearings held that the statute, *supra*, does not require that the last publication of notice of a mineral patent application be on the last day of the 60-day period, that the departmental regulations (43 CFR 3453.1, 3470.1(a)) requiring publication for nine consecutive weeks do not shorten the period, and that a person seeking to file an adverse claim has 60 days, excluding the first day, from the date of the first publication of notice in which to file his adverse claim. It found that the appellant did not file its protest until long after the expiration of the period for filing adverse claims, that the statutory provision limiting that period to 60 days is mandatory and precludes consideration of the merits of an adverse claim filed after that period, and that by its failure to file its claim within such time the appellant had waived its right to be heard upon the merits of its claim, citing the Department's decision in the case of *Seymour Gray et al. v. Milner Corporation*, 64 I.D. 337 (1957). The Office of Appeals and Hearings further held that after the expiration of the 60-day period an adverse claim may be considered only as a protest against the approval of a patent application, that the only other charge in the protest had been refuted by the land office, and that the appellant had not asserted that charge in its appeal.

In its appeal to the Secretary the appellant renews allegations made in its appeal to the Director, Bureau of Land Management, that the 60-day publication requirement was not satisfied and that the appellant's lode mining claims were known to exist by Bowen at the time he located his placer claims and at the time he made application for a patent. It contends that the Bureau erroneously concluded that the protest is an adverse claim rather than a protest against the approval of the patent application, that under the ruling in *Noyes v. Mantle*, 127 U.S. 348 (1888), the appellant's claims were "known to exist" by the applicant when he applied for a patent, that the election of the applicant not to include those claims in his application is a conclusive declaration that he has no right to possession of such claims, and that the lode claims are property of the appellant and are not subject to disposition by the Bureau of Land Management.

With respect to the appellant's initial contention, it has long been established that the statutory requirement of 60 days' publication is satisfied when notice has been inserted in nine successive issues of a weekly newspaper, and the full statutory period has elapsed, since a tenth weekly issue would be after the expiration of the period for filing of adverse claims and, therefore, a meaningless gesture. *Davidson v. The Eliza Gold Mining Co.*, 28 L.D. 224 (1899). The appellant's contention is, therefore, wholly lacking in merit.

Sections 2325 and 2326 of the Revised Statutes (1875), as amended, 30 U.S.C. §§ 29 and 30 (1964), prescribe the method of determining the right of adverse claimants to the possession of mineral lands for which a patent application has been made. Section 2325 provides in part that:

* * * The register of the land office, upon the filing of * * * [an application for patent to a mining claim] * * * shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim * * *. If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Section 2326 provides in part that:

Where an adverse claim is filed during the period of publication * * * all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession * * *.

The foregoing language has been interpreted by this Department and by the courts to mean simply that the failure of a party to file an adverse claim within the 60-day publication period amounts to a waiver of any rights which might have been asserted by such a claim. Thereafter, such adverse claimant may show that the patent applicant has not complied with the requirements which would entitle him to a patent, but he may not assert his own claim as a bar to the issuance of a patent to the applicant. *Dahl v. Raunheim*, 132 U.S. 260 (1889); *Wight v. Dubois*, 21 Fed. 693 (C.C.D. Colo. 1884); *Seymour Gray, et al. v. Milner Corporation, supra*, and cases there cited. Thus, the Bureau properly found that the appellant had waived its right to assert a claim adverse to that of the patent applicant.

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The appellant contends, however, that its present action is in the nature of a protest and is not an adverse claim. Nevertheless, it is asserting the existence of its lode claims as the basis for its opposition to the issuance of a placer patent to Bowen for the same mineral deposits that it claims as lodes. Thus, the appellant is, in fact, attempting to assert a claim adverse to that of Bowen, for it is well established that the same mineral deposit cannot be the basis for both a lode and placer location and that a conflict between a lode claimant and a placer claimant is an adverse claim within the meaning of sections 2325 and 2326 of the Revised Statutes, *supra*. *Cole v. Ralph*, 252 U.S. 286, 295 (1920); *Webb v. American Asphaltum Mining Co.*, 157 Fed. 203 (8th Cir. 1907); *San Francisco Chemical Co. v. Duffield*, 201 Fed. 830 (8th Cir. 1912); *Titanium Actynite Industries v. McLennan*, 272 F. 2d 667 (10th Cir. 1959); *Ethelyndal McMullin et al.*, 62 I.D. 395 (1955). The same authorities make it clear that a suit filed pursuant to Revised Statutes section 2326 is the proper means for determining not only possessory rights between the conflicting mining claimants but all facts involved in a valid possessory right, including the question as to whether the mineral deposit claimed is subject to placer location or to lode location. Although the point does not seem to have been directly made in the cases cited, the rulings in them make it plain that a lode claimant asserting a right to the same deposit as a placer claimant cannot rely upon the "known vein or lode" provisions of Revised Statutes section 2333 (1875), 30 U.S.C. section 37 (1964), to salvage rights lost by an unsuccessful adverse claim or by the failure to file a proper adverse claim.

Moreover, contrary to the appellant's apparent theory, a location embracing a prior valid and subsisting location is not *ipso facto* void and ineffectual, but, if unopposed, may properly become the subject of mineral patent. Thus, a valid and subsisting location will in no case avail to defeat a junior location, as to which patent proceedings are regularly prosecuted, except upon the invocation of judicial intervention. *The Clipper Mining Co. v. The Eli Mining and Land Co. et al.* (On review), 34 L.D. 401, 408 (1906). The appellant, therefore, in order to protect any rights which may have been established by its lode locations, was required to institute adverse proceedings in accordance with sections 2325 and 2326 of the Revised Statutes, *supra*. Having failed to do so, it is now precluded from asserting the existence of those claims as a bar to the recognition of the placer claims.

Aside from the charges which have already been found to lack merit, the appellant has not alleged failure of the placer applicant to comply with the requirements which would entitle him to receive a patent.

Accordingly, the protest was properly dismissed. Whether the deposit is locatable as a placer or a lode, however, must still be determined in the adjudication of the patent application. *The Clipper Mining Co. v. The Eli Mining and Land Co., et al., supra; Ethelyndal McMullin et al., supra.*¹

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

¹The record discloses that a timely adverse proceeding was instituted in December 1961 in the Superior Court of the State of Arizona in and for the County of Maricopa by Sil-Flo Corporation as a result of other lode claims conflicting with the placer applicant's claims. This action is still pending in the Arizona courts (see *Sil-Flo Corporation v. Bowen*, 402 P. 2d 22 (Ariz. 1965)), and final action on Bowen's patent application must necessarily await the outcome of that litigation.

In June 1962, after the expiration of the period prescribed by Rev. Stat. §§ 2325 and 2326, *supra*, for the institution of adverse proceedings, and after its protest had been dismissed by the land office, the appellant instituted a proceeding in the Superior Court of the State of Arizona in and for the County of Pinal to establish its possessory right to the claims in conflict. In a decision dated April 24, 1964, the court granted judgment for the appellant and enjoined Bowen from any claim, interest, right of possession in or to the Mary T and Sandy No. 2 lode mining claims. It appears from the record that this case is presently on appeal before the Supreme Court of Arizona. Regardless of the ultimate disposition of the case in the State courts, however, this action is not a bar to the adjudication of Bowen's patent application, as a judicial determination of the possessory rights of conflicting mining claimants is not necessarily binding upon this Department in determining to whom a patent should be issued, and the pendency of such proceedings, commenced after expiration of the statutory period for initiating such action, does not bar the issuance of a patent. *Nettie Lode v. Texas Lode*, 14 L.D. 180 (1892); *Madison Placer Claim*, 35 L.D. 551 (1907).

PALO VERDE VALLEY COLOR OF TITLE CLAIMS

Accretion

Accretion is the gradual and imperceptible accumulation of land by action of water, title to such land accruing to the upland owner, and erosion is the gradual and imperceptible reduction of land by such action, title to the eroded land being lost to its former owner.

Avulsion

Avulsion is the sudden and perceptible shifting of a river, in which case title to land is not affected.

Boundaries

Because of the presumption in favor of the permanence of boundary lines, any change in a riparian boundary is presumed at law to be an accretion rather than an avulsion.

Accretion—Avulsion

In determining title to land, the preferable distinction between accretion and avulsion is based upon whether the land in question retained its identity.

Color or Claim of Title: Generally

Federal withdrawn land is not subject to the Color of Title Act.

Color or Claim of Title: Applications

Land attaching to Federal withdrawn land by accretion itself becomes withdrawn and is not public land subject to color of title applications even when later separated from the withdrawn land by artificial avulsions.

M-36684*October 4, 1965***TO: SECRETARY OF THE INTERIOR.****SUBJECT: PALO VERDE VALLEY COLOR OF TITLE CLAIMS.**

Nineteen applications were filed with the Bureau of Land Management under the Color of Title Act of 1928, as amended,¹ for patents to issue to public lands on the west bank of the present channel of the Lower Colorado River.² These applications were rejected by Bureau of Land Management decision, approved by the Under Secretary, on April 5, 1965.³ The Department of Justice has been requested to institute trespass actions, for ejectment and damages, against some of the claimants, and similar requests are being prepared as to the others. Because of Congressional interest in this matter, I am setting out for your information the factual and legal background of this problem.

¹ 45 Stat. 1069, as amended, 67 Stat. 227 (1953), 43 U.S.C. sec. 1068 (1964).

² BLM serial numbers, Riverside 05356 through 05373 and Riverside 05503.

³ Union Feed Yards, Inc., *et al.*, April 5, 1965.

In 1903, all lands in Arizona lying within six miles of the Colorado River, west of the 114th Meridian, were withdrawn for reclamation purposes pursuant to section 3 of the act of June 17, 1902.⁴ The area involved here was surveyed by the General Land Office in 1917. Both before and after this survey, reaches of the river with which we are concerned had been forming progressively larger bows or bends to the west.

The force of the river's current was detaching soil from the west bank and carrying it downstream. At the same time, soil from upstream was being gradually deposited on the opposite bank. Title to soil accumulating upon the east bank of the river is in the United States and, by the same token, owners of land on the west bank lost title to soil eroded from their land.⁵

By 1923-24, the bows in the river had moved far enough west to threaten levees constructed to protect farms in the Palo Verde Valley. The seriousness of this threat is revealed in a report prepared in September 1922, which recommended that cuts be made in the river channel to eliminate the bends. The bends in which the subject lands are located were known as the Raab, Hauser, and Comer bends. As to the Raab bend, the report stated: "The river, *for some time past*, has given unmistakable evidence of its desire to develop this bend and attack the levee." In the Hauser area, the report observes: "The river, *for many years*, has been developing an acute bend to the west." And further, "As in the case of the Raab and Hauser bends, this bend [Comer] is becoming more pronounced each year."⁶

Accordingly, in 1923-24, artificial cuts were made, straightening the river's course and eliminating the bends. The lands within these bends were separated from the eastern bank of the river and the Federal withdrawn lands to which they had been attached. These are the lands which are the subject of the color of title applications.

The Color of Title Act permits persons in certain circumstances to obtain limited amounts of public land to which they do not have title. Section 1(a) of the 1953 amendment⁷ requires the Secretary to issue a patent for not to exceed one hundred and sixty acres for an appraised value of not less than \$1.25 per acre, whenever it is shown to his satisfaction that a tract of land has been held (1) in good faith, (2) and in peaceful, adverse possession, (3) by a claimant, his ancestors or grantors, (4) under claim or color of title, (5) for more than twenty

⁴ 32 Stat. 388, 43 U.S.C. sec. 416 (1964).

⁵ *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 717 (1836).

⁶ Report to Board of Directors, Palo Verde Joint Levee District, by C. N. Perry and F. C. Finkle, September 5, 1922. [Italics added.]

⁷ 67 Stat. 227; 43 U.S.C. sec. 1068(a) (1964).

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years, and (6) that valuable improvements have been placed on the land or some part of it has been reduced to cultivation.

The Color of Title Act applies only to public land, *i.e.*, vacant, unappropriated, unreserved Federal real property subject to the public land laws. *Beaver v. United States*, 350 F. 2d 4 (9th Cir. 1965). In the *Beaver* case a color of title application was filed for land accreted to withdrawn land located on a stretch of the Lower Colorado River slightly downstream from the present area of interest. The Court of Appeals upheld the trial court's denial of the color of title claim on the basis that:

* * * (a) this was not land subject to public entry, for it was land accreted to withdrawn land; and (b) withdrawn land is not subject to the Color of Title Act because it is already appropriated for other purposes. [Citing *Federal Power Comm'n. v. State of Oregon*, 349 U.S. 435, 446-48 (1955), and other cases.]

This decision serves to reaffirm the principle, established in earlier cases, in Departmental decisions, and Federal regulations, that public land does not include reserved or withdrawn land⁸ and that accretions to withdrawn land become part of that land and subject to the withdrawal.

The rules of law affecting the movement of streams may be simply stated. The gradual and imperceptible accumulation of land by action of a river is known as accretion.⁹ Gradual and imperceptible reduction of land by such action is erosion. Title accrues to the upland owner by accretion.¹⁰ It is lost by erosion.

Avulsion is the sudden and perceptible shifting of the course of a river.¹¹ It may be natural or artificial. In the case of avulsion, title to the avulsed land is not lost by its former owner nor does it accrue to the owner of what was formerly the opposite bank.¹²

Although the distinction between accretion and avulsion is often discussed in terms of the suddenness of stream movements, for purposes of determining title to land along rivers which flow rapidly and whose banks are susceptible to erosion, the Supreme Court has recognized the preferable test to be whether the land in question retained its identity.¹³ In the case of erosion the soil detached is carried downstream. Other soil, *i.e.*, soil from upstream, is deposited

⁸ *United States v. Minnesota*, 270 U.S. 181, 206 (1926); S. Rep. 857, 85th Cong., 2d Sess. (1958); Claude M. Williams, Jr., *et al.*, A-29928 (March 26, 1964); Axel Ursin, A-28310 (Aug. 4, 1960); 43 CFR sec. 2214.11(b).

⁹ Tiffany, *Real Property* secs. 1219, 1220 (3d ed. 1939).

¹⁰ *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 191-193 (1890), and cases cited.

¹¹ 4 Tiffany, *supra*, sec. 1222.

¹² *Nebraska v. Iowa*, 143 U.S. 359, 368-369 (1892), and cases cited.

¹³ *Ibid* at 369.

on the opposite bank. Ownership of the soil lost is not replaced by ownership of soil added to the opposite bank because it is different soil.¹⁴

Thus, even in situations where the erosive action of a stream appears to be rapid, an avulsion occurs only where the stream cuts a new channel, isolating certain soil and leaving it undisturbed. If a stream "cuts out a new channel through the land, so as to separate parts of the land which were formerly not separated, the ownership of each part remains the same as before * * *"¹⁵ Because of the presumption in favor of the permanence of boundary lines, any change in a riparian boundary is presumed at law to be an accretion rather than an avulsion.¹⁶

In order for these lands to be subject to color of title applications, the claimants must prove that they were originally California lands and were separated from the west bank of the Colorado River by an avulsion or series of avulsions. In so doing they must overcome the legal presumption that such boundary changes are accretive. The applicants have presented no evidence to the Department which overcomes this presumption. In fact, the engineering report prepared for the Palo Verde Joint Levee District strongly supports the Department's position that the westward movement of the river was gradual and therefore accretive.¹⁷ Furthermore, according to Department engineers, avulsions normally occur where a stream has developed bends and seeks to assume a more direct course; only extraordinary circumstances would cause a stream to move erratically sideways developing bends or bows by avulsion.

The applicants contend that the 1909 closure of the Laguna Dam artificially increased, by aggradation, the river's natural instability, possibly causing avulsive changes. No evidence has been presented to support this contention. The same argument was made by appellants in the *Beaver* case, *supra*, as to a stretch of the river slightly *downstream*¹⁸ from the lands for which these applications are made. In *Beaver* the trial court and Court of Appeals rejected that argument. The Court of Appeals noted that the "erection of artificial structures does not alter the application of the accretion doctrine (*County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 50-66 (1874)), unless the structures were intended to cause accretion. It

¹⁴ *Beaver v. United States*, *supra* at 8.

¹⁵ 4 Tiffany, *Real Property*, sec. 1222, at 625.

¹⁶ *Oklahoma v. Texas*, 260 U.S. 606, 636-638 (1923); *Wyckoff v. Mayfield*, 280 Pac. 340, 342 (1929); *Ibid.*

¹⁷ *Supra*, p. 410, note 6.

¹⁸ Therefore more likely to be affected by the closure of Laguna Dam.

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concluded that the Government's evidence disclosed that the Laguna Dam had little, if any, effect upstream.¹⁹

It follows that the applications under the Color of Title Act were properly denied as being made to withdrawn land.

However, other arguments are advanced by the applicants. They urge the Department to accept the determination of the Colorado River Boundary Commission which established the present channel of the river as the mutual boundary between California and Arizona in the area in question. However, three factors militate against reliance on the Boundary Commission. First, the Commission adopted the present river channel as the boundary after failing to discover evidence sufficient to retrace the meanderings of the entire stream since 1850. However, this does not preclude the possibility of establishing the movements of a relatively short stretch of the river during the decade preceding the 1923-24 artificial cuts, particularly where, as here, sufficient evidence is available. Second, the Commission's own report fails to overcome the presumption that the river's movements were accretive. It concludes that all available historical data is not "sufficiently comprehensive or accurate to make determinations of the avulsive nature of changes in the location of the channel except for a comparatively few cases."²⁰ Third, the effect of the applicants' argument is that an agreement between states as to their boundary should be dispositive of title to United States property. However, agreements regarding jurisdiction or sovereignty over land do not affect title to land.²¹ In fact, the legislatures of both Arizona and California, in ratifying the boundary agreement, specifically provided that title to lands was not to be affected.²² Furthermore, the boundary agreement itself amounts to an interstate compact which, under Article I, section 10, clause 3, of the Constitution, Congress is required to ratify, and such Congressional approval has not been given.

In conclusion, it is appropriate to point out that even if the Color of Title Act were applicable here, certain basic requirements of that Act have not been met. The color of title applications indicate that at least

¹⁹ Citing with approval the trial court's finding that:

[T]he assumption would not support a finding that the aggradation attributed to the building of the Laguna Dam was more than a minor factor in causing the erosion and accretion at the site of the parcel. There are many other natural factors which played a part in the erosion and accretion which took place.

Beaver v. United States, *supra*, at 11.

²⁰ Joint Summary Report, Colorado River Boundary Commission (Dec. 27, 1954), pp. 7-8.

²¹ *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

²² *Ariz. Laws 1963, ch. 77, sec. 5, Ariz. Rev. Stat. 41-522; Calif. Stats. 1963, ch. 859, sec. 4, Cal. Gov. Code sec. 175.*

parts of the claimed land have not been occupied for the requisite twenty-year period. In several instances clearing operations did not begin until the mid forties and proceeded gradually over a number of years. Any land not held for the required period could not be validly claimed under the act.²³

Further, to establish good faith the original occupants must be shown to have been unaware of the 1923-24 artificial cuts. However, Palo Verde Irrigation District records indicate that a number of the applicants or their grantors were active, either as individuals or representatives of corporate holdings, in Irrigation District affairs. Since the 1923-24 cuts were common knowledge in this area, at least some of the occupants must have known that the exposed tracts were Federal withdrawn land and were not the product of accretion.

Another defect in the applications stems from the fact that the lands in question were originally cleared and occupied as a few large holdings. The Color of Title Act clearly contemplates patenting of only 160 acres for each original occupancy. In cases where the area held exceeds the statutory maximum, the Secretary is given authority to determine what subdivisions, not exceeding the 160 acre limit, should be patented.²⁴ Occupants of the claimed land include Ulmer Ranches, Inc., Union Feed Yards, Inc., John Norton Farms, Intake Farms, Inc., B & K Farms, Inc., and others. Five original large holdings were broken down, in most cases a few months before applications were filed, so that no individual holding now exceeds the 160 acre limitation of the Color of Title Act. Since the original occupants of the large holdings would have been limited by statute to 160 acres, these occupants cannot defeat the statutory intent by subdividing the land to permit each grantee to qualify for a 160 acre tract under the Color of Title Act.

Finally, the applicants assert what they consider to be their "equities," namely, that the failure of the Government to claim the land during the period when it was being improved establishes exceptional rights in the applicants. However, since estoppel does not operate against the United States, the inaction of Federal employees does not prevent the United States from asserting a valid title to its own property.²⁵ Under Article IV, section 3, clause 2, of the Constitution, Congress alone is given authority to dispose of public property,²⁶ and no "equities" which counterbalance this authority are created in

²³ *Beaver v. United States*, *supra* at 9-10.

²⁴ 43 U.S.C. sec. 1068 (1964).

²⁵ *United States v. California*, 332 U.S. 19, 39-40 (1947); *Utah Power & Light Company v. United States*, 243 U.S. 389, 408-409 (1917).

²⁶ *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Alabama v. Texas*, 347 U.S. 272 (1954).

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the absence of an assertion or rights stemming from administrative action validly taken under an act of Congress.

I must advise you, therefore, that the color of title applications were properly rejected by the Department as claims to Federal withdrawn land and that there is no administrative action possible by which title can be recognized to be in the claimants.

FRANK J. BARRY,
Solicitor.

APPEAL OF PETER KIEWIT SONS' COMPANY

IBCA-405

Decided October 21, 1965

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal—Contracts: Performance or Default: Compensable Delays

An appeal will be dismissed for lack of jurisdiction as to claims of the contractor for expenses of delays allegedly caused by the Government, where such delays are not compensable under the provisions of the contract.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Damages: Measurement—Contracts: Disputes and Remedies: Equitable Adjustments

Where a contractor is required to perform extra work of a kind not provided for by the contract unit prices, the contractor's actual cost of such performance is the proper basis for an equitable adjustment of the contract price.

BOARD OF CONTRACT APPEALS

In this appeal the contractor, hereinafter also referred to as the appellant, seeks to recover the sum of \$201,350 claimed to be due from the Government as a result of changes in the work and additional expenses caused by delays and errors in staking, loss of efficiency, additional work and the necessity of prolonging the work for more than one work season.

The Board heretofore denied the Government's motion to dismiss the appeal,¹ and pursuant to that decision a hearing was held in Seattle, Washington, in July 1964.

The contract, dated September 25, 1959, was in the total estimated amount of \$425,267.90. By the terms of the contract, under Project

¹*Peter Kiewit Sons' Company, IBCA-405 (March 13, 1964), 1964 BCA par. 4141, 6 Gov. Contr. 281(e).*

NP-A4,B1, the contractor was required to grade and surface nearly eight miles of the McKinley National Park Road in Alaska. In general, the new road followed an existing road, and to some extent the project road coincided with the existing road as an improvement of it. The contract documents included Standard Form 23A (March 1953) and Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, known familiarly as FP-57.

Under an agreement of long standing, the contract was funded and executed by the Department of the Interior, but the administrative responsibility for inspection, acceptance and payment was vested in the Bureau of Public Roads, Department of Commerce.

Prior to a preconstruction conference in April 1960, appellant had prepared a "Construction Progress Chart" indicating the approximate dates for starting and completing various phases of the work. This chart contemplated that the contract work would be commenced on May 20, 1960, and would be entirely completed about September 10, 1960. The contract provisions allowed 135 days for completion of performance. Also, according to the testimony of appellant's Job Superintendent, Mr. Clance McElravy, it had been planned, in accordance with appellant's general practice, to start the work with unclassified excavation near the center of the project where most of the cut and fill work was located. This phase, according to Mr. McElravy, was to be followed by placing a layer of gravel, to minimize difficulties in hauling material when rain occurred. The gravel was to be obtained from the rivers at either end of the project. An additional reason for planning the unclassified excavation as the first stage was the desirability of removing the top layer of brush and tundra in all cut sections as soon as possible, so as to expose the underlying frozen earth or "permafrost" (of frequent occurrence in that part of Alaska) to the thawing actions of the air and sun. Then, the permafrost could be excavated in successive layers without the added expense and slower operation of ripping.

However, in the appellant's covering letter of April 26, 1960, transmitting the chart to the Division Engineer, Bureau of Public Roads, the appellant made the following request:

We hereby request permission to start construction operations between May 25th, 1960 and June 1, 1960 on that part of the project nearest the Sanctuary River and in general proceed with construction from the Sanctuary River to the Savage River.

Appellant's work camp was established at the west end of the project near the Sanctuary River, about May 31, 1960. For several days thereafter the stakes that had been placed by the Government did not cover

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an area large enough to permit the effective use of appellant's machinery. During that period appellant used some of its equipment to level a small airport for a third party, at a point between the railroad and the Park Road.

Notice to Proceed was issued June 3, 1960, received by the contractor on June 6, 1960. The contract was completed on August 22, 1961.

Appellant alleges that the delay by the Government in commencing the staking of the road as one of the causes of prolonging the job. However, testimony offered by the Government showed that during the preconstruction meeting the Government requested that appellant give two weeks' notice of its intent to begin work in order that sufficient staking could be done before arrival of the contractor's forces. At that time, according to Mr. John A. Russell, National Park Service Project Supervisor for Alaska, the contractor advised that it could not furnish two weeks' notice before starting work; that its operations would be flexible enough so that it could be performing work of some nature, in the absence of more complete preparation by the Government. Mr. Russell testified on cross-examination that during the conference in April 1960, the contractor advised the Government that it would be ready to start work in the first part of June, at the Sanctuary River. This informal advice does not seem to have been a firm commitment, there being no day certain specified for the expected commencement of work. Mr. McElravy had testified that during the meeting the starting time was discussed as being "the last of May." If the contractor was unable to furnish notice two weeks in advance of starting the project, it is hardly reasonable to suppose that in April it could have given definitive notice more than a month in advance.

Claim No. 1—Multiple Change and Line Change \$14,764.

In addition to the lack of staking at the start of the job, appellant claims that it was not fully compensated for expense and delay in connection with Change Order No. 1, which directed that the grade of the road be raised where it was to cross a stream in a gully and consequently increased the required length of a large structural plate culvert pipe to be placed in the gully at Station 856+27. It also directed a change in the line of the road between Stations 902 and 908.

The pipe (known in the trade as "Multiplate") was constructed of curved steel plates, each about 6 feet long, that were usually assembled and bolted together at the time of installation. When so assembled, the pipe was 8 feet in diameter. Sheet No. 15 of the contract drawings required a 70-foot pipe, and Bid Item 455 (2G) estimated that the pipe

would be 70 feet in length. On June 28, 1960, the Government orally advised Mr. McElravy that an additional 26 feet of pipe would be needed for this culvert, because of the increase in the height and width of the embankment. On that same day, by telephone, Mr. McElravy ordered the additional length of pipe. Delivery of the additional pipe was scheduled for about August 6, 1960, but because of delay in transit it did not arrive until August 13, 1960. The additional 26 feet of pipe and the original 70 foot length were bolted together and placed in the stream that was to flow through the pipe. The pipe was then backfilled and the culvert was completed on August 22, 1960.

The findings of the contracting officer are in error with respect to the dates of starting and completion of the culvert. On page 6 of the findings it is stated that installation of the original 70 feet of the multi-plate began on July 5, 1960; that fill was placed on July 22, 1960, and that "hauling over the pipe continued thereafter without difficulty."

The time required for obtaining the additional pipe caused a corresponding delay in work to be performed to the east or far side of the stream, where most of the cuts were located and in certain work on the west or near side of the stream, where most of the fills were to be made. Loss of efficiency is claimed concerning work performed after completion of the culvert, attributed to the necessity of ripping through the permafrost sections. It was not then possible, because of the loss of time, to proceed with the original plan of first scraping off the top layers and thawing the permafrost, as hereinbefore described. The various delays thus prolonged the project into the following year, it is alleged. Except for an old bridge for the existing road nearby, there was no way for the contractor's equipment to cross the stream that was to flow through the pipe, until the pipe had been placed and backfilled. The old bridge was not safe for heavy machinery. It is the contractor's position that it could not have reinforced or rebuilt the old bridge without closing it to traffic for a considerable period. The contract specifications required that the existing road into the Park be maintained for the use of the public except for periods not exceeding one hour, to be coordinated with the Park Service to avoid inconvenience to busses, etc.² The Government contends that the contractor could have first placed the original 70 feet of the pipe and could have backfilled it to the extent that it could be used as a bridge. However, the contractor maintains that if it had placed and backfilled the original 70 feet of pipe, it would not have been feasible later to connect the 26 additional feet of pipe to the original 70 feet while the stream

² Article 4.3, *Construction and Maintenance of Detours*, Section 4, Scope of Work, Special Provisions, Part 2.

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was flowing through the pipe. Additionally, practical considerations involving the necessity of freedom to roll the pipe while bolting sections together and the possibility that the original 70 feet would be distorted in shape by the weight of the fill above it were advanced by the contractor as reasons for not placing and backfilling the 70 feet of pipe when it was first assembled, about July 12, 1960.

The Board finds that the position of the contractor is reasonably sound with respect to the necessity of awaiting delivery of the additional length of pipe before constructing the culvert. A thorough analysis of the claim and of the costs associated with it reveal, however, that the relief requested is based entirely on Government delay, for which the contract provides no remedy except extension of time for performance. The contractor was compensated by means of the contract unit prices for the additional length of pipe and for the increased volume of backfill. In no case has the contractor complained that the quantities of items measured for payment pursuant to the contract were too low, either as to this claim or the other claims included in this appeal. Moreover, the contract work was completed within the time required (as extended); hence, no further extensions of time are claimed.

The contract provisions for payment on the basis of the actual quantities of work performed at specified bid prices afford the only means of monetary compensation to the contractor for additional quantities exceeding the estimates aside from the clauses specifically permitting adjustment in certain circumstances, such as the Changes clause.³ Where a change requires extra work of a kind not covered by the contract prices, the contractor is entitled to an equitable adjustment for the cost of performing the extra work. If the extra work necessitates additional time for performance of the contract, the contractor is entitled to an equitable adjustment in the time for performance allowed by the contract and this is true irrespective of

³"CHANGES

"The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed."

whether the cost of such extra work is compensable at the unit prices or under the other payment provisions set out in the contract.⁴

The contractual arrangement for estimated quantities and fixed unit prices whereby such agreed unit prices are applied to the actual quantities of work performed obviously makes for flexibility of administration. In most cases it also eliminates the necessity for issuance of a formal change order. The equitable adjustment for variations in quantities is automatic and, thus, it excludes the time-consuming processes of ascertaining the costs of the additional work and the negotiation of a price adjustment pursuant to the Changes clauses.⁵ We are not concerned here with the type of adjustment of the unit prices permitted by Articles 4.2 and 9.3 of FP-57 in the case of a variation in the quantity of a major item (identified in the contract) exceeding 25 percent of the contract estimate. However, such an adjustment was made under the instant contract with respect to an overrun of Item 102(4) Borrow Excavation Case 1. The parties agreed on a new unit price of \$1.11 per cubic yard for the excess quantity (compared with the original bid price of \$0.73 per cubic yard), as embodied in Change Order No. 2 dated November 7, 1961.

The same line of reasoning applies to the companion claim identified as a "Line Change." According to the contracting officer's findings, the Government determined that the course of the new road, as previously staked on June 16 and 17, 1960, should be changed to follow more nearly the existing road between Stations 902 and 908. This section was restaked on July 30, 1960 and all grading and fill operations were completed by the Contractor on August 13, 1960. In addition, the contracting officer's findings include the statement that the work required by the Line Change was carried out "in regular sequence with the Contractor's other operations." The record does not clearly disclose in what manner or to what extent the contractor's performance of the contract was made more costly by reason of the Line Change except as it may have contributed to the over-all delay in performance. The evidence indicates that the contractor was delayed by the restaking for the Line Change but other work was being performed during the period of restaking. In its claim letter of August 10, 1962, the contractor seems to relate its claim for additional compensation under Change Order No. 1 (dated August 8, 1960), to the inadvertent omission of revised drawings that should have accompanied the change order, describing the changed work. The change order was received by the contractor on August 19, 1960,

⁴ *R & M Contractors, Inc.*, IBCA-325 (April 21, 1964), 71 I.D. 132, 1964 BCA par. 4208, 6 Gov. Contr. 257.

⁵ See Spector, *An Analysis of the Standard "Changes" Clause*, 25 Fed. B.J. 177, 187.

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and the revised drawings were delayed until September 22, 1960. However, all of the work required by Change Order No. 1 had been completed by August 22, 1960, in accordance with the revised staking, so that the change order merely confirmed what was an accomplished fact. Examination of the itemized charges in Enclosure "A" attached to the claim letter of August 10, 1962, discloses that the total amount of \$14,764 for Claim No. 1 is apparently attributable to "Ripping Frost (1960)." We conclude that the delays occasioned by Multiplate Change and the Line Change, under the contractor's theory, prevented the contractor from following its original efficient and economical plan (discussed earlier in this opinion) of scraping off the top layers of soil in the early stages of the project so as to thaw the permafrost and avoid the slower and more costly process of ripping.

In any event, it is clear that this claim is one for the costs of delay and for the "ripple" effects or indirect results stemming from the issuance of a change order. As such (absent a "pay-for-delay" type of contract clause) it is a claim for breach of contract. The contractor does not claim that it was not compensated for the direct costs of performing the changes themselves. In certain other claims made by the contractor, the delays and indirect results flowing from Change Order No. 1 are asserted to be responsible (together with other causes) for the necessity of continuing the project into the following year. Appellant contends that the Government, having had ample time to make any substantial changes after execution of the contract and before commencement of the work, breached the contract by its several allegedly arbitrary and capricious changes that unnecessarily prolonged the contract performance into a second work season. As we stated in our opinion ⁶ denying the motion of the Government to dismiss this appeal:

If it should develop that such claims are in fact claims for breach of contract, then (contrary to appellant's theory) the Board would have no jurisdiction, as we have held on numerous occasions. The Board's power to grant relief must be found within the "four corners" of the contract, for that power is not granted by statute, as alleged in appellant's reply brief, but by the contract itself. The authority of the Board to decide questions of law does not include authority to grant relief for breach of contract since it is not a dispute arising "*under the contract.*" (Italic supplied)

The Board held in *R. G. Brown, Jr., and Company*:⁷

It is well settled that in the absence of an express contract provision such as a "Suspension of Work" clause (not present here) this Board has no juris-

⁶ Note 1, *supra*.

⁷ IBCA-356 (July 26, 1963), 1963 BCA par. 3799, 5 Gov. Contr. 406(k). See also, *United States v. Rice*, 317 U.S. 61 (1942).

diction over a claim for expenses incurred as a result of Government interference or delay.

Accordingly, the appeal is dismissed as to Claim No. 1.

Claims No. 2 and 6—Incorrect Staking in 1960 and 1961 Resulting in Changes. \$10,610

Appellant complains that frequent errors were made by the Government in staking the highway, preliminary to the excavating, grading and embankment work performed by appellant. In addition to the contribution of such errors to the over-all delay that prevented completion of the project within the time anticipated by appellant, it is alleged that the work performed by appellant after the correction of the errors was more costly than it would have been except for the errors. The additional costs are represented variously by the expenses of moving appellant's equipment and work forces from one location to another, returning equipment and operators to the location of the staking changes, lost time caused by a decision to change the length of certain pipes, and delays occurring while stakes were being changed.

Appellant's brief, in discussing staking errors, states in substance that Claims No. 1, 2, 5 and 6 should not now be treated as separate claims for compensation but that the costs involved "should be included as part of the overall 'loss of efficiency.'" Nevertheless, consideration will be given to certain illustrative examples of items within Claims No. 2 and 6, for the purpose of determining their eligibility for possible adjustment pursuant to the Changes clause. No dollar amounts have been assigned to the separate items involved.

The details concerning equipment time and labor hours alleged to have been expended are described in Appellant's Exhibit L as to the 1960 work season and in Appellant's Exhibit N with respect to 1961.

Claim No. 2. Item (a)

The diary of appellant's superintendent, Mr. McElravy, contains an entry for July 2, 1960, that is similar to the description of the first claim item in Exhibit L, also dated July 2, 1960, and entitled: "Moving equipment from 1120—one location to another, due to having to change slope stakes—3 hours lost."

The contracting officer found that

No work was done in this section (Station 1120) on July 2, 1960. No stakes were reported in error and no reworking of the section was reported nor recorded.

These conflicting statements have been partially reconciled by the explanation in appellant's brief:

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On July 2, 1960, several men and machines were moved to the area of station 1120 to establish shoulder lines. The stakes were so bad no shoulder lines could be established. Hence the men and equipment had to be moved to another location.

It is apparent that the appellant's claim does not describe a situation that constituted a change. It alleges errors that may have resulted in changes at a later time. The delay that was occasioned did not arise out of any necessity of repeating work previously performed. The period of 3 hours alleged to have been lost seems to have been a delay related to the determination that work could not be done feasibly at Station 1120, and that the men and equipment could be more usefully employed at another location "on up the road," as Mr. McElravy's diary recorded it.

The principles described in our discussion of Claim No. 1 concerning the Board's lack of jurisdiction to consider claims for delay are also applicable in this instance. Hence, the appeal is dismissed as to Item (a) of Claim No. 2.

Claim No. 2. Item (b)

July 15, 1960: More stripping required Sta. 926-931—Had to move equipment back in this area after stakes were changed from 2:1 to 3:1 backslope—6 hours lost time.

Mr. McElravy's diary for July 15, 1960, contains the following pertinent entry:

The B.P.R. man moved the cut stakes from a 2:1 to a 3:1 Sta. 926 to 931 today after we had stripped a steep slope to clean up the 2:1 a few days ago.

The contracting officer found that according to the Government's records the stakes were changed from 2:1 to 3:1 before the contractor had performed any excavation and that the work of excavation in accordance with the change had been performed on July 8, 1960. Furthermore, the contracting officer determined from the Government's records that none of the work performed on July 15, 1960 included work on the slope between Stations 926 and 931.

The testimony and exhibits did not provide any resolution of the discrepancy between the contractor's records on the one hand, and the findings of the contracting officer and the Government records on the other.

We conclude that appellant has not carried its burden of proof as to its allegations concerning additional work of stripping the slope in accordance with the revised stakes.⁸ Accordingly, the appeal is denied as to Item (b) of Claim No. 2.

⁸ Cf. *R & B Construction Company*, IBCA-413 (September 27, 1965).

Claim No. 2. Item (c)

July 23, 1960: Slope stakes at Sta. 963 to 967 moved after cut finished—4-5 hours time loss.

Mr. McElravy's diary for July 23, 1960, includes the following:

The BPR boys are still re-marking stakes and resetting some. They have moved some in the top of the back slope, Station 963 to 967 and we have nearly all of cut finished.

According to the contracting officer's findings, the changes in the slope stakes covered the area of Stations 962 to 968 plus 50, and such changes were made beginning on July 8, 1960. The restaking was completed before the contractor's grading operations had reached the area in question, according to the contracting officer, who found that:

* * * in no instance did the Contractor have to refinish the slopes of any cut section previously brought to grade.

On cross-examination, in response to a question describing the area as Station 963 to Station 967, Mr. McElravy replied as follows:

A. No. It was not in this location. I remember it well. It is right across the road from Park Lot No. 17 and that is quite a cut in there.

The evidence offered by appellant concerning this Item (c) is so inconclusive as to the location of the alleged occurrence that the Board is compelled to find that the appellant has failed to sustain its burden of proof, as we held with respect to Item (b), *supra*.

Claim No. 2 Item (d)

August 2, 1960: Change of Mind on Pipe lengths by pipe inspector at Sta. 789+43—4-5 hour time loss.

Mr. McElravy entered the following comments in his diary concerning this incident:

No end to the monkey business on the corrugated metal pipe today at Station 789 plus 43. The plans called for 50 feet of 24-inch corrugated metal pipe. The inspector changed that to 54 feet by 24 inches. So Chris took back the lengths to make up 50 feet and brought out lengths to make 54 feet. Then the inspector Gary Clyde decided to put in 46 feet so Chris had to make another change of lengths to make it.

The contracting officer did not deny that the changes occurred as alleged, except to point out that the correct location was Station 789+13. When the claim was asserted in the contractor's letter dated February 1, 1961, no costs were stated. Exhibit L shows the following described equipment and labor for the time claimed:

- 1 Pickup—1 Frmn
- 3 Laborers
- 1 Flatbed truck—1 Oper.
- 1 D-6—1 Oper.

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Except for the trips made to obtain extra lengths of pipe or to return pipe that eventually was not required, it does not appear that the contractor was required to redo any work. More delay in the commencement of actual performance, caused by changes in the character or extent of the work or due to correction of errors, does not give rise to a right to additional compensation, where, as here, the contract does not specifically provide for it.⁹ Accordingly, Item (d) of Claim No. 2 is disallowed.

Examination of the 2 remaining items of Claim No. 2 and of the 17 items of Claim No. 6 as set forth in Exhibit N reveals that they are similar in nature to one or another of the items described, *supra*, except for work concededly done over again on May 24 and 31, 1961, and resetting of 3 culverts in 1960. The contracting officer found that the contractor was entitled to adjustments for these changes in the amounts of \$1,012.32 and \$578.55. It is understood that the contractor does not dispute those findings.

The time allegedly lost by reason of the changes in staking amounts in each instance to about 3 to 6 hours. Such minor changes are largely unavoidable in a construction project involving the building of a highway nearly 8 miles in length. The specifications (FP-57) recognize that such occurrences are "inherent in the nature of highway construction."¹⁰ While the cumulative effect of such changes and the delays that resulted may have been a factor in prolonging the duration of the performance of the contract, the Board finds that in no case has the contractor shown that it is entitled to any additional compensation, as originally asserted in its claim letters as to Claims No. 2 and 6, for any changes in staking or as more particularly set forth in Appellant's Exhibits L and N. Accordingly, the appeal is denied as to Claims No. 2 and 6.

Claims No. 3, 4, 8 and 9 through 19

These claims are associated with the contractor's allegations that the Government was responsible for the delays and loss of efficiency

⁹ Note 7, *supra*.

¹⁰ "4.2 Changes. It is mutually agreed that it is inherent in the nature of highway construction that some changes in the plans and specifications may be necessary during the course of construction to adjust them to field conditions and that it is of the essence of the contract to recognize a normal and expected margin of change within the meaning of the clauses 'Changes' and 'Changed Conditions' in the 'General Provisions' of the contract as not requiring or permitting any adjustment of contract prices, provided that any change or changes do not result in (1) an increase or decrease of more than 25 percent in the original contract amount, in the quantity of any major item, or in the length of project, or (2) a substantial change in the character of the work to be performed under a contract pay item or items that materially increases or decreases the cost of its performance."

that caused the work to fall behind the rate of progress envisioned by the contractor, so that the project could not be completed during the 1960 work season. This caused additional and unavoidable expenses such as the cost of moving out equipment and closing the camp—\$8,169.64 (Exhibit J) in September 1960; moving in the equipment and re-activating the camp in April and May 1961—\$14,418.87 (Exhibit B); travel pay—\$1,111 (Exhibit C); air transportation—\$759 (Exhibit D) and other kindred expenses shown on Exhibits E through I, and M.

To go back to a point prior to the beginning of performance, it has been noted that the starting date contemplated by the contractor's proposed progress schedule was May 20, 1960. Discussions between the parties at the preconstruction conference resulted in an understanding that the contractor would commence work during the last of May or the first part of June 1960, although it was also indicated that the contractor would not be able to furnish a definite notice of two weeks in advance of starting work.

The testimony of Mr. McElravy shows that he and Mr. Selleck, the contractor's Alaska area manager, first came to the project on Friday, May 27, 1960, when the contractor's equipment and supplies began to arrive. On May 31, the contractor's men commenced moving in. Mr. McElravy had observed on May 27 that no stakes had been placed by the Government. It does not appear that any notice was given to the Government by the contractor in advance of May 27, 1960, when Mr. McElravy and Mr. Selleck first appeared on the site. On the other hand, the Notice to Proceed was not issued by the Government until June 3, 1960, and then only at the request of the contractor.

Regardless of the question of timely notice by either party, it seems to the Board that the Government should have commenced its staking operations well in advance of the probable commencement of performance by the contractor. The Government's obligation in this respect, while implied rather than expressed in the contract, was made more critical by the slow progress of the staking work because of the relative inexperience of its staking crew, lack of sufficient stakes and the unfamiliarity of the crew with a new system of calculation.

Additionally, there is little doubt that the "green" Government staking crew made an unusually large number of errors, many of which affected only 1 or 2 stakes in a given location. In such cases, the contractor proceeded with its work after checking the adjacent stakes, and projecting from those stakes if they were found to be correct. Mr. McElravy and Mr. Claire Piller, equipment foreman and grade foreman for the contractor testified that no complaint usually was made concerning errors in staking unless more than 1 or 2 stakes were wrong.

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We have discussed the delay that was occasioned by the changes affecting the multiplate pipe and the inability of the contractor to strip off the successive layers of tundra and earth for more efficient excavation of permafrost (due also in part to the lack of advance staking). There were no doubt other factors, such as weather, that militated against the possibility of an orderly, uninterrupted and complete contract performance during the 1960 work season. Not only did it rain a great deal during August 1960, but the winter weather began to close in prior to September 1, 1960. Thereafter, conditions were not suitable for further operations and the project was closed down on September 2, 1960. The contractor's original schedule required that its performance be continued until September 10, 1960.

It is conceded that the Government had a contractual right to make changes. Moreover, there was no representation on the part of the Government that it would be possible to complete the contract within the 1960 work season. It was perhaps theoretically possible to do so, but such a possibility was dependent upon the absence of substantial delays caused by changes in the staking or other phases of the work. If the contractor had seriously contemplated using a double shift in order to take advantage of the long hours of the northern summer daylight, any such possibility was abandoned at an early stage upon discovery of the slow progress of the staking operations.

In *Weldfab, Inc.*,¹¹ the Board had occasion to examine a series of landmark decisions, originating with *Chouteau v. United States*,¹² dealing generally with costs of delays in the performance of work not changed, resulting from the additional time required for performance of numerous change orders, and delays occurring while work was suspended pending the issuance of a change order, as distinguished from costs incurred in the performance of the portion of the work that was changed. In *Chouteau*, the Supreme Court held that in the absence of express contract provisions therefor, the contractor could not recover expenses incurred after the completion of changes in construction of a Civil War ironclad vessel, where the very numbers and magnitude of the changes prolonged the contract performance by nearly 2 years into a period of higher costs of material and labor. In *United States v. Rice*, case, *supra*, the contractor was delayed by a change in the location of the building that was to be constructed and there was a considerable delay while a new foundation was prepared. The Supreme Court held that the overhead expenses of the contractor

¹¹ IBCA-268 (August 11, 1961), 68 I.D. 241, 61-2 BCA par. 3121, 3 Gov. Contr. 500.

¹² 95 U.S. 61 (1877).

for the period of delay while the changes were being issued and carried out could not be recovered from the Government.

As we stated in *Weldfab*, the Court of Claims in later cases, such as *Peter Kiewit Sons' Co. v. United States*,¹³ distinguished *Chouteau* and *Rice* by holding that there is "an implied obligation on the part of the Government not to willfully or negligently interfere with the contractor in the performance of his contract." Breach of this obligation would give rise to a cause of action in the courts. It is clear that under whatever theory appellant seeks recovery of expenses of delay, interruptions or loss of efficiency alleged to have been caused by Government actions—delay in staking and in the issuance of changes or on delay in the form of extended time of performance—the dispute must sound in breach of contract, where, as in this case, there is no contract provision permitting monetary compensation therefor. As such it is not within the jurisdiction of the Board. Hence, we do not arrive at the question of whether any of the acts or omissions of the Government amounted in fact to breaches of contract. Accordingly, the appeal is dismissed as to Claims No. 3, 4, 8 and 9 through 19.

Claim 5—Engineering added to Contract

In order to expedite the task of staking the work, the contractor sent one of its engineers, not originally contemplated to be employed in performance of the contract, to assist its forces in correction of errors in staking. The contracting officer determined that those services were not ordered by the Government and were not required in addition to the already adequate engineering services provided by the Government.

The evidence does not show that the additional engineering services were specifically ordered by the Government. The Board finds that such services were voluntary¹⁴ and the expense thereof may not be paid by the Government. Even if such services were necessary as mitigation of the expenses of delay, the Board would have no jurisdiction. The appeal is accordingly dismissed as to Claim No. 5.

Claim No. 7—Excavating and Backfilling \$9,432

During the 1961 work season a number of "soft spots" were found in the previously constructed road embankments that had been brought to grade (or nearly so) during the 1960 work season. In those spots

¹³ 138 Ct. Cl. 668, 674-75 (1957).

¹⁴ *R & M Contractors, Inc.*, IBCA-325 (April 21, 1964), 71 I.D. 132, 1964 BCA par. 4208, 6 Gov. Contr. 44(1).

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fill material had apparently settled, due to the use of marginal material. The material had been inspected by observation in places. The contractor was directed to excavate these soft spots to a depth that would reach stable material and refill the excavations with selected material. The contractor was paid for unclassified excavation at the unit bid prices in the contract and for back fill at the prices for borrow or crushed aggregate, depending on the type of material used.

The contracting officer took into account the additional expense of excavating small, scattered areas, and of returning the contractor's equipment to the locations involved. The contract price for excavating was \$0.57 per cubic yard, and the contracting officer made a unilateral determination (in the absence of detailed data from the contractor) that the contractor was entitled to an additional payment of \$0.93 per cubic yard (thereby arriving at an estimated reasonable price of \$1.50 per cubic yard) for 1209.7 cubic yards, or a total additional payment of \$1,125.02.

The contractor furnished cost data with its brief, and in Exhibit K, showing equipment rental and labor costs, plus indirect costs. Using this method, the contractor arrived at a total claim of \$9,432. It does not appear that this amount includes any credit for the amounts already paid by the Government for this work. The record does not reveal the total sums so paid, except as to the contract unit price of \$0.57 per cubic yard for excavating 1209.7 cubic yards. Mr. Lawrence L. Walker, the Project Engineer who succeeded Mr. Divine about July 29, 1960, testified that the contractor worked about 2 days on the largest area to be repaired, using 3 "Eucs" and a "Cat." He testified that the contractor was paid for excavation and also for selected material as backfill. Mr. Walker estimated that the total time required for repairing all of the soft spots was 4 or 5 days. His opinion agrees closely with the total of 37 hours shown in the tabulations of Exhibit K.

A review of Government's Exhibit No. 10 (Chief Inspector's Daily Summary) shows that the work performed and the equipment used by the contractor tallies with the descriptions in Exhibit K. A spot check of the rental rates charged in Exhibit K indicates partial conformance with the rates specified in Article 9.5(c) of the contract for force account work. Some of the equipment used cannot be readily identified with equipment described in Article 9.5(c). Also, there are some duplications of charges, such as those for repairs, that are specified by Article 9.5(c) to have been already included in the rental rates agreed to in that article. On two of the dates, June 5 and 6, 1961,

listed in Exhibit K, the repair work was performed in a cut area, and not in a fill embankment, according to the contracting officer's findings. Therefore, the excavation and repairs for those dates were excluded from the contracting officer's calculations for additional compensation. Offsetting these deductions to some extent, the contracting officer found that the contractor had made repairs to soft spots in 3 other areas not claimed by the contractor. Apparently the reason for excluding from the payment calculations the work performed in cut sections was the fact that such work had not been previously performed, pursuant to the requirement in Section 102-3.9 of Specification FP-57, as follows:

102-3.9 Removal of Unsuitable Material. When unstable or other material which is unsuitable for foundation, roadbed, or other roadway purposes occurs within the limits of the roadway, the contractor shall excavate such material below the grade shown on the plans, or as directed, and backfill the areas so excavated with suitable material. * * *

These areas, being in cut sections, had no fill placed over them. Hence, the contractor was not required to do over any work, but was merely completing required work that had not been finished previously.

Accordingly, there should be deducted from Claim No. 7 the sum of \$2,257.13 asserted in Exhibit K for work performed on June 5 and 6, 1961, leaving a balance of \$7,174 (the nearest dollar figure).

The Board considers that the piecemeal working conditions that prevailed make it inappropriate to use, in the determination of an equitable adjustment, a rate per cubic yard that has no demonstrated relationship to actual cost. It is well known that work of a fragmentary and intermittent nature is more costly than work performed in planned sequence. No evidence was submitted by the Government tending to controvert the cost data in Appellant's Exhibit K. In fact, the time claimed by the contractor as having been required for performance of the work (29 hours, after deducting 8 hours disallowed for June 5 and 6, 1961) is well within the 4 to 5 days of the Project Engineer's estimate. We conclude that the contractor's actual cost is the proper basis to be taken into account in arriving at an equitable adjustment.

However, in order to arrive at an equitable adjustment with respect to the 3 additional areas allowed by the contracting officer, it is necessary to obtain the contractor's actual costs for the work performed in such areas. It is also essential that duplications of charges contained in Exhibit K be eliminated and that where equipment used by the contractor is not among the machines for which rates are prescribed in Article 9.5(c), "rental rates be agreed upon as required by Article 9.5 of the FP-57 Specifications."

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While the record shows that the contractor received payment at the contract unit prices for excavation and backfill, the payments made for excavation are the only figures apparent in the record. The amounts previously paid for backfill with selected material and crushed aggregate are not stated in the contracting officer's findings. It is not possible to ascertain such amounts, with any degree of certainty, from the pay estimates.

The Board finds that the contractor is entitled to additional compensation as an equitable adjustment for extra work described in the findings of the contracting officer with respect to Claim No. 7, based on the contractor's actual costs, as limited by Articles 9.5 and 9.5(c), less payments already made for that work. It is necessary that the claim be remanded to the contracting officer for equitable adjustment of the amount due the contractor. In furtherance of that objective, the contractor should submit a proposal to the contracting officer, based on appropriate revision of Exhibit K as indicated herein.

Conclusion

1. The appeal is sustained to the extent reflected *supra*, with respect to Claim No. 7.

2. The appeal file is remanded to the contracting officer for arriving at an equitable adjustment by negotiation on the basis stated above. If the contractor is not satisfied as to the decision of the contracting officer concerning the equitable adjustment a further appeal may be taken from such decision.

3. The appeal is denied or dismissed as hereinbefore specified as to all other claims encompassed by the appeal.

THOMAS M. DURSTON, *Deputy
Chairman.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN,
Chairman.

WILLIAM F. MCGRAW,
Member.

H. T. CRANDELL

A-30373

Decided October 26, 1965

Mining Occupancy Act: Principal Place of Residence

A cabin which is used only intermittently for vacations and other leisure periods, even though used at frequent intervals during most of the year,

does not constitute "a principal place of residence" within the meaning of section 2 of the act of October 23, 1962, and an application for the conveyance of land based upon such use is properly rejected.

Mining Occupancy Act: Qualified Applicant

A qualified applicant for conveyance of land under the act of October 23, 1962, must have been, on that date, a residential occupant-owner of valuable improvements in an unpatented mining claim which constituted for him a principal place of residence, and an application is properly rejected where practically no information is furnished with respect to residential occupancy prior to October 23, 1962.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

H. T. Crandell has appealed to the Secretary of the Interior from a decision dated July 18, 1964, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Sacramento, California, land office rejecting his application, Sacramento 076248, filed pursuant to the act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. §§ 701-709 (1964), to purchase a tract of land embraced in the unpatented J. Barton placer mining claim in section 30, T. 35 N., R. 10 W., M.D.M., California.

Crandell filed his application on July 11, 1963, after receiving notification on June 27, 1963, in response to his petition for a statement of belief as to the validity of the J. Barton mining claim (Sacramento 074885), that the claim was believed to be invalid. The application stated that the J. Barton placer mining claim was located on April 12, 1947, that a residence had been on the claim since prior to July 23, 1955, and that the appellant acquired his interest in the claim on August 28, 1961.

By a decision dated May 13, 1964, the land office rejected the application for the reason that the appellant did not meet the "principal residence" requirement of section 2 of the act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. § 702 (1964). The decision was based upon a report of field examination by the U.S. Forest Service which indicated that an "old cabin" on the claim, which might have been considered a residence prior to October 23, 1962, did not provide complete residential accommodations at any time, that a 15' x 20' cabin, described in the appellant's application as the improvements placed upon the land, represented construction done after October 23, 1962, and that investigation had disclosed that the Crandells had spent a two-week vacation period and periodic weekends on the land for which application was made.

Crandell based his appeal to the Director, Bureau of Land Management, upon the fact that his vacation period is one month plus various holidays, that his son gets a month's leave from the Army, that his wife spends "additional time" at the claim, and that during 1963 he

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and his family used the claim "ten months of the year for varying periods of time, but never less than five days at a time." He asserted that the information obtained by the Forest Service with respect to residential use was inaccurate, that the Forest Service could have found more reliable sources from which to get such information, that he had shown that he occupied the cabin as a home on a fairly regular basis, that it was "never used for weekends, hunting, or a two-week vacation place," that when he purchased the claim there were three buildings on it, two cabins and an old building converted into a wash house, or outhouse, and that when he decided to make improvements he "picked the 'outhouse' to improve, as it contained the most expensive features, namely the plumbing and septic tank."

After reviewing the evidence upon which the land office acted and the contentions of the appellant, the Office of Appeals and Hearings concluded that it was apparent from the record that the appellant was not a qualified resident-occupant of the claim, as defined by the act, on October 23, 1962, and that the appellant's short and periodic visits to the claim, as indicated in the record, were not sufficient to qualify him for relief under the act.

In his present appeal, Crandell contends that the original application and appeal contain all the necessary technical data, that the matter hinges upon the definition of principal place of residence, that the law states only that the claim must be *a* principal place of residence, not *the* principal place, thereby allowing a person to have two residences, one where he works and spends a majority of his time and the other for his leisure time. He asserts that the Bureau of Land Management and the Forest Service are willing to recognize only one residence and consider anything else as being for vacation purposes and not counting as a residence. He states that the second residence "is very 'principal' as far as the owner is concerned."

The record before the Department affords no basis for a conclusion other than that reached by the Bureau.

Section 2 of the act of October 23, 1962, *supra*, provides that:

For the purposes of this Act a qualified applicant is a residential occupant-owner, as of the date of enactment of this Act [October 23, 1962], of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

The statute is not explicit in defining "a principal place of residence." Nevertheless, without attempting to determine what amount of time must be spent at a place for it to constitute a principal place of residence or how many principal places of residence a person may have under the act, it may be reasonably established from the legislative

history of the act what does *not* constitute a "principal place of residence" within the statutory meaning.

The "principal place of residence" provision was initiated by the Senate. In recommending its adoption, the Senate Committee on Interior and Insular Affairs stated:

The committee substituted the term "and which constitutes for him a principal place of residence" for the term "seasonal or year-round" for the purpose of more clearly setting forth what is required to become a qualified applicant. In some circumstances climatic conditions make year-round residence impracticable. The language used intends to specify that the applicant must be one who uses his claim as one of his principal places of residence. Casual or intermittent use, such as for a hunting cabin or for weekend occupancy, are not intended to be covered and the Secretary shall require applicants to submit proof of residence as a part of determining whether the applicant is qualified. S. Rep. No. 1984, 87th Cong., 2d Sess. 5-6 (1962).

In further explanation of the language, the House members of the conference committee called to reconcile differences between the Senate and the House on the legislation stated:

The House version would have permitted any "seasonal or year-round residential occupant-owner, as of January 10, 1962," of improved land in an unpatented mining claim which is found to be invalid or is relinquished * * * to apply for relief under the act. The Senate version used July 23, 1962, as the critical date, required the applicant to be a citizen or declarant, and provided that the improvements should be "a principal place of residence" for him and that he or his predecessor in interest should have been in possession of the claim for at least 7 years. The conference committee recommends, in substance, adoption of the Senate "principal place of residence," 7-year possession, and July 23, 1962, tests * * *.

(The conference committee notes that the amendment it proposes does not require the mining claim to be *the* principal place of residence of an applicant. It requires, rather, that it be *a* principal place of residence. This is intended to avoid problems in cases in which weather and topography make the site, though suitable for continuous occupancy for several months each year, impossible for the remainder of the time. It also eliminates, on the other hand, the occasional week-ender who cannot, in good faith be said to use the site as a *principal* place of residence. * * * (Italics supplied.) H.R. Rep. No. 2545, 87th Cong., 2d Sess. 4 (1962).

This language of the conference committee supplied the basis for the Department's regulation 43 CFR 2215.0-5(d) which provides that:

The term "a principal place of residence" means an improved site used by a qualified applicant as one of his principal places of residence except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as for a hunting cabin or for weekend occupancy.

The legislative history strongly indicates that "a principal place of residence" must be in the nature of a home which the occupant leaves periodically only because adverse weather conditions or some similar circumstance makes it impossible or impracticable for him to live there on a year-round basis. But however that may be, it seems

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clearly to exclude a place to which a person repairs only on weekends and during vacations, while maintaining a regular home elsewhere. This accords with the purpose of the legislation. As the Senate Committee said:

The bill is a relief measure designed to aid those qualified people on whom a hardship would be visited were they to be required to move from their long-established homes. S. Rep. No. 1984, *supra* 3.

While the appellant has contended that the information obtained by the Forest Service as to his occupancy of the claim is inaccurate, he has neither furnished evidence nor alleged facts that would refute the findings of the Forest Service, although he has been afforded ample opportunity to supply more detailed information with respect to the residential use made of the claim.

As the record stands, it shows that appellant did not acquire an interest in the claim until August 1961, 14 months before the statute was enacted. He does not state to what extent he or members of his family occupied the claim from August 1961 to the date of the act. In a letter dated October 23, 1963, to the Forest Service he said only that all his annual leave as a Federal employee was spent there, that he managed to be there at least once a month "for a considerable time" but that his wife was able "to spend more time there." In another letter dated October 28, 1963, to the Forest Service he stated that "[t]his year [1963] we will have used it ten months of the year for varying periods of time, but never less than five days." Apparently, the modern improvements he made to the wash house on the claim were made after October 23, 1962, so that it is a reasonable surmise that most of appellant's occupancy occurred after October 23, 1962.

As noted earlier, a qualified applicant under the act of October 23, 1962, must be a residential occupant-owner *on that date* of valuable improvements which constitute for him a principal place of residence. An applicant cannot qualify by making the claim a principal place of residence after that date. It is plain that as the appellant has not made any showing of the required occupancy as of October 23, 1962, he is not a qualified applicant.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

EDWARD WEINBERG,
Deputy Solicitor.

GRADY L. JOHNSON ET AL.

A-30288

Decided October 26, 1965

Mining Occupancy Act: Generally—Mining Occupancy Act: Qualified Applicant

The act of October 23, 1962, does not apply to occupants of mining claims which were invalidated or relinquished prior to the date of enactment of that act.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Grady L. Johnson and five others¹ have appealed to the Secretary of the Interior from a decision dated February 19, 1964, whereby the Division of Appeals, Bureau of Land Management, affirmed separate decisions of the Colorado land office rejecting their applications, filed pursuant to the act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. §§ 701-709 (1964), to purchase lands once embraced in unpatented mining claims.

The appellants are all possessors of improvements constructed on lands included in former mining claims which, prior to October 23, 1962, were determined by the Bureau of Land Management to be invalid. The rejection of their applications was based upon the Bureau's interpretation of the act of October 23, 1962, section 1 of which provides in part:

That the Secretary of the Interior may convey to any occupant of an unpatented mining claim which is determined by the Secretary to be invalid an interest, up to and including a fee simple, in and to an area within the claim of not more than (a) five acres or (b) the acreage actually occupied by him, whichever is less. The Secretary may make a like conveyance to any occupant of an unpatented mining claim who, after notice from a qualified officer of the United States that the claim is believed to be invalid, relinquishes to the United States all right in and to such claim which he may have under the mining laws. Any conveyance authorized by this section, however, shall be made only to a qualified applicant, as that term is defined in section 2 of this Act, who applies therefor within five years from the date of this Act and upon payment of an amount established in accordance with section 5 of this Act * * *

Divergent legal views have been expressed on the issue presented by these appeals, i.e., whether the act applies retrospectively to former unpatented mining claims which prior to the date of enactment of the act had been determined to be invalid.

We have concluded that the view reflected in the decision of the Bureau of Land Management in these cases is correct and, consequent-

¹ The appellants are as follows:

Grady L. Johnson.....	Colorado 0102744
Leighton W. Davis.....	“ 0104136
Mrs. Opal Lofquist.....	“ 0105330
Frank W. Whitenack.....	“ 0107409
Richard E. and James C. Andrews.....	“ 0108806
Joseph F. Abele.....	“ 0108808

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ly, we must decline to read the statute retrospectively.² Our reasons follow.

The bill from which the act emerged, S. 3451, 87th Cong., 2d sess. (1962), as introduced, provided in pertinent part:

That the Secretary of the Interior may convey to an occupant of an unpatented mining claim which is determined by the Secretary after due process, to be invalid, an interest in an area within the claim of not more than (a) five acres or (b) the acreage actually occupied by him, whichever is less. The Secretary may make a like conveyance to an occupant of an unpatented mining claim who, after notice from a qualified officer of the United States that the claim is believed to be invalid, relinquishes to the United States all right in and to such claim which he may have under the mining laws or who, *within two years prior to the date of this Act*, relinquished such rights to the United States or had his unpatented mining claim invalidated after due process. Any conveyance authorized by this section, however, shall be made only to a qualified applicant, as that term is defined in section 2 of this Act, who applies therefor within five years from the date of this Act and upon payment of the amount established pursuant to section 5 of this Act. (Italics added.)

The House version of the bill (H.R. 12761) differed with the Senate version as to the first section only in the omission of the phrase "after due process" and in providing for a period of three years rather than five years in which to apply for a conveyance.

The Senate passed S. 3451 with only minor amendments in section 1. The language making the legislation applicable to mining claims invalidated or relinquished within two years prior to the date of the act was left intact.

When S. 3451 reached the House, it was amended by substituting for its text the provisions of H.R. 12761, and it was passed with this substitution. 108 Cong. Rec. 19651 (1962). As indicated earlier, H.R. 12761 contained the identical 2-year retroactive provision that S. 3451 did; consequently, the substitution of the text of H.R. 12761 made no change in S. 3451 so far as that provision was concerned.

When S. 3451 went to conference, it emerged with the 2-year retroactive provision in section 1 stricken out. The only explanation given by the conference committee for the language changes in section 1 of the act which have clouded the question of applicability of the act to persons whose mining claims had previously been invalidated is that:

The House version would have permitted any "seasonal or year-round residential occupant-owner, as of January 10, 1962," of improved land in an unpatented mining claim which is found to be invalid or is relinquished or which, within 2 years preceding the date of the act, was found to be invalid or was relinquished, to apply for relief under the act. The Senate version used July 23, 1962, as the critical date, required the applicant to be a citizen or declarant, and provided that the improvements should be "a principal place of residence" for him and that he or his predecessor in interest should have been in possession of the claim for at

² Our views are consistent with the Director's decision of July 8, 1963, approved September 13, 1963, in the case of *Charles M. and Jessie B. Sipes*, Sacramento 074622.

least 7 years. The conference committee recommends, in substance, adoption of the Senate "principal place of residence," 7-year possession, and July 23, 1962, tests, and omits the citizenship provision as unnecessary and the *retrospective 2-year provision as inconsistent with certain other provisions of the conference amendment*. H.R. Rep. No. 2545, 87th Cong., 2d Sess. 4 (1962). (Italics added.)

The conferees' explanation of why the 2-year retrospective provision was eliminated is not at all clear. The conference report sets forth all the significant points of difference between the Senate-passed and House-passed versions of S. 3451 and the resolution of the differences by the conferees. We are unable to find any provision adopted by the conferees with which the 2-year retrospective provision would have been inconsistent.

Leaving aside the conferees' explanation of the reason for deletion and considering only the effect of the fact of the deletion, it is apparent that it could have two opposite meanings: (1) that the deletion was intended to eliminate any retrospective application of the bill and to have it apply prospectively only, and (2) that it was intended to remove only the 2-year limitation on retrospective action and to have the bill apply retroactively without a time limitation.

Supporting the first interpretation is the language of the bill as enacted, that the Secretary may make a conveyance to any occupant of an unpatented mining claim which "is" determined by the Secretary to be invalid or to any occupant of such a claim who "relinquishes" his claim. The present tense of the verbs clearly connotes prospective action, acts of determination or relinquishment occurring after enactment of the legislation. This becomes more apparent when we examine the precise language change accomplished by the conference action. As the bill went to conference, it provided in pertinent part as follows:

That the Secretary of the Interior may convey to any occupant of an unpatented mining claim *which is determined* by the Secretary to be invalid an area * * *. The Secretary may make a like conveyance to any occupant of an unpatented mining claim *who * * * relinquishes* to the United States all right in and to such claim * * * or *who, within two years prior to the date of this Act, relinquished such rights to the United States or had his unpatented mining claim invalidated* * * *. (Italics added.)

It is obvious at a glance that the first two italics clauses referred only to actions to be taken after the enactment of the act and that the last italics clause was to take care of claims invalidated or relinquished within the 2-year period prior to enactment of the legislation.

The conferees struck out only the last clause, leaving intact the first two clauses which, until that moment, had prospective operation only. How can this action be construed suddenly to enlarge the meaning of the unchanged words, to give them now retrospective as well as prospective meaning? We know of no sound basis for such a construction. Had Congress intended the retained verbs "is determined" and "relinquishes," which spoke *in futuro* only, to have retroactive application,

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surely it would have added such a modifying phrase as "heretofore or hereafter." That Congress failed to take this simple step militates against the interpretation that it in effect did so.

This conclusion accords with the familiar rule of statutory construction that legislation will not be construed to operate retrospectively unless the legislative intent to that effect is clearly expressed. *Claridge Apartments Co. v. Com'r.*, 323 U.S. 141, 164 (1944); *Hassett v. Welch*, 303 U.S. 303 (1938); *K. E. Saltgaver et al.*, 58 I.D. 546, 547-48 (1943); see *Greene v. United States*, 376 U.S. 149 (1964).

There is no such expression of legislative intent in this case. Although, up to the time of the conference action, there were expressions of intent in the Congress that relief should be afforded to those whose claims had already been invalidated,³ such expressions were made with respect to earlier versions of S. 3451 and other bills which specifically contained retrospective provisions. After the conference action, however, which struck from S. 3451 all language of retroactivity and retained only the language of prospective operation, there were no further statements as to retroactive application of the legislation.

Lacking any expression of Congressional intent that S. 3451, as reported by the Conferees, should have retrospective application, we see no justifiable basis for reading the statute contrary to the meaning expressed by its plain language. The rule is that while not incompetent or irrelevant in construing a statute legislative materials which are themselves without probative value, or ambiguous, or contradictory, will not be permitted to overcome the customary meaning of its words. *United States v. Dickerson*, 310 U.S. 554 (1954).

To apply the statute retrospectively would impute to the Congress an intention to have authorized an unlimited retrospective application save only as the Secretary of the Interior might conclude otherwise in the exercise of a discretion for which the act provides no standards. But a two-year retrospective period is the most that either Committee or either House ever envisioned. Such a construction would amount to an extension of the statute which cannot be squared with its own terms, for which the legislative history lends no support and which would be inconsistent with the rule against retrospective application.

Accordingly, we conclude that the benefits of the act of October 23, 1962, cannot be extended to occupants of mining claims who relinquished their claims or had them invalidated prior to the date of the act.

Therefore, pursuant to the authority delegated to the Solicitor by the

³ See Sen. Rep. No. 2184, 87th Cong., 2d sess. 3 (1962), on S. 3451; statement of Sen. Church in the debate on S. 3451, 108 Cong. Rec. 18786 (1962); statement of Sen. Bottom on S. 3564, 108 Cong. Rec. 14488 (1962); statement of Rep. Johnson on H.R. 12761, 108 Cong. Rec. 19648 (1962).

Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decisions appealed from are affirmed.

FRANK J. BARRY,
Solicitor.

APPEAL OF SUNSET CONSTRUCTION, INC.

IBCA-494-9-64 *Decided October 29, 1965*

Contracts: Performance or Default: Excusable Delays—Contracts: Disputes and Remedies: Burden of Proof

A contractor who seeks an extension of time under a standard form of construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract and that it delayed the ultimate completion of the contract as a whole.

Contracts: Disputes and Remedies: Damages: Liquidated Damages—Contracts: Performance or Default: Excusable Delays

Failure by a contractor to prosecute the work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the contractor to extensions of time for such portions of the ultimate delay in completion as are attributable to conditions, such as "unusually severe weather," that are excusable under the terms of the contract.

Contracts: Performance or Default: Excusable Delays—Contracts: Construction and Operation: Waiver and Estoppel

A contractor who bids on a Government contract unqualifiedly represents that it has the skill and ability to do the work; consequently, neither the absence of the requisite "know-how" nor the lack of the proper equipment and qualified personnel to do the job, are excusable causes of delay under the standard form of construction contract.

Contracts: Disputes and Remedies: Damages: Liquidated Damages—Contracts: Performance or Default: Generally—Contracts: Disputes and Remedies: Damages: Actual Damages

Liquidated damages provisions in contracts are valid and enforceable without regard to whether or not the Government is in a position to show the amount of actual damage sustained by reason of the delayed performance of a contract. The inability to prove the amount of actual damages suffered because of the delayed performance is not fatal to the Government's enforcement of liquidated damages and does not convert liquidated damages into penalties.

BOARD OF CONTRACT APPEALS

This appeal is concerned solely with the propriety of an assessment by the contracting officer of liquidated damages for delayed performance of the contract. Certain wage claims relating to performance under the contract were not considered in the findings; hence, they are not before us for review. Other claims arising under the contract or asserted in connection therewith have been specifically relinquished in the appellant's brief.

The contract, which was dated July 26, 1961, was on U.S. Standard

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Form 23 (Revised March 1953) and embodied the General Provisions of U.S. Standard Form 23A (March 1953). It provided for grading, drainage and crushed aggregate surfacing work on 1.869 miles and roadbed reconditioning and crushed aggregate surfacing on 9.085 miles, of the Lodgepole-Brookside Road on the Fort Belknap Indian Reservation in Montana.

Notice to proceed with the work was received by the contractor on August 11, 1961. Under the terms of the contract the contractor was to complete the work within 285 days after the date of receipt of such notice; consequently, the work was scheduled for completion on or before May 23, 1962. The work was finally accepted as of September 29, 1962. This entailed a delay in completion of the work of 129 days. Article 32.1 of the Special Provisions provided for the assessment of liquidated damages at the rate of \$75 per day for each calendar day's delay in completion. The contracting officer found that none of the delay in question was excusable and liquidated damages were assessed against the contractor in the amount of \$9,675.

The contractor contests the assessment of liquidated damages on several grounds. Among its principal allegations are the contentions that it was delayed for a period of 117 days between December 8, 1961 and April 2, 1962, by "unusually severe weather" within the meaning of paragraph (c) of Clause 5 of the General Provisions;¹ and that it was further delayed by such conditions for a substantial but unspecified period in May 1962. Neither party has requested a hearing; hence, the appeal will be decided upon the record.

As previously noted, the contractor's claim of excusable delays is asserted under Clause 5 (c) of the General Provisions. The contract also provided that the contracting officer might suspend all or any part of the work under certain conditions. In none of the correspondence included in the administrative record (appeal file) does the contractor even mention the "suspension" clause. While a portion of the clause is quoted in appellant's brief, no attempt is made to show its applicability to the appeal. In his findings the contracting officer refers to the "Suspension of Work"² provision but notes its inapplicability³ to the instant appeal, stating:

¹ Clause 5(c) of the General Provisions of the contract provided that the contractor should not be charged with liquidated damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including, but not restricted to, certain named causes among which is "unusually severe weather."

² In pertinent part, this provision (Article 8.7 of the General Requirements) provided the contracting officer with authority to suspend the work wholly or in part by written order, for such period as he deemed necessary for certain enumerated causes. Included was authorization to suspend "(1) If the climatic conditions specified under which certain features of work are to be undertaken do not prevail when the contractor is ready to perform those features of work."

³ Cf. *Paul A. Teegarden, IBCA-419-1-64* (July 27, 1965), 72 I.D. 301, '65-2-BCA par:

* * * Since there were no climatic conditions specified for any feature of the work the Contracting Officer did not find it necessary to order suspension of all or any part of the work under Article 8.7; therefore, no extensions of time are allowable under this provision.

Unusually Severe Weather

Before considering the specifics of the claims for extensions in time for performance, it would perhaps be well to note that the contractor appears to have proceeded upon fundamental misconceptions as to the proof required to establish an excusable cause of delay under the standard form of construction contract. Judging by the proof offered, the contractor appears not to have realized that in order for a delay to be considered excusable it must be shown to have been unforeseeable,⁴ pursuant to the language of the clause, as has been the uniform holding of the Board in cases involving claims of "unusually severe weather;"⁵ nor does the contractor appear to have given any consideration to the fact that in order to be entitled to an extension of time it must show not only that an excusable cause of delay occurred but also that it was a factor in the ultimate delay in the completion of the work.⁶

Claim No. 1

In its letter of December 14, 1962, the contractor requested that it not be assessed liquidated damages for the 117 days between December 8, 1961 and April 2, 1962, "per the General Provisions 5(c), Unusually Severe Weather." The contracting officer rejected this request for extension apparently on the ground that the time allowed for performance of the work covered by the contract provided an appropriate allowance for the fact that in Montana the construction season usually extends to mid-December and (in the words of the contracting officer) "is virtually discontinued until spring due to severe conditions normally prevailing during winter months in the area." On the other hand, the contractor contends in its brief that what was actually contemplated was "285 work days with a normal winter shut down."

5011 (1965); *Reid Contracting Company, Inc.*, IBCA-74 (December 19, 1958), 65 I.D. 500, 58-2 BCA par. 2037, 1 Gov. Contr. 50, 51, 52, 280N., 431N., 703N.; *Larsen-Meyer Construction Co.*, IBCA-85 (November 24, 1958), 65 I.D. 463, 58-2 BCA par. 1987 (1958); and *Urban Plumbing and Heating Company*, IBCA-43 (November 21, 1956), 63 I.D. 381, 56-2 BCA par. 1102.

⁴ *United States v. Brooks-Calloway Co.*, 318 U.S. 120 (1943).

⁵ *Allied Contractors, Inc.*, IBCA-265 (September 26, 1962), 69 I.D. 147, 1962 BCA par. 3501, 4 Gov. Contr. 512, citing *Caribbean Engineering Company v. United States*, 97 Ct. Cl. 195 (1942), and 14 Comp. Gen. 431. Reconsideration denied (December 10, 1962), 69 I.D. 222, 1962 BCA par. 3591, 4 Gov. Contr. 610(i). In that case the Board stated: "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."

⁶ *J. W. Mers*, IBCA-64 (March 10, 1959), 59-1 BCA par. 2086, 1 Gov. Contr. 193, 197, 202, 431N., 471N., 601N., and authorities there cited.

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Neither the contracting officer nor the contractor have referred to any contractual provisions in support of their respective positions and we have discovered none. Endorsement of the contracting officer's position would require construing Clause 5(c) as if the words "unusually severe weather" did not appear therein. This would be in contravention of the express language of a General Provision prescribed for use in the standard form of construction contract.

We assume *arguendo* that the contracting officer would have authority to give effect to a special contract provision included in the contract terms by which the "unusually severe weather" provision of Clause 5(c) would be rendered nugatory.⁷ It is clear, however, that in interpreting the contract he has no authority to disregard the plain language of Clause 5(c) where, as here, no such special provision was in fact so included; nor do we have such authority.⁸

For the same reason we will not undertake to extend the time for performance over and above that provided for in the contract merely because the contractor says in effect that the contract should have been written differently. To accede to either of these positions would be to substitute a different agreement for that executed by the parties.⁹ Accordingly, we will interpret Clause 5(c) so as to give effect to all of the language thereof including that relating to unusually severe weather.

Except for the allegation that the delays encountered between December 8, 1961 and April 2, 1962, were attributable to "unusually severe weather" within the meaning of Clause 5(c) of the General Provisions, the contractor has offered no evidence to show that its performance of the contract was in any way delayed by such "unusually severe weather" as may have been present. Mere allegations unsupported by any evidence of record are not acceptable as proof.¹⁰

The record includes weather information as to the year 1962,¹¹ but contains no such information as to December of 1961. The information furnished discloses that the weather in January 1962, was of more than usual severity being some ten degrees colder than the long-term mean; that February and March temperatures of that year were from slightly less than 4 to slightly more than 5 degrees colder than the long-term mean; and that temperatures in April and May were

⁷ The validity of the proposition is highly doubtful.

⁸ *R & R Construction Co.*, IBCA-413 (September 27, 1965), 65-2 BCA par. 5109, and authorities there cited.

⁹ *Duncan Miller*, IBCA-305 (April 18, 1962), 69 I.D. 25, 1962 BCA par. 3339, 4 Gov. Contr. 310 (Board without authority to either rescind or reform contracts).

¹⁰ *R & R Construction Co.*, IBCA-458-9-64 (September 27, 1965), 65-2 BCA par. 5109, and authorities there cited.

¹¹ Monthly weather summaries, taken from the records of the United States Weather Bureau station situated at Hays, Montana, were furnished by the contracting officer. Reportedly, the station is approximately 8 airline miles from the nearest point on the con-

from slightly less than 6 degrees to slightly more than 2 degrees warmer than the long-term mean.

On the basis of such information it is considered that a number of the days in January and perhaps a few of the days in February and March had "unusually severe weather" within the meaning of Clause 5(c) of the General Provisions as generally interpreted. The difficulty, however, from the standpoint of the contractor's position is that it has offered no evidence to show that it contemplated proceeding with performance of the road construction work called for by the contract during even normal winter weather in Montana. On the other hand, there is an abundance of evidence in the record showing that the contractor had no intention of performing the contract during the winter months. Illustrative of that intention is the contractor's letter of December 8, 1961,¹² by which it notified the contracting officer of its decision to discontinue performance of the contract until spring. This decision could hardly have been affected by the fact that the weather in the succeeding January turned out to be of unusual severity; nor could it have been affected by the fact that the temperatures in February and March were slightly lower than are usual for such months.

While in the letter of December 14, 1962, the contractor refers to "instructions" from Government inspection personnel in December of 1961 to discontinue performance, the alleged "instructions" were not even referred to in appellant's brief; nor was any proof offered in support of this sole reference to Government intervention, made in a letter written over a year after the purported event. As previously noted, mere allegations are no substitute for proof.¹³

From the evidence of record it appears that the decision to suspend

struction site but separated by a range of hills. A table* based upon the information so furnished appears below :

	1962		Long-term Mean at Hays, Montana	
	Average temperature	Precipitation	** Average temperature	** Precipitation
January.....	8.0	0.58	18.62	0.69
February.....	19.0	.57	22.85	.564
March.....	24.1	.87	29.24	.533
April.....	46.0	.40	40.28	1.103
May.....	49.4	4.53	***46.9	***2.816

*No information was furnished as to temperature and precipitation readings for December of 1961.

**Reflects the average figure for the ten-year period 1953 to 1962, inclusive.

***Neither temperature nor precipitation figures were reported for May of 1955.

¹² The contractor's letter of December 8, 1961 provides in pertinent part: "This is to advise your office that all work on the above reference project will be curtailed until spring when weather conditions become more favorable."

¹³ *R & R Construction Co., supra*, note 10.

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all work during this period was a voluntary decision by the contractor; that it was made with a view to avoiding the difficulties and expenses attendant upon road construction during even a normal Montana winter and early spring;¹⁴ and that it apparently was based upon the estimate of the contractor's initial superintendent that the work involved could be performed in much less time than provided for in the contract.¹⁵ The Board finds that such unusually severe weather as may have been present during the period in question could not have delayed the performance of the contract. Accordingly, it is determined that the appellant is not entitled to an extension of time on account of the weather conditions at the construction site from December 8, 1961 to April 2, 1962.

Claim No. 2 (Delays in May 1962)

By letter dated May 22, 1962, the contractor's superintendent requested an extension in the time for performance of the contract on the grounds of the unusual amount of rainfall in May up until the time of the request, and the fact that due to wet weather the contractor had only crushed gravel "one day in the last two weeks." The contracting officer denied the request for extension on two principal grounds: (i) "the months preceding May of 1962 were below normal as far as rainfall was concerned, yet this was the period when very little work was being performed;" and (ii) "the records during May of 1962 indicate a total of 4.53 inches of rainfall" as contrasted with the fact that in 1953 there were 7.76 inches of rain during that month.

Reports from the contracting officer's representatives disclose that immediately prior to the commencement of the wet weather reported in the letter of May 22, 1962, the contractor was actively engaged in the prosecution of the work. In such circumstances the Board has held that a contractor is entitled to an extension of time upon a proper showing that due to an excusable cause of delay it was unable to continue with performance.¹⁶

The test for determining whether the weather encountered in a particular case was "unusually severe" within the meaning of Clause 5 is not whether at some time within a ten-year period the weather can

¹⁴ See *J. W. Merz, supra*, note 6, for a discussion of the difficulties involved in outdoor construction in even a normal Montana spring.

¹⁵ In letter of September 27, 1961, the contractor's superintendent estimated that weather permitting the job could be completed in November of that year.

¹⁶ *J. W. Merz, supra*, note 6, citing *Chas. I. Cunningham Co., IBCA-60* (December 6, 1957), 64 I.D. 449, 451, 57-2 BCA par. 1541 in which it was stated: "It is well settled that the failure of a contractor to prosecute the contract work with the efficiency and expedition requisite for its completion within the time specified by the contract does not, in and of itself, disentitle the contractor to extensions of time for such parts of the ultimate delay in completion as are attributable to events that are themselves excusable, as defined in Clause 5(c) of the General Provisions of the standard-form Government construction contract * * *."

be shown to have been even more inclement; rather the test is whether the weather advanced as an excusable cause of delay varies significantly from the average weather for the particular locality and season involved over an acceptable period,¹⁷ and, if so, the extent to which the weather encountered in a particular case impeded performance of the contract over and above the impediment to performance resulting from weather in a normal year.¹⁸

A table reflecting pertinent weather data has been set forth elsewhere herein.¹⁹ Taking such data as representative of the average temperatures and precipitation prevailing at the construction site during May of 1962 and the nine preceding years (exclusive of May of 1955 for which no information was furnished), we find that the temperature in May averaged 2.5 degrees warmer than the long-term mean; and that there was approximately 1.7 inches more precipitation in that year than the long-term mean. The question, therefore, is simply whether performance of the contract was significantly affected by such excess precipitation and, if so, to what extent.

In the letter of May 22, 1962, the contractor's superintendent reported that the gravel pit from which it was required to take gravel in order to meet the specifications was located in a creek bottom and that as of that date the gravel pit was flooded with three feet of water. The same letter reported that due to the high water table it was very hard to get any good production from the pit. This was said to be the situation because "the water in the gravel makes it difficult to screen and crush." Although the contracting officer's representatives were apparently at the scene, the substance of these allegations has not been controverted, insofar as the presence of abnormally wet weather during most of the period in question is concerned. Thus, the project engineer, in a report under date of June 1, 1962, states: "* * * Working conditions were excellent up to the 14th of May at which time considerable moisture in the vicinity has closed down the work much of the time to date." In the same report, however, the project engineer stated: "Last Friday May 25th a Mr. Hackette, owner of the trucks that have been hauling, quit and took his trucks off the job. No work has been done since that time although working conditions were good up to Thursday May 31."

The apparent difference of 4 days in the amount of time lost due to wet weather up until May 22, 1962, may reflect conflicting appraisals by the respective parties as to when road construction operations were feasible. In addition to the 9 days reported by the project engineer

¹⁷ *Reid Contracting Company, Inc.*, *supra* note 3, in which the Board stated: "* * * Weather may be said to be 'unusually severe' within the meaning of Clause 5 of the General Provisions of the contract when it is more severe than the average weather for the particular locality and season of the year. * * *" See also appeal of *Allied Contractors, Inc.*, *supra*, note 5.

¹⁸ *Allied Contractors, Inc.*, *supra*, note 5.

¹⁹ See note 11, *supra*.

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as lost due to wet weather up until May 22, 1962, there is for consideration that two additional days that appear to have been lost due to that cause subsequent to that date.

The contractor is not entitled, however, to have the contract extended by all of the time lost due to unusually severe weather but for only the time lost due to such cause as is found to be unforeseeable.²⁰ From the record available it is not possible to say the number of days of unusually severe weather that the contractor could reasonably expect to encounter normally in the area at the time in question; but it is noted that the contracting officer found that normally May is a wet month in the locality involved and the summary of the weather reports furnished by him corroborate this finding. Except for the appellant's brief inviting consideration of matters dehors the record, the contractor has offered no evidence in addition to its letter of May 22, 1962. In these circumstances and bearing in mind that it is incumbent upon the contractor to prove not only the existence of the excusable delay but to also show the extent to which overall performance of the contract was delayed thereby,²¹ it is considered that the time for performance of the contract should be extended by 11 calendar days.

Contractor Responsibility for Performance of Contract

Aside from the question of "unusually severe weather," the contractor contends in its brief that liquidated damages could not properly be assessed because: (i) the contracting officer had accepted the contractor's bid even though he knew or should have known that the contractor had had no prior experience as a dirt contractor; and (ii) the Department by not demanding changes in supervision, more equipment and more labor had lured the contractor "into a false sense of security until completion date arrived."

The contractor's bid was an unqualified representation that the contractor had the supervision, personnel, equipment, skill and ability to do the work²² upon which the contracting officer was entitled to rely.²³ The Board concludes, therefore, that the first contention is without merit.

The second contention has no support in the record. On at least six occasions, commencing with the letter of September 7, 1961, the contracting officer requested the contractor to furnish a work progress

²⁰ *Central Wrecking Corporation*, IBCA-69 (March 29, 1957), 64 I.D. 145, 57-1 BCA par. 1209, citing *Jeneckes*, IBCA-44 (November 28, 1955), 62 I.D. 449, 452, 6 CCF par. 61, 732, in which following a detailed discussion of the question the Board stated: "* * * the number of days of excusable delay could have been calculated more simply by deducting the average number of days of unusually severe weather from the number of days of such weather actually experienced on the job. * * *"

²¹ *J. W. Merz*, *supra*, note 6 and authorities there cited.

²² *Montgomery-Macri Co., et al*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 63 BCA par. 3819 (1963), 5 Gov. Contr. 419; 6 Gov. Contr. 332(e).

²³ *Trand Plastics Company*, ASBCA 3708, 57-1 BCA par. 1186 and authorities there cited.

schedule, equipment list and layout as required by Paragraph 8 of the General Requirements of the contract. It was not until its letter of May 15, 1962, however, that the contractor undertook to explain its failure to furnish the requested information; and it was not until May 26, 1962, that a work project schedule was actually furnished in response to repeated requests.

The Board finds, therefore, that such deficiencies as existed in performance were attributable to and were the responsibility of the contractor; and that, consequently, they furnish no basis for a finding of excusable delay.

Liquidated Damages as Penalty

In its brief the appellant contends that "an award of liquidated damages would in this instance amount to an award of punitive damages." As to this position it would appear to be sufficient to observe that this Board has frequently sustained the assessment of liquidated damages in cases indistinguishable in principle from the instant appeal.²⁴ Contrary to the appellant's assertion that the delay in construction occasioned the Department no real damage, the contracting officer specifically found that the "Government went to considerable expense in having inspectors present when no work was being accomplished and no notice was forthcoming from the Contractor as to his schedule of operations." Liquidated damages are properly imposed, however, even where the Government has failed to show actual damages by reason of the delay,²⁵ nor does the fact that the liquidated damages imposed resulted in a hardship to the contractor in any way impugn the validity of the assessment.²⁶ On the basis of the facts found and the authorities cited, the Board concludes that liquidated damages were properly assessed for delayed performance not found to be an excusable delay pursuant to Clause 5 of the General Provisions of the contract.

Conclusion

The appeal is sustained to the extent that time for performance of the contract is hereby extended by 11 days.

WILLIAM F. MCGRAW, *Member.*

I CONCUR:

DEAN F. RATZMAN,
Chairman.

I CONCUR:

THOMAS M. DURSTON,
Deputy Chairman.

²⁴ *Refer Construction Company*, IBCA-267 (May 19, 1961), 68 I.D. 140, 61-1 BCA par. 3048, 3 Gov. Contr. 358(e) and authorities there cited.

²⁵ *United States v. Bethlehem Steel Company*, 205 U.S. 105 (1907).

²⁶ *Parker-Schram Company*, IBCA-96 (April 7, 1959), 86 I.D. 142, 59-1 BCA par. 2127, 1 Gov. Contr. 289, 563n.

APPEAL OF RAY D. BOLANDER COMPANY, INC.

IBCA-331

Decided November 16, 1965

Rules of Practice: Witnesses—Rules of Practice: Evidence

Where, under the terms of a pre-hearing agreement limiting the number of witnesses, the parties to a contract appeal proceeding exchanged lists of names of proposed witnesses and where one party having had opportunity to do so failed to notify timely the opposing party of its intent to call an additional witness whose name had not been submitted, the testimony of such additional witness will be disregarded by the Board.

Contracts: Construction and Operation: Changed Conditions—Contracts: Performance or Default: Acceptance of Performance

General references in a construction contract to a requirement that "suitable" earth material excavated from cuts be used and compacted in fills for road embankments, did not constitute a representation that most of the earth removed from cut areas would be of a type that could be handled efficiently by construction practices and equipment that the contractor had anticipated using, and the encountering by the contractor of soils having a high moisture content that became acceptable for compacted embankments after handling pursuant to other recognized practices and with other types of equipment, did not constitute a changed condition of the first category within the meaning of the standard form of the Changed Conditions clause.

Contracts: Construction and Operation: Changed Conditions—Contracts: Disputes and Remedies: Burden of Proof

Where a reasonably careful pre-bid investigation by a contractor would have disclosed that some of the soils to be excavated and moved on a road construction project contained a high proportion of fine particles and very little plasticity, and the site of the project was in an area of known heavy rainfall, the existence of wet soils that were difficult to excavate and move was not an "unknown" condition within the meaning of the Changed Conditions clause; further, the contractor failed to prove by a preponderance of evidence that wet soils were an "unknown" condition within the meaning of that clause.

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Third Persons

Where the specifications of a road construction contract authorized the contractor to take certain actions that would interfere with the flow of traffic on an existing road in a park, but also required that the road be kept open to the public, the expense involved in coping with heavy tourist traffic in the summertime cannot be recovered under the theory that a change in the contract had been made, where it appears that the contractor could have obtained information as to the number of summertime visitors that would be expected to come to the park, and the number of visitors who actually came was within the range of what should have been expected.

Contracts: Construction and Operation: Changed Conditions

The standard "Changed Conditions" clause of a construction contract provides no basis for relief with respect to a claim that summertime traffic in a park was heavier than that expected by a contractor, since the situation complained of came into being after the contract had been executed, and the contractor's request for relief essentially is related to an allegation that the Government breached its obligations under the contract rather than to the existence of conditions at the site of the type described in the first and second categories of the "Changed Conditions" clause.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof

A contractor's claim that it had been required to obtain material for highway fills from slopes that previously had been brought substantially to grade, rather than from the areas specified in the contract, is not allowable when there was no showing that the contracting officer or his authorized representative had ordered the work in question; the evidence showed contractor had re-entered upon the slopes voluntarily, with no indication that such re-entry was disadvantageous to its operations or would result in excess costs.

BOARD OF CONTRACT APPEALS

This appeal arises under a contract calling for highway construction. The section of highway involved replaced an existing section of route U.S. 441. It crosses the Great Smoky Mountains National Park from Gatlinburg, Tennessee, to Cherokee, North Carolina, and furnishes the principal means of access to the park from both west and east. The park area is mainly composed of heavily wooded mountains and at one point the highway attains an elevation of approximately one mile above sea level.

Project 1-B-3, considered in this opinion, was for work on 3.893 miles of highway which descends from elevation 4,260 at the western end of the section to elevation 2,740 at the eastern end. The new highway followed alignments and grades that were different and separate from the old road, but crossed or impinged upon the latter at a number of locations. There were many substantial cuts and fills. The cuts were mostly in earth rather than in rock. Most of the rock was encountered at the lower or eastern end of the project.

The contract was made by the National Park Service of the Department of the Interior, but was administered by the Bureau of Public Roads of the Department of Commerce. It was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953). It also incorporated by reference the provisions of the January 1957 edition of the "Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects" issued by the Bureau of Public Roads, commonly known as FP-57. The estimated contract price was \$667,355.

The invitation for bids was issued and bids were opened in the winter of 1958, and work was begun on April 7, 1958. The contract

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required that the work be completed within 550 days after receipt of notice to proceed. Originally the completion date was October 2, 1959. It was not completed until 1,187 days after receipt of notice to proceed, on June 30, 1961. The difference of 637 days was covered by time extensions allowed by reason of such circumstances as changes in specifications, overruns in quantities and unsuitable weather conditions. Hence, liquidated damages for delay in performance were not assessed.

By letters dated April 27, 1960, and November 18, 1960, appellant formally presented six claims for additional compensation under the contract. The total amount sought was \$393,137.26. All six claims were rejected by the Regional Engineer of the Bureau of Public Roads, acting as authorized representative of the contracting officer, in a decision dated June 1, 1962. From this decision the appeal now before us was timely taken.

Claim I

Wet Soil in Cuts

This claim is for \$297,132.49. It is asserted under the "Changed Conditions" clause (Clause 4) of the General Provisions.¹ Before its merits are examined, two preliminary questions need to be considered.

The first question has to do with notice. The Regional Engineer denied the claim on the ground that it was not presented until almost two years from the time the alleged changed conditions became apparent, as well as on the ground that the conditions encountered were typical of the area and could have been ascertained through a reasonable pre-bid investigation.

The notice required by the "Changed Conditions" clause is notice of the existence of the physical conditions encountered, rather than notice of the making of a claim for additional compensation.² It

¹ The text of this clause reads as follows:

"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."

² *Shepherd v. United States*, 125 Ct. Cl. 724, 729-33. (1953); *Layne Texas Co., IBCA-362* (January 29, 1965), 72 I.D. 39; 65-1 BCA par. 4658.

need not be given to the contracting officer himself, but may be given to a person who has been clothed by the contracting officer with authority to be on the job and see that the work is performed.³ The time within which it must be given is "promptly" and "before such conditions are disturbed"—hence, the contractor has some leeway in determining when to act, so long as the physical conditions encountered remain open for investigation by the Government.⁴ Knowledge of the presence of a condition is the equivalent of receipt of notice.⁵

In this case the Government had ample and timely notice of wet soil being encountered on the job and of the difficulties which appellant was experiencing in excavating this material from the cuts and in using it for building fills. Engineers of the Bureau of Public Roads were fully aware of these conditions and problems from almost the very beginning of earth moving operations on the job. Appellant commenced grading operations on or about May 20, 1958. Its representatives initially discussed the problem of what to do about the wet soil with the Project Engineer on or about May 23, 1958. There were several subsequent discussions.

The evidence that the Government had notice of the existence of the wet soil does not consist solely of the oral testimony of interested witnesses. It includes written entries made by Government employees in official job records. One significant entry, which appears in the Project Engineer's diary under date of July 8, 1958, reads as follows:

Mr. Browning [Vice-President of appellant], Mr. Greene [Superintendent for appellant], Mr. Obenschain [Assistant Division Engineer; subsequently Division Engineer] and myself met this morning in Mr. Obenschain's office and discussed the progress on 1-B-3, especially the grading operation, which is very slow due to excessive moisture on the cuts and intermittent rains. Mr. Obenschain suggested that the contractor contact some equipment companies as to their recommendations for compacting the material encountered.

He also said he would issue a stop order at the end of work on July 5, 1958. I suggested that the contractor open up grading operations over as large an area as possible in order to move around and allow material to aerate.

This, of course, is limited by the number of drainage structures in place.

When this entry was written, most of the grading work remained to be done. No cut or fill of any consequence had as yet been finished. The Government had lost no significant opportunity to investigate the physical conditions before they were disturbed, and the Project Engineer had, in fact, investigated them.

³ *General Casualty Co. v. United States*, 130 Ct. Cl. 520, 532-33 (1955).

⁴ *Allied Contractors, Inc. v. United States*, 149 Ct. Cl. 671, 673-75 (1960); *Morgan Construction Co.*, IBCA-299 (September 6, 1963), 1963 BCA par. 3855, 5 Gov. Contr. par. 429 (g); *John A. Quinn, Inc.*, IBCA-174 (November 29, 1960), 67 I.D. 430, 60-2 BCA par. 2851, 3 Gov. Contr. par. 62; *Coleman Electric Co.*, ASBCA No. 4895 (September 24, 1958), 58-2 BCA par. 1928.

⁵ *Herman Groseclose*, IBCA-190 (December 22, 1960), 61-1 BCA par. 2885, 3 Gov. Contr. par. 63 (f); *Peter Kievik Sons' Co.*, ASBCA No. 5600 (April 14, 1960), 60-1 BCA par. 2580.

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In the light of the foregoing facts, the Board concludes that there was substantial compliance with the notice requirements of the "Changed Conditions" clause. The Regional Engineer, in effect, conceded this to be so when he stated, in the decision appealed from, that:

The Government was aware of the wet nature of the soil which you encountered but this was considered then and still is considered a normal and general situation which can be expected in this area more often than not. (Italics supplied.)

The second question that needs preliminary consideration is whether the testimony of one of the Government's witnesses should be stricken. This witness, Mr. Joseph M. Todd, was an employee of the Bureau of Public Roads who, during much of the period while Project 1-B-3 was under construction, occupied the position of Resident Engineer at Waynesville, North Carolina. Part of his testimony related to conditions observed by him on a number of visits of Project 1-B-3, and to the types of soils encountered on some nine other projects administered by the Bureau of Public Roads in the general vicinity of that project. Counsel for appellant moved to strike this testimony on the ground that the calling of Mr. Todd as a witness contravened the terms of a pre-hearing agreement.

At a pre-hearing conference, held pursuant to 43 CFR 4.9, the parties, with the concurrence of the hearing official, entered into an agreement. One provision of the agreement was:

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.

Appellant in its list named nine persons, three of whom were designated as experts. The Government named eleven persons, five of whom were designated as experts. Some of those listed were not called.

The name of Mr. Todd did not appear on either list. When he was called by the Government, counsel for appellant manifested surprise and, upon ascertaining that he had not been listed, moved to strike his testimony. The hearing official made no ruling upon the motion, but reserved it for consideration by the full Board.

The rules governing procedure before the Board, although they provide for limitation of the number of expert witnesses, do not prescribe the effect that should be given to a pre-hearing exchange of the names of proposed witnesses. The Rules of Civil Procedure for the United States District Courts do not cover situations of this type. The Rules of the Court of Claims, however, do contain provisions on the subject. Rule 43, paragraph (e) reads, in pertinent part, as follows:

(e) Submissions: (1) The court may direct any party to submit to the court (with copy to any other party)—

* * * * *

(V) A list of the prospective witnesses, giving as to each witness the name, address, and occupation, and the issue or issues of fact to which his testimony will be directed;

* * * * *

(2) Notwithstanding any submission made in good faith pursuant to subparagraph (1) of this paragraph (e), a party may, for good cause shown, alter positions in relation to facts or law, or call witnesses other than those listed, in order to meet the exigencies of the case as it develops.

The quoted provisions are, of course, not binding in proceedings before this Board, but they are an appropriate guide for reception of testimony in Board proceedings.

The explanation advanced by the Government for not having Mr. Todd on its list is that at the time when the lists of witnesses were exchanged, the attorneys responsible for defending the appeal were unaware that he possessed significant information. They averred that they became aware of this fact only during the two weeks preceding the hearing, when one of them visited Great Smoky Mountains National Park in the course of preparing the defense. The Government appears to have made no effort to apprise appellant of its intention to use Mr. Todd as a witness until he was actually called, an event which did not occur until the hearing had been in progress for over a week. Appellant thus was deprived of an opportunity to prepare to meet Mr. Todd's testimony. That opportunity easily could have been afforded by the Government.

Considering all the circumstances, the Board concludes that the Government's calling of Mr. Todd without notice was not in conformity with the understanding that called for the listing of witnesses. His testimony, therefore, is stricken from the record and will be disregarded by the Board.

Contentions Concerning Wet Soil

Appellant contends that the wet soil encountered in a number of the cuts, and used in building many of the fills, amounted to a changed condition of the first category described in Clause 4, that is, "subsurface or latent physical conditions at the site differing materially from those indicated in this contract." Appellant further contends that the wet soil amounted to a changed condition of the second category described in that clause, that is, "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." If either contention is sound, appellant would be entitled to an equitable adjustment.

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First Category Changed Conditions

The evidence proves conclusively that much of the soil on Project 1-B-3 had a natural moisture content materially higher than the "optimum moisture content," determined in accordance with a standard test—the Proctor test. There are two principal versions of the Proctor test. The version applicable to the appellant's contract, designated in the specifications as AASHO T 99, is the one that uses a lesser compactive effort and is usually termed the "standard" Proctor test.

The evidence also proves conclusively that the expense of grading major portions of Project 1-B-3 was materially greater than would have been the case if the natural moisture content of all of the soils had been at or about optimum as determined by the Proctor test. The contract required the material excavated from the cuts to be used for building the fills. The presence of soils with moisture contents materially greater than optimum affected the embankment costs as well as the excavation costs. Excavation of the soils from cuts, transportation, placement in fills, and compaction tended to turn them into mud and to cause them to lose strength. Since the soils frequently were too muddy for the successful operation of rubber-tired equipment, most of the work was performed with crawler equipment which, being slower, was less economical than rubber-tired equipment would have been, except on steep grades. Operations in mud also increased the wear and tear on the equipment, and thus led to higher costs. Cuts had at times to be excavated piecemeal in shallow layers, so the freshly uncovered material would have an opportunity to dry before being removed. Material placed in fills often had to be left undisturbed for days while it was undergoing further drying and was regaining the strength lost through handling. This necessitated moves of men and equipment from one cut or fill to another in order to keep the job going. Attempts to obtain the requisite degree of soil density by rolling each newly placed layer of embankment, without tilling or resting the material, were unsuccessful more often than not. While some of the expense occasioned by the wet soil could have been avoided through the use of better moisture control procedures by appellant, the remainder was unavoidable.

These proved facts, however, do not establish that a changed condition was encountered. It must also be shown by a preponderance of the evidence that the presence of soils with natural moisture contents greater than optimum either (1) was contrary to what the contract indicated, or (2) in addition to being unknown, was unusual and not to be expected in work of the character provided for in the contract.⁶

⁶ *Guy F. Atkinson Co.*, IBCA-385 (January 12, 1965), 72 I.D. 1, 65-1 BCA par. 4642, and authorities cited therein.

The Board has been unable to find in the contract any indication that the natural moisture content of the soils on the project would be at or about optimum or would not materially exceed optimum. The provision of the contract that appears to be most closely in point is article 106-3.5, entitled "Compaction," of FP-57. It reads as follows:

Unless the special provisions state that watering and rolling are not required, all embankments shall be compacted in accordance with the following requirements:

Each layer of embankment material, except layers consisting of rock, shall be moistened or dried to a uniform moisture content suitable for maximum compaction and then thoroughly compacted by rolling with tamping or pneumatic-tired rollers or 3-wheel power rollers conforming to the requirements of section 109. Subject to the modifications below, at least one roller shall be operated continuously for each 150 cubic yards, or fraction thereof, of material placed per hour. When several embankments, each of small area, are so isolated from each other that one roller cannot compact them satisfactorily, additional rollers shall be provided.

The amount of rolling as required above is estimated as the minimum necessary for adequate compaction. Where the materials in the embankment permit practical density tests, the engineer may, during the progress of the work, make such tests, and if he finds the density, is less than 95 percent of the maximum density as determined by AASHTO T 99, modified to include in the test sample all material passing a $\frac{3}{4}$ -inch sieve, the contractor shall perform additional rolling as may be necessary to obtain that density.

The engineer may permit compaction with types of equipment other than those specified above provided he determines that use of the alternate equipment will consistently produce densities of not less than 95 percent determined as provided above. The engineer's permission for use of alternate compaction equipment shall be given in writing and shall set forth the conditions under which the equipment is to be used.

This article, like the other provisions of FP-57, forms part of a set of standard specifications that are designed to be "generally applicable to direct Federal highway projects." It was not written specifically for this contract. It not only permits the contractor to use rollers of any one of the three major types, but also permits the Government engineer to authorize the use of other types of equipment for compaction purposes. It specifies a minimum amount of rolling, but describes that amount as the "estimated" minimum necessary for "adequate compaction," and provides that the contractor shall perform additional rolling if necessary to obtain the required density. Even the quantitative designation of the degree of density required is not absolute, but is to be applied where the embankment materials "permit practical density tests." The very generalized nature of the article affords little opportunity for the drawing of inferences concerning the natural moisture content or other properties of the soils on a particular highway project.

The terms of the "Compaction" article, moreover, affirmatively reveal that its basic objective is to bring the embankments up to a degree of

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density substantially equal to 95 percent of the maximum density that could be attained by subjecting the same soil to the standard Proctor test—AASHTO T 99—with the modification as to size of particles mentioned in the article. It contains no language which implies that optimum moisture, as determined by that test, is to serve as a criterion of what the contractor should expect in the way of natural moisture. On the contrary, by stating that each layer of embankment material “shall be moistened or dried to a uniform moisture content suitable for maximum compaction,” the article plainly negates any implication that natural moisture would be the same as optimum moisture.

It is of significance that the contract allowed 550 calendar days for completion of the job. A performance period of that length would, under normal weather conditions for the area, afford extensive opportunities for the drying of embankment material on a road project. No contention is made that the time extensions actually granted were not commensurate with the additional drying time, if any, needed because of the abnormal weather that prevailed at times while the job was underway.

Appellant seeks to draw an inference from the fact that, prior to acceptance of its bid, it was required to submit certain information to the Government, and that this included an equipment list which showed that appellant intended to do most of the earth moving with rubber-tired equipment. The contract, however, contained no provision for approval or disapproval of the equipment list by the Government, and it is conceded that the Government did not furnish a notification of approval or disapproval, or comments in any other form concerning such equipment list to appellant. In such circumstances no inference can be drawn, from mere receipt by the Government of the equipment list, that the job was capable of being performed with rubber-tired equipment.

The appellant places great reliance upon the argument that the contract indicates that the material encountered will be “suitable” for embankment construction, asserting that, in fact, the soils with natural moisture contents greater than optimum were unsuitable for embankment construction. The contract does call for “suitable” material in various provisions, of which the most pertinent is article 106-2.1 of FP-57, reading as follows:

Material for embankments shall consist of suitable material approved by the engineer. Embankments and backfills shall contain no muck, frozen material, roots, sod, or other deleterious matter.

One ground for appellant’s contention that soils with greater-than-optimum moisture contents were not “suitable” rests upon the assertion that such soils could not be compacted to 95 percent of maximum density as determined by the standard Proctor test. In evaluating this

contention, it is necessary to bear in mind that the Proctor test is not a measure of the maximum density to which the particular soil is physically capable of being compacted, but is merely a measure of the maximum attained through the application of a given amount of compactive effort. Densities in excess of the Proctor maximum generally can be attained if the soil is subjected to a greater compactive effort than that used for test purposes, or if compaction is followed by a natural consolidation, or if the actual field conditions are more favorable in other respects than the laboratory norms used for test purposes.

Records are available for 63 density tests made on the fills for Project 1-B-3 by a Government inspector. In 19 cases the density recorded was greater than 95 percent of maximum density, determined according to the standard Proctor test, the highest value recorded being 108.2 percent. In 44 cases the density recorded was less than 95 percent of maximum density, determined according to the same test, the lowest value recorded being 76.4 percent. Of the 19 cases where satisfactory density was recorded, the moisture content at the time of the density test was less than optimum (or exceeded it by not more than one percentage unit) in 9 instances. Of the 44 cases where unsatisfactory density was recorded, the moisture content at the time of the density test was less than optimum (or exceeded it by not more than one percentage unit) in 7 instances.

During the job appellant experimented with a number of different types of rolling equipment, and also attempted to obtain the 95 percent of maximum density specified in article 106-3.5 through compactive methods, such as the operation of crawler-type tractors, that did not involve the use of rolling equipment. In general, satisfactory results were obtained, where the natural moisture content of the soil was materially greater than optimum, only if the rolling or other compactive operations were conducted as a part of a series of operations that involved such additional measures as drying and resting the individual layers of material.

Many of the density tests were made in layers of material that had been placed and rolled shortly before the test. The significance of the timing of the tests is illustrated by a case where two tests were made at the same place, but five days apart. The moisture content decreased from 23.4 percent in the first test to 15.0 percent in the second test, while the density increased from 87.1 percent to 100.1 percent. It is abundantly clear from the evidence that the density of the completed embankments exceeded, in most cases, that shown by the density tests.

A lack of realization of the importance of tilling or otherwise drying the soil before attempts were made to roll or otherwise compact it contributed to the failures of appellant's work to pass the density tests. Appellant took little care to dress the incompleting cuts and

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fills so as to minimize the infiltration of rain and surface water. Positive measures for aeration of the soil frequently were not attempted until the natural strength of the material had been weakened by untimely efforts to compact it before it had had an opportunity to dry. Appellant argues that moisture control was unnecessary because the soil, somewhat paradoxically, tended to become more dense after a shower. It is true that rain sometimes tightened up freshly placed layers of soil, but this was a localized benefit that did not prevent the rain from recharging the ground water supplies of the areas yet to be excavated.

The failures on test were also due in substantial part to a lack of realization of the importance of adequately resting the soil after each manipulation. Such resting affords an opportunity for the natural processes of consolidation or settlement to expel some of the water and air from the voids between the soil particles. Furthermore, many of the soils encountered on Project 1-B-3 were subject to a molecular process known as "thixotropic regain," whereby strength lost through manipulation is regained through resting. While appellant characterizes the "thixotropic regain" as "fortuitous," it is, nevertheless, a fairly common property of silty soils and is not more "fortuitous" than other common properties of such soils, such as low plasticity and high retentiveness of moisture.

Notwithstanding the test failures, the weight of the evidence is that a degree of density at least equal to 95 percent of maximum density was actually obtained at all locations where the achievement of such a degree of density was really important. Almost one-third of the tests were recorded as satisfactory. Many of the tests in which unsatisfactory density was recorded were followed by the performance of additional compactive measures, the results of which must have been to bring about a degree of density higher than that recorded. A number of tests were taken on fills that were ultimately built to higher levels, thus subjecting the levels at which the tests were taken to a permanent load that necessarily added to their density. No embankment failure occurred.

Appellant makes much of the fact that the Government either expressly or impliedly permitted certain deviations from article 106-3.5, notably by tolerating or authorizing the substitution of crawler-type tractors for rollers as compactive equipment and by not requiring that 95 percent of maximum density be achieved in cases where this degree of density appeared to be unnecessary. These were deviations, however, that the Government was entitled to sanction under that article, and that made appellant's performance less costly and difficult than it might otherwise have been. Such relaxations have no bearing upon the question before us, which is whether the wet soils were suitable

for use in the manner that the Government actually required them to be used, rather than in some manner that the Government might have, but did not, require.

The Board finds that the wet soils of which appellant complains were capable of being compacted to 95 percent of maximum density as determined by the standard Proctor test. It further finds that these soils were, for the most part, actually compacted to that degree of density. From the standpoint of the results that could be and were achieved through their use, the wet soils were "suitable" for the purposes of Project 1-B-3.

There is, however, a second ground upon which appellant rests its contention that soils with greater-than-optimum moisture content were not "suitable." This second ground is that material should be considered as "suitable" only if it would allow the work at hand to be accomplished through the use of the most economical construction practices and equipment. Thus, in the present case appellant would consider as suitable only material that did not tend to turn into mud when manipulated, that was well adapted to handling by rubber-tired equipment, that needed little or no drying before being rolled, that needed little or no resting in order to regain strength lost through manipulation and that was capable of being worked in a continuous manner until the grading of the particular cut or fill had been finished.

So limited a concept of suitability is not supported by the terms of the contract. The provisions in which the term "suitable" is used—such as article 106-2.1 and article 106-3.5—contain no such restriction of its meaning. Neither party has called to our attention any statement in the contract which expressly or impliedly suggests that in order for a soil to be "suitable" it not only must be a soil out of which an embankment meeting the requirements of the specifications can be constructed, but also must be a soil that will admit of the employment of the most economical construction practices.⁷

This is not to say that the concept of suitability may be stretched to the opposite extreme of including materials out of which embankments can be constructed only by methods so expensive that they would be rarely, if ever, employed. But the testimony reveals that such practices as the use of crawler-drawn equipment, drying, tilling, resting, and like adjustments to soil conditions are not unusual in road construction work. The steep grades on Project 1-B-3 would have tended to neutralize the advantages of rubber-tired equipment over

⁷ In *J. D. Armstrong Co., Inc.*, IBCA-40 (August 17, 1956), 63 I.D. 289, 56-2 BCA par. 1043, the Board stated:

"The contractor could not insist that he would handle only such an amount or kind of shale as could be excavated with normal excavating equipment. The specifications did not specify the type of equipment he was to employ, and he was, therefore, required to have such equipment as could take care of such hard material as might actually be encountered."

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crawler-drawn equipment even if there had been no problem of wet soil. A contractor will use the least expensive practices whenever practical. Nonetheless, since in road construction the choice of material ordinarily is limited by the location of the road, the use of less-than-optimum material is not unusual.

The Board finds that Project 1-B-3 was capable of being completed to the standards required by the Government through the use of construction practices and equipment that were not so unreasonable or so uncommon for road-building purposes as to be unforeseeable by appellant. From the standpoint of the practices and equipment utilized, these soils were "suitable" for the purposes of that project.

Second Category Changed Conditions

This brings us to the question of whether changed conditions of the second category were encountered or; in other words, whether the presence of soils with greater-than-optimum moisture contents was an "unknown physical condition 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."

It has been held that a second category changed condition does not exist if a reasonable pre-bid investigation would have disclosed the existence of the condition.⁸ In the instant case a site examination was expressly called for by article 2.3 of FP-57.⁹

The amount bid by appellant for grading the cuts and fills amounted to more than one-half of the total contract price. Notwithstanding the importance of this work, appellant made only cursory efforts to ascertain the nature of the materials that would have to be moved, except in the case of rock. The contractor's officials who participated in the investigation feared that, since there was no classification of materials for pay purposes, an underestimate of the quantity of rock might produce a serious loss. They seem not to have fully realized that an underestimate of the difficulty of work in earth could have a like result. They took no soil samples, directed no inquiries about soils to the Government personnel whom they contacted, and apparently made no effort to ascertain whether there were any geological or soil surveys of the area.

⁸ *Reid Contracting Co., Inc.*, IBCA-74 (December 19, 1958), 65 I.D. 500, 58-2 BCA par. 2037, 1 Gov. Contr. pars. 50-52; *L. L. Hall Construction Co.*, ASBCA No. 7627 (November 15, 1962), 1962 BCA par. 3590.

⁹ "2.3 Examination of Plans, Specifications, and Site of Work. The bidder should examine carefully the site of the project contemplated and the bid form, bid schedule, plans, specifications, and contract form prepared for the project contemplated. It is mutually agreed that submission of a bid shall be considered prima facie evidence that the bidder has made such examination and is familiar with the character, quality, and quantities of the work to be performed and material to be furnished."

The soils that gave appellant difficulty on Project 1-B-3 were, in general, soils that contained a high proportion of fine particles—that is, particles capable of passing a No. 200 sieve—and that possessed almost no capacity for being moulded (plasticity). Soils with this combination of qualities are frequently characterized as silt. They are apt to have a high capacity to hold and retain water. In the instant case, abundant sources of ground water were afforded by the heavy rainfall common in the Great Smokies, and the capacity of the soil to hold and retain large quantities of water was confirmed by the high natural moisture readings obtained when Proctor tests were made.

The general nature of the soil that gave appellant so much trouble could have been readily ascertained at the time of the pre-bid investigation. Much of the wet material was at or near the surface of the ground, rather than deeply buried. Appellant's president testified, with reference to the pre-bid investigation, that the soil looked to him like a "sandy clay" material. During the progress of the work appellant obtained the services of a consulting engineer specializing in soil mechanics. This expert was able to identify the essential characteristics of the soil simply through the use of visual and manual procedures.

Appellant's officials took no soil samples for inspection or analysis before bidding. In contrast, the firm of earth-moving experts, subsequently retained by the appellant to determine what would have been a reasonable bid if appellant had been aware of the wet soil in advance of bidding, did take samples when they inspected the project in December 1960. So too did the consulting engineer previously mentioned when he inspected the project in June 1960. These actions are indicative of what a prudent bidder would have done.

Appellant makes much of the fact that the bidding period occurred during the month of February when snow was on the ground. But there were bare spots, particularly on the ridges. The ridges were the places where the cuts for the road were made. At some of the locations where snow was present it could be, and was, kicked aside by appellant's officials during the course of their investigation. That the ground was frozen would not have precluded identification of the essential characteristics of the soil or have made impossible the taking of soil samples.

A contention of more importance is that the Government improperly withheld pertinent soil data from appellant. In 1957, the Bureau of Public Roads had made 9 soil borings along the route of Project 1-B-3. Three of these were in rock areas not included within appellant's claim. The remaining six disclosed information which would have caused a person skilled in soil mechanics to believe that the soil in the areas where the borings were made would be difficult

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to handle when wet. These data were available in the Gatlinburg office of the Bureau of Public Roads upon the occasions—two or more in number—when appellant's officials visited that office during the course of their pre-bid investigation.

From the evidence in this appeal, the Board arrives at the following conclusions: (i) that the Gatlinburg office had a policy of making available any borings or other soil data in its custody to all prospective bidders who requested such data; (ii) that appellant's officials did not ask any of the personnel of the Gatlinburg office whether soil borings had been made or could be seen; and (iii) that the personnel of the Gatlinburg office did not inform appellant's officials of the existence or availability for inspection of the soil borings previously made by the Bureau of Public Roads.

In reaching the above conclusions, the Board does not find a breach of any duty owed to appellant by the Government. The decisions in which the Government has been held to have improperly withheld information from a prospective bidder have involved situations where there was no reasonable way in which the bidder otherwise could have obtained the information.¹⁰ Here, however, the data revealed by the soil borings in the custody of the Gatlinburg office was data which appellant could have readily obtained either by making a reasonably adequate investigation of the site of the work by directing a simple inquiry to the Gatlinburg office. The task of making a site investigation sufficient to have disclosed the general nature of the soil would have been no more onerous than the types of pre-bid investigations usually made by prudent bidders on Government contracts.¹¹

Appellant also argues that the Government was under an obligation to make a thorough investigation of the soil conditions on Project 1-B-3, and that appellant was entitled to rely on the assumption that the Government had made such an investigation and had found the material to be suitable (in the sense given to that term by appellant) for road construction. No authority is cited for this contention, and similar contentions have been rejected by the Board in the past.¹² In any event, the contention is completely at variance with the testimony of appellant's officials, to the effect that they assumed no soil borings had been made since none appeared in the contract drawings or specifications.

¹⁰ *Helene Curtis Industries, Inc. v. United States*, 312 F. 2d 774, 777-78 (Ct. Cl. 1963); *Leal v. United States*, 149 Ct. Cl. 451, 459-63 (1960); see *J. A. Jones Construction Co., Eng. C. & A. No. 1082* (May 20, 1957).

¹¹ See *Layne Texas Company*, *supra* note 2; *Inter-City Sand & Gravel Co.*, IBCA-128 (May 29, 1959), 66 I.D. 179, 59-1 BCA par. 2215, 1 Gov. Contr. pars. 430-32; *Erhardt Dahl Andersen*, IBCA-223 (July 17, 1961), 68 I.D. 201, 61-1 BCA par. 3082, 3 Gov. Contr. par. 505; *cf. Larsen-Meyer Construction Co.*, IBCA-85 (November 24, 1958), 65 I.D. 463, 58-2 BCA par. 1987.

¹² *Dane Construction Corporation*, IBCA-135 (February 15, 1960), 60-1 BCA par. 2549, 2 Gov. Contr. pars. 228-29.

Appellant not only should have anticipated that the nature of the soil was such as would make it difficult to handle if wet, but also should have anticipated that it would be wet. Prior to bidding appellant obtained certain weather records from the United States Weather Bureau. These records indicate that at Bryson City—the nearest major recording station to Project 1-B-3—the mean annual precipitation was approximately 52 inches. They also show that in the area of the Great Smokies, as in many other mountain regions, rainfall increases with elevation. Thus, for example, at Bryson City, where the elevation is 2,000 feet, the precipitation in 1956 was approximately 45 inches, whereas at Clingman's Dome, which is nearer to Project 1-B-3 than Bryson City and where the elevation is 6,250, the precipitation in 1956 was approximately 85 inches. On Project 1-B-3 where the mean elevation was 3,500 feet it would not have been unreasonable to anticipate 60 inches of precipitation each year, which would cause the soil to have a high moisture content.¹³

The testimony bearing upon the foregoing matters is voluminous. In the light of all of it, the Board finds that the existence of the wet soil was a condition which a prudent bidder could readily have ascertained through a reasonable pre-bid investigation. Accordingly, the Board finds that the condition was not "unknown" within the meaning of the "Changed Conditions" clause.

Another basic requisite of a second category changed condition is that the condition be "of an unusual nature." Appellant offered very little testimony on this point. The expert in soil mechanics who appeared for appellant was asked no questions, either on direct or cross-examination, concerning the extent to which soils of the type found on Project 1-B-3 had been found elsewhere, whether in the immediate vicinity of that project or in a larger area. The witnesses for appellant who were questioned on the point obviously lacked the background and experience for determining the prevalence of wet soil in the Project 1-B-3 area or its vicinity and responded to the questions only by such generalities as the statement that the soil on that project was "the worst" they had ever encountered.

On the other hand, the Government's expert—who was the head of the soil mechanics group at the principal laboratory of the Bureau of Public Roads—testified that soils just as difficult to handle as those on Project 1-B-3, or even more so, were widely distributed through the Southeastern portion of the United States. He also testified that

¹³ Appellant cites *Peter Kiewit Sons' Co.*, Navy BCA No. 566 (April 28, 1958), 4 CCF par. 60,972, as authority for the proposition that "Core borings are not expected to be made by either the government or bidders unless some external conditions indicate doubt of the subgrade." Actually, the Navy Board merely recited that "neither the Government nor Appellant found any external conditions indicating sufficient doubt as to the subgrade to cause them to take such borings." In the present case the heavy rainfall to which Project 1-B-3 was subject constituted an external condition which would raise doubt as to whether the soils on Project 1-B-3 would be dry enough for easy handling.

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the difficulty of handling these soils had not precluded their being used for road construction where they were present on the route of the proposed road.

The Board finds, on the basis of all the evidence, that appellant has not borne the burden of proving that the wet soils encountered on project 1-B-3 were "unusual" within the meaning of the "Changed Conditions" clause. This finding, as well as our previous finding that the wet soils were not an "unknown" condition, negates appellant's contention that a changed condition of the second category existed.

Therefore, Claim I is denied.

Claim II

High Traffic Density in Summer Months

The appellant grounds this claim upon the assertion that there was unusually high traffic density during the construction seasons. The claim is for \$58,759.20, and consists principally of charges for "down time" of heavy earth hauling equipment that was idle at times when automobile traffic was allowed to pass through the project area. The claim letter of November 8, 1960, states:

* * * The Government should have informed prospective bidders in advance of the very high traffic density which would be encountered in this national park during the summer months. The government had this information available to it, and since the road was to be maintained for traffic in certain areas, the government should have made this information available so that contractors could have figured their bids to take this unusual element into account. * * * Particular attention is called to the extremely heavy traffic during the three summer months as compared to the very low traffic found in February, that being the month in which the prospective bidders had an opportunity to observe conditions. * * *

In support of the claim the appellant furnished travel density statistics for several years in which project work was carried on, contended that the heavy traffic should be compensated for as an unknown physical condition differing materially from those ordinarily encountered, and cited Section 4, Article 4.2 of FP-57, a special "Changes" provision.

The appellant obtained travel density statistics when it was preparing its claim but unfortunately did not seek such information at the time of bid preparation.

The Government established that an annual summary of travel statistics for the Great Smoky Mountains National Park, giving a comparison by months for the calendar years 1952 through 1957, was available to the public from the National Park Service upon request during the advertising period. It was also shown that similar information was available from the highway departments of the States

of Tennessee and North Carolina. Some of the figures in the National Park Service tabulation tell the story:

Year	1952	1953	1954	1955	1956	1957
February-----	38, 646	48, 753	38, 784	35, 273	42, 821	43, 018
June-----	298, 525	392, 342	367, 039	329, 546	494, 135	468, 626
July-----	585, 562	502, 364	566, 413	608, 610	660, 788	684, 373
August-----	582, 726	400, 407	559, 863	557, 769	535, 062	682, 746

The contracting officer pointed out correctly that Route U.S. 441, on which the project is located, is a major arterial highway and that the Great Smoky Mountains National Park is this nation's most visited national park. The appellant's vice president testified that it was evident at the time of pre-bid visits by officials of the appellant that there were a number of tourist attractions in the location of Gatlinburg and Newfound Gap and Cherokee; in addition, he acknowledged that the appellant should have assumed, because tourists are attracted to the area involved, that the traffic would be considerably heavier in the summer than in the winter.

The specifications required the contractor to keep the road open to the public, although it authorized the bypassing of traffic over detours, the use of temporary approaches, crossings and accessory features; in addition, the right to hold up traffic for short periods was given. The Government, therefore, was under no obligation to do what the appellant's vice president described at the hearing as the "best thing"—closing the highway while it was under construction and placing the traffic on a detour, the detour to be built at the expense of someone other than the appellant.

The travel statistics submitted by appellant show that 39,830 and 55,776 tourists visited the Great Smoky Mountains National Park in February of 1958 and 1959, respectively, and that in the summer months of those years the number of tourists per month ran from approximately 425,000 to approximately 817,000. The Board concludes that the appellant was remiss in not obtaining information on the number of park visitors. Such information would have been relatively easy to obtain. Further, it is determined that the number of visitors who actually came to the park when the project was under construction was within the range of what should have been expected from review and analysis of the statistics for the years 1952 through 1957.

Even if an assumption is made that the traffic was heavier than that to be expected by the appellant, no basis exists under the contract for granting relief. Expenditure of the sums included in this claim were not made because of any changes in the plans and specifications. The claim was submitted because the appellant had included \$8,000 in its bid to cover the expense of handling tourist traffic, but (according to

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the appellant's estimates) in fact spent more than eight times that sum in controlling, diverting and contending with traffic.

Article 4.2 of FP-57, relied upon by appellant, is a special "changes" provision, related to and purporting to limit the effect of the "Changes" and "Changed Conditions" clauses of Standard Form 23A. A reference in Article 4.2 to a permissible adjustment for "a substantial change in the character of the work to be performed under a contract pay item or items that materially increases or decreases the cost of its performance" is deemed by the Board to cover only adjustments that may be made under the standard "Changes" and "Changed Conditions" clauses—it does not in itself authorize payment of costs associated with delay in the performance of work that has not otherwise been altered by a revision in the plans or specifications, or because of discovery of existence of a changed condition.

The appellant has relied heavily on the "Changed Conditions" clause¹⁴ in making its "traffic density" claim. The claim is not cognizable under that clause. The Board has consistently held that the natural sense of the language used in the "Changed Conditions" clause imports that both categories of changed conditions described in the clause must be limited to physical conditions which exist when the contract is made, and that neither comprehends physical conditions which come into being only after the contract has been executed.¹⁵

It was asserted in a closing statement on behalf of the appellant that "the Government should have done something else besides put the new road so close to the old road that you couldn't work on the new road without cutting away portions of the old road" and that "what the Government should have done was close this road to tourist traffic." The latter assertion was tied to a suggestion that tourist traffic could have been shifted to another route. The Board does not find that the Government had an express or implied obligation to do those things. Even if it had been so obliged the "changed conditions" clause would not aid the appellant, because it is inapplicable to work dislocations brought about through the failure of the Government to discharge its obligations under a contract.¹⁶

Because of our conclusion that Claim II cannot be sustained on its merits we will not go into the questions of delayed filing of the claim and insufficient proof of damages, which were raised by the Government as defenses to that claim. This portion of Claim II is denied.

¹⁴ Quoted in note 2, *supra*.

¹⁵ *Montgomery-Maeri Company and Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (1963), 70 I.D. 242, 253-55, 1963 BCA par. 3819, pp. 19010-11, 5 Gov. Contr. 419 and authorities cited therein; *Commonwealth Electric Company*, IBCA-347 (March 12, 1964), 1964 BCA par. 4136, 6 Gov. Contr. 262.

¹⁶ *Commonwealth Electric Company*, IBCA-347, *supra*, note 15. But see *Lee Hoffman v. United States*, Ct. Cl. No. 259-59 (May 15, 1964), 6 Gov. Contr. 231.

WITHHOLDING OF AMOUNTS EXPENDED BY THE
NATIONAL PARK SERVICE

A difference of opinion related to the traffic problem considered above in Claim II arose on the project in July 1960. At a time when the appellant was maintaining one-way traffic in the vicinity of Station 38+00 because it had narrowed the highway, the Division Engineer issued a partial suspension of excavation work in that area. This suspension was issued in the latter part of June and continued into the 4th of July holiday period.

The contract administration officials of the Bureau of Public Roads apparently did not foresee the traffic problems that would result from holiday travel. On July 3, 1960, the Superintendent of the Great Smokey Mountains National Park found that traffic was backed up about 4½ miles from the one-way traffic area. He was extremely dissatisfied with this situation and arranged for the performance of work by National Park Service employees and equipment on the night of July 3, 1960, and by forces and equipment of both the National Park Service and the contractor on July 4 and 5. Notice to resume full construction operations was given to the contractor effective on July 6, 1960.

On July 8 and July 11 the Park Superintendent again concluded that traffic was not being satisfactorily maintained. He ordered further work by National Park Service employees. The cost of the work done by Government forces on July 3, 4 and 5 was \$698.42, and of such work on July 8 and 11 was \$117.91.

The Park Superintendent advised the appellant in latter July that in his opinion \$816.33 should be withheld from payments under the contract because it was for "work which should have been performed by you." In a final estimate transmitted by the Regional Engineer on June 20, 1962, the sum of \$816.40 representing that work was withheld from the contractor. It was determined in the course of the hearing that the dispute concerning the withholding was a proper subject of the appeal and that the Board would consider the contractor's claim that the amount should be paid.

We do not find in the record a sufficient justification for the Government's nonpayment of these contract earnings. There has been no showing that the contractor was given an adequate and reasonable opportunity to correct the traffic situation. In reaching this conclusion we have taken into account the fact that the Bureau of Public Roads officials apparently were satisfied that the contractor's forces were handling vehicular traffic in a manner consistent with the authorization for one-way traffic, and for partial suspension of work. The Park Superintendent did not channel his actions through an authorized representative of the contracting officer; instead, he exercised what

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amounted to "self-help." He may well have done the best thing to relieve the blockage of traffic and to ensure the safety of the public. However, we are not able to find that the labor and equipment costs for the work performed by the National Park Service forces can be charged against amounts due under the appellant's contract. The appeal concerning the withholding of \$816.40 "for work performed by Government forces" is sustained. The Board's decision on this withholding is directed only to the propriety of taking such action under the contract. It would be beyond the purview of the Board's authority to render a decision as to the propriety of a set-off of the sum in question pursuant to instructions issued by the General Accounting Office, or under some other theory not involving application of provisions of contract 14-10-0100-945.

Claim III

Maintenance of Roadway

This claim was made because the appellant was required to perform maintenance and repair work on portions of the new road. The appellant contends that after the roadbed had been completed and accepted, it deteriorated quickly "due to conditions beyond the control of either the government or this contractor." The contractor submitted testimony on this claim at the hearing but the Government did not.

Surface treatment of the portions of roadway that are the subject of this dispute was completed in the fall of 1959. In Directive No. 2 dated December 7, 1959, the Government issued five instructions, including:

2. Open the new roadway to traffic between Station 258+50 and Station 384+00.

A statement in the file assigning reasons for the issuance of the directive states that it was to the Government's advantage to add certain embankment work and to place traffic on the new grade.

The Government's position is that, notwithstanding its orders to place traffic on the new road, repair and maintenance work that became necessary because the new road broke up under the traffic was the appellant's responsibility. This position is inconsistent with (1) payment by the Government for the original paving work performed by the appellant, and (2) the fact that the Government did not require the appellant to replace the pavement that deteriorated. Instead the Government had it replaced under another contract. Department Counsel in cross-examination referred to Directive "U", dated September 21, 1960, as being the one which accepted the portion of road under consideration. However, the appellant established that in

September of 1960 the paved section of the roadway was less acceptable for traffic than it had been in December 1959.

A contracting officer should have considerable latitude in determining whether a portion of a project should be accepted prior to the time the entire project is completed. In this situation, though, the Board must conclude that the Government's earlier orders and actions are incompatible with a September 1960 acceptance. It is determined that Directive No. 2, dated December 7, 1959, accepted for traffic the paved portions of the roadway between the stations specified in Paragraph 2 of that Directive. It follows that the costs of repair and maintenance work performed on those portions by the appellant in late December 1959, and in the first nine months of 1960, should be borne by the Government.

The appellant recorded the costs for equipment use, labor and materials necessary for the repair and maintenance work as that work was performed. Claim III as submitted is in the amount of \$2,416.91. That amount appears to be reasonable, except for a \$10.25 per hour charge made for a grader. The contractor billed for this piece of equipment on the basis of rental by the hour. The grader was not brought onto the project specifically for the repair and maintenance work included in this claim. It was assigned to that work from time to time over a nine-month period, and for the greatest part of that period was used elsewhere on the project. Because the grader was assigned to the job for a considerable period of time, a monthly rental rate should be applied rather than one covering use by the hour. The record will support a reduction of the claim amount from \$2,416.91 to \$2,100 to reflect a decrease of approximately \$2 per hour in the \$10.25 per hour rate listed by the appellant for the grader (applied to utilization for 158½ hours).

Claim III is allowed in the amount of \$2,100.

Claim IV
Slope Laybacks (Flattening)

This claim, for \$24,895.39, was first brought to the attention of the contracting officer's authorized representative in a letter dated April 27, 1960. In that letter the appellant stated:

In addition, we have been directed at various times to obtain additional material for embankment purposes where deficiencies occurred. Such additional material has been obtained by flattening the previously cut slopes which were substantially cut to grade and completed. Because of the difficult terrain in which this work is located, the unit cost for performing this additional work is not sufficient to adequately cover the cost of doing such work under the conditions that exist.

The formal claim letter, submitted on November 18, 1960, cited Section 102 of FP-57 as justification for the request for additional compensation. Pertinent portions of Section 102 are as follows:

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102-1.2 *Borrow*. Where sufficient quantities of suitable materials are not available from roadway excavation as planned, additional material shall be excavated from borrow pits indicated on the plans or as directed by the engineer. In lieu of borrow, cuts may be widened or slopes of cuts may be flattened provided the engineer determines the need for such action before the contractor starts work on any particular cut.

* * * * *

102-2.1 *Borrow*. [Under the heading "Materials"] Borrow shall be material approved by the engineer as meeting the requirements for the particular embankment, backfill, or other use for which the material is intended.

* * * * *

102-3.2 *Utilization of Excavated Materials*. All suitable material removed from the excavation shall be used as far as practicable in the formation of the embankment, subgrade, shoulders, slopes, bedding and backfill for structures, and for other purposes shown on the plans or as directed.

* * * * *

* * * The contractor shall not borrow nor waste material without approval by the engineer.

The project undertaken by the appellant was designed to be a "balanced" job, that is, the material excavated from the cuts was supposed to be enough, or more than enough, to bring the fills up to the specified grade. The Government engineers testified that they found, as construction progressed, that the job was in fact "balanced." As a result they did not call for the opening of any borrow pits.

The contracting officer found that the re-entry by the appellant's forces into cuts where work had been performed previously was at the suggestion of a representative of the appellant and was allowed, not required, by the Government. He concluded that the reworking of the slopes was advantageous to the appellant because it served to eliminate the hauling of excavated material through traffic for considerable distances.

The contractor's method of computing its claim is one that generally is considered to be unsatisfactory—the amount claimed is the difference between the costs allegedly incurred in obtaining material from previously worked slopes, and what the contractor received for the excavation at the specified unit prices. The contracting officer determined that equipment rental rates shown in Claim IV were too high, being based on hourly, rather than monthly, use. The record does not support use of an hourly rate. There also was not a sufficient showing made that the unit price bid by the appellant was adequate to cover the cost of excavating, transporting and placing material from the cuts listed in the contract.

We will not discuss the claim amount in great detail because the appellant has not established that the facts justify payment of Claim IV.

There is very little in the record to controvert the testimony of the individual who in the first half of 1959 was the Assistant Division Engineer (Bureau of Public Roads). He stated that the Government did not direct or order the appellant to obtain material from the "reentered" slopes. He recounted discussions between representatives of the appellant and himself, in which it was agreed that both the appellant and the Government would be better off if material was obtained from the slopes close at hand rather than from the more distant areas specified in the contract. In reentering the nearby slopes the appellant in all likelihood did not incur costs in excess of those it would have incurred had it obtained the material from the more distant areas. The Board must conclude also that the appellant acted as a volunteer.

The "agreements" relating to reentry of the slopes were between representatives of the appellant and the Division Engineer or one of his assistants. There is no evidence that orders to do this were issued by the contracting officer or his authorized representative (the Regional Engineer, Bureau of Public Roads). The Government is not liable for volunteered work. The contractor, in order to recover claimed extra costs, must show action, requiring the asserted additional work, on the part of the contracting officer or his authorized representatives, as distinguished from subordinates. *General Bronze Corporation v. United States*, Ct. Cl. No. 198-61 (November 13, 1964); *C. V. Bianchi & Sons, Inc.*, ASBCA No. 8243, 1963 BCA par. 3894 (1963); *R. & M. Contractors, Inc.*, IBCA-325 (April 21, 1964), 1964 BCA par. 4208. If at the time the arrangements were made to reenter the slopes the appellant had given any indication such reentry was disadvantageous to its operations or could result in excess costs, and this had been called to the attention of the contracting officer or his authorized representative, it is very doubtful that permission to reenter would have been given. Sufficient material to complete all fills was on the job. Thus, there was no necessity for the contracting officer to agree to extra expenditures at the areas involved. Claim IV is denied.

Claim V
Hand Raking on Slopes

This claim as originally presented was for \$9,810.36, but at the hearing it was reduced to \$7,054.34. The claim is related to what the appellant describes in its claim letter as "hand raking on excavation slopes [required] by the project engineers for final landscaping and finishing." The appellant contends that the hand raking was performed for approximately two months beginning on June 29, 1959, and for another period of about two months in 1960, beginning on August 25, 1960. The contracting officer in his findings pointed out that the first notice of this claim was the letter of November 18, 1960.

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Early in the job the Division Engineer first assigned to the project by the Government discussed the procedure for finishing the slopes with representatives of the appellant. The recollection of the appellant's grade foreman was that this discussion took place just before the seeders moved in and started their seeding on the slopes, rather than during the first part of the job; however, the appellant's vice president testified that the conversation took place in September 1958, before the finishing work on the slopes had been started. The position of the Division Engineer, at the time he talked to the contractor's employees about slope finishing seems to have been that he did not want the slopes too smooth, and that marks left on the slopes by earth moving machines should not be smoothed out. His indication of what was acceptable corresponded with Section 102-3.8(c) of FP-57, which states:

(c) *Finishing*.—All earth slopes shall be finished to reasonably smooth and uniform surfaces without any noticeable break, and in substantial accordance with the planes or other surfaces indicated by the lines and cross sections shown on the plans, with no variations therefrom readily discernible as viewed from the road.

Degree of finish for grading of slopes shall be that ordinarily obtainable either from blade-grader or scraper operations or hand-shovel operations, as the contractor may elect. The nicety of finish ordinarily associated with template and stringline or hand raking methods will not be required, except in the case of shoulders and gutters.

The Division Engineer who emphasized the requirements of the second paragraph in the quote immediately above was promoted in the summer of 1959. The appellant asserts that the project engineer, after he came under the supervision of the replacement Division Engineer, required hand raking on the slopes.

The project engineer denied that the contractor's forces had been instructed or requested to use hand-raking methods on the slopes. He acknowledged that some hand raking had been performed, but said that this was the means chosen by the appellant to correct steep slopes that had not been rounded originally in accordance with the specifications, or to comply with Section 591-3.1 of FP-57, *Advance Preparation and Cleanup* (under *Seeding*), which provides:

After grading of areas has been completed and before applying fertilizer and ground limestone, areas to be seeded shall be raked or otherwise cleared of stones larger than 2 inches in any diameter, sticks, stumps, and other debris which might interfere with sowing of seed, growth of grasses, or subsequent maintenance of grass-covered areas. If any damage by erosion or other causes has occurred after the completion of grading and before beginning the application of fertilizer and ground limestone, the contractor shall repair such damage. This may include filling gullies, smoothing irregularities, and repairing other incidental damage.

The appellant did not make a sufficient showing that work was required beyond its obligations under the contract. No written orders or protests were made at the time the raking was performed. The first Division Engineer had gone out of his way to point out that hand raking was not required under the *Finishing* portion of FP-57, quoted above. The appellant did not show by a preponderance of evidence that the raking complained for was for slope finishing rather than for advance preparation and cleanup for seeding. That it was done for the latter purpose is indicated by the unprotesting manner in which it was carried out. This claim is based upon the allegation that the inspector required more work than that specified in the contract. A contractor who asserts, with respect to inspection requirements, that the contracting officer or his representative has erred has the burden of proving that there was a departure from the contract requirements. *Noonan Construction Co.*, ASBCA No. 8320 (January 17, 1963), 1963 BCA par. 3638, 6 Gov. Contr. 201.

Claim V is denied on its merits because the appellant did not prove that it was ordered to perform hand raking beyond the requirements of the contract.

Claim VI

Additional Pipe to Complete Culverts

Claim VI, in the amount of \$340.80, concerns work on culverts that was performed prior to October 15, 1959. It was first submitted in the appellant's claim letter of November 18, 1960, which states that after culverts were installed as specified in the plans, "the project engineer required the contractor to add additional pipe." The appellant objects to payment for such work at the unit prices because extra costs assertedly were incurred in going back to areas to add extra lengths of pipe after embankments had been made, or cuts had been completed. The contracting officer determined that only minor adjustments were made, that such adjustments in the culvert lengths occur commonly on road jobs, and that the payments which were made on the basis of unit prices (listed in the contract) were all that were called for.

The proof submitted by the appellant was not enough to establish that extra lengths of pipe were in fact added at Stations 364+05, 376+50, 377+00 and 411+40.

It was shown that extra lengths were added at Stations 329+50, 333+00 and 333+25. The appellant asserts that in these three areas installation of the extra lengths resulted in an additional expense of \$254.14 above what was paid for the work on the basis of the unit prices. The contracting officer found that the appellant had included improper elements of cost in calculating its claimed extra expense.

In making Claim VI the appellant referred to Article 4.2 of FP-57, a special "Changes" clause which the Board considered in its opinion

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on Claim II, above. The only portion of Article 4.2 that could authorize the requested payment provides that if an adjustment is to be considered there should be "a substantial change in the character of the work to be performed under a contract pay item." It also requires that the cost of performance of the work to be performed under a pay item be materially increased or decreased.

The total amount shown by the final estimate to have been paid under the contract for installation of 12-inch, 18-inch, and 36-inch reinforced concrete culvert pipe (the culvert sizes involved in Claim VI) is more than \$12,000. Some of the adjustments suggested in the contracting officer's findings should be made. If this were done the claim would be reduced to less than \$200. The Board cannot conclude either that there was a substantial change in the character of the work to be performed under the pay items for culverts or that there was a material increase in the cost of performance. Since work in question is covered by a unit price, and there is no contract provision authorizing an increase, Claim VI is denied.

Summary

The action taken with respect to the claims involved in these appeals is summarized below.

Claim No. I-----	Denied
Claim No. II-----	Denied, except that withholding of \$816.40 under the contract is not approved
Claim No. III-----	Sustained in the amount of \$2,100
Claim No. IV-----	Denied
Claim No. V-----	Denied
Claim No. VI-----	Denied

DEAN F. RATZMAN, *Chairman.*

WE CONCUR:

THOMAS M. DURSTON, *Deputy Chairman.*

WILLIAM F. MCGRAW, *Member.*

APPEAL OF RALPH CHILD CONSTRUCTION COMPANY

IBCA-422-1-64 *Decided November 17, 1965*

Contracts: Construction and Operation: Notices—Contracts: Performance or Default: Excusable Delays—Contracts: Construction and Operation: Duration of Contract

Under a contract for construction of facilities on the shores of an impounded river, where access to the site of the work was to be limited by the rising water level at an indeterminate time during the year following the award of the contract, which provided that work was not practicable in winter

and that the work should be performed during the 1962 summer season, the failure of the Government to furnish notice to proceed within a reasonable time after award, causing the major portions of the work and the duration of the contract performance to be extended into the 1963 work season under conditions of severely restricted access, makes the ensuing delay in completion of the contract excusable to the extent that it was not foreseeable, and the contractor is entitled to a commensurate equitable extension of time for performance.

BOARD OF CONTRACT APPEALS

This appeal represents a consolidation of three separate appeals arising out of the same contract, the first two having been docketed originally as IBCA-393 and IBCA-404. All of the appeals were filed timely. A hearing upon the consolidated appeal was conducted in April 1964 at Salt Lake City, Utah. At the time of the hearing the contract had not been completed. The contract was awarded July 23, 1962, in the estimated total amount of \$313,844.41, based in large part upon unit bid prices for estimated quantities. The terms of the contract included Standard Form 23-A (April 1961 edition). The site of the project was in northeastern Utah, on the Green River, a few miles upstream from the Flaming Gorge Dam which was under construction at the time the contract was awarded. One portion of the work was described as:

Constructing the Filter Bed, Pump Gallery, Inclined Well, Pump & Chlorinator Houses complete with all Appurtenances for the water system at Lucerne Valley.

The remainder of the work was to be performed on the opposite side of the Green River and was described as:

Construction of Access Road, Boat Launching Ramp and Water System, Antelope Flat.

The two portions described above were bid separately but were awarded as one contract.

It was a part of the overall plan of the Bureau of Reclamation and the National Park Service that the Flaming Gorge Dam would impound the waters of the Green River, thereby creating a wide lake or reservoir for recreational purposes in the area where the above-described facilities were to be constructed. The filter beds for the two water systems were intended to be inundated by the rising river, hence it was desirable that the filter beds be completed before the water level rose to a point where it could interfere with their construction. Also, as stated in the contract, it was not feasible to perform the contract work in winter weather.

It was likewise important that the facilities at Antelope Flat be started at the earliest possible date, because of the possibility that the new highway to be built across the top of the dam would not be

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open for traffic before the only two existing bridges in the vicinity across the Green River were removed. One of the bridges, known as the "Suspension Bridge," was about one mile above the dam. The only other bridge, usually described as the "Dutch John Haul Road Bridge" crossed the Green River at a point close to the sites of the work about 10 miles upstream from the dam. The only sources of supplies, materials and labor within reasonable reach were at Vernal, Utah, which would be inaccessible from Antelope Flats for all practical purposes after the two bridges were removed, if the highway across the dam was not then open for traffic. Otherwise, the nearest available bridge (at Jensen) required a haul of about 200 miles, through Maybell, Colorado, by means of vehicles equipped with four-wheel drive. The work site at Lucerne Valley, being on the Vernal side of the river, would continue to be accessible.

The Invitation for Bids dated June 7, 1962, in recognition of some of the factors just described, contained the following admonitions and instructions:

SP-14—UNUSUAL CONDITIONS. This installation is being made on what will be the lake formed by the completion of the Flaming Gorge Dam, now under construction by the Bureau of Reclamation.

When the water will be impounded and reach the elevation of our installation depends on several factors, none of which we can control. Water may be over our installation by May 1963 and then again it may be a year later or sometime in 1964. It is necessary that both the water system and boat launching ramp be completed prior to inundation and since the terrain of the area makes the installation of both be constructed nearly on top of each other, they are to be build [sic] under one contract.

Construction of this nature is not practical in the area during the winter months; therefore, the work is to be accomplished during the summer of 1962.

All work under the contract was to be completed within 180 days after receipt of notice to proceed and liquidated damages of \$50 per day were to be imposed for each day of delay beyond the stipulated completion date. As extended from time to time for causes not related to this appeal, the required date of completion became September 15, 1963. After the contract was awarded to the contractor-appellant, no action was taken by the Government in furtherance of the performance of the contract, until September 18, 1962, when notice to proceed was issued by the Government and acknowledged by the contractor on the same date. At that time it was estimated by officials of the dam contractors that the Dutch John Haul Road Bridge would be inundated or removed in May 1963, and that the road over the dam would be completed about July 1, 1963. The work of removing that bridge was subcontracted to the appellant. The Suspension Bridge was removed in October 1962. These estimates indicated possible interference with the work at Antelope Flat for a

period of about 2 months and the appellant proceeded to stockpile nearly all of the materials needed for performance of the work at Antelope Flat, except for cement.

On November 17, 1962, the Government issued a Stop Order because of winter weather. Work was ordered to be resumed on April 17, 1963. Appellant, under instructions from the dam contractors, began removal of the Dutch John Bridge on May 18, 1963. Thenceforth, appellant's access to Antelope Flat was limited to certain hours when traffic was permitted to cross the partially completed road over the dam, until about October 18, 1963. These restricted hours were established by signs posted at the gates at both ends of the dam, and enforced by guards. The hours were from 6:30 to 7:30 a.m. and from 5:00 to 6:00 p.m. In July 1963, the bridge was opened for an additional period of 30 minutes, from 12:00 noon to 12:30 p.m. At other times the gates were kept locked by means of a chain secured with several padlocks between links so that the gate could be opened by unlocking only one padlock. The privilege of having such access was restricted to certain Government officials and key employees of the contractor and subcontractors who were constructing the dam. Appellant attempted to obtain similar privileges but was not successful. On only two or three occasions was the appellant able to get across the dam during nonaccess hours, through intercession of a contractor on the dam. Otherwise, it appears that no exceptions were made for appellant during nonaccess hours. Reasons of safety and possible interference with the work on the dam were the basis of the restrictions.

In addition to other obstacles, access to the dam road was further complicated by the fact that certain "tail towers" or cranes on the crest of the dam traveled on rails there were about 6 feet above the ground level at some points. In order for vehicles to cross the dam, it was necessary for bridges and ramps made of heavy timbers to be placed in position to span the rails or tracks. The "tail towers" were normally used for conveying concrete buckets or moving smaller cranes, scaffolds, etc. To some extent, boats were used by both contractor personnel and Government officials for transportation across the lake between Lucerne Valley and Antelope Flat.

The contractor, by letter of June 10, 1963, asked that he be given unrestricted and unlimited authority to cross the dam to the job site at Antelope Flat with materials and personnel, or that he be granted a time extension until such unrestricted access could be granted. The contracting officer denied the request for time extension by Findings of Fact and Decision dated June 26, 1963, from which the contractor appealed. This claim for time extensions is designated as Claim No. I.

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Claim No. 1

In the circumstances described *supra*, the Board considers that the performance of the contract was delayed from its inception by the failure of the Government to issue a notice to proceed within a reasonable time following the award of the contract.¹ Bids had been opened on July 10, 1962, and award to the contractor was recommended on July 12, 1962. The uncertainties facing the contractor, as spelled out by the contract provisions with respect to the probable times of removal of the only available bridges, and the certainty that it was not practical or feasible to work during the winter, made it imperative that the Government act with more than usual promptness. We are of the opinion that a period of 15 days after the award was recommended on July 12, 1962 (July 27, 1962), was a reasonable time for the Government to take care of any administrative details related to the award and to issue the notice to proceed. The contractor should have been given the notice in time for it to be able to perform a substantial portion of the critical concrete work prior to the closing of the bridges. There was not sufficient time to perform a substantial amount of work between September 18 and November 17, 1962, when the contracting officer suspended work for the winter, although appellant offered testimony that it could have performed work after November 17, 1962, if it had been permitted to do so.

We conclude that the Government's delay in issuing the notice to proceed was the underlying contributory factor that aggravated the circumstances of lack of access to the work site during the 1963 work season.

The contractor has shown that it suffered substantial delays in performance as a result of the severe restrictions upon access to the job site at Antelope Flat. While it is contended by the Government that the delays occasioned by lack of timely deliveries of cement could have been avoided by stockpiling cement for as long as 30 days, the Board is satisfied that because of weather and risk of deterioration it was not practical to do so in the absence of extensive storage sheds. We do not consider that the contractor was bound to anticipate or foresee the worst possible outcome with respect to the date of eventual unrestricted access to the job site. It would not have been reasonable for him to have computed his bid on the assumption that restrictions on the use of the road across the dam would be so severe and would remain in effect from May until late October of 1963, or until all of the concrete work

¹ *Ross Engineering Co. v. United States*, 92 Ct. Cl. 253 (1940), holding that 12 days after furnishing bond was reasonable time in which Government should have issued notice to proceed. Cf. *Sidney Kent, d/b/a Doraid Engineering Co. v. United States*, 228 F. Supp. 929 (S.D. N.Y., 1964), aff'd 343 F.2d 349 (2d Cir. 1965), Contractor entitled to extension of time for delay in issuing notice to proceed but not entitled to damages; *Triangle Construction Company, IBCA-232*, (March 14, 1962), 69 I.D. 7, 1962 BCA par. 3317, 4 Gov. Contr. 316(c), notice given just prior to severe weather.

was completed at Antelope Flat. Even as late as May 7, 1963, it was estimated by the contracting officer in his letter of that date to the contractor, that "It will probably be mid-July before unrestricted travel will be permitted." By May 18, 1963, it was too late to stockpile large supplies of cement in the manner suggested (after the fact) by the Government.

The rigorous limitations on access prevented the contractor from making efficient use of its men, trucks and other equipment. It was not feasible for the cement trucks to make more than one round trip per day, compared with two trips if access had not been restricted. As a consequence the performance of concrete work was limited. The evidence is that the total delay in performance of the contract because of restricted access for deliveries of cement amounted to 11 or 12 days. However, some delay on this account should have been anticipated. The Board considers that a period of 10 days is excusable within the meaning of the contract clause (paragraph (d)(1) of Clause 5, Termination for Default—Damages for Delay—Time Extensions).

Appellant's work force was hampered on a few days because certain key employees did not arrive. Apparently these employees were late in arriving at the dam gates and were not permitted to cross. Appellant claims that 3 days were lost on this account. In the opinion of the Board, such a delay is not excusable, for if appellant's employees had not been tardy, the time would not have been lost.

The efficient use of the men and equipment was reduced considerably by reason of the fact that overtime could not be used when it was necessary to start and complete a particular phase of the work within the same day. When it was desirable that a concrete pour be started during the afternoon, but where it could not be completed before 5 p.m., the work had to be postponed until the following morning. The use of a double shift or split shift is recognized as permitting the maximum use of machinery with high rental values. Appellant was unable to use such shifts because there were insufficient living accommodations in nearby Dutch John. Nearly all of the contractor's employees resided in Vernal, where they had homes. The testimony of Mr. Neil Child, the contractor's Vice President and superintendent, established that the performance of the contract was delayed anywhere from 40 to 100 days by the reduced efficiency of men and equipment. The wide range of this estimate indicates that a conservative approach should be used to arrive at a reasonable determination. To some degree, a reduction in efficiency should have been expected. Accordingly, the Board finds that the performance of the contract was excusably delayed for 70 days by reason of loss of efficiency of men and equipment.²

² Cf. *Corrigan Construction Company*, ASBCA Nos. 10072, 10146 (August 27, 1965), 65-2 BCA par. 5062, where contractor's access to site was restricted by locked gates, and deliveries of concrete mix were limited as to weight by unnecessarily low load limits posted on bridge.

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The problem of restricted access to the Antelope job site affected Government employees, who were overseeing the work, as well as those of the contractor. The Government personnel on the project customarily used a boat to reach the site, and Mr. Neil Child testified without refutation, that the Government representatives usually arrived at the Antelope Flat site at about 9:00 to 9:30 a.m. Hence, at least the first work hour of each day was idle time for the contractor's work force. On one occasion when no Government personnel had appeared at the project at 9:42 a.m., except for Mr. W. H. Salmon, the Construction Representative for the National Park Service, the contractor's forces were laid off for the day. It was estimated by Mr. Neil Child that the contract performance was delayed 9 days (Mr. Ralph Child's estimate was 7 days) by reason of the habitual tardy arrival of Government employees and their failure to appear on the one occasion. Since the contractor's forces are required to report for work at the proper time, it is only reasonable that Government personnel should observe the same rule. When their absence or tardiness causes significant delay of the contract work, such delay is excusable to the contractor. Accordingly, the Board concludes that the performance of the contract was delayed 7 days by the actions of Government employees who were tardy in arrival or who failed to appear at the job site.

Mr. Ralph Child testified concerning a number of minor incidents, each involving alleged delays of one-half to one and one-half days. While the cumulative effect of these incidents may be of some significance in the time required for performance of the contract, many of them seem to coincide with periods of delay that the Board has already determined to be excusable for other reasons. We conclude that such minor incidents and loss of time were to be expected and should be absorbed by the contractor, since lack of access for a reasonable period should have been anticipated. Additionally, the Board will not take into consideration for the purpose of granting an extension of time the delay of three days testified to by Mr. Ralph Child as involving the loss of services of an electrician employed by another contractor on an exchange basis. The time allowed for the job should not be required to depend on an arrangement whereby the trucking of gravel to another contractor was consideration for the services of the other firm's electrician. The possibility that the gravel could not be delivered timely was known to appellant when the barter agreement was made.

An alleged delay of 6 days is related to a dispute as to power for testing of the water system at Antelope Flat. Other aspects of that dispute are discussed under Claim No. II. At the time, there was no electric power supply available for testing the winch that was to be capable of pulling the pipe line and pump up from the sump house for

purposes of inspection. The contractor alleges that the Government delayed 6 days while deciding to waive the test with respect to raising and lowering the pipe column. Aside from the fact that the Government was entitled to a reasonable time to make a decision, and that about 3 days were consumed by the exchange of letters, it appears that the contractor was able to make progress with respect to a substantial portion of the contract work while awaiting the decision. The Board concludes that the contractor was delayed in the performance of the contract for 1 day.

Accordingly, the Board finds that the contractor is entitled under Claim No. I to an extension of time of 88 days for performance of the contract.

Claim No. II

This claim arose out of a dispute as to interpretation of the contract provisions concerning testing of equipment and the furnishing of electrical power for such tests. The equipment concerned was the mechanism for operation of the inclined well that was the most important part of the water system. This system was designed so that water from the reservoir would pass through the filter beds and into a concrete housing or sump. Within this housing (submerged in the water during normal operation) was an electrical pump, connected to the end of a long pipe that conveyed the water drawn by the pump up a long incline to another concrete structure or pumphouse containing a winch and electrical controls near the upper end of the concrete boat launching ramp. From that point the water was piped to a reservoir constructed by others. The pipe was supported by castor wheels that ran on tracks, that in turn rested on a concrete foundation in a trench so that the entire pipe column, including the pump at its lower end with its electrical wiring, could be pulled up by means of the electric winch in the upper concrete structure, for purposes of inspection and repair.

The pipe column was composed of sections 10 feet in length, and when completed was covered with welded sections of half-round metal housing for its full length. The entire mechanism was then backfilled with earth to a depth of several feet. In order for the pipe and the pump to be raised it was necessary, because of lack of space in the pumphouse at the upper end, to disconnect each 10-foot section of pipe with its electrical connections as each section was hauled into the pumphouse that also housed the winch.

It is the appellant's position, as stated in its letter of August 1, 1963, and in its appeal dated September 3, 1963, that it was the intent of the contract that the apparatus described, including the automatic controls, electrical system and the operation of the raising and lowering mechanism be tested upon installation as well as after completion and inundation. Also, it is contended by appellant that electrical power

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for all such tests should have been furnished by the Government and that failure to furnish such power had the effect of waiving the contractor's guarantee of one year with respect to the water system.

Prior to appellant's letter of August 1, 1963, discussions were held between the appellant and the contracting officer's representative relative to the possibility of rental of an electrical generator to furnish power for the tests. Such rental was to be paid by the Government according to appellant's proposed plan, but the Government refused to agree to pay for rental of a generator and the plan was abandoned.

The practical basis for appellant's position is that after backfilling the pipe column it would be impracticable to re-excavate the pipe to make any changes or repairs except at considerable expense. Hence, it was only reasonable to make all possible tests as to the electrical system and the carriage system while the mechanism was accessible.

The principal contract provisions for testing are found in Special Provision 15 of the contract, as follows:

SP-15 TESTS (WATER SYSTEM) :

Without water it will be impossible to test the system completely prior to the filling of the lake. These portions are to be tested; however, at the time of installation: 4' Pump Column—Air test for leaks; winch is to be tested by pulling the pump and pump column 50 ft. + several times.

The tests of the pumps, pump controls and chlorinator will have to be deferred until water is available. Refer to SP-14 above.

The Contractor shall, in preparing his bid for this project, take into consideration the delay of completion due to the uncertainty of water. While vandalism is not very likely in this remote area, the Contractor shall be expected to take any reasonable precautions he deems necessary to protect the installation until the completion of all tests and final acceptance of the project by the Government.

After the Contractor has completed all construction called for under this contract and completed all tests *without water* a "Stop Order" will be issued closing down the project until the lake has filled sufficiently to complete the tests. When conditions are right for all remaining tests a "Resume Work Order" will be issued and the Contractor hereby agrees to resume the tests within fifteen (15) days after receipt of notice to *resume work*.

The second paragraph of subsection "d-1" of Section 2-05, Electric System, of the Construction Specifications provides in pertinent part:

Electric power as described in these Specifications will be delivered by others at the weatherhead.

The time for connecting electric power to the weatherhead is not mentioned in the contract. At the time of the hearing such electric power had not yet been furnished.

The test to be conducted after completion of installation is described as follows in subsection "g" of Section 2-05:

g. Test. After the installation is complete, and at such times as the Contracting Officer may direct, the Contractor shall conduct an operating test for approval. The equipment shall be demonstrated to operate in accordance with the require-

ments of these specifications. This test shall be performed in the presence of the Contracting Officer or his authorized representative. The Contractor shall furnish all instruments and personnel required for the test.

The Government's position was grounded in part on the contract provisions concerning utilities, as follows:

SP-11 UTILITIES:

No utilities are available and the Contractor will have to provide all of his requirements, and the Government shall not be held liable because of his failure to do so.

The Contracting Officer's letter of August 6, 1963, states in part:

It is agreed that an ambiguity exists as to availability of electrical power for use in raising and lowering the pipe column prior to inundation of the installation.
* * *

The Government's letter of August 6, 1963, then waives the test requiring the contractor to raise and lower the pipe column 50 feet, but specifically does not waive any other tests, guarantees or warranties required by the contract. Further, the letter goes on to state that the Government will furnish power at the weatherhead for tests when the installation is complete and when the reservoir has inundated the filter beds.

As indicated by the post-hearing briefs of both parties, the question of waiver of tests or warranties may be moot at this time, since the water system was in operation and was working properly when the briefs were filed in September 1964.

In any event, the pumphouse and electrical controls had not been completed on August 1, 1963, when the controversy arose. The Board considers that the questions raised by Claim No. II are moot at this time for the reason that the administrative record on appeal is not complete. The relief requested may be unnecessary, for the contract's guaranty period of one year may have expired.

Accordingly, the appeal is dismissed without prejudice as to Claim No. II.

The appeal may be reinstated as to Claim No. II upon written application showing due cause by appellant to the Board within 30 days following the date of this decision. Written notice of such application with a copy thereof shall be furnished to Department Counsel, who will have 30 days after receipt of such notice for filing a brief in opposition thereto.

Claim No. III

The work had not been completed on December 6, 1963, when the contractor requested the contracting officer to issue a Stop Order because of winter weather. The contracting officer denied this request in letters dated December 9 and 10, 1963, for the stated reasons that

* Article 39, General Provisions, as modified by SP-16.

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work could be continued on backfill operations, mechanical and electrical work and placing of filter sand, concrete work having been completed. The contracting officer also pointed out that it was necessary to complete the filter beds before they could be inundated by the reservoir waters. The contractor appealed from that decision by letter dated January 7, 1964. The contractor discontinued most of the work on December 6, 1963, and performed no substantial work thereafter. On December 13, 1963, according to the testimony of Mr. Child, an attempt was made to perform work of welding, but it was too cold to weld materials successfully. The last of the contractor's equipment was moved away from the work sites on December 17, 1963. Work was resumed about April 6, 1964.

In its notice of appeal the contractor called attention to the fact that the water in the reservoir was receding and predicted that it would continue to recede until warm weather; that the contractor would be able to complete the filter beds before being hindered by high water. At the time of the hearing the beds had not been inundated. Additionally, the obtaining of filter sand that would meet the specifications was a problem as far as the contractor was concerned. A number of samples of sand had been submitted but all had been disapproved, including samples from sources suggested by the Government. The contractor finally turned to the expedient of modifying the available sand by washing and screening to remove silt material so that it would meet the specifications. This process was not feasible in freezing weather or when there was too much rain for the sand to dry. It has not been shown that the Government was arbitrary or unreasonable in its rejections of the samples of sand.

The contract contains provisions for temporary suspension of work,⁴ but specifically excludes (except to protect the Government's interest) cases "where the Contractor, through his negligence, has permitted the work under the contract to extend beyond the stipulated time for contract completion, or where the work under the contract is not progressing satisfactorily in conformance with the approved operation and progress schedule."

As previously indicated, the contract was based on the premise that it was not practical to work in the winter season, and a suspension order had been issued November 17, 1962, for the winter season previous to 1963-1964. Also the evidence shows that it was customary in that area to shut down construction work in the winter season.

The Board has found with respect to Claim No. I that the appellant was entitled to an extension of time amounting to 88 days. This has the effect of extending the required completion date from Sep-

⁴ Clause 32 of the General Provisions of contract—"Temporary Suspension of Work."

tember 15, 1963 to December 12, 1963, with the result that appellant was not behind schedule on December 6, 1963, the date of its request for a stop order. Under the conditions hereinbefore described, we find further that it cannot reasonably be said that the work under the contract was not progressing satisfactorily.

Accordingly, the Board concludes that the contractor was entitled to a suspension order from December 6, 1963 to April 5, 1964, both inclusive, amounting to 102 days.

Conclusion

The appeal is sustained as to Claim No. I to the extent that the appellant is granted a time extension of 88 days in addition to such other time extensions as have been granted by the contracting officer.

The appeal is dismissed as to Claim No. II without prejudice to its reinstatement.

The appeal is sustained as to Claim No. III to the extent that a suspension order is granted with respect to the period of December 6, 1963, to April 5, 1963, both inclusive, amounting to 102 days.

THOMAS M. DURSTON, *Deputy Chairman.*

WE CONCUR:

DEAN F. RATZMAN, *Chairman.*

WILLIAM F. MCGRAW, *Member.*

SCHERMERHORN OIL CORPORATION KENWOOD OIL COMPANY

A-30319

Decided November 29, 1965

Oil and Gas Leases: Applications: Drawings

An interest which an oil and gas lease applicant has in the offer of another applicant for the same land in a drawing of simultaneously filed noncompetitive lease offers which gives the first applicant, in effect, 1¼ chances of success in the drawing is inherently unfair whether or not there has been collusion or intent to deceive the Department, and the applicant's offer is properly disqualified from participation in the drawing.

Oil and Gas Leases: Applications: Drawings

Where two offers for the same tract of land are filed during a simultaneous filing period by two corporations one of which owns 29 percent of the stock of the other, the offer of the first corporation is properly rejected because by reason of its stockholding its chances of success at the drawing are enhanced over those of other offerors; the offer of the second corporation is also properly rejected where it appears that officers of the first corporation are also officers of the second corporation and as officers are authorized to file offers and execute leases for the respective corporations.

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APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Schermerhorn Oil Corporation and Kenwood Oil Company have appealed to the Secretary of the Interior from a decision dated May 11, 1964, whereby the Division of Appeals, Bureau of Land Management, affirmed a decision of the Colorado land office rejecting their simultaneously filed noncompetitive oil and gas lease offers, Colorado 0115527 and Colorado 0115528, respectively, filed pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 782 (1960), 30 U.S.C. § 226 (1964).¹

Both lease offers, filed on October 28, 1963, described the same 679.27 acres of land in sections 19 and 30, T. 5 N., R. 95 W., and sections 24 and 25, T. 5 N., R. 96 W., 6th P.M., Colorado. The offers were not included in the drawing and were rejected for the reason that information submitted to the land office regarding corporate qualifications showed that 29 percent of the stock of Kenwood Oil Company is owned by Schermerhorn Oil Corporation and that to permit the offers to participate with other offers in a drawing to establish priority would be prejudicial to such other offers and contrary to the Department's policy that each offeror should have an equal opportunity with every other offeror.

In affirming the rejection of the appellants' offers, the Division of Appeals held that the filing of the two offers presented an inherently unfair situation even though no collusion between the parties was shown, that because of its holding in Kenwood, Schermerhorn's opportunity in the drawing would have been enhanced and that, if Kenwood had been successful in the drawing, Schermerhorn would have been an indirect holder of the acreage in the lease and chargeable with its proportionate share of Kenwood's accountable acreage, citing *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955).

The appellants contend that Schermerhorn does not have control of Kenwood, that it does not have sufficient interest in the actions of the latter that the filing of oil and gas lease offers by the two companies would constitute multiple filings or would constitute a violation of the Department's policy that each offeror in a simultaneous filing should have an equal opportunity, and that Kenwood owns no stock or interest of any kind in Schermerhorn. They further contend that the present case is distinguishable from *McKay v. Wahlenmaier*, *supra*, in several important respects, that the decision appealed from has no precedent, and that to interpret the principles set forth in *McKay v. Wahlenmaier* as covering the present situation would be to extend the policy of equal opportunity among applicants beyond reasonable proportions.

¹ On April 28, 1965, Richfield Oil Corporation filed a petition to intervene and file an amicus curiae brief in support of the appeals of the appellants.

In its amicus brief, Richfield alleges that the Bureau's decision would seriously injure every corporation in which competing corporations owned stock.² It contends that a corporation which owns stock in competing corporations or which is partially owned by competing corporations, in order to avoid the possibility of having a lease offer disqualified merely by the fact that such competitors filed simultaneous offers for the same land, would be required to (1) file a joint lease offer with the competitors or (2) enter into an agreement with the competitors whereby all but one of the companies would refrain from filing a simultaneous offer for the same lands. It is argued that the first alternative would be a practical impossibility and that the second would involve risk of violation of the anti-trust laws and laws against restraint of trade.

In its decision, the Division of Appeals stated that in the circumstances of this case the submission of the two offers "*would appear to be in violation of regulation 43 CFR 3123.3.*" (*Italics added.*) That regulation provides in part that:

(a) When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3123.9, all offers filed by either party will be rejected. * * *

In this case, as has been noted, the Bureau did not find that there was collusion between the appellants or that the appellants had entered into any kind of agreement or plan for giving either or both a greater probability of success in the drawing, but it held that the ownership by Schermerhorn of 29 percent of the stock of Kenwood created an inherently unfair situation. This conclusion was based essentially upon the Bureau's interpretation of *McKay v. Wahlenmaier, supra.*³

In that case the court held an oil and gas lease issued to the president of a corporation in his individual capacity to be invalid where a drawing of simultaneously filed offers had included, in addition to the corporation president's offer, offers for the same land filed by the vice president of the corporation in his individual capacity and by the corporation. In that instance the president was the owner of

² As of March 2, 1965, according to Richfield's brief, Cities Service Company owned 29.87 percent, and Sinclair Delaware Corporation, a wholly owned subsidiary of Sinclair Oil Company, owned 29.05 percent of the stock of the Richfield Oil Corporation. Richfield owns no stock in either of the other two companies. Under the Bureau's ruling, Richfield would be disqualified in any simultaneous filing by the filing of an offer for a lease of the same land by either of the other companies, although it would have no control over their filing and would, in fact, be in direct competition with them for the lease.

³ The land office decision also cited *Eugene J. Bernardini et al.*, 62 I.D. 231 (1955). That decision was not mentioned, however, by the Division of Appeals and is readily distinguishable upon its facts from the present case.

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23.7 percent of the capital stock of the corporation, and the vice president was the owner of 19.3 percent of the capital stock. In holding that the three offers were disqualified, the court found that (1) the corporation president should have been disqualified as a lease offeror because of his failure to disclose his indirect interest in his corporation's federal oil and gas leases as required by departmental regulation; (2) the Secretary of the Interior had found that because of the corporate and two individual filings the individuals had, in effect, $1\frac{1}{4}$ chances and $1\frac{1}{2}$ chances, respectively, to acquire the lease, and in combination with the corporation they had three chances against the single chance of the ordinary applicant; and (3) the president of the corporation was in a fiduciary relationship with the corporation and must be found to have violated a duty to the corporation or to have made his individual offer in behalf of the corporation. The court concluded that, as a matter of equity, he should have been found to have applied in behalf of the corporation.

The court did not state specifically whether each of the three bases which it found for holding the lease offers unacceptable would, by itself, have been sufficient cause for disqualifying the offers. However, a reading of the court's separate discussion of each ground strongly indicates that any one would have been sufficient. In the instant case neither the first nor the third factor found in *McKay v. Wahlenmaier* is present. The second factor is present with some variation. In *McKay v. Wahlenmaier* neither of the two individual offerors had an interest in the offer of the other, but their interests were so entangled with those of the corporation that no separate interests could be identified. In the present case, Schermerhorn would have an interest in a lease issued to Kenwood, but it does not appear that Kenwood would have any interest at all in a lease issued to Schermerhorn. Thus, there is a substantial factual difference between the two cases so far as the second ground of disqualification is concerned.

In addition, in *McKay v. Wahlenmaier* the court sustained the finding of the district court that the three lease offers in question were not filed in good faith and were collusive, which, it stated, "was equivalent to saying they were filed pursuant to a scheme to deceive the Department." (P. 46.) The court referred to the discussion in the Department's decision of the cases of *Clifton Carpenter*, A-22856 (January 29, 1941), and *Edward A. Kelly*, A-22856 (August 26, 1941), in which the Department held that the circumstances of those cases and the business relationship of 12 of 14 lease offerors were such that it could be found that the applications were not made in good faith for the sole benefit of the individual applicants and that the filings were made at the behest of and for the benefit of one of the applicants or his firm despite the affidavits of all of the appli-

cants that each had filed in his own behalf and had no agreement or understanding with any other applicant respecting the disposition or handling of the lease, if issued. However, despite citing *Carpenter* and *Kelly*, in which collusion was found, the Department made no finding in *Wahlenmaier* that there was collusion. The Department found that there was sufficient inherent unfairness in the three filings involved to have warranted rejection of the offers before a lease was issued. *Annie L. Hill et al. v. E. A. Culbertson*, A-26150—A-26157 (August 13, 1951).

As already noted, the Bureau relied on *McKay v. Wahlenmaier* to reject Kenwood's and Schermerhorn's offers even though it found there was no collusion in the filing of the offers. We think that the reliance was proper. Although the court did find collusion in *Wahlenmaier*, there is nothing in its opinion to suggest that, if it had found there was no collusion, it would have held there was no inherent unfairness in the offers that were filed. On the contrary, the court's opinion indicates its agreement with the Department that it was inherently unfair that the two individual offerors had chances of $1\frac{1}{4}$ and $1\frac{1}{5}$, respectively, in the drawing.

In the present case, Schermerhorn's interest in Kenwood gave it, in effect, more than $1\frac{1}{4}$ chances of success in the drawing of lease offers. This is contrary to the Department's policy, whether or not collusion was involved. Thus, Schermerhorn's lease offer was properly rejected.

Does the rejection of Schermerhorn's offer, however, require the rejection of Kenwood's? The arguments presented to support the conclusion that it ought not to are based upon the assumption that Kenwood and Schermerhorn are distinct entities connected solely by the fact that Schermerhorn owns 29 percent of Kenwood's stock.

Although, the Bureau did not find that the appellants' lease offers were collusively filed, there is little in the record to suggest the existence of such independence of management as is professed in the present appeals. An examination of the files containing the documents submitted by the appellants to qualify themselves to hold oil and gas leases reveals that the principal offices in both are held by the same persons, although not in the same capacity. The following chart sets out the extent to which the appellants share officers:

	<i>Kenwood</i>	<i>Schermerhorn</i>
H. A. Sherman.....	President	Vice President and Director
H. J. Sherman.....	Vice President	Vice President and Director
C. J. Winton.....	Vice President	
E. J. Schermerhorn.....	Vice President and Treasurer.	President and Director
J. C. Carnahan.....	Secretary	Treasurer and Assistant Secretary.
J. Hargrove.....	Assistant Secretary.	Secretary

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Furthermore, appellants share the same street address and post office box. The offers of both appellants were filed in the land office on the same date and were assigned successive serial numbers by the land office. The offers are identical in all respects except for the names of the offerors and the signatures that appear on them. The first year's rental was remitted by both appellants in the form of cashier's checks drawn on the same bank on the same date. Both appellants are represented by the same attorney, and, throughout the proceedings before the Department, almost identical briefs have been simultaneously filed in behalf of both appellants. In short, these simultaneous filings have been simultaneous in practically every respect.⁴

In a letter dated June 21, 1965, to appellants' attorney, this office adverted to these interrelationships and shared facilities and offered appellants an opportunity to submit any material which would demonstrate that they conduct their business operations so independently of each other that they should be allowed to take part in a drawing in which applicant is limited to one chance. The appellants have presented nothing for our consideration.

In its statement of reasons Kenwood says that its controlling ownership lies with persons who do not have stock or other ownership in Schermerhorn, without, however, identifying those who do control it. Kenwood has reported that only one stockholder, Schermerhorn, owns more than 10 percent of its stock. While the 29 percent that Schermerhorn owns is not a majority interest, it certainly is a substantial one in an ownership pattern where no one else owns as much as 10 percent.

It is generally true that majority stockholders have the power to control the affairs of a corporation. However, the power is not exercised on a day by day basis whereas the authority of corporate officers is. Therefore, the authority of the officers may be of more significance in a given situation than the residual power of the stockholders. The corporate qualification files of Schermerhorn and Kenwood (Colorado 0123133 and 0125223, respectively) contain instruments filed by them on May 3 and 6, 1963, which state identically that the officers authorized to act on behalf of the corporation in the execution of offers to lease and oil and gas leases are the president, any vice president, the secretary or any assistant secretary, and the treasurer or any assistant treasurer. As indicated above all the officers of Schermerhorn having authority to execute offers and leases are also officers of Kenwood having the same authority. Thus, the officers of Schermerhorn, having filed an offer for that company, could file as officers of Kenwood an offer for that company on the same land, thus increasing Schermerhorn's chances at the drawing.

⁴ The Tulsa, Oklahoma, telephone directory of October 1964, listed the same telephone number for both appellants.

This being the case, we believe that in the case of such filings by both corporations for the same land both offers must be rejected because of the unfair advantage accruing to Schermerhorn. We need not examine into the actual intent with which Kenwood's offer was filed. The fact that it was filed by officers who also had authority to file for Schermerhorn and the fact that the Kenwood filing enhanced Schermerhorn's chances at the drawing are sufficient to justify rejection of both offers.

With this disposition of the case, it is unnecessary to reach the question raised by Richfield. This question concerns filings by a Kenwood and a Schermerhorn where there are no common officers empowered to file for both companies and there is only substantial stock ownership by the Schermerhorn in the Kenwood. Of course, the Schermerhorn filing would be bad just as the Schermerhorn filing in this case is bad, because by reason of the stock ownership alone it gains an unfair advantage over other offerors. Whether the Kenwood filing would be improper is the question which need not be decided at this time.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

EDWARD WEINBERG,
Deputy Solicitor.

APPEAL OF LINCOLN CONSTRUCTION COMPANY

IBCA-438-5-64 *Decided November 26, 1965*

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustment—Contracts: Formation and Validity: Implied and Constructive Contracts

Under a contract for the construction of dikes, requiring the use of material excavated from borrow areas, where a substantial portion of a borrow area containing suitable material as staked by the Government is withdrawn from use by Government instructions so that the contractor's borrow operations are confined to a previously excavated borrow pit that became filled with water, and was more difficult to excavate, such instructions constitute a constructive change for which the contractor is entitled to an equitable adjustment.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustment—Contracts: Formation and Validity: Implied and Constructive Contracts—Contracts: Construction and Operation: Intent of Parties

Where the intent of the parties, clearly inferable from contract provisions, is that the contractor's reasonable requests for access roads will be granted

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subject to restoration of the natural landscape and repair of damage thereto at the contractor's expense, the erroneous interpretation of the contract by the contracting officer's representative, to the effect that the contractor's request for more than one access road should be denied because of probable damage to the natural landscape, constitutes a constructive change for which the contractor is entitled to an equitable adjustment.

BOARD OF CONTRACT APPEALS

This timely appeal is concerned with claims for additional compensation in the amount of \$66,875.86 for increased costs of performance allegedly caused by actions of the Government in revising the area of a borrow pit and in refusing to permit the contractor-appellant to use more than one haul road in and out of the borrow pit. The contractor also claims that additional extensions of time should have been allowed by the contracting officer because of the delays that resulted from the aforesaid actions of the Government.

The contract was awarded August 23, 1963, in the total estimated amount of \$28,230. The provisions of the contract included Standard Form 23-A (April 1961 edition). The work required was the construction of two extensive dikes of sand material, 2700 feet and 3700 feet in length, a short distance inland from the seashore at Cape Hatteras, to be completed within 60 days from receipt of notice to proceed. The contractor bid \$4.70 per lineal foot for the 2700 feet of Unit No. 1, and \$4.20 per lineal foot for 3700 feet of Unit No. 2. The notice to proceed was received by the contractor on August 30, 1963, so that October 29, 1963 was the date required for completion. As extended because of weather conditions the final completion date became November 21, 1963, but the contract was not finally completed and accepted until December 16, 1963. Liquidated damages of \$150 per day for each day of delay were stipulated in the contract.

The Board conducted a hearing upon the appeal during the week beginning September 15, 1964, at Cape Hatteras, North Carolina, at which time the hearing official visited the sites of the work in company with officials and counsel of the respective parties.

The contractor received the Invitation for Bid by mail on August 15, 1963 and two of its representatives visited the sites of the work on Saturday, August 17, 1963. The bid opening was the following Monday, August 19, 1963. At the time of the pre-bid site inspection by the contractor, the two borrow pits, from which the contractor was to obtain the material for the dikes, had not been staked. Only general locations and outlines of the borrow pits were shown on the plans. In particular, the borrow pit to be used for the dike identified as Unit No. 1 (this borrow pit will be referred to as Pit No. 1) was indicated as being "approx. 700' x 400'." The location of this borrow pit was not fixed on the plan with respect to its distance from any other located

point. There was a partially excavated area at the approximate location of the proposed borrow pit, and the contractor was informed that the excavated area had been used previously as a source of borrow by another contractor. This excavated area was not identified as such on the plans.

Mr. Clayton Best, the contractor's Vice President and General Superintendent, and Mr. Charles C. Henry, Jr., who later supervised the contract work for the contractor, were the contractor's representatives who visited the sites before bidding. There was no information given by Government representatives to them during their stay concerning whether the contractor would be required to secure borrow material for Unit No. 1 from the area already excavated. The excavated pit had little or no water in it at that time and vegetation was growing in the lower portions of the pit. Mr. Best and Mr. Henry had proceeded directly to the area of Pit No. 1 before contacting Park officials. After leaving Pit No. 1 they met with Mr. Charles Basnight, Maintenance Foreman for the National Park Service, and with a Mr. McGinnis and a Mr. Matteo, both of the National Park Service.

As a result of their conversation with Park personnel, Mr. Best and Mr. Henry learned that a previous contractor, one Williams, had performed a similar contract using rubber-tired scrapers for obtaining borrow from a pit not very far from Pit No. 1 of the instant contract; that the Park Service estimate of the total quantity of borrow required for the two dikes was about 52,000 cubic yards, about 26,000 cubic yards for each dike. Following the visit to the site Mr. Best and Mr. Henry reported their findings to Mr. Donald W. Sneedon, President and principal stockholder of Lincoln Construction Company and recommended that Lincoln's bid should be based on use of self-loading rubber-tired scrapers for obtaining borrow from Pit No. 1 in a circular operation directly to the dike and return. Pit No. 2 was on the marshy shore of Manteo Sound and the material at that location was wet; hence, it was planned to use a dragline to cast the wet material on solid land where it could dry, then the dried material was to be loaded with scrapers and carried to the dike known as Unit No. 2.

Immediately following the preconstruction conference on August 28, 1963, the contractor's forces proceeded to the location of Pit No. 1 where Park Service employees, headed by Mr. Edward Nash, the Project Supervisor and contracting officer's representative, were staking the perimeter of the borrow area. As staked, the borrow area was bounded roughly on 3 sides by the perimeter of the borrow pit that had previously been partially excavated. On the fourth side, however, there was an untouched piece of land extending to the west, that appeared to be a good source of borrow, being somewhat higher in

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elevation than the land on other sides of the excavated section. This better section constituted about one-third of the total borrow area that was staked.

The contractor's forces commenced work by having a scraper proceed around the perimeter of the untouched borrow section to define the edges of that area. In doing so the scraper cut a two-inch plastic water line that crossed the untouched borrow area near the excavated section, just below the surface of the ground. The water line was not in use and was not connected to a source of water. The water line was not shown on the plans and its presence was not known to the contractor's personnel nor to any of the Park Service employees whose duties were related to the instant contract. Although the water line had apparently been abandoned and could have been bridged or removed and relocated outside of the borrow area without difficulty, the contractor, in spite of protests and requests for additional borrow area, was directed to stop operations in the untouched borrow area. The stakes were changed so as to confine the borrow operations to that section that had already been dug by a predecessor contractor, together with a narrow strip about 20' or 30' by 200' on the edge opposite the area that had been taken away. This added strip was lower in elevation than the 1½ acre area of which the contractor had been deprived and did not compensate for the loss of that area.

At about this time the contractor requested permission to use two temporary haul roads in and out of the pit so that its scrapers could use a continuous circular method of transportation, in one direction. This would result in an efficient operation whereby the scrapers could pick up a load of borrow, leave the pit by the exit road, distribute the material along the dike and return to the borrow pit by means of a separate entrance a few hundred feet from the exit, where the operation would be repeated. This is the usual practice of the grading or excavating industry. Permission to use more than one temporary haul road was refused by the Government because of the damage that would be caused to the landscape features of the Park and the possibility that where vegetation and ground cover was destroyed, the underlying sand would be shifted and blown away. The contract provisions¹ concerning such matters require the contractor to "provide and maintain all temporary roadways which may be authorized," and further that "the contractor shall restore at his expense any damage to any property, including ground cover, and other vegetation, and the Contractor shall save and hold the United States free from all claims for damages or injury to all persons or property caused by the Contractor, his agents, employees, workmen, and subcontractors in the execution of this contract."

¹ Clause 33—Operation and Restoration, of General Provisions.

It appears from the testimony that the contractor requested authorization for the use of a second road on numerous occasions and emphasized to Mr. Nash the essential need of such road for efficient operations. The contractor also pointed out that any damage to the surroundings would be repaired and the landscape restored, but the Government continued to refuse authorization for a second haul road until the time required for completion of the contract had expired. This was corroborated by the testimony of Mr. Nash, the Project Supervisor and Contracting Officer's representative, as follows:

Q. Now, was any request made to you to open up a new access road at Position "D" on that diagram, on Exhibit 14?

Mr. STATION: What was that figure?

Mr. CORBETT: "D"

The WITNESS: I see. "D", yes.

Q. And who made a request to open that?

A. I don't recall exactly who made it but it may have been Mr. Henry or Mr. Ipock [the contractor's first superintendent on the project] or Mr. Sneaden [sic] but it was made.

Q. And it was made verbally to you or by writing?

A. It was made verbally.

Q. And did you grant permission or refuse permission?

A. I refused permission.

Q. And what reason did you have to refuse permission for them to open a new road in there?

A. Well, I felt that—in fact, I did not think it was needed; that it was necessary, really, and I felt opening up this road was not so far up to this old road here, the distance out to where the dike was, was quite a stretch; I guess, overall, maybe from here to here, about 800 feet; I felt it would provide a scar which I felt was unnecessary and therefore, I confined it—I denied the request. It was purely a matter of, you might say, appearance—park appearance; park policy, because we don't like to add any more roads than we have to.

* * * * *

Q. You don't know who asked you for the access road but it could have been Mr. Hipock [sic] or Mr. Henry?

A. Probably all three did because there were several requests, as Mr. Sneaden [sic] testified, for this road.

After about a week of operation in the previously excavated borrow pit, water began to rise in the lower portions, due apparently to the excavating operations, rain, surface drainage and the water table. The contractor continued to use scrapers, with the help of pumps to control the water, until about September 28, 1963, when the water rose to a point beyond feasibility for the continued use of scrapers. From that point on, the contractor used draglines in the borrow pit.

However, the contractor was not permitted to operate its draglines in the manner employed at Borrow Pit No. 2 where the wet material was cast up on solid ground adjacent to the borrow pit. At Pit No. 1 permission was refused by the Government concerning the contractor's

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request for use of a 20' or 30' strip of land at the edge of the pit where wet material could be cast for drying and eventual loading on scrapers. At this point the pit had been excavated to a depth of 3' or 4'.

As an expedient, the contractor was obliged to excavate material from beneath the surface of the water and pile it up in the water until the material was above the water level. More material was then piled on this temporary embankment for draining and drying. The embankment then served as a temporary road whereby scrapers could come out and load the material that had drained. Only one scraper could use the embankment at one time, since it was necessary for it to turn around when it was loaded, because only one haul road was permitted for entrance and exit. During this period, other scrapers were idle at the entrance, awaiting their turns. This method of operation was a slow process for another reason. The dragline took up so much water with the material from the bottom of the pit that much of the material was washed out of the bucket with the water that drained out as it was hoisted out of the pit. (A similar difficulty was encountered at Pit No. 2.)

When it became impracticable for the dragline to reach material to be excavated from the first embankment, the embankment was picked up by the dragline and moved out a few feet where it was constructed all over again, and the rest of the process was repeated. By this means the borrow pit was excavated to a depth of about 8 to 10 feet in some places. At the end of the project the final embankments, so constructed and used, were left in place except for being cut down or "erased" below the water surface, on instructions of the Park Service, to avoid an unsightly appearance.

About the time the contract performance time had expired on October 29, 1963, when it was no longer feasible to excavate from the original pit, the contractor, after numerous requests for more suitable borrow areas, was allowed to excavate an area adjacent to the north-east edge of the pit. However, it was still necessary to use the dragline method just described. Although an additional haul road was granted at this time to enable material to be moved out of the new pit, because the first road used did not provide access to the new borrow area, the new road did not provide any advantage in terms of cycling operations. It could have been used in cycling operations if it had been furnished at the outset of performance. The new road was only a few hundred feet north of the first road, and both roads were some distance from either end of the dike, which was about 2,700 feet in length. Since both roads were approximately opposite the central one-third portion of the dike, it was still necessary (as it had been in the use of the first road) to proceed several hundred feet to the north end of the dike, then come back along the full length of the dike to distribute

the material and return from the south end of the dike to the same road that provided exit from the borrow area.

The point that had been requested by the contractor for use as a haul road was at the extreme southerly end of the previously excavated borrow pit. This point was nearly opposite the south end of the dike, and the granting of a haul road at this location would have permitted the contractor to make a continuous loading sweep through the entire original borrow area, exiting to the north at the only road that was authorized during the first 2 months of the contract.

By the time the second haul road was authorized, no such long sweep was possible because the original borrow area was exhausted.

In performing the work the contractor had anticipated using 2 rubber-tired scrapers, 2 bulldozers and dragline with 2 operators for 24-hour operation, as stated in a letter dated August 25, 1963, to the Park Service. During the peak of the performance, for about 5 weeks the contractor was using 3 draglines with 2 operators for each on a 24-hour operation, 5 scrapers and 3 bulldozers. Normal work was performed on a 12-hour-day basis including Saturdays and Sundays.

On a number of occasions in September and October the contractor requested orally that certain days be omitted from the computation of contract time because of excessive amounts of water that prevented the use of scrapers. Finally, on October 18, 1963, the contractor's superintendent, Mr. Best, personally presented a letter to the Acting Park Superintendent and Contracting Officer, Mr. R. K. Rundell. The body of the letter is as follows:

Gentlemen:

We bid the above project based on the following conditions:

1. Unit 1 to haul direct from borrow area to dune fill with self loading scrapers.
2. Unit 11 [2] to cast borrow material in a stock pile and later haul to dune fill with self loading scrapers.

Due to an excessive amount of water, the material in both pits has to be cast with dragline and later re-loaded and hauled with scraper.

We are requesting a fifteen day extension on time to complete this contract and trust that you will grant us this request.

Mr. Rundell refused to accept the letter, saying that it was not worded as he would like it, and he instructed Mr. Best to rewrite the letter in substance as it later was rewritten and mailed to Mr. Rundell, as follows:

Due to severe hurricane conditions, extremely high tides and abnormal rainfall, we request an eighteen day extention [sic] of time to complete the above reference contract.

Change Order No. 2, dated October 29, 1963, extended the contract time by 18 days, referring to general storm conditions in the area

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during the periods of October 9th through October 16th and October 19th to October 29th, establishing a new completion date of November 16, 1963. The Change Order also granted the additional borrow area described above.

Change Order No. 1 dated September 25, 1963, had permitted the contractor at its choice to take borrow from an area on the beach, but this proved to be too far away to be feasible and the sand could not be moved with a rubber-tired scraper. Apparently, the Government recognized the making of verbal arrangements for the use of access roads, for Change Order No. 1 states:

The contractor will also move his equipment only over those access routes either staked before borrowing operations begin or verbally agreed to as points of access to dune fill placement.

After the issuance and acceptance of Change Order No. 2, the contractor, through its superintendent, Mr. Best, made further verbal requests for time extensions because of the difficulties encountered in performance of the work, and the Government issued a Stop Order on November 29, 1963, effective as of the close of business November 28, 1963 through December 3, 1963, so that the new final completion date became November 21, 1963. No further extensions were granted, and according to Mr. Best's testimony, when he asked Mr. Nash and Mr. Rundell concerning further extensions of time he was told that it would not be considered, that no further time could be granted.

The dike identified as Unit No. 1, where most of the difficulties arose, was completed on November 9, 1963 (in part, at least at the expense of Unit No. 2, which was finished on December 16, 1963). Two of the draglines were used in Pit No. 1, while one dragline was used in Pit No. 2.

Time Extensions

The principal problem with taking borrow from Pit No. 2 was the high water that came from the Sound into the low marshy area of the pit, when high tides and storms in the ocean piled up water in the Sound. The Government allowed a total of 23 days for this type of delay, and the Board considers this allowance to be reasonable in view of the fact that several days of bad weather including hurricanes and high water should be anticipated during September and October in the area of Cape Hatteras. Apart from the weather, however, we also find that the difficulties encountered and the necessity for using most of the contractor's resources in Pit No. 1 had the effect of prolonging to some extent the excavation of Pit No. 2 and the construction of Dike Unit No. 2.

For reasons that will be discussed more fully *infra*, the Board concludes that the difficulties experienced by the contractor in Pit No. 1

and Unit No. 1 were caused by actions of the Government. Because of those actions, it is the opinion of the Board that the contractor is entitled to an extension of time for performance of the contract amounting to 10 days. Further, the Board finds that the contractor was delayed for 2 days in the completion of Unit No. 2 by the Government's requirement that the contractor leave in place the excavated material that had been placed in building up the level of the haul road, instead of permitting such material to be removed and used for the final stage of constructing Unit No. 2. These findings establish a revised date of December 3, 1963, for required completion of the contract. The remainder of the time required for completion we find to have been the result of weather conditions that were foreseeable within the meaning of paragraph (d) (1) of Standard Clause No. 5, entitled "Termination for Default—Damages for Delay—Time Extensions." Accordingly, the appeal is denied as to the remainder of the claim of excusable delay, from December 3, 1963 to December 16, 1963.

Change of Borrow Area

It is the opinion of the Board that the actions of the Government on August 28, 1963, in changing the outlines of the borrow area, so as to restrict the contractor to the area that had been excavated previously, constituted a constructive change,² that should have been effected by a written change order.³

The Board considers that the parties could not reasonably have contemplated that the contractor's borrow operations as to Pit No. 1 would be confined to the area that had been previously excavated. There was available, adjacent to the excavated pit, an ample expanse of material that was better for the intended purpose. As it turned out, it eventually became necessary to make a part of that area available to the contractor on October 29, 1963. Hence, it was a logical assumption, at the time of bidding, that a reasonable quantity of good borrow material would be made available, in addition to the "left-over" material that remained in the old borrow pit.

Where such a constructive change delays the contractor's performance and increases his costs, it entitles the contractor to an equitable adjustment of time required for performance of the contract⁴ and of the contract price, pursuant to the Changes clause.⁵ The equitable adjustment of time for performance has been covered in our dis-

² *Henly Construction Company*, IBCA-185 (February 23, 1960), 67 I.D. 44, 61-2 BCA par. 3239, 2 Gov. Contr. 198 (Change in staking and method of construction).

³ *United Exploration Corp.*, IBCA-427-2-64 (October 7, 1965), 65-2 BCA par. 5129.

⁴ *Blanchard Construction Co.*, ASBCA No. 7323 (August 29, 1962), 1962 BCA par. 3489 (Contract wrongfully terminated for default).

⁵ *Henly Construction Company*, IBCA-249 (December 7, 1961), 68 I.D. 348, 61-2 BCA par. 3240, 4 Gov. Contr. 49(b).

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cussion of time extensions. Such time extensions were based in part upon other actions of the Government, that will be considered under the subject of access roads. The equitable adjustment of price will be determined with respect to both types of Government actions.

Changes in Access Roads

From the outset of contract performance the contractor requested and continued to request an additional access road. This was conceded by Mr. Nash, as we have discussed. As the representative of the contracting officer, Mr. Nash based his denial of the additional access road on his erroneous interpretation of the contract. His paramount concern with respect to performance of the contract seemed to be related to the preservation of the landscape features of the park. He allowed that concern to override considerations of reasonable access by the contractor and the contract requirements for restoration by the contractor of any damage done through the use of access roads. The Board considers that such interpretation of the contract provisions was erroneous and not reasonable, in view of the clear intent that the contractor was entitled to access roads that would be sufficient to enable the normal and efficient use of his work force and equipment in removing borrow material from Pit No. 1. This finding is buttressed by the fact that Mr. Nash did in fact grant an additional access road when it could not be avoided (too late to be of any value for the first two months of operations) and the showing in an aerial photograph (Government's Exhibit I) that an additional access road had been used by a previous contractor in the same location requested by appellant.

An erroneous interpretation by the contracting officer with respect to the contract provisions or specifications, that results in a restriction of the contractor's performance, or causes a change in the method or an increase in the costs of the contractor's performance, constitutes a constructive change,⁶ and the contractor is entitled to an equitable adjustment of time for performance and of the contract price. We have considered and allowed an extension of time for performance on this account, and there remains for review the contractor's claim for increased costs, or adjustment of the contract price.

One of the grounds relied upon by the Government for denial of the contractor's claim for increased costs is the alleged release of claims that resulted from appellant's acceptance of Change Order

⁶ *C. W. Schmid v. United States*, Ct. Cl. No. 75-63 (October 15, 1965); *Corrigan Construction Company*, ASBCA No. 10072, 10146 (August 27, 1965), 65-2 BCA par. 5062; *Hunt Contracting Company*, IBCA-301 (December 27, 1963), 1963 BCA par. 3970, 6 Gov. Contr. 126.

Nos. 1 and 2. Such acceptance does not amount to a release of all prior claims arising under the contract. Change Order No. 1 provided the contractor with an area on the ocean beach as an optional source of borrow, and it is conceded that it was unsuitable. There was no language in Change Order No. 1 to the effect that by its acceptance the contractor released all claims relative to the borrow area beyond the water line, that had been taken away on the first day of performance. Nor did Change Order No. 2 state in words, or imply, that by signing it the contractor accepted the added borrow area and new access road in full settlement of all claims relative to previous borrow areas or other access roads that had been denied.

The contractor had based its claims principally on alleged changed conditions and unusually severe weather, and the Government properly refuted those allegations. However, the Board "is not limited by the appellant's choice of remedy nor by the Government's assignment of defense."⁷

Equitable Adjustment of Price

The contractor's claim of increased costs of performance in the amount of \$66,875.86 is based on its total costs of \$90,833.86 less the amounts payable to it pursuant to the contract. As such it must be subject to close scrutiny, because of the possible existence of factors unrelated to the causes that constitute a basis for an equitable adjustment.

One such factor is the increased cost of performance caused by the encountering of a larger volume of material than had been anticipated by the contractor in computing its bid. The Invitation for Bids stated that the dikes were to be paid for on the basis of a price per lineal foot. In order to arrive at its bid price per lineal foot, the contractor found it necessary to convert the lineal footage of each dike as required by the plans, to a cubic yard figure. In so doing, the contractor's computations included the length, width and height of the dike, but it complains that because the contours of the natural ground were somewhat lower in certain areas than had been represented by the dike sections calculated by the Government, the actual volume of material needed to construct the dikes was 31,517.7 cubic yards for Unit No. 1 and 31,010.6 cubic yards for Unit No. 2, or a total of 62,528.3 cubic yards as compared with the estimated total quantity of 52,000 cubic yards shown by the Government (26,000 cubic yards for each dike).

The contractor used the Government's estimates (which were not guaranteed) because it did not make its own independent survey.

⁷ *Peter Kiewit Sons' Company, IBCA-405* (March 13, 1964), 1964 BCA par. 4141, 6 Gov. Contr. 281 (e) and cases cited therein.

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The result was that the contractor's bid was lower than it should have been. The total contract price of \$28,230, divided by the estimate of 52,000 cubic yards, gives a quotient of about \$0.543 per cubic yard. Based on the contractor's computations of actual quantities the contractor was paid at the rate of only \$0.451 per cubic yard. To express it another way, the contractor should have bid a total price of about \$34,000 in order to realize an average rate of \$0.543 per cubic yard.

The bids submitted by other contractors ranged from \$38,400 to \$118,404. The disparity between appellant's bid and the prices quoted by its competitors may not be of compelling significance, but the Board considers that such variations should be taken into account in any attempt to fix a fair amount of compensation. The Board does not look with favor upon the "total cost" method of arriving at an equitable adjustment. As we stated in *Henly Construction Company* (Note 5 *supra*):

* * * Needless to say, it is not possible to rule out other factors as causes of the appellant's extremely high costs for this contract. * * *

It must be pointed out that appellant's claim does not distinguish between the total costs experienced in the construction of Unit No. 1 and those of Unit No. 2. The Government's actions in the form of constructive changes were directed only at operations in Pit No. 1 and Unit No. 1. The contractor had anticipated that it would be necessary to use the dragline method of operation in Pit No. 2, which was in a wet marshy area. Mr. Sneed testified as follows with respect to Pit No. 2 in response to questions raised by the hearing officer:

HEARING OFFICER: But you did not have the difficulty there, using the dragline, that you did in Pit No. 1?

THE WITNESS: Pit No. 2 went exactly like we had planned; it would have worked better if we had a larger area to work in. The only thing in Pit No. 2 was this haul road we built, which we had planned to remove on the last week of operation. That was denied, because the Park Service wanted the road left in place.

Nevertheless, the time required for completion of Unit No. 2 was considerably more than for Unit No. 1, as we have mentioned earlier with respect to the claims for time extensions. This was due in part to flooding and storms that prevented efficient performance in both pits, and for which the contractor received time extensions. However, storms and floods, while they may be excusable causes for delay, may not form the basis of claims for additional compensation.

One other factor that should be considered is the efficiency of the contractor's work force and equipment. It appears that the contractor's operators were capable and performed their work in an efficient

manner, considering all of the circumstances. The contractor's machines were in generally good condition, and the extent of repairs and maintenance due to breakdown was not excessive.

Mr. Sneed testified further that in his opinion, the reduction of the original borrow area was responsible for about 50 percent of the increased costs, and that the denial of a second access road accounted for one-third of such additional costs. From his testimony as well as from other evidence, it appears that if the borrow area had not been reduced, the contractor would have been able to complete its operations in Pit No. 1 as to excavation of about 26,000 cubic yards without encountering water in such a volume as to make necessary the use of draglines instead of scrapers.

Because of the imponderables and unknown elements involved, it is not possible to arrive at a precise mathematical determination concerning the amount of an equitable adjustment. Such precision is not required, however, in the use of the "jury verdict" approach.⁸

Taking into consideration all of the administrative record before us, giving due weight to the evidence adduced at the hearing, and resolving the conflicting positions taken by the parties as best we can, the Board arrives at the opinion that the appellant is entitled to an equitable adjustment in the amount of \$36,000 by reason of the constructive changes hereinbefore determined to have been imposed by the Government.

Conclusion

1. The appeal is sustained as to the claim for extension of time to the extent of 12 days.
2. The appeal is sustained as to the claim for increased costs of performance to the extent of an equitable adjustment in the amount of \$36,000.
3. The appeal is denied as to all other claims.

THOMAS M. DURSTON, *Deputy Chairman.*

WE CONCUR:

DEAN F. RATZMAN, *Chairman.*

WILLIAM F. MCGRAW, *Member.*

⁸ *Western Contracting Corporation v. United States*, 144 Ct. Cl. 318 (1958); *Henly Construction Company*, note 5 *supra*; *Flora Construction Company*, IBCA-180 (June 30, 1961), 61-1 BCA par. 3081, 3 Gov. Contr. 468; *Caribbean Construction Corporation*, IBCA-90 (Supp.) (September 22, 1959), 66 I.D. 334-38, 59-2 BCA par. 2322, 1 Gov. Contr. 666. See also *Fred H. Hicks Construction Company*, IBCA-271 (October 20, 1961), 61-2 BCA par. 3165, 3 Gov. Contr. 49(a); *Lake Union Drydock Company*, ASBCA No. 3073 (June 8, 1959), 59-1 BCA par. 2229.

November 1, 1965

BOBBY LEE MOORE ET AL.

A-30433

Decided November 1, 1965*

Indian Allotments on Public Domain: Lands Subject to—Applications and Entries: Generally

Public land which has been patented and has passed into private ownership does not regain its status as public land upon being acquired subsequently by the United States through purchase or condemnation, nor is it, in the absence of specific legislative authority, restored to the public domain when no longer needed for the purpose for which it was acquired, and an application for such land, filed under the Indian Allotment Act, is properly rejected, because such land does not constitute public land within the meaning of the act.

Indian Allotments on Public Domain: Classification—Public Lands: Classification

Acquired lands under the administrative jurisdiction of a Federal agency other than the Bureau of Land Management are not subject to the land classification provisions of 43 CFR, Part 2410.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bobby Lee Moore, Riverside 05607 and six others¹ have appealed to the Secretary of the Interior from a decision dated January 22, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed separate decisions of the Riverside, California, district and land office rejecting their petition-applications for Indian allotments, filed pursuant to section 4 of the act of February 8, 1887, 24 Stat. 389, as amended, 25 U.S.C. § 334 (1964).

The appellants' applications, filed on August 17, 1964, described portions of the Rosedale Tract in Ts. 15 and 16 S., R. 2 W., and Ts. 15 and 16 S., R. 3 W., S.B.M., California, containing a total of 1280 acres. By letters dated August 21, 1964, the appellants were each informed that:

Examination of the Riverside District and Land Office records disclose that the lands sought in your petition-application are within the boundaries of the Rancho Mission (Ex) San Diego Grant, confirmed by patent issued September 1, 1876 to one S. Arguello. Although these lands may have subsequently been acquired by an agency of the United States Government for use as a part of the

*Not in chronological order.

¹ The other appellants are:

Elsie White Crow Moore.....	Riverside	05608
Donald Edwin Moore.....	"	05609
Donald Edwin Moore, Guardian for Sandra Gay Moore, Minor....	"	05610
Bobby Lee Moore, Guardian for Bret White Crow Moore, Minor....	"	05611
Donald Edwin Moore, Guardian for Terry Stephen Moore, Minor....	"	05612
Bobby Lee Moore, Guardian for Robert Leo Moore, Minor.....	"	05613

Camp Elliott Naval Reservation, the jurisdiction or administration of the lands within this military reservation has never been assigned or transferred to the Department of the Interior. The Bureau of Land Management, therefore, has no authority to act upon a petition-application seeking such lands.²

The appellants were also informed that they could withdraw their applications within 30 days, or, in the alternative, the applications would be rejected. Thereafter, the appellants filed a joint protest against the proposed decisions, alleging that the lands sought "fall within the exceptions to the definition of the term 'property' in 40 U.S.C. section 472, sub-paragraph D, as amended (72 Stat. 29)." By separate decisions dated September 28, 1964, the land office rejected the applications and dismissed the appellants' protest.

In appealing to the Director of the Bureau of Land Management, the appellants contended, in substance, that:

(1) Their petition-applications should have been considered under the provisions of departmental regulations 43 CFR, Part 2410 (Land Classification), the provisions of 43 CFR, Part 1840 (Appeals Procedures), are not applicable, and the decision of the land office should be vacated and an initial decision should be rendered by the Bureau's State Director;

(2) "Public lands" or "public domain lands" are purely and simply Federally owned lands;

(3) If land which has been acquired by the United States for a specific purpose is of such character that it would have been suitable for disposition under the general public land laws, and its character has not been changed by virtue of improvements placed on the land, when the land is no longer required for the purpose for which it was acquired it must be transferred to the Department of the Interior, and it becomes subject to the general public land laws; and

(4) The subject lands have not been improved, and, therefore, the Secretary of the Interior could not determine that they are not suitable for disposition under the general public land laws.

The Office of Appeals and Hearings held that the decision of the land office was not a land classification under the provisions of 43

² It appears from the record that the subject lands are no longer required for the purpose for which they were acquired and that they may have been turned over to the General Services Administration for disposition as surplus property. There is, however, no specific information in the record with respect to the date and manner of acquisition of the lands or the present administrative jurisdiction over them and the manner in which jurisdiction was obtained. Although the appellants deny the authority of the General Services Administration to dispose of the lands, it is not specifically alleged or shown that the General Services Administration has jurisdiction over them. The only facts that appear to be clearly set forth are that the lands, once patented, were acquired by the United States and that the Bureau of Land Management does not claim to have any jurisdiction over them.

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CFR, Part 2410, but a finding of law that the subject lands are not public domain within the meaning of the Indian Allotment Act and the regulations thereunder (43 CFR 2212.0-3), and that the provisions of 43 CFR, Part 2410, were not applicable. It further held that public land which has been properly patented and has passed into private ownership does not regain its status as public land upon being acquired again by the United States through purchase or condemnation, citing the Department's decision in the case of *El Mirador Hotel Company*, 60 I.D. 299 (1949), and the opinion of the Attorney General at 40 Ops. Att'y Gen. 9 (1941). It concluded that the lands in question are not "public lands" within the meaning of the Indian Allotment Act.

In their appeal to the Secretary the appellants renew their contention that their applications should have been acted upon in accordance with the provisions of 43 CFR, Part 2410. They acknowledge that there is a distinction between "acquired lands" and "original public domain." They contend, however, that the authority cited by the Bureau is valid only with respect to lands that are being used for a definite purpose, and that the distinction between "public domain" and "acquired lands" does not apply to lands no longer "reserved" or needed for a specific purpose. They argue that:

When land is acquired by the Federal Government, it becomes part of the public domain though not subject to the operation of the public land laws at that time. The reason they are not subject to the public land laws is that they are segregated from these laws by the mere fact that they are held for a special purpose. The segregation is a reservation from operation of the public domain laws, sometimes called a reservation from the public domain.

* * * The [Indian Allotment Act of February 8, 1887] applies on the public domain only when the public domain is, or becomes, unreserved. Unreserved means not being held for a special governmental purpose. While reserved, the lands are public domain, but the general public land laws do not operate on them. When no longer held for a special governmental purpose, i.e., when unreserved, the general public land laws operate on them, unless unsuitable for disposition under the operation of the general public land laws because changed in character by improvements while they were reserved.

Moreover, the appellants contend, by the act of February 28, 1958, 72 Stat. 27, Congress specifically amended section 3(d) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U.S.C. § 472(d) (1964), to eliminate any distinction between acquired lands and public domain lands where such lands have been withdrawn or reserved for a specific purpose and thereafter have been declared excess.

In substance, then, the appellants contend simply that "acquired

lands" are the same as "public domain lands" except for the fact that they have been acquired for a specific purpose which removes them from the operation of the public land laws and that when they are no longer needed for a special purpose they revert to the status of "public domain lands." There is however, no basis for such an assertion, and the obvious fallacy of the appellants' argument lies in the supposition that lands can return to a status from which they did not come.³

The distinction between "public lands" and "acquired lands" has been the subject of many decisions of the courts and of this Department, and recognition of the difference between them should not at this time present a serious problem. "Public land is Government-owned land which was part of the original public domain." *Barash v. Seaton*, 256 F. 2d 714, 715 (D.C. Cir. 1958); *Thompson v. United States*, 308 F. 2d 628, 631 (9th Cir. 1962). "'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' *Newhall v. Sanger*, 92 U.S. 761, 763." *Barker v. Harvey*, 181 U.S. 481, 490 (1901). See *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 114 (1949); *Justheim v. McKay*, 229 F. 2d 29, 30 (D.C. Cir. 1956); *United States v. Holliday*, 24 F. Supp. 112, 114 (D. Mont. 1938); *McKenna v. Wallis*, 200 F. Supp. 468 (E.D. La. 1961). "'Acquired land,' as the term implies, is land obtained by the United States through purchase or transfer from a state or a private individual and normally dedicated to a specific use." *McKenna v. Wallis*, *supra*; see *Barash v. Seaton*, *supra*; *Thompson v. United States*, *supra*; *United States v. Holliday*, *supra*.

The essential difference between public land and acquired land, then, is not one of use but, rather, one of origin of title in the United States. Land, the title to which was vested in the United States at the time the land became a part of the United States, is commonly known as "original public domain." Such land is subject to use, sale, entry, or other disposition under the general public land laws of the United States unless withdrawn or reserved for public purpose. When title to any such land leaves the United States through operation of one of

³ It is by no means established that the lands applied for in this instance were ever a part of the public lands, since the lands were included in a Spanish land grant which passed title before the lands became a part of the United States and which was subsequently recognized by the United States by the issuance of a patent. But even if they were considered initially to have been public lands, as will be pointed out hereafter, such status was lost upon the issuance of a patent and was not automatically restored by the act of acquisition by the United States.

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the applicable laws, the land ceases to be public domain. It does not follow, however, that upon the reversion of title in the United States to land which once formed part of the public domain the land again becomes public domain. On the contrary,

It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses * * *. *Rawson v. United States*, 225 F. 2d 855, 858 (9th Cir. 1955).

That the public land laws do not apply to acquired lands is well established by an abundance of administrative and judicial decisions. Thus, it has been held that: lands acquired by the United States by purchase under the act of April 8, 1935, 49 Stat. 115, for the purposes of restoration of the range, prevention of erosion, and flood control were not to revert to the public domain and were not subject to grazing use under the public land laws (*United States v. Holliday, supra*); lands purchased by the Government with funds appropriated under the act of April 8, 1935, *supra*, designated for administration by the Secretary of Agriculture under the Bankhead-Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525, as amended, 7 U.S.C. § 1000 *et seq.* (1964), were not open to location under the general mining laws of the United States (*Rawson v. United States, supra*); lands purchased by the United States under the acts of June 7, 1924, 43 Stat. 654, 16 U.S.C. § 569 (1964), and March 3, 1925, 43 Stat. 1133, 16 U.S.C. § 555 (1964), to be administered by the Secretary of Agriculture as national forest lands, were not subject to entry and location under the general mining laws of the United States (*Thompson v. United States, supra*); lands acquired by the United States for military purposes were not "public lands" within the meaning of the Gerard Script Act of February 10, 1855, 10 Stat. 849, and were not subject to selection under the act (*El Mirador Hotel Co., supra*).

The appellants profess to recognize the distinction that has been made between public lands and acquired lands, but they insist that the distinction exists only so long as acquired lands are needed for the purpose for which they were acquired. Again, the contention is unfounded, for the appellants do not explain how jurisdiction over such lands becomes vested in this Department.⁴ They simply say that it does, which is no more than bootstrap reasoning.

⁴ Even if administrative jurisdiction over acquired lands were transferred to this Department, the lands would not necessarily become subject to the public land laws (as, for example, lands formerly administered by the Secretary of Agriculture under the Bankhead-Jones Act, *supra*, see *Thompson v. United States, supra*, at 633).

By statute, full administrative jurisdiction over the public lands is conferred upon the Secretary of the Interior. Rev. Stat. § 453 (1875), as amended, 43 U.S.C. § 2 (1964). Upon the issuance of a patent to land, however, legal title is transferred from the United States, and all jurisdiction over the land is removed from the Department of the Interior. See *Germania Iron Company v. United States*, 165 U.S. 379, 383 (1897); *Everett Elwin Tibbets*, 61 I.D. 397 (1954). Thereafter, this Department cannot possibly have any jurisdiction over land which has been patented unless, through some means, jurisdiction is again conferred upon the Department.

The appellants do not appear to contend that any land acquired by any agency of the United States is automatically under the jurisdiction of the Department of the Interior, subject only to the right of the acquiring agency to administer and use the land for the purposes for which it was acquired, but such a finding would appear to be necessary to support their position. Such a proposition, of course, is unsupported. There are daily transactions whereby various governmental agencies acquire title to land under authority granted them by Congress to purchase land for specific purposes. The Department of the Interior takes no part in these acquisitions and, in fact, is generally uninformed of either the acquisitions or any subsequent dispositions that may be made. That these lands are Federally owned lands is unquestioned, but, as we have already pointed out, the mere reacquisition of patented lands by the United States does not restore the lands to the public domain. If acquisition does not, it must be asked, what, if anything, does?

As the court stated in *Rawson v. United States, supra*, "absent legislation or authoritative directions to the contrary," lands which have been reacquired by the United States "remain in the class of lands acquired for special uses." There are, of course, provisions whereby some lands which have been patented may again become subject to some or all of the public land laws. In an exchange of lands under section 8 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315g (1964), for example, the statute expressly provides that lands conveyed to the United States under the act shall become public lands. Such a provision would be pure surplusage if, upon acquisition by the United States, lands automatically became public lands. It will be noted that the lands acquired in exchange are not to be devoted to any particular purpose; yet specific statutory provision is needed to make them subject to disposal under the public land laws generally.

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We come then to the appellants' final argument, that the act of February 28, 1958, *supra*, specifically amended section 3(d) of the Federal Property and Administrative Services Act, *supra*, to eliminate any distinction between acquired lands and public domain lands where such lands have been withdrawn or reserved for a specific purpose and thereafter have been declared surplus.

Section 203 of the Federal Property and Administrative Services Act, 63 Stat. 385 (1949), as amended, 40 U.S.C. § 484 (1964), gives the Administrator of General Services supervision and direction over the disposition of surplus Federal property. Section 3(d) of the act, *supra*, defines the term "property" as

* * * any interest in property except (1) the public domain; lands reserved or dedicated for national forest or national park purposes; minerals in lands or portions of lands withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain except lands or portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public-land laws because such lands are substantially changed in character by improvements or otherwise * * *

But for the exceptions set forth in section 3(d), then, all government property, real or other, which is found to be surplus would be subject to disposition under the act by the Administrator. "Acquired lands" are not specifically included in the exceptions to property subject to the act so they are subject to the act unless they are included in one of the listed exceptions. In contending that "acquired lands" are included in the term "public domain," the appellants have cited the legislative history of the act, but that history affords no basis for such a conclusion.

In attempting to explain the terms "public lands" and "public domain lands," as used in the act, the Senate Committee on Interior and Insular Affairs stated that:

In their general sense the terms "public lands" and "public domain lands" are defined as—

"Original public domain lands which have never left Federal ownership; also, lands in Federal ownership which were obtained by the Government in exchange for public lands or for timber on such lands; also original public domain lands which have reverted to Federal ownership through operation of the public-land laws * * *."

In its technical, legal, or statutory sense, however, the term "public lands" by itself—employed interchangeably with the term "public domain lands"—is today used to embrace vacant, unappropriated, unreserved Federal real property;

i.e., lands open to the public lands laws relating to settlement, entry, location, and sale, and authorizing entry for mining, mineral leasing, timber, and other materials removal, local public purposes, recreation, homesteading, etc. Such lands are administered by the Bureau of Land Management, Department of the Interior.

"Public lands" as a term by itself should also be distinguished from the term "reserved public lands" or "withdrawn public lands." All are public lands, all are public domain; the former generally refers to unreserved public lands, while the latter two terms refer to areas described as "Federal reservations."

Two categories of federally owned real property may be said to fall within the term "reservations."

Original public domain lands—lands to which title has been in the United States since acquisition—and withdrawn to a greater or lesser degree from the general operation of the public-land laws relating to settlement, entry, location, and sale, are "Federal reservations." So, too, are lands acquired or reacquired by the United States by purchase, condemnation, or by exchange for such purchases condemned, or donated lands or for interests in or on such lands, and held for a specific public purpose.

The term "withdraw" is used interchangeably with the term "reserve" to describe the statutory or administrative action which restricts or segregates a designated area of Federal real property from the full operation of the public-land laws relating to settlement, entry, location, and sales, which action holds them for a specific—and usually limited—public purpose.

* * * * *

Federally owned lands, as distinguished from reserved public lands on Federal reservations, then, are commonly referred to today—as they are in the reported bill and this report—as "public lands" or "public domain lands." S. Rep. No. 857, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. & Ad. News 2233-2234 (1958).

The committee, in employing the term "public lands," intends it to apply in its technical or legal sense, as distinguished from "reserved public lands" or "withdrawn public lands," and "acquired public lands * * *."

5. Section 5 would amend in two particulars the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended.

First, it would except from the real property-disposition provisions of the 1949 act, minerals in withdrawn or reserved public domain lands which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws.

Second, it amends the 1949 act to provide that only those withdrawn or reserved public domain lands surplus to the needs of Federal agencies found by the Secretary of the Interior—with the concurrence of the Administrator of General Services—not suitable for restoration to public land status by virtue of their having been substantially changed in character by improvements, or otherwise, would hereafter be subject to the real property disposition provisions of the amended 1949 act.

Both of these amendments would clarify the operation of existing law; one would make it clear that only when determined by the Secretary to be not suitable for mining or mineral leasing purposes would the mineral estate pass with the title to the surface estate being disposed of under surplus property provisions; the other would reverse the roles of the Secretary and the Administrator

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so as to provide that the Secretary would make an initial judgment of the nature with which his Department is most familiar—suitability of lands for public land uses, a traditional Interior function—and if the Administrator concurs in a finding of nonsuitability, the lands would be disposed of as surplus. *Id.* at 2243.

The committee's explanation is perhaps more confusing than clear, and one sentence relied on by appellants might seem to support their position. This is the sentence that "Federally owned lands, as distinguished from reserved public lands on Federal reservations, then, are commonly referred to today * * * as 'public lands' or 'public domain lands.'" However, to the extent that the term "Federally owned lands" as used in the sentence might be said to include acquired lands, this is negated by the sentence quoted next that "The committee, in employing the term 'public lands,' intends it to apply in its technical or legal sense, *as distinguished from* 'reserved public lands' or 'withdrawn public lands,' and '*acquired public lands*'" (italics added).

Appellants are attempting to convert the committee's definition of the term "public lands" as those vacant, unreserved, and unappropriated portions of the original public domain which are subject to disposal under the public land laws generally into affirmative legislation to make surplus acquired lands subject to disposition under the public land laws generally. There simply is no basis for this interpretation of the statute.

Accordingly, it is concluded that the long-recognized distinction between "public lands" and "acquired lands" has not been changed, that the appellants have not demonstrated that the lands applied for are public lands of the United States, subject to the administration of this Department, and that their applications were properly rejected.

This conclusion necessarily disposes of the appellants' contention that their applications should be treated in accordance with the provisions of 43 CFR, Part 2410, for, as the Bureau has already pointed out, those regulations are applicable only to lands that are subject to disposition under the public land laws.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

NORMAN H. NIELSON ET AL.

A-30417

*Decided November 2, 1965****Public Sales: Preference Rights—Regulations: Applicability**

Where a preference-right claimant in a public sale, in compliance with the current departmental regulation, submitted with his preference-right bid an amount equal to the purchase price of the offered land plus the cost of publication of notice of the sale, it was not necessary that he comply with the then-superseded procedure set forth in the regulation in effect at the date of the sale as neither the interests of the United States nor the rights of other parties were thereby adversely affected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Norman H. Nielson and others¹ have appealed to the Secretary of the Interior from a decision dated December 8, 1964, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Idaho land office rejecting their preference-right bid to purchase a tract of land offered for public sale pursuant to Rev. Stat. § 2455, as amended, 43 U.S.C. § 1171 (1964).

On July 23, 1964, the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 15, T. 11 S., R. 22 E., B.M., Idaho, was offered for sale at public auction pursuant to application Idaho 013769, filed by W. Garnet Kidd on December 6, 1962. By a decision dated July 24, 1964, Kidd was declared the highest bidder for the land with a bid of \$2,000. On August 19, 1964, during the 30-day period following the date of the sale, the appellants submitted acceptable proof that they were owners of land contiguous to the public-sale tract and tendered to the land office a check for \$2,050, the amount of the high bid plus \$50. By a decision dated August 27, 1964, the appellants were declared to be the preference-right purchasers of the land subject to their submitting to the land office, within 10 days from the date of receipt of the decision (1) evidence that they had reimbursed the public sale applicant for the cost of publication of notice of the sale and (2) a statement of citizenship from each. The preference-right bid of the appellants was rejected by the land office on September 14, 1964, for the reason that the evidence of reimbursement and the statements of citizenship, required to be filed in the land office no later than September 7, 1964, were not received in the land office until September 9, 1964.

The record shows that the land office decision of August 27, 1964,

*Not in chronological order.

¹ Norman H. Nielson, Lucille H. Nielson, Henry C. Savage, and the heirs at law of Marjorie H. Savage, deceased, asserted a preference-right claim, based upon the ownership of land held jointly by them, to purchase the subject tract of land offered at public sale.

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was received by the appellants on August 28, 1964. Thus, the specified evidence and statements were required to be filed in the land office by September 7, 1964, or, since that day was a legal holiday, on September 8, 1964, the first working day thereafter. The record further shows that the documents submitted by the appellants were erroneously received in the State Land Department of the State of Idaho on September 8, 1964.

In their appeal to the Director, Bureau of Land Management, from the rejection of their preference-right bid the appellants stated that the letter containing the necessary documents was correctly addressed to the Bureau of Land Management at P.O. Box 2237, Boise, Idaho, that the letter was mailed on September 4, 1964, and through the normal mails would have been delivered in Boise on September 5, a Saturday, and should have been in the hands of the Bureau of Land Management on September 8, and that through an error of the United States Postal Service the letter was mistakenly delivered to the State Land Department.

The Office of Appeals and Hearings found that it could not be determined whether or not the envelope transmitting the appellants' letter and documents had been correctly addressed since the envelope had not been forwarded to the Bureau. It concluded, however, that since the evidence was not filed within the time allowed by the departmental regulation in effect at the time the sale was held (43 CFR 2243.1-6, 29 F.R. 4470 (1964)),² the appellants' bid was properly rejected, citing departmental decisions: *John N. Pomeroy*, A-28134 (January 13, 1960); and *Ralph Faulkner*, A-29385 (July 11, 1963).

The Office of Appeals and Hearings noted that the public sale regulations were amended on July 28, 1964, to require a preference-right applicant to submit the cost of publication to the land office with the amount of the purchase price of the land within 30 days after the close of bidding rather than to pay the publication cost directly to the original applicant (43 CFR 2243.1-4(b), 29 F.R. 10462). It held, however, that "since there are adverse rights involved, the issues will be considered under the regulations in effect at the time the sale was held." I am unable to concur in the conclusions reached by the Bureau.

As was noted by the Bureau, the Department has held that where a regulation is amended to bestow a benefit upon an applicant, the

² The regulation then provided that the person awarded the land must reimburse and pay directly to the unsuccessful applicant for the sale the amount spent for publication of the notice of sale and file evidence of such reimbursement in the land office within 10 days from the date he is declared to be the purchaser.

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. *Henry Offe*, 64 I.D. 52 (1957); *Milton H. Lichtenwalner et al.*, 69 I.D. 71 (1962). On the other hand, where an amended regulation would impose an added burden or obligation upon an applicant without affecting the rights of others or the interests of the United States, the Department has refrained from applying the amendment to pending cases. See *Gilbert V. Levin*, 64 I.D. 1 (1957). In a third situation, where a regulation has been amended after the filing of an application, but before the vesting of any rights in the applicant, in such a manner as to impose an additional burden upon the applicant *and to bestow a benefit upon the United States*, the Department has held that the applicant may properly be required to comply with the amended regulation as a prerequisite to the favorable consideration of his application. *Roy W. Swenson et al.*, 67 I.D. 448 (1960); *cf. Miller v. Udall*, 317 F. 2d 573 (D.C. Cir. 1963). The present case, however, differs somewhat from all of those cited.

The purpose of the pertinent regulation, both before and after the amendment of July 28, 1964, was to insure the prompt reimbursement by the successful bidder at a public sale of the unsuccessful applicant for the cost of publication of notice of the sale. The amended regulation did not, in substance, bestow a benefit or impose an additional burden upon a preference-right claimant. Neither did it affect the rights or interests of the United States or of any other parties in any manner. It simply changed the procedure for reimbursing the original applicant for the cost of publication, a change designed to avoid administrative problems which had sometimes arisen in the past.

In the unique type of factual situation presented here, that is, where the sale was held before the amended regulation became effective but the amended regulation became effective during the 30-day period following the sale, application of the amended regulation might or might not impose an unfair burden upon a preference-right claimant. If, for example, only a day or two remained of the 30-day period when the amended regulation was published, it might well have been practically impossible for a preference-right claimant, who had already filed his claim and matched the high bid, to submit before the end of the 30-day period an amount to cover the cost of publication, as required by the amended regulation. On the other hand, if the sale had been held only a day or two before the amended regulation became effective, it might have been easy for the preference-right

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claimant to submit with his matching bid during the 30-day period an amount to cover the cost of publication. It may be, therefore, that a categorical answer cannot be given to the question whether the amended regulation applies to cases where the sale was held before the regulation became effective but the 30-day period had not run at that time, but we need not decide this point.

In the case presented here, the appellants did in fact comply with the requirements of the amended regulation,³ and when they had made payment to the land office of a sum sufficient to cover the cost of publication the Department's requirements were satisfied, and the interests of the original applicant who had paid the publication cost were protected. Indeed the appellants remitted the amount to cover the cost of publication of August 19, 1964, well before they were required to pay such amount (on September 8, 1964) under the old regulation. It was, therefore, unnecessary to require the appellants thereafter to comply with the old regulation, for, while it might have been improper to impose upon the appellants the new requirements adopted after the close of bidding, there is no reason why their voluntary compliance with those requirements should not be accepted, since the only ones whose rights or interests could possibly be substantially adversely affected by application of the new regulation were the appellants themselves. Accordingly, I conclude that the new regulation may properly be applied to appellants' case and that its requirements were satisfied by the timely submission to the land office of a sum adequate to cover publication cost. It is unnecessary, therefore, to determine whether or not the additional evidence of compliance with the old regulation was timely filed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

³ The appellants did not fully explain the submission of the extra \$50 in connection with the filing of their preference-right bid. In the transmittal letter accompanying their check for the purchase of the land they stated only that "[t]he amount of the bid was for the sum of \$2,000 and we are enclosing the sum of \$2,050 for our preference right." In view of the newly amended regulation, however, and the uncertainty as to which regulation would govern, the submission of an amount sufficient to meet the publication cost was a reasonable precautionary measure.

THE MONTANA POWER COMPANY

A-30310

*Decided December 3, 1965***Coal Leases and Permits: Royalties**

An increase in royalty rates for an additional 20-year extended period of a coal lease is properly provided when it has been determined that these rates are in line with those required of other coal lessees in the area and the lessee's claim for more favorable treatment rests on a desire to better its competitive position with other sources of power and to overcome in part a state tax.

Coal Leases and Permits: Leases

It is proper to include a surface restoration clause in a coal lease even though the surface of the leased lands is not owned by the United States.

Coal Leases and Permits: Leases

A surface restoration clause which has been incorporated in all coal leases since 1951 will be included in a coal lease upon its renewal for a 20-year term where there are no extraordinary reasons justifying a departure from the regular policy.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Montana Power Company has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated May 1, 1964, which affirmed a decision of the Billings, Montana, land office, dated March 8, 1963, notifying it as the lessee under consolidated coal lease Billings 020989-038770 that the lease may be renewed for a third 20-year period, beginning May 5, 1963, subject to readjustment of the lease terms as follows: (1) modification of section 2(d) to provide for payment of royalty of 10 cents a ton of 2,000 pounds for the first five years, 12½ cents a ton for the next five years, and 15 cents a ton for the remainder of the third 20-year period; (2) modification of section 2(b) to provide for a lease bond in the sum of \$10,000; and (3) inclusion in the lease of a new section providing for protection of the surface, natural resources and improvements and restoration of the surface after mining operations.

The proposed readjustments in lease terms were made under authority of section 3 of the lease and regulation 43 CFR 3132.5 (formerly 43 CFR 193.16), and in conformity with recommendations in the matter made by the Geological Survey. The Montana Power Company accepts the bond requirement but challenges the reasonableness of the royalty rate increase and the provision for restoration of the surface of the leased lands. The existing lease provides simply for a flat 10 cents per ton royalty and has no provision governing surface restora-

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tion. The existing royalty rate would be continued for the first 5 years of the renewed term.

Montana Power contends in regard to royalties—

that the coal situation in Montana differs materially from that applied by the Geological Survey in making its comparison which forms the basis of the decision below.

The marginal nature of this operation, the coal license tax, the competitive fuel sources for electrical energy, and the lack of a stimulant for full-scale coal production in Montana require an incentive royalty rate for the first ten years of their renewed lease and a rate not to exceed ten cents (10¢) for the remainder of the term.

The Geological Survey has offered the following comments on the appellant's contentions:

1. Although figures have been used on comparative costs of delivered fuel to various powerplants in previous reports and by the appellant, too much consideration cannot be given to them in setting royalty rates under Federal leases.

There is nothing in the Regulations or precedent that sanctions setting a royalty rate to encourage or assist in the starting of a new enterprise. However, a lessee, after actual operating experience shows that the lease cannot be successfully operated under the terms provided, may request and the Secretary can approve an adjustment downward. An incentive, such as a tax reduction or the withholding of one to encourage a new enterprise, is a prerogative of a state or municipality. If the Montana 5-cent coal tax is a hindrance to starting the new plant, the company should petition the State for relief rather than expect a royalty concession in lieu thereof.

The statement has been made that the powerplant may not be operating within the first 5-year period and the royalty rate will be 12½ cents rather than 10 cents. Within the next 6 years, all the present Federal leases in Montana, North Dakota and Wyoming, except one, will be paying 12½ cents a ton royalty. Further, two competitive leases were issued recently involving lands in south-central Montana at royalty rates of 17½ cents for the first 10 years and 20 cents for the second 10-year period. These leaseholds are located about 15 miles from the nearest railroad, in an undeveloped area where mining conditions are comparable to those at Colstrip.

2. The same, or similar comments could be made in answer to the appellant's statements as to the difference in operating conditions at its property when compared to mines in Wyoming. If royalty rates were to be set in an attempt to equalize operating cost because of more overburden at one mine than at another, we would have a multiplicity of rates. We must admit that one of the two properties in Wyoming, mentioned in connection with stripping ratios, has operating conditions that perhaps are unequalled anywhere else in the United States. However, continuance of the lease without any royalty would not materially improve the competitive position with respect to this operation. The other operation mentioned has conditions similar to those at the appellant's mine. The claim that Colstrip has a relatively unfavorable stripping ratio is not substantiated

by the record. Northern Pacific Railway Company, the former lessee, completed an extensive drilling program in 1955 at the Colstrip property and in a published report stated that 62 million tons of coal can be mined at Colstrip by strip mining methods at a stripping ratio of 2.1 cubic yards of overburden to one ton of recoverable coal. Many successful mines are operating in the United States today with stripping ratios greater than 10 to 1. In the same report, total reserves in the Rosebud seam at Colstrip under less than 60 feet of cover are estimated at 190 million tons.

3. We will agree that the appellant has expended substantial sums in recent core drilling and additional exploratory work. Nevertheless, 3,000,000 tons of coal are presently uncovered, 200,000 tons on the lease lands, and allowing the amounts quoted for putting equipment in operating condition and for preparation equipment, we are quite sure that the total outlay will be very much less than if new machinery were purchased, a complete new plant started and a 29-mile branch railroad constructed. Undoubtedly, the mining equipment was acquired at a much depreciated value and even if the original price was paid, to purchase the same new at present prices would require a much larger expenditure.

* * * * *

We will agree with the appellant as to the competition from low-priced Bonneville power but companies operating in eastern Montana, North Dakota and northeastern Wyoming also have competition from low-priced power from Federal dams on the Missouri River, as well as Federal financed steam-powered plants.

In view of these comments of the Geological Survey, which we adopt, we conclude that the royalty rates as provided are reasonable and fair and their imposition is affirmed.

In regard to the provision for surface restoration of the lands to be included in the lease, it appears that the surface of none of the lands involved,¹ is owned by the United States and that the surface ownership of all the lands involved except part of sec. 4, T. 1 N., R. 41 E., M.P.M., is held by the Northern Pacific Railway Company which also was the assignor of the coal lease to the appellant.² According to appellants Northern Pacific has waived restoration of the surface rights.

As the Bureau of Land Management pointed out, the same clause has been a part of all coal leases issued since March 1951, without, so far as

¹ They are:

- T. 1 N., R. 41 E., Mont. Prin. Mer.*
- Sec. 2: Lots 1, 2, S $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$
- Sec. 4: Lots 1, 2, 3, 4, S $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$
- Sec. 12: N $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$
- T. 2 N., R. 41 E., Mont. Prin. Mer.*
- Sec. 34: SE $\frac{1}{4}$ SE $\frac{1}{4}$
- T. 1 N., R. 42 E., Mont. Prin. Mer.*
- Sec. 18: Lot 2, SE $\frac{1}{4}$ NW $\frac{1}{4}$

² The surface of the portion of section 4 described is apparently owned by another private party.

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we are aware, causing any particular controversy in its application.³ There are no extraordinary circumstances here warranting a departure from the regular practice. The undesirable after effects of the single-minded exploration of mineral resources are well known and the clause is merely a reasonable attempt to achieve some balance between the competing uses of land now and in the future.

That the land is of relatively low value and used only for grazing and that the cost of restoration might exceed its value do not justify an exception from the Department's general policy. The lease has been in existence for 40 years and in starting on a new 20-year extension its terms must look to the possibility of changed circumstances in the future. Further, even if the restoration costs suggested by the appellant are high in relation to the value of the surface, they are quite moderate in relation to the value of the coal removed.

The appellant also points out that some of the pits created in earlier operations have been allowed to fill with water from underground springs and have become recreation areas used for swimming, fishing and picnicking. If the lessee, when it completes its operations or when the lessor requests action under the clause, offers an equally attractive alternative, it can be assured that its proposals will receive careful attention.

The appellant stresses that the Northern Pacific Railway has no interest in the restoration of the surface. It contends that the restoration provision should be limited to acreage the surface of which is owned by the United States. Although it is true that the United States has a greater interest in its own lands, it also has a substantial concern with lands of others in which it has reserved the minerals, together with the right to prospect for, mine, and remove the minerals. Furthermore, by the end of the 20-year lease term the ownership of the surface of the land may well have changed and the new owners may have a different attitude from the railroad's.

³The new provision required to be included in appellant's lease reads as follows:

"Protection of the surface, natural resources, and improvements. The lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth thereon; (2) polluting the waters of springs, streams, wells, or reservoirs; (3) damaging crops, including forage, timber or improvements of a surface owner; or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees; and upon any partial or total relinquishment or the cancellation or expiration of this lease, or at any other time prior thereto when required by the lessor and to the extent deemed necessary by the lessor, to fill any sump holes, ditches and other excavations, remove or cover all debris, and, so far as reasonably possible, restore the surface of the leased land to its former condition, including the removal of structures as and if required. The lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon."

Finally, the appellant contends that the terms of the surface restoration clause are vague and uncertain. Its language, which requires the lessee "so far as reasonably possible to restore the surface of the leased land to its former condition" is not unusual legal terminology⁴ and its interpretation should occasion no more than ordinary difficulties.

There remains the appellant's assertion that it ought not to be held responsible for restoring land already mined. We agree that the restoration clause is to be read as applying only to operations undertaken after it obtained the lease.

Therefore the decision of the Bureau of Land Management is affirmed.

STEWART L. UDALL,
Secretary of the Interior.

UNITED STATES

v.

VERNON O. AND INA C. WHITE

A-30460

Decided December 3, 1965

Mining Claims: Discovery—Mining Claims: Patent

A placer mining claim is properly declared null and void and a patent application rejected when there have not been found on the claim minerals of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, the only mineral found being fine gold of very little value.

Mining Claims: Discovery

Labor costs are properly a factor to be considered in determining whether a discovery has been made pursuant to the prudent man rule.

⁴ See *Ballsun v. Star Petroleum Co.*, 288 P. 437, 438 (California 1930), interpreting a lease clause reading: "The lessee shall restore the premises as to which this lease is terminated and canceled to as near their original conditions as is reasonably possible so to do"; and Houston & Merrill, "*Suggested Oil and Gas Lease Form*," 2 Rocky Mountain Mineral Law Review 83, 88 (1964): "* * * LESSEE * * * shall restore the surrounding land * * * to their original condition so far as reasonably possible * * *."

Compare Baldwin's Ky. Rev. Stat. § 350.090 (1963): "(1) * * * the [reclamation] plan * * * may require the [strip mining] operator to:

(e) Grade the overburden, where practicable, and provide suitable vegetative cover;"
For a general discussion of the obligation of an oil and gas lessee to restore surface after drilling see: Moses, "*Peaceful Coexistence Between Lessor and Lessee Under An Oil and Gas Lease*," 2 Rocky Mountain Mineral Law Review 48, 56 (1964).

For a discussion of recent statutory approaches to the problem see: Meiners, "Strip Mining Legislation," 3 Natural Resources Journal 442 (1964).

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APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Vernon O. and Ina C. White have appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated March 17, 1965, which affirmed a decision of a hearing examiner, dated November 16, 1962, declaring the Ruewbarb and Rubarbe Additional No. 2 placer mining claims, located in sec. 21, T. 19 N., R. 6 E., Boise Mer., Idaho, within the Payette National Forest, null and void and rejecting their mineral patent application Idaho 011114 because no discovery of a valuable mineral deposit had been made within the boundaries of either mining claim.

The appellants contend, *inter alia*, that the decision appealed from is "not in accordance with law" and is "unsupported by the evidence of record." They state also that it is improper to include the cost of a mining locator's own labor "in determining whether a prudent man would expend time and money with a reasonable prospect of success in developing a valuable mine * * *" because to do so imposes "a test of commercialability [sic] in case of values of limited occurrence * * *."

I have carefully reviewed the entire record in this case, including the transcript of the hearing held before the examiner on March 19, 1962, the exhibits, all briefs and other relevant material, and am convinced that there is no merit to the appellants' contentions. Contrary to their allegations, the decisions below are supported by both the facts and law. The testimony and evidence adduced at the hearing has been very completely summarized in the decision of the hearing examiner and will not be repeated at length here.

The Ruewbarb and Rubarbe Additional No. 2 placer mining claims were located by the appellants in the fall of 1923 and in July 1924, respectively (Tr. 153), for gold, platinum, monazite, two kinds of garnet, and other rare earth minerals.¹

Two government mining engineers, G. R. Plumb and Vernon Dow, examined the claims and took 14 samples of material thereon. They sampled every discovery point suggested by the appellants (Tr. 15,

¹ Mr. White testified that the claims were originally located in 1894 (Tr. 156). The claimants attempted to amend the Ruewbarb claim on July 21, 1958, and the Rubarbe Additional No. 2 claim on July 16, 1958. However, the attempted amendments are without legal effect as to lands in sec. 21 temporarily withdrawn for the Krassel Administrative Site on July 16, 1953 (see 20 F.R. 1898 (March 29, 1955) and 43 CFR § 295.9, Circular No. 1330 published in 17 F.R. 7368 (August 26, 1952) and 17 F.R. 7677 (August 21, 1952)). Land in the section was permanently withdrawn for the administrative site pursuant to Public Land Order 1374 of December 20, 1956, 21 F.R. 10400 (December 28, 1956).

69) and also other places selected by themselves (Tr. 69). The examination by Plumb and certificate of assay for these samples showed an estimated value of a low of .6 of a cent per cubic yard to a maximum of about 2 cents per cubic yard of material. The average was less than one cent per cubic yard (Tr. 41-43, 53-60, Exhibits 9, 11). Samples taken from the appellants' workings failed to indicate any significant values (Tr. 55, 57-59, 79-80). Plumb testified that the quality and quantity of materials found were negligible, that mining would not be economically feasible (Tr. 70), and that a prudent man would not be justified in a further expenditure of time and money on either of the claims with a reasonable expectation of developing a payable mine (Tr. 71). Dow concurred (Tr. 88).

Three mining engineers examined the claims for the mining claimants, Bill Harris, Ernest Oberbillig, and Mark Evans. Each sampled the claims and each found some fine gold in the samples. Harris concluded that the deposit was not extensive but was sufficient to justify a small operation (Tr. 96). Evans, a geologist and mining engineer, believed that since gold was found on the surface it was a good indication that pay gravel would be found at depth or at bedrock, although he stated that there was no certainty of it (Tr. 205). Oberbillig made the most thorough examination of the three. He divided the two claims into five parcels (see Exhibit H). He shaded portions of each claim to indicate where he believed placer gravel deposits existed. After sampling parcel No. 1, which is on the western end of the Rubarbe Additional No. 2 claim, he stated that mining in this area is questionable because of the limited amount of placer gravel remaining in this area (Tr. 114). His examination revealed a very limited quantity of placer gravel on parcel No. 2—possibly 5,000 yards (Tr. 115); parcel No. 2 comprises about one-fourth of the western end of the Ruewbarb claim. Parcel No. 3, which comprises the remaining part of the Ruewbarb claim, has about 30,000 yards of minable gravel (Tr. 123). Parcel No. 4, which covers the largest area of the Rubarbe Additional No. 2 claim, has only about 600 or 700 yards of minable gravel, and parcel No. 5, located along the east endline of the Rubarbe Additional No. 2 claim, has 800 to 1,000 yards of minable gravel (Tr. 125). Oberbillig concluded that only parcel No. 3 on the Ruewbarb claim would support a mining operation and then only a one- or two-man operation (Tr. 135). His opinion of the material in the discovery cut on the Ruewbarb claim was that the gravel in the pit was very good material for concrete gravel, but it was not essentially a strong mineral carrier (Tr. 127). Based on his examination, Oberbillig con-

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cluded that parcel No. 3 on the Ruewbarb claim is conducive to a one- or two-man operation, but that the prospects of operating a paying mine on the Rubarbe Additional No. 2 are questionable (Tr. 135, 136).

It is apparent that what exists on these claims, from the results obtained by both the mining engineers for the Government and appellants, is some fine gold and small values not sufficient to justify a prudent man to undertake a mining operation.

The certificate of the assays of two samples taken by mining claimant Vernon White (Exhibits N, O) showed exceptionally high values (\$9.62 per ton and \$560 per ton). They were so far in excess of the values recovered by the mining experts who testified for him that his sampling cannot be considered to be representative and little probative value can be given to it. This is further evidenced by two statements by White. He testified that he had recovered only six ounces of gold since 1924, and, further, he stated that the claims are not ready to pay at this time (Tr. 184). These statements certainly must cast considerable doubt on the results of his sampling.

When the Government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case in support of its charge of invalidity. The burden then shifts to the mining claimant to show by a preponderance of the evidence that his claim is valid. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959).

Although the mining statutes do not specifically define a "discovery," it has been held that one exists where:

* * * minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, * * *. *Castle v. Womble*, 19 L.D. 455, 457 (1894); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

The mining laws do not require that the values shown must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about. *United States v. C. F. Smith*, 66 L.D. 169, 172 (1959). Nevertheless, the value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result. *United States v. Santiam Copper Mines, Inc.*, A-28272 (June 27, 1960). Thus, the mere willingness of a mining claimant to expend more time and money in an effort to develop his claim is not enough. *United States v. Ben Fullingim and John Tinkle*, A-28850 (September 18, 1962).

A showing of isolated bits of material, not connected with or leading to substantial values is not sufficient to constitute a discovery. *United States v. Frank J. Miller*, 59 I.D. 446 (1947); *United States v. Richard L. and Nellie V. Effenbeck*, A-29113 (January 15, 1963). Nor is it sufficient to constitute discovery that the mineral showings indicate only that more exploratory work is warranted. *United States v. Clyde Raymond Altman and Charles M. Russell*, 68 I.D. 235 (1961). Further, the mere hope or expectation, based upon a general belief that values will increase at depth, is not sufficient to validate a claim. *United States v. Laura Duwall and Clifford F. Russell*, 65 I.D. 458 (1958).

The appellants have not made out their case. They have not shown that the minerals in existence are of sufficient quantity or quality to satisfy the prudent man test. *United States v. David L. and Kathryn King*, A-30217 (December 29, 1964); *United States v. Robert G. and Orpha B. McMillan*, A-29456 (July 26, 1963); *United States v. Sam Goehring*, A-29407 (July 2, 1963).

There is no merit to the appellants' contention that to take into account the financial cost of their own labors in applying the prudent man test is to impose a marketability test to their operations. Labor costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success and there is no reason to treat the value of the labor of a locator any differently from that of one he might hire; either one must be taken into consideration in determining the likelihood of a profitable venture being established. *United States v. Jacobo Armenta et al.*, A-28248 (June 22, 1960). Labor costs have been disregarded not only by the appellants but by one of their witnesses, Harris. In expressing the opinion that a small operation could be conducted on the claims with a reasonable prospect of success, he seemed to base it on the assumption that mining costs would run 10 cents a yard or less. However, he said that estimate included very little for labor costs, that it would be "doing it for yourself for free * * *." (Tr. 101.)

The incredibility of the appellants' contention that they have made a discovery is perhaps most clearly pointed out by the testimony they elicited from their own witnesses that in 1923 and 1924 there existed on the claims mineral deposits that could have been developed by a prudent person with a reasonable prospect of success (Tr. 97, 135-136, 204-205). If this were so, it passes belief that in the 38-39 years elapsing until the hearing appellants mined only 6 ounces of gold. How long were they going to wait before commencing a mining op-

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eration, and, more importantly, why were they waiting? The answer seems plain—that they have not yet found any values sufficient to warrant development.

Thus, in view of the absence of a showing of a discovery on these claims, they were properly declared null and void and the appellants' patent application properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior: (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

**JOHN SNYDER
STATE OF MONTANA**

A-30462

Decided December 3, 1965

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

A metes and bounds description of a tract of land in an oil and gas lease offer must be connected to an official corner of the public land surveys, which term includes township corners, section corners, quarter-section corners and meander corners and excludes quarter-quarter section corners and lot corners established by protraction, but an offer is not to be reject for failure to tie the description to an official corner where the point of beginning for the description is a lot corner which is also a meander corner.

Navigable Waters—Rules of Practice: Hearings

Although a hearing is not required prior to a determination that a lake is non-navigable and its bed public lands, a State which has heretofore not been informed of the factual basis for such a determination will be allowed to present such information as it desires supporting its view that the lake is navigable and the Director will then decide whether a hearing would be useful.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John Snyder has appealed to the Secretary of the Interior from a decision dated February 25, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, rejected his noncompetitive oil and gas lease offer Montana 058503, filed pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226 (1964).

The appellant filed his lease offer on June 10, 1963, describing therein, by metes and bounds, a tract of 99.90 acres in sec. 1, T. 35 N., R. 38 E., M.P.M., Montana, consisting of a portion of the lake bed of Goose Lake.

By a letter dated August 6, 1963, the Montana land office notified the Montana Commissioner of State Lands and Investments of its determination, based upon land office records, that Goose Lake is not and has never been a navigable body of water, that title to the bed of a nonnavigable lake remains in the United States until it disposes of the abutting land, and that the Government, as a riparian owner of mineral rights, asserted its authority and intent to issue an oil and gas lease covering the land applied for by the appellant.¹ Subsequently, the State notified the land office of its claim to ownership of the bed of Goose Lake on the grounds that Goose Lake was a navigable lake in 1889 under the test of navigability set out in *United States v. Utah*, 283 U.S. 64, 76, 82-83 (1931), and title to the lake bed vested in the State upon its admission into the Union in 1889.

On April 3, 1964, upon the basis of a field examination conducted in December 1963, the land office issued a decision setting forth its finding that Goose Lake was not navigable when Montana entered the Union and stating its intention to issue an oil and gas lease. The State appealed from that decision to the Director, Bureau of Land Management, and requested a hearing.

The Office of Appeals and Hearings found that the metes and bounds description in Snyder's lease offer is tied to the public land surveys at the southeast corner of lot 12, sec. 1, T. 35 N., R. 38 E., that this corner is approximately the west quarter-quarter section corner, secs. 1 and 12, and that the description does not meet the requirement that such a description must be connected to an official corner of the public land surveys, which term includes township corners, section corners, quarter-section corners, and meander corners, citing departmental decision, *Jack S. Stanley*, A-29148 (January 24, 1963). It concluded that Snyder's offer was defective and therefore rejected it. It further found that there was no apparent present need to determine by a hearing whether Goose Lake was navigable when Montana was admitted into the Union and denied the request for a

¹The record shows that the lake bed land applied for abuts patented land in which all minerals were reserved to the United States.

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hearing, holding that the State was not precluded from initiating action looking to a judicial determination in the matter. The State did not appeal from that decision.

Snyder now contends, *inter alia*, that the point of beginning in his metes and bounds description, the southeast corner of lot 12, sec. 1, is, in fact, a meander corner and satisfies the criteria set forth in the *Stanley* case, *supra*. This contention has merit.

The *Stanley* case pointed out that section 349 of the *Manual of Instructions for the Survey of the Public Lands of the United States, 1947*, defines the "corners" of the public land surveys as "those which are represented on the official plat, i.e.—the township corner, the section corner, the quarter-section corner, the meander corner." Section 196 of the *Manual*, the decision further pointed out, provides that "[t]he regular quarter-quarter sections are aliquot parts of quarter sections based upon mid-point protraction; it is not deemed necessary to indicate these lines upon the official plat." The same section also provides that "[t]he sections bordering the north and west boundaries of a normal township, excepting section 6, are further subdivided by protraction into parts containing two regular half-quarter sections and four lots, the latter containing the fractional areas resulting from the plan of subdivision of normal township * * *."

Thus, the quarter-quarter section corners and the normal lot corners in regular townships are not points that have been established by actual survey and are not "corners" as that term is used in the *Manual of Surveying Instructions* and in the Department's regulation 43 CFR 3123.8(a). But lot 12, sec. 1, is not a regular lot established by protraction. It is an irregular lot resulting from the existence of a meandered body of water, and its southeast corner is a meander corner established by the surveying process. The fact that the southeast corner of lot 12 may be approximately the same as the west quarter-quarter section corner, secs. 1 and 12, a point which, if established, would be established by protraction, is immaterial. It was, therefore, error to reject the appellant's lease offer for failure to tie the metes and bounds description to an established survey corner, and it becomes necessary to consider anew the question of title to the lake bed, for the determination of this issue is a prerequisite to the issuance of an oil and gas lease. *A. W. Glassford et al.*, 56 I.D. 88, 91 (1937).

The answer to the question of title to the lake bed, as the land office

pointed out, depends upon the determination as to whether or not Goose Lake was a navigable body of water at the date of Montana's admission into the Union in 1889, for, if the lake was then navigable, title to the lake bed passed to the State upon admission, but, if the lake was not navigable, title to the lake bed did not pass to the State. The question of navigability, of course, is a federal question, even though the waters are not capable of use for navigation or in interstate or foreign commerce, and state laws cannot affect title vested in the United States. *United States v. Utah, supra; United States v. Oregon*, 295 U.S. 1, 14 (1935).

While it is often difficult to determine whether or not a body of water is, in fact, navigable, the rules that govern this determination have been set forth with clarity. In *United States v. Utah, supra*, the Court stated that:

The test of navigability has frequently been stated by this Court. In *The Daniel Ball*, 10 Wall. 557, 563, the Court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In *The Montello*, 20 Wall. 430, 441, 442, it was pointed out that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation," and that "it would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway." The principles thus laid down have recently been restated in *United States v. Holt State Bank*, 270 U.S. 49, 56, where the Court said:

"The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flat-boats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

* * * * *

The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. * * * The extent of existing commerce is not the test. The evidence of the

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actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. As the Court said, in *Packer v. Bird*, 137 U.S. 661, 667: "It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership either of the waters or soils under them." In *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122, 123, the Court quoted with approval the statement in *The Montello*, *supra*, that "the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use."

In *The Montello*, 87 U.S. (20 Wall.) 430, 442, (1874), it was further stated by the Court that:

* * * Vessels of any kind that can float upon water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

This Department has also held that an inland lake, two miles long and three-fourths of a mile wide, is not navigable in the sense that its waters can be put to a public use for the purpose of trade and commerce. *Reuben Richardson*, 3 L.D. 201 (1883).

The determination by the land office that Goose Lake is not, and was not in 1889, a navigable body of water, as we noted earlier, was based upon the report of a field investigation conducted in December 1963. That report disclosed that Goose Lake is a shallow alkali lake approximately a mile long and a half-mile wide. Local residents were reported to have stated that you could walk across any part of the lake in hip boots. Affidavits were taken of four local residents, each of whom stated that in his opinion the lake is not and has not been navigable. One of the affiants stated that the only times the lake was used for transportation were during the winter months from approximately 1920 to 1940, as a coal sleigh road, and occasionally, since 1940, as a truck route, uses which can hardly be described as navigation.

It is not entirely clear how much weight the land office gave, in

making its determination, to testimony that the lake had not at any time been used for navigation. It is, of course, well established that it is the potentiality for navigation of a body of water, rather than the actual use of it that has been made or is being made that determines its legal navigability. See *United States v. Utah, supra*; *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-409 (1940). Whether or not the land office applied the proper criteria in reaching its conclusion, however, I would have to conclude, upon the basis of the evidence contained in the record, that Goose Lake does not meet the test of a navigable body of water set forth by the Supreme Court.²

In its appeal to the Director, Bureau of Land Management, the State asserted that it was "prepared to prove through expert testimony, reference to various maps, charts, and other documents, and other factual evidence, that Goose Lake, and particularly that portion of Goose Lake overlying the lands proposed to be included in the oil and gas lease, was a navigable body of water" in 1889 under the test set out in *United States v. Utah, supra*. The State did not, however, allege any facts whatsoever, apparently declining to state its case unless it could do so in an open hearing. Thus, the State's appeal to the Director, as it now stands, does not raise any factual issue, but it asserts only a conclusion of law which affords no basis for a hearing.

It does not appear, however, that the State has previously been informed of the factual basis for the determination of the status of Goose Lake. Now that it has, the State is allowed 60 days from the date of this decision in which to submit to the Director of the Bureau of Land Management an additional statement showing wherein it believes the land office to have erred in the factual evidence which it accepted in making its finding. If the State alleges the existence of facts which appear to be inconsistent with those relied upon by the land office the Director, in his discretion, may order that a hearing be held.³ If, on

² In *United States v. Oregon, supra*, the Court sustained the finding of a Special Master that five connected bodies of water, covering 81,786 acres of land and extending over a distance of approximately 30 miles, were not navigable. Included in the Master's findings of fact was a finding that at average water surface elevation nearly half of the area of the largest of the bodies, a lake more than 16 miles long and more than 6 miles wide, was covered by water two feet or less in depth and that less than one-fourth of its area was covered by water having a depth as great as three to four feet. There is no evidence in the record that the small lake in question here has or had any greater adaptability to navigation than did the several bodies of water in that instance.

³ There is no requirement that a hearing be held prior to a determination by the Department that the bed of a river or lake is public lands. If the State is dissatisfied, it may institute judicial proceedings to assert its claim to the lake bed. See *Willis W. Ritter et al.*, A-27755 (December 22, 1958).

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the other hand, the State fails within that period to allege such facts, the finding of the land office will stand as the Department's determination that the mineral deposits in the subject lands are a part of the public domain, subject to administration by this Department under the Mineral Leasing Act. *Cf. State of Oregon*, 60 I.D. 314, 315 (1949); *Bernard J. and Myrle A. Gaffney*, A-30327 (October 28, 1965).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348); the decision appealed from is reversed insofar as it rejected Snyder's lease offer for failure to tie the land description to an official survey corner, and the case is remanded to the Bureau of Land Management for further proceedings in accordance herewith.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF PAUL A. TEEGARDEN

IBCA-419-1-64

Decided December 14, 1965

Rules of Practice: Appeals: Generally

A motion for reconsideration will be denied where representations presented are not persuasive of error by the Board, and the other matters advanced were fully considered by the Board in its original decision.

BOARD OF CONTRACT APPEALS

This appeal was heretofore sustained to the extent of recognizing that Paul A. Teegarden (Appellant) had been excusably delayed for specified periods and, therefore, was entitled to have his liability for liquidated damages reduced.¹ Further claims for extensions of time for performance were denied, because appellant failed to meet the criteria of excusability prescribed by paragraph "c" of the Termination for Default—Damages for Delay—Time Extensions provision (Clause 5) of Standard Form 23A (March 1953 Edition).

A timely motion for reconsideration was filed by Department Counsel on August 26, 1965, and a brief in support of that motion was submitted to the Board on November 3, 1965.

¹ IBCA-419-1-64 (July 27, 1965), 72 I.D. 301, 65-2 BCA par. 5011.

In our original decision, the Board found from the evidence that the contract, which called for placing hot bituminous concrete pavement on an existing gravel base, was substantially completed on June 22, 1962. On the basis of that finding we held that liquidated damages should not have been assessed for the period between that date and July 27, 1962, which was the date of final completion of the contract as determined by the authorized representative of the contracting officer.

Government Counsel's motion for reconsideration is premised primarily on legal grounds, that is, that the doctrine of "substantial completion" or "substantial performance" as it is known in the general law of contracts, is not applicable here, because subject contract contained Standard Specifications FP-57,² which were not present in cases which were cited in support of the Board's original decision.

Government Counsel specifically makes reference to Clause 8.6 entitled "Contract Time"³ and Clause 5.6 entitled "Final Inspection"⁴ of Specifications FP-57. These clauses authorize the Government engineer to determine and establish the final completion date. We are not convinced that the mere presence of Specifications FP-57 in the contract precludes the Board from reviewing the propriety of the

² Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects (January 1957) issued by the Bureau of Roads, United States Department of Commerce.

³ "8.6 Contract Time. The number of calendar days of contract time for performance shown in the contract as awarded is based on the original contract quantities. The total contract time allowed for the performance of the work shall be the number of calendar days shown in the contract as awarded, plus the number of calendar days granted in orders issued by the engineer, plus the number of calendar days determined as follows: If satisfactory performance of the contract with changes, extensions, and increases ordered or authorized by the engineer results in the final amount earned being greater than the original contract amount, the number of calendar days shown in the contract as awarded shall be increased in the same ratio that the total amount earned bears to the original contract amount.

"The count of elapsed calendar days to be charged against contract time shall begin on the calendar day immediately following the date of receipt by the contractor of the notice from the engineer to proceed with the work and shall continue to and include the date of completion of the work as determined at the final inspection, exclusive of those intervening calendar days not chargeable against contract time as provided in article 8.7."

⁴ "5.6 Final Inspection. Whenever, upon inspection, the engineer shall find that all the materials have been furnished, all the work has been performed, and all the construction provided for by the contract, has been completed in accordance with its terms, he shall accept the work and shall establish the date of completion thereof, after which no calendar days shall be charged against contract time and the contractor shall be so notified. Upon such notification, which shall be confirmed in writing, the contractor shall be relieved of any responsibility for further work under the contract except as may be required for correction of any defective work subsequently found.

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contracting officer's establishment of the date of completion of the contract, pursuant to the Disputes clause (Clause 6). Nor does the incorporation of FP-57 constitute an exception to, or waiver of, the "substantial completion" doctrine.

The Court of Claims⁵ other administrative Boards⁶ and this Board⁷ have recognized the principle of substantial completion of contracts.

As pointed out in our original decision, the contract work remaining to be done on June 22, 1962, consisted of minor topsoiling, seeding and sodding which did not interfere with the intended use of the road under construction. The Board accordingly found that the contract work was substantially completed on that date, and that such completion precludes the assessment of liquidated damages for a period subsequent thereto.

The motion sets forth no new matters which were not thoroughly considered prior to, and in our decision; furthermore, it does not advance a valid reason for modification of our decision, or the reopening of the proceedings for the purpose of receiving additional evidence.

Conclusion

Government Counsel's motion for reconsideration is denied, and the Board's original decision is affirmed.

JOHN J. HYNES, *Member.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

WILLIAM F. MCGRAW,
Member.

⁵ *Continental Illinois National Bank v. United States*, 126 Ct. Cl. 631, 639 (1953); *Continental National Bank v. United States*, 121 Ct. Cl. 203, 243-4, 101 F. Supp. 755 (1952).

⁶ *Conway Electric Co.*, ASBCA No. 4570 (August 30, 1960), 60-2 BCA par. 2732; *Shreveport Laundries, Inc.*, ASBCA No. 2577 (December 2, 1955); *Ed. L. Powers Contracting Co.*, ASBCA No. 1430 (August 31, 1953).

⁷ *Eastern Maintenance Company*, IBCA-275 (November 29, 1962), 69 I.D. 215, 1962 BCA par. 3583; *Elmer A. Roman*, IBCA-57 (June 28, 1957), 57-1 BCA par. 1320; *Urban Plumbing and Heating Co.*, IBCA-43 (November 21, 1956), 63 I.D. 381, 56-2 BCA par. 1102. Note: In the appeal of *Sun Construction Corporation*, IBCA-208 (January 25, 1961), 61-1 BCA par. 2926, 3 Gov. Contr. par. 198(d), the Board found that a building was substantially completed on a specified date, but determined that this work constituted approximately only one-half of the total cost of performance, and consequently denied that phase of the appeal pertaining to the assessment of liquidated damages.

CLIFTON O. MYLL

A-29920 (Supp. II) *Decided December 28, 1965***Rules of Practice: Appeals: Generally—Desert Land Entry: Cancellation—
Equitable Adjudication: Generally**

A decision holding a desert land entry for cancellation will be vacated and the case remanded for further proceedings where during the pendency of a petition for reconsideration the Department adopts a policy concerning similar entries permitting them to proceed to patent in certain circumstances under principles of equitable adjudication.

Clifton O. Myll, 71 I.D. 458 (1964), as supplemented, 71 I.D. 486 (1964), vacated

PETITION FOR RECONSIDERATION

On December 11, 1964, Clifton O. Myll filed a petition for reconsideration of the Departmental decision of November 25, 1964, *Clifton O. Myll*, A-29920, 71 I.D. 458, as supplemented by a decision of December 11, 1964, 71 I.D. 486, holding desert land entry Los Angeles 039478 for cancellation.

In a recent notice, dated December 2, 1965, "Regarding Certain Desert Land Entries in Imperial and Riverside Counties, California," the Secretary of the Interior determined that, in certain circumstances, desert land entries which had been suspended pursuant to *Maggie L. Havens*, A-5580 (October 11, 1923), and which have been actually reclaimed or are in the process of being actually and diligently reclaimed, though the statutory life of the entries has elapsed since the date water became available to the districts in which they were situated, would be permitted to submit final proof which would be considered in accordance with the principles of equity and justice as authorized by 43 U.S.C. (1964) 1161, notwithstanding that such development was not completed within the statutory life remaining in the entry after March 4, 1952.

Since it appears that Myll's entry is one of those qualifying for consideration under the terms of the notice, the decision of November 25, 1964, as supplemented, *supra*, is vacated and the case remanded for further proceedings in accordance with the notice.

EDWARD WEINBERG,
Deputy Solicitor.

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1. Reports of examinations of mining claims by Government examiners are generally considered as confidential intra-departmental communications and will not be made available to mining claimants; however, in an exceptional case where the Government flooded the land in a claim before initiation of a contest challenging the mineral character of the flooded land and there appears no obvious detriment to the public interest, the reports will be made available to the mining claimants..... 248

CONTESTS AND PROTESTS

GENERALLY

1. A private contest against a trade and manufacturing site claim cannot be instituted by a person seeking a preference right of entry pursuant to the acts of May 14, 1880, or March 3, 1891, since those acts relate only to contests against homestead and desert land entries..... 242

CONTESTS AND PROTESTS—Continued**GENERALLY—Continued**

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2. A private contest against a trade and manufacturing site claim cannot be instituted by a soldiers' additional homestead applicant not claiming present title to or an interest in the land involved; however, the defective contest may be considered to be a protest and adjudicated accordingly-----

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CONTRACTS**CONSTRUCTION AND OPERATION****Action of Parties**

1. Where a contract contains the clause entitled "Permits and Responsibility for Work, Etc.," of Standard Form 23A (March 1953), the contractor is responsible for damages to all materials furnished and work performed and for replacement or repair thereof at his own expense, until completion and final acceptance, unless it is established by a preponderance of the evidence that such damages are due solely to wrongful acts or omissions of the Government-----
2. Under a contract which provides that backfilling work shall be performed in a prescribed manner and then only in the presence of a Government Inspector, after timely advance notice to the Government of the starting of such work, instructions issued by the Government Inspector, to a contractor's employee who was performing improper backfilling in violation of the contract provisions, that such improper backfilling be stopped, and that backfilling be performed only in the presence of an inspector, do not constitute interference by the Government with the contract work and do not create any liability on the part of the Government for damage to transmission line towers occurring during a windstorm a few days after the issuance of such instructions-----

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Changed Conditions

1. A mutual mistake by the Government and the contractor with respect to a physical condition at the site of the work is within the scope of the "Changed Conditions" clause of a standard-form Government contract if, and only if, the mistake has as its subject either a condition that is indicated in the contract or a condition that is unusual and not to be expected in work of the character provided for in the contract-----
2. The encountering of boulders and other forms of hard rock during the drilling of test holes and water supply wells under a contract which describes the materials to be drilled merely as clay, sand and gravel formations, located in alluvial and lake deposits along a mountain front, constitutes a changed condition to the extent that the percentages of rock and boulders encountered and the drilling problems created by their presence are outside the range of those which the contractor anticipated, and are also outside the range of those which, in the light of the information available at the time of bidding, were of sufficient probability of occurrence to be considered as normal for the work area-----
3. Under the standard form of Changed Conditions clause, a theory that the contractor was bound to assume the worst possible conditions consistent with the information disclosed by the contract, is not compatible with the basic purposes of the clause-----

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CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Changed Conditions—Continued

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4. Where the subsurface conditions disclosed by the contract and by drill logs indicated the presence of water tables and of water in sandy materials at levels above the grades where the excavation work was to be performed, but did not contain any direct indication of hydrostatic pressure, the encountering of large quantities of water under hydrostatic pressure as exhibited by water flowing upward through the subgrade of the excavation and having a velocity sufficient to develop unstable conditions of quicksand and sand boils, is a changed condition of the second category, within the meaning of the standard form of Changed Conditions clause----- 193
5. Where the contract did not present any direct indications of subsurface conditions as to a specific work site because of the absence of logs of borings with respect to such specific location, and there were no other direct indications of hydrostatic pressure revealed by the logs of borings with respect to nearby similar locations in the vicinity, and where there was no evidence of the presence of hydrostatic pressure at any other place in the general area of the project, the encountering at such work site of conditions of hydrostatic pressure generating a flow of water from below the subgrade of the excavation and having sufficient velocity to develop unstable condition of quicksand and sand boils, is a changed condition of the second category within the meaning of the standard form of Changed Conditions clause----- 193
6. General references in a construction contract to a requirement that "suitable" earth material excavated from cuts be used and compacted in fills for road embankments, did not constitute a representation that most of the earth removed from cut areas would be of a type that could be handled efficiently by construction practices and equipment that the contractor had anticipated using, and the encountering by the contractor of soils having a high moisture content that became acceptable for compacted embankments after handling pursuant to other recognized practices and with other types of equipment, did not constitute a changed condition of the first category within the meaning of the standard form of the Changed Conditions clause----- 449
7. Where a reasonably careful pre-bid investigation by a contractor would have disclosed that some of the soils to be excavated and moved on a road construction project contained a high proportion of fine particles and very little plasticity, and the site of the project was in an area of known heavy rainfall, the existence of wet soils that were difficult to excavate and move was not an "unknown" condition within the meaning of the Changed Conditions clause; further, the contractor failed to prove by a preponderance of evidence that wet soils were an "unknown" condition within the meaning of that clause----- 449
8. The standard "Changed Conditions" clause of a construction contract provides no basis for relief with respect to a claim that summer-time traffic in a park was heavier than that expected by a contractor, since the situation complained of came into being after the contract had been executed, and the contractor's request for

CONTRACTS—Continued

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Changed Conditions—Continued

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relief essentially is related to an allegation that the Government breached its obligations under the contract rather than to the existence of conditions at the site of the type described in the first and second categories of the "Changed Conditions" clause. 450

Changes and Extras

1. An agreement for the performance of extra excavation work which provides that such extra work will be performed at the contract unit price is not in conflict with, and does not supersede a clause of the original contract providing for adjustment of contract unit prices in the event that the actually performed quantities of work related to such unit prices shall exceed the estimated quantities thereof, as set forth in the contract, by more than twenty-five percent.----- 113
2. Where delay on the part of the Government in the issuance of a change order causes an interruption of the work, the contractor is entitled to an extension of time for performance of the contract, within the meaning of Clause 5 of Standard Form 23-A (March 1953 edition).----- 395
3. Where a contractor is required to perform extra work of a kind not provided for by the contract unit prices, the contractor's actual cost of such performance is the proper basis for an equitable adjustment of the contract price.----- 415
4. Where the specifications of a road construction contract authorized the contractor to take certain actions that would interfere with the flow of traffic on an existing road in a park, but also required that the road be kept open to the public, the expense involved in coping with heavy tourist traffic in the summertime cannot be recovered under the theory that a change in the contract had been made, where it appears that the contractor could have obtained information as to the number of summertime visitors that would be expected to come to the park, and the number of visitors who actually came was within the range of what should have been expected.----- 449
5. A contractor's claim that it had been required to obtain material for highway fills from slopes that previously had been brought substantially to grade, rather than from the areas specified in the contract, is not allowable when there was no showing that the contracting officer or his authorized representative had ordered the work in question; the evidence showed contractor had re-entered upon the slopes voluntarily, with no indication that such re-entry was disadvantageous to its operations or would result in excess costs.----- 450
6. Under a contract for the construction of dikes, requiring the use of material excavated from borrow areas, where a substantial portion of a borrow area containing suitable material as staked by the Government is withdrawn from use by Government instructions so that the contractor's borrow operations are confined to a previously excavated borrow pit that became filled with water, and was more difficult to excavate, such instructions constitute a constructive change for which the contractor is entitled to an equitable adjustment.----- 492

CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Changes and Extras—Continued

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| <p>7. Where the intent of the parties, clearly inferable from contract provisions, is that the contractor's reasonable requests for access roads will be granted subject to restoration of the natural landscape and repair of damage thereto at the contractor's expense, the erroneous interpretation of the contract by the contracting officer's representative, to the effect that the contractor's request for more than one access road should be denied because of probable damage to the natural landscape, constitutes a constructive change for which the contractor is entitled to an equitable adjustment -----</p> | <p>Page
492</p> |
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Conflicting Clauses

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|---|------------|
| <p>1. The provisions of the "Changed Conditions" clause prevail over the specifications and drawings of the same contract to the extent that such provisions are inconsistent with the specifications and drawings, unless the contract expresses a clear intent that the latter are to prevail -----</p> | <p>1</p> |
| <p>2. An agreement for the performance of extra excavation work which provides that such extra work will be performed at the contract unit price is not in conflict with, and does not supersede a clause of the original contract providing for adjustment of contract unit prices in the event that the actually performed quantities of work related to such unit prices shall exceed the estimated quantities thereof, as set forth in the contract, by more than twenty-five percent -----</p> | <p>113</p> |

Construction Against Drafter

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| <p>1. Where a contract contains a clause delegating to the contracting officer's representative broad authority concerning the administration of the contract, an interpretation by the contractor that such clause relieves him of responsibility for seeing to it that appropriate construction procedures are utilized by his subcontractors, is not a reasonable construction of the contract, and hence, the doctrine of <i>contra proferentem</i> does not apply -----</p> | <p>26</p> |
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Contracting Officer

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|---|------------|
| <p>1. Where a contract does not require Government approval concerning the proportions or method of mixing ingredients to be used for plaster, a series of correspondence consisting of the submission by the contractor to the Government of a proposed plaster formula, the solicitation by the Government of an opinion from a plaster manufacturer, a reply from the manufacturer and the transmittal of the reply by the Government to the contractor, does not constitute approval by the Government of such formula, even if modified to conform to the manufacturer's recommendations -----</p> | <p>26</p> |
| <p>2. Under a contract incorporating provisions for suspension of work when ordered by the Contracting Officer because of periods of unsuitable weather, where work without doubt could not be performed for a substantial period because of such weather but the Contracting Officer failed to issue an order suspending the work for that period, the contractor is entitled to an extension of time therefor -----</p> | <p>301</p> |

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Contracting Officer—Continued**

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3. Where a prospective bidder relies upon erroneous assurances given by a subordinate of the contracting officer not authorized to give them, and as a consequence erroneously fails to include in its bid the cost of performing certain work required by the Invitation for Bids, it is not entitled, after award, to an equitable adjustment of its bid price for performing the work so required, even though not contemplated by its bid-----

385

Drawings and Specifications

1. Where a contract does not require Government approval concerning the proportions or method of mixing ingredients to be used for plaster, a series of correspondence consisting of the submission by the contractor to the Government of a proposed plaster formula, the solicitation by the Government of an opinion from a plaster manufacturer, a reply from the manufacturer and the transmittal of the reply by the Government to the contractor, does not constitute approval by the Government of such formula, even if modified to conform to the manufacturer's recommendations-----

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Duration of Contract

1. Under a contract for construction of facilities on the shores of an impounded river; where access to the site of the work was to be limited by the rising water level at an indeterminate time during the year following the award of the contract, which provided that work was not practicable in winter and that the work should be performed during the 1962 summer season, the failure of the Government to furnish notice to proceed within a reasonable time after award, causing the major portions of the work and the duration of the contract performance to be extended into the 1963 work season under conditions of severely restricted access, makes the ensuing delay in completion of the contract excusable to the extent that it was not foreseeable, and the contractor is entitled to a commensurate equitable extension of time for performance-----

475

Estimated Quantities

1. Under a contract which contains an "approximate quantities" provision, estimates of quantities noted in the bidding schedule do not constitute indications or representations within the meaning of the "Changed Conditions" clause-----
2. An agreement for the performance of extra excavation work which provides that such extra work will be performed at the contract unit price is not in conflict with, and does not supersede a clause of the original contract providing for adjustment of contract unit prices in the event that the actually performed quantities of work related to such unit prices shall exceed the estimated quantities thereof, as set forth in the contract, by more than twenty-five percent-----

1

113

Intent of Parties

1. Where the terms of an agreement between the parties are integrated into a written contract, prior or contemporaneous oral negotiations between the parties cannot be referred to in order to ascertain what constitutes the agreement between them-----

113

CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Intent of Parties—Continued

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2. Where the intent of the parties, clearly inferable from contract provisions, is that the contractor's reasonable requests for access roads will be granted subject to restoration of the natural landscape and repair of damage thereto at the contractor's expense, the erroneous interpretation of the contract by the contracting officer's representative, to the effect that the contractor's request for more than one success road should be denied because of probable damage to the natural landscape, constitutes a constructive change for which the contractor is entitled to an equitable adjustment -----

492

Labor Laws

1. Under construction contracts incorporating the provisions of the Davis-Bacon Act covering minimum wage rates, where the principal disputes concern the question of whether or not work was performed "directly upon the site of the work" as provided in the Act, and where current interpretations of the Department of Labor and the Comptroller General are in conflict, the Board will decline to exercise jurisdiction over the appeal, pursuant to the doctrine of *forum non conveniens*, and the appeal will be dismissed -----

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Notices

1. Under a contract for construction of facilities on the shores of an impounded river, where access to the site of the work was to be limited by the rising water level at an indeterminate time during the year following the award of the contract, which provided that work was not practicable in winter and that the work should be performed during the 1962 summer season, the failure of the Government to furnish notice to proceed within a reasonable time after award, causing the major portions of the work and the duration of the contract performance to be extended into the 1963 work season under conditions of severely restricted access, makes the ensuing delay in completion of the contract excusable to the extent that it was not foreseeable, and the contractor is entitled to a commensurate equitable extension of time for performance....

475

Payments

1. A claim for additional payment arising out of the extensive failure and cracking of plaster and the repair thereof by the contractor will be denied where the weight of the evidence discloses that the defective plaster was the result of noncompliance by the plastering subcontractor with industry specifications and instructions that were known or readily available to the contractor.....

26

Subcontractors and Suppliers

1. Where a contract contains a clause delegating to the contracting officer's representative broad authority concerning the administration of the contract, an interpretation by the contractor that such clause relieves him of responsibility for seeing to it that appropriate construction procedures are utilized by his subcontractors, is not a reasonable construction of the contract, and hence, the doctrine of *contra proferentem* does not apply.....

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| 2. A claim for additional payment arising out of the extensive failure and cracking of plaster and the repair thereof by the contractor will be denied where the weight of the evidence discloses that the defective plaster was the result of noncompliance by the plastering subcontractor with industry specifications and instructions that were known or readily available to the contractor----- | 26 |
| 3. In order to be entitled to an extension of time for excusable delay under Clause 5 of Standard Form 23A (April 1961), the contractor must establish by a preponderance of evidence that the failure of its subcontractor to complete the contract within the time required was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of the contractor and its subcontractor----- | 386 |

Third Persons

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| 1. Under a standard "Suspension of Work" clause a contractor is not entitled to a price adjustment on account of delay by another Government contractor in preparing the site for the job, if the claimant contractor fails to sustain the burden of proving that the duration of any part of the job was necessarily protracted for an unreasonable period by such delay, or fails to sustain the burden of proving that the Government itself had caused the delay by an unexpected and unauthorized act taken in its contractual capacity, or had expressly or impliedly represented or promised that the delay would not occur. Entitlement to a price adjustment under such a clause is not established merely by showing that an extension of time on account of the delay was obtained by the claimant contractor----- | 69 |
| 2. Where the specifications of a road construction contract authorized the contractor to take certain actions that would interfere with the flow of traffic on an existing road in a park, but also required that the road be kept open to the public, the expense involved in coping with heavy tourist traffic in the summertime cannot be recovered under the theory that a change in the contract had been made, where it appears that the contractor could have obtained information as to the number of summertime visitors that would be expected to come to the park, and the number of visitors who actually came was within the range of what should have been expected----- | 449 |

Waiver and Estoppel

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|--|-----|
| 1. A contractor who bids on a Government contract unqualifiedly represents that it has the skill and ability to do the work; consequently, neither the absence of the requisite "know-how" nor the lack of the proper equipment and qualified personnel to do the job, are excusable causes of delay under the standard form of construction contract----- | 440 |
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Warranties

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| 1. The legal principle of cumulation of warranties enunciated in the Uniform Sales Act and the Uniform Commercial Code forms part of the general Federal common law applicable to Government contracts----- | 278 |
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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Warranties—Continued**

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| 2. The expiration of an express guaranty period in a Guarantee clause does not preclude the Government from exercising the remedies specified in the standard form of Inspection clause, which excepts latent defects from the conclusive effect of acceptance and payment----- | 279 |

DISPUTES AND REMEDIES**Appeals**

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| 1. Procedural requests looking towards the submission of a Government counterclaim to the Board of Contract Appeals should be accompanied by a showing that the Board would have jurisdiction to entertain the proposed counterclaim----- | 1 |
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Burden of Proof

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| 1. Where a contract contains the clause entitled "Permits and Responsibility for Work, Etc.," of Standard Form 23A (March 1953), the contractor is responsible for damages to all materials furnished and work performed and for replacement or repair thereof at his own expense, until completion and final acceptance, unless it is established by a preponderance of the evidence that such damages are due solely to wrongful acts or omission of the Government---- | 49 |
| 2. Under a standard "Suspension of Work" clause a contractor is not entitled to a price adjustment on account of delay by another Government contractor in preparing the site for the job, if the claimant contractor fails to sustain the burden of proving that the duration of any part of the job was necessarily protracted for an unreasonable period by such delay, or fails to sustain the burden of proving that the Government itself had caused the delay by an unexpected and unauthorized act taken in its contractual capacity, or had expressly or impliedly represented or promised that the delay would not occur. Entitlement to a price adjustment under such a clause is not established merely by showing that an extension of time on account of the delay was obtained by the claimant contractor----- | 69 |
| 3. In order to be entitled to an extension of time for excusable delay under Clause 5 of Standard Form 23A (April 1961), the contractor must establish by a preponderance of evidence that the failure of its subcontractor to complete the contract within the time required was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of the contractor and its subcontractor----- | 386 |
| 4. A contractor who seeks an extension of time under a standard form of construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract and that it delayed the ultimate completion of the contract as a whole----- | 440 |
| 5. Where a reasonably careful pre-bid investigation by a contractor would have disclosed that some of the soils to be excavated and moved on a road construction project contained a high proportion of fine particles and very little plasticity, and the site of the project | |

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was in an area of known heavy rainfall, the existence of wet soils that were difficult to excavate and move was not an "unknown" condition within the meaning of the Changed Conditions clause; further, the contractor failed to prove by a preponderance of evidence that wet soils were an "unknown" condition within the meaning of that clause.....

449

- 6. A contractor's claim that it had been required to obtain material for highway fills from slopes that previously had been brought substantially to grade, rather than from the areas specified in the contract, is not allowable when there was no showing that the contracting officer or his authorized representative had ordered the work in question; the evidence showed contractor had re-entered upon the slopes voluntarily, with no indication that such re-entry was disadvantageous to its operations or would result in excess costs.....

450

Damages

Actual Damages

- 1. Liquidated damages provisions in contracts are valid and enforceable without regard to whether or not the Government is in a position to show the amount of actual damage sustained by reason of the delayed performance of a contract. The inability to prove the amount of actual damages suffered because of the delayed performance is not fatal to the Government's enforcement of liquidated damages and does not convert liquidated damages into penalties.....

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Liquidated Damages

- 1. A contract has been substantially performed when the work remaining to be performed is a relatively minor quantity and is of such an inconsequential nature as to not impair the utility of the project; liquidated damages may not be assessed for periods after that point has been reached.....
- 2. Liquidated damages are properly assessed pursuant to contract provisions therefor with respect to unexcused delay resulting from the removal of the contractor's personnel and equipment from the project site during periods when substantial progress could otherwise have been made in the performance of the contract.....
- 3. Failure by a contractor to prosecute the work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the contractor to extensions of time for such portions of the ultimate delay in completion as are attributable to conditions, such as "unusually severe weather," that are excusable under the terms of the contract.....
- 4. Liquidated damages provisions in contracts are valid and enforceable without regard to whether or not the Government is in a position to show the amount of actual damage sustained by reason of the delayed performance of a contract. The inability to prove the amount of actual damages suffered because of the delayed performance is not fatal to the Government's enforcement of liquidated damages and does not convert liquidated damages into penalties.....

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2. Where a bracket for a tap changer in an autotransformer fails more than four years from the date of its activation, and has performed more than 14,000 operations of a guaranteed 50,000 operations, a proportional adjustment will be made of the total cost of repair to arrive at the amount properly chargeable to the contractor----	279
3. Where a prospective bidder relies upon erroneous assurances given by a subordinate of the contracting officer not authorized to give them, and as a consequence erroneously fails to include in its bid the cost of performing certain work required by the Invitation for Bids, it is not entitled, after award, to an equitable adjustment of its bid price for performing the work so required, even though not contemplated by its bid-----	385
4. Where a contractor is required to perform extra work of a kind not provided for by the contract unit prices, the contractor's actual cost of such performance is the proper basis for an equitable adjustment of the contract price-----	415
5. Under a contract for the construction of dikes, requiring the use of material excavated from borrow areas, where a substantial portion of a borrow area containing suitable material as staked by the Government is withdrawn from use by Government instructions so that the contractor's borrow operations are confined to a previously excavated borrow pit that became filled with water, and was more difficult to excavate, such instructions constitute a constructive change for which the contractor is entitled to an equitable adjustment-----	492
6. Where the intent of the parties, clearly inferable from contract provisions, is that the the contractor's reasonable requests for access roads will be granted subject to restoration of the natural landscape and repair of damage thereto at the contractor's expense, the erroneous interpretation of the contract by the contracting officer's representative, to the effect that the contractor's request for more than one access road should be denied because of probable damage to the natural landscape, constitutes a constructive change for which the contractor is entitled to an equitable adjustment---	492

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| 1. Claims for extra costs of performance allegedly caused by the Government's excessive delay in approving shop drawings required by it pursuant to the terms of a construction contract are claims for breach of contract. Such claims are beyond the jurisdiction of the Board of Contract appeals to decide, in the absence of an appropriate Suspension of Work clause or other provision authorizing a price adjustment for such a delay----- | 134 |
| 2. Under construction contracts incorporating the provisions of the Davis-Bacon Act covering minimum wage rates, where the principal disputes concern the question of whether or not work was performed "directly upon the site of the work" as provided in the Act, and where current interpretations of the Department of Labor and the Comptroller General are in conflict, the Board will decline to exercise jurisdiction over the appeal, pursuant to the doctrine of <i>forum non conveniens</i> , and the appeal will be dismissed----- | 269 |
| 3. An appeal will be dismissed for lack of jurisdiction as to claims of the contractor for expenses of delays allegedly caused by the Government, where such delays are not compensable under the provisions of the contract----- | 415 |

FORMATION AND VALIDITY**Authority to Make**

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| 1. Where a prospective bidder relies upon erroneous assurances given by a subordinate of the contracting officer not authorized to give them, and as a consequence erroneously fails to include in its bid the cost of performing certain work required by the Invitation for Bids, it is not entitled, after award, to an equitable adjustment of its bid price for performing the work so required, even though not contemplated by its bid----- | 385 |
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Implied and Constructive Contracts

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| 1. Under a contract for the construction of dikes, requiring the use of material excavated from borrow areas, where a substantial portion of a borrow area containing suitable material as staked by the Government is withdrawn from use by Government instructions so that the contractor's borrow operations are confined to a previously excavated borrow pit that became filled with water, and was more difficult to excavate, such instructions constitute a constructive change for which the contractor is entitled to an equitable adjustment----- | 492 |
| 2. Where the intent of the parties, clearly inferable from contract provisions, is that the contractor's reasonable requests for access roads will be granted subject to restoration of the natural landscape and repair of damage thereto at the contractor's expense, the erroneous interpretation of the contract by the contracting officer's representative, to the effect that the contractor's request for more than one access road should be denied because of probable damage to the natural landscape, constitutes a constructive change for which the contractor is entitled to an equitable adjustment--- | 492 |

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1. Where the terms of an agreement between the parties are integrated into a written contract, prior or contemporaneous oral negotiations between the parties cannot be referred to in order to ascertain what constitutes the agreement between them----- 113

PERFORMANCE OR DEFAULT

Generally

1. Where a contract contains a clause delegating to the contracting officer's representative broad authority concerning the administration of the contract, an interpretation by the contractor that such clause relieves him of responsibility for seeing to it that appropriate construction procedures are utilized by his subcontractors, is not a reasonable construction of the contract, and hence, the doctrine of *contra proferentem* does not apply----- 26
2. Liquidated damages provisions in contracts are valid and enforceable without regard to whether or not the Government is in a position to show the amount of actual damage sustained by reason of the delayed performance of a contract. The inability to prove the amount of actual damages suffered because of the delayed performance is not fatal to the Government's enforcement of liquidated damages and does not convert liquidated damages into penalties----- 440

Acceptance of Performance

1. Where a contract contains the clause entitled "Permits and Responsibility for Work, Etc.," of Standard Form 23A (March 1953), the contractor is responsible for damages to all materials furnished and work performed and for replacement or repair thereof at his own expense, until completion and final acceptance, unless it is established by a preponderance of the evidence that such damages are due solely to wrongful acts or omission of the Government----- 49
2. The expiration of an express guaranty period in a Guarantee clause does not preclude the Government from exercising the remedies specified in the standard form of Inspection clause, which excepts latent defects from the conclusive effect of acceptance and payment----- 279
3. General references in a construction contract to a requirement that "suitable" earth material excavated from cuts be used and compacted in fills for road embankments, did not constitute a representation that most of the earth removed from cut areas would be of a type that could be handled efficiently by construction practices and equipment that the contractor had anticipated using, and the encountering by the contractor of soils having a high moisture content that became acceptable for compacted embankments after handling pursuant to other recognized practices and with other types of equipment, did not constitute a changed condition of the first category within the meaning of the standard form of the Changed Conditions clause----- 449

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1. Under a contract which provides that backfilling work shall be performed in a prescribed manner and then only in the presence of a Government Inspector, after timely advance notice to the Government of the starting of such work, instructions issued by the Government Inspector, to a contractor's employee who was performing improper backfilling in violation of the contract provisions, that such improper backfilling be stopped, and that backfilling be performed only in the presence of an inspector, do not constitute interference by the Government with the contract work and do not create any liability on the part of the Government for damage to transmission line towers occurring during a wind-storm a few days after the issuance of such instructions.....	49
2. Claims for extra costs of performance allegedly caused by the Government's excessive delay in approving shop drawings required by it pursuant to the terms of a construction contract are claims for breach of contract. Such claims are beyond the jurisdiction of the Board of Contract Appeals to decide, in the absence of an appropriate Suspension of Work clause or other provision authorizing a price adjustment for such a delay.....	134
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1. In order to be entitled to an extension of time for excusable delay under Clause 5 of Standard Form 23A (April 1961), the contractor must establish by a preponderance of evidence that the failure of its subcontractor to complete the contract within the time required was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of the contractor and its subcontractor.....	386
2. Where delay on the part of the Government in the issuance of a change order causes an interruption of the work, the contractor is entitled to an extension of time for performance of the contract, within the meaning of Clause 5 of Standard Form 23-A (March 1953 edition).....	395
3. Liquidated damages are properly assessed pursuant to contract provisions therefor with respect to unexcused delay resulting from the removal of the contractor's personnel and equipment from the project site during periods when substantial progress could otherwise have been made in the performance of the contract.....	395
4. A contractor who seeks an extension of time under a standard form of construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract and that it delayed the ultimate completion of the contract as a whole.....	440

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- 5. Failure by a contractor to prosecute the work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the contractor to extensions of time for such portions of the ultimate delay in completion as are attributable to conditions, such as "unusually severe weather," that are excusable under the terms of the contract..... 440
- 6. A contractor who bids on a Government contract unqualifiedly represents that it has the skill and ability to do the work; consequently, neither the absence of the requisite "know-how" nor the lack of the proper equipment and qualified personnel to do the job, are excusable causes of delay under the standard form of construction contract..... 440
- 7. Under a contract for construction of facilities on the shores of an impounded river, where access to the site of the work was to be limited by the rising water level at an indeterminate time during the year following the award of the contract, which provided that work was not practicable in winter and that the work should be performed during the 1962 summer season, the failure of the Government to furnish notice to proceed within a reasonable time after award, causing the major portions of the work and the duration of the contract performance to be extended into the 1963 work season under conditions of severely restricted access, makes the ensuing delay in completion of the contract excusable to the extent that it was not foreseeable, and the contractor is entitled to a commensurate equitable extension of time for performance.... 475

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- 1. Under a contract which provides that backfilling work shall be performed in a prescribed manner and then only in the presence of a Government inspector, after timely advance notice to the Government of the starting of such work, instructions issued by the Government inspector, to a contractor's employee who was performing improper backfilling in violation of the contract provisions, that such improper backfilling be stopped, and that backfilling be performed only in the presence of an inspector, do not constitute interference by the Government with the contract work and do not create any liability on the part of the Government for damage to transmission line towers occurring during a windstorm a few days after the issuance of such instructions..... 49
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- 1. Under a standard "Suspension of Work" clause a contractor is not entitled to a price adjustment on account of delay by another Government contractor in preparing the site for the job; if the claimant contractor fails to sustain the burden of proving that the duration of any part of the job was necessarily protracted for an unreasonable period by such delay, or fails to sustain the burden of proving that the Government itself had caused the delay by an unexpected and unauthorized act taken in its contractual capacity, or had expressly or impliedly represented or promised that the delay would not occur. Entitlement to a price adjustment under such a clause is not established merely by showing that an extension of time on account of the delay was obtained by the claimant contractor. ----- 69
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- 1. Section 7 of the act of March 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands. --- 156
- 2. The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of March 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used ----- 156
- 3. A corporation which has acquired actual possession or the right of actual possession to more than 320 acres of desert land "holds" such acreage within the meaning of the prohibition of section 7 of the act of March 3, 1891. ----- 156
- 4. Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte*, into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements ----- 157

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- 1. Section 1 of the act of March 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted..... 156

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- 1. Section 1 of the act of March 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted..... 156

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- 3. Section 7 of the act of March 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands... 156
- 4. The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of March 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used..... 156

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- 1. A decision holding a desert land entry for cancellation will be vacated and the case remanded for further proceedings where during the pendency of a petition for reconsideration the Department adopts a policy concerning similar entries permitting them to proceed to patent in certain circumstances under principles of equitable adjudication..... 536

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- 1. It is proper to classify land in Imperial Valley, California, as not proper for disposition under the desert land law where a favorable classification would, contrary to the public interest, increase the pressure on the inadequate water supply available for use in California from the Colorado River..... 111

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| 3. Section 1 of the act of March 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted ----- | 156 |

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| 1. Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, <i>sua sponte</i> , into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements ----- | 157 |
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| 1. Where a desert land entry has been assigned subsequent to March 4, 1929, the assignee is not entitled to the relief afforded by the act of March 4, 1929, as amended, 43 U.S.C. (1958 Ed.) 339, or the act of March 4, 1915, as amended, 43 U.S.C. (1958 Ed.) 338, which allow entrymen, under certain prescribed circumstances, to purchase the lands embraced within their entries ----- | 138 |
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| 1. A decision holding a desert land entry for cancellation will be vacated and the case remanded for further proceedings where during the pendency of a petition for reconsideration the Department adopts a policy concerning similar entries permitting them to proceed to patent in certain circumstances under principles of equitable adjudication ----- | 536 |
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| 1. The term "wildlife" as used in the act may be construed broadly to include all wild vertebrates, including endangered species thereof, other than fish ----- | 14 |
| 2. The act specifically authorizes the Secretary of the Interior to acquire refuge lands for all forms of wildlife, including endangered species thereof ----- | 14 |

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FISH AND WILDLIFE COORDINATION ACT—Continued

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| 1. An appeal from a district grazing manager's decision reducing a Federal range user's grazing privileges to conform with the carrying capacity of his range allotment is properly dismissed where the user has accepted the same allotted area for 17 years without protest or appeal and does not question the necessity for the reduction but objects to the apportionment of the range as inequitable..... | 274 |
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| 1. In cases of wilful trespasses on the Federal range a reduction or suspension of grazing privileges may be imposed on the offender in addition to the assessment of monetary damages..... | 100 |
| 2. A penalty for wilful trespass of a suspension of grazing privileges for five years will be reduced to a reduction of privileges by 40 percent for five years where the circumstances do not appear to warrant imposition of the more stringent penalty..... | 100 |

HOMESTEADS (ORDINARY)**CONTESTS**

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| 1. A charge of failure to cultivate the required acreage within the second year of a homestead entry is not sustained where the evidence is merely that persons who had occasion to view and be on the land occasionally during the crucial period did not see any cultivation and the entrywoman testifies positively that the necessary cultivation was accomplished..... | 124 |
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INDIAN ALLOTMENTS ON PUBLIC DOMAIN**GENERALLY**

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1. An enrolled member of the Comanche Tribe of Indians of Oklahoma is not entitled to an Indian allotment in Alaska under the act of May 17, 1906, as amended, which authorizes the Secretary of the Interior to allot land to Indian Natives of Alaska----- 124

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LANDS SUBJECT TO

1. Unappropriated public land in Alaska is subject to allotment under the General Allotment Act to Indians who are not natives of Alaska----- 124
2. Public land which has been patented and has passed into private ownership does not regain its status as public land upon being acquired subsequently by the United States through purchase or condemnation, nor is it, in the absence of specific legislative authority, restored to the public domain when no longer needed for the purpose for which it was acquired, and an application for such land, filed under the Indian Allotment Act, is properly rejected, because such land does not constitute public land within the meaning of the act----- 505

INDIAN LANDS**GENERALLY**

1. Where the Navajo tribe of Indians has protested against issuance of a patent to the State of Utah under the act of June 21, 1934, to numbered sections which the State claims as having vested in it pursuant to the grant for school purposes under its Enabling Act and the Tribe has requested a hearing alleging that the vesting of title in the State under the grant was precluded by occupancy of the sections by Navajo Indians and that title is now in the Tribe pursuant to acts of Congress, a hearing will be ordered for the purpose of receiving evidence as to the full extent and nature of the occupancy alleged by the Tribe in order to make an informed and definitive determination of the question as to when, if ever, title did vest in the State----- 361

ALLOTMENTS**Alienation**

1. Where an approved lease of individually owned restricted Indian land provides for the direct payment of rentals to the owner or his legal representative (guardian or conservator), the rental payments must be treated as unrestricted funds as of the time of payment, but future or anticipated rentals are classed as restricted property over which the Secretary of the Interior may recapture supervision over the collection, care and disbursement. Any action of the legal representative (guardian or conservator) or of the guardianship court to obligate such future or anticipated rentals would be ineffective unless approved by the Secretary of the Interior----- 83

INDIAN LANDS—Continued**COMPETENCY**

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1. Where an approved lease of individually owned restricted Indian land provides for the direct payment of rentals to the owner or his legal representative (guardian or conservator), the rental payments must be treated as unrestricted funds as of the time of payment, but future or anticipated rentals are classed as restricted property over which the Secretary of the Interior may recapture supervision over the collection, care and disbursement. Any action of the legal representative (guardian or conservator) or of the guardianship court to obligate such future or anticipated rentals would be ineffective unless approved by the Secretary of the Interior -----

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DESCENT AND DISTRIBUTION**Wills**

1. Proof of testamentary capacity by witnesses to an Indian testatrix's will and by others closely associated with her remained unaffected by allegations that testatrix was ill, infirm, and mentally incompetent, that she could not use the English language, had no business capacity, and that she failed to show comprehension of her property interests and the objects of her bounty -----
2. The fact that there may have been an opportunity to exert undue influence on an Indian testatrix is insufficient to establish the invalidity of a will where convincing proof has not been furnished that such undue influence was actually exerted or that testatrix's free agency in the testamentary act was influenced improperly ----

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LEASES AND PERMITS**Generally**

1. Where an approved lease of individually owned restricted Indian land provides for the direct payment of rentals to the owner or his legal representative (guardian or conservator), the rental payments must be treated as unrestricted funds as of the time of payment, but future or anticipated rentals are classed as restricted property over which the Secretary of the Interior may recapture supervision over the collection, care and disbursement. Any action of the legal representative (guardian or conservator) or of the guardianship court to obligate such future or anticipated rentals would be ineffective unless approved by the Secretary of the Interior -----

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INDIAN TRIBES**GENERALLY**

1. Where the Navajo tribe of Indians has protested against issuance of a patent to the State of Utah under the act of June 21, 1934, to numbered sections which the State claims as having vested in it pursuant to the grant for school purposes under its Enabling Act and the Tribe has requested a hearing alleging that the vesting of title in the State under the grant was precluded by occupancy of the sections by Navajo Indians and that title is now in the Tribe pursuant to acts of Congress, a hearing will be ordered for the purpose of receiving evidence as to the full extent and nature of the occupancy alleged by the Tribe in order to make an informed and definitive determination of the question as to when, if ever, title did vest in the State -----

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INDIANS

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1. Where an approved lease of individually owned restricted Indian land provides for the direct payment of rentals to the owner or his legal representative (guardian or conservator), the rental payments must be treated as unrestricted funds as of the time of payment, but future or anticipated rentals are classed as restricted property over which the Secretary of the Interior may recapture supervision over the collection, care and disbursement. Any action of the legal representative (guardian or conservator) or of the guardianship court to obligate such future or anticipated rentals would be ineffective unless approved by the Secretary of the Interior-----

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CONTRACTS

1. Where an approved lease of individually owned restricted Indian land provides for the direct payment of rentals to the owner or his legal representative (guardian or conservator), the rental payments must be treated as unrestricted funds as of the time of payment, but future or anticipated rentals are classed as restricted property over which the Secretary of the Interior may recapture supervision over the collection, care and disbursement. Any action of the legal representative (guardian or conservator) or of the guardianship court to obligate such future or anticipated rentals would be ineffective unless approved by the Secretary of the Interior-----

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PROBATE

1. Proof of testamentary capacity by witnesses to an Indian testatrix's will and by others closely associated with her remained unaffected by allegations that testatrix was ill, infirm, and mentally incompetent, that she could not use the English language, had no business capacity, and that she failed to show comprehension of her property interests and the objects of her bounty-----
2. The fact that there may have been an opportunity to exert undue influence on an Indian testatrix is insufficient to establish the invalidity of a will where convincing proof has not been furnished that such undue influence was actually exerted or that testatrix's free agency in the testamentary act was influenced improperly-----

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MIGRATORY BIRD CONSERVATION ACT

ACQUISITION OF REFUGE LANDS

1. Plain language of the Act authorizes the Secretary of the Interior to purchase or rent lands approved by the Migratory Bird Conservation Commission for endangered species of migratory "game" birds-----
2. Acquisitions under the Act for endangered species of migratory "game" birds could be financed through funds made available from either the Land and Water Conservation Fund Act of 1965, or from the Migratory Bird Hunting Stamp Act, or from funds authorized by the Migratory Bird Conservation Act itself-----
3. The Migratory Bird Conservation Act when read as a whole and considered in the light of its legislative history and purpose is unclear in regard to the purchase of lands for "non-game" migratory birds-----

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MIGRATORY BIRD CONSERVATION ACT—Continued**ACQUISITION OF REFUGE LANDS—Continued**

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| 4. The Migratory Bird Treaty with Great Britain lists as protected birds both "game" and "non-game" migratory birds..... | 14 |

MINING CLAIMS**GENERALLY**

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| 1. Although the alienage of a mining claimant may not provide a ground for collateral attack upon his possessory title by other claimants, it is a ground upon which the United States, as sovereign, may reject the alien's verified statement filed under the act of July 23, 1955, asserting surface rights to a mining claim, because the mining laws authorize the occupancy and purchase of public lands for their minerals only by United States citizens or those who have declared their intent to become citizens..... | 233 |
| 2. When two or more persons participate in the location of a mining claim, a tenancy in common arises and each locator has the same rights in respect to his share as a tenant in severalty, but he holds his interest independently of the other and may transfer, devise or encumber it separately without the consent of the other co-tenants..... | 314 |
| 3. A conflict between a lode claimant and a placer claimant is an adverse claim within the meaning of Rev. Stat. secs. 2325 and 2326 and is properly resolved by the filing of an adverse claim and the institution of judicial proceedings as provided therein.... | 404 |

CONTESTS

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| 1. Reports of examinations of mining claims by Government examiners are generally considered as confidential intra-departmental communications and will not be made available to mining claimants; however, in an exceptional case where the Government flooded the land in a claim before initiation of a contest challenging the mineral character of the flooded land and there appears no obvious detriment to the public interest, the reports will be made available to the mining claimants..... | 248 |
| 2. In contest proceedings initiated under Circular No. 460 and the Rules of Practice in effect in the early thirties, service of notice of contest by registered mail was proper and effective and may be proved by a post office return receipt under the following circumstances: (1) Where the signature of the person signing the post office return receipt is identical with the name of the mining claimant; (2) Where the signature of the addressee is consistent with the surname and given names or initials of the claimant; (3) Where the surname of the signature on the return receipt is different than the name of the locator but the record shows that the claimant has married and that she has signed with her married name; and (4) Where the receipt is signed by an agent of the addressee and there is written evidence of the agent's authority to sign for the addressee..... | 313 |
| 3. In contest proceedings initiated under Circular No. 460 and the Rules of Practice in effect in the early thirties, a post office return receipt for letters bearing notices of contest is not sufficient proof of service if it bears a signature clearly different and inconsistent with the name of the claimant and there is no evidence showing that the party signing the receipt had written authority to sign for the claimant..... | 313 |

MINING CLAIMS—Continued

CONTESTS—Continued

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4. Service of notice of contest by registered mail is a form of notice reasonably calculated to give a party knowledge of administrative proceedings and an opportunity to be heard and, consequently, where authorized by statute and the rules of an administrative agency, it satisfies the requirements of due process.----- 313
5. Where the name and address of a mining claimant are not of record in the Department when the validity of a claim is questioned, the Department merely assumes the task of ascertaining the name and address of the claimant from other sources and may then serve the notice of contest by registered mail in accordance with the applicable regulations.----- 313
6. Unless it is affirmatively shown to the contrary by the mining claimant, the presumption of identity between the claimant and the recipient of a notice of contest in adverse proceedings before the Department is not overcome by minor discrepancies in the use of given names or initials of the parties in the notice of contest and the post office return receipt.----- 313
7. There is nothing in the law or the regulations requiring the posting of an oil shale placer mining claim as a condition precedent to service of notice of contest.----- 314

DETERMINATION OF VALIDITY

1. No hearing is necessary to invalidate mining claims located on land previously included in small tract applications and subsequently classified for small tract disposition.----- 21
2. The Department of the Interior has been granted plenary power in the administration of the public lands, and, until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of the claim.----- 141
3. In the exercise of his supervisory authority over the public lands, the Secretary of the Interior may, without further notice and hearing, declare mining claims to be null and void where, after adversary proceedings brought against the claims, a hearing examiner has found that there has been no discovery within the limits of the claims and has rejected patent applications for the claims.----- 213
4. A decision declaring lode mining claims null and void for lack of discovery is proper where evidence at a hearing supports the conclusion that there has not been a discovery of minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in the development of the claims.----- 223
5. An allegation of surprise by mining claimants in a contest against their claims, alleging that they were unprepared for the geological theories presented by the Government at the hearing, is properly disregarded when the theories presented related only to the manner of formation of mineral deposits in the claims involved and the critical question as to whether a discovery has been made does not depend upon consideration of the theories but can be answered on the basis of factual data presented at the hearing.----- 224

MINING CLAIMS—Continued**DETERMINATION OF VALIDITY—Continued**

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| 6. In contest proceedings initiated under Circular No. 460 and the Rules of Practice in effect in the early thirties, service of notice of contest by registered mail was proper and effective and may be proved by a post office return receipt under the following circumstances: (1) Where the signature of the person signing the post office return receipt is identical with the name of the mining claimant; (2) Where the signature of the addressee is consistent with the surname and given names or initials of the claimant; (3) Where the surname of the signature on the return receipt is different than the name of the locator but the record shows that the claimant has married and that she has signed with her married name; and (4) Where the receipt is signed by an agent of the addressee and there is written evidence of the agent's authority to sign for the addressee..... | 313 |
| 7. In contest proceedings initiated under Circular No. 460 and the Rules of Practice in effect in the early thirties, a post office return receipt for letters bearing notices of contest is not sufficient proof of service if it bears a signature clearly different and inconsistent with the name of the claimant and there is no evidence showing that the party signing the receipt had written authority to sign for the claimant..... | 313 |
| 8. Where the name and address of a mining claimant are not of record in the Department when the validity of a claim is questioned, the Department merely assumes the task of ascertaining the name and address of the claimant from other sources and may then serve the notice of contest by registered mail in accordance with the applicable regulations..... | 313 |
| 9. There is nothing in the law or the regulations requiring the posting of an oil shale placer mining claim as a condition precedent to service of notice of contest..... | 314 |

DISCOVERY

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| 1. To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit..... | 141 |
| 2. A Government mineral examiner investigating a mining claim prior to a proceeding under the act of July 23, 1955, has no duty to test a claim for discovery beyond examining the discovery points made available by the mining claimant..... | 141 |
| 3. When in a direct proceeding against a mining claim it is found that no discovery has been made, the claim cannot survive as a valid claim even though the decision determining that no discovery has been made merely rejects the patent application..... | 212 |
| 4. A decision declaring lode mining claims null and void for lack of discovery is proper where evidence at a hearing supports the conclusion that there has not been a discovery of minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in the development of the claims..... | 223 |

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DISCOVERY—Continued

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| 5. A mining claimant has the burden of proving, in a contest against his claim, that a discovery has been made after the Government has made a <i>prima facie</i> case that the claim is invalid for want of a discovery of a valuable mineral deposit..... | 224 |
| 6. An allegation of surprise by mining claimants in a contest against their claims, alleging that they were unprepared for the geological theories presented by the Government at the hearing, is properly disregarded when the theories presented related only to the manner of formation of mineral deposits in the claims involved and the critical question as to whether a discovery has been made does not depend upon consideration of the theories but can be answered on the basis of factual data presented at the hearing.... | 224 |
| 7. When a mining location is made and the workings on the claim consist only of surface explorations, the land in the claim is then withdrawn from mineral entry, and subsequent to the withdrawal there is substantial mineral discovery at depth on the claim, the claim is properly declared null and void for lack of discovery when it cannot be shown that there was any physical or geological relationship between the surface deposits which are of a low mineral value not constituting a discovery and the subsequent substratum showings..... | 224 |
| 8. To constitute a valid discovery upon a mining claim there must be a discovery of such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine..... | 307 |
| 9. The finding of high mineral values by a mining claimant is properly denied substantial weight when the samples from which these values are obtained are shown to be in areas of high concentration not representative of the claims..... | 307 |
| 10. In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mining claimant to the surface resources of his claims in order to prevent the claim from being held subjected to the terms and limitations of section 4 of that act, it must be found that there was a discovery of valuable mineral deposits within the claims at the date of the act and that the claim is still valuable for the mineral deposits; after the Government presents evidence to show <i>prima facie</i> that there has been no discovery, the burden of proof shifts to the claimant to show by a preponderance of the evidence that there has been a discovery, and that the claims are valuable for their mineral deposits..... | 367 |
| 11. Not only must a mining claimant properly mark mining claims on the ground to have a valid location, but the claimant also bears the responsibility of maintaining markings for mining claims and discovery points within them so that when the Government raises a question affecting title to the claims, its examiners may be able to inspect and examine the claims and discovery points..... | 367 |
| 12. When in a proceeding under section 5(c) of the act of July 23, 1955, the Government establishes a <i>prima facie</i> right to the surface resources of mining claims located for cinnabar by evidence that | |

MINING CLAIMS—Continued

DISCOVERY—Continued

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| Government examiners found no cinnabar in any of the workings that could be examined and sampled so far as the examiners could ascertain from advice by the mining claimant's representatives and from their inspection of the claims hampered by insufficient markings of the claims, evidence by the claimant was insufficient to sustain its burden of proving with a preponderance of the evidence a discovery on each claim where it simply showed that conditions might be favorable for the formation of cinnabar, and that some cinnabar ore was found in the past, but which primarily shows that further exploration and development of the claims to establish the locus of ore-carrying veins has been recommended by claimant's mining engineer consultants, and there is no probative evidence establishing the existence of ore bodies of sufficient value that would justify an expectation that a profitable mine might be developed. | 368 |
| 13. A placer mining claim is properly declared null and void and a patent application rejected when there have not been found on the claim minerals of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, the only mineral found being fine gold of very little value | 522 |
| 14. Labor costs are properly a factor to be considered in determining whether a discovery has been made pursuant to the prudent man rule | 522 |

HEARINGS

- | | |
|--|-----|
| 1. A request to reopen a hearing proceeding in a contest against a mining claim to produce further evidence will be denied where there is no showing that further evidence of a discovery will be produced. | 224 |
| 2. There is no basis for ruling that a hearing examiner in a proceeding to determine surface rights to mining claims under the act of July 23, 1955, was personally prejudiced against the mining claimant and that the claimant was denied any rights, where a motion for a change of examiner filed under section 7 of the Administrative Procedure Act was not timely filed and the accompanying affidavit alleging bias simply asserted that the examiner had never decided a case in favor of mining claimants in Oregon, since such an assertion is insufficient to show bias by the examiner against the particular claimant, and further where there is nothing in the record showing any evidence of bias or prejudice by the examiner. | 367 |

LANDS SUBJECT TO

- | | |
|---|----|
| 1. When a small tract application is filed, a mining claim is subsequently located on the same land, and the land is then classified as chiefly valuable for small tract purposes, the classification relates back to the time of the filing of the small tract application and the subsequent mineral location becomes invalid upon allowance of the application | 21 |
| 2. The Secretary is under no obligation to issue regulations providing for mineral location of mineral deposits reserved from disposition under the Small Tract Act. | 21 |

MINING CLAIMS—Continued

LOCATION

Page

1. When two or more persons participate in the location of a mining claim, a tenancy in common arises and each locator has the same rights in respect to his share as a tenant in severalty, but he holds his interest independently of the other and may transfer, devise or encumber it separately without the consent of the other co-tenants ----- 314
2. Not only must a mining claimant properly mark mining claims on the ground to have a valid location, but the claimant also bears the responsibility of maintaining markings for mining claims and discovery points within them so that when the Government raises a question affecting title to the claim, its examiners may be able to inspect and examine the claims and discovery points ----- 367

PATENT

1. When in a direct proceeding against a mining claim it is found that no discovery has been made, the claim cannot survive as a valid claim even though the decision determining that no discovery has been made merely rejects the patent application ----- 212
2. The 60-day period of publication required by section 2325 of the Revised Statutes on application for mineral patent is complete when the notice has been inserted in nine successive issues of a weekly newspaper and the full statutory period has elapsed ----- 404
3. Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered unless filed within the required time ----- 404
4. An adverse claim filed out of time, and subsequent judicial proceedings based thereon but not begun within the period prescribed by Rev. Stat. secs. 2325 and 2326, do not preclude the allowance of a mineral entry, nor does the pendency of such proceedings bar the issuance of a patent on such entry ----- 404
5. A protest against allowance of an application for patent to a placer mining claim is properly dismissed where the protestant fails to show that the placer applicant has not complied with the requirements of the law for obtaining a patent ----- 405
6. A placer mining claim is properly declared null and void and a patent application rejected when there have not been found on the claim minerals of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, the only mineral found being fine gold of very little value ----- 522

POSSESSORY RIGHT

1. Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered unless filed within the required time ----- 404

MINING CLAIMS—Continued**POSSESSORY RIGHT—Continued**

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| 2. An adverse claim filed out of time, and subsequent judicial proceedings based thereon but not begun within the period prescribed by Rev. Stat. secs. 2325 and 2326, do not preclude the allowance of a mineral entry, nor does the pendency of such proceedings bar the issuance of a patent on such entry----- | 404 |

POWER SITE LANDS

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|---|-----|
| 1. It is proper under the Mining Claims Rights Restoration Act of 1955 to prohibit placer mining operations on mining claims located on a segment of a river in a State park which has high recreational value for fishing where such operations have the potential for destroying or severely damaging the fish habitat and population although the limited operations presently contemplated by the claimants might not have an appreciable deleterious effect----- | 183 |
|---|-----|

SPECIAL ACTS

- | | |
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| 1. In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mineral claimant to the surface resources of his mining claim, the claim is properly subjected to the terms and limitations of section 4 of that act unless it is shown that there was a valid discovery within the meaning of the mining laws made within the limits of the claim prior to the date of the act----- | 142 |
| 2. It is proper under the Mining Claims Rights Restoration Act of 1955 to prohibit placer mining operations on mining claims located on a segment of a river in a State park which has high recreational value for fishing where such operations have the potential for destroying or severely damaging the fish habitat and population although the limited operations presently contemplated by the claimants might not have an appreciable deleterious effect----- | 183 |

SURFACE USES

- | | |
|--|-----|
| 1. In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mineral claimant to the surface resources of his mining claim, the claim is properly subjected to the terms and limitations of section 4 of that act unless it is shown that there was a valid discovery within the meaning of the mining laws made within the limits of the claim prior to the date of the act----- | 142 |
| 2. It is proper under the Mining Claims Rights Restoration Act of 1955 to prohibit placer mining operations on mining claims located on a segment of a river in a State park which has high recreational value for fishing where such operations have the potential for destroying or severely damaging the fish habitat and population although the limited operations presently contemplated by the claimants might not have an appreciable deleterious effect----- | 183 |
| 3. Although the alienage of a mining claimant may not provide a ground for collateral attack upon his possessory title by other claimants, it is a ground upon which the United States, as sovereign, may reject the alien's verified statement filed under the act of July 23, 1955, asserting surface rights to a mining claim, because the mining laws authorize the occupancy and purchase of public lands for their minerals only by United States citizens or those who have declared their intent to become citizens----- | 233 |

MINING CLAIMS—Continued**SURFACE USES—Continued**

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| 4. In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mining claimant to the surface resources of his claims in order to prevent the claims from being held subjected to the terms and limitations of section 4 of that act, it must be found that there was a discovery of valuable mineral deposits within the claims at the date of the act and that the claim is still valuable for the mineral deposits; after the Government presents evidence to show <i>prima facie</i> that there has been no discovery, the burden of proof shifts to the claimant to show by a preponderance of the evidence that there has been a discovery, and that the claims are valuable for their mineral deposits..... | 367 |
| 5. When in a proceeding under section 5(c) of the act of July 23, 1955, the Government establishes a <i>prima facie</i> right to the surface resources of mining claims located for cinnabar by evidence that Government examiners found no cinnabar in any of the workings that could be examined and sampled so far as the examiners could ascertain from advice by the mining claimant's representatives and from their inspection of the claims hampered by insufficient markings of the claims, evidence by the claimant was insufficient to sustain its burden of proving with a preponderance of the evidence a discovery on each claim where it simply showed that conditions might be favorable for the formation of cinnabar and that some cinnabar ore was found in the past, but which primarily shows that further exploration and development of the claims to establish the locus of ore-carrying veins has been recommended by claimant's mining engineer consultants, and their is no probative evidence establishing the existence of ore bodies of sufficient value that would justify an expectation that a profitable mine might be developed..... | 368 |

MINING OCCUPANCY ACT**GENERALLY**

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| 1. The act of October 23, 1962, does not apply to occupants of mining claims which were invalidated or relinquished prior to the date of enactment of that act..... | 436 |
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PRINCIPAL PLACE OF RESIDENCE

- | | |
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| 1. A cabin which is used only intermittently for vacations and other leisure periods, even though used at frequent intervals during most of the year, does not constitute "a principal place of residence" within the meaning of section 2 of the act of October 23, 1962, and an application for the conveyance of land based upon such use is properly rejected..... | 431 |
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QUALIFIED APPLICANT

- | | |
|---|-----|
| 1. A qualified applicant for conveyance of land under the act of October 23, 1962, must have been, on that date, a residential occupant-owner of valuable improvements in an unpatented mining claim which constituted for him a principal place of residence, and an application is properly rejected where practically no information is furnished with respect to residential occupancy prior to October 23, 1962..... | 432 |
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MINING OCCUPANCY ACT—Continued**QUALIFIED APPLICANT—Continued**

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| 2. The act of October 23, 1962, does not apply to occupants of mining claims which were invalidated or relinquished prior to the date of enactment of that act..... | 436 |

NAVIGABLE WATERS

- | | |
|---|-----|
| 1. Although a hearing is not required prior to a determination that a lake is nonnavigable and its bed public lands, a State which has heretofore not been informed of the factual basis for such a determination will be allowed to present such information as it desires supporting its view that the lake is navigable and the Director will then decide whether a hearing would be useful..... | 527 |
|---|-----|

NOTICE

- | | |
|--|-----|
| 1. The 60-day period of publication required by section 2325 of the Revised Statutes on application for mineral patent is complete when the notice has been inserted in nine successive issues of a weekly newspaper and the full statutory period has elapsed.... | 404 |
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OIL AND GAS

- | | |
|--|----|
| 1. The Secretary of the Interior has authority under the act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Union Pacific Railroad Company pursuant to the acts of July 1, 1862, and July 2, 1864, even though the lands traversed by the right-of-way were later granted to a State as school lands..... | 76 |
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OIL AND GAS LEASES**APPLICATIONS****Description**

- | | |
|---|-----|
| 1. Where a metes and bounds description in an oil and gas offer refers to land applied for as being in a river bed, but the tract described as plotted on an aerial photograph made part of the offer, the acreage applied for and the rental paid makes it plain that the land applied for covers some land formerly in the river bed but now fast land as the result of accretion, a lease issued pursuant to the offer covers the described accreted land as well as the land still remaining in the river bed..... | 251 |
| 2. A metes and bounds description of a tract of land in an oil and gas lease offer must be connected to an official corner of the public land surveys, which term includes township corners, section corners, quarter-section corners and meander corners and excludes quarter-quarter section corners and lot corners established by protraction, but an offer is not to be rejected for failure to tie the description to an official corner where the point of beginning for the description is a lot corner which is also a meander corner..... | 527 |

Drawings

- | | |
|---|-----|
| 1. An interest which an oil and gas lease applicant has in the offer of another applicant for the same land in a drawing of simultaneously filed noncompetitive lease offers which gives the first applicant, in effect, 1¼ chances of success in the drawing is inherently unfair whether or not there has been collusion or intent to deceive the Department, and the applicant's offer is properly disqualified from participation in the drawing..... | 486 |
|---|-----|

OIL AND GAS LEASES—Continued

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APPLICATIONS—Continued

Drawings—Continued

- 2. Where two offers for the same tract of land are filed during a simultaneous filing period by two corporations one of which owns 29 percent of the stock of the other, the offer of the first corporation is properly rejected because by reason of its stockholding its chances of success at the drawing are enhanced over those of other offerors; the offer of the second corporation is also properly rejected where it appears that officers of the first corporation are also officers of the second corporation and as officers are authorized to file offers and execute leases for the respective corporations----- 486

640-Acre Limitation

- 1. It is proper to reject an offer for an oil and gas lease embracing less than 640 acres where the oil and gas deposits in contiguous land were reserved to the United States in a patent of the contiguous land and remain available for leasing under the Mineral Leasing Act despite inclusion of the land in a reservoir right-of-way---- 153

Bona Fide Purchaser

- 1. An assignee of a lease, who may himself be a bona fide purchaser, loses the protection of the bona fide purchaser provisions of the Mineral Leasing Act if his agent who acts for him in procuring the assignment has knowledge which would disqualify the agent as a bona fide purchaser----- 287
- 2. The subassignee of an assignee of an oil and gas lease whose assignment has not been approved holds only an equitable interest in the lease and cannot be a bona fide purchaser----- 287

CANCELLATION

- 1. The Secretary has authority to cancel any lease erroneously issued whether the error was fraudulently induced or resulted from inadvertence by his own subordinates and whether or not there is a proceeding timely instituted by a competing applicant----- 287
- 2. The Departmental policy of sometimes not canceling a lease issued in violation of a provision of the oil and gas regulation where there are no intervening rights will not be applied to a lease issued to one who was involved in a plan designed to give others associated with him an unfair advantage in the drawing held to determine priority of filing----- 287

DESCRIPTION OF LAND

- 1. Where a metes and bounds description in an oil and gas offer refers to land applied for as being in a river bed, but the tract described as plotted on an aerial photograph made part of the offer, the acreage applied for and the rental paid makes it plain that the land applied for covers some land formerly in the river bed but not fast land as the result of accretion, a lease issued pursuant to the offer covers the described accreted land as well as the land still remaining in the river bed----- 251

DISCRETION TO LEASE

- 1. Whether small areas of public lands are to be leased for oil and gas development is to be determined according to the circumstances of each case----- 266

OIL AND GAS LEASES—Continued

EXTENSIONS

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1. Where a noncompetitive oil and gas lease is segregated during its primary term into separate leases by commitment of a portion of the original lease to a unit agreement, the holder of the non-unitized lease may elect to have his lease extended for a period of five years upon the expiration of its primary term rather than to accept the two-year extension granted to the segregated non-unitized lease, but once the election is made and the five-year extension is granted the lessee cannot rescind the election----- 217

LANDS SUBJECT TO

1. Where land is added by accretion to a surveyed lot of public land riparian to a nonnavigable body of water in which the United States has title to the bed to its medial line, an oil and gas lease of the upland lot described according to the plat of survey covers only the land in the original lot to the meander line----- 251
2. Where a surveyed lot of public land riparian to a nonnavigable body of water is leased according to the plat of survey, the area covered by the original lot remains in the lease even though part of the lot is later covered by water----- 251
3. Where a surveyed lot of public land riparian to a nonnavigable body of water is leased according to the plat of survey, the area covered by the original lot remains in the lease even though part of the lot is thereafter covered by water----- 266

PATENTED OR ENTERED LAND

1. Land patented with a reservation of the oil and gas deposits to the United States which is subsequently included within the outer limits of the boundary of a reservoir right-of-way thereafter granted is not affected by the right-of-way so as to make the oil and gas subject to disposal under the act of May 21, 1930, and the reserved deposits are subject to leasing only under the Mineral Leasing Act----- 153

RIGHTS-OF-WAY LEASES

1. Land patented with a reservation of the oil and gas deposits to the United States which is subsequently included within the outer limits of the boundary of a reservoir right-of-way thereafter granted is not affected by the right-of-way so as to make the oil and gas subject to disposal under the act of May 21, 1930, and the reserved deposits are subject to leasing only under the Mineral Leasing Act----- 153

ROYALTIES

1. A noncompetitive oil and gas lease in Alaska issued prior to July 3, 1958, and extended thereafter for a five-year term must pay royalty, when due, at the rate of 12½ percent the rate for leases covering similar lands in the other States of the United States.--- 217

PATENTS OF PUBLIC LANDS

EFFECT

1. Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte*, into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements ----- 157

PHOSPHATE LEASES AND PERMITS

PERMITS

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- 1. An application for a phosphate prospecting permit is properly rejected when the application is not accompanied by payment of the first year's rental as required by regulation----- 189

RENTALS

- 1. An application for a phosphate prospecting permit is properly rejected when the application is not accompanied by payment of the first year's rental as required by regulation----- 189

PUBLIC LANDS

CLASSIFICATION

- 1. Acquired lands under the administrative jurisdiction of a Federal agency other than the Bureau of Land Management are not subject to the land classification provisions of 43 CFR, Part 2410... 505

JURISDICTION OVER

- 1. The question whether the Department of the Interior may perform soil and moisture conservation operations pursuant to the Soil Conservation and Domestic Allotment Act of 1935 (49 Stat. 163, as amended; 16 U.S.C. secs. 590a-590e, 590f, 590g, 590h, 590i, 590j-590q (1958)), on a particular tract of land is answered by determining whether the Department has administrative jurisdiction over the tract. If the tract is under the Department's administrative jurisdiction, the Department may perform such soil and moisture operations on the tract, even though the benefits of such operations accrue in whole or in part to other lands not under the jurisdiction of the Department. Accordingly, the Department may conduct soil and moisture conservation operations on lands under its jurisdiction where the primary benefits from such operations accrue to lands in private ownership or to federally owned improvements which are under the jurisdiction of other Federal agencies. In addition, the Department of the Interior may perform soil and moisture conservation operations on lands not under the jurisdiction of the Department, provided that the operations have as their primary purpose the protection and benefit of lands which are under the jurisdiction of the Department----- 92

PUBLIC RECORDS

- 1. Reports of examinations of mining claims by Government examiners are generally considered as confidential intra-departmental communications and will not be made available to mining claimants; however, in an exceptional case where the Government flooded the land in a claim before initiation of a contest challenging the mineral character of the flooded land and there appears no obvious detriment to the public interest, the reports will be made available to the mining claimants----- 248
- 2. Where the request of an appellant for a copy of the record is not answered by inadvertence but the appellant makes not attempt to inspect the record in accordance with Departmental procedure, asks for no extension of time within which to file a statement of reasons for the appeal on the ground that the record has not been

PUBLIC RECORDS—Continued

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made available to him, and his attorney has been fully apprised in a Departmental decision in which he was counsel of a document in the record which he desires to have copies of, the failure to respond to his request for copies of the record is not prejudicial...

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PUBLIC SALES**PREFERENCE RIGHTS**

1. Where a preference-right claimant in a public sale, in compliance with the current departmental regulation, submitted with his preference-right bid an amount equal to the purchase price of the offered land plus the cost of publication of notice of the sale. It was necessary that he comply with the then-superseded procedure set forth in the regulation in effect at the date of the sale as neither the interests of the United States nor the rights of other parties were thereby adversely affected.....

514

RAILROAD GRANT LANDS

1. The Secretary of the Interior has authority under the act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Union Pacific Railroad Company pursuant to the acts of July 1, 1862, and July 2, 1864, even though the lands traversed by the right-of-way were later granted to a State as school lands.....

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RECLAMATION HOMESTEADS**GENERALLY**

1. Under the act of August 13, 1953, a reclamation homestead entryman whose farm unit is found to be insufficient to support a family is entitled to relinquish his entry and to make a lieu entry on the same or another reclamation project or to obtain an amendment of his entry by the addition of sufficient adjacent irrigable land to constitute a farm unit which will support a family, and he may have his residence, improvements, and cultivation on the original entry credited as performance of the requirements of the homestead and reclamation law on the lieu or amended entry.....
2. Where a reclamation homestead entryman relinquishes his entry and subsequently contracts to sell the improvements but reserves the right to farm the entry during the following crop season, he is not disqualified from making an exchange entry under the act of August 13, 1953.....
3. An entryman who first makes a proper entry in one reclamation project and then acquires another entry in a different project, both of which entries together have more than 160 irrigable acres, can dispel any possible objection to his first entry under the excess acreage provisions of the reclamation law by disposing of the second entry.....

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Cancellation

1. Where a reclamation homestead entryman has met all the residence, improvement, and cultivation requirements under the homestead laws and then relinquishes his entry and makes an exchange entry under the act of August 13, 1953, it is erroneous to cancel the lieu entry on the ground that he is not living on the entry and does not have a bona fide intent to make the entry his home.....

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RECLAMATION LANDS

GENERALLY

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|---|------------|
| 1. An entryman who first makes a proper entry in one reclamation project and then acquires another entry in a different project, both of which entries together have more than 160 irrigable acres, can dispel any possible objection to his first entry under the excess acreage provisions of the reclamation law by disposing of the second entry----- | Page
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EXCHANGE

- | | |
|---|----|
| 1. Under the act of August 13, 1953, a reclamation homestead entryman whose farm unit is found to be insufficient to support a family is entitled to relinquish his entry and to make a lieu entry on the same or another reclamation project or to obtain an amendment of his entry by the addition of sufficient adjacent irrigable land to constitute a farm unit which will support a family, and he may have his residence, improvements, and cultivation on the original entry credited as performance of the requirements of the homestead and reclamation law on the lieu or amended entry----- | 87 |
| 2. Where a reclamation homestead entryman relinquishes his entry and subsequently contracts to sell the improvements but reserves the right to farm the entry during the following crop season, he is not disqualified from making an exchange entry under the act of August 13, 1953----- | 87 |
| 3. Where a reclamation homestead entryman has met all the residence, improvement, and cultivation requirements under the homestead laws and then relinquishes his entry and makes an exchange entry under the act of August 13, 1953, it is erroneous to cancel the lieu entry on the ground that he is not living on the entry and does not have a bona fide intent to make the entry his home----- | 87 |

REGULATIONS

APPLICABILITY

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| 1. Where a preference-right claimant in a public sale, in compliance with the current departmental regulation, submitted with his preference-right bid an amount equal to the purchase price of the offered land plus the cost of publication of notice of the sale, it was not necessary that he comply with the then-superseded procedure set forth in the regulation in effect at the date of the sale as neither the interests of the United States nor the rights of other parties were thereby adversely affected----- | 514 |
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REORGANIZATION PLANS

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| 1. Section 6 of Reorganization Plan No. 4, effective June 30, 1940 (5 F.R. 2421; 54 Stat. 1234, 1235; note following 5 U.S.C. sec. 133t (1958)), transferred to the Department of the Interior the full power which was formerly vested in the Department of Agriculture, pursuant to the Soil Conservation and Domestic Allotment Act of 1935 (49 Stat. 163, as amended; 16 U.S.C. secs. 590a-590e, 590f, 590g, 590h, 590i, 590j-590q (1958)), with respect to lands otherwise under the jurisdiction of the Department of the Interior. The question whether the Department of the Interior may perform soil and moisture conservation operations pursuant to the Soil Conservation and Domestic Allotment Act of 1935 (49 Stat. 163, as |
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REORGANIZATION PLANS—Continued

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amended; 16 U.S.C. secs. 590a-590e, 590f, 590g, 590h, 590i, 590j-590q (1958)), on a particular tract of land is answered by determining whether the Department has administrative jurisdiction over the tract. If the tract is under the Department's administrative jurisdiction, the Department may perform such soil and moisture operations on the tract, even though the benefits of such operations accrue in whole or in part to other lands not under the jurisdiction of the Department. Accordingly, the Department may conduct soil and moisture conservation operations on lands under its jurisdiction where the primary benefits from such operations accrue to lands in private ownership or to federally owned improvements which are under the jurisdiction of other Federal agencies -----

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RIGHTS-OF-WAY**ACT OF MARCH 3, 1891**

1. The grant of a right-of-way under the act of March 3, 1891, is a grant through the public lands of the United States and does not attach to the oil and gas deposits reserved to the United States in land patented prior to the grant of the right-of-way-----

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NATURE OF INTEREST GRANTED

1. The Secretary of the Interior has authority under the act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Union Pacific Railroad Company pursuant to the acts of July 1, 1862, and July 2, 1864, even though the lands traversed by the right-of-way were later granted to a State as school lands-----

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RULES OF PRACTICE**GENERALLY**

1. Where the request of an appellant for a copy of the record is not answered by inadvertence but the appellant makes no attempt to inspect the record in accordance with Departmental procedure, asks for no extension of time within which to file a statement of reasons for the appeal on the ground that the record has not been made available to him, and his attorney has been fully apprised in a Departmental decision in which he was counsel of a document in the record which he desires to have copies of, the failure to respond to his request for copies of the record is not prejudicial -----

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APPEALS**Generally**

1. A motion for reconsideration will be denied where representations presented are not persuasive of error by the Board, and the other matters advanced were fully considered by the Board in its original decision-----
2. A decision holding a desert land entry for cancellation will be vacated and the case remanded for further proceedings where during the pendency of a petition for reconsideration the Department adopts a policy concerning similar entries permitting them to proceed to patent in certain circumstances under principles of equitable adjudication-----

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RULES OF PRACTICE—Continued

APPEALS

Dismissal

- | | Page |
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| 1. Under construction contracts incorporating the provisions of the Davis-Bacon Act covering minimum wage rates, where the principal disputes concern the question of whether or not work was performed "directly upon the site of the work" as provided in the Act, and where current interpretations of the Department of Labor and the Comptroller General are in conflict, the Board will decline to exercise jurisdiction over the appeal, pursuant to the doctrine of <i>forum non conveniens</i> , and the appeal will be dismissed ----- | 269 |
| 2. An appeal will be dismissed for lack of jurisdiction as to claims of the contractor for expenses of delays allegedly caused by the Government, where such delays are not compensable under the provisions of the contract ----- | 415 |

Service on Adverse Party

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| 1. In contest proceedings initiated under Circular No. 460 and the Rules of Practice in effect in the early thirties, service of notice of contest by registered mail was proper and effective and may be proved by a post office return receipt under the following circumstances: (1) Where the signature of the person signing the post office return receipt is identical with the name of the mining claimant; (2) Where the signature of the addressee is consistent with the surname and given names or initials of the claimant; (3) Where the surname of the signature on the return receipt is different than the name of the locator but the record shows that the claimant has married and that she has signed with her married name; and (4) Where the receipt is signed by an agent of the addressee and there is written evidence of the agent's authority to sign for the addressee ----- | 313 |
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| 5. Where the Navajo Tribe of Indians has protested against issuance of a patent to the State of Utah under the act of June 21, 1934, to numbered sections which the State claims as having vested in it pursuant to the grant for school purposes under its Enabling Act and the Tribe has requested a hearing alleging that the vesting of title in the State under the grant was precluded by occupancy of the sections by Navajo Indians and that title is now in the Tribe pursuant to acts of Congress, a hearing will be ordered | |

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1. There is no basis for ruling that a hearing examiner in a proceeding to determine surface rights to mining claims under the act of July 23, 1955, was personally prejudiced against the mining claimant and that the claimant was denied any rights, where a motion for a change of examiner filed under section 7 of the Administrative Procedure Act was not timely filed and the accompanying affidavit alleging bias simply asserted that the examiner had never decided a case in favor of mining claimants in Oregon, since such an assertion is insufficient to show bias by the examiner against the particular claimant, and further where there is nothing in the record showing any evidence of bias or prejudice by the examiner.----- 367

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1. Although the alienage of a mining claimant may not provide a ground for collateral attack upon his possessory title by other claimants, it is a ground upon which the United States, as sovereign, may reject the alien's verified statement filed under the act of July 23, 1955, asserting surface rights to a mining claim, because the mining laws authorize the occupancy and purchase of public lands for their minerals only by United States citizens or those who have declared their intent to become citizens-----

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