

UNITED STATES DEPARTMENT OF THE INTERIOR

Walter J. Hickel, *Secretary*

Mitchell Melich, *Solicitor*

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

Edited by
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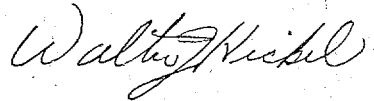
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1969 to December 31, 1969. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Walter J. Hickel served as Secretary of the Interior during the period covered by this volume; Mr. Russell E. Train served as Under Secretary; Messrs. Hollis M. Dole, Carl L. Klein, Harrison Loesch, James R. Smith and Dr. Leslie L. Glasgow served as Assistant Secretaries of the Interior; Mr. Lawrence H. Dunn served as Assistant Secretary for Administration; Mr. Mitchell Melich served as Solicitor of the Department of the Interior and Mr. Raymond C. Coulter as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "76 I.D."

A handwritten signature in cursive script, reading "Walter J. Hickel".

Secretary of the Interior

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ERRATA

See also 75 I.D. No. 8—Page 256, Paragraph 2, Line 4—change the word *providing* to *proving*.

Page 27—Paragraph 4, Line 2—it was extensively revised 30 F.R. 9009, should appear as 20.

Page 73—Syllabus for *United States v. Lloyd W. Booth*, A-30994 (May 27, 1969), Homesteads (Ordinary) : Resident, should appear as follows :

The homestead law requires an entryman in good faith to establish his home on his entry, and, although it does not prohibit him from maintaining a second residence elsewhere, the fact that such a second residence is maintained throughout the period of claimed residence on the homestead entry raises a rebuttable presumption that the entryman has not in good faith established his residence upon the entry; where residence on the entry is claimed for only seven months during the first entry year, the minimum period required after credit is allowed for military service, where the entryman maintained "living quarters" elsewhere which constituted his residence both before and after his sojourn at the entry and which he and his family occupied intermittently throughout that period, where the entryman and his family stayed only five or six nights at the entry during one of the seven months and spent only weekends there during another, commuting daily between the homestead entry and town during periods when they slept at the entry, and where no attempt was made to reside on the homestead after the first entry year or to improve the dwelling place to make it suitable as a permanent habitation, but the entryman did purchase a home elsewhere during the life of the entry, it must be concluded that the entryman intended only to satisfy the minimum requirements of the law rather than to establish his home on the entry, and the entry is properly canceled for failure to meet the residence requirements of the law.

Page 128—Paragraph 1, Line 7 Bonneville Project Act of Aug. 26, 1937, should read August 20, 1937.

Page 198—Paragraph 1, Line 5 from the bottom after the word *predecessor*. Delete period insert comma.

Page 199—Paragraph 1, Line 14 insert comma after the words *it found*.

Page 290—Paragraph 1, Line 2 delete comma after word *decision*.

Page 296—Paragraph 2 (8 point type) Line 4 delete *was provided* and insert *as provided*.

Page 301—Item (7) should read Barrows was known to the other operators, in the years in question, to be *in* * * *.

Page 303—Line 14 case *was* a proper standard, should read case *as* a proper standard.

Page 306—Paragraph 1, Line 18, Legal Citation corrected to read as *United States v. Joe H. York and Jemima York*.

Page 307—Line 14 should read *of observations were so great that any substantial removals of material would have been noticed by one or more of them*.

Page 309—Paragraph 1, Line 3 should read for both the stone and the sand *and gravel sales*.

Page 314—Paragraph 4 (8 point type), Line 9 should read for *the* acquisition; Line 11 transpose 948 to 984.

Page 318—Paragraph 2 (8 point type), Line 3 should read the necessity of *there* being a valid discovery on the claim.

Page 323—Line 2 the word is *bona fides*; Paragraph 5, Line 2 should read .5 cents; line 4 should read .6 cents; and Paragraph 6, line 6 should read .5 cents.

Page 324—Line 1, delete 0.5 add .5 cents.

Page 327—Paragraph 3, Line 3, the formula should read $Q = MRC^4 S$.

M

Page 332—Paragraph 3, Line 3 *California*.

Page 336—Paragraph 2, Line 4 should read "Motion to Assume Supervisory Jurisdiction,"

Page 338—Footnote 8, Line 5, the word is "*dolomite*."

Page 343—Paragraph 3, Line 7, should read *Is it* possible for a lower * * * *.

Page 344—Paragraph 1, Line 6, should read *supplemental* endeavor.

Page 354—Paragraph 1, should read Thus, *persons*.

Page 355—Footnote 3, Line 2, should read to citizenship by the *tribal* authorities, * * *

Page 372—Subheading should read *Subcontractors and Suppliers*.

Page 390—Subheading, Drawings and Headnote should follow Topical Index Heading, Description to Lease on p. 391.

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

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

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

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

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

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

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

Shell Oil Company v. Udall, Civil No. 216-67. Stipulated dismissal, August 19, 1968.

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- Florida Railway and Navigation Co. v. Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.
- 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.
- 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.
- Galliber, 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.
- Glassford, A. W. *et al.*, 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.
- Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy *et al. v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Gramplan 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.
- Grinnel *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- *Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R. R. Rouseau, 47 L.D. 590).
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
- 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, 1973, 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. 698.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413).
- Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.
- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
- Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman *et al. v.* Letroadec's Heirs *et al.* (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
- Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Heirs of Vradenburg *et al. v.* Orr *et al.* (25 L.D. 323); overruled, 38 L.D. 253.
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (See 44 L.D. 112 and 49 L.D. 484).

- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275.
- Herman *v.* Chase *et al.* (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
- Hickey, M. A. *et al.* (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696); decided April 26, 1934; overruled in part, 55 I.D. 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624); modified, 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.
- 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.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.
- Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.
- Jacks *v.* Belard *et al.* (29 L.D. 369); vacated, 30 L.D. 345.
- Jackson Oil Co. *v.* Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.
- Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
- Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429.
- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.
- Kemper *v.* St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.

- Kilner, Harold E. *et al.* (A-21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
- King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
- Kinsinger *v.* Peck (11 L.D. 202) (See 39 L.D. 162, 225).
- Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B. *et al.* (30 L.D. 227); overruled, 31 L.D. 64.
- Knight *v.* Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242.
- Kniskern *v.* Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B. *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Layne and Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with Schweigert, Inc. *v.* United States, Court of Claims No. 26-66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA-534-12-65 (Mar. 29, 1968).
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 389.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Lindermann *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.
- Lonnergran *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 L.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.

- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472).
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511; overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather *et al.* v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (See 35 L.D. 399).
- McFadden *et al.* v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).
- McMicken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al.* v. State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck v. Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee v. Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer v. Brown (15 L.D. 307) (See 39 L.D. 162, 225).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- 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 *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan, Henry S. *et al.* (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22.
- 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 I.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- *Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 224; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265, 33 L.D. 426; 44 L.D. 218; 177 U.S. 435).
- Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. *v.* Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.
- Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.
- Northern Pacific R.R. Co. *v.* Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127.
- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).
- Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.

- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.
- Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguish, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372.
- Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397) (See 58 I.D. 158, 160).
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, 54 I.D. 517 (1934); overruled, M-36410 (Feb. 11, 1957).
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M-36410).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
- Opinion of Solicitor, August 31, 1943 (M-33183); distinguished, 58 I.D. 726, 729.
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.
- Opinion of Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57.
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388.
- Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).
- Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366.
- Opinion of Solicitor, M-36456 (Nov. 21, 1957), will not be followed to the extent that it conflicts with these views. M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14.
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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

SOUTHERN PACIFIC COMPANY

A-30948

Decided January 15, 1969

Railroad Grant Lands

A railroad company asserting a right to patent on the ground that the land for which patent is sought was excepted from a release filed pursuant to section 321 (b) of the Transportation Act of 1940 must show that the land was sold prior to September 18, 1940, to an innocent purchaser for value and that the application for patent is for the benefit of a grantee now entitled to the protection afforded an innocent purchaser for value; it is not enough to show that land was sold by a railroad company for valuable consideration where it is also shown that six weeks after the conveyance the railroad reacquired the land, where the railroad company does not claim to be an innocent purchaser for value, and where it appears that, prior to execution of a release, the railroad company was entitled to a conveyance of the land from the United States irrespective of the effect of the deeds executed in connection with the earlier sale.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Southern Pacific Company has appealed to the Secretary of the Interior from a decision dated January 23, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Sacramento, California, land office rejecting its application, Sacramento 351, for patent to the E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 9, T. 26 N., R. 3 E., M.D.M., Lassen National Forest, California.

Appellant, as successor in interest of the Central Pacific Railroad Company, filed its application on January 12, 1967, pursuant to the act of July 1, 1862, 12 Stat. 489, as amended by the act of July 2, 1864, 13 Stat. 356, and section 321 (b), Part II, Title III, of the Transportation

76 I.D. Nos. 1 & 2

Act of 1940, as amended, 49 U.S.C. sec. 65(b) (1964),¹ alleging therein that the land applied for was sold by the Central Pacific Railroad Company to Sierra Lumber Company for \$5 per acre cash. In support of its application appellant submitted a copy of a deed dated January 4, 1889, from Central Pacific Railroad Company to Sierra Lumber Company and copies of deeds from Sierra Lumber Company to Central Pacific Railroad Company dated February 19, 1889, from Central Pacific Railroad Company to Central Pacific Railway Company dated July 29, 1899, and from Central Pacific Railway Company to Southern Pacific Land Company dated September 2, 1930.

By a decision dated July 28, 1967, the land office rejected appellant's application upon determining that the request for patent did not come within the saving clause of the Transportation Act of 1940. The application stated, the land office noted, that it was filed for the benefit of the Southern Pacific Company, but the Transportation Act of 1940, the land office held, was intended for the benefit of innocent purchasers for value from the railroad companies and did not provide that a patent would be issued for the benefit of a railroad company which had reacquired land from a party to whom it had conveyed the same land.

In appealing to the Director, Bureau of Land Management, from the rejection of its application, appellant asserted that the sale of the land in question to the Sierra Lumber Company in 1889 was to an innocent purchaser for value and that the fact that the land had been sold to an innocent purchaser for value could not be affected by a subsequent reconveyance to the railroad company. On October 16, 1940, it argued, Central Pacific Railway Company filed a release with the Secretary of the Interior pursuant to the Transportation Act of 1940, which release expressly provided that it does not embrace the land sold by Central Pacific Railway Company to innocent purchasers

¹ Section 321 (b), Part II, Title III, of the Transportation Act of 1940 provided certain rate benefits for those land grant railroads which released within a specified period any claims to lands which they might have against the United States. The saving clause of the statute provides in part that:

"* * * Nothing in this section shall be construed * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *"

The record shows that on October 16, 1940, the Central Pacific Railway Company executed a release in accordance with the provisions of that act "and the rules and regulations issued thereunder by the Secretary of the Interior" whereby it relinquished, remised and quitclaimed to the United States "any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted or claimed should have been granted by any act of the Congress to the CENTRAL PACIFIC RAILWAY COMPANY or to any predecessor in interest in aid of the construction of any portion of its railroad," excepting from the release "the rights of way or station grounds of this Company, lands sold by the Company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the Company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the Company or any predecessor in interest in aid of the construction of its railroad."

January 15, 1969

for value prior to September 18, 1940, and which was accompanied by a list of lands falling into that category, which list included the land in question.

In affirming the action of the land office, the Office of Appeals and Hearings observed that:

As applied to the facts of this case Sierra Lumber may have been an innocent purchaser for value when it took a quitclaim deed for these lands from the railroad grantee for \$400. However, for the purposes of section 321(b) the effect of this conveyance was immediately canceled when the railroad reacquired the rights to the lands 6 weeks later, and the lands were restored to their original status. Although the Central Pacific Railroad Company may have acted in good faith and paid valuable consideration, it certainly was chargeable with notice of the true status of the lands reconveyed. The railroad must have known that it had not yet received a patent from the United States for these lands. It could not reacquire better title than it originally conveyed to Sierra Lumber. The railroad merely resumed its original position as grantee as though these transactions had never occurred. Therefore, under these circumstances the railroad was not an innocent purchaser, nor could it pass the rights of such status to its successors.

The language of section 321(b) indicates an intent to protect those who innocently purchase unpatented public lands from grantee railroads by allowing the Secretary of the Interior to convey title to such lands to the railroad for the relief and benefit of such bonafide purchasers. It was not intended to operate for the benefit of the grantee railroad itself, or its successors, where the railroad subsequently reacquired the lands from its purchaser. In this situation the need to protect Sierra Lumber as an innocent purchaser was negated long before the enactment of the saving provisions of the Transportation Act of 1940. Therefore, a subsequent purchaser from the grantee or its successor must establish evidence of an independent qualifying sale prior to 1940 in order to claim the benefits of section 321(b). * * *

In support of its conclusions the Office of Appeals and Hearings recited the qualifications of an "innocent purchaser for value" as set forth in *United States v. Central Pacific Railroad Co.*, 84 Fed. 218 (C.C.N.D. Calif. 1898), and in *Santa Fe Pacific Railroad Company*, 58 I.D. 596 (1944).

In its present appeal, appellant points out what it views as material facts distinguishing the cases cited by the Office of Appeals and Hearings from the present case. It argues that:

The fact that the land described in this application was sold by Central Pacific Railroad Company to the Sierra Lumber Company for its fair value is sufficient evidence of compliance with the provisions of the Transportation Act of 1940 and regulations issued thereunder to authorize the requested issuance of a patent covering such land for the benefit of Southern Pacific Land Company. There is no requirement under the 1940 Transportation Act or the regulations issued thereunder that evidence be furnished that subsequent conveyances in the chain of title, after the initial conveyance by a carrier, have been made to innocent purchasers for value. Valid transfers in the chain of title to such property interest may be made by succession under state inheritance statutes, devises in wills and gift deeds, in each such case there is no value paid for the transfer of the prop-

erty interest. It is immaterial, for purposes of the savings clause in the 1940 Transportation Act, whether or not the reconveyance from Sierra Lumber Company to Central Pacific Railroad Company and subsequent conveyances in Southern Pacific Land Company's chain of title were made for value.

We cannot accept this as a correct statement of the law. While appellant denies that the cases cited by the Office of Appeals and Hearings are in point, it has cited no decisions tending to support its own position, and we have found none that it may have overlooked.

The precise question presented here does not appear to have arisen before. However, under principles that have been long established, we think it is clear that appellant has failed to show that it is entitled to the patent which it seeks.

Appellant attempts to distinguish the present case from that of the *Santa Fe Pacific Railroad Company*, *supra*, cited by the Bureau, upon the fact that in the latter the applicant railroad company did not include the land applied for in its list of lands sold prior to enactment of the Transportation Act, whereas appellant's predecessor did expressly list the land now sought. Appellant misconstrues the Department's decision in the *Santa Fe* case, at the same time according the list of excepted lands prepared by a railroad company in connection with the filing of a release a legal effect which it does not have.

In the *Santa Fe* case the Department pointed out that the railroad company, by filing with its release a list of lands sold prior to the effective date of the Transportation Act, recognized that the saving clause of section 321(b) does not operate automatically without any designation of land to be excepted from the release and that the railroad company had not included the land there in question in its list of excepted lands. The inference was that the land applied for had not been listed because the railroad did not suppose that it came within the scope of the saving clause of the statute. The Department did not hold, however, that the failure of a railroad company to include a tract of land in its list of lands excepted from a release would preclude the issuance of patent to that land if it were found that the land belonged to one of the categories of lands described in the saving clause of the statute. Rather, the critical deficiency in that case was the railroad company's failure to show that the Greene Cattle Company, the purported beneficiary of the application, was an innocent purchaser under the act. While the facts differ here, the problem is essentially the same.

We cannot attach any legal significance to the fact that appellant's predecessor included the land presently in question in its list of lands sold to innocent purchasers prior to September 18, 1940. The Transportation Act itself specifies the circumstances which except land from a release filed by a railroad company under the act and commits to the Secretary of the Interior the responsibility for determining where

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those circumstances exist. If the specified conditions are not found, the inclusion of a tract of land by a railroad company in its list of excepted lands cannot except that land from the effect of a release. In other words, the list of sold lands submitted with the release filed in 1940 was for informational purposes only.

Appellant does not purport to be an innocent purchaser for value.² Rather, it has attempted to sever the protection afforded by the saving clause of the statute from the party to be protected. In the view of appellant, if land in a railroad grant was sold by the railroad company prior to September 18, 1940, for value, this in itself is sufficient to invoke the saving clause of the statute notwithstanding that the sale may have been rescinded or otherwise nullified by a transaction which left both parties to the sale exactly as they were before the sale. This view, we think, is unsupportable and is inconsistent with the obvious intent of the act.

The saving clause of the statute can be invoked in this case only if the land in question was sold by the grantee railroad company prior to September 18, 1940, to an innocent purchaser for value. If such disposal of the land has been made, the railroad company, of course, has been fully compensated and has received all of the benefits to which it was entitled under the grant from the United States. How then can it now say that it is entitled to the land itself as well? If, on the other hand, the railroad company has not (in fact, been compensated for the land, obviously, there has been no sale to a purchaser for value, and there is no basis for invoking the saving clause of the statute.

We do not find it necessary to determine whether or not, in any circumstances, appellant could have succeeded to the rights of an innocent purchaser of the land and thereby obtained a right exempt from the

² The term "innocent purchases for value," as used in the Transportation Act, must be understood in its ordinary commercial sense, and it has long been understood by the courts to describe one who purchases in good faith and for value. *Chapman v. Santa Fe Pac. R. Co.*, 198 F. 2d 498, 502 (D.C. Cir. 1951). It is essentially equivalent in meaning to "bona fide purchaser." See *Words and Phrases*, Innocent Purchasers for Value.

It is well settled that one who claims protection as a bona fide purchaser must be a purchaser for value and that the burden is upon him to show that he has paid value. See 46 Am. Jur., Sales, § 465. It is equally settled that one who himself qualifies as a bona fide purchaser is entitled to protection as such notwithstanding any lack of qualifications on the part of his immediate grantor, the original purchaser, or any intervening purchaser. 73 C.J.S. Public Lands § 167; 92 C.J.S. Vendor & Purchaser § 321. This latter principle has been expressly applied in cases arising under the act of March 3, 1887, as amended, 43 U.S.C. §§ 894-899 (1964), and involving purchasers of lands in canceled railroad grants. See Instructions, 11 L.D. 229 (1890); *Union Pacific Ry. Co. et al. v. McKinley*, 14 L.D. 237 (1892); *Union Colony v. Fulmele et al.*, 16 L.D. 273 (1893); *Sethman v. Clise*, 17 L.D. 307 (1893); *Ray et al. v. Gross*, 27 L.D. 707 (1898). It is clear, however, that the protection of the statute could be invoked only by, or for the benefit of, a bona fide purchaser. See *United States v. Southern Pacific R. R. Co.*, 184 U.S. 49, 60 (1902), in which relief was denied to one who entered into an agreement to purchase land from a party not entitled to invoke the protection of the 1887 act for the purpose of securing for that party the protection which it could not seek in its own right.

effect of its predecessor's release. We find only that a railroad cannot invoke the saving clause of section 321 without showing that application for patent is made on behalf of one who can assert the rights of an innocent purchaser for value.³ In the absence of any evidence that appellant is an innocent purchaser for value of the land applied for, appellant's application was properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348, the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES

v.

WARREN E. WURTS and JAMES E. HARMON

A-30945

Decided January 23, 1969

Rules of Practice: Appeals: Timely Filing

An appeal to the Secretary of the Interior must be dismissed where the notice of appeal was not transmitted until after the expiration of the 30-day period in which it was required to be filed.

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

In order to be "valuable" within the meaning of the mining laws, a deposit of limestone must be marketable, and where it is acknowledged that there is

³ Appellant's comparison of its position in this case with that of a donee or devisee who gives no consideration for the conveyance of land is not apt.

A donee or devisee takes whatever interest in land his donor or deviser may have to convey, subject to any infirmities in the title of his benefactor. We do not question the right of a donee to succeed to the rights of a donor who was an innocent purchaser for value. However, by definition a donee lacks the characteristics of an innocent purchaser for value, and if his donor did not have good title to land, the donee can have no better.

Appellant's position is entirely different. Prior to October 16, 1940, when the Central Pacific Railway Company filed its release, the railroad company claimed title to the E½NW¼ sec. 9, T. 26 N., R. 3 E., by virtue of a grant from the United States. Its right to that land was in no degree contingent upon the validity of the title conveyed to Sierra Lumber Company in January 1889. Had that deed been absolutely void, the railroad's right to the land in 1940 would have been exactly the same as it would have been if both the deed to Sierra and the subsequent deed back to the railroad were effective conveyances of the land.

JAMES E. HARMON

January 23, 1969

no market for the limestone found on a mining claim, even though it may be equal in quality to limestone which is marketed, the exposure of the limestone does not constitute the discovery of a valuable mineral deposit.

Mining Claims: Determination of Validity

In order to demonstrate the validity of a mining claim it must be shown as a present fact that the claim is valuable for mining purposes, and if that fact is not established by the evidence, the claim is properly declared null and void; it is immaterial that the claim may have been successfully mined at some time in the past or that at some time in the future, depending upon increased mineral prices or improved mining technology, it may become valuable for mining purposes.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Warren E. Wurts and James E. Harmon have separately appealed to the Secretary of the Interior from a decision dated January 3, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner denying their motion to dismiss a contest complaint and declaring the Reliance and Sunshine lode mining claims in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 15, T. 4 S., R. 92 W., 6th P.M., Garfield County, Colorado, to be invalid.

The appeal of Wurts must be dismissed because his notice of appeal was not transmitted until after the expiration of the 30-day period in which a notice of appeal was required to be filed. The Bureau's decision was served on his attorneys on January 18, 1968. A notice of appeal was therefore required to be filed or at least mailed not later than February 19, 1968, the 30th day, February 17, falling on a Saturday. The notice of appeal was not mailed until February 20, 1968. Therefore the appeal cannot be considered and the case must be closed as to Wurts. 43 CFR 1844.2, 1840.0-6(b).

This action, however, does not substantially prejudice Wurts in the circumstances of this case. As noted later, the two claims involved here overlap, the issues as to both are practically identical, and the testimony of each claimant was adopted by the other (Tr. 7).¹ Therefore the same ruling would be made as to Wurts' claim as is being made on Harmon's claim.

The record shows that the Sunshine lode claim was located on February 20, 1941, by L. Harmon, father of appellant James E. Harmon (Ex. B; Tr. 4, 22-23). It also shows that the Reliance lode claim was located by appellant Wurts and others on April 3, 1964 (Ex. H; Tr. 40-41). The land embraced in the claims was closed to mining location

¹References in this decision to the transcript of hearing (Tr.) are references to the hearing held on September 27, 1966. A brief earlier hearing involving only the matter of a continuance was held on August 17, 1966.

on August 14, 1964, by its inclusion in an area classified for public recreational use pursuant to the Recreation and Public Purposes Act of June 14, 1926, as amended, 43 U.S.C. sec. 869 *et seq.* (1964) (Ex. 5). Subsequently, substantial quantities of limestone were quarried from the claims by a contractor on a reclamation project for use as riprap, or fill material, in the construction of a nearby dam (Tr. 59-60, 70).

On December 23, 1965, a complaint was filed in the Colorado land office in which it was charged that both claims were invalid for the reasons that:

a. No mineral deposits such as are deemed valuable mineral deposits within the meaning of the mining laws have been discovered within the limits of the claims.

b. The claims are located on land that has been withdrawn from appropriation under the mining laws since August 17, 1964, and no valuable mineral deposits were discovered within the limits of the claims prior to said date.

A hearing was held at Glenwood Springs, Colorado, on September 27, 1966, for the purpose of receiving evidence bearing upon the merits of these charges.

It appears that the Reliance and Sunshine claims are overlapping, that mine workings on the claims are in an area common to both claims, and that the rights claimed by the respective appellants are adverse to each other as well as to the title of the Government (Tr. 8, 99; Ex. 1).² However, the rights of appellants, as against each other, were not at issue in this proceeding, the dispute before the Department having been limited to the question of whether or not either appellant could demonstrate a discovery which would vest in someone a claim to the land superior to the title of the United States. For purposes of this proceeding appellants adopted each other's testimony, taking the position that proof of a discovery by either was sufficient (Tr. 7-8).

In a decision dated April 18, 1967, the hearing examiner denied a motion, made by appellants during the course of the hearing, to dismiss the complaint for failure of the Government to make a prima facie case showing the claims to be invalid. After summarizing the testimony presented at the hearing he explained that it is not necessary for a mining claimant, in order to show a discovery, to demonstrate that a claim can be worked at a profit but that the mineral value which sustains a discovery must be such that with actual mining operations under proper management a profitable mine may reasonably be expected to result, that it is not enough to show that sufficient mineralization has been found to justify further exploration or to raise a hope or expectation that values will increase at depth but that exploratory

² The Sunshine claim is allegedly valuable for the lead, zinc, gold and silver occurring in veins on the claim, while the Reliance claim apparently was located primarily for the limestone occurring on the claim, as well as for lead, silver and gold (Tr. 33, 41, 108-109).

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work must show that minerals exist in such quantities and of such values that there is a reasonable prospect of success in developing a paying mine, that evidence of the removal and profitable sale of ore from a mine at some time in the past is insufficient to demonstrate a discovery if the land can no longer meet the test of a discovery, and that, where land has been closed to mining location, it must be shown that a discovery was made while the land was open to location. From the evidence presented the hearing examiner found that there was some mineral enrichment on the claims but not in significant amounts, that the costs of mining, transporting and processing the metal-bearing ore would exceed the value of its mineral content, that the claimants admitted that there was not a market for the limestone on the claims, and that the claimants' case rested upon a hope that further exploration would uncover greater values than are now known which would justify a mining venture, from which he concluded that neither claim was valid.

In appealing to the Director, Bureau of Land Management, appellants challenged generally the propriety of the standards employed by the hearing examiner, denying the sufficiency of the Government's prima facie showing of invalidity on grounds that the Government's principal witness, a mining engineer employed by the Bureau of Land Management, was not qualified to give an opinion as to what a man of ordinary prudence would have done from 1941 to 1947 when mining operations were intermittently conducted upon the land and that his opinion was based only upon information available at the time of the hearing, and asserting that the Government required the discovery of minerals of commercial value. They further pointed out that witnesses for both parties to the contest had recommended further exploration of the claims, and they argued that an increase in mineral values or a decrease in production costs would make a mine operable.

In affirming the decision of the hearing examiner the Office of Appeals and Hearings found that the hearing examiner had reached a sound conclusion by the use of proper standards. It expressly found that the Government's mineral examiner had established a prima facie case that there was not a discovery on either claim by showing that it is not possible to mine the minerals on the claims with any hope of making a profit, that the claimants had the burden of proving a discovery by a preponderance of the evidence, and that they had failed to offer the required evidence.

In their appeal to the Secretary appellants renew their charge that the hearing examiner applied an erroneous standard of discovery, asserting that the Bureau of Land Management totally ignored the

decisions of the United States District Court for the District of Colorado in *Snyder v. Udall*, 267 F. Supp. 110 (1967), and *Garula v. Udall*, 268 F. Supp. 910 (1967). Responding to a statement in the decision of the Office of Appeals and Hearings that, in the event appellant Harmon relied upon mineralization in the shaft on the Sunshine claim to establish the validity of his claim, he had the duty to keep this discovery open, appellants argue that there was no duty to keep the mine shaft open "since the shaft would have been open except for the action of the government's agent, Northwestern Engineering Company, in blasting thousands of tons of mineral rock and limestone upon Harmon's workings." Appellants assert that the Bureau of Land Management acknowledges that there may have been a discovery 15 years before the hearing but, apparently, is "endeavoring to take advantage of the fact that its own agent deliberately covered James Harmon's exposed mineral discovery" and that this contest was brought in an attempt to justify the Government's destruction of appellant's mining claims. Appellants also charge that the Government's principal witness was without practical experience or special knowledge relating to "the complexities of mineral development, particularly insofar as the practical aspects thereof are related to the commercial nature of the deposits," and they assert that their own, as well as the Government's, assay samples of the limestone on the claims "showed that it was of a quality equal to, or better than, many established and commercially operative limestone deposits" and that "the mineral was readily available, accessible and easy to mine."

Appellants' reliance upon the *Snyder and Garula* decisions, *supra*, is misplaced. The district court decisions in both of those cases were reversed by the United States Court of Appeals for the Tenth Circuit on May 24, 1968, in *Udall v. Snyder*, No. 9671, rehearing pending, and *Udall v. Garula*, No. 3681, in which decisions the standard of discovery employed by the Department in those cases was expressly recognized as the approved standard.³ Review of the record presently before us is persuasive that the hearing examiner utilized the same standard in this instance.

³ Appellants' charge that the Government's mineral examiner was not qualified as an expert was apparently based upon the finding of the district court in *Snyder v. Udall*, *supra*, that Government mineral examiners are not competent to testify as to what a man of ordinary prudence would do, a finding which was subsequently reversed by the Court of Appeals. Whatever may be meant by their present challenge of his testimony, we find no lack of qualifications on the part of the Government's mineral examiner in this case to examine a mining claim, to take mineral samples and to form an opinion with respect to the significance of the mineralization which he has observed. Since, in this case, there is no material difference in the mineral values found by witnesses for the opposing parties or in the recommendations made by the witnesses upon the basis of those values, but the difference is found in differing views with respect to the requirements of the law, the objection to the testimony of the Government's witness seems pointless.

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In a long line of decisions, the Department has distinguished between the evidence of mineralization which will justify further exploration for mineral deposits which are valuable for mining purposes and that evidence which will warrant a man of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in attempting to develop a valuable mine on a claim, and it has held that only the latter constitutes a discovery. See *e.g.*, *United States v. Clyde R. Altman and Charles M. Russell*, 68 I.D. 235 (1961); *United States v. Edgecumbe Exploration Company, Inc.*, A-29908 (May 25, 1964); *United States v. Kenneth O. Watkins and Harold E. L. Barton*, A-30659 (October 19, 1967). The validity of this distinction has now been expressly recognized in *Converse v. Udall*, 399 F. 2d 616 (9th Cir. 1968).

The mineral value which demonstrates a discovery must be, as the decisions of the hearing examiner and the Office of Appeals and Hearings have pointed out, a present mineral value. That is, the mineralization presently exposed on a claim must be sufficient to meet the test of a discovery. If it is not, the fact that minerals of sufficient quality and in sufficient quantity to justify mining operation may once have been found upon the claim, that the claim may have been successfully mined at some time in the past, or that, at some time in the future, increased mineral prices or improved technology may make profitable mining operations possible where they cannot now be contemplated, cannot compensate for present deficiencies in the showing of mineral values.⁴ See *Best v. Humboldt Placer Mining Company*, 371 U.S. 334 (1963); *Adams v. United States*, 318 F. 2d 861 (9th Cir. 1963); *Mulkern v. Hammitt*, 326 F. 2d 896 (9th Cir. 1964); *United States v. R. W. Wingfield*, A-30642 (February 17, 1967); *United States v. Taylor T. Hicks et al.*, A-30780 (October 24, 1967); *United States v. Evelyn M. Kiggins et al.*, A-30827 (July 12, 1968); *United States v. W. S. Pekovich*, A-30868 (September 27, 1968). It is, therefore, immaterial that the Bureau may have acknowledged the possibility of a discovery on the claimed land 15 years before the hearing.

⁴ Where land is closed to mining location subsequent to the location of a mining claim, the validity of the claim can be established only by showing that there was a discovery prior to the withdrawal of the land from mining entry. See *Union Oil Company of California v. Smith*, 249 U.S. 337 (1919); *United States v. Harold Dale*, A-30465 (January 20, 1966); *United States v. Frank Coston*, A-30835 (February 23, 1968). The land presently in question having been closed to mining location on August 14, 1964, a discovery after that date would be insufficient to validate appellants' claims. If the claims do not presently meet the test of discovery, the fact that the land has been closed to mining location is of no particular importance insofar as this proceeding is concerned. There is some indication in the record that appellants do not fully understand this aspect of the case.

As we recently pointed out in *United States v. W. S. Pekovich, supra*, the Department does not require a mining claimant to prove the discovery of a valuable mineral deposit by showing that he is actually engaged in profitable mining operations or even that profitable operations are assured, but it does require a showing of a prospect of profit which is sufficient to induce reasonable men to expend their means in attempting to reap that profit by extracting and marketing the mineral. This view of the Department, that the "prudent man" test of *Castle v. Womble*, 19 L.D. 455 (1894), is a test of practical economic value of land for mining purposes, has been given expressed judicial sanction in *United States v. Coleman*, 390 U.S. 599 (1968), and *Converse v. Udall, supra*.

Appellants' arguments have been directed almost exclusively to the question of the proper test of discovery. Appellants do not assert that, under the criteria just discussed, they have demonstrated a discovery, and review of the evidence of record discloses no support for such an assertion.

Witnesses for both parties were virtually unanimous in recommending further exploration of the claims to determine their potential for mining purposes. It is clear, however, that successful exploration was viewed as an absolute prerequisite to any serious consideration of mineral development.⁵ Thus, the record fully supports the hearing examiner's conclusion that appellants have failed to demonstrate the finding of sufficient mineralization to constitute a discovery, at least insofar as the claims are based upon the discovery of metallic minerals.

⁵ The Government's chief witness, James McIntosh, stated that he thought further exploration is justified (Tr. 141, 155), but, upon the basis of the present evidence of mineralization, he did not believe that either of the claims has a present or probable future value for mining purposes (Tr. 116, 127-134).

Appellants' principal witness, Robert A. Baxter, a professional engineer and a retired professor at the Colorado School of Mines, but not a mining engineer (Tr. 201), recommended that there be "reasonable additional exploration" for the purpose of "finding higher mineralized ores or higher concentrates or better mineral than has presently been found" on the claims, and he thought that there was a reasonable possibility that there "could be a profitable and a payable mine by making such further exploration" (Tr. 181-182). However, he was explicit in stating that his recommendation was that further exploration should be undertaken and that he would recommend that a man *not* "start developing that mine right now, go in and start mining, with a reasonable expectation of developing a valuable mine in the future" (Tr. 196).

He would have been "a little more cautious" in his recommendations, he said, if he had been in possession of the information contained in the Government's exhibit 8, a report of field examination prepared in 1951 by the Defense Minerals Administration in connection with a development loan application filed by L. Harmon, locator of the Sunshine lode claim (Tr. 201).

The recommendations of these witnesses are consistent with the findings of the cited Defense Minerals Administration report in which denial of a loan for development of the Sunshine mine was recommended on grounds that profitable operation did not appear feasible, the most favorable finding being that the "mine is not without merit as a future lead-zinc producer, especially if the strong east-west fault about 100 feet south of the portal of the main level, and as yet unexplored, is found to be mineralized." (Ex. 8.)

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The Department has long held, with respect to nonmetallic minerals of widespread occurrence, which category includes limestone, that, in order to be valuable, minerals must be marketable at a profit and that it is not enough to show that a market exists for a particular mineral or that a particular deposit of that mineral is of such quality as to satisfy the standards of the market but that it must be shown that the particular deposit itself can be mined and marketed at a profit. See *United States v. Gene DeZan et al.*, A-30515 (July 1, 1968), and cases cited. This so-called "marketability test" was approved in *United States v. Coleman, supra*, as a proper complement to the long-accepted prudent man test of discovery.

In arguing that the limestone occurring on appellants' claims is "of a quality equal to, or better than, many established and commercially operative limestone deposits," appellants have not shown wherein the hearing examiner erred in finding that the exposure of the limestone did not constitute a discovery. Appellants have not, in fact, disputed the finding of the hearing examiner that the "contestees admit that there is not a market for the limestone on the claims." In these circumstances the quality of the limestone is immaterial.

Appellants' charge that the Government's action in permitting thousands of tons of mineral rock and limestone to be blasted upon the mine workings is responsible for the inaccessibility of the mine shaft appears to be wholly unfounded and is, in fact, inconsistent with the testimony of witnesses at the hearing.

The Government's witness, McIntosh, stated that quarrying work, which was done prior to his examination of the claims,⁶ did not adversely affect his examination of the claims and that none of the quarried material was within the mine workings (Tr. 92, 110). He stated, however, that some of the workings were caved, thereby limiting his examination (Tr. 110).

Appellants' witness, Baxter, testified that, at the time of his examination of the claims in about February 1965, "there was material that had been blasted down" and that there "was rough rubble that we had to climb over to get into the tunnels, but we could get into both of them" (Tr. 188). With respect to the shaft reportedly closed by the Government's action, the same witness stated:

I looked at the top of the shaft and one look was enough; I didn't want to go down. There's only one way to go down that shaft and that's to let somebody let you down in a bucket. Tr. 188.

He stated that he did not have the necessary equipment to go into the

⁶ McIntosh initially examined the claims on August 17, 1965. He re-examined the claims on June 6, August 11 and September 22, 1966 (Tr. 87).

the shaft but that "it would be extremely interesting and valuable, and I'm a little bit surprised that it hasn't been done before" (Tr. 188).

So far as the record reveals, then, there was no casual relationship between the removal of construction material from the area of the claims and the failure of witnesses to examine or sample any particular parts of the workings. We do not know, of course, what the present condition of the mine workings is. If appellants are now advising us that quarrying work done after the mineral examinations were completed has blocked access to the workings, they have not indicated in what respect this was prejudicial to their opportunity to demonstrate the validity of their claims at the hearing.

At the hearing, appellants' witness, Baxter, suggested that a red line approximating the west boundary of the Sunshine claim (see Tr. 211-212) had been painted by the Government to prevent accidental development of the claim (Tr. 189-190). The charge now made that the Government's agent has deliberately covered the exposed mineralized areas appears to be based upon a somewhat different theory of governmental behavior from that previously espoused. Regardless of the degree of consistency or inconsistency in appellants' theories, the accusation that the Government has deliberately sought to obscure or destroy evidence of a discovery is wholly unsubstantiated, and the charge is found to be without merit.

The balance of appellants' arguments have been considered, but they do not afford any basis for concluding that there has been a discovery made upon either claim.

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 appeal of Wurts is dismissed and the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

STATUS OF THE OZETTE INDIAN RESERVATION, WASHINGTON

Indian Lands: Generally

The Makah Indian Tribe did not acquire any interest in the Ozette Indian Reservation merely because the class of Indians for whom the reservation was established may, whether for some or all purposes, be considered Makahs.

Indian Lands: Generally

Since the Executive Order of April 12, 1893, establishing the Ozette Indian Reservation, has not been rescinded or modified, the right of use and occupancy granted the Indians for whom the reservation was set aside remains intact, even though those Indians have all departed from Ozette and settled on other reservations, where many have become allottees.

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Indian Reorganization Act

The occurrence of an election at which the voters choose to make the provisions of the Indian Reorganization Act applicable on a given reservation does not mean that the Indians having rights in the reservation must organize thereunder.

Indian Reorganization Act

The occurrence of an election to determine the applicability of the Indian Reorganization Act to the Ozette Reservation did not change or in any way affect the interests of the Indian beneficiaries named in the 1893 executive order establishing the reservation.

Indian Lands: Allotments: Generally

While it is clear that no Indian may receive an allotment on two reservations, *Josephine Valley*, 19 L.D. 329 (1894), there is nothing to preclude acceptance of an allotment on one reservation by an individual who is a member of a class of Indians for whom another reservation has been established.

Solicitor's Opinion, 64 I.D. 435 (1957) will not be followed, to the extent that it conflicts with these views.

M-36456 (Supp.)

February 18, 1969

TO: SECRETARY OF THE INTERIOR.

SUBJECT: STATUS OF THE OZETTE INDIAN RESERVATION, WASHINGTON.

Makah Tribal Council Resolution No. 29-69, enacted on October 22, 1968, requested this Department to review *Solicitor's Opinion* (M-36456, 64 I.D. 435 November 21, 1957), and to modify or reverse it. The Opinion in question, rendered by Deputy Solicitor Edmund T. Fritz, concluded that the Makah Indian Tribe has no enforceable claim to the Ozette Indian Reservation, and that in fact, there are no persons or groups now in existence who can be said to have a beneficial interest in the reservation.

At your request we have reviewed the 1957 opinion and examined all available evidence, including that presented in the brief submitted by Alvin J. Ziontz, Makah Tribal Counsel, on October 25, 1968, in which he argues that the Makah Tribe is the present beneficial owner of Ozette. We are not persuaded that such is the case. On the other hand, we find that we cannot fully concur in the position taken by Deputy Solicitor Fritz. Accordingly,

Solicitor's Opinion, M-36456, *supra*, is hereby modified as stated herein.

I. Solicitor's Opinion M-36456 dealt with five specific questions. Before considering the questions and answers presented by that opin-

ion concerning present use rights in the Ozette Reservation, we feel it important to review briefly the reservation's history.

Located on the southern coast of Cape Flattery, Washington, at the mouth of the Ozette River, the Ozette Reservation was created by Executive Order on April 12, 1893, "for the Osette Indians not now residing upon any Indian reservation." The area reserved, 719 acres, was the site of one of the principal villages of the Makah Indian Tribe. Its inhabitants had long been considered Makahs, both by the tribe itself and by federal officials in the area. Indeed, the first federal treaty with the Makahs, concluded at Neah Bay on January 31, 1855 (12 Stat. 939), was signed by Tse-Kow-Wootl, from Ozette, as "Head Chief of the Makah Tribe." In that treaty, the Makahs ceded their tribal land to the United States in consideration of the establishment of the original Makah Reservation, a small portion of Cape Flattery, which for some unknown reason, did not include any of the tribe's permanent settlements. Four Makah villages—Sooes, Waatch, Neah, and Baada—were added to the reservation by Executive Order on October 26, 1872, as amended, January 2, 1873, and October 21, 1873.

When Ozette was reserved, 20 years later, it was not specifically added to the existing Makah Reservation, as the other villages had been, but was set aside as a separate reservation.

The census roll of June 30, 1893, indicated that 64 Indians were then living in Ozette. This number steadily dwindled as parents were forced to leave the village, which had no school facilities, in order to comply with school attendance requirements. By 1908, the Indian Agent for the area could report "Most of the Ozette Indians live in Neah Bay, on the Makah Reservation."

Eventually, the village itself was totally deserted, although it was sometimes (and still is) used by members of the Makah Tribe as a site for hunting, fishing, and camping.

Many of those who left Ozette settled on the Makah Reservation; while some chose to move to the Quinaielt Reservation, where the Act of March 4, 1911 (36 Stat. 1345), had authorized the allotment of surplus lands:

* * * to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt or Quileute tribes in the treaty of July 1, 1855 and January 23, 1856, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes. * * *

On both the Makah and Quinaielt Reservations they were enrolled as tribal members and considered eligible for allotments.

When the Indians of Washington were preparing to vote on whether to accept the provisions of the Indian Reorganization Act

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of June 18, 1934 (48 Stat. 984), the approximately 30 Indians who had emigrated from Ozette were informed they could participate in only one I.R.A. election—the one to be held at Ozette or the one to be held at their current residence. All but two chose to vote with the Makahs or Quinaielts. Those two, unallotted residents of Neah Bay, returned to Ozette to cast their ballots on April 13, 1935. Both voted to make the provisions of the I.R.A. applicable to the reservation.

Since that time, there has been little activity at Ozette. There is no indication that either the two participants in the 1935 election, now dead, or any other former residents of the villages ever returned there again. The reservation remains deserted, save for occasional use by residents of the Makah Reservation for hunting and fishing purposes.

II. We turn now to the specific questions on present use rights discussed in *Solicitor's Opinion*, M-36456, *supra*, considering the second first.

A. Does the Makah Tribe of Indians have an enforceable property or use claim to the lands or waters within the Ozette Reservation?

The Makah Tribe argues now, as it did in 1957, and earlier in 1955 and 1941, that it possesses a beneficial interest in the Ozette Reservation. Deputy Solicitor Fritz concluded that it had no such interest. We find nothing to warrant amendment of that conclusion.

The Ozette Reservation was created not for a tribe or band but for a class of Indians; i.e., "for the Osette Indians not now [1893] residing upon any Indian Reservation." Thus, even if we accept the Makah Tribe's position that the "Osette Indians" are not a distinct tribe or band but merely Makahs residing at Ozette Village, it does not follow that the Makah Tribe acquired any rights in the reservation merely because the class of Indians to which the rights were given may, whether for some or all purposes, be considered Makahs. That there are connections between the Makahs and the Indians for whom the Ozette Reservation was reserved has never been in doubt.

The Treaty of Neah Bay, *supra*, described Ozette as one of "the several villages of the Makah Tribe of Indians." The 1862 report of Henry A. Webster, first Indian Agent at Neah Bay, noted that the Makah Indians were the only tribe included in that treaty, and made reference to "that portion of the tribe living at Osett Village." In a letter dated September 5, 1872, Indian Agent E. M. Gibson reported on his visit the previous August to Ozette, "most distant from the Agency of any village belonging to this [the Makah] Tribe." (The Ozette Reservation

was not created until 1893 and in 1872 could not have "belonged" to the Makahs except by affinity of the residents.) In their report of November 20, 1874, the Board of Indian Commissioners recommended consolidation of the Makahs and Quinaults on the Makah Reservation and extension of that reservation 15 miles south, a distance which would have included Ozette within the reservation's boundaries. The Indian Agent at Neah Bay reported on August 19, 1892, that the Makahs lived in four separate villages, "one at the mouth of the Osette River."

In a letter dated June 8, 1907, the special agent appointed to supervise the allotment of the Makah Reservation pursuant to the act of February 8, 1887 (24 Stat. 388), and the act of February 28, 1891 (26 Stat. 794), was informed that "Indians enrolled as belonging to the Ozette Reservation, but really Makahs," were eligible for allotments. In the Department report on S. 5268, 61st Cong. 2d Sess. (1910), the bill later enacted as the act of March 4, 1911, *supra*, Secretary Ballinger referred to the "Ozette Tribe," classifying it as one of the coastal fish-eating tribes of Washington whose members should receive allotments on the Quinault Reservation. Available records on this legislation, which was prepared by the Department, indicate that the Ozettes, who were not a party to the Treaty of Point Elliott of July 1, 1855, and January 25, 1856 (12 Stat. 971), but had long been identified with the Makahs and signed treaties as Makah Indians, were classified among the Indians to be protected under the act primarily because the reservation which had been set aside for their use, like those reserved for several other small Indian groups of the area, was merely a fishing village site, not large enough to provide allotments for more than a fraction of its Indians. See *Halbert v. United States*, 283 U.S. 753 (1931).

Most modern anthropologists and ethnologists seem to consider the Ozettes as a band or branch of the Makah Tribe. In his 20-volume work, *The North American Indian* (Cambridge, Mass., 1907-1930), Edward S. Curtis speaks "of the Ozette branch of that [the Makah] tribe," Vol. XI, 1916, Appendix. John R. Swanton classifies the Ozette as "a southern branch" of the Makah Tribe, *Indian Tribes of North America*, H. Doc. No. 383, 81st Cong. 2d Sess. (1951). In a report prepared in June 1955, included in the Makahs' brief as Exhibit 4, Professor Herbert C. Taylor, Jr., concludes that "the Ozette constitute one band and the Diaht, Wa'atch, T'Sues and Ba'adah constitute the other band of the Makah."

However, as previously indicated and more fully discussed below, the establishment of such connections between the Makah Tribe and the

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class of Indians for whom the reservation was created is not enough to vest the tribe with an interest in the lands and waters of the reservation at Ozette.

In the Treaty of Neah Bay, *supra*, the Makah Tribe ceded to the United States all lands to which it held aboriginal title, including Ozette Village, and relinquished any rights or interest it might have maintained outside the designated tract of land set apart as the Makah Reservation. This left the Federal Government free to utilize the ceded lands as it saw fit—for Indian purposes or otherwise. It chose to set aside some of those lands, including four of the principal Makah Villages, for the benefit of the Makah Tribe. Ozette, a fifth village, was not disposed of in the same manner. It was not reserved for the use of the entire Makah Tribe, nor was it added to the existing Makah Reservation. Indeed, the language of the 1893 executive order establishing the Ozette Reservation explicitly precluded those Makahs living in the Makah Reservation from acquiring an interest in Ozette by restricting the class of beneficiaries to Indians not then residing on an existing reservation. The United States was under no obligation to utilize Ozette for the benefit of the entire Makah Tribe, or any other tribe, for that matter. It chose to reserve the land for a limited group of Indians, all of whom happened to be associated with the Makahs; it did not bestow any interest in the reservation upon the Makah Tribe itself or its membership as a whole. To date, that decision, embodied in the Executive Order of 1893, has not been rescinded or amended.

Thus, although the Makah Tribe has a historical and perhaps even an equitable interest in Ozette, it has no enforceable claim to the lands or waters within the Ozette Reservation. Such a claim could best be acquired through legislation.

B. Are there any classes of persons who could successfully exercise a valid claim to the Ozette Reservation?

In his 1957 opinion, the Deputy Solicitor [Fritz] concluded that no group then in existence could be said to have such a beneficial ownership right in the reservation as would be sufficient, without further act of Congress, to support a claim against the United States. We cannot agree. The Executive Order of April 12, 1893, granted a beneficial interest in the Ozette Reservation to certain members of a group of Indians historically identified with the Makah Tribe, termed Ozette Indians, i.e., those who were then or had previously been associated with the Village of Ozette and at the time of the order were living at

Ozette or somewhere other than on an existing Indian reservation. The events discussed in the 1957 opinion did not serve to extinguish or alter the interest of that group.

The Ozettes' departure from their village and settlement on other reservations, where many became allottees, did not affect the rights they had acquired in 1893. As the Supreme Court has noted, the creation of an Indian reservation invests the Indians for whom the lands are reserved with certain definite interests.

"When by an executive order, public lands are set aside, either as a new Indian Reservation or an addition to an old one without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an 'Indian Reservation' and so long, at least, as the order continues in force, the Indians have the right of occupancy and use and the United States has the title in fee." *Spalding v. Chandler*, 160 U.S. 394 (1896). (Italics added). See also *In re Wilson*, 140 U.S. 575 (1891); 29 Op. Atty. Gen. 239, 241 (1911).

The Executive Order of April 12, 1893, has not been rescinded or modified; the right of occupancy and use granted the class of Ozettes thereunder, thus remains intact.

The 1957 opinion unwarrantedly concludes that the interest of this class was terminated in 1935 by an election to determine whether the Indian Reorganization Act should apply to the Ozette Reservation. Characterizing the two Indians who voted in that election as "the total population remaining on the Ozette Reservation," the opinion states:

It appears that there are no longer representatives of the class designated [as entitled to a beneficial interest in Ozette] * * * [since] all Indians enrolled as Ozettes are now deceased.

We note initially that the opinion assumed both voters were residents of Ozette as of 1935. Historical evidence indicates, however, that Ozette was totally deserted at the time of the election and that the two Indians who took part in the election left their homes at Neah Bay only long enough to cast ballots at Ozette. They were thus no different from any other Ozettes; the entire group resided off the reservation.

More important than the opinion's description of those who participated in the 1935 election is the Deputy Solicitor's view of its effect upon the beneficial interest in the reservation. He saw the election as somehow shifting that interest from "the Ozette Indians" designated in the 1893 executive order, to an "Ozette Tribe" organized pursuant to the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. sec. 463 *et seq.* Since there was no one able to claim membership in such

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a tribe, there never having been such a tribe, he concluded that the equitable estate in the Ozette Reservation had merged with the legal estate for lack of existing beneficiaries.

It is our opinion that Deputy Solicitor Fritz accorded the 1935 election a result it did not have. The election was one of many held pursuant to section 18 of the Indian Reorganization Act, *supra*, throughout the country in order to furnish an opportunity for those Indians with an interest in a particular reservation to indicate if they wished to make the provisions of the I.R.A. applicable to their reservation. The voters at Ozette indicated that they wished to do so; nothing more. Organization of a tribal group under section 16 of the Indian Reorganization Act was not involved in the election. No organization of Indians on the Ozette Reservation under section 16 of that act (25 U.S.C. sec. 476) has ever taken place. Section 16 simply offers the opportunity for organization; the mere fact that the Indian Reorganization Act is applicable on a given reservation does not mean that the Indians having rights on the reservation must organize thereunder. Thus, Deputy Solicitor Fritz's statement that "all Indians enrolled as Ozettes are now deceased" is erroneous to the extent that it equates voting in the 1935 election with enrollment in a tribe organized pursuant to section 16. The two Indians who participated in the election were not "enrolled" in an organized Ozette tribe, since such a tribe did not (and still does not) exist. In this connection, it may be noted that in a letter to the Superintendent of the Taholah Agency, dated March 14, 1935, prior to the election at Ozette, the Assistant Commissioner of Indian Affairs stated:

It should be made clear, however, that ineligibility for voting in this referendum [an I.R.A. election] does not necessarily mean that the individual concerned will be excluded from the tribal organization if and when it is formed.

Thus, the 1935 election to determine the applicability of the I.R.A. to the Ozette Reservation did not change or in any way affect the interests of the Indian beneficiaries named in the 1893 executive order establishing the reservation.

Nor have other events cited by Deputy Solicitor Fritz served to do so. History indicates that the residents of Ozette were compelled to leave their village in order to comply with federal education requirements. We do not believe a departure under such circumstances can properly be considered abandonment of the reservation. *cf. United States v. Santa Fe Pacific Railway Company*, 314 U.S. 339 (1941).

Neither did Ozettes relinquish their claim to the Ozette Reservation by accepting allotments on other reservations. While it is clear that no Indian may receive an allotment on two reservations, *Josephine Valley, supra*, there is nothing to preclude acceptance of an allotment on one reservation by an individual who is a member of a class of Indians for whom another reservation has been established. The Chief Counsel of the Bureau of Indian Affairs addressed himself to this very point in a memorandum opinion dated November 26, 1941, when he concluded that:

The Ozettes have a common or joint interest in the undisposed of Ozette "Reservation," regardless of the fact that these Indians may not be located elsewhere and may have received allotments in severalty at Quinaieit or Makah.

Deputy Solicitor Fritz took issue with that conclusion upon the assumption that it contained a claim that any interest the Ozettes had in the Ozette Reservation was derived solely from their aboriginal title to the lands. Since such title had been extinguished by the Treaty of Neah Bay, *supra*, he felt bound to differ with the Chief Counsel. We do not believe that the 1941 memorandum made any such claim, however; and find nothing to indicate that the Chief Counsel did not view the order of April 12, 1893, as the source of the Ozettes' "joint or common interest" in the reservation.

III. Having made these observations, we are unable to determine whether there are in fact any Indians currently entitled to use and occupy the Ozette Reservation. We are informed that there are Indians, primarily residents of the Makah Reservation, who assert that they are among the class designated in the 1893 executive order. However, the merits of their individual claims have not been investigated. Until each of these claims is examined, those Indians presently holding a beneficial interest in Ozette cannot be accurately identified. At most, we can only conclude that the class for whom the Ozette Reservation was established has not necessarily ceased to exist. The history of the reservation, its present vacant status, and the current affiliation of those who may have a beneficial interest in it all prompt us to add, however, that the question of which Indians should now enjoy the benefits of the Ozette Reservation is one which might best be resolved by the Congress.

RICHMOND F. ALLAN,
Deputy Solicitor.

February 12, 1969

UNITED STATES

v.

THE DREDGE CORPORATION

A-30846

Decided February 12, 1969

Rules of Practice: Appeals: Standing to Appeal—Rules of Practice: Government Contests

An order by a hearing examiner denying a motion to dismiss for lack of jurisdiction a contest proceeding brought by the Government against a mining claim is an interlocutory order which is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the contest, and an appeal from such an order is properly dismissed as premature.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Dredge Corporation has appealed to the Secretary of the Interior from a decision dated May 8, 1967, whereby the Office of Appeals and Hearings, Bureau of Land Management, dismissed its appeal from a decision of a hearing examiner denying its motion to dismiss adverse proceedings against a mining claim.

The record shows that, on September 29, 1966, the validity of the Dredge No. 51 placer mining claim in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 11, T. 21 S., R. 60 E., M.D.M., Clark County, Nevada, was challenged by the filing of a contest complaint in the Nevada land office in which it was charged that:

1. Minerals have not been found within the limits of the claim in sufficient quantities and/or qualities to constitute a valid discovery.
2. No discovery of a valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit and/or could not be marketed at a profit prior to the Act of July 23, 1955.

Appellant thereafter filed a motion to dismiss the complaint, alleging that the validity of the claim had been previously challenged on June 27, 1958, on charges that were substantially the same, that the Department of the Interior, "after a more careful examination and field report, on its own motion filed a motion to dismiss contest proceedings and withdrew the charges in the complaint in contest," that the action was dismissed by a hearing examiner on December 4, 1958, and that the Nevada State Supervisor, Bureau of Land Management, acknowledged the validity of the mining claim in revoking a conflicting small tract classification of the land embraced in the claim. It is clear, appellant contended, that the issues set forth in the complaint have been fully adjudicated and are now *res judicata* and that the Department

of the Interior has no jurisdiction to conduct further contest proceedings.

By a decision dated January 23, 1967, the hearing examiner denied appellant's motion, holding that the authority of the Department to inquire into the extent and validity of the rights of a mining claimant against the Government does not cease until legal title to the land has passed from the United States. As no patent has been issued for the Dredge No. 51 mining claim, he concluded, the motion to dismiss should be denied.

In appealing to the Director, Bureau of Land Management, from the hearing examiner's ruling, appellant reiterated essentially the same argument previously advanced in its motion for dismissal. Equitable title, it asserted, passed to the contestee upon the publication of the order revoking the small tract classification, and all that then remained to be done was the ministerial duty of the Department to issue patent.

In its decision of May 8, 1967, the Office of Appeals and Hearings held that an appeal from a ruling of a hearing examiner on a motion relating to the conduct of contest proceedings, prior to a decision by the hearing examiner on the merits of the case, is premature and must be dismissed. It therefore dismissed appellant's appeal, citing *United States v. William A. McCall and Olaf H. Nelson*, *United States v. The Dredge Corporation*, A-29161 (July 30, 1962), and *United States v. Reed H. Parkinson*, 65 I.D. 282 (1958), and cases cited.

In its appeal to the Secretary, appellant renews its argument that the Department has no jurisdiction to conduct this present contest proceeding. It does not, however, discuss the grounds relied upon by the Office of Appeals and Hearings for dismissing its appeal.

Appellant has pointed to no error in the decision appealed from, and we find none. The Bureau's decision is consistent with departmental decisions relating to interlocutory rulings of hearing examiners, as well as with judicial decisions holding that the denial of a motion to dismiss, even if based upon jurisdictional grounds, is not immediately reviewable. See *Catlin v. United States*, 324 U.S. 229, 236 (1945); *McKendry v. United States*, 219 F. 2d 357, 358 (9th Cir. 1955); *Shaheen v. Government of Guam*, 223 F. 2d 773 (9th Cir. 1955).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.

¹ In any event, the decision of the hearing examiner was in accordance with *United States v. U.S. Borax Co.*, 58 I.D. 426 (1943).

*February 27, 1969***STEPHEN C. HELBING****A-30963***Decided February 27, 1969***Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Discretion to Lease**

Lands outside the Bitter Lake Wildlife Refuge which were acquired for the same purposes as lands within the refuge but are no longer used for such purposes are not to be deemed to have been closed to leasing by a regulation barring the leasing of wildlife refuge lands, which are defined as lands withdrawn for such purposes, or by other equivalent action so as to require the rejection of offers filed for such lands prior to the publication of notice of availability of such lands for leasing.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Stephen C. Helbing has appealed to the Secretary of the Interior from a decision dated January 29, 1968, by the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the New Mexico land office rejecting two acquired lands oil and gas lease offers filed by Helbing.

The first offer, NM-A 2504, was filed on May 25, 1967, for 794.38 acres of land said to be under the administrative control of the Bureau of Sport Fisheries and Wildlife of this Department. The second offer, NM-A 2692, was filed on June 19, 1967, for 280 acres said to be under the control of the same agency.

The first offer was rejected by the land office on June 20, 1967, on the ground that the land applied for was within the Bitter Lake Wildlife Refuge and therefore not available for leasing, except in the event of drainage. The offer was also rejected as to one tract for the reason that it had been included in a prior lease dated July 1, 1960.

Subsequently, on July 3, 1967, the land office decision was revoked for the reason that the status of the land might have changed (except as to the leased tract).

On August 16, 1967, the land office again rejected Helbing's first offer and rejected his second offer. The land office stated that on May 25, 1967, the Bureau of Sport Fisheries and Wildlife had assigned the lands applied for and other land to the Bureau of Land Management and that the transfer had been accepted on June 2, 1967. Accordingly,

although the lands were no longer wildlife refuge lands, they could not be leased except with the consent of the Secretary, as provided in section 3 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. sec. 352 (1964). The land office said that by regulation, 43 CFR 3120.3-3(b), the Secretary had withheld his consent to lease lands in wildlife refuges and that once lands had been closed to oil and gas leasing by public notice it had long been the policy of the Department to re-open them for leasing only by published notice so that the general public would be informed. The land office concluded that the best interests of the United States and of the public would be served by withholding consent to lease until notice of availability of the lands was published in the Federal Register. Helbing's offers were therefore rejected as premature filings.

Helbing appealed to the Director except as to the tract that was already leased. He contended in essence that the lands applied for were not wildlife refuge lands, as defined by 43 CFR 3120.3-3(a), therefore they had not been closed to leasing and were available for leasing without further public notice.

The Office of Appeals and Hearings conceded that the lands applied for were outside the boundaries of the Bitter Lake Wildlife Refuge as established by Executive Order No. 7724 of October 8, 1937 (2 F.R. 2111). It said that nonetheless the lands had been acquired for and administered as part of the refuge and therefore came within the purview of the regulation withholding consent to lease wildlife refuge lands. Consequently the removal or revocation of the classification of wildlife refuge lands from lands which had been acquired and used for that purpose but were no longer needed for such purposes required publication in the Federal Register of their availability for leasing. Since no notice had been published, the lands applied for were not available for leasing and Helbing's offers were properly rejected as premature.

The Office of Appeals and Hearings also pointed out that a tract of land in Helbing's second offer had been included in another lease issued May 16, 1967, and that rejection of his offer to that extent was required for that reason.

In his present appeal Helbing has not expressly acknowledged the correctness of the partial rejection of his second offer for the tract already leased, but he has not questioned it. The partial rejection was correct as was the earlier partial rejection of his first offer for the tract already leased.

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In essence, the decisions below rejected Helbing's offers on the ground that the lands applied had been made unavailable for leasing by a formal published action of the Secretary and that therefore the lands remain unavailable until a notice of availability is published. The soundness of this rationale requires an examination of the history of the Department's position with respect to the leasing of wildlife refuge lands and of Departmental actions taken specifically with respect to the Bitter Lake refuge.

To begin with, there has never been a statutory exclusion of wildlife refuge lands from leasing under the Mineral Leasing Act of 1920, 30 U.S.C. sec. 181 *et seq.* (1964), or the subsequent Mineral Leasing Act for Acquired Lands, 30 U.S.C. sec. 351 *et seq.* (1964).¹ It has been recognized from the beginning that wildlife refuge lands were available for leasing in the discretion of the Secretary. See *Martin Wolfe*, 49 L.D. 625 (1923); *J. D. Mell et al.*, 50 L.D. 308 (1924). The leasability of lands within the Bitter Lake refuge was specifically recognized in *Mary E. Helmig*, 59 L.D. 309 (1946).

The first general restriction on leasing refuge lands were imposed by a regulation approved on October 29, 1947 (43 CFR 192.9; 12 F.R. 7334). This regulation prohibited the issuance of a lease within a refuge unless the land was subjected to a unit agreement and unless the lease prohibited drilling or prospecting except with the consent of the Secretary.

The regulation remained in effect until December 1955 at which time it was extensively revised. 30 F.R. 9009. The amended regulation prohibited any leasing in certain named areas. It provided that leases could be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation except that in certain designated areas no leases would be issued unless an operating program for the area was approved by the Service. A portion of the Bitter Lake refuge was listed among these areas. This meant that the remainder of the refuge was open to leasing without the restrictions imposed by the regulation.

The regulation was again revised—substantially to its present form—on January 8, 1958 (23 F.R. 227). It now provides that—

¹The following discussion draws no distinction between the two acts because the policy as to public lands and acquired lands in wildlife refuges has been the same. The fact that the Acquired Lands Act was not enacted until 1947 is also not material for the purposes of this discussion.

(b) *Leasing policy and procedure.* (1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (2) of this paragraph [i.e., when drainage occurs]. 43 CFR 3120.3-3.

The regulation defines "wildlife refuge lands" as

(a) * * * Such lands are those embraced in a *withdrawal* of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands * * * is vested in the United States Fish and Wildlife Service even though such lands * * * by the terms of the *withdrawal order*, may be subject to mineral leasing. 43 CFR 3120.3-3; *Italics added.*

At this point, we note that, under the regulations, until January 8, 1958, certain lands included within the boundaries of the Bitter Lake refuge, as established by Executive Order No. 7724, *supra*, could have been leased if certain conditions were met; other lands in the refuge were specifically made available for leasing without any advance prescribed conditions, subject only to the exercise of the Secretary's discretion to lease. It is to be noted that the prior regulations in terms dealt only with lands in "wildlife refuges" or in named refuge areas. They did not apply in terms to lands outside the limits of refuges although they may have been acquired for possible inclusion in refuges and for use for the same purposes as lands in refuges. Thus, until January 8, 1958, the lands in question here, which were not situated within the boundaries of the Bitter Lake refuge, were not covered by any formal pronouncement barring leasing or permitting leasing subject to certain conditions. The lands in question were acquired in 1941.

How were these lands affected by the revised regulation of January 8, 1958? Helbing contends that they were not because the proscription in paragraph (b) against leasing extends only to "wildlife refuge lands" and paragraph (a) defines "wildlife refuge lands" only as lands included in a withdrawal for wildlife purposes. The decisions below did not say that the lands in question were included in the Bitter Lake withdrawal but only that since they were acquired and used for the same purposes as the lands in the withdrawal they came within the purview of the regulation.

This issue has been raised before. In *Gregory Salinas*, A-28802, A-29302 (September 25, 1962), and in *Stuart Montgomery*, A-29053 (January 24, 1963), the Department was confronted with offers for

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lands acquired for refuge purposes but outside the area withdrawn for the Bitter Lake refuge by Executive Order No. 7724, *supra*. The offerors contended, as Helbing does here, that because the lands applied for were not in the withdrawn area they were not wildlife refuge lands to which the ban on leasing applied. The Department found it was not necessary to answer the question, holding that even if the lands were not covered by the regulation the lease offers could be rejected in the exercise of the discretionary authority of the Secretary to lease or not to lease. The offers were rejected because the lands had been acquired for the same purposes for which the refuge lands had been withdrawn.

The same action would be taken here if the factual situation were basically the same, but it is not. Long before Helbing filed his first offer on May 25, 1967, the lands in question had been declared by the Bureau of Sport Fisheries and Wildlife on October 24, 1966, to be excess property no longer needed for the Bureau's program. On the day that Helbing applied, the Bureau of Sport Fisheries and Wildlife had transferred the land to the Bureau of Land Management. The transfer was accepted by the Bureau of Land Management on June 2, 1967, before Helbing filed his second offer (June 19, 1967). Thus the reasons given in the *Sabinas* and *Montgomery* cases, *supra* for rejecting the offers filed there are not pertinent to Helbing's offers.

This leaves then the ground given in the decisions below, that since the lands applied for by Helbing were acquired for refuge purposes and were presumably administered with that purpose in mind until October 1966, they should be treated as within the purview of the regulation prohibiting the leasing of wildlife refuge lands and should be made available for leasing only by formal published notice.

Although the question was avoided in the *Sabinas* and *Montgomery* cases, *supra* we think that the definition in the regulation of "wildlife refuge lands" includes only lands covered by a withdrawal for refuge purposes. The regulation specifically refers to lands "embraced in a withdrawal" and to "the terms of the withdrawal order." This language cannot reasonably be read to include lands outside the withdrawn area even if they were acquired for the same purposes as the land in the withdrawn area. We conclude therefore that the January 8, 1958, regulation did not formally prohibit leasing of the lands in question.

The question then arises as to whether any other form of action was taken by the Department which could be construed as equivalent to a regulation or formal notice that lands outside the Bitter Lake refuge but acquired for refuge purposes were to be excluded from leasing. We are not aware of any action or series of actions having that effect. The *Salinas* and *Montgomery* cases, *supra* did not purport to be more than ad hoc determinations of the leasability of specific tracts of land in the light of the circumstances then present. Two cases since January 8, 1958, do not create the type of established policy which is equivalent to a regulation or published notice.

We therefore conclude, in view of the facts and background outlined, that the availability of the lands in question for leasing is not dependent upon the publication of a formal notice of availability, and that the decisions below erred in ruling that Helbing's offers were prematurely filed.

Therefore, the decision of the Office of Appeals and Hearings is reversed, except to the extent that it rejected the offers for lands already leased to others, and the case is remanded for further consideration of Helbing's two offers.

ROBERT E. VAUGHAN,
Deputy Assistant Secretary.

CHARLES J. BABINGTON

A-30992

Decided February 28, 1969

Oil and Gas Leases: Applications: Description

Where an acquired lands lease offer for a quarter-quarter section of land describes two tracts comprising 11 acres which are excluded from the offer, it is improper to reject the offer for an improper description merely because the 11-acre tract described differs substantially from an 11-acre tract which was excluded in the conveyance of the quarter-quarter section to the United States.

Oil and Gas Leases: Discretion to Lease

If the effect of the acceptance of an oil and gas lease offer for the lands described would leave unleased fragments of available land, it is within the discretion of the Secretary of the Interior to decide whether or not to accept the offer as it stands.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles J. Babington has appealed to the Secretary of the Interior from a decision dated April 24, 1968, by the Office of Appeals and

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Hearings, Bureau of Land Management, which affirmed a decision of the Eastern States land office, dated October 31, 1967, rejecting his oil and gas lease offer BLM-A 072698 as to the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 2, T. 3 N., R. 6 E., Choc. Mer., Miss.

Appellant's offer, filed on August 14, 1963, described, among other tracts in the township, the following:

Sec. 2: N $\frac{1}{2}$ NW $\frac{1}{4}$ less the following described portions: From the NE cor. of Sec. 2 Go West 40 chs. to pt. of beg. thence around said tract as follows: West 170 $\frac{1}{2}$ yards, South 170 $\frac{1}{2}$ yards, East 170 $\frac{1}{2}$ yards, North 170 $\frac{1}{2}$ yards to pt. of beg. AND From the NE cor. of Sec. 2 go West 40 chs., thence South 170 $\frac{1}{2}$ yards to pt. of beg. thence around said tract as follows: West 142 yards, South 170 $\frac{1}{2}$ yards, East 142 yards, North 170 $\frac{1}{2}$ yards to pt. of beg., the excluded portions being 11 acres more or less.

The offer was subsequently rejected as to the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 2 for the reason that it was included in a prior lease. There is no question as to that action; the only issue relates to the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 2.

It appears that in the deed conveying the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 2 to the United States there was excluded a rectangular 11-acre tract comprising the northeast corner of the NE $\frac{1}{4}$ NW $\frac{1}{4}$. The 11-acre tract was 312.4 yards by 170.5 yards in size, the longer sides running in an east-west direction. The first exclusion described by appellant was a perfect square having the same north-south length as the 11-acre tract but only a 170.5 yard east-west length. Thus it described only a portion of the 11-acre tract. In addition, appellant's offer excluded a second smaller tract contiguous on the south to the first excluded tract. The land in the second exclusion was included in the conveyance to the United States.

The land office rejected the offer on the ground that the boundary of the first exclusion was not properly described in that the length of the east-west boundary was given as 170.5 yards instead of 312.4 yards and that the second exclusion was not made in the deed to the United States.

The Office of Appeals and Hearings affirmed for the same reason, holding that since the 11-acre tract was improperly described the Bureau could not alter the description of it to make appellant's description of the remainder of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ acceptable.

We believe that the decisions below were in error and that they misconceived the applicable regulation. This regulation, 43 CFR 200.5(a) (1964) at the time the offer was filed (now 43 CFR 3212.1(a)), provided:

Each offer or application for a lease or permit must contain * * * a complete and accurate description of the lands for which a lease or permit is desired. If the lands have been surveyed under the rectangular system of public land surveys, and the description can be conformed to such survey system, the lands must be

described by legal subdivision, section, township, and range. Where the description cannot be conformed to the public land survey, any boundaries which do not so conform must be described by metes and bounds, giving courses and distances between successive angle points with appropriate ties to established survey corners. * * *

The decisions below do not say that appellant's descriptions of the two exclusions were not in precise conformity with the requirements of the regulation. They were. The decisions faulted the descriptions only because they did not describe the 11-acre tract excluded from the deed to the United States but a somewhat different tract. In other words appellant applied for some land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ which had not been conveyed to the United States and he did not apply for other land in the quarter-quarter section which had been conveyed to the United States.

This, however, is not prohibited by any regulation. On the contrary, in other cases involving the same regulation as here the Department has recognized that an offer is not defective because it describes land which is not available for leasing or fails to describe all the land in a tract that is available for leasing. *Charles J. Babington et al.*, A-30666 (March 29, 1967); *Arthur E. Meinhart, Irwin Rubenstein*, A-30665 (March 30, 1967). As those decisions point out, the offer is simply rejected as to the land that is unavailable and is not accepted for the land that is available but not described.

This does not mean, of course, that an offer must be accepted in all cases merely because the description in it meets all the requirements of the regulation. Suppose, for example, that all 640 acres in a section are available for leasing but an offeror applies for only 100 acres in 100 irregularly shaped tracts scattered throughout the section. If each tract is properly described in accordance with the regulation, the offer could not be rejected for improper description but it could be rejected in the exercise of the Secretary's discretion to lease. See *Thomas D. Chace*, 72 I.D. 266 (1965), and cases cited; *Arthur E. Meinhart, Irwin Rubenstein, supra*. The Secretary is not compelled to issue a lease which would leave unleased fragmented tracts of available land. This, however, is not to intimate that appellant's offer should be rejected because it omits the available land described in the second exclusion. The issue has not been raised and the facts pertinent to such a determination have not been developed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed and the case is remanded for further consideration of appellant's offer as to the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 2.

ERNEST F. HOM,
Assistant Solicitor.

WATER DISTRICT

*February 28, 1969***INVOLUNTARY SALE OF EXCESS LANDS—WESTLANDS WATER DISTRICT****Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Recordable Contracts**

The Secretary of the Interior has discretionary authority to waive price approval on a transfer of excess lands.

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Recordable Contracts

The Secretary of the Interior has discretionary authority to permit a purchaser of excess lands to assume an outstanding recordable contract covering the excess lands, under circumstances where the sale is involuntary.

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Recordable Contracts

There is no discretionary authority to permit a purchaser of after-acquired excess land to execute a recordable contract for such lands.

M-36774

February 28, 1969

RALPH M. BRODY, ESQUIRE
MANAGER-CHIEF COUNSEL
WESTLANDS WATER DISTRICT
P.O. Box 5222
FRESNO, CALIFORNIA 93755

Dear Mr. Brody:

In your letters of January 15, 1969 and January 29, 1969, you asked us to consider certain questions regarding the application of the excess land laws to a situation in the Westlands Water District in which Price and Joann Giffen are constrained to sell certain of their properties in order to satisfy the demands of Anderson, Clayton & Company, the holder of their demand note in the amount of \$3,158,129.61 secured by a second deed of trust. You indicate that the debtor husband and wife have until July 1, 1969, to meet the note and that the present plan is for them to sell the Cheney Ranch, consisting of 4,132 acres with improvements, for \$3,013,000. Cheney Ranch and Belmont Ranch are owned in part by Price and Joann Giffen jointly, and in part by their wholly owned corporation.

According to the information supplied by you none of the Cheney Ranch is within an area for which the distribution system is completed as contemplated by *Solicitor's Opinion*, 72 I.D. 245, but that 640 acres of the ranch is under recordable contract in order to secure water by temporary diversion from the San Luis Canal. As to the Cheney Ranch you ask whether the present owners, in a sale of the

whole ranch to a buyer, must secure price approval where the sale is being effected to raise cash to meet the demands of a creditor holding a second deed of trust on that land as well as on other land owned by the Price Giffens. You are also concerned about the status of the buyer and seller with regard to the recordable contract covering 640 acres.

With regard to price approval, it is our opinion that there is discretion in the Secretary in the administration of the excess land laws to waive price approval when justified by the facts. The Solicitor, in his letter of December 19, 1968, to the Department of Justice, went on record as to authority to waive price approval with regard to the enforcement of the excess land laws within Imperial Irrigation District and such authority has, on occasion, been exercised in specific cases in the Central Valley of California.

Based upon the factual information as to the sale price for the Cheney Ranch and the conditions under which it would be sold, we think that the case would be appropriate for such exercise of discretion. For this purpose we advise you that the Secretary has delegated his authority to the Commissioner of Reclamation, who has, in turn, redelegate it to the Regional Director of the Bureau of Reclamation.

We also are of the opinion that the Secretary has discretion, under the excess land laws, to waive requirements of the recordable contract as to sale to eligible buyers and to allow the recordable contract to be assumed by an ineligible buyer when such action does not prejudice the seller, and is not detrimental to the policy of the United States in securing the breakup of excess land holdings. Again, the facts and circumstances will control. At the least, however, the seller should make a good faith attempt in the time remaining to find eligible purchasers for the land under recordable contract.

You indicate also in your letters that if the debtors cannot raise the cash to meet the demand note secured by the second deed of trust, that the holder of the second deed of trust may on or after July 1, 1969, exercise its legal remedies. In such an event, the properties of the debtor comprising the Belmont Ranch of 3,200 acres will also be affected and such ranch may be sold by the creditor or foreclosed by him.

The Belmont Ranch is within an area falling within the purview of Opinion M-36666 and 1,280 acres of the Belmont Ranch are covered by a recordable contract. With regard to the Belmont Ranch you ask three questions in your letter of January 29, 1969. One question relates to price approval on the transfer from the debtor to the creditor or to a third party at the instance of the creditor. Another to the effect of the recordable contract covering 1,280 acres. As to these two

WATER DISTRICT

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questions, our answers are the same as given on the Cheney Ranch, that is, there is discretion in the Secretary, under appropriate circumstances, to waive price approval and to allow an assumption of the recordable contract by an ineligible buyer. We wish to emphasize that we view the Secretary's discretion as to these matters as extraordinary and to be exercised only on a case by case basis, each on its own facts.

There remains the question as to the right, if any, of the buyer to execute a recordable contract with respect to the remaining 1,920 acres of the Belmont Ranch. According to the *Solicitor's Opinion*, 72 I.D. 245, the 1,920 acres would be after-acquired excess land as to which the after-acquiring owner could not execute a recordable contract.

It is also our opinion that there is no discretion to allow the execution of a recordable contract as to after-acquired land under any circumstances. While not stated so directly in M-36666, we believe this to be a clear implication of that decision. You will recall that in that opinion the question related to lands acquired after the date of the execution of a water contract but prior to the date of initial availability of water, and that the answer was given that the Secretary had the discretion to allow the owner to place such lands under recordable contract. The reason for the conclusion was based upon section 46 of the Omnibus Adjustment Act of 1926, which was held in *Kings and Kern River Project*, 68 I.D. 372 (1961) to be applicable as to its recordable contract provisions only to "pre-existing" excess lands. In M-36666 it was pointed out that the point of no return, the boundary between "pre-existing" and "after-acquired" excess land, is the date of the initial water delivery. Thus, as a matter of law, the latest date for eligibility of such after-acquired lands is the date of the availability of water. This same conclusion was also reached in *Solicitor's Opinion*, 68 I.D. 433 (1961), which held that no authority existed for allowing the execution of recordable contracts as to after-acquired land, but which was in error only in the date it selected for the cut off.

Thus, no recordable contract would be available to the buyer of the 1,920 acres of the Belmont Ranch not presently under recordable contract. If a recordable contract for the 1,920 acres is essential to the situation, we suggest that the present owner, who is eligible for such a recordable contract, execute it and that you seek and exercise of the Secretary's discretion to allow the recordable contract to be assumed by the buyer.

Because of our position that there is no authority to allow the execution of a recordable contract by any other than the present owner as to

the 1,920 acres, there is no basis in any set of facts for seeking and applying any kind of administrative discretion. However, an argument has been raised with us to the effect that the buyer should be allowed to execute a recordable contract in the present case because of the involuntary nature of the sale by the present owner, citing the favorable treatment given to a seller in the tax laws with regard to the taxation of income from an "involuntary" sale of real estate. Even if there were room for the exercise of discretion on this point, the involuntary aspect of the transfer seems irrelevant to the right of the buyer to execute a recordable contract. Under the tax laws the benefit is given to the seller. We know of no tax law that gives the buyer of the real property a tax benefit merely from the fact that the seller's sale was in some manner or other "involuntary." Yet here, under the excess land law, the primary benefit would be not to the seller, but to the buyer who would be allowed a right which would not be accorded to a buyer of after-acquired excess land in the normal course. The fact that it might make the task of the seller easier in finding the buyer does not seem to us enough to justify such discrimination among buyers. We also see room for abuse if such were to be the course of action allowed by this Department. It would be easy enough under the vague standards by which "involuntary" conduct is measured in the analogous area of tax law, to set up situations of apparently involuntary sale which, in fact, would be totally voluntary and engaged in solely for the purpose of giving an added benefit to the buyer.

As a final question you ask what would be the status of the excess land held by the corporation if the stock of the corporation were transferred by the debtor to the creditor in satisfaction of the debt. In our opinion this would merely be a transfer of stock, and not land. The land would be in exactly the same status as before the transfer of stock.

In any situation where the Secretary is requested to exercise his discretion to allow a purchaser to assume an outstanding recordable contract, the purchaser should be required to execute a document of assumption binding him to the terms of the recordable contract in a form suitable for recordation. The document of assumption should be submitted to the Department for review and approval.

We hope that the answers supplied to you in this letter will aid you in advising the affected landowners in the Westlands Water District as to the views of this office on the question raised by you.

Sincerely yours,

RAYMOND C. COULTER,
Acting Solicitor.

March 4, 1969

UNITED STATES

BESS MAY LUTEY ET AL.

A-30927 Decided March 4, 1969

Mining Claims: Determination of Validity—Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land

Where a valid discovery of a valuable mineral deposit has not been made within a mining claim located in a national forest prior to the construction by the Forest Service of a logging road through the claim, the road was a valid appropriation by the United States of the land included in the right-of-way and is reserved from entry under the mining laws; therefore, whether or not the presence of the road caused some interference with mining activities on the claim does not excuse the mining claimant's failure to show a valid discovery thereafter or otherwise give him any rights in the unappropriated portion of the claim superior to the United States in the absence of a valid discovery.

Mining Claims: Contests—Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Hearings

Evidence tendered on appeal to the Secretary of the Interior after a hearing has been held in a Government mining contest case cannot be considered and weighed with the evidence presented at the hearing in making a decision on the merits of the contest since the record made at the hearing constitutes the sole basis for decision; however, such evidence may be considered in determining whether there is any justification for ordering a further hearing in the case and where it appears that most of the evidence pertains to a discovery on a portion of a claim which has been appropriated for a roadway by the Forest Service and the remaining evidence is insufficient to indicate a discovery on the remaining portions of the claim, a new hearing is not warranted.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bess May Lutey, Leonard G. Lutey, and George E. Akerlund have appealed to the Secretary of the Interior from a decision dated November 13, 1967, by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a hearing examiner's decision of March 30, 1967, declaring the Crystal Queen quartz lode mining claim to be null and void for lack of a valid discovery of a valuable mineral deposit as required by the mining laws, 30 U.S.C. sec 22 *et seq.* (1964).

The mining claim is located in section 2, T. 8 N., R. 2 W., Montana

76 I.D. No. 3

P.M., within the Helena National Forest. A certificate of location was first recorded in July 1962, with the Luteys as locators, and an amended certificate of location dated May 1964 included Akerlund. The contest proceeding was initiated at the request of the Forest Service, United States Department of Agriculture, charging that no discovery of valuable mineral sufficient to support a mining location had been made upon or within the limits of the claim, that the land within the claim was nonmineral in character and that the claim was not being held in good faith for mining purposes. The hearing examiner found that there was not a valid discovery of a valuable mineral deposit within the meaning of the mining laws and that therefore the claim was invalid for that reason. No ruling was made on the other charges. The Office of Appeals and Hearings affirmed on this basic issue.

There are some minor inaccuracies in the hearing examiner's decision, but they do not warrant any change in his crucial finding that there has not been a discovery of a valuable mineral deposit within the claim. The decision of the Office of Appeals and Hearings has adequately discussed the evidence adduced at the hearing and has properly applied the law to the factual conclusions deduced therefrom.

The appellants have not disputed the Office of Appeals and Hearings' discussion of the law applicable in this case. They expressly dispute the decision below only as to two specific statements which will be discussed in reverse order. First, they assert that a statement that it is clear that there was no deposit of valuable minerals exposed on the claim at the time of any of the Government mineral examinations, or at the time of the hearing, is not correct. Instead, they assert that road construction equipment cut through two branches of the lode exposing high grade ore on the claim in the fall of 1964 and that the hearing was held on May 16, 1966. They have not, however, supported this assertion by any reference to the evidence presented at the hearing. The statement in the decision was a conclusion reached after discussing the evidence presented at the hearing and the law with respect to what constitutes a discovery of a valuable mineral deposit. From our review of the record, the evidence supports this conclusion. Such evidence included testimony by Forest Service witnesses regarding mineral examinations of the claim in the presence of contestee Akerlund which failed to reveal evidence of a lode containing valuable minerals. There is nothing in the evidence at the hearing to establish that a lode of high grade ore was exposed by the road construction on the claims in 1964. To the contrary, one of the Forest Service's mineral examiners stated that he had observed all of the pits, shafts,

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natural outcroppings, and also the road cuts on the claim but he concluded that the land was nonmineral (Tr. 101).

The road in question is a Forest Service logging road. It was surveyed and flagged and constructed through a portion of the claim prior to the location of the claim in 1962. However, the portion involved here was constructed later in 1964. The second statement in the decision below that appellants dispute is to the effect that a Forest Service mining engineer gave his opinion that there was sufficient space between a mining shaft and the road to dispose of dump material from the shaft without disturbing the road. Appellants contend that this is incorrect as the space mentioned overlies a part of the lode which is about 11 feet from the surface, and also that large rocks from the dumped material would roll downhill into the roadway and interfere with traffic thereon.

This matter of possible interference with the road was raised because the appellants gave this as an excuse for failing to do further excavation work in the shaft leading to the exposure of the vein of ore which they insist underlies the area. Although at the hearing Akerlund testified to the drilling of holes within the claim to delineate the vein and to the digging of other shafts, his testimony was not supported by any evidence which would tend to corroborate that there actually is a vein bearing valuable minerals. For example, most of his belief in the existence of a vein stems from his alleged seeing of a vein in a shaft in 1949 from which he took a sample at a depth of 27 feet showing a high gold value of \$289.12 per ton. The existence of this vein has never been confirmed by the exposure or removal of ore and the discovery point was not open so that the Government mineral examiners could examine and sample it effectively. Akerlund testified that as someone else had a mining claim on the land in 1949 he covered the hole so that no one else would discover the vein (Tr. 47, 52). He did testify that in July 1962 he took a sample in the same shaft at a depth of 11-16 feet which showed an assayed value of \$4.40 a ton (Contestee's Exhibit G, Tr. 37, 53-55). However, this was the shaft which was filled in and never open for inspection or testing by Government mineral examiners (Tr. 9, 13, 18, 37).

The reason given for filling the shaft was that it was too dangerous to work (Tr. 38, 50). For that reason a new shaft immediately adjacent to the old one was commenced and the material from it used to fill up the old shaft. The new shaft was intended to reach the 27-foot level where the valuable 1949 sample was found in the old shaft but it was not sunk below 13 feet (Tr. 10) so the old structure was never uncov-

ered (Tr. 31). It was to explain why the new shaft was not deepened that appellants argued that there was no place to dump excavated material from it without interfering with the road (Tr. 42-43, 70). However, contestee Leonard Lutey admitted that the material could be dumped below the road if they "wanted to go to a lot of extra expense" (Tr. 70).

The fact remains that 5 samples taken by the contestees in the new shaft showed at best only a trace of gold and silver, or very small percentages (Ex. H, J, K, L, M). Three samples in the new shaft taken by a Government mining engineer produced only one sample worth assaying and it showed only a gold value of 77 cents, which was considered exaggerated because it came from a narrow $\frac{1}{4}$ inch seam (Tr. 79-83, 85, 86).

A second Government mining engineer testified that a sample he took in the new shaft showed only a trace of gold and silver (Tr. 97, 100). Both witnesses indicated that they were told by the contestees that there were no other places in the claim worth sampling (Tr. 83, 98-99).

Akerlund admitted that the only time he actually saw the vein to determine its distance was in the shaft which is now covered over and which he saw in 1949 (see Tr. 24).

It is apparent from the evidence in the record at the hearing that the presence of a vein bearing a valuable mineral deposit within the claim was not established by any mining work prior to the construction of the Forest Service road and at the time of the hearing. Thus, appellants' assertions that there is a lode underlying the area between the road and the new shaft is not supported by the evidence produced at the hearing. In the absence of a valid discovery of a valuable mineral deposit within the claim, which under the mining laws is necessary in order to give a mining claimant rights to the land superior to the United States, the Forest Service was entitled to construct the logging road. Cf. *United States v. Frank Coston*, A-30835 (February 23, 1968); *United States v. Charles L. Seeley and Gerald F. Lopez*, A-28127 (January 28, 1960), affirmed *Seeley v. Seaton*, Civil No. 41094 (N.D. Calif., July 29, 1964). The construction of the road constitutes an appropriation by the Government of the land within the mining claim covered by the road, road bed and necessary right-of-way and as such is reserved from entry under the mining laws. See *United States v. Paul F. and Adeline A. Cohan et al.*, 70 I.D. 178, 181 (1963) and cases cited therein. That construction of the road here may have interfered with appellants' mining operations thereafter does not

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give them any rights in the unappropriated portion of the claim in the absence of a valid discovery, nor does it constitute an excuse for failing to show a discovery. *Cf. United States v. Frank Coston, supra; United States v. Charles L. Seeley and Gerald F. Lopez, supra.*

Appellants' present appeal consists principally of statements evidentiary in nature concerning the taking of four samples, together with copies of assay certificates of the samples, which purport to establish that there are gold and silver within the claim constituting a discovery of a valuable mineral deposit and that there is a lode within the claim.

The Forest Service, in response to appellants' appeal, objects to any consideration of these statements and the assay certificates on the ground that they are factual in nature and that the rules of practice of this Department (43 CFR 1840.0-8) provide that where a hearing has been held in a contest the record made at the hearing shall be the sole basis for a decision (also citing *United States v. Gilbert C. Wedertz*, 71 I.D. 368, 374 (1964)). They also contend that the statements are inadmissible in any event because they are unsworn and not subject to cross-examination or rebuttal. The Forest Service also indicates that, at Akerlund's request after the hearing, a Forest Service mineral examiner, one of the witnesses at the hearing, accompanied him to the claim and took several samples where requested. The Forest Service states that the examiner learned nothing which would significantly change the facts as presented at the hearing, but would only give additional support to his previously stated opinion that no discovery of valuable mineral has been exposed upon the claim.

The Forest Service is correct that appellants' allegations of fact and certificates submitted on appeal cannot be accepted as evidence to be weighed with the evidence presented at the hearing in making a decision on the merits of the case as the record made at the hearing constitutes the sole basis for decision. Otherwise the procedures and safeguards for developing the facts by having testimony and other evidence presented at a hearing, where it is subject to cross-examination and rebuttal, would be thwarted. See *United States v. David L. King*, A-30867 (February 28, 1968), and *United States v. Rodney Wood et al.*, A-30697 (May 31, 1967). Evidence submitted after a hearing has been held can be considered only to determine whether a further hearing should be granted, and where it does not show that a further hearing would be productive of more conclusive evidence on the question of whether there has been a valid discovery it has been held that there is no basis for remanding a case for another hearing.

Id. Also, in order to warrant a further hearing there should be reasons given to show that there is a substantial equitable basis for holding a second hearing. *United States v. Lawrence R. Dowell et al.*, A-30614 (November 21, 1966).

Appellants have not requested a further hearing in this case but simply submitted the statements and certificates as further evidence. As indicated, such "evidence" is not acceptable for the purpose of making a decision on the issue of discovery, but at the most can be considered only to determine whether there should be further hearing in this case. We have given consideration to appellants' appeal for this purpose even in the absence of a specific request for a hearing and in the absence of reasons presented to show any equitable basis warranting the reopening of the evidentiary proceedings.

The information given by appellants with respect to the samples is insufficient to properly evaluate their significance. Nevertheless, if we accept the assay certificates and appellants' statements at face value it is apparent that they do show significantly higher values of gold and silver than were revealed by evidence produced at the hearing. However, three of the four samples appear to have been taken from the area within the Forest Service road right-of-way: one sample showing \$112 per ton was taken in the embankment of the roadway about 2 feet above the roadbed, a second sample having a value according to appellants of \$175 per ton was taken directly below the cut for the first sample and on the inner edge of the roadway, and the third sample with a value of \$16.90 per ton was taken on the surface of the roadway. The fourth sample, appellants state, was taken from a footwall near the face of the tunnel at a site within the claim and has a value of \$22.85 per ton. Since the first three samples were taken from the area appropriated by the Forest Service they would not be acceptable as indicative of values within the unappropriated portion of the mining claim except as such values could be deduced by inference. However, under the mining laws inference cannot be accepted as a substitute for showing the existence of an actual valuable mineral deposit within a mining claim. *United States v. Frank Coston, supra.* The question arises also as to why these areas allegedly exposed by the road construction in 1964 (and not by any work of appellants apparently) revealed no valuable minerals to the Forest Service witnesses when they examined the claims with Akerlund who showed them the alleged points of discovery.

Appellants' assertions that the samples show that there is a zone of high grade ore across the claim are not supported by any offer of other proof which would further demonstrate that such a zone has actually

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been exposed by the appellants within the unappropriated portion of the claim. The showing of the single fourth sample having good values does not in and of itself suggest that further evidence can be produced to establish the discovery of a valuable mineral deposit on the portions of the claim outside the roadway. Without more being shown, we do not believe that an adequate reason exists for ordering a new hearing.

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 MacDONALD CONSTRUCTION COMPANY

IBCA-507-8-65

IBCA-589-9-66

Decided March 20, 1969

Contracts: Disputes and Remedies: Damages: Liquidated Damages—Contracts: Construction and Operation: General Rules of Construction—Contracts: Construction and Operation: Conflicting Clauses—Contracts: Construction and Operation: Intent of Parties

A bid schedule and specifications called for construction of the Gateway Arch and the installation of a transportation system in the Arch, and subsequently the schedule (but not the specifications) was revised to call only for construction of the Arch, and a contract was entered into between the parties providing for construction of the Arch to commence after receipt of a notice to proceed, and containing a clause providing for liquidated damages to be assessed for each day of delay in completing the Arch beyond the date fixed by the contract, until completion and acceptance of the Arch. Subsequently, the parties entered into a second agreement (entitled "Transportation Supplement") which provided for the installation of the transportation system commencing on the date of execution of the Supplement and to be completed within 95 days after completion and acceptance of the Arch, and containing a clause providing for liquidated damages to be assessed for each day of delay beyond the time fixed "herein" for completion, and which also incorporated the specifications by reference (including a clause providing for liquidated damages to be assessed in connection with the transportation system if the system was not completed within a fixed period from the date of receipt of the notice to proceed). In the described situation the Board ruled that liquidated damages for delay in completing the Arch would run until the Arch was completed and accepted and liquidated damages for unexcused delay in completing the transportation system would commence 95 days after the Arch was completed and accepted. Since the

designation of the subsequent contract as a "supplement" is not determinative, and in the absence of any proof that the parties intended the two instruments to be treated as one, the Board finds that they are separate and that the term "herein" in the Supplement referred only to the provision for completion of the transportation work specifically set forth therein and not to any such provision contained in the specifications; accordingly, the contracting officer erred (i) in looking to such clause in the specifications by which liquidated damages respecting the transportation work would be assessed within a fixed period from the date of the notice to proceed, inasmuch as that clause was found inapplicable, and (ii) in consequently failing to assess such liquidated damages from a date controlled by the actual completion of the Arch and its acceptance.

BOARD OF CONTRACT APPEALS

These appeals grew out of the construction of the Gateway to the West Arch, and of the installation of the transportation system within the Arch, located in St. Louis, Missouri. The Arch was constructed pursuant to a contract with the appellant executed March 14, 1962 (which also provided for construction of a Visitor Center). The transportation system was constructed by the appellant, pursuant to a second document executed July 31, 1962, designated as a Supplement to the March 14 contract.¹ The contracting officer has separately assessed liquidated damages against the appellant for unexcused delay in completing the Arch and the transportation system. By stipulation, the parties have asked the Board to determine at this juncture only if the contracting officer's formula for imposing liquidated damages is proper. Questions relating to excusable delays are not now before us. There are no facts in dispute. The controversy is over the application of the provisions relating to liquidated damages found in the two instruments.

There are four such provisions, viz. (i) SW-3 and (ii) SP-24 contained in the Specifications, and (iii) the "work shall be completed" clause and (iv) paragraph 5, contained in the Supplement. SW-3 is found under Part I, entitled "STATEMENT OF WORK," and is headed "PHASES AND COMPLETION OF WORK." SP-24 (as amended by Addendum No. 2, dated November 30, 1961), appears in Part 3 of the Specifications, which is entitled "SPECIAL PRO-

¹The original bid schedule on which the appellant had bid, dated October 23, 1961, called for construction of the Arch and installation of the transportation system. However, prior to award of the contract on March 14, 1962, the bid schedule was amended to exclude the transportation system and to provide only for construction of the Arch and Visitor Center. The Supplement covers those items of work shown on the original bid schedule prior to the amendment, which were not included in the Arch contract. The Specifications and Addenda included in the Arch contract were incorporated by reference into the Supplement.

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VISIONS," under the heading "LIQUIDATED DAMAGES." The "work shall be completed clause" is found on page 1 of the Supplement, which is Standard Form 23 (March 1953 edition). Paragraph 5 is one of the five typed clauses on page 2 of the Supplement and is the only such provision relating to liquidated damages.

Subparagraph a. of SW-3 (as amended by Addendum No. 5, dated January 3, 1962), called for the Arch to be completed 875 days after the date of receipt of the notice to proceed. As the notice to proceed was received on March 29, 1962, the Arch accordingly should have been completed on August 18, 1964. By virtue of a number of change orders, the date of scheduled completion of the Arch was extended a total of 269 days to May 15, 1965.

The "work shall be completed" clause of the Supplement provided that the transportation system and electrical service (which is not here involved) be completed 125 calendar days after the date of completion and acceptance of the Arch by the Government.² This period was reduced from 125 "to 95 days after date of completion and acceptance" by Change Order No. 35, dated February 2, 1965. Subparagraph c. of paragraph SW-3 provides that the "means of transportation," *inter alia*, "shall be performed and completed in a period of 1,000 calendar days from date of receipt of notice to proceed."³

The Government accepted the Arch on June 28, 1966, and the transportation system on May 24, 1967. The contracting officer refused appellant's request (made on behalf of itself and its subcontractor, Pittsburgh-Des Moines Steel Company) for an extension of time of 483 days in connection with construction of the Arch.⁴ He also denied appellant's request (made on behalf of itself and its subcontractor, Planet Corporation) for extensions of time totaling 313 days respecting the transportation work.⁵

The contracting officer assessed liquidated damages against the appellant for 95 days of unexcusable delay in completion of the Arch (covering the period from May 16, 1965 through August 18, 1965),

² "WORK SHALL BE COMPLETED One Hundred Twenty Five (125) calendar days after date of completion and acceptance by National Park Service of Gateway Arch."

³ It reads:

"SW-3 PHASES AND COMPLETION OF WORK.

"C. All work in conjunction with furnishing and installing the means of transportation within the Gateway Arch, the Electrical Service, and Painting, as set forth in the contract documents, shall be performed and completed in a period of 1,000 calendar days from date of receipt of notice to proceed."

⁴ The appeal from that decision bears IBCA docket number 507-8-65.

⁵ In addition to the appeal bearing IBCA docket number 589-9-66, there are unresolved disputes in other docketed appeals that have arisen from more than 10 requests for extensions of time. The Stipulation also provides that there are two more requests involving an additional 44 days which are not at issue in presently docketed appeals.

at the rate of \$250 per day, amounting to \$23,750.⁶ The Government is, pursuant to the contract, the recipient of these damages. He assessed liquidated damages against the appellant under the Supplement for 644 days of unexcusable delay (from August 19, 1965 to May 24, 1967), at the rate of \$250 daily, amounting to \$161,000.⁷ In accordance with the Supplement the Bi-State Development Agency of the Missouri-Illinois Metropolitan District⁸ is designated the recipient of these damages.

The method employed by the contracting officer in arriving at the assessments is the following. Under SP-24, liquidated damages were assessable "for delay in completing the work beyond the time fixed and agreed upon in the contract for its completion" plus any extensions. The time fixed and agreed upon in the contract for completion of the Arch is stated in subparagraph a. of SW-3. This, as we have seen, worked out to May 15, 1965. Consequently, the contracting officer initiated liquidated damages respecting the Arch on May 16, 1965.

He held that the assessment should run only for 95 days, until August 18, 1965, even though the Arch was neither complete nor substantially complete then. His reasoning was that at that point, 95 days after the scheduled date of completion of the Arch, the transportation system should have been fully installed. Since it was not, he imposed liquidated damages under the Supplement, commencing August 19, 1965, which ran until the transportation system was accepted on May 24, 1967. He terminated the assessment under the Arch contract as of August 18, 1965, on the ground that the assessments could not overlap.

The parties have agreed that overlapping assessments were not

⁶ The assessment was made under the following clause:

"SP-24 *LIQUIDATED DAMAGES*: Liquidated damages in lieu of actual damages will be deducted from the contract amount for delay in completing the work beyond the time fixed and agreed upon in the contract for its completion or beyond such time as may be established because of justifiable extensions of time granted pursuant to other provisions of this contract, as follows:

* * * * *

"b. *Completion of all work in conjunction with the Gateway Arch Foundations, proper, and with the Gateway Arch, proper*: Two hundred fifty dollars (\$250.00) for each calendar day until completion and acceptance in writing, as described in the Statement of Work."

⁷ The assessment was made under the following clause:

"5. Liquidated damages in lieu of actual damages will be deducted from the amount of this Supplemental Agreement for delay in completing the work beyond the time fixed and agreed upon herein for its completion or beyond such time as may be established because of justifiable extensions of time granted, in writing, in the amount of Two Hundred Fifty Dollars (\$250.00) per calendar day. Such liquidated damages are for the benefit of the Bi-State Development Agency and shall be deducted by it from payments to be made hereunder."

⁸ Bi-State is a non-Federal entity which joined in the execution of the Supplement for the purpose of assuming the obligation to make payment to appellant for the work performed under the Supplement. See paragraph 2 of Supplement, p. 2.

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contemplated.⁹ Their quarrel is over the basis under which the contracting officer cut off damages on the Arch phase and initiated damages on the transportation phase. Appellant and its transportation subcontractor contend that under the Transportation Supplement liquidated damages were not properly imposable in connection with the transportation work until 95 days after the date of completion and acceptance of the Arch. As the Arch was accepted on June 28, 1966, appellant maintains that the date when the transportation phase should have been completed was October 1, 1966. In its view liquidated damages were thus not assessable for delay in transportation work before that date. Appellant also claims that the doctrine of substantial performance should be considered in arriving at the terminal date of the assessment.

In their stipulation the parties have referred without amplification to the contract and Supplement as constituting a "contractual arrangement." We do not disagree with this characterization in the sense that the two documents obviously relate to the same general transaction and contain subjects which might well have been combined into one agreement. Beyond that, however, the relationship appears uncertain. Whatever it may be, it affects the context within which the various provisions before us are found. It is therefore necessary for us to ascertain the extent of the relationship between the two documents. Whether a later contract is to be deemed independent of, incorporated in, or correlated to an earlier agreement is to be determined by the intention of the parties as expressed in the subsequent instrument.¹⁰

We have been furnished with no evidence that the parties intended the Supplement and the Arch contract to constitute one agreement. The very fact that a separate contract was executed would seem to belie any such intention. Moreover, because the document is designated a supplement is not determinative of its legal nature.¹¹ A "supplement" is defined as that which supplies a deficiency, but it does not necessarily follow that in supplying that deficiency here a merger ensued between the contract and its supplement. If the Supplement had been intended simply to add by merger the transportation and electrical work to the Arch contract, there was no point in incorporating by reference into the Supplement all of the specifications and addenda which were already a part of the Arch contract. It would appear that they were included a second time because the Supplement was considered to be a second, separate contract. It also would seem that if the

⁹The parties have expressly stipulated that "under the Arch contract and the Transportation Supplement * * * liquidated damages * * * under no conditions were to run concurrently against appellant." (Stipulation, dated July 3, 1968, par. 3, p. 3).

¹⁰*Frierson v. International Agricultural Corp.*, 148 S.W. 2d 27, 35 (Tenn. Ct. App. 1940).

¹¹17 Am. Jur. 2d, *Contracts*, sec. 269 (1964).

parties believed they were effecting a complete consolidation between the two documents they could have easily so provided on the face of the Supplement.¹² This they did not do either.

Merely because the two documents relate to the same transaction does not mean that all provisions of one are *ipso facto* consolidated bodily into the other.¹³ They should, however, in view of their connection, be construed together.¹⁴ But even though they are construed together, it does not necessarily follow that two such documents constitute one contract for all purposes.¹⁵ Separate instruments may be treated as one only where the provisions of each, if consolidated, will not be incompatible.¹⁶ If grave violence would be done to the language of the instruments in question, they may not be forcibly combined for the purpose of making them mean, as one, something other than what they do mean separately.¹⁷

It is clear that the provisions relating to imposition of liquidated damages on the Arch are not modified by the terms of the Supplement and are thus wholly compatible with it. There is, however, an apparent conflict between the "work shall be completed" clause contained in the Supplement and paragraph SW-3. The former calls for the transportation work to be completed only after completion *and acceptance* of the Arch. On the other hand, under SW-3, completion of the transportation system is keyed to performance within a certain period of time from the date of receipt of the notice to proceed and is not contingent on prior completion and acceptance of the Arch. This is a different standard. Accordingly, for the reasons we have mentioned, we would not be justified in regarding the Arch contract and Supplement as one instrument. We therefore conclude that at least in this respect the Arch contract and the Supplement are separate, viable agreements.

¹² See *Frierson v. International Agricultural Corp.*, note 10, *supra*, in which the Court while considering if two agreements were consolidated said: "* * * If such was the understanding of the parties, why was there not inserted a specific provision to that effect?" * * *

¹³ *Lawrence v. United States*, 378 F. 2d 452, 461 (5th Cir. 1967); 17 Am. Jur. 2d, *Contracts*, sec. 264 (1964).

¹⁴ See *Four-Three-O-Six Duncan Corporation v. Security Trust Company*, 372 S.W. 2d 16, 23 (Mo. 1963).

¹⁵ *Lawrence v. United States*, note 13, *supra*; *Sterling Colorado Agency, Inc. v. Sterling Ins. Co.*, 266 F. 2d 472, 475-76 (10th Cir. 1959); *Four-Three-O-Six Duncan Corporation v. Security Trust Company*, note 14, *supra*.

¹⁶ 17 Am. Jur. 2d, note 13, *supra*. This, of course, does not mean that one instrument will be treated as two if it contains incompatible provisions.

¹⁷ See *Lawrence v. United States*, note 13, *supra*; *Sterling Colorado Agency, Inc. v. Sterling Ins. Co.*, note 15, *supra*; *Four-Three-O-Six Duncan Corporation v. Security Trust Company*, note 14, *supra*; 17 Am. Jur. 2d, note 13, *supra*.

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Were this purely a matter involving two apparently inconsistent contracts we would have no difficulty at this point in resolving the controversy on a non-substantive basis. In the first place, it might well be said that those provisions of the Arch contract which relate to transportation work, including subparagraph c. of SW-3, are mere surplusage, since the transportation work was excluded from the purview of the Arch contract. There was, consequently, a lack of consideration for such provisions. As surplusage, they would have no efficacy and it is problematical if they possessed any legal force which could be activated *in futuro*. Under that approach it could be argued that they lacked the capacity to create a conflict with the provisions of the Supplement.

Assuming *arguendo*, however, that matters which are dehors the contract may nonetheless become binding and thereby create a conflict with the Transportation Supplement, it would seem that the Supplement would control. The reason we believe the provisions of the Supplement would take precedence is that under Missouri law (the jurisdiction wherein both documents were executed), if two contracts are inconsistent, the contract last executed supersedes the earlier contract to the extent they are inconsistent.¹⁸ While the interpretation of Government contracts is governed by Federal common law and we are therefore not bound to follow the Missouri rule,¹⁹ we regard it as sound and expressive of general contract principles applicable to this case.

The problem, nevertheless, persists because the specifications and addenda of the Arch contract were incorporated by reference into the Supplement. Consequently, they are part of the Supplement and so their presence perpetuates the apparent conflict even though, as we have seen, the Arch contract as such would not have that effect.

Under paragraph 5 of the Supplement, liquidated damages are assessable "for delay in completing the work beyond the time fixed and agreed upon herein for its completion" or as it may be extended. The key word is "herein." To determine what is "the time fixed and agreed upon herein," it is necessary to establish what is meant by "herein." According to the Court of Appeals, for the Sixth Circuit, "as used in

¹⁸ See *Berry v. Crouse*, 376 S.W. 2d 107, 112 (Mo. 1964) and authorities cited therein.

¹⁹ 1 McBride & Wachtel, *Government Contracts*, Sec. 2.10[2] (1968) citing, *inter alia*, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) and *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947). See generally Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision*, 105 U. Pa. L. Rev. 797 (1957) and Note, 65 Mich. L. Rev. 1502 (1967). But see *Houdaille Industries, Inc. v. United States*, 138 Ct. Cl. 301, 318 (1957).

legal phraseology, [*it*] is a locative adverb and its meaning is to be determined from the context. It may refer to a single paragraph, to a section, or to the entire contract in which it is used.”²⁰ In this instance, then, the word “herein” might have been intended to refer only to the immediate five pages of which the Supplement is comprised or it might apply to the entire document including all provisions incorporated therein by reference. If “herein” only refers to the former, then it would seem that “the time fixed and agreed upon” was intended to be that which is provided for in the “work shall be completed” clause found in the Supplement. But if the word “herein” is given a broader connotation and encompasses SW-3 as well, the time fixed and agreed upon would refer to either 95 days after the date of completion and acceptance of the Arch or 1,000 calendar days from the date of receipt of the notice to proceed.

For all practical purposes paragraph 5 of the Supplement and SP-24 are identical until “the time fixed and agreed upon” provision is reached. However, at that point SP-24 refers to “the time fixed and agreed upon *in the contract* for its completion,” whereas paragraph 5 refers to “the time fixed and agreed upon *herein*.” (Italics supplied) We regard this as a significant distinction. If the liquidated damages clause in the Supplement was intended to be applied in a manner identical to that prescribed by SP-24, it appears that identical language would have been used, viz., “the time fixed and agreed upon in the contract for its completion,” or something very similar. Instead paragraph 5 refers “to the time fixed and agreed upon herein for its completion,” which is more restrictive. From the context in which it appears, it seems to us that the word “herein” was intended specifically to cover the five immediate pages of the Supplement. In that case the word relates only to the “work shall be completed” clause on the first page of that document.

How, then, do we treat the presence in the Supplement of paragraph SW-3, which was incorporated by reference along with the rest of the specifications? A contract should be read as a harmonious whole, with no word or term rejected outright or rendered meaningless or held to conflict with another unless no other reasonable interpretation is possible.²¹ However, if it is impossible to avoid conflict, as between an express term and a provision incorporated by reference the express term is regarded as controlling.²²

²⁰ *Saultsberry v. Maddia*, 125 F. 2d 430, 434 (6th Cir. 1942), cert. denied 317 U.S. 643 (1942).

²¹ *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 395 (1965).

²² *Arrow Sheet Metal Works v. Bryant & Detwiler Co.*, 61 N.W. 2d 125, 129 (Mich. 1953).

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It might well be that the purpose in utilizing the word "herein" was to limit the otherwise broad impact of the incorporation-by-reference clause on the express terms of the Supplement.²³ But we believe that insofar as the transportation phase is concerned SW-3 is mere surplusage and inapplicable, since its provisions are keyed to the notice to proceed.²⁴ It appears to us that SW-3 was tailored to the original bid schedule which called for construction of the Arch and installation of the transportation system. After the bid schedule was amended to separate the two phases, we believe the parties inadvertently failed to make the provisions of SW-3 consistent with the terms of the Supplement when the latter document was executed.

It is thus clear that under the provisions of the Supplement the transportation work was to have been completed only after the Arch was completed and accepted. Both completion and acceptance were required. However, the Government based appellant's liability for liquidated damages upon the date of scheduled completion alone and for this purpose disregarded the date when the Arch was accepted. In order to sustain the Government's view it is necessary to negate or overcome in some fashion the requirement of "acceptance."

The contracting officer's position has been supported on various grounds. Considerable weight is placed upon a Government memorandum which describes the negotiations leading up to the Transportation Supplement.²⁵ Inasmuch as a copy of the memorandum was furnished appellant, and not disputed by it, in advance of the disagreement, the contemporaneous interpretation doctrine is said to be applicable. However, the Government's strongest emphasis is directed toward the alleged injustice inherent in the contractor's interpretation. The Government contends that if appellant's position is adopted appellant would be profiting from its own wrong. We will consider these grounds *seriatim*.

²³ See *International Erectors v. Wilhoit Steel Erectors & Rental Service*, 400 F. 2d 465, 469 (5th Cir. 1968), in which the Court said: "The words 'except as herein modified and changed' must be presumed to have been used for a specific purpose. They can neither be struck from the contract nor ignored. Their apparent purpose was to limit the otherwise broad provisions of the incorporation-by-reference clause * * *."

²⁴ It would seem that since the provisions of SW-3 are keyed to the notice to proceed, they are effective only where a notice to proceed has been received. But in connection with the work performed under the Supplement appellant received no notice to proceed and none was contemplated. It is only the work under the Arch contract which was required to be commenced within a certain number of days after receipt of the notice to proceed. Supplement work was to start on the date of execution of the agreement. Inasmuch as the two instruments are separate, the logical conclusion is that the notice to proceed received under the Arch contract was not intended to be carried over to the transportation work.

²⁵ Memorandum of Superintendent, Jefferson National Expansion Memorial, dated June 26, 1962, Exhibit 19, Appeal File to *MacDonald Construction Company*, IBCA-572-5-66. Under paragraph 17 of their stipulation the parties agreed to utilize that appeal file in this matter.

Assuming *arguendo* that the Government memorandum relied on qualifies as a contemporaneous interpretation, it does not appear to us that it clearly supports the Government's position. On the contrary, we believe that the document as a whole more readily supports the appellant's view. Thus, in paragraph 1 the following appears:

* * * The question, then, arises as to whether the 1,000 days should be counted from March 28 (the position of Bi-State) or from the date of signing the supplemental Agreement (the position of MacDonald). In the absence of an agreement on this point, we proposed to allow the Contractor 125 calendar days for completion of the transportation system *after* the date of completion and acceptance by the National Park Service of the Gateway Arch. * * * [T]ying the time of completion of the transportation system to the completion of the Gateway Arch will facilitate contract administration in that time extension, if any, granted for completion of the Gateway Arch will automatically extend the time for completing the transportation system, without the added paper work of increasing the transportation system time separately. The problem is that the transportation system cannot be installed and completed fully until the Arch is finished. * * *

We regard the foregoing as a recognition that the transportation system was to be completed after the completion and acceptance of the Arch and that the 125 days of "free time" (later reduced to 95 days) were to run after such completion and acceptance.²⁶ Conversely the memorandum indicates "the absence of an agreement" with respect to the position presently advanced by the Government.

The major thrust of the Government's position is stated as follows on page 10 of its brief: "We cannot agree with the construction placed by MacDonald on the words 'completion and acceptance.'²⁷ The law does not permit a party to a contract by his own wrongdoing to postpone his own obligation." The Government's point is that if comple-

²⁶ The Government has also attached some weight to the fact that the Supplement is dated exactly 125 days after the date when the notice to proceed with the Arch was served. Although not fully developed, the point presumably is that the date of the notice to proceed with the Arch, under SW-3, did in fact govern the completion date of the transportation work. We do not attribute any significance to this, however. In the first place, the time provisions of SW-3 are calculated from the "date of receipt" of the notice and not from the date it was transmitted. Moreover, the Supplement was executed when it was at Bi-State's request. On page 2 of the memorandum referred to in note 25, *supra*, the following appears: "Bi-State * * * wishes to execute this Supplemental Agreement on or about July 15, when it expects to have its bond revenue available." (Italics supplied.) That the date of the Supplement occurred exactly 125 days after the notice to proceed seems to have been simply a coincidence. Coincidence cannot be entirely eliminated.

²⁷ At one time the contracting officer did take the position that completion of the transportation system was determined by passage of the designated number of days after completion and acceptance of the Arch. See letters of contracting officer to appellant, dated September 1, 1965, and August 31, 1965, added to the appeal file in IBCA-572-5-66 by order of the Board, dated August 17, 1966. In the letter of August 31, 1965, the contracting officer said: "You are expected to complete the conveyance system 95 days after the Arch is accepted."

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tion and acceptance constitute a condition precedent, appellant can prevent and "has prevented the occurrence of that condition by what the Contracting Officer has found to be its continuing inexcusable delay."²⁸

We do not quarrel with the proposition that a party may not by his own wrongdoing postpone with impunity his own obligation. But we do not regard the contractual language in question as creating any such *carte blanche*. Implicit in the completion provision is the requirement that any delay in completion of the Arch must be excusable. It must have arisen as a result of circumstances beyond the appellant's control. If the delay in completion of the Arch is inexcusable liquidated damages are assessable. The appellant is thereby held responsible for its "wrongdoing." It cannot therefore be maintained that the appellant is profiting from its own wrongdoing. Moreover, this was the parties' bargain. Appellant was to complete the transportation system after completion and acceptance of the Arch, which makes eminently good sense when one takes into account the contracting officer's statement, *supra*, that "the transportation system cannot be installed and completed fully until the Arch is finished." The "acceptance" feature of the agreement may not be lightly disregarded. The words "completion and acceptance" are not equivalent and do not mean the same thing.²⁹ Neither may we impliedly insert the word "scheduled" before "completion."³⁰ In order to sustain the Government's contention reformation of the Supplement is required. The Board is not empowered to reform a contract.³¹

For all of these reasons we hold that under the terms of the Supplement (as modified by Change Order No. 35), the appellant had 95 days after completion and acceptance of the Arch to complete the transportation work. Accordingly the contracting officer should not have imposed liquidated damages against the appellant in connection with the transportation work before October 1, 1966. It follows that

²⁸ Government's Brief, p. 11.

²⁹ See *Stitzer v. United States*, 182 Fed. 513, 518 (3d Cir. 1910). There the Court, in construing "completion and final settlement of the contract" said: "* * * The contract might well be completed, and yet divers disputes and differences exist between the parties, which would require adjustment before final settlement could be made. * * *"

³⁰ See *Copco Steel & Engineering Co. v. United States*, 169 Ct. Cl. 601 (1965). Cf. *Smith v. Minneapolis-Honeywell Regulator Co.*, 236 F. 2d 573, 575 (10th Cir. 1956); *Metroplitan Casualty Ins. Co. of New York v. Dolese Bros. Co.*, 20 P. 2d 569, 570 (Okla. 1933).

³¹ *MacDonald Construction Company*, IBCA-572-5-66 (August 15, 1966), 66-2 BCA par. 5764, aff'd upon reconsideration (March 17, 1967), 67-1 BCA par. 6202. As is evident from note 25, *supra*, that appeal grew out of the construction of the Arch and installation of the transportation system. However, it involved only the issue of the Board's jurisdiction and in its opinion on reconsideration the Board made clear that it was passing only on that question and was not passing on the question now before us.

the assessment starting August 19, 1965, was improper. We will treat *infra* the question of when the assessment should have been terminated.

Our holding affects the assessment on the Arch and we now turn to that aspect of the contracting officer's determination. First, assuming for the purpose of this decision that the appellant was entitled to no further extensions of time, the contracting officer properly initiated the assessment on May 16, 1965, under the terms of subparagraph a. of SW-3 and subparagraph b. of SP-24. There is no dispute on this point. According to subparagraph b. of SP-24, the assessment was to be continued "until completion and acceptance in writing" of the Arch. However, the contracting officer terminated the assessment on August 18, 1965, prior to completion and acceptance of the Arch, at the conclusion of the 95-day period which had commenced on the scheduled date of completion of the Arch.

The contracting officer's action in stopping the assessment before completion and acceptance of the Arch contravened the express provisions of subparagraph b. of SP-24. Ordinarily, as we said *supra*, no word or term in a contract should be rendered meaningless. The contracting officer justified it, however, on the ground that overlapping assessments were not authorized by the contract and Supplement. He, consequently, determined that liquidated damages could run on only one phase of the work at a time and cut off the assessment relative to the Arch. The parties have stipulated that liquidated damages on the Arch and transportation phases were not to run concurrently.

The Board is not bound by the terms of a stipulation purporting to describe the legal effect of a contract.³² We have therefore disregarded the stipulation of the parties in this respect. However, we have reached the same conclusion as the parties, that liquidated damages were not to run concurrently, but not for the Government's reason. Our conclusion stems directly from our interpretation of the various provisions relating to liquidated damages and completion of the work discussed *supra*. Inasmuch as the transportation phase was not to be completed until after the Arch was completed and accepted, it follows that any assessment of liquidated damages on the Arch would of necessity terminate before the imposition of liquidated damages on the transportation phase would be contractually possible.

We also regard it as clear that a 95-day interval was to occur be-

³² See *Andrews v. St. Louis Joint Stock Land Bank*, 107 F. 2d 462, 470 (8th Cir. 1939), cert. denied 309 U.S. 667 (1940), rehearing denied 309 U.S. 697 (1940); *Travelers' Indemnity Co. v. DeWitt*, 207 S.W. 2d 641, 643 (Tex. Civ. App. 1948); 83 C.J.S. *Stipulations* Secs. 10e., 13 (1953).

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tween assessments during which appellant was to complete the transportation work. Within that period the assessment of liquidated damages was unauthorized. The contracting officer therefore erred in making back-to-back assessments.

For all of these reasons we hold that the contracting officer improperly terminated the assessment on the Arch on August 18, 1965. We are of the opinion that the assessment on the Arch should have continued until the appropriate terminal date was reached. The question that remains, then, is establishing the date on which the assessments relating to the Arch, and to the transportation phase as well, should have been terminated.

Appellant maintains that in fixing the terminal date of the assessments the contracting officer should have considered the "substantial performance" or "substantial completion" doctrine. According to this doctrine, liquidated damages may not be assessed for periods after the point of substantial completion has been reached.³³ The doctrine has long been recognized by the courts and boards.³⁴

The test to be applied in determining whether a project is substantially complete is (i) the quantity of work remaining to be done, and (ii) the extent to which the project was capable of adequately serving its intended uses.³⁵ In other words, quantitative considerations alone are not enough to justify the conclusion that performance has been substantially completed, but an inquiry into the effectiveness of the work is also required.³⁶

We have been furnished with no basis by which we may determine if the test for substantial performance can be here met. However, we believe it should be considered. If it is found applicable, the assessment on the Arch should be terminated in advance of June 28, 1966, on the date when performance was substantially complete, and the assessment on the transportation system should be terminated in advance of May 24, 1967, also on the date of substantial completion. If the doctrine is determined to be inapplicable, the assessments on the Arch and on the transportation phase should terminate on their respective dates of acceptance, June 28, 1966 and May 24, 1967.

³³ *Paul A. Teegarden*, IBCA-419-1-64 (July 27, 1965), 65-2 BCA par. 5011, aff'd on reconsideration, 65-2 BCA par. 5273 (December 14, 1965).

³⁴ See *J & B Construction Company, Inc.*, IBCA-668-9-67 (January 23, 1969), 69-1 BCA par. 7469, and cases cited in footnotes 5, 6 and 7 of *Paul A. Teegarden*, note 33, *supra*, par. 5273.

³⁵ *Paul A. Teegarden*, note 33, *supra*, par. 5011.

³⁶ *Elmer A. Roman*, IBCA-57 (June 28, 1957), 57-1 BCA par. 1320.

Conclusion

The appeal is sustained. The contracting officer incorrectly assessed liquidated damages on the Arch phase for 95 days, amounting to \$23,750 and on the transportation phase for 644 days, amounting to \$161,000.

Liquidated damages should be assessed as follows:

1. On the Arch phase: commencing May 16, 1965, and running through June 28, 1966 (or earlier, upon proof of substantial completion). Calculated simply on the basis of the dates shown, this would involve a period of 408 days and an assessment of \$102,000.
2. On the Transportation phase: commencing October 1, 1966, and running through May 24, 1967 (or earlier, upon proof of substantial completion). Using the dates given this would involve a period of 236 days and an assessment of \$59,000.
3. If appellant is found to be entitled to further extensions of time, the applicable assessment should be reduced by \$250 per day for each additional day allowed.

SHERMAN P. KIMBALL, *Member*.

WE CONCUR:

DEAN F. RATZMAN, *Chairman*.

WILLIAM F. MCGRAW, *Member*.

UNITED STATES

v.

LAWRENCE W. STEVENS ET AL.

A-30980

Decided March 24, 1969

Mining Claims: Contests—Mining Claims: Discovery—Rules of Practice: Evidence—Rules of Practice: Government Contests

A Government mineral examiner has no duty to do discovery work on a mining claim but merely to investigate the claim to determine whether a discovery has been made; therefore, testimony by an examiner that he examined a mining claim and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a *prima facie* case by the Government as to the invalidity of the claim.

Mining Claims: Contests—Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Hearings

The technical exclusionary rules of evidence applied in court proceedings need not be followed in administrative hearings; therefore, the fact that

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hearsay evidence, consisting primarily of assay reports, was presented by both parties in a Government contest together with other evidence is no reason for changing a decision invalidating a mining claim which is sustainable even without such evidence.

Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery

A mining claim allegedly valuable for magnetite and sand and gravel located prior to the act of July 23, 1955, is properly declared null and void where the evidence supports a finding that there is not a valuable deposit of magnetite within the claims, and also supports a finding that the sand and gravel is a common variety for which no market was shown to exist prior to the act of July 23, 1955, which precluded the location of mining claims for common varieties of sand and gravel thereafter.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

An appeal to the Secretary of the Interior has been filed in behalf of Lawrence Stevens and W. B. Grossardt from a decision of the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated February 29, 1968, captioned *United States v. Robert A. Spooner et al.*¹ The decision affirmed a hearing examiner's decision of July 25, 1967, which declared the Blue Sky Annex placer mining claim to be null and void for lack of a valid discovery under the mining laws.

The mining claim was located in 1949 for sand and gravel and magnetite. A hearing was held on March 21, 1967, on contest charges brought by the Bureau of Land Management to the effect that there was not a valid discovery of minerals within the claim, and that the material within the claim is not now a valuable mineral deposit under section 3 of the act of July 23, 1955, 30 U.S.C. sec. 601 (1964), and no market existed for the material prior to July 23, 1955.

The hearing examiner found that the Government established a prima facie showing that the magnetite-bearing material within the claim does not constitute a valuable mineral deposit and that this was not rebutted by the contestees by a preponderance of the evidence. He also found that the sand and gravel is a material of widespread occurrence similar to that exposed over much of the Mojave desert where the claim is located, and that it is generally suitable for use as fill material and road surfacing, having no special or distinct value over similar deposits of widespread occurrence, and that it is thus a "common

¹ Spooner filed an appeal to the Director, Bureau of Land Management, in behalf of himself and the other contestees, including Margaret E. Spooner, Gordon A. Christiansen and Dorothy R. Christiansen. However, no appeal to the Secretary has been filed in behalf of the Spooners or the Christiansens and, therefore, the decision of the Bureau has become final as to them.

variety" within the meaning of the act of July 23, 1955, and not subject to location under the mining laws thereafter under the terms of that act. He concluded that there was no evidence in the record to show that the sand and gravel deposits could have been mined, removed and disposed of at a profit on or before the date of the act, which was necessary to validate the claim before the act of July 23, 1955, precluded common varieties of sand and gravel from being located under the mining laws.

In affirming the hearing examiner's decision the Office of Appeals and Hearings reviewed somewhat the evidence established at the hearing and discussed contentions made on appeal concerning the factual conclusions of the hearing examiner and certain legal issues.

The statement of reasons for the present appeal of the appellants consists only of a copy of the reasons submitted in their appeal before the Bureau of Land Management. These reasons were adequately answered by the discussion of the facts and law in the decision of the Office of Appeals and Hearings and we shall discuss them and add comments only for further emphasis.

The first of their three reasons states as follows:

The decision [sic] holding the placer mining claims null and void was not supported by the evidence, in that Fred S. Boyd, Jr., expert witness for the contestant, United States of America, made only a cursory examination of the premises; spent little time in the examination of the premises; and admitted on cross-examination that his investigation would not have been acceptable to any private mining interest to determine the content, productivity or value of the mining claim.

An analysis of Boyd's direct examination (Tr. 4-17) reveals that he is a qualified mining engineer, that he examined the area of the claim, examined the workings on the claim, took samples from the principal places of the workings, some of which were submitted to an assayer for testing, and based his opinion upon the lack of discovery of magnetite—an iron ore—on the ground that there was an insufficient quantity of it within the claim to warrant mining work, and that the sand and gravel had no special or distinct property over other similar widespread alluvial material derived from the weathering of granitic rock in the desert (Tr. 16-17). Appellants' statement that Boyd admitted that his investigation would not have been acceptable to any private mining interest is not an accurate statement. Boyd's admission does not support the implication which appellants attempt to make concerning the adequacy of his examination. In response to a question as to whether if he were testing a claim of his own to deter-

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mine if there were marketable minerals he would consider his examination adequate, he replied:

If I were to examine it on my own I would do much more excavation and sampling. Tr. 26.

The most that can be made from this statement is that if it were his claim he would do much more examination and sampling. In other words, he would do more work to establish whether or not there were minerals constituting a valuable mineral deposit. As the decision below pointed out, in effect, it is not the duty of the Government mineral examiner to examine a mining claim to the extent of doing work to establish a discovery—this is the function of the mining claimant. Instead, the only function of the Government examiner is to examine the workings exposed by the claimant simply to verify whether an alleged discovery of a valuable mineral deposit has or has not been made. If he testifies that he examined the mining claim but that the workings exposed no evidence of a valuable mineral deposit, this is sufficient to establish a prima facie case. *United States v. Frank Coston*, A-30835 (February 23, 1968). This was done in this case.

Appellants' second contention is that:

The decision is based on hearsay, which was objected to at the time of the hearing and was over-ruled by the hearing officer.

The decision below correctly concluded that the hearing examiner's decision was clearly based upon the testimony of the witnesses at the hearing, and that the admission of hearsay evidence is no basis for reversal of an administrative decision since technical exclusionary rules of evidence applied in court proceedings are not applicable in such administrative proceedings. Instead, whether such evidence is considered and what weight is given to it may depend upon whether there is other corroborative evidence and whether it is in the interest of fair play and justice to allow the evidence. See *United States v. Arch Little and Ethelyn Little*, A-30842 (February 21, 1968). In this case, the hearsay evidence complained of consisted mostly of assay reports which were presented without the assayer being present (Tr. 13-14). Such reports, without the assayer being present, have long been accepted as competent evidence by mining claimants as well as the Government in mining contests. Since they redound to the advantage or disadvantage of each party equally, objections to their acceptance have been rare. In the immediate case the contestees also submitted an assay report (Ex. A), although recognizing that it was subject to their own objection as hearsay (Tr. 14). We cannot see that there has

been any undue weight given to hearsay evidence in this case or that the exclusion of the hearsay evidence presented by either party would alter the result of this case.

The third contention made by appellants is:

The contestant failed to make a prima facie case. The evidence of Messrs. Spooner, Grossardt and Stark clearly established that a valid mining claim does exist on the disputed properties.

We have previously discussed what is necessary to establish a prima facie case by the Government so far as the testimony of its mineral examiners is concerned. We must conclude that there was adequate evidence to establish a prima facie case that the mining claim here is not valid. We must also agree with the conclusion of the decisions below that the evidence presented by the contestees failed to overcome satisfactorily the Government's case and to establish the validity of the claim. In the absence of any analysis by appellants of the evidence it is not necessary to discuss the evidence in this case further. It is sufficient to state that the evidence did not show that there was a valuable mineral deposit of a mineral locatable under the mining laws. The slight showings of magnetite were insufficient in this respect under the prudent man test long followed by this Department. See the decision in *United States v. Coleman*, 390 U.S. 599 (1968), for the latest Supreme Court approval of this test. There was also nothing to show that the sand and gravel on the claim was anything but a common variety within the meaning of the act of July 23, 1955; consequently there had to be a showing that it was marketable prior to that date in order for the claim to be sustained on the ground of a discovery of a valuable deposit of the sand and gravel. See *Palmer v. Dredge Corporation*, 398 F. 2d 791 (9th Cir. 1968), cert. denied January 27, 1969, 37 U.S.L.W. 3278. This was not done in this case; therefore, the claim is not valid because of any discovery of sand and gravel deposits.

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.

March 26, 1969

UNITED STATES

v.

ALICE A. and CARRIE H. BOYLE

A-30922

Decided March 26, 1969

Mining Claims: Common Varieties of Minerals

If a deposit of decomposed granite which is used only for the same purposes as other similar deposits of decomposed granite which are a common variety possesses properties giving it a distinct and special value for such uses that is recognized by the premium price it commands in the market place, it is not a common variety of stone and is locatable under the mining laws, but where the evidence is not clear as to the competitive prices of decomposed granite in the market area, the case is to be remanded for the development of fuller and clearer evidence on that point.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alice A. and Carrie H. Boyle have appealed to the Secretary of the Interior from a decision dated October 30, 1967, of the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner holding invalid their placer mining claims, the Enterprise No. 1 and Bulldog No. 2, and rejecting their mineral patent application Arizona 034343 for them.

The claims are located in sections 2 and 3, T. 1 N., R. 8 E., G. & S. R. M., Arizona, on the southeast slope of Blue Ridge Mountain approximately three miles northeast of Apache Junction, which in turn is some 30 miles east of Phoenix.

The history of the claim was summarized by the Office of Appeals and Hearings as follows:

The contestees' father, who was mining the claims for gold, acquired full title to the claims in 1939 and filed location notices designating them as lode claims. Upon his death in 1940, the contestees acquired title to the claims and, in 1941, relocated them as lode claims. In 1963 the contestees filed mineral patent application Arizona 032253, claiming gold. A Bureau of Land Management mining engineer examined the claims and stated in his mineral report that decomposed granite was being mined on the claims and the claims should have been located as placers rather than lodes. Based upon his recommendations, adverse proceedings were initiated against the claims and a contest hearing was held in 1964. At this hearing, the parties withdrew the patent application and the contest complaint by stipulation and, by decision, the Examiner dismissed the complaint without prejudice and declared the patent application withdrawn. On August 3, 1964, the contestees filed so-called amended location notices designating the claims as placers, and on October 27, 1964, they filed mineral patent application Arizona 034343, indicating decomposed granite as the mineral being mined from the claims.

While the contestees made some references to the gold values on the claims, they now contend that the claims are valuable for their deposits of decomposed granite. There are extensive deposits of decomposed granite to the west and north of the claims along the base of the Goldfield Mountains and in the vicinity of the Usury Mountains and elsewhere in the Phoenix area (Tr. 38, 43, 45-54; Ex. 6-A).¹

The decomposed granite on the claims occurs as granules, varying "from the size of popcorn on down," formed from granite by weathering processes (Tr. 123, 30). Composed of quartz and feldspar with minor amounts of biotite, it is found on the claims in pleasing shades of bronze, pink and red (Ex. 7, page 6; Tr. 68, 127). Because it forms a compact surface when rolled which drains readily, it is used as a surface material for roads and driveways. It is also utilized for landscaping grounds around homes, either for decorative use in small areas or as a substitute for grass.

It appears that several hundred tons of material from the claims were used from 1944 to 1947 at the nearby Williams Air Force base for the construction of driveways and parking lots. About 10 years later, beginning in 1955 and continuing through 1959, Earl C. Johnson removed 3-4,000 tons of material from the claims which he sold for about \$2 a yard for use for decorative purposes in landscaping and for driveways and streets (Tr. 137-138). In 1961 Earl Gudd entered into a lease with appellants which gave him the right to remove the decomposed granite from the claims (Tr. 118). Since then his gross income from sales of this material has averaged \$20-22,000 a year (Tr. 120). While he pays the contestees 6¢ per yard (Ex. B, page 6),² he sells it for as much as \$5 per yard delivered in Sunnyslope, some 43 miles from the claims. At closer locations the delivered price varies from \$1.50 to \$3 per yard, depending on the mileage and hauling costs (Tr. 121).

The hearing examiner held that the decomposed granite could be located only as a placer claim and that the attempt to amend the location from lode to placer could be considered only as a new location with no relation to the earlier lode claims. He also held that the contestees could gain no rights to a patent under the provisions of Rev. Stat. sec. 2332, 30 U.S.C. sec. 38 (1964), which permit a mineral locator to establish a right to a patent if he has held and worked a claim for a period equal to the time prescribed by the statute of limitations

¹ This and similar references are to the pages of the transcript of the official report of proceedings before the hearing examiner on October 4, 1966, and to the exhibits introduced at the hearing.

² Gudd testified that he was paying the Boyles 10c per cubic yard at the time of the hearing (Tr. 129).

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of the State in which it is located. The mining laws, he stated, require that there must be a valuable mineral deposit on the claim at the time the application for patent is made. Since the discovery of gold will not support the patent application now and since, for reasons discussed below, the decomposed granite was not locatable as a mineral after July 23, 1955, there was now no locatable valuable mineral deposit on the claim to support a patent application.

As placers, he further held, the claims were located subsequent to the act of July 23, 1955, as amended, 30 U.S.C. sec. 611 (1964), and are controlled by its terms. Section 3 of that act provided that:

A deposit of common varieties of sand, stone, gravel * * * shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws. * * * "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it a distinct and special value. * * *

The hearing examiner held that decomposed granite was a common variety of mineral without a distinct and special value and not locatable under the mining laws. He found that the physical properties of the material, that is, its color, compactability, its water absorbing characteristic and its freedom from dust, which the appellants asserted gave them an advantage over their competitors did not remove the deposit from the "common varieties" category. It is not enough, he held, that the material be of better quality than other similar material, if it is used for exactly the same purposes as other decomposed granite produced in the area. The Department, he stated, "has consistently held that materials of superior quality which have some sales advantage but which are used only for the same purposes as other less desirable deposits of the same materials are common varieties of material and are not locatable under the mining laws since these advantages do not give them a special and distinct value."

On appeal the Office of Appeals and Hearings affirmed the hearing examiner, and held that the particular properties of the decomposed granite did not give it a special and distinct economic value so as to take it out of the category of the common variety of the general run of such deposits in the area.

On appeal to the Secretary, the appellants again urge that they have earned a right to a patent either under the provisions of Rev. Stat. sec. 2332 (*supra*) or by relating back their amended location as a placer to the original lode location, or because the decomposed granite is of special and distinct value and locatable under the mining laws after July 23, 1955.

In support of their assertion that the material in the claims is not a "common variety," the contestees emphasize again that it is dust free, forms a hard surface when compacted, and contains colors not found in other material in the area. They also stress that the decorative qualities of the material for use in driveways, lawns, rock gardens, cactus gardens, lawn terracing and edging have created a steady and growing market for it.

In a recent case the Department discussed the criteria pertinent to determining whether or not a material is a "common variety:"

In short, the Department interprets the 1955 act as requiring an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.

The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.

* * * * *

When the same classes of minerals used for the same purposes are being compared, about the only practical factor for determining whether one deposit of material has a special and distinct value because of some property is to ascertain the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold. *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127, 134, 135 (1968).

Applying these principles to the facts of this case, we note that the material from the appellants' claims is used for the same purposes as other decomposed granite in the area. The question then is whether appellants' deposit has a unique property which gives it a distinct and special value for such purposes. The special qualities claimed for the decomposed granite on the claims are:

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1. It is dust free.
2. It is the only material in the area which can be used for *decorative* surfacing.
3. When compacted, the material forms a hard surface because of its clay quality.
4. It contains colored feldspar not found in other material in the area which create a beautiful and natural looking surface. Appellants' brief, p. 10.

Let us examine closely the evidence presented by the appellants on these points. Witness Gudd testified that people in Sunnyslope, which is 43-45 miles from the claims, bought granite for their yards from Buffalo Ridge, which is within 12 miles of Sunnyslope, but that it was taken out, that a woman replaced the granite in her yard with material from the claims, that Gudd had samples of the rejected Buffalo Ridge material and "it is real fine and dirty and it has no color that would be pleasing to what you would call decorative" (Tr. 122-123). Gudd testified that he had three good colors, a bronze, red, and pink but that the color did not matter in road building. When asked if he had any competitors for the red material, he replied that he had no competition for the pink and bronze (Tr. 128). He testified that to his knowledge there were no other granites competitive with his in the greater Phoenix area, that his was better because it made a hard road. He said also that it was used for decorative purposes in landscaping yards, that it was not dusty and muddy (Tr. 126-127). He said he had his material in every yard of the 600 homes in Dreamland Villa (Tr. 119).

Witness Johnson, when asked whether the material on the claims had "any special qualities over any other granites that you have known and seen," replied: "Well, yes, the color. The color is the primary interest in the granites out there" (Tr. 138-139). He said the distinctive color was the deep red and that the Salt River Indian Reservation, where he had obtained granite during 1965 and part of 1966, was the only other place that he knew of where the same color could be obtained. He said that Buffalo Ridge had a gray, a gold, and maybe a brown and that Deer Valley had a gold (Tr. 129, 136, 141-142). He testified that the material was used in driveways and roads because it packed down and absorbed water and did not puddle and become muddy (Tr. 140). He said that he had been priced out of the granite from the Salt Lake reservation and was no longer selling decomposed granite because he could not find one competitive to Gudd (Tr. 141).

Robert W. Graham and Porter E. Beaver testified for the appellants with respect to the use of material from the claims on the Williams Air Force Base. They said it was used for driveways, parking lots,

sidewalks, and runway shoulders. They liked it for its compactability, freedom from dust, and durability. Its color was of no value (Tr. 145-146, 148, 152-153). Graham indicated that it was better than other material used for the same purposes so far as its compactability and freedom from dust was concerned (Tr. 146), and Beaver said that materials closer to the field could not be found which would do the same job (Tr. 152).

Hale C. Tognoni, attorney for the appellants, also testified as an expert witness as to general examinations he had made in the area. His conclusion was that "in examining this material, and other granite around the area, I find no other granite that has the particular qualities of this one, and these qualities add up, even including the locality, as far as the nearest market" (Tr. 180).

This summary of appellants' evidence supports, we believe, the conclusion that the decomposed granite on appellants' claims has qualities of compactability and freedom from dust which make it very suitable for hard surfacing of roads or parking areas. The evidence, however, does not, in our opinion, establish that other decomposed granite in the general area is so lacking in these qualities that it cannot be and is not used for the same purpose. Appellants' evidence does indicate that the other granite may not possess these attributes to the degree that their material does.

As for the quality of colors, it is conceded that color is of no significance in road surfacing; it is of prime consideration in the use of the decomposed granite for landscaping purposes. But here the testimony is not completely consistent. Gudd indicated that his material had two exclusive colors: bronze and pink. He did not claim the red was exclusive. Johnson, on the contrary, singled out the red as the distinctive quality which gave the material primary interest. He also mentioned that other deposits had other colors, such as gold, which the claims in issue presumably do not have. How unique the colors on appellants' claims are, therefore, appellants' evidence does not establish.

We have been referring only to appellants' evidence. The sole witness for the Government, Lewis S. Zentner, a mining engineer with the Bureau of Land Management, testified that there are other producers in the area selling decomposed granite in the Phoenix market for road surfacing and decorative uses, that in his opinion appellants' material had no special properties which would give it a special value over other deposits of decomposed granite in the area, that the granite used in yards varies in color, maybe white, sandy, or red, that Buffalo Ridge has colors like those in appellants' claims, that the materials

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in appellants' claims and in other places in the area all have the same market in Phoenix and all have the same qualities (Tr. 38, 55, 74, 75, 78, 80, 82, 98). In a mineral report of the claims, dated May 27, 1965 (Ex. 7), Zentner listed three businesses selling decomposed granite in Phoenix, including Buffalo Ridge but excluding appellants; he did state in the report that the granite on the claims was "especially desirable" for landscaping "because of its coloring" (p. 6). Zentner conceded that he had not tested the granite from one area with that from another and had not taken any granite that he thought was good to a seller and asked if it was salable (Tr. 54, 71).

From our survey of the evidence to this point we are not persuaded that the decomposed granite on appellants' claims has been shown to possess the characteristics listed by appellants to such a degree as to set it apart from the other decomposed granite in the area. We turn now, however, to some remaining evidence which may be more decisive of the point. In the *U.S. Minerals Development Corp.* case, *supra*, the Department ruled that the test for determining whether a mineral deposit claimed to have special value but used for the same purposes as ordinary varieties of the mineral did have a special value was to be determined by the market price that it commanded. If the mineral in question sold for a significantly higher price than ordinary varieties of the mineral did, the distinct and special value of the deposit would be established.

In Zentner's mineral report of May 27, 1965, *supra*, he listed the prices at which three businesses sold decomposed granite in Phoenix. One sold it at \$2.50 a yard, another at \$3 a yard. The third, Buffalo Ridge, sold colorless granite at \$2.50 a yard and colored granite at \$3.50 a yard. Zentner did not give any price for appellants' material but testified that he did not know but thought that it sold for approximately the same price. He did not know current prices (Tr. 61, 79).

Johnson, who removed and sold material from appellants' claims from 1955 to 1959, said that he sold it "for around \$2 a yard. That was the going price at that time" (Tr. 137, 138).

Gudd, on the other hand, testified that he sold material from appellants' claims for \$5 a yard in Sunnyslope whereas Buffalo Ridge sold material "for around two dollars and a half a yard, as I understand, from the people up there" (Tr. 123). He also testified as to competition in Apache Junction, close to the claims, but the testimony is somewhat unclear:

Q. This other competition that you have in Apache Junction, what do they charge for the materials they sell? Do you know?

A. Yes, they are quite a bit under my price.

Q. About how much?

A. Well, they run a dollar a yard under.

Q. At Apache Junction?

A. *Not in the Junction.* They are selling it for 90 cents. The Apache Drug just yesterday morning, I took him 84 yards at a dollar and a half a yard. There is a Chuck Thompson that offered him the same material, said it was the same material at 90 cents a yard. He looked at it and he bought mine for a dollar and a half a yard. * * * (Tr. 132; italics added.)

The statement "Not in the Junction" makes the testimony uncertain in meaning. Nonetheless the evidence indicates that appellants' material does command a higher price in the vicinity of Apache Junction.

We do not believe, however, that the evidence on prices has been developed nearly as fully as it can be. If decomposed granite from appellants' claims is being sold in the Phoenix area in competition with decomposed granite from other sources in the same area, it should be possible to develop without too much difficulty the prices at which the competing granites are being sold in the area. The decision in this case should not have to depend on Gudd's partly hearsay testimony as to prices at Sunnyslope and his less than clear testimony as to Apache Junction, as contrasted with Johnson's statement that he sold at the "going price" and Zentner's general and not specifically supported belief that all the decomposed granites in the area sold at approximately the same price.

We are therefore remanding the case for the development of fuller and clearer evidence on the competitive prices of decomposed granites in the Phoenix area, with the principles of the *U.S. Minerals Development Corp.* case in mind. If the parties can stipulate as to the evidence, a further hearing need not be held, but if there is disagreement a further hearing should be held. However the evidence is developed, the case should then be returned to this office for a final decision.

Consideration of the other issues raised by the appellants is deferred until the return of the case.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is set aside and the case is remanded to the Bureau of Land Management for further action in accordance with this decision.

ERNEST F. HOM,
Assistant Solicitor.

UNION OIL COMPANY BID ON TRACT
NO. 228, BRAZOS AREA, TEXAS OFFSHORE SALE

Oil and Gas Leases: Competitive Leases—Contracts: Formation and Validity:
Bid and Award—Outer Continental Shelf Lands Act: Oil and Gas
Leases

When a decision of the Secretary is challenged in the courts, and the litigation has been settled under an agreement which requires its revocation, the Secretary will revoke the prior decision.

M-36733 (Supp.)

May 14, 1969

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT.

SUBJECT: UNION OIL COMPANY BID ON TRACT NO. 228, BRAZOS AREA,
TEXAS OFFSHORE SALE.

On June 17, 1968, the Secretary of the Interior issued memorandum decision M-36733 under which the Director, Bureau of Land Management, was directed to consider the bid of Union Oil Company of California for Tract No. 228, Brazos Area, submitted at the bid opening held in New Orleans, Louisiana, on May 31, 1968, for oil and gas leases to specified areas of the Outer Continental Shelf offshore the State of Texas, as a valid bid for said tract, and remanded the matter for consideration of the bid as to adequacy only. The Secretary further directed that, if the bid were found to be adequate as to amount, a lease for Tract No. 228 was to be forwarded to Union Oil Company of California in accordance with 43 CFR 3382.5.

Pursuant to this directive, the Bureau of Land Management forwarded to Union oil and gas lease OCS-G1723 covering said Brazos Tract No. 228, whereupon Union executed the lease and returned it to the Bureau along with payment of the remaining balance of its bonus bid and the first year's rentals, as required by 43 CFR 3382.5. In the meantime, the action entitled *The Superior Oil Company et al. v. Stewart L. Udall, Secretary of the Interior*, No. 1521-68, was filed in the United States District Court for the District of Columbia, and on June 18, 1969, a temporary restraining order was issued by the Court which restrained the Secretary and other Department officials from taking further administrative action in the matter. This litigation is now pending in the United States Court of Appeals for the District of Columbia. *Superior Oil Company et al. v. Walter J. Hickel, Secre-*

76 I.D. Nos. 4 & 5

*The correct date for bid opening held in Louisiana is May 21, 1968, and Memorandum decision dated June 17, 1968.

tary of the Interior, *Union Oil Company of California* (Nos. 22192 and 22194).

An agreement has now been entered into for the purpose of settlement of this litigation. A copy of the executed agreement is attached hereto. In order that this agreement may be effectuated, the memorandum decision of the Secretary of the Interior, dated June 17, 1968 (M-36733), is hereby vacated, and you are directed to take all other administrative actions necessary to comply with its terms.

WALTER J. HICKEL,
Secretary of the Interior.

AGREEMENT

This agreement is entered into for the purpose of settlement of the actions entitled, *Walter J. Hickel, Secretary of the Interior, and Union Oil Company of California v. The Superior Oil Company et al.*, Nos. 22192 and 22194, in the United States Court of Appeals for the District of Columbia. The parties to the agreement are the Secretary of the Interior (hereinafter referred to as the Secretary), Union Oil Company of California (hereinafter referred to as Union), The Superior Oil Company; Ashland Oil & Refining Company, Canadian Superior Oil (U.S.) Ltd., General Crude Oil Co., Highland Oil Co., Kerr-McGee Corp., Texas Eastern Transmission Corp., and Transocean Oil, Inc. (hereinafter referred to as the Superior Group).

The parties hereto desire to make a complete and final settlement of the controversy which resulted in this litigation, and, in order to effectuate that purpose, mutually agree as follows:

1. The Secretary will vacate his memorandum decision of June 18, 1968 (M-36733), entitled "Union Oil Company Bid on Tract No. 228, Brazos Area, Texas Offshore Sale," and, pursuant to his authority under section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. sec. 1337), will accept the bonus bid of the Superior Group, in the total amount of \$11,628,691.20, offered for Brazos Tract No. 228, at the sale of specified areas of the Outer Continental Shelf offshore the State of Texas held in New Orleans, Louisiana, on May 21, 1968, and award a lease to the Superior Group within ten days after execution of this agreement; and, upon compliance by the Superior Group with the procedures required under 43 C.F.R. 3382.5, on behalf of the United States, execute and issue a lease for said Brazos Tract No. 228, in the usual and customary form, to the Superior Group. It is agreed

TEXAS OFFSHORE SALE

May 14, 1969

that compliance with the procedures required under 43 C.F.R. 3382.5 by the Superior Group shall include execution of the lease awarded, payment of the first year's rental in the amount of \$17,280, payment of the balance of the Superior Group's bonus bid for said tract in the amount of \$9,302,952.96 (constituting the difference between the total bid and the deposit of \$2,325,738.24 paid by the Superior Group at the time the bid was made), and compliance with the bonding requirements of 43 C.F.R. 3384.1.

2. The Superior Group agree to waive all claims for interest against the Department of the Interior, the Secretary, or the United States with respect to Superior's deposit of \$2,325,738.24.

3. After vacating his memorandum decision of June 18, 1968 (M-36733) as provided in paragraph 1, above, the Secretary will return to Union the sum of \$13,600,000 paid by Union for oil and gas lease OCS-G 1723 on said Brazos Tract No. 228, together with \$17,280 paid in advance as the first year's rental. Union will accept such sum without interest as full payment of any claims arising out of issuance of the lease on Brazos Tract No. 228, whereupon it is agreed that the award of said lease to Union is null and void and of no effect.

4. The parties hereto will file a joint motion with the United States Court of Appeals for the District of Columbia Circuit to vacate its opinion and judgment in this case and to remand the case to the District Court with instructions to dismiss the complaint on the grounds that the parties have agreed to a settlement and the cause is accordingly moot. Further, in the event it becomes necessary to do so, the Superior Group and Union agree to stipulate or otherwise to join in and support any application which may be made to the United States Supreme Court for the purpose of vacating the opinion and the judgment by the Court of Appeals in this case.

5. The parties further agree that any costs of litigation shall be borne by the party incurring them and no costs shall be assessed by the court.

6. The Superior Group and Union agree to exchange the mutual releases, attached hereto as Exhibit A, with respect to any claim arising out of the issuance of the lease on Brazos Tract No. 228. These releases will become operative upon the execution and delivery of a lease to the Superior Group by the Secretary of the Interior.

7. It is the intention of the parties to make a complete and final settlement of this controversy, and the parties respectively agree to

execute such documents as may be necessary to effectuate the understandings described in this letter.

/s/ WALTER J. HICKEL,
The Secretary of the Interior.

Glen E. Taylor,
/s/ GLEN E. TAYLOR,
*Acting Assistant Attorney General,
Attorney for the Secretary of the Interior.*

Agreed to:

The Superior Oil Co., et al.

/s/ By ABE KRASH
Attorney for The Superior Oil Co., et al.

Union Oil Co.

/s/ By E. W. COLE
Attorney for Union Oil Co.

Dated: *May 6, 1969*

EXHIBIT A

Mutual Releases

In consideration of these mutual releases and for other good and sufficient consideration, the *Union Oil Company of California* (Union) hereby agrees with *Superior Oil Co., Ashland Oil & Refining Company, Canadian Superior Oil (U.S.) Ltd., General Crude Oil Co., Highland Oil Co., Kerr-McGee Corp., Texas Eastern Transmission Corp., and Transocean Oil, Inc.* (referred to hereinafter as *Superior Oil Co. et al.*) as follows:

1. *Superior Oil Co. et al.* agree that they will not assert any claim against Union based on delay in issuance of the lease on Brazos Tract No. 228 or for any damage resulting from any drilling on adjacent Tract No. 330 which may have occurred up to and including the date of the issuance of the lease on said tract to *Superior Oil Co. et al.*

2. *Union* agrees that *Superior Oil Co., et al.* are entitled to a valid and lawful lease on Tract No. 228, that it will not further contest the issuance of the lease to *Superior Oil Co., et al.*, and it hereby re-

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leases *Superior Oil Co., et al.* from any claim arising out of the issuance of the lease on Brazos Tract No. 228 to *Superior Oil Co., et al.*

SUPERIOR OIL Co., *et al.*

/s/ By ABE KRASH

UNION OIL Co. OF CALIFORNIA

/s/ By E. W. COLE

UNITED STATES

v.

LLOYD W. BOOTH

A-30994

*Decided May 27, 1969***Homesteads (Ordinary): Residence**

The homestead law requires an entryman in good faith to establish his home on his entry, and, although it does not prohibit him from maintaining a second residence elsewhere, the fact that such a second residence is maintained throughout the period of claimed residence on the homestead entry raises a rebuttable presumption that the entryman has not in good faith established his residence upon the entry; where residence on the entry is claimed for only seven months during the first entry year; the minimum period required after credit is allowed for military service, where the entryman maintained "living quarters" elsewhere which constituted his residence both before and after his sojourn at the entry and which he and his family occupied intermittently throughout that period, where the entryman and his family stayed only five or six nights at the entry during one of the seven months and spent only weekends there during another, commuting daily between the homestead entry and town during periods when they slept at the entry, and where no attempt was made to reside on the homestead after the first entry year or to improve the dwelling place to make it suitable as a permanent habitation, but the entryman did purchase a home elsewhere during the life of the entry, it must be concluded that the entryman intended only to satisfy the minimum requirements of the law rather than to establish his home on the entry, and the entry is properly canceled for failure to meet the residence requirements of the law.

Administrative Procedure Act: Hearing Examiners—Rules of Practice: Hearings

A hearing examiner is not disqualified, and his findings will not be set aside, in the absence of a showing of bias; the fact that a hearing examiner may have ruled against a homestead entryman in a previous proceeding involving, in part, the same issues that are again before him does not constitute such a showing.

Rules of Practice: Evidence

The Government is a party in interest in any proceeding before the Department of the Interior and may take advantage of any information

developed in such a proceeding, and the transcript of hearing in a private contest of a homestead entry is properly received in evidence at the hearing held in connection with a subsequent Government contest of the same entry regardless of what may have been the final disposition of the private contest.

Equitable Adjudication

Equitable adjudication is not available to a homestead entryman in the absence of substantial compliance with the requirements of the homestead laws.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lloyd W. Booth has appealed to the Secretary of the Interior from a decision dated March 26, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, modified and affirmed a decision of a hearing examiner canceling his homestead entry Fairbanks 023487.

The chain of events leading to the current status of appellant's entry is long and somewhat complex, and the critical issues which are determinative of appellant's rights tend to become obscured by the numerous incidental issues that have arisen during the course of the various controversies which have engulfed the appellant since the inception of his entry.

The record shows that appellant filed a notice of location of settlement under the homestead laws on June 11, 1959, in accordance with the provisions of the act of April 29, 1950, 48 U.S.C. § 461a (1958), describing therein by metes and bounds a tract of unsurveyed land approximating that which, when surveyed, would be the SW $\frac{1}{4}$ sec. 29, T. 1 N., R. 3 E., Fairbanks Mer., Alaska. Thereafter, by notice dated April 21, 1961, appellant was advised of the survey of the land embraced in his settlement claim and of his preference right to make formal application to enter the land under the homestead laws. On July 11, 1961, he filed such application.

On July 18, 1962, a private contest was initiated against appellant's entry by Elvan W. Allen, who charged that the entryman had not fulfilled the residence requirements of seven months' continuous residence on the land and that he had not fulfilled the requirement that one sixteenth of the land be brought under cultivation.¹ By a decision dated March 21, 1963, the Fairbanks land office dismissed the complaint on the grounds that the charges contained therein were statements of conclusions and that the complaint contained no allegation of specific

¹ The record presently before the Department does not contain a copy of either the contest complaint filed by Allen or that filed in any of the other private contests referred to hereafter. These documents, however, are not essential to a review of the issues currently before us.

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facts relating to residence and cultivation which, if established as true, would sustain the charges. At the same time the land office rejected Allen's notice of location of homestead settlement on the same land claimed by appellant, and it allowed appellant's homestead application for the SW $\frac{1}{4}$ sec. 29, T. 1 N., R. 3 E., finding that the land was appropriated on May 30, 1959, by appellant's homestead settlement, that the 5-year statutory life of the entry began in June 11, 1959, the date upon which appellant filed notice of his settlement, and that final proof must be filed prior to June 11, 1964.

On March 16, 1964, a contest complaint was filed against appellant's entry by Arlo L. Wells who charged that the entryman had not lived the required time on the homestead, had not cleared the required amount at the "set date" and had not cultivated or harvested a crop from the land. The complaint was dismissed by the land office on April 29, 1964, upon the same grounds relied upon in the dismissal of the earlier complaint of Allen.

On June 11, 1964, Wells filed another complaint in which he charged (1) that the contestee lived on the land only between July 1959 and October 1959, which was less than the required time (2) that the contestee did not clear the land until 1964 and still had not cultivated the land, and (3) that the contestee did not have a house on the entry until the latter part of 1963. This time the complaint resulted in a hearing which was held at Fairbanks, Alaska, on September 25, 1964.

By a decision dated May 14, 1965, the hearing examiner canceled the entry upon a finding that the evidence presented at the hearing sustained the first charge of the complaint.² Apart from the testimony of witnesses for the contestant, he found, a daily diary kept by appellant's wife during periods of occupancy of the homestead indicated that the entryman and his family stayed at the homestead almost every night during June and July 1959, that, in August, September and October, they remained at their living quarters in town at night approximately one-third of the time, and that, in November, they spent five nights at the homestead and the remaining twenty-five nights in town. The family returned to the homestead on May 5, 1960, for one month, he found, during which month they spent twelve nights in town. During the total seven-month period, the hearing examiner determined, the family remained in town a total of seventy-five nights. After finding that the entryman, as a veteran of military service, could have satisfied the residence requirements of the homestead law by residing on his entry for a period of five months in any three years, six months in any two years, or seven months in any one year of the life

² The hearing examiner dismissed the second charge for insufficiency of proof and the third for insufficiency, even if true, as a basis for cancellation of the entry.

of the entry, he concluded that, while the entryman claimed residence of seven months during one year, he did not actually reside on the entry for the required period.

On appeal to the Director, Bureau of Land Management, the hearing examiner's decision was vacated, and the contest complaint dismissed, by the Office of Appeals and Hearings in a decision dated July 26, 1965, upon a finding that one of two corroborating statements filed with the complaint was not made under oath as required by Departmental regulation (43 CFR 1852.1-4(c)) and that the other did not set forth any facts which, if proved, would render the entry subject to cancellation.

In the meantime, on June 10, 1964, appellant had filed final proof on his entry, alleging therein that he resided on the entered land during the periods of May 31 to November 30, 1959, and May 1 to June 15, 1960, his explanation for the periods of absence from the entry being "business" and "compliance met." According to appellant's final proof testimony ten acres of barley were cultivated on the entry in 1961 and twenty acres in 1964. Shortly thereafter, on June 30, 1964, appellant filed in the Fairbanks land office an application for reduction of cultivation requirements, explaining in a subsequently filed statement that he was unable to accomplish the cultivation during the fourth entry year because he sustained "a disabling heart attack (stroke) on February 26, 1962, which was followed by hospitalization and a lengthy convalescent [sic] period."

By a letter dated August 14, 1964, the Chief Hearing Examiner, Sacramento, California, advised the entryman that his application for reduction in cultivation had been referred to the Office of Hearing Examiners by the land office, and he stated that, upon verification of the alleged illness through the testimony of witnesses at the hearing scheduled for September 25, 1964, or the concurrence of the contestant, Wells, the entryman would be relieved of the cultivation requirement for the fourth entry year.³ He further explained that no cultivation was required during the first entry year, that the entryman could substitute his military service for the cultivation requirements of the second and third years, and that, upon being relieved of the fourth year's requirement on account of illness, he would be required only to show compliance with the requirement that twenty acres be cultivated during the fifth entry year.

³The hearing examiner did not, either in his decision of May 14, 1965, in the private contest or in his decision of July 6, 1967, in the Government contest, discuss the question of reduction of cultivation requirements for the fourth entry year. However, at the hearing of October 10, 1966, he was explicit in his allowance of the application for relief (Tr. 215-216).

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On May 31, 1966, the Government initiated a contest against appellant's entry by the filing of a complaint in the Fairbanks land office in which it was charged that:

A. The contestee did not reside upon the land embraced in his entry for at least seven months in any one of the residence years during the life of the entry as required by the homestead laws * * *.

B. The homestead law and the regulations issued thereunder * * * require that the entryman must cultivate one-sixteenth of the claim during the second year of the entry and one-eighth of the claim during the third year of the entry and until submission of proof, unless the requirements in this respect be reduced upon application duly filed. * * *

Contestee filed final proof at the end of the fifth entry year. He is entitled to credit for two years military service and has requested that this credit be applied to the cultivation requirements of the second and third entry years. Application for reduction in cultivation during the fourth entry year has been filed. However, contestee failed to cultivate, as that term is defined in 43 CFR 2211.9-5(3)(b), one-eighth [sic] of the entry of 160 acres during the fifth entry year.

A hearing on those charges was held at Fairbanks on October 10, 1966, at which hearing the Government submitted, as a part of its evidence, the transcript of the hearing of September 25, 1964, in the private contest, as well as the diary of Mrs. Booth which was introduced in evidence by the contestee in the earlier proceeding (Tr. 3, 15).⁴ From the evidence developed at that hearing the hearing examiner concluded in a decision dated July 7, 1967, that the contestee had failed to comply with the mandatory residence requirements of the homestead law, and he canceled the entry in its entirety.

In concluding that appellant had not satisfied the residence requirements of the homestead law the hearing examiner made the same findings with respect to the periods of occupancy of the entry as he had made in the earlier private contest.⁵ Relying upon the Department's decision in *United States v. Victor H. Cooke*, 59 I.D. 489 (1947), he held that in order to constitute residence on a homestead there must be a combination of intent to make the desired public land the entryman's home or fixed abode and coexisting bodily presence upon the land. The entryman need not intend to remain on the entry for the rest of his life, he observed, but must have a definite and fixed intention to establish on the entry his new home without any present intention of removing therefrom to any other place as his home. Although he found that the contestee filed for a homestead in 1959 with the intention of acquiring a tract of land from the Government and of constructing a home on the land for his family at some future date, the

⁴ Transcript references, unless otherwise indicated, are to the transcript of the hearing of October 10, 1966.

⁵ The same hearing examiner presided at both the 1964 and 1966 hearings.

hearing examiner also found from the evidence developed at the hearing that he left his living quarters in Fairbanks on May 30, 1959, with the intention of satisfying the minimum requirements of the homestead law and then returning immediately to Fairbanks and that he had no present intent as of May 30, 1959, of residing on the homestead as his fixed place of abode to the exclusion of a home elsewhere. In addition, he found that the contestee's residence at the homestead for five days during weekends in November 1959 did not qualify as residence on the land, thereby precluding the conclusion that the contestee had resided on the entry for seven months during any one year of the life of the entry.

With respect to cultivation of the entry the hearing examiner found that 20 acres of land were cleared, the last part in the winter of 1963-1964, that the cleared land was disked in early June 1964 but that because of adverse weather conditions the disking was only partially effective, that the entryman drill-planted approximately five-eighths of the twenty acres on the last day of the life of the entry, hoping for the best, and that the balance of the land was not planted until after the life of the entry had expired. There was little or no possibility that profitable results could be achieved from these efforts, the hearing examiner said. He found, however, that there seldom is such a possibility in the first year of cultivation in that area, a period of several years of working the land being required before such results can be achieved, and he concluded that the contestee's efforts toward cultivation were all that could normally be expected during the first cultivation year and were directed toward a future profitable result, that approximately 12½ acres were cultivated in the manner required by the homestead law, and that, if equitable adjudication were authorized⁶ and if all other requirements of the law were satisfied, the contestee would be entitled to a patent for 100 acres of the entered land. As the hearing examiner found that the other requirements of the law were not all satisfied, his conclusions with respect to cultivation must be viewed as dicta.

In appealing to the Director, Bureau of Land Management, from the cancellation of his entry, appellant argued only that he believed that his clearing and cultivation of, and residence upon, his entry far

⁶ Equitable adjudication would be required for the contestee to receive credit for his cultivation in 1964, the hearing examiner explained, because residence was claimed beginning on May 30, 1959, while the cultivation was not accomplished until June 1964. Thus, if May 30, 1959, the date of settlement were to be used as the beginning date of the entry, the disking and seeding in 1964 were accomplished after the expiration of the statutory life of the entry. If, on the other hand, June 11, 1959, the date on which the entryman filed his notice of location, were accepted as the beginning of the entry, the contestee could not utilize occupancy before that date in satisfaction of the residence requirements of the law.

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exceeded those of many homesteads adjoining or near his own, and he requested that his application for patent be considered under the same rules and regulations applied to others.

In its decision of March 26, 1968, the Office of Appeals and Hearings found that the evidence of record overwhelmingly supported the hearing examiner's conclusions with respect to the deficiency in appellant's residence and that this alone constituted sufficient grounds for cancellation of the entry. Apart from this, however, it found that the hearing examiner was without authority to relieve appellant of the fourth-year cultivation requirements, and it vacated the hearing examiner's action in granting such relief. It then denied the requested relief on grounds that appellant had failed to give the land office notice of his misfortune within the time provided for by the Department's regulation (43 CFR 2211.2-3(b)(2)) and that, inasmuch as appellant relied upon others to do all of his cultivation, he did not demonstrate that his illness was in any way the proximate cause of his inability to meet the cultivation requirements. The Office of Appeals and Hearings further found from the evidence that appellant's reported disking and seeding of ten acres in 1961 was apparently accomplished after the growing season for that year had ended and that the 1964 cultivation apparently consisted in the spreading of seed over land which had been only partially disked and was not prepared for planting, and it concluded that there was no basis for the hearing examiner's finding that approximately 12½ acres were cultivated in the manner required by the law.

In appealing to the Secretary appellant alleges error in the preceding decisions in (1) the denial of the contestee's motion to disqualify the hearing examiner on the ground that he had previously heard a similar contest and formed an opinion (2) the admission in evidence of the transcript of hearing in the earlier private contest proceeding (3) the denial of a reduction in cultivation for the fourth entry year after the hearing examiner had granted such relief (4) the ignoring of the hearing examiner's finding with respect to equitable adjudication, and (5) the failure to find that appellant had shown the two elements, act and intent, necessary to demonstrate residence on the entered land. With respect to the last allegation appellant asserts:

At the time of his entry Mr. Booth did not own a home elsewhere. However, a residence was provided adjoining his office as manager of the Island Homes Housing Project. The Examiner in his decision alleged that on May 30, 1960 the family moved back to their living quarters in town and never again attempted to maintain residence on the homestead. This conclusion is not supported by the evidence and if inquiry had been made of Mr. Booth, his testimony would have been otherwise.

Appellant's attempt to revive the issue of the hearing examiner's qualifications is without merit. The record does show that at the outset of the hearing appellant's attorney moved that the hearing examiner disqualify himself for the reasons that he had previously heard this matter, that he had written a decision, and that he had formed an opinion as to the rights of the contestee. The hearing examiner, however, denied the motion, explaining that if it had been filed sooner he could have changed examiners (Tr. 4-6).

The motion, in substance, and in its timing, was very similar to one made before the same hearing examiner in *United States v. Ford M. Converse*, 72 I.D. 141 (1965), in which case a mining claimant charged that because the hearing examiner had ruled adversely to him previously in a proceeding involving the same issues and similar facts he could not impartially judge the matter then before him. In upholding the propriety of the hearing examiner's denial of the contestee's motion in that case the Department held that it required a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that a hearing was unfair, and it concluded that the contestee's allegations fell far short of the required substantial showing. In subsequent judicial review of the Department's decision the court held that a hearing examiner is not biased, either in law or in fact, simply because he ruled against a party in a prior action and that mere prejudgment of a case or a predisposition to favor the Government is not sufficient to disqualify a hearing examiner but that there must be a personal bias on the part of the hearing examiner to disqualify him from presiding at a hearing. *Converse v. Udall*, 262 F. Supp. 583, 590 (D. Ore. 1966), *aff'd*, 399 F. 2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

We must similarly conclude here that the fact that the hearing examiner had previously ruled against appellant in a proceeding involving at least one of the same issues presented in the instant proceeding is not a disqualifying factor and that appellant has alleged no other basis for disqualification of the hearing examiner.

Turning then to the question of the admissibility of the hearing transcript from the private contest, the general rule relating to the admission of such evidence in a judicial proceeding has been stated as follows:

The mere fact that testimony has been given in the course of a former proceeding between the parties to a case on trial is no ground for admitting it in evidence.* * *

When, however, as frequently happens, it is impossible to produce on a trial evidence which was introduced at a previous trial, the former evidence may, as a matter of necessity, be introduced and received into evidence at the later trial, sometimes by express statutory permission, if it is relevant and material

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on the later trial * * * This has been said to be a simple concept well grounded in the common law. The purpose of using prior testimony is to save the time, effort, and money of the litigants and to expedite trials, with a view to achieving substantial justice, and to prevent a miscarriage of justice. Where such evidence is admitted the admission is an exception to the rule against the admission of hearsay evidence.⁷ The introduction of such evidence has been held to be a matter within the discretion of the court.

It is immaterial to the admission of former evidence what was the outcome of the former trial or suit in which the witness was examined, but the evidence may be received whether the former action was abandoned, dismissed, or terminated by a nonsuit, or for other reason failed to result in a decision.* * * 31A C.J.S. Evidence § 384.

It has long been settled, of course, that the technical rules for the exclusion of evidence are not applicable to Federal administrative proceedings in the absence of a statutory requirement that such rules are to be observed. See, e.g., *United States v. Richard C. Porter et al.*, A-29882 (April 24, 1964), *aff'd sub nom. Hal W. Eldridge et al. v. Secretary of the Interior*, Civil No. 64-353, in the United States District Court for the District of Oregon (December 15, 1965); *United States v. Arch Little and Ethelyn Little*, A-30842 (February 21, 1968). Thus, even if evidence developed in a previous trial were inadmissible in judicial proceedings, it would not necessarily be so in administrative proceedings. As we have seen, such evidence, in proper circumstances, is admissible even in judicial proceedings.

Apart from general rules on the admission of evidence, however, the Department has long held that the Government is a party in interest in any proceeding before this Department and that the Government may take advantage of any information developed in any such proceeding, regardless of how much information may have been disclosed or what may be the rights of the private parties to a contest as against each other. *Van Ostrum v. Young*, 6 L.D. 25 (1887); *Bridges v. Curran*,

⁷ A different view with respect to the nature of such evidence is that:

"The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The analogy is not at all perfect. Objections to hearsay evidence consist of the want of the sanction of an oath and of an opportunity to cross-examine the witness. These two objections do not apply where former testimony is sought to be introduced in evidence. In the latter case the testimony is taken down word for word at a former trial and preserved. The testimony is taken in open court in the presence of the parties and witnesses under the supervision of the trial judge under oath of the witness where there is full opportunity to examine and cross-examine the witness, to search his motives, appeal to his conscience, and test his recollection and the accuracy of his statements. So taken it must be as high an order of testimony as a deposition taken upon interrogatories in the private office of a notary public or some like officer.

Under our system, where the words of a witness are taken down as they fell from his lips and are recorded by an official stenographer, who performs his duties under the sanction of an oath, the written testimony, being preserved, is likely to be more satisfactory than a deposition. * * *

Habig v. Bastian, 158 So. 508 (Fla. 1935).

7 L.D. 395 (1888); *Saunders v. Baldwin*, 9 L.D. 391 (1889); *Rice v. Simmons*, 43 L.D. 343 (1914); *Mullin v. Keaster*, 44 L.D. 161 (1915). We have no difficulty then in concluding that the transcript of the hearing held on September 25, 1964, and the diary submitted in evidence at that time by appellant were properly received in evidence at the hearing of October 10, 1966.

As a practical matter, it is difficult to see wherein appellant finds cause to complain of the admission of this evidence. The obvious objective in admitting such evidence was to save the time, effort and money of the parties to the contest which otherwise would have been expended in redeveloping the same testimony which had previously been given, a saving at least as beneficial to appellant as to the Government. Moreover, it is to be noted that, in determining the amount of time actually spent by appellant on his homestead entry, a critical factor in answering the ultimate question of compliance with the residence requirements of the law, the hearing examiner fully accepted appellant's own testimony.⁸

If, as appellant argues, the diary upon which the hearing examiner relied in computing the residential use of the homestead "has to do with pleasures the family enjoyed rather than the exact times they resided on the homestead," and if, as appellant seemingly implies, appellant's actual residence on the entry exceeded that recorded in the diary, appellant was afforded ample opportunity at the hearing of October 10, 1966, to submit evidence of his additional residence. Such evidence was not forthcoming, and appellant's testimony at the 1966 hearing was fully consistent with the hearing examiner's findings with respect to the periods of occupancy.⁹

We find no justification for appellant's charge that the hearing examiner's finding that on May 30, 1960, the family moved back to their living quarters in town and never again attempted to maintain residence "is not supported by the evidence and if inquiry had been made of Mr. Booth, his testimony would have been otherwise." The record shows that such inquiry was made of Booth and that his response was:

⁸ That is, the hearing examiner accepted appellant's testimony with respect to the time actually spent on the entry. He did not accept appellant's claim that he had "resided" on the entered land for seven months, a claim which went beyond an allegation of fact, requiring a conclusion of law as well.

⁹ At the 1964 hearing both appellant and his wife testified simply that they moved onto the homestead on May 30, 1959, that they resided there until the last of November 1959, and that they resided on the entry again in May 1960 (Tr. 34, 41-42, 56-57, 1964 hearing). At the 1966 hearing appellant acknowledged that he and his family did not stay at the homestead every night from May 30 through November 1959, that they stayed overnight only about half the time in October, that they were at the homestead on about twelve days in November but only stayed about five or six nights, that they stayed only twelve or fifteen nights in May 1960, and that in June 1959, the first month after establishing residence, they spent only weekends at the homestead or half the nights (Tr. 185, 188-191).

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In 1960, according to the information we had received we had to spend seven months out of that year, and we went back out there to complete the seven months in May and we lived there through May and after that we were there occasionally but didn't make any attempt to live there full time after that time. (Tr. 57, 1964 hearing.)¹⁰

There is no basis in the record, then, for serious debate with respect to the nature and duration of appellant's residential occupancy of the entered land. Notwithstanding implied allegations to the contrary, the sum of the evidence clearly is to the effect that all of appellant's residential use of the land occurred during seven months of the first entry year, that throughout that period of time appellant and his family maintained and intermittently occupied "living quarters" in Fairbanks¹¹ which constituted their place of residence both before and after their occupancy of the homestead,¹² and that, during all periods of occupancy of the homestead, it was necessary for appellant and his wife to commute daily between the homestead and their employment in Fairbanks. The question which must be answered is whether or not habitancy of the kind indicated here satisfies the residence requirements of the homestead law.

The problem of determining whether or not there has been compliance with the residence requirements of the homestead law in cases involving double residence was treated at great length in *United States v. Victor H. Cooke, supra*. In that case the Department stated:

The basic principles common to these questions of domicile and homestead residence are set forth in the discussions of domicile in textbooks on the conflict of laws. These all show that the term *domicile*, derived from *domus*, the Latin word for *home*, is intimately bound up with the concept "home" and a whole complex of related ideas. * * *

* * * [M]ere bodily presence in a new place does not by itself initiate a domicile of choice. The actual residence, or bodily presence, must be accompanied by a certain intent if the place of new sojourn or physical habitancy is to be converted into such a home as makes the basis of legal domicile. In other words, a

¹⁰ Although, in his final proof, appellant alleged residence at the homestead from June 1 to June 15, 1960, Mrs. Booth's diary contained no entries after May 30, 1960, and there was no mention at either hearing of residence after the end of May. In any event, residence from June 1 to June 15, 1960, would have availed nothing toward satisfying the requirement of seven months' residence in any one year.

¹¹ Appellant lived at "Island Homes," which, according to the record, was a part of Fairbanks in 1964 but was outside the limits of Fairbanks at the time of the entry in 1959 (Tr. 38, 1964 hearing). The homestead entry is about 15 or 16 miles northeast of Fairbanks (Tr. 12).

¹² Appellant asserts in his present appeal that at the time of his entry he did not own a home elsewhere. The point of this assertion is not clear, for ownership of a home is not a prerequisite to residence. In spite of appellant's assertions that he "did not maintain another home elsewhere other than the homestead" (Tr. 194) and that the only place he had as a home or dwelling during his period of claimed residence at the homestead was his homestead (Tr. 214), the evidence of record compels a finding that appellant maintained two residences throughout that period. The record also indicates that in 1961 or 1962, during the life of the entry, appellant purchased a home in the area of his previous "living quarters" in Fairbanks which was his residence at the time of the first hearing and, presumably, thereafter (Tr. 39, 63, 1964 hearing).

domicile of choice can be established only by intent and by act, *animo et facto*. It is not otherwise with homestead entry. These same principles underlie the terms of the homestead law. * * *

The chief rules implementing these common principles, here phrased with particular reference to homestead rather than domicile, are as follows: First, there must be *intent* to make the desired public lands the applicant's home, or fixed abode. This intent is called the *animus manendi*, the *intent to remain*, and implicit in it, of course, is *the intent no longer to have a home at the former residence*, or domicile; second, there must be *actual bodily presence* on the lands entered, this act of inhabitation of the entry being called the *factum*. Moreover, these two elements must coexist. The mere intent to acquire a new home on the desired lands, if unaccompanied by the *factum* of bodily removal to the entry and bodily presence there, avails nothing; nor does the fact of removal and presence if those acts be not animated by intent.

It results that in the absence of an intent to remain, no inhabitation of the new abode on the entry, no actual residence there, whether for 3 years or for longer, is sufficient to create the homestead residence and home envisaged by the homestead law any more than it would create a new domicile. Without the requisite intent, the dwelling place on the entry and the entryman's actual residence therein do not constitute home and homestead residence, but only the actual situs of the entryman; nor is homestead residence or home established any more than a change of domicile is effected, if despite removal to the new place there is an intention to return to the former dwelling place as the home. Exactly as acquisition of a new domicile involves "a present, definite, and honest purpose to give up the old and take up the new place as the domicile," [footnote omitted] so establishment of homestead residence and home involves a present, definite, and honest purpose to give up the old dwelling place as home and to take up the entry as home. * * *

The entryman's intention to remain need not be an intention to remain there for the rest of his life. It is enough if the entryman, like the domiciliary in a new jurisdiction, have a definite and fixed intention to establish on the entry his new fixed home and be without any present intention of removing therefrom to any other place as his home. * * *

* * * * *

In the determination of whether homestead residence has been established and maintained, difficult questions often arise. The question whether there has been bodily presence on the entry is a question of fact generally easy to establish by eyewitnesses or circumstantial evidence. But the questions whether there has been a genuine intent to make a home on the entry and whether that home exists are questions of fact not so simple, having to be determined by the inferences to be drawn from a large number of evidential facts. * * * 59 I.D. at 501-503. (Italics in original.)

* * * * *

Of the many facts as to residence which may cast doubt upon the intent to establish a home on the entry, one of the most troublesome is an entryman's maintenance of double residence—a residence in the dwelling place from which he has gone to the entry, as well as the residence on the entry itself. This is not to say that the homestead law prohibits a man from having two residences. Although the law does not accord the homestead right to one owning more than 160 acres of land at the time of making application for a homestead, it nevertheless does not deny the homestead right either to one who owns less land

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or to one who is well enough off to own a house or lots of whatever value. Nor does the Department hold the entryman prohibited from making certain personal or family *residential* uses of such owned property or of any other off-entry dwelling place. Indeed, it pertinently asks where an entryman is to live during absences from the entry, whether with or without his family. [Footnote omitted.]

But although the law thus permits an entryman to have *two residences*, it insists that he have only *one home* and that he make that home on the entry. It insists that he shall have given up his former home not as a place or mere residence, or temporary sojourn, but as a *home*, and that he shall not have any present intention of again making it his *home*. Otherwise his sworn intent to make his fixed home on the entry will be found not to have been in good faith.

Here, as in domicile, the question of which dwelling place is genuinely intended to be the home and which the mere residence finds its answer in the inferences to be drawn from the acts of the entryman and the circumstances of his life, whether trivial or unusual. * * * *Id.* at 505-506. (*italics in original*).

* * * * *

Of course, bad faith will always tip the scales against the entryman. * * * The presumption [of bad faith] is * * * held sustained when scrutiny of the entryman's acts shows his alleged observance of the requirements to be only colorable. Where there is evidence that the entryman's actual personal residence on the entry is defective in length or only intermittent or occasional, that his cultivation has been meager, his improvements insufficient, his house inadequate, uninhabitable or uninhabited, that evidence is held to show that the entryman never intended to change his residence and make his home on the entry, but on the contrary intended to keep his home where the family continued to reside and to return there when he should have obtained title to the entry.

In all such cases, deeds speak louder than words. The acts of the entryman determine the issue, and the explanations he gives for the family's residence away from the entry become of no worth, however meritorious in themselves apart from the circumstances, or however acceptable they might be to the Department if all else were regular. *Id.* at 512-513.

We find an almost total want of evidence in this case of acts on the part of appellant and his family tending to show the required intent to make the entered land their home and an abundance of acts which suggest a contrary intent. As we have already observed, appellant has alleged residence on his entry for the barest minimum of time required to satisfy the law, and, as we have also noted, throughout this minimum period of claimed residence on the entry, he maintained concurrent residence for himself and his family elsewhere¹³ where they lived a

¹³ In the *Cooke* case, *supra*, the Department listed three classes of double residence raising presumptions against an entryman's good faith in establishing residence. These were cases in which, during the statutory life of an entry, occupancy of either a former home or some other off-entry dwelling was maintained:

"1. By the entryman and his family during long absences from the entry, no one remaining on the entry.

2. By the entryman alone, his family living on the entry.

3. By the family only, the entryman living alone on the entry." 59 I.D. at 507.

We have in the present case an aspect of the first category of double residence.

substantial part of the time. Appellant's explanation for his failure to reside on the entry beyond the period of time claimed, as previously noted, was simply "compliance met." In answer to a question as to whether, prior to his illness (which occurred in 1962), he intended to go back to the homestead on a permanent basis, appellant replied:

Not until we could get a different building built on it and improved to the point where we could have a year-round home, which would be quite a while, and I don't know when that would have been done. (Tr. 63, 1964 hearing.)

Appellant's reported residential use of the entry was all accomplished within the first year of the life of the entry, and there is no evidence of any effort after that to improve the living quarters on the entry, which were temporary at best, to make them suitable as permanent residence.¹⁴ However, after terminating his residence at the homestead, but within the life of the entry, appellant did buy a home elsewhere, and, prior to that transaction, he permitted occupancy of the homestead accommodations by others, which occupancy continued, with some interruption, until shortly before the 1966 hearing (see Tr. 17, 26, 58-59, 1964 hearing; Tr. 174-175, 197-198, 1966 hearing). Moreover, it is to be noted that appellant's cultivation of the entered land was, at best, meager and that, in appellant's own view, the improvements placed on the land were not suitable for use as a permanent home.

There is, then, no basis in the evidence of record for inferring the existence of one of the two essential elements of residence, that is, an intent on the part of the appellant in going upon the entered land to make the entry his home. Rather, the record fully supports the finding of the hearing examiner that appellant "left his living quarters in Fairbanks on May 30, 1959, with the intention of satisfying the minimum requirements of the homestead law and then to return immediately to Fairbanks." We concur also in his determination that appellant did not satisfy the second essential of homestead residence, that is, physical occupancy of the entry for the minimum period, in this case, of seven months. Failure to comply with these requirements is a proper basis for cancellation of the entry. *Melvin O. Wright*, A-30839 (December 29, 1967), and cases cited.

As to the cultivation requirement it is difficult to view the reported

¹⁴ The improvements on the entry which constituted appellant's living quarters consisted of a house trailer and wanigan (a frame addition attached to a trailer) (Tr. 7, 49, 1964 hearing; Tr. 31-32, 1966 hearing). Those improvements were moved a short distance about 1963, apparently to place them within the boundaries of the entry as established by the survey of the land (Tr. 13, 17, 46-47, 1964 hearing; Tr. 80-81, 94-95, 1966 hearing).

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acts of cultivation on appellant's entry, which appear to have been neither preceded nor followed by progressive acts of cultivation, as steps in the gradual agricultural development of land reasonably directed toward future profitable results, as the hearing examiner found them to be.¹⁵ However, in view of our findings with respect to appellant's residence on the land, it is unnecessary either to determine whether appellant cultivated the land in his entry during the fifth entry year in a manner reasonably calculated to produce profitable results or to determine the related questions as to whether he was entitled to be excused from performance of the fourth year's cultivation and whether the hearing examiner was authorized to grant such relief.

One other point requires brief comment. In charging that the Office of Appeals and Hearings "totally ignored the decision of the Hearing Examiner in regard to equitable adjudication," appellant seemingly implies that the hearing examiner found that he was entitled to equitable adjudication of his entry. However, the hearing examiner made no such finding. Rather, as we have already noted, he found that equitable adjudication would be required in order for appellant to receive credit for both his cultivation of and his residence upon the entry even if he had satisfied the substantive terms of both requirements. As the hearing examiner found that appellant had not satisfied the residence requirements of the law, the question of the applicability of the principles of equitable adjudication did not arise.

Appellant does not now make any positive assertion that he is entitled to equitable adjudication of his case, and we find in the evidence no basis for concluding that there has been "substantial compliance" with the requirements of the homestead law, an indispensable prerequisite to the invocation of equitable adjudication. See *United States v. Richard Dean Lance*, 73 I.D. 218 (1966), *complaint dismissed in Richard Dean Lance v. Stewart L. Udall*, Civil No. 1864, in the United States District Court for the District of Nevada (January 23, 1968).

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.

¹⁵ Assuming, as the hearing examiner found, that profitable results could be achieved only through working the land over a period of several years, the seeding of 20 acres of partially-disked land with 1400 pounds of seed in 1964 in the hope that it would germinate (see Tr. 179-183) would appear to be an act performed solely for the purpose of satisfying the letter of the law rather than one performed in progressive agricultural development of the land.

APPEALS OF COE CONSTRUCTION, INC.

IBCA-632-4-67

IBCA-687-11-67

Decided May 28, 1969

**Contracts: Construction and Operation: Changes and Extras—Contracts:
Construction and Operation: Drawings and Specifications—Contracts:
Performance or Default: Impossibility of Performance**

Where the Government required a construction contractor to utilize soil of a marginal quality in the processing of soil cement for a road, pursuant to a specification allowing the use of a single pass stabilizer (naming a specific manufacturer's product or its equal) and thereafter issued a sweeping modification of the specifications, the contractor, who prior to the modification attempted with a machine of the type named over a period of approximately three weeks to produce an acceptable road (including several days of processing performed under the direction of a Government engineer), was entitled to an equitable adjustment for the costs incurred during that period. The Board concluded that a case of legal or practical impossibility had been established, since an acceptable road could not be economically constructed under the specifications with the soil that had been made available by the Government.

**Contracts: Construction and Operation: Changes and Extras—Contracts:
Disputes and Remedies: Equitable Adjustments**

Where, in a related appeal, an equitable adjustment was allowed to a contractor for specified grading work performed prior to the issuance of a major contract modification involving the processing of soil cement for a road, which adjustment would include labor and equipment expense associated with such grading, the contractor was not entitled to isolate and be paid for additional grading on the basis of a contract unit price schedule found by the Board to be inapplicable. The grading in question was only one phase of the work performed under the modified method and additional costs that may have been incurred during that phase could not be considered separately, since the equitable price adjustment allowable for changed work should be determined on the basis of the difference between the work originally specified and the work as changed and actually performed by the contractor—here costs that would have been incurred under the originally specified processing method may have been saved under the modified method because certain steps (such as the use of designated equipment) were eliminated.

BOARD OF CONTRACT APPEALS

Coe Construction, Inc., a contracting firm which is referred to in this opinion as "Coe," has filed two appeals under a National Park Service contract calling for the construction of roads, parking areas, water and sewer system and other improvements and the Navaho Reservoir Recreation Area in New Mexico and Colorado. The original estimated contract price was \$428,400.50. In IBCA-632-4-67 Coe seeks to recover \$27,804.74 in additional costs associated with the building

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of a soil cement road. The second appeal, IBCA-687-11-67, also is concerned with the soil cement road—Coe contends that its construction forces were required to perform grading work of the value of \$6,605 for which compensation has been improperly withheld.

IBCA-632-4-67

The soil cement road question arose during the fall of 1966. The contracting officer's Finding of Fact which denied the claim is dated March 10, 1967, and the appeal was taken on March 31, 1967. A hearing on this dispute and on IBCA-687-11-67 was held on October 9 and 10, 1968, in Albuquerque, New Mexico.

The parties are in agreement that during the course of construction there was a modification of the soil cement road specifications contained in the contract as it was signed in June 1966. Those specifications provided:

1-09 SOIL CEMENT BASE

* * * * *

b. Materials.

1. *Portland Cement* shall be Type II, conforming to the Specifications of ASTM Designation C-150. One sack of cement shall be considered to weigh 94 pounds and one barrel to weigh 376 pounds.

2. *Water* shall be reasonably clean and free from oil, acid, alkali, sugar and vegetable matter.

3. *Soil* shall consist of select material from the road prism or the borrow pits designated previously.

c. *Preparation of Soil.* The area to be treated with cement shall be graded, compacted and shaped to the required cross-section, alignment, and grade. The top layer of material shall be scarified to the depth required for cement stabilization, and shall be pulverized such that 100 percent by dry weight passes the one-inch sieve, and 80 percent passes a No. 4 sieve. After the loosened material has been pulverized, it shall be placed in a windrow and sized for addition of cement. The windrowed material shall be moved back and forth as required to permit reshaping and compacting of the subgrade.

In lieu of scarifying and breaking-up of material as specified above, the use of a machine that pulverizes the material and cuts a true plane at the required depth will be permitted, provided it does not loosen the material below the plane specified for the bottom of the base.

d. *Addition of Cement.* Cement to be mixed with the prepared aggregate may be furnished in sacks or bulk. If sacked cement is used, the sacks shall be distributed on the aggregate at required intervals, then emptied by hand methods, following which the cement from each sack shall be distributed into a layer of uniform thickness. If cement is furnished in bulk, it shall be spread by mechanical equipment. The rate of spread shall not vary more than 10 percent from the designated rate. The top of the windrow shall be flattened to receive the cement. The distance which the cement may be spread ahead of the mixing operation will be determined by the Contracting Officer.

e. *Mixing.* The mixing machine shall be the auger or pugmill type, designed to pick up material from a windrow, and shall be equipped with a bottom pan or shell so that at least 50 percent of the material is picked up and mixed while separated from the mixing table. The mixing machine shall be equipped with a device for introducing water at the time of mixing. The water shall be applied by means of controls that will supply the correct quantity of water to produce a mixture with a uniform moisture content. Leakage of water from equipment will not be permitted. Mixing shall be continued until the mixture is uniform.

f. *Spreading and Compacting.* The treated mixture shall be spread on the subgrade to the required width and thickness. Initial rolling shall be accomplished with a three-wheel steel-tired roller weighing at least twelve tons. Following completion of initial rolling, the surface shall be rolled with a pneumatic-tired roller have a width of not less than four feet and equipped with tires or equal size, and constructed such that the total weight of the roller can be varied to produce an operating weight of not less than 2,000 pounds per tire. Wobble-wheel rollers will not be permitted.

Rolling shall be continued until a density of not less than 95 percent of the maximum density, as determined by moisture density test, AASHTO T-134-5 or ASTM D 558-57, is obtained. Not more than two hours shall elapse between the time the water is added and final compaction is completed, including trimming and final shaping.

Addendum No. 1 to specifications (dated May 10, 1966) made the following change:

In lieu of placing and mixing the soil cement base material in windrows, the following alternate mixing methods will be allowed:

a. *In place Mixing*—with a single pass stabilizer (P & H single pass stabilizer or equal).

b. *Central Plant Mix*—When this method is used, the soil, cement and water shall be mixed in a pugmill either of the batch or continuous flow-type. The plant shall be equipped with feeding and metering devices which will add the soil, cement and water into the mixer in the specified quantities. Soil and cement shall be mixed sufficiently to prevent cement balls from forming when water is added. Mixing shall continue until a uniform and intimate mixture of soil, cement and water is obtained. The mixture shall be hauled to the roadway in trucks equipped with protective covers. The mixture shall be placed on the moistened subgrade in a uniform layer by an approved spreader. Not more than thirty minutes shall elapse between the placement of soil-cement in adjacent lanes at any location except at longitudinal construction joints.

The revision made by the Addendum is directly involved in this appeal. In making its claim Coe also points to a modification incorporated in a letter dated October 28, 1966 to Coe from the Government's Project Supervisor, which states in pertinent part:

After exhaustive efforts to assist you in solving your problems in placing Soil Cement Base in such a manner that the finished product will meet the requirements of the Typical Road Sections, as shown on the Contract Drawings, and comply with the provisions of the Contract Specifications in regard to density, depth of material, and uniformity of mix, the following procedure, as per your authorized experimental operation in the Campground Area on Thurs-

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day, October 27, 1966, was found to be satisfactory, and to meet minimum requirements.

1. Shape and compact subgrade to subgrade elevations in accordance with normal procedure, and as indicated on Typical Road Sections as shown on the Contract Drawings.

2. In preparing the material, pulverization may be accomplished either in the pit or on the prepared subgrade. Cement may be added at any time during the pulverization, provided that thorough mixing of the soil and the cement is accomplished.

Extreme care must be exercised in order that no more of the cement added mixture is prepared than can be placed and completed during the day's operation. Soil-cement mixture left uncompleted after close of the day's operation will be rejected and no payment will be made therefor.

3. Final processing and placing is to be accomplished by windrowing the mixed material to one side of the subgrade, thoroughly wetting the exposed subgrade surface, move windrowed material over and on the wetted subgrade surface and thoroughly wet the other exposed subgrade surface of opposite hand. Processing is then to be continued by blading the material back and forth across the subgrade in light lifts and adding water in small amounts until a uniform mixture of soil, water, and cement has been attained. After processing is completed the mix shall be shaped to proper cross-section for rolling and compacting.

4. Rolling is to be accomplished by first using the pneumatic tired roller. Rolling shall be continued with the pneumatic tired roller until the specified density is obtained. Finish rolling shall be accomplished with a steel wheel, tandem type roller to remove surface irregularities. Surface rolling may be preceded by a light wetting of the compacted surface.

5. Curing and sealing shall be in accordance with the applicable portions of the Contract Specifications.

* * * * *

The above outlined method for placing soil cement is considered a modification to the Contract Specifications. This modification is made in an effort to aid you in the solution of your problems in providing a suitable and acceptable Soil Cement Base, as required.

However, if you decide to adopt this method of procedure for your Soil Cement Operations it is to be understood that no extra cost to the Government is involved. * * *

All other provisions of the Contract Specifications, not herein modified, will apply. A thorough study and analysis of these provisions is recommended. Assistance in regard to the interpretation of any of the provisions of the Contract or the Project Specifications will be provided upon request.

Coe contends that the issuance of the October 28, 1966 modification definitely and finally established that the procedure for making soil cement set forth in the specifications was unworkable and defective. The costs which Coe is attempting to recover are those incurred during a period of approximately five weeks when Coe was attempting to process soil with (first) a pugmill, and (later) a single pass stabilizer. No claim has been made for any additional costs that may have been incurred by Coe in actually processing and placing the soil cement on

the road subsequent to, and in accordance with, the October 28, 1966 modification.

The soil that was made available by the Government for the soil cement eventually was mixed, spread and compacted so as to produce a completed road that was satisfactory to the Government. This was done by mixing the soil and the cement with a grader, and supplying the necessary water from a truck. The Government acknowledges, however, that the clay-like soil specified for use was "marginal in quality."¹ Also, a testing laboratory official who testified for the Government conceded that the soil was "not very good."²

The appellant's project supervisor made a pre-bid inspection of the road that was to be surfaced with soil cement, and of the borrow pit that was designated by the Government as the source of the soil that was to be utilized.³ Because the Government employee who was assigned to accompany prospective bidders on pre-bid inspections was assigned to another job at the time Coe scheduled its inspection,⁴ Coe's project supervisor decided to "look at the job" on his own.⁵ Apparently, the Government assumed that each prospective bidder would choose to make his bid inspection in company with a Government representative, and that the assigned representative would by word of mouth advise interested concerns that the Government possessed a document which had been prepared by a testing laboratory and was entitled "Investigation of Existing Boat Launching Ramp and Recommendations Regarding Use of Soil Cement for Access Road at Simms Mesa Site, Navaho Recreation Area." Although the report containing soil cement road recommendations is dated October 1965, and was transmitted to the Government in the same month,⁶ no reference was made to it in the Invitation to Bid (dated April 18, 1966) or in Addendum No. 1 (dated May 10, 1966).

The recommendations in the testing laboratory report are less than one and one-half pages in length, and, as the appellant's counsel has pointed out, general in nature. There is no evidence that personnel of the laboratory had, prior to accepting the assignment on the project under consideration, any field experience in observing or assisting in the operation of equipment engaged in processing and laying soil

¹ Government's Closing Brief dated March 14, 1969 (p. 7).

² Tr. 203.

³ Tr. 64.

⁴ Tr. 65. The Government's project supervisor was given the task of assisting bidders with pre-bid inspections. He stated that at the time such inspections were being made he was on a bridge project and that "this was rather awkward with [the bridge project] many miles away." Tr. 104.

⁵ Tr. 65.

⁶ Transmittal letter dated October 18, 1965, Item 32, Appeal File.

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cement.⁷ The testing laboratory official explained that soil cement is a specialized field and that "not very many" projects of that kind other than state highway projects had been completed in New Mexico.⁸

Addendum No. 1 allowed the central plant mix method to be used in "lieu of placing and mixing the soil cement base materials in windrows," and stated that "the soil, cement and water shall be mixed in a pugmill either of the batch or continuous flow-type." Coe first attempted to make acceptable soil cement by this method. The diary of its project supervisor indicated that on September 21, 1966, an effort was made to calibrate the central soil cement plant, and concluded that it "might work."

In a letter to the project supervisor dated October 15, 1966,⁹ Coe's President described the attempt to operate the pugmill on September 22 and 23, 1966, and asserted that although numerous attempts to adjust the rate of material and cement were made, the mixed material balled up in the pugmill when optimum moisture was reached. The balling up of the wet soil and cement mixture was said to have "produced an adverse torque causing the belts to slip locking the pugmill." The appellant's claim includes costs associated with the effort to utilize the pugmill at the central plant, with equipment costs listed beginning September 14, 1966 and labor costs listed beginning September 17, 1966.

Three comments concerning the operation of the pugmill were written at the time the effort to use it was made. An employee of the testing laboratory hired by the Government reported:

* * * It was noted that there was not proper pulverization in pug mill but was told by the contractor that this would be corrected when water was added. Water was then added and not only did this not correct pulverization but it also clogged the machine where it would completely stall. Production was cut in less than half and a trough was welded on the pug mill to retain the material for better mixing. This did not work satisfactorily and also the contract was unhappy with production cut. The contractor said he would look into a better method of processing material over the weekend.¹⁰

Coe's project superintendent's notations on the operation of the pugmill for September 22 and 23 are very brief, referring to trouble with clay clods, and the contractor's inability to make the pugmill

⁷ The Board affirms the ruling of the Board member who conducted the hearing in this appeal that a testing laboratory official (Government witness) had not been shown to be an expert with respect to the mechanics of mixing and placing soil cement (although he had top-flight qualifications in the testing field). See offer of proof concerning Coe's mixing operations, beginning at Tr. 172.

⁸ Tr. 163.

⁹ Item 7, Appeal File.

¹⁰ Third attachment to Item 32, Appeal File.

“work on soil cement” because it would not mix the clay and break the clods.¹¹ The Government’s construction representative reported during the same period that the pugmill would not handle the material due to difficulties with pulverizing and mixing. His diary entry for September 23 stated that Coe’s project superintendent “intends to replace present soil cement equipment, that he is now satisfied that the equipment on the job will not produce satisfactory material.” Five days later (September 28, 1966) he reported that the project superintendent proposed to use a P and H stabilizer to process the mix, but the processing would take place at the road site and that borrow material (rather than in place soil) would be used for the soil cement.¹² At the hearing the project superintendent testified that he had been told by the construction representative “that the best thing we could do was get that (pugmill) off the job, that it wasn’t going to work here.” However, the diaries for September 23 do not furnish support for this assertion.

Upon abandoning its central plant mix operation, Coe brought a single pass soil stabilizer to the job. Before a description is given of the work that can be performed by such a stabilizer, it should be observed that the pugmill and its accessory equipment used in a central plant mix operation perform the functions of feeding soil, conveying it on a belt, mixing it with cement and water, and loading it into trucks.¹³ In discussing the need to have the soil pulverized to the extent designated in the specifications, the Government’s project supervisor pointed out that “a pugmill as such is primarily a mixing device and not a mill.”¹⁴ This point was made in testimony directed to his contention that in Coe’s initial attempt to process the soil cement at a central plant utilizing a pugmill, a necessary piece of equipment was lacking—a machine to pulverize the material to the specified gradation, prior to its delivery into the pugmill. The single pass stabilizer, which was used in Coe’s second attempt to produce satisfactory soil cement, does not have a similar limitation. A manufacturer’s pamphlet describing the type of stabilizer that was brought onto the job,¹⁵ lists eight basic processing steps which it performs, including “its own digging and pulverizing,” uniform blending of all materials, accurate control and application of all liquids, and thorough mixing.

¹¹ Exhibit 3.

¹² The construction representative’s diary entries are contained in Exhibit 9A.

¹³ Exhibit 4.

¹⁴ Tr. 263.

¹⁵ Exhibit 5.

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Use of the Single Pass Stabilizer

A P and H single pass soil stabilizer was delivered to the project on Thursday, September 29, 1966. It came within the description of "permitted" or "allowed" equipment described in the "Preparation of Soil" portion of Section 1-09 of the specifications,¹⁶ and in Paragraph 3 of Addendum No. 1.¹⁷

On September 30, 1966, it was learned from a trial run that three passes with the P and H Stabilizer did not bring material brought from the Government's borrow pit to the gradation called for by the specifications. On October 3 and 4 multiple passes were made with the Stabilizer, with and without addition of water. Some were made at slow speed. On both days it was found that the gradation requirement was not met. The final portion of the October 4 diary entry of the Government's construction representative is as follows:

* * * W.O.D.C. [Western Office of Design and Construction] to be informed of the gradation problem by phone with a view toward modification of the specifications to the extent that 70% to 75% passing No. 4 sieve [rather than the 80% called for in the specifications] will be acceptable. Fuller [the project supervisor] to meet with [Coe's representatives] and San Juan Lab tomorrow morning in order to try and resolve the gradation problem.

At this point it was decided that the use of a Woods Pulverizer ahead of the P and H machine might be helpful. This additional piece of equipment ordered by Coe arrived at the project on the afternoon of October 6. On October 7, utilization of the Woods Pulverizer and the P and H Stabilizer produced the required gradation; however, soil cement produced on that date was not accepted by the Government.

The Government in the defense to this claim, asserts that the contractor was incompetent, inexperienced and inept. There are references in several of the diaries to erratic moisture contact of the soil cement, or irregular operation of the P and H Stabilizer. Coe's project supervisor, who had been in charge of single pass soil stabilizer operations on other jobs, attributed the difficulties in (i) controlling the addition of water, and (ii) in preventing the P and H Stabilizer from rising up or stalling, to the high plasticity of the soil and its tendency to form into clay balls. Two specific deficiencies in the P and H machine—clogged water nozzles and a weak pump—were corrected by the contractor when the Government made complaint. In addition, the machine was run at the slowest possible speed.

¹⁶ "A machine that pulverizes the material and cuts a true plane at the required depth." The "Preparation of Soil" subsection is quoted as part of the third paragraph of this opinion.

¹⁷ "a. In Place Mixing—with a single pass stabilizer (P and H single pass stabilizer or equal)."

The soil cement difficulties on October 7 seem to have gone beyond an inefficient operation on the contractor's part, since the Government arranged for a Park Service representative from San Francisco, testing laboratory officials and representatives of the Portland Cement Association to come to the road site. They met with employees of Coe on October 11, 1966. A portion of the construction representatives' diary for that date is as follows:

* * * Ideas were presented as to the proper procedure to be followed in mixing and placing soil cement. All ideas and suggestions were given consideration with the result that it was decided that a letter to the contractor should be prepared, offering for his consideration certain procedures in regard to sequence of operations that may improve the quality and appearance of the soil cement and comply with the project specifications.

Coe's project supervisor testified that the Government officials and advisors concluded on October 11 that "sand or some kind of * * * material other than clay out of the pits" should be used on the project.¹⁸ The Government's project supervisor confirmed that serious consideration was given to authorizing the "addition of sand * * * at an extra expense for which the contractor would be paid * * * we found some sand that we felt would be suitable at a delivery of about five miles away."¹⁹

The original plan, following the October 11 meeting, was for a National Park Service construction official from San Francisco (who participated in that meeting) and a testing laboratory official (the laboratory had representatives present both at the October 7 road work and at the October 11 meeting) to draft a letter to Coe concerning work procedures. However, the Government's forces were swelled on October 12 when a design engineer arrived from San Francisco. Although he had neither observed the October 7 road work nor participated in the October 11 meeting, the design engineer took the view that "the work should be carried out in accordance with the specifications before revisions to the specifications are considered," and also assisted in drafting the letter to the contractor.²⁰ That letter, which was transmitted on October 13,²¹ and amended on October 14,²² confirmed the rejection of the soil cement processed on October 7, and made recommendations respecting construction procedures. The construction representative referred to these recommendations as "sug-

¹⁸ Tr. 36.

¹⁹ Tr. 119-120.

²⁰ Exhibit 9A.

²¹ Item 5, Appeal File.

²² Item 6, Appeal File.

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gestions * * * offered for consideration only,"²³ and the October 13 letter states that they are "all within the Contract Specifications." The letter also suggests additional procedures "which it is believed would enhance the operation"—the use of a drag or laborers with rakes behind P and H Stabilizer to level the mixture, and keeping the surface of the soil cement mixture moist during rolling and final grading work.

Coe's reply²⁴ to the letter containing the Government's suggestions reads in part:

The recommended procedures * * * are fine except they will not work as fully discussed at the * * * conference.

Paragraph 4 of the recommended construction procedures is directly in violation of subject specification in that under Section 1-09c it clearly states cement shall be added after pulverization * * * the gradation requirements are to be met before the cement is added. * * * By adding the cement before testing would have saved the cost of the Woods Pulverizer and the time and money attempting to meet specification requirements.

The appellant's letter also advises that there is no machine manufactured which can process and mix the pulverized soil and cement with water as required by the Government's engineers and that the "complete operation could not be performed within the two-hour limit as required by the specifications." The negotiation of a contract modification was requested.

After the appellant transmitted its request for a contract modification there was a period of eight or nine days during which there was no renewal of efforts to process soil cement, and no written or verbal instructions concerning the problem were issued by the Government. On October 24, the Government's construction representative learned that the San Francisco design engineer was returning to the project "to take charge" of resumption of the soil cement work.²⁵

The Government's design engineer arrived at the site on October 25. On that date test or experimental soil cement activities began on a campground road. Borrow material which had been placed on the road was scarified and processed with a blade. After cement was placed on windrowed borrow material, pulverizing with a Woods Pulverizer and additional windrowing was performed on a 150-foot stretch of the

²³ Exhibit 9A (October 12, 1966 diary entry).

²⁴ Letter dated October 15, 1966, Item 7, Appeal File.

²⁵ Exhibit 9B.

road for about four hours.²⁶ On the morning of October 26 testing revealed that the pulverized material did not pass the "number 4 sieve" requirement of the specifications. If the cement content of the processed material was considered to be soil (a relaxation of the specifications), then the "number 4 sieve" requirement was met. Notwithstanding the test results, the design engineer stated that Coe should "go ahead and begin processing" with the P and H Stabilizer. An analysis behind the Stabilizer showed the material to be 4% below the contract's standard—80% passing a No. 4 sieve.

The design engineer next ordered an additional sequence of operations, involving blading, rolling with several types of machines, scaring and shaping. All of this produced an "uneven and scabby" surface with some "very bad" cracks, and rejection of the 150-foot strip of soil cement by the project supervisor.

Persisting in the effort to make acceptable soil cement from the borrow material with a single pass stabilizer, the design engineer decided to try a second 150-foot strip. With cement in the material, two passes were made with the Woods Pulverizer, followed by two passes with the Stabilizer (water was not added to the mixture at this point). Because this did not bring the material into gradation the passes continued. After a total of four passes with the Woods machine and three with the Stabilizer the material was brought into gradation.

Processing of 100 feet of the second 150-foot strip was completed late in the day—again blading, raking, and rolling with two machines was performed behind the Stabilizer.

After viewing and participating in the October 26 test work, the construction representative concluded his report for the day as follows:

It was agreed by all concerned that none of the soil cement placed so far is satisfactory and acceptable as a road base and finish surface. [The project supervisor, design engineer] and the inspector²⁷ also agreed that the contractor, yesterday and today, has made a sincere effort to comply with the project specifications and the modifications authorized by [the design engineer]. These modifications consisting of changing sequence of blade and roller work and adding handraking behind the P and H were made in order to try and improve the scabby, rutted and otherwise uneven condition of the road surface after rolling is completed.

At the end of today's work it was clearly evident that a satisfactory and acceptable road cannot be economically constructed under the project specifications

²⁶ The Board's description of happenings on the job during the last week of October 26, 1966, is taken from the construction representative's diary (Exhibit 9B). The appeal record does not disclose whether or not diaries covering that period were kept by the Government's design engineer and project superintendent. The latter official did review the construction representative's diary entries "nearly every day at the end of the day." Tr. 284-285.

²⁷ In his diary the construction representative refers to himself as the inspector.

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with the material available in the project borrow pit. The P and H Pulverizer will not process the material to even consistency and depth and moisture control with $\pm 5\%$ of optimum has not been attainable except for short periods. After completion of the day's trial runs [Coe's project superintendent] stated that he did not intend to try any further use of the P and H. [The design engineer] informed [Coe's superintendent] that he would be paid for yesterday's and today's production even tho the product is mostly substandard and has been partially rejected.

On October 27 soil cement processing under a new method was instituted. The P and H Stabilizer was not used; instead, a grader was used to mix the material after it had been pulverized by multiple passes with the Woods Pulverizer. Water was added to the mix from a truck. The Government representatives at the project were very pleased with the results obtained from the new processing method. In particular, there was a great improvement in the appearance of the finished road surface. A detailed description of the new procedure is given in the contract modification dated October 28, 1966.²⁸ Coe performed the soil cement work in accordance with the modified specifications, and it was accepted by the Government.

Decision on Soil Cement Claim

The evidence in this appeal is strongly in favor of the appellant's contention that the specifications covering the processing and application of soil cement were seriously deficient. The appellant's first effort—the one in which processing began on September 21, 1966—did not correspond to a method that is authorized or approved by the specifications. There is no suggestion in the contract that a pugmill will take care of both the pulverization and the mixing. The notation in Coe's project supervisor's diary that the attempt to process the material with a pugmill unaided by a pulverizing machine "might work" lends the proper note to the appellant's activity at the central plant. It was a good try, but not one as to which the specifications promised success.

The P and H Stabilizer operation is a different matter. Subsection 1-09c. of the specifications, in stating requirements for the preparation of soil, expressly permits "the use of a machine that pulverizes the material and cuts a true plane at the required depth," and provides that the use of such a machine can be "in lieu of scarifying and breaking up of material" as specified in detail in the preceding part of that subsection. A P and H Stabilizer is the type of machine described (one

²⁸ Most of the October 28, 1966 modification is quoted in this opinion in the second full paragraph preceding Footnote 1.

that pulverizes material and cuts a true plane as indicated). The close attention that was given to the equipment needs of this specific project by the Government engineers is shown by the addition to the specifications which invites the use of the type of machine that was delivered to the job in early October. This is Addendum No. 1, allowing as an alternate mixing method:

a. In place Mixing—with a single pass stabilizer (P and H single pass stabilizer or equal).

The Government has not furnished an adequate explanation as to how it concluded in the first place that a single pass stabilizer would, within reasonable limits of efficiency and economy, handle the pulverizing, mixing and placing of the specified material. The work in question was a small part of the entire project. The Government should have realized that bidders would place great reliance upon the indications concerning proper equipment and procedures that were made a part of the specifications.

The tests conducted during the last week of October take the force from critical comments by Government witnesses respecting Coe's P and H Stabilizer and the manner in which it was operated. The statement of the construction representative, who was performing the daily reporting task for the Government in his diary entry for October 26, 1966, bears reiteration:

At the end of today's work it was clearly evident that a satisfactory and acceptable road cannot be economically constructed under the project specifications with the material available in the project borrow pit. * * *

The Government's design engineer in a memorandum written almost a month after the last day of tests with the single pass stabilizer²⁹ concedes that the moisture content was properly controlled during the tests. He states in the same memorandum that "we all knew that the operation could be performed with the equipment on hand." This does not square, however, with the fact that he was in charge of the tests in late October, and at that time carefully followed the pulverization (accomplished by many passes), the moisture control during mixing, and the rolling and raking procedures. Nonetheless, the short strips of soil cement installed on October 25 and 26 were rejected by the project supervisor.

Because the marginal borrow pit soil turned out to be unsuitable for use in the processing of soil cement by means of a P and H Sta-

²⁹ The contents of a project daily diary, recording the important events as a job progresses, are entitled to preferential treatment as evidence by the Board when compared to allegations made in findings or claim documents. *Kean Construction Company, Inc.*, IBCA-501-6-65 (Reconsideration April 4, 1967), 74 I.D. 106, 67-1 BCA par. 6255.

³⁰ Memorandum dated November 23, 1966, Item No. 20, Appeal File.

May 28, 1969

bilizer, the Government's attempt to issue a modification on a permissive basis cannot succeed.³¹ The contractor was entitled to rely upon the references to use of a single pass stabilizer contained in the "Preparation of Soil" and "In Place Mixing" portions of the soil cement specifications.³² It may be that the appellant has not shown that no contractor in any circumstance could have processed acceptable soil cement with a single pass stabilizer. However, practical or legal impossibility may be found even though there is no showing of literal impossibility.³³ The Government, we find, warranted here that a suitable soil cement road could be placed when the borrow pit material was processed with a P and H Stabilizer without attendant unreasonable expense and unusually slow production. Prolonged field work with a stabilizer demonstrated that this warranty could not be relied upon. Therefore, we hold that this is a case of legal impossibility resulting from an erroneous specification or design provision.

The equitable adjustment in this appeal should include the costs incurred by Coe in attempting to perform under the defective specifications.³⁴ As has been indicated, the Board is of the view that Coe was in compliance with the specifications in its activities utilizing the P and H Stabilizer (entitlement to payment for the central plant mix work is not found). It should be noted also that after October 27, 1966, Coe was operating under the modified specifications was delayed by equipment that needed repairs, or could not proceed because of adverse weather; accordingly, October 27 should be the cutoff date for the additional payment related to soil cement processing at the road site. It is concluded that the amount payable by the Government reflecting rental for the P and H machine should run from the date in the last week of September when that machine was started on its way to the project, and extend through October 27 plus a reasonable additional time for its return. The remainder of the equitable adjustment should cover the other costs (labor, equipment, materials, plus allowable overhead and profit) incurred in the soil cement operation between October 3 and October 27 (both dates inclusive). To the extent that the Government has paid for expenses associated with the experimental work in late October, suitable deductions should be made. The specific amount of the equitable adjustment is to be the subject of negotiations by the parties. In the event they are unable to agree, the quantum issue should be referred to the Board.

³¹ *Master Manufacturing Co., Inc.*, ASBCA Nos. 12132, 12433 and 12640 (March 29, 1968), 68-1 BCA par. 6953.

³² See *Bolander Company, Inc. v. United States*, Ct. Cl. No. 51-66 (December 13, 1968).

³³ *Johnson Electronics, Inc.*, ASBCA No. 9366 (December 31, 1964), 65-1 BCA par. 4628; *F. J. Stokes Corp.*, ASBCA No. 6352 (September 11, 1963), 1963 BCA par. 3944.

³⁴ *Spencer Explosives, Inc.*, ASBCA No. 4800 (August 26, 1960), 60-2 BCA par. 2795; *J. W. Hurst & Son Awnings, Inc.*, ASBCA No. 4167 (February 20, 1959), 59-1 BCA par. 2095.

*IBCA-687-11-67**Preparation of Subgrade*

This claim was initiated by a letter dated November 1, 1966,³⁵ addressed to the Government's project supervisor, requesting a contract modification for 13,210 square yards of roadway grading work at fifty cents per square yard. The justification given in that letter for the requested \$6,605 price increase is as follows:

With reference to subgrade preparation being required on the access road we find no contract specification requiring this work and therefore request a contract modification of fifty cents (\$.50) per square yard to cover the cost for this work as bid for other roadway subgrade preparation.

The contracting officer's denial of the claim³⁶ called the appellant's attention to the Unclassified Excavation (Section 1-04) and Imported Borrow (Section 1-05) provisions of the Construction Specifications. In particular, it was noted that Section 1-04 called for unclassified excavation to be performed in accordance with Specifications R-E-1. Portions of the latter specification state that (i) the Unclassified Excavation for Roads item shall "consist of excavating and grading the roadway, including gutters, ditches, parking areas, intersections, private entrances, and borrow pits," and (ii) the unclassified excavation yardage "shall be paid for at the contract price per cubic yard."³⁷ Payment at the specified price (\$1 per cubic yard in Coe's contract) was to constitute, under Specification R-E-1, full compensation for all labor, equipment, tools and incidentals required to perform the item, including "the preparing and completion of subgrade."

The appellant's counsel asserts that the contract provisions are "hopelessly complicated and ambiguous," and that due to the defective contract specifications covering the soil cement work Coe "was required to perform subgrade preparation on more than one occasion."³⁸

The contractor's attempt to receive payment on a square yard basis under Section 1-06 (Subgrade Preparation) cannot succeed, because in the first four lines of that Section its coverage is restricted to subgrades on the "campground picnic and residential access roads, campsite spurs, campsite loops, parking areas, and driveways." That the

³⁵ Item 3, Appeal File. IBCA-687-11-67 has its own appeal file. However, the hearing on October 9 and 10, 1968 was concerned not only with that appeal, but also Appeal No. IBCA-632-4-67.

³⁶ Decision dated March 21, 1967. Item 8, Appeal File.

³⁷ The estimated quantity for unclassified excavation in the bid schedule was 9,730 cubic yards. The appellant was paid for 10,721 cubic yards (Exhibit 8).

³⁸ Statement of the Contractor's Position dated March 21, 1968.

May 28, 1969

exclusion of the main access road from the application of Section 1-06 was not inadvertent is established by the Contract Bid Schedule, which lists (i) an Unclassified Excavation item specifying that payment is to be by the cubic yard, and (ii) items for campground and picnic roads, parking areas and the other project features described in Section 1-06 which contain specific references to subgrade preparation and payment by the square yard. The Board does not agree with the appellant's interpretation of the original specifications concerned with excavation and subgrade preparation. Section 1-06 and its price of fifty cents per square yard do not apply to the main access road.

In his post-hearing briefs the appellant's counsel relied principally upon the contention that an additional sum is due in this appeal because Coe was required to bring the access road to finished subgrade on at least three occasions.

There is no dispute that during the period between October 4, 1966 and October 27, Coe was required to remove the in place access road soil to the point that the road was "down to subgrade."³⁹ Further, the Government counsel concedes that there were additional quantities of borrow beyond the total that was paid for by the Government, and that such additional quantities were "hauled subsequently by the Contractor to replace sections of unacceptable processed soil cement which had been rejected by the Project Supervisor."⁴⁰ The Board finds, from a review of the entire appeal record, that the instruction given on October 27, 1966, by the project supervisor to Coe's superintendent was that all of the imported borrow on a 600-foot stretch of the access road was to be taken down to subgrade.⁴¹ The giving of such an order, applicable to the road area where soil cement work had been rejected would have been a logical and appropriate step at the time. The superintendent's assertion that the order covered the entire length of the access road is supported by an entry in his diary;⁴² nonetheless, taking into account the absence of a reason for removing all of the imported borrow material from the roadbed, and the fact that the Government's principal concern on October 27 was with the experimental work on the campground road, the Government's position as to the reach of the order for removal of borrow is found to be the most credible.

In one respect the expense of grading the imported borrow is allowable. When the equitable adjustment ordered by the Board in IBCA-632-4-67 (soil cement claim) is calculated, there should be included the labor and equipment costs incurred during the October 3

³⁹ Tr. 277.

⁴⁰ Pages 15-16, Closing Brief for the Department of the Interior.

⁴¹ Tr. 277.

⁴² Detached page for October 27, 1966 stapled into Field Book, Exhibit 3.

to October 27 period that were associated with obtaining a subgrade condition which would facilitate operations in which the P and H machine was utilized; in addition, payment should be made for the additional quantities of borrow which have not been paid for and are referred to in the Government's Closing Brief (pages 15-16).

The expense of subgrade preparation incurred after abandonment of processing efforts with the P and H machines was part and parcel of the complete cost of performance under the new soil cement method described by the Government in the October 28, 1966 contract modification.⁴³ Work considered by the Government to be shaping of subgrade, or preparation or windrowing of the imported borrow material, may have been viewed by the appellant's forces as bringing the road down to subgrade. Since after October 28 the appellant's soil cement activities unquestionably were performed under specifications which had been changed radically in a number of respects, an attempt to isolate only one phase of the modified work—the grading of the imported borrow material—does not materially assist the grading (preparation of subgrade) claim.

The appellant has made no direct complaint about the over-all expense of its soil cement work under the modified specifications. If additional grading of the material on the subgrade was needed for accomplishment of the modified work, it may be that the expense of such grading was offset by the fact that the October 28 modification eliminated the requirement for utilization of a single pass stabilizer or mixing at a central plant. The appellant has not presented a complete account of the expenses incurred in soil cement work under the modification.⁴⁴ The charge that the road was taken down to subgrade on three occasions unaccompanied by such an account is too general to support recovery of any grading expenses incurred after October 27.

The subgrade preparation claim, in so far as it seeks recovery for additional yardage on the basis of a contract unit price, is denied; however, as has been indicated, this denial shall not be deemed to preclude recovery under IBCA-632-4-67 of the costs incurred in grading the access road during the period of October 3 to October 27, 1966 (inclusive).

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

⁴³ Item 8, Appeal File in IBCA-632-4-67.

⁴⁴ The equitable price adjustment allowable for changed work should be determined on the basis of the difference between the work originally specified and the work as changed and actually performed by the contractor. *Bruce Construction Corp.*, ASBCA No. 5932 (August 30, 1960), 60-2 BCA par. 2797.

FREDA TURNER

A-31013

*Decided June 19, 1969***Mining Occupancy Act: Generally**

The Mining Claims Occupancy Act does not provide for the granting of relief to one who has occupied a claim principally for the purpose of operating a business thereon and only incidentally as a residence.

Mining Occupancy Act: Generally

An applicant under the Mining Claims Occupancy Act who attempts to rely upon his possession of a claim which has not been declared invalid or relinquished is not entitled to any relief under the act.

Mining Occupancy Act: Generally

An applicant under the Mining Claims Occupancy Act is not entitled to a hearing as a matter of due process and will not be granted one where he does not allege any facts which, if proved, would entitle him to relief.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Freda Turner has appealed to the Secretary of the Interior from a decision dated May 15, 1968, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision dated March 1, 1968, of the Sacramento land office rejecting her application under the Mining Claims Occupancy Act, 30 U.S.C. secs. 701-709 (1964).

Section 1 of the act authorizes the Secretary of the Interior to convey to any occupant of an unpatented mining claim "which is determined by the Secretary to be invalid" an interest up to a fee simple in land in the claim. Section 1 also authorizes a like conveyance to a mining claimant "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." 30 U.S.C. sec. 701.

Section 2 of the act defines a qualified applicant who is eligible for a conveyance under section 1 as a "residential occupant-owner" of valuable improvements in an unpatented mining claim "which constitutes for him a principal place of residence" and which he and his predecessors in interest were in possession of for at least 7 years prior to July 23, 1962. 30 U.S.C. sec. 702 (1964).

Mrs. Turner filed her application on September 4, 1964. She named her claim as the Lucky No. 1, said it was located in 1948, and gave the volume and page of the county record in which the claim is recorded. However, she also stated the claim was purchased from Jack Gilliam, that she gave him a down payment in 1947, but that he passed away 4 months later, giving her the claim. She said she had not filed a peti-

tion for a statement from a qualified officer of the Department as to whether he believed the claim to be invalid. She also did not say whether she had relinquished the claim or whether it had been declared invalid.

The land office rejected the application on the ground that Mrs. Turner had maintained a bar-restaurant and other business enterprises on the land since 1955, that her residential occupancy was incidental to the business, and that a Senate committee report on the Mining Claims Occupancy Act showed that it was not intended to apply to commercial property. The land office also stated that the Lucky No. 1 claim was located on May 6, 1949, at a time when the land was withdrawn from mining location by three actions dating from June 8, 1926, to March 8, 1932, and that the claim was therefore void *ab initio*. The land office did offer Mrs. Turner a non-renewable special use permit for a period expiring December 31, 1969.

Mrs. Turner appealed to the Director, Bureau of Land Management, giving several reasons for her appeal. One was that no consideration had been given to her equities, which were that she and her predecessor, John G. Gilliam, had continuously occupied the claim since its location on November 1, 1923; that she had paid Gilliam market value for the property in 1947 or 1948; that both of them made concerted efforts to extract minerals from the claim and she had done assessment work each year from 1949 to 1967; and that she was relying on custom and usage in her occupation and improvement of the property. She also contended that the land office decision was reached by improper procedural means, including the fact that material evidence was received by the adjudicating officer which substantially influenced his decision but none of which was set forth in the decision so that she had no opportunity to rebut it. She also complained that she was not afforded an opportunity to be heard on her application and to present evidence on her behalf and that the land office decision was materially influenced by bias and prejudice against her. Mrs. Turner concluded with a request for a hearing "in order that she may present evidence upon issues of fact herein designated as basis for appeal."

The Office of Appeals and Hearings held that Mrs. Turner had been in trespass since 1949 because her claim was void *ab initio*, that every material aspect of the withdrawals of the land had been set forth in the land office decision, that her unsupported charge of bias and prejudice could be given no consideration, and that she had failed to allege any facts which, if proved, would entitle her to relief; therefore, her request for a hearing was denied.

In her present appeal Mrs. Turner incorporates the reasons given for her previous appeal and asserts that they were not considered by the Office of Appeals and Hearings. She also requests an opportunity

June 19, 1969

"to present evidence concerning the true nature and origin of her mining claim herein."

Two basic points are confused in Mrs. Turner's appeal and the decision appealed from did not clarify them. The first relates to the status of the mining claim and concerns satisfaction of the requirements of section 1 of the Mining Claims Occupancy Act, *supra*. The case file contains copies of two notices of location of mining claims. The first states that Mrs. Turner and Gus Fitzgerald located the Lucky No. 1 placer mining claim on May 6, 1949. The second shows that Walter A. Gilliam and J. G. Gilliam located the Oregon Placer Mining Claim on the same land on November 10, 1923. As we noted earlier, Mrs. Turner's application gave the name of the mining claim upon which the application was based as the Lucky No. 1 and she identified the county record in which the location notice of that claim was recorded. She erred only in the year of location, giving 1948 instead of 1949. However, as we also noted, her application also referred to her purchase of a claim from Jack Gilliam in 1947. Obviously she was referring to the Oregon placer, located in 1923.

Apparently Mrs. Turner now wants an opportunity to show that she is relying upon her purchase of the Oregon placer from Gilliam in order to avoid the rulings that the Lucky No. 1 was void *ab initio* because it was located on withdrawn land. But if she relies on the Oregon placer, she has vitiated her application because section 1 of the act permits a conveyance to be made only to an occupant of a claim which has been determined by the Secretary to be invalid or to a claimant who has relinquished his claim. The Oregon placer has not been determined to be invalid and it has not been relinquished by Mrs. Turner so her application must fall if it is based on that claim. She can meet the requirements of section 1 only if she stands on the Lucky No. 1, which has been declared to be invalid.

Assuming then that Mrs. Turner really wants to rely on the Lucky No. 1, we turn to the second point, which is whether she qualifies under section 2 of the Mining Claims Occupancy Act, *supra*. Here we are concerned with the ruling below that it was not the intent of the act to permit the conveyance of property used for commercial purposes. This intent is plainly stated in the Senate committee report cited in the decisions below. In its section-by-section analysis of the legislation, the Senate Committee on Interior and Insular Affairs stated concerning section 2:

The use of the property for commercial purposes not connected with previous efforts to extract minerals, in addition to residence, would not be covered by this act, but a record of use for garden-type agricultural purposes would be if incidental to regular residential occupancy. The establishment of taverns, restaurants, stores, and offices, for example, is not intended to be regularized by this legislation. Where it is appropriate that such use be continued upon invalid

mining claims, the departments may use other authority available to them. Should experience indicate that there are commercial uses not relating to mining disclosed by the operation of this act and actions taken under the mining law, which cannot be adequately handled by existing law, the department may wish to analyze its findings and experience and report its recommendations to the Congress. S. Rep. No. 1984, 87th Cong., 2d sess. 6 (1962).

This statement by the Senate committee makes it plain that the act was not intended to give relief to occupants of commercial property, and Mrs. Turner has not challenged this interpretation either in her appeal to the Director or in her present appeal. She is therefore conclusively barred from relief under the act because, by her own admission, she commenced her business on the claim in 1955 and was consequently operating it during the 7-year period preceding July 23, 1962, when she was required by section 2 of the act to be occupying the claim only as a residence.

Mrs. Turner has alleged no other ground which would qualify her for relief. Her asserted equities do not compensate for her legal deficiencies and her complaints about procedural irregularities are without substance. As for her request for a hearing, it may be noted, first, that the United States Court of Appeals for the Ninth Circuit has very recently held that an applicant under the Mining Claims Occupancy Act is not entitled to a hearing as a matter of due process. *United States v. Walker*, No. 22,379 (March 27, 1969). Secondly, Mrs. Turner has not alleged the existence of any facts which, if substantiated at a hearing, would entitle her to relief under the act. Her request is therefore denied.

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.

PARTIAL ASSIGNMENTS UNDER SECTION 30(a) OF THE MINERAL LEASING ACT

Oil and Gas Leases: Assignments or Transfers

The term "*legal subdivision*" as used in the proviso to section 30(a) of the Mineral Leasing Act means a quarter-quarter section. Consequently, the Secretary may not disapprove an assignment of a quarter-quarter section on the grounds that it is an assignment of only part of a legal subdivision.

Words and Phrases

"*Legal Subdivision.*" The term "*legal subdivision*" as used in the proviso to section 30(a) of the Mineral Leasing Act means a quarter-quarter section. Consequently, the Secretary may not disapprove an assignment of a quarter-quarter section on the grounds that it is an assignment of only part of a legal subdivision.

MINERAL LEASING ACT

June 23, 1969

M-36778

June 23, 1969

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT.

SUBJECT: PROPOSED DIRECTIVE TO THE STATE DIRECTOR, ALASKA, CONCERNING OIL AND GAS LEASES IN AREA OF PLO 1621.

We have not approved your proposed directive on the partial assignment of oil and gas leases in the area of Public Land Order No. 1621 of April 22, 1958 (23 F.R. 2637), because it is based on a misunderstanding of section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C. sec. 187a). Section 30(a) grants an oil and gas lessee a right to assign all or a part of a "legal subdivision." A "legal subdivision," for purposes of section 30(a), is a quarter-quarter section (40 acres). To the extent that Public Land Order No. 1621 attempted to redefine the term "legal subdivision" and to restrict the lessee's right of assignment, the order was ineffective. We are therefore returning your proposed directive to you for amendment in a manner consistent with this memorandum.

Public Land Order No. 1621 opened to oil and gas leasing an area in northern Alaska in which such leasing had been prohibited since 1943. Paragraph 6 of Public Land Order No. 1621 provided that all offers to lease must describe the lands applied for according to the leasing blocks in the specified townships as shown in the enclosed leasing maps. Those blocks were of 2,560 acres each. Paragraph 6 also provided that "Each of such leasing blocks will be deemed to be a legal subdivision, subject to the restriction on assignments of part of a legal subdivision as set forth in 43 CFR 192.140." The regulation 192.140 is now found at 43 CFR 3128.1.

Section 30(a) of the Mineral Leasing Act authorizes an oil and gas lessee to assign his lease in whole or in part. That section provides that:

* * * The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: *Provided, however,* That the Secretary may, in his discretion, disapprove an assignment of a separate zone or deposit under any lease, or of a part of a legal subdivision.

The Secretary's authority to disapprove the partial assignment of an oil and gas lease is strictly limited. He may disapprove the assignment only: (1) for lack of qualification of the assignee or sublessee (2) for lack of sufficient bond; or (3) in his discretion, because the assignment is of a separate zone or deposit under any lease or of a part of a legal subdivision. The question presented by the proposed directive and discussed in this legal opinion is concerned with only one

of these grounds for disapproval, i.e., the Secretary's discretionary power to disapprove an assignment because it is of only a part of a legal subdivision.

It seems quite clear that the intent of paragraph 6 of Public Land Order No. 1621 was to prevent the partial assignment of leases in the area by establishing, for the purposes of the Public Land Order No. 1621 area only, a special definition of the term "legal subdivision" as it is used in section 30(a) of the Mineral Leasing Act. This intent is evident from the penultimate paragraph of the March 28, 1958, memorandum of the Director of the Bureau of Land Management to the Secretary concerning the new Public Land Order. However, the question before us is not whether the Secretary intended to prevent partial assignments in the area of Public Land Order No. 1621 in this manner, but whether he had authority to do so. We believe that he was prevented from doing so by the provisions of the Mineral Leasing Act.

Although section 30(a) of the Mineral Leasing Act grants the Secretary discretion to disapprove an assignment "of a part of a legal subdivision," the term "legal subdivision" is defined nowhere in the statute. Moreover, at no point in the Congressional Committee reports on the enactment of section 30(a) in 1946 is the term "legal subdivision" defined. This lack of specific definition is evidence that the Congress believed that it was dealing with a word of art and that this term had a recognized meaning in the law which did not require repetition in every statute where it was used. We believe the Congress's use of the term in this manner precludes an interpretation that the Secretary was granted discretion to create one definition of the term "legal subdivision" for assignments in one area and another definition for assignments in another area. We believe that the Congress intended the term to have the same meaning for all assignments in all geographic areas.

In the Bureau's *Glossary of Public Land Terms*, 1949 ed., which reflects the practices of the period when section 30(a) was enacted, are found definitions of "legal subdivision," "regular subdivision," and "smallest legal subdivisions." A "legal subdivision" is defined as:

In a general sense, a subdivision of a township, such as a section, quarter section, lot, etc., which is authorized under the public-land laws; in a strict sense, a regular subdivision.

A regular subdivision is defined as:

Generally speaking, a subdivision of a section which is an aliquot part of 640 acres, such as a half section of 320 acres, quarter section of 160 acres, and quarter-quarter section of 40 acres.

Finally, a smallest legal subdivision is defined as:

For general purposes under the Public Land Laws, a quarter-quarter section.

June 23, 1969

As we have said, it is apparent that the Congress thought that it was using words of an ascertainable meaning when it referred to a "legal subdivision." Nothing in the context of the statute or in the legislative history indicates an intent to use the term loosely. Consequently, we should interpret the term "legal subdivision" in as strict a sense as possible.

In the strict sense of the *Glossary* definition a "legal subdivision" is a "regular subdivision," and we may therefore substitute the term "regular subdivision" for the term "legal subdivision" in section 30(a). However, even the term "regular subdivision" does not have a precise meaning in the context of section 30(a). A regular subdivision may itself be composed of regular subdivisions, e.g., a half section which is composed of quarter sections; but the Congress did not authorize the Secretary to disapprove an assignment of a regular subdivision merely because the tract assigned is also a part of a larger regular subdivision. Consequently, it is evident that the Congress, in giving the Secretary discretion "to disapprove an assignment * * * of part of a legal subdivision," only authorized him to disapprove an assignment when the assigned tract is of such a small size that it itself cannot be considered a "legal subdivision," i.e., when the assigned tract is less than the smallest possible legal subdivision. Therefore, our interpretation of the statutory language is that, by its reference to "a part of a legal subdivision," the Congress must have meant what would be more precisely termed "a part of a smallest legal subdivision."

As has been noted, the *Glossary* defines "smallest legal subdivision" as "a quarter-quarter section." This interpretation of the smallest legal subdivision as a quarter-quarter section is sustained in both judicial and administrative cases. It was so defined by the Supreme Court of the United States in *Warren v. Van Brunt*, 86 U.S. (19 Wall.) 646, 652 (1873), where it was stated that "There is no legal subdivision of the public lands less than a quarter of a quarter section, or forty acres, except in the case of fractional sections." This interpretation of the term "smallest legal subdivision" has been the interpretation adopted in State courts. The Supreme Court of Kansas held that a requirement that each legal subdivision be separately appraised referred to a quarter-quarter section, except where for special reasons lots had been platted in irregular shapes. *Hopper v. Nation*, 96 Pac. 77 (Kansas 1908). A similar position was adopted in *Greenblum v. Gregory*, 294 Pac. 971 (Wash. 1930). This has been the customary interpretation of the Department of the Interior. *State of Arizona*, 53 I.D. 149 (1930); *Right of Land-Grant Railroad Companies to List Less Than a Legal Subdivision*, 51 L.D. 487 (1926), as supplemented, 52 L.D.

254 (1928); *United States v. Central Pacific Railway Co.*, 49 L.D. 250 (1922).

In view of this long standing practice, there would seem to be little doubt that, when the Congress in 1946 referred to a legal subdivision in the enactment of section 30(a), it was thinking of a quarter-quarter section. From this we must conclude that the proviso in section 30(a) gives the Secretary discretion to disapprove an assignment only when it is of a part of a quarter-quarter section. The Secretary may not by regulation, or by the issuance of a Public Land Order, deprive an oil and gas lessee of a right granted by statute. Therefore, paragraph 6 of Public Land Order No. 1621 was ineffective insofar as it attempted to restrict assignments to blocks of 2,560 acres.

It should be emphasized that our interpretation of section 30(a) is that the Secretary may not disapprove an assignment of a quarter-quarter section on the grounds that it is an assignment of only part of a legal subdivision. In order not to be subject to disapproval, the portion of any lease assigned by a partial assignment must be composed of whole quarter-quarter sections; for example, an assignment of a quarter-quarter section and 20 acres of another quarter-quarter section would be subject to disapproval, because the 20 acres would be only part of a legal subdivision.

Parenthetically, it should be noted that, although a quarter-quarter section is ordinarily of 40 acres, if any particular quarter-quarter section should be of more than 40 acres or of less than 40 acres, it would still be the smallest legal subdivision for the purposes of section 30(a). It is not the precise acreage of the tract which governs; the controlling factor is whether an assignment is of one or more whole quarter-quarter sections.

RAYMOND C. COULTER,
Deputy Solicitor.

COLOWYO COAL COMPANY

A-30995

Decided June 24, 1969

Coal Leases and Permits: Leases

Where a coal lease was modified pursuant to section 3 of the Mineral Leasing Act to include more than 2,560 acres and where the lessee subsequently applies pursuant to that section to add another 1400 acres, rejection of the application and cancellation of the lease to the extent that it includes in excess of 2,560 acres are required in view of the fact that section 3 imposes a 2,560-acre limitation on the size of a modified lease; the acreage limitation was not vitiated by the removal of a similar limitation in section 2 of the act by the amendatory act of August 31, 1964.

June 24, 1969

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Colowyo Coal Company has appealed to the Secretary of the Interior from a decision dated April 17, 1968, by the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed the rejection of its application to modify its coal lease Denver 034365 and ordered it to show cause why its lease should not be canceled in part.

The lease was issued on October 25, 1924, and assigned to Colowyo effective May 1, 1946. Successive applications by Colowyo to modify the lease by the addition of contiguous lands were approved until on August 18, 1964, the lease included 2,324.73 acres. On October 29, 1965, Colowyo applied again to modify the lease by adding 1,400 acres. The application was approved and a modified lease was issued on March 11, 1966, for 3,724.73 acres.

Then, on July 25, 1967, Colowyo applied for the addition of another 1,400 acres to the lease, which would make the total acreage 5,124.73 acres. This application, like the previous applications, was referred to the Geological Survey for report. On November 27, 1967, the Survey reported that the lease then had in excess of 2,560 acres, which was more than the acreage allowable under section 3 of the Mineral Leasing Act, 30 U.S.C. sec. 203 (1964), and that it would not be to the best advantage of the United States to modify the lease. Thereupon, in a decision dated December 1, 1967, the Colorado land office denied approval of the application, stating only that it was not considered in the best interest of the United States to modify the lease. The land office added that its action was without prejudice to Colowyo's requesting that the land be offered for competitive leasing.

Colowyo appealed to the Director, Bureau of Land Management, pointing to its extensive production of coal under the lease and its heavy investments in the lease. It set forth economic justifications for adding the land requested to its lease and said that regulations of the Department indicated that it was entitled to hold at least 5,120 acres in its lease.

Upon referral of the appeal to the Geological Survey, the Survey reported that it did not question the reasons given by Colowyo for needing the additional lands to carry on economic mining operations. It said, however, that there was a competitive interest in the area involved and that the land should be offered for lease at oral auction.

In its decision of April 17, 1968, the Office of Appeals and Hearings held that the Department had no authority to modify the lease because section 3 of the Mineral Leasing Act, *supra*, limits the size of a modified lease to 2,560 acres. The Office held that the previous modification on March 11, 1966, was unauthorized and ordered

Colowyo to show cause why its lease should not be canceled as to so much of the acreage added on that date as was in excess of 2,560 acres.

In its present appeal Colowyo contends that by changes in the Department's regulations the acreage limitation on modified leases has been eliminated. It asks therefore that its existing lease be left intact. It requests that its application for an additional 1,400 acres be approved to the extent of the acreage which is not the subject of competitive interest, which it understands is approximately 700 acres. It asks the right to have the remaining acreage offered for competitive leasing.

To understand properly Colowyo's position it is necessary to look at several provisions of the Mineral Leasing Act and the related regulations. Prior to August 31, 1964, at which time Colowyo's lease comprised 2,324.73 acres, sections 2, 3, 4, and 5 of the Mineral Leasing Act, 30 U.S.C. sections 201, 203, 204, 205 (1964), provided in pertinent part as follows:

Sec. 2. (a) The Secretary of the Interior is authorized to divide any of the coal lands * * * owned by the United States, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in his opinion, will permit the most economical mining of the coal in such tracts, *but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract*, and thereafter he shall, in his discretion, * * * offer such lands * * * for leasing, and shall award leases thereon by *competitive bidding* or by such other methods as he may by general regulations adopt, to any qualified applicant. * * * (Italics added.)

Sec. 3. That any person * * * holding a lease of coal lands * * * may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his * * * original lease by including additional coal lands * * *, *but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.* (Italics added.)

Sec. 4. That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land * * * which, including the coal area remaining in the existing lease, *shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease.* (Italics added.)

Sec. 5. That if, in the judgment of the Secretary of the Interior, the public interest will be subserved thereby, lessees holding under lease areas not exceeding the maximum permitted under this Act may consolidate their leases through the surrender of the original leases and the inclusion of such areas in a new lease of *not to exceed two thousand five hundred and sixty acres of contiguous lands.* (Italics added.)

The Departmental regulations in effect under these provisions were as follows (all in 43 CFR, 1967 rev.):

§ 3131.1 Acreage limitations.

(a) * * * a permit or lease may not exceed 2,560 acres. * * *

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§ 3132.1-2 *Leasing of additional coal deposits.*

(a) Under section 3 of the act * * * a lessee may obtain a modification of his lease to include coal lands * * * contiguous to those embraced in his lease * * * *but in no event shall the area embraced in such modified lease exceed in the aggregate 2,560 acres* * * *.

(b) Under section 4 of the act * * * upon satisfactory showing by the lessee that all of the workable deposits of coal within a tract covered by the lease will be exhausted, worked out or removed within three years thereafter, an additional tract of land or coal deposit may be leased. * * * [The land or deposit] will be offered for leasing as provided in § 3132.4-2.¹ If the applicant be the successful bidder * * * the additional lands may be included in a modified lease *which must not exceed 2560 acres*; otherwise, a separate lease may be issued. (Italics added.)

* * * * *

There was no regulation relating to the consolidation of leases.

It is apparent that these statutory provisions and the regulations were uniform in providing a 2,560-acre limit for leases, whether the lease was an original or additional lease issued by competitive bidding, a modified lease issued without competitive bidding, or a consolidated lease.

The problem in this case began when some of the coal provisions of the Mineral Leasing Act were amended on August 31, 1964, 78 Stat. 710. As introduced, H.R. 8960, the bill that became the law, provided simply for an amendment of section 27 of the act to raise the statewide acreage limitation on coal leases from 10,240 acres to 46,080 acres. Thereafter it was amended by the House Committee on Interior and Insular Affairs to include an amendment of subsection (a) of section 2 of the act to strike out the language that a leasing tract must not exceed 2,560 acres in size. No amendment was made of sections 3, 4, or 5 of the act. The House committee explained the amendment of section 2(a) as follows:

H.R. 8960, as amended by the committee, will authorize a person * * * to take * * * coal leases or permits covering up to 46,080 acres of public land in any one State, will remove the limitation on a single *competitive* lease * * *.

* * * * *

In reaching the determination to increase to 46,080 acres the maximum acreage limitation for the total of all coal leases and permits within one State held by any person, * * * the committee determined that it would be illogical to restrict each single coal lease or permit to 2,560 acres.

The committee, accordingly, has eliminated the acreage ceiling for individual coal leases * * *.

* * * In the case of leasing, the committee believes that the Secretary of the Interior should have greater flexibility in determining the area of individual leases but directs that, in determining such size, the Secretary shall take into consideration the area required for plant facilities and the physical conditions of the lands being leased including the thickness and density of the coalbed. * * * (H.R. Rep. No. 1714, 88th Cong., 2d Sess. 2-3 (1964) (Italics added).)

¹ 43 CFR 3132.4-2 provides that lands to be leased will be offered for lease by competitive bidding.

In reporting on a companion Senate bill, S. 2327, the Senate Committee on Interior and Insular Affairs stated that "Amendments adopted by the committee would remove the limitation on a single *competitive* lease, now 2,560 acres * * * (S. Rep. No. 1466, 88th Cong., 2d sess. 1 (1964); *Italics added*). It gave the identical explanation for the amendment that the House committee gave.

This Department has been asked by the House committee for its views on the amendment. In a report dated May 18, 1964, the Department said:

The amendments * * * would (1) eliminate the present limitation on *competitive* lease size, which is 2,560 acres * * *.

* * * * *

With respect to the proposed amendment to permit coal *competitive* leasing of tracts exceeding 2,560 acres, we are not aware of any problems which have arisen in the past.* * * We believe that the amendment is desirable in that it will afford flexibility when the need arises. * * * (H.R. Rep. No. 1714, *supra* 6; *Italics added*.)

After the legislation was enacted, the Department set about amending its coal leasing regulations. This was finally accomplished on July 12, 1967 (32 F.R. 10652). Among the regulations amended was 43 CFR 3132.1-2. Paragraph (a) of that regulation provides for the modification of leases pursuant to section 3 of the Mineral Leasing Act; paragraph (b) for the leasing of additional land pursuant to section 4 of the act. Both paragraphs had expressly provided, in accordance with the act, that the modified leases could not exceed 2,560 acres in size. The amendments of July 12, 1967, struck the limitation from both paragraphs.

The only explanation of the change in section 3132.1-2 was contained in a memorandum dated April 7, 1967, by the Director of the Bureau of Land Management which tabulated the changes made by the various amendments to "conform the regulations to present statutory law." The notation for the change in section 3132.1-2 was simply: "No limitation on Lease acreage within total allowable." In other words, the amendments to section 3132.1-2 reflected the view that the 1964 amendment to section 2(a) of the act, eliminating the 2,560-acre limitation on leases issued competitively under that section, also had the effect of amending sections 3 and 4 of the act to delete the 2,560-acre limitation in those sections.²

It is the effect of this interpretation of the changes in the regulations that Colowyo relies on—that the Department has interpreted the 1964 act as eliminating the 2,560-acre limitation from section 3.

We believe that this interpretation of the 1964 act cannot be justified. That act amended only section 2 of the Mineral Leasing Act, not

² Perhaps also the limitation in section 5 of the act, but since there has been no regulation pertaining to section 5, there was no occasion for an amendment.

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sections 3, 4, or 5. That Congress had only section 2 in mind is evidenced by the references in both the Senate and House committee reports to the fact that the amendment would lift the 2,560-acre limitation on *competitive* leases. That is the manner of leasing provided for in section 2 although, by reference, it is also the manner of leasing additional lands provided by section 4. Clearly, it is not the method of leasing provided for by section 3 or section 5. A section 3 modification is effected noncompetitively and, of course, a consolidation of leases under section 5 involves no element of competition.

As a matter of logic and reason, an argument could be made for the proposition that, if an originally issued competitive lease may exceed 2,560 acres in size, there is no reason why a modified lease under section 3 should be restricted to 2,560 acres. It may not make much sense that, if the holder of such an original lease for, say, 6000 acres wished to modify it by adding additional acreage, he would have to relinquish or assign away enough of the original acreage so that the modified lease would not include more than 2,560 acres.

Nonetheless, even if it were more clear that the House and Senate committees thought that they were removing the 2,560-acre limitation from all coal leases, and intended to do so, the fact is that they did not amend sections 3, 4, or 5 but left those sections intact. That being the case, this Department cannot ignore the statutory language of those sections and read the acreage limitation out of them. If there was an absolute inconsistency between these sections and section 2, as amended, if the amendment of section 2 would be completely defeated unless the acreage limitations in those sections were disregarded, a different conclusion might be justifiable. But there is no such irreconcilable conflict between section 2 and the other sections.

We must conclude therefore that section 3 remains intact³ and that any change in it is to be accomplished by the legislative process and not by unsound administrative fiat. It follows, as the decision below held, not only that Colowyo's application for modification must be rejected but that its lease must be canceled as to acreage in excess of 2,560 acres. This action does not prejudice the offering of the excess lands or of the additional lands for competitive leasing as provided by section 2.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

MITCHELL MELICH,
Solicitor.

³ This was the holding in *Malcolm N. McKinnon*, A-30778 (December 13, 1967), although it was reached without a consideration of the intent and effect of the 1964 legislation and the 1967 amendment of the Department's regulations.

APPEAL OF TYEE CONSTRUCTION COMPANY

IBCA-692-1-68

*Decided June 30, 1969***Contracts: Performance or Default: Acceleration—Contracts: Construction and Operation: Government-furnished Property**

A contractor under a contract with the Bonneville Power Administration to construct a power substation is entitled to an equitable adjustment for constructive acceleration where the evidence showed a late delivery of Government-furnished steel for towers and bridges, a timely request for a time extension, a denial thereof, and an actual speed-up of the affected work. Under the standard Bonneville Power Administration Government-furnished property clause, a contractor is not entitled to delay costs for delay in delivery if the Government made a reasonable effort to secure delivery. However, the fact of delayed delivery may serve to support a claim for equitable adjustment based upon a constructive acceleration.

Contracts: Performance or Default: Acceleration—Contracts: Disputes and Remedies: Equitable Adjustments

A contractor is entitled to an equitable adjustment for a constructive acceleration based upon the late delivery of Government-furnished rigid aluminum bus where the contractor timely requested, and the Government denied, a time extension asking for good summer days the following year, for good summer days lost due to the delay, and where the evidence showed that an essential operation in the installation of the bus was unusually vulnerable to adverse winter weather. While a lack of a reasonable effort on part of the Government to secure delivery of Government-furnished property may provide a basis for the Bonneville Power Administrator to allow a contractor delay costs under the Bonneville Power Administration Government-furnished property clause, such delay costs may not be considered by the Board in an equitable adjustment based upon a constructive acceleration. The equitable adjustment is limited to consideration of costs incurred in the acceleration and not in the delay.

Contracts: Disputes and Remedies: Jurisdiction

The Board has no jurisdiction to grant relief for an unreasonable delay in delivery of Government-furnished property under the Bonneville Power Administration Government-furnished property clause.

BOARD OF CONTRACT APPEALS

This appeal arises out of the performance of a contract between Tyee Construction (Tyee) and Bonneville Power Administration (BPA) for the construction of the Malin 500 KV substation situated on the California-Oregon border. The contract, dated May 26, 1966, was awarded to Tyee on a bid of \$411,391.55, performance to be completed by February 19, 1967, or 250 days after the notice to proceed dated June 14, 1966. The total time for completion was subsequently extended by change orders to July 22, 1967. Tyee claims entitlement to an equitable adjustment of either \$102,310.27 on a total cost basis, or \$83,764.41 on an itemized basis for certain categories of costs incurred after December 26, 1966, its planned substantial completion

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date, until the final completion of the job. The theory of the claim is that a constructive acceleration and a constructive change resulted from the late delivery of Government-furnished materials or the delivery of defective Government-furnished materials, or both.

Before developing the facts and law as they apply to the claim, the basic legal arguments of Tyee and BPA will be summarized since the legal theories appear to have guided counsel in their development of the factual record and since we diverge from both Tyee and BPA in our analysis and decision. Tyee's legal theory is attractively simple. The unreasonable late delivery of Government-furnished materials required a change in the method of performance and the time of completion, which is a constructive change. In addition, a constructive acceleration occurred because the late delivery entitled Tyee to time extensions which were both untimely granted and inadequate, with the effect of making Tyee trade good summer days for bad winter days. A third theory was added later in Tyee's post-hearing brief, that the late delivery of incomplete sets of towers and bridges was a delivery of defective material, also entitling Tyee to an equitable adjustment according to the Board's recent decision in the Appeal of *Power City Construction and Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 68-2 BCA par. 7126. Tyee broadly applies each theory to the whole job, in support of the total claimed amount.

BPA admits delivery of certain materials some time after their scheduled delivery, primarily steel towers, bridges, and rigid aluminum bus, with certain minor items also being late. However, the late delivery was not the sole cause of Tyee's additional costs connected with delayed performance. BPA defends also upon the basis of contract language, Tyee's lack of diligence in pursuing certain items of work, and upon its evaluation of the facts that Tyee was not ready for the material until it was delivered. That is, even if the delivery was behind schedule, it was not late in terms of Tyee's readiness for it. BPA also filed a motion to dismiss on the ground that the claim is one for breach of contract and not within the Board's jurisdiction. By opinion dated July 19, 1968, the Board denied the motion. The denial, however, was based upon the need to develop a record in order to answer the question—breach or change?

In our analysis of the record the claim falls readily into four parts (1) late delivery of steel for towers and bridges (2) late delivery of aluminum rigid bus (3) late delivery of gravel, and (4) miscellaneous items. We shall discuss each part separately and in doing so elaborate upon the facts and the law.

1. Late Delivery of Steel

In addendum No. 1 to the contract, dated May 10, 1966, an "expected delivery date" of July 1, 1966 is given for "14 each Multi D.E. Tower

500 KV Body 'B'," and for "9 each Multi D.E. Tower 500 KV Bridge 'A'" (Appeal file item 1). On May 27, 1966, at a preconstruction conference BPA informed Tye of the then status of delivery of materials. According to the Contract Shortage Report, dated May 25, 1966, five towers and four bridges from Bethlehem Steel were due June 15, 1966, at the BPA materials yard at Dairy. Nine towers and five bridges from Anchor Metals were due at Dairy on August 1, 1966 (Appeal file item 3). Tye prepared its construction schedule on BPA form 137 (Appeal file item 2), supposedly basing it upon the later information (Tr. 16-17), noting thereon that the Government-furnished steel was required on July 20, 1966.

It was Tye's intention to assemble the steel at the same time that the concrete tower footings were poured and to proceed to erect the steel after the footings had cured, working progressively from north to south through the site (Tr. 115). Steel, however, was not available in the sense that it could be assembled until Friday, September 9, 1966 (Tr. 306). Eleven towers and six bridges were on hand at Dairy on August 23 (Tr. 301), but they could not be assembled until the plates, PAL nuts, and bolts arrived on September 9 (Tr. 306). Tye immediately began hauling on Monday, September 12, and commenced assembly. Footings had been completed by September 1, 1966. Thus, even though Tye had slipped by about two weeks on their tower footings, such slippage was without consequence because of the late delivery of steel.

Tye hauled out the available tower and bridge steel at Dairy between September 12 and 29. Three tower bodies were delivered directly from the fabricator to Malin on October 4, and three bridges arrived at Malin on October 19 (Appeal file item 37c). Assembly and erection of towers and bridges were completed on October 31, 1966 (Exhibit A, Tr. 260).

Tye commenced to show its concern about Government-furnished materials in a timely fashion. On July 18, 1966, Tye, by letter (Appeal file item 5) called attention to the fact that no steel was available, citing the Contract Shortage Report for availability dates of June 15, 1966 and *July 1*, 1966. We point out that the latter date is in error; the two dates in the Shortage Report are June 15 and *August 1*, 1966, a difference of a month for the major part of the steel. In a reply dated July 27, 1966 (Appeal file item 6), BPA denied any job delay caused by materials delay.

By letter of September 26, 1966 (Appeal file item 7), Tye requested a time extension of 51 days in connection with the late delivery of steel. BPA replied on October 4, 1966 (Appeal file item 8), denying the request. The reply letter pointed out that the matter could be

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submitted for consideration by the "contracting officer."¹ On October 18, 1966, Tyee by counsel addressed a letter to the contracting officer (Appeal file item 11), requesting an extension of time of 82 days from May 1, 1967, in order to perform the job in summer days as bid. The letter also informed the contracting officer that counsel was prepared to advise Tyee that the Government had breached its contract, and in the absence of redress Tyee would close down on October 31, 1966, and seek compensation *quantum meruit* for work done. The contracting officer's reply of October 27, 1966 (Appeal file item 12), stated that an extension would be granted if Tyee could establish that a delay occurred. After a meeting on November 1, 1966, Tyee was informed by letter of same date (Appeal file item 14) that a 51-day time extension with respect to steel would be recommended to the contracting officer. The time extension was granted finally on February 8, 1967 (Appeal file item 1).

In our opinion the facts justify a conclusion of constructive acceleration with regard to steel assembly and erection. BPA was clearly late in delivery of the material. A time extension was timely requested and denied. Tyee actually increased its effort on steel assembly (Tr. 67). The fact that the crash program to assemble steel was in part forced upon Tyee by the steel erection subcontractor's schedule does not relieve BPA of responsibility. Had the steel been delivered on time the subcontractor's schedule could have been met without extra effort (Tr. 22-24). If the time extension had been granted when asked for Tyee would have had the opportunity to make other arrangements for tower and bridge erection. The granting of the time extension of 51 days, whether it be viewed as granted on November 1, 1966, the date of the conference, or on February 8, 1967, comes too late. It does not cure the earlier denial, since Tyee in the meantime had in fact made a greater effort than it had planned for. The crucial fact is the denial of a time extension. By this act BPA signaled to Tyee that it was requiring Tyee to adhere to the original schedule. See, *Electronic and Missile Facilities, Inc.*, ASBCA No. 9031 (July 23, 1964), 1964 BCA par. 4338.

In arriving at the amount to be paid Tyee on the steel assembly and erection acceleration no costs incurred after October 31, 1966, should be included, since that date marks the completion of steel assembly and erection (Exhibit A); nor can we authorize standby or delay costs, if any, related to steel assembly and erection since these are breach of contract damages beyond our jurisdiction to award. Since the record is bare of any proof on steel assembly and erection

¹ Since BPA has not raised the issue of the authority of the signer of this letter to deny the request, even though he was not formally the "contracting officer," we assume that the signer had authority to act for the contracting officer.

costs, this part of the claim is remanded to the contracting officer for appropriate findings.

Tyee's claim insofar as it is based upon late steel delivery is broader than we have allowed. It claims a cost impact on the whole job resulting from the delay and acceleration of towers and bridges. The record does not reflect a cost impact subsequent to October 31 that can be clearly attributed causally to either the delay in steel delivery or the accelerated assembly and erection.

We are led to our conclusion as to the impact of the delayed delivery of steel on the whole job by the testimony and exhibits of Tyee's expert engineering witness, Mr. Richard A. Brown, who prepared and analyzed an as-planned critical path (Exhibit C and Appeal file item 35), based on Tyee's proposed schedule (Appeal file item 2) and Tyee's actual times (not total elapsed times) spent in the performance of specific activities, such as steel assembly. Mr. Brown also prepared an as-built critical path diagram (Exhibit E and Appeal file item 36).

As explained by Mr. Brown, the critical path is the longest connected series of activities from one end of the job to the other (Tr. 149). The purpose of the as-planned critical path prepared for this case by Mr. Brown was to indicate that the job could have been performed within the time period scheduled by Tyee (Tr. 150), and substantially completed by December 26, 1966. In our analysis of the record, the as-planned critical path has at least two shortcomings with regard to steel. First, as an overall matter it does not appear to allow for contractor-caused delays (Tr. 185). Second, as far as the steel assembly and erection sequence is concerned, it commences it too early. As pointed out above, the bulk of towers and bridges were shown as available on the Contract Shortage Report on August 1, 1966. The critical path appears based upon availability dates contained in addendum 1. The addendum 1 dates are naturally more favorable to Tyee's case, but its own evidence indicates that it had the Contract Shortage Report before it and used it in preparing its schedule on BPA form 137 (Tr. 16-17). We are not able to evaluate what effect it would have had upon the as-planned critical path had Tyee observed the steel availability dates more closely. We do, however, accept the as-planned critical path even with its limitations as proving that the steel schedule prepared by Tyee was not unrealistically short.

It appears on the as-planned critical path diagram that tower and bridge erection would restrain strain bus stringing and that in turn would have a restraining influence on the installation of rigid bus and connectors. The restraining influence of tower and bridge erection on strain bus stringing is obvious. The restraint of the latter on rigid bus installation appears more a matter of convenience than absolute necessity in getting the overhead work out of the way before setting up the rigid bus since the as-built critical path diagram in

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fact shows strain bus stringing coming *after* rigid bus installation. There was here disruption in the sequence of work. The question is, to whom is the fault for it to be ascribed.

There is no allegation or evidence that strain bus was late in delivery or unavailable. 3994 feet of Chukar was picked up by Tyee on September 28, 1966 (Appeal file item 37c). Tyee alleges that it was delayed in stringing by two facts, (1) the absence of a tower outside the site to the south, to be erected by the Bureau of Reclamation (the TAHX tower), and (2) missing strain bus insulators. In our opinion, however, neither of these two facts will support Tyee's contention that the fault for the disrupted sequence lies with BPA. The TAHX tower, to which Tyee was to string, was never erected during the life of the contract. Stringing to the tower was deleted from the contract on or about May 1, 1967 (see Exhibit A, diary entry for 5/1/67). Mr. George Stewart, General Superintendent for Tyee, testified that he did not call the missing tower to BPA's attention until May 1967, when it was deleted (Tr. 48). Clearly, if the tower was missing in May 1967, it was missing earlier. If Tyee had been on its own schedule it would have had to request deletion of the tower in September 1966 at the earliest (Exhibit C), or before December 26, 1966 at the latest (Tr. 13). The TAHX tower had to be deleted if Tyee was to finish any earlier than it did. Carlyle Brown, head of BPA's substation construction section, testified that the tower would have been deleted in November 1966, had Tyee desired it (Tr. 249). It was not deleted earlier than May 1967, because Tyee never requested it (Tr. 282).

The only evidence in the record as to missing strain bus insulators is Tyee's diary entry of March 3, 1967 (Exhibit A), which stated "George Stewart called to get shortages listed on Bill of Materials—short 3 P.P.&L. P.T's & 3 BPA litening (sic) arrestors (sic), and 264 suspension insulators." In his testimony regarding the diary entry, Mr. Al Anderson stated that they were just that much short of what was supposed to have been on the job at that time (Tr. 128). Carlyle Brown of BPA testified that there were no strain bus insulators missing that would be needed to complete the job. There was, however, some controversy over insulators for the TAHX tower, but insulators were available in the Dairy yard. The question of material related only to this last span to the missing TAHX tower (Tr. 253). Again, on cross-examination, Carlyle Brown stated that the only missing insulators were a string broken by Tyee during the course of installation, which was replaced by borrowing from Pacific Gas & Electric, a co-tenant of the site, pending replacement from the Dairy yard (Tr. 280-281).

Standing alone, the statement that insulators were missing on March 3, 1967, does not prove that such insulators were not available

in November 1966, had Tyee chosen to string strain bus then. Nor does it prove that insulators were not available when Tyee actually did string the strain bus. In the absence of any evidence that Tyee requested unavailable materials in November 1966, and in view of the irrelevancy of the missing tower, we are compelled to conclude that Tyee has failed in carrying its burden of proof that BPA was responsible for delaying the stringing of strain bus until the following spring.

The record also indicates that BPA made a reasonable effort to secure timely delivery of tower and bridge steel. In terms of *Paul C. Helmick Company*, IBCA-39 (July 31, 1956), 63 I.D. 209, 56-2 BCA par. 1027, the delay that BPA encountered in delivering steel was due to circumstances entirely beyond its control.

According to the record BPA first became aware of delay in the fabrication of steel in April 1966 (Tr. 386). Bethlehem Steel had slipped on its delivery from June 1 to June 15. In order to expedite Bethlehem's delivery BPA waived plant assembly for inspection (Tr. 384). Bethlehem's problems stemmed from the fact that a new fabrication plant had itself been delayed, overloading the production capability of their existing plant (Tr. 385).

Anchor Metals, the major supplier, had a delivery date of June 12, 1966. By mid-April Anchor Metals had slipped a week (Tr. 397), in May, a month, by June, 5 weeks (Tr. 399). There was a problem over the late delivery of certain drawings by BPA to Anchor Metals, which eventually resulted in a time extension of 85 days being given the supplier covering the procurement group that included the towers and bridges. However, towers and bridges were not involved in the late drawings. The reason the time extension covered the whole group was because liquidated damages were assessed by group (Tr. 396). Certain inspection requirements were also waived for Anchor Metals (Tr. 384-385).

On May 27, 1966, the same day as the preconstruction conference, Anchor Metals called Mr. Raymond L. Hiersche, head of the BPA Pacific Coast inspection office, in charge of administering supply contracts. The call was in regard to other supply matters but Mr. Hiersche used the occasion to inquire about the Malin steel. He then learned that shipment would be made about July 23 (Tr. 399). Mr. Hiersche was not aware of the preconstruction conference (Tr. 400). The Contract Shortage Report of May 26, 1966, upon which Tyee allegedly based its schedule, was apparently in its turn based upon earlier information on steel delivery than that which came to Mr. Hiersche's attention on May 27. It should be noted, however, that the Contract Shortage Report calls for Anchor Metal steel to be due on August 1, 1966, a still valid date even considering what BPA, through Mr. Hiersche, could have been held to know as of May 27,

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1966. Finally, it should be noted that BPA diverted steel to Malin from another substation to meet Tyee's requirements (Tr. 301).

Paul C. Helmick, supra, involved construing a BPA clause on provision of right-of-way similar in substance to the BPA standard Government-furnished materials clause 3-102-F contained in the present contract. The case held that if a reasonable effort was made to deliver the required right-of-way, the contractor was not entitled to additional compensation for delays in delivery. In *Witzig Construction Company, IBCA-92* (July 11, 1960), 67 I.D. 273, 60-2 BCA par. 2700, the holding of *Helmick* was applied to a case of alleged late delivery of transmission line tower steel, disallowing the claim. In *Witzig*, BPA in fact had delivered the tower steel before the contractor's program as submitted to BPA called for it. With regard to steel we thus distinguish here precisely between compensation for delay, holding it not allowable because of BPA's reasonable efforts, and an equitable adjustment for a constructive acceleration. See *Montgomery-Macri Company and Western Line Construction Company, Inc., IBCA-59* and *IBCA-72* (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3819.

Even if we had found BPA's conduct unreasonable with regard to late delivery of steel and entitling Tyee to compensation for the delay under the rules of *Montgomery-Macri, supra*, we would be without authority in the matter.² This matter is more fully discussed below with reference to the late delivery of rigid bus.

2. Late Delivery of Rigid Bus

In addition to steel, BPA was also late in delivery of rigid aluminum bus. However, the story as to rigid bus differs in many respects from that as to steel. The differences point up the reason why we are constrained to treat the various parts of the job separately, and not use the broad approach implicit in Tyee's presentation. In the first place there are elements of unreasonableness in BPA's handling of rigid bus deliveries. The question of time extension presents issues not only of timeliness but also of adequacy. The contractor's own conduct on rigid bus installation requires evaluation as to contributory fault for added costs.

Addendum 1 to the contract does not specify an expected delivery date for rigid bus, but merely states that all other Government-furnished material is expected to be available as required. The Contract Shortage Report of May 25, 1966, lists a rigid bus availability date of July 1, 1966, at Ross warehouse. Tyee's construction schedule called for bus and connectors on July 20, 1966, work to commence the same day and finish November 30, 1966.

² Since March 31, 1966, the Board has been without the special authority of the Bonneville Power Administrator to settle all claims including those for breach of contract.

Four to five thousand feet of rigid bus were delivered to the job site on September 13, 1966 (Tr. 239). The second and last shipment of about two thousand feet arrived on October 18, 1966 (Tr. 240). There were 12 misfabricated pieces, some of which were corrected by Tye and some replaced by BPA on or about January 11, 1967 (Tr. 240). Tye was paid \$3,841 and given a 15-day time extension with respect to the misfabricated bus (Appeal file item 1, see Change Orders C and G).

BPA did not supply the rigid bus on July 20, because, in the words of Carlyle Brown (head of BPA's substation construction section):

In checking with the inspector, I had to make a decision as to which buss to fabricate first, prior to the time that the buss was to be delivered, according to their schedule. We had another job that was similar to it. I had to make a decision as to which buss to fabricate first. The other job had progressed to the point of where the buss was immediately needed. In checking with the inspector, he said that if they had the buss—I called him by telephone. He said if they had the buss, that they wouldn't be—that they weren't in a position to use it. Predicated on this information, of course, I requested our shops to fabricate the buss for the Grizzly substation prior to that at Malin. (Tr. 238-239).

As in the case of the steel, Tye had inquired as early as July 18, 1966, as to the availability of rigid bus (Appeal file item 5). Carlyle Brown replied to this inquiry by letter dated July 27, 1966 (Appeal file item 6). The reply letter does not inform Tye that BPA had already decided to supply Grizzly job first. It simply states the conclusion of BPA that Tye was not ready to install the bus. Tye was not informed of problems with rigid bus delivery after its schedule had been submitted (Tr. 265).

In support of BPA's position the contracting officer in his findings of fact (Appeal file item 39) noted that as of September 10, 1966, the contractor had completed only 58 percent of the rigid bus pedestal footings and had not erected any of the pedestals themselves. However, we do not see how the situation as of September 10 can be held to justify a decision taken more than 40 days earlier, and based upon the then existing situation at two job sites. As of July 20, according to Mr. Richard Brown's as-planned critical path diagrams (Exhibit C and Appeal file item 35), Tye would be 10 days into excavation of tower footings and just commencing pouring of footings. According to the same diagrams no pedestals would be expected to be erected until September 27. BPA appears to have been in control of rigid bus supply, the critical factor being the capacity of its own fabricating shop. On the face of the record it made a unilateral decision, based upon its own evaluation of the job situation, to delay delivery of material to the Malin site.

The BPA effort on delivery of rigid bus contrasts with that as to steel. For steel, the anticipated delivery dates in the Contract Shortage Report were still good dates in terms of information available to BPA

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at the time notice to proceed was issued. As to rigid bus, however, BPA must be held to have known, at the time notice to proceed was issued, both the capacity of its own fabrication shop and its other contract commitments. It was reasonably foreseeable to BPA that rigid bus could be late in delivery for Malin. Factors of knowledge and foreseeability control. See *Peter Kiewit Sons' Co., Inc. v. United States*, 138 Ct. Cl. 668, 675-679 (1957).

In its letter of September 26, 1966 (Appeal file item 7) Tyee also requested a time extension of 82 days for late delivery of rigid bus, in addition to 51 days for steel. There was, however, one difference between the two requests (apart from the number of days). The 82-day request was coupled with a request that it be granted from May 1, 1967. Tyee's reason was that the late delivery would cause it to work in winter, and good days lost should be replaced by good days. The 82-day request was denied (Appeal file item 8), then renewed (Appeal file item 11), and again denied (Appeal file item 12). Reconsideration was requested by letter of November 8, 1966 (Appeal file item 15), and finally denied again on November 25, 1966 (Appeal file item 18). The last letter instructs Tyee that the rigid bus delay was concurrent with steel delay as to which 51 days "was granted."

It is true that the delays in delivery were concurrent. But the relief requested was different. The unique feature of the requested time extension on rigid bus was dating it from May 1, 1967. It was essentially a request to close down work on rigid bus for the winter. As it turned out, Tyee worked through most of the winter on rigid bus installation and, according to the record, under extremely difficult conditions. Welding of the bus was particularly affected by weather (Tr. 59), and on this job bad weather commenced in November 1966 (Exhibit A, entry for 11/22/66). According to specification 4-1007, all aluminum bus had to be welded by the inert-gas-shielded metal arc welding method. If it was windy Tyee couldn't weld, and windy days were frequent in February and March (Tr. 324). Shielding presented problems since the fumes from the welding were poisonous (Tr. 408-409). In view of these facts the request of Tyee for a time extension to run from May 1, 1967, was reasonable. The 51 days granted on the steel were not adequate to compensate also for delay in delivery of rigid bus.³ Cf. *Urban Plumbing and Heating Co. v. United States*, Ct. Cl. No. 70-67 (decided March 14, 1969).

We are thus led to conclude that a constructive acceleration also occurred with respect to rigid bus installation. There is a late delivery of material, a timely request for a reasonable time extension, a refusal

³ There is some evidence in the record from which to infer that BPA was not willing to grant a time extension from May 1, 1967, because of independent commitments it had made to energize the substation lines on or about May 15, 1967, and that electrical work could not be put off (Tr. 272-274).

of such request, and a consequent requirement for Tyee to work under difficult and adverse conditions at a procedure more than normally susceptible to bad weather. For such a constructive acceleration an equitable adjustment is in order.

As with the equitable adjustment for constructive acceleration of steel assembly and erection we must also in the case of rigid bus acceleration precisely delimit the area of adjustment. There are two reasons. First, even though BPA acted unreasonably in delaying delivery of rigid bus, we cannot include delay damages in our adjustment subsequent to the withdrawal from the Board of authority granted BPA under section 2(f) of the Bonneville Project Act of August 26, 1937, as amended (16 U.S.C. sec. 832a(f), 1964 ed.). This provision was the basis of the Board's award of delay damages in *Paul Helmick, supra*, and *Montgomery-Macri, supra*. Second, we find that Tyee itself was also at fault and contributed substantially to the increased costs of its performance with regard to the installation of rigid bus.

In view of Tyee's insistence that footings and pedestal erection at no time held up the job,⁴ we are at a loss to explain or understand why Tyee did not work on rigid bus installation, and in particular on welding, from October 26, 1966, to about January 3, 1967, a period of 69 calendar days. The weather during this period was better than it was later on into the winter.

As previously noted, all rigid bus had been delivered by October 18, 1966. An alleged lack of materials is without foundation.

Tyee's witnesses testified to the fact that the welder was sent to another job (Tr. 70, 104-105). Again, the welder appears to have been pulled off the job for some days in February 1967 (Tr. 75, 104-105), and from March 9 to April 13, 1967 (Tr. 74). By February even the few misfabricated pieces had been replaced. Only three permissible inferences are available as to these large gaps of time in rigid bus installation, one, delay in restraining activities, two, direct hindrance by the Government in welding and installation, and three, Tyee's own convenience. The first inference is defeated by the fact that all rigid bus, except the minor misfabrications, had been delivered by October 18, 1966, and by Tyee's own insistence that footings and pedestals never slowed the job. The second cause is not alleged or proved. We are left with the third. Just as BPA favored Grizzly over Malin initially in delivery of rigid bus, so Tyee favored another job over Malin in the use of its equipment and labor.

The record does not permit us to fix the amount of the equitable adjustment with any degree of fairness and precision. The cost records, necessary to distinguish allowable acceleration costs from unallowable breach of contract items, are more readily available to Tyee and the contracting officer. In addition, both have accounting assistance. Our

⁴ Tyee's Post-Hearing Reply Brief, pp. 16-17.

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conclusions, however, dictate certain guidelines and principles to be followed. Standby and delay costs are not allowable. Costs incurred for Tyee's convenience are not allowable. BPA should not pay twice for base contract work. The adjustment should be limited to costs reasonably and causally related to rigid bus installation. Account should be taken of Tyee's own delays.

With these guidelines in mind we can review the items listed in Tyee's post-hearing brief and point to some clearly not allowable, and indicate methods of handling others:

1. First category equipment—pick-up truck and van trailer construction office. The total cost from December 26, 1966, is not allowable. An acceptable prorated allowance could be based on the ratio of the dollar value of rigid bus installation remaining to be done after December 26, and total dollar value of all work (including rigid bus installation) remaining to be done after that date.

2. Second category—yard equipment. To the extent this equipment was used for rigid bus installation after December 26, an allowance may be made based upon loss of efficiency. In the alternative, a prorating approach as suggested for first category equipment could be used. We question the inclusion of the trencher. It does not appear to be a piece of equipment relevant to rigid bus installation subsequent to December 26, but to underground work.

3. Third category—line equipment. This category of equipment is not related to rigid bus installation and is not allowable. Nor is it allowable as an item with regard to steel assembly and erection because of our findings and conclusion with regard to strain bus installation.

4. Fourth category—the Heliarc welder. Tyee's request is for damages for delay or standby costs prior to delivery of rigid bus. Although BPA under its special powers could take such costs into account, the Board cannot include them in an equitable adjustment. In addition, the move from Wenatchee to Malin and back was found to be for the convenience of Tyee and is not allowable.

5. Payroll for supervisory employees. A prorated allowance may be made for supervisory payroll subsequent to December 26 based upon the same ratio suggested for first category equipment. Payroll loading of 24.88 percent is reasonable. Travel time should also be prorated.

6. Miscellaneous direct charges to the job. Telephone bill after December 26, two plane trips by George Stewart, electrical bill after December 26, and extra per diem and travel expenses of Clarence Stone may be prorated. Extra wages paid after December 26 on account of increase in wage scale are allowable insofar as they are related to rigid bus installation.

7. Loss of efficiency. Loss of efficiency of 50 percent is supported by the record and is allowable on wages clearly attributable to rigid

bus installation and on equipment used in rigid bus installation, including the Heliarc welder. However, in order to take into account Tyee's own delays, all working days from October 26, 1966, when the Heliarc welder or other essential rigid bus installation equipment was off the job for Tyee's convenience, should be subtracted from the total available working days from October 26 until the completion of rigid bus installation and the loss of efficiency computed only on payroll and equipment costs for the days remaining. Payrolling loading and travel time may be added to labor loss of efficiency. The equipment rates used in Tyee's post-hearing brief were discussed at the hearing and appear to be acceptable to BPA (Tr. 344).

8. Overhead. An allowance may be made of 20 percent (see Tr. 356-357) of the adjustment allowed on rigid bus installation, excluding profit.

9. Profit. A profit of 10 percent is allowable.

3. Late Delivery of Gravel

Contract specification 4-1301 called for Tyee to spread yard surfacing material and yard road surfacing material. The specification stated that crushed rock surfacing material was stockpiled at the site and would be furnished by BPA. Form 137, the contractor's schedule, requested the material as of August 30, 1966. The gravel was not stockpiled at the site.

According to Mr. Carlyle Brown, there was a dispute between BPA and the private utility that had graded the site and was supposed to have stockpiled the surfacing over the material to be used. The dispute was resolved in November 1966, when a contract was issued to a vendor for supply and installation. A letter of November 10, 1966, informed Tyee that the crushed rock items were to be deleted from the contract. On November 29, 1966, the letter of deletion was rescinded, placing the matter back on the same terms as originally contained in the contract. The reason given for rescinding the proposed deletion was the difficulty of coordinating the vendor's installation with Tyee's work (Tr. 250-252).

Gravel commenced to be delivered to the job site in February 1967, and Tyee's subcontractor commenced to grade roads (See Exhibit A, diary entries for February 20-28). On March 1 and 2 gravel was being spread on roads (Exhibit A). Apparently specification 4-1303 prohibiting the placement of surfacing material in snow, or on a soft, muddy or frozen subgrade was not applied to the base course for yard roads since that gravel was placed as it was delivered (Tr. 252), while the remainder was stockpiled. By letter of May 2, 1967, Tyee requested a time extension of 30 days for surfacing the yard running from the contract completion date of May 4, 1967

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(Appeal file item 25). BPA granted 49 days, running the contract out to June 22, 1967 (Appeal file item 1).

According to the testimony of George Stewart, it was Tyee's intention to spread road rock during the early part of the contract, and spread the balance at the end of the contract (Tr. 44). The idea was to insure the mobility of equipment around the site in the event of rain (Tr. 44).

It is our opinion that any claim based upon the late delivery of gravel must be dismissed as beyond our jurisdiction. In terms of the cases previously cited construing the BPA Government-furnished materials clause this delay constitutes a breach of contract, if anything, because of the unreasonableness of the delay. BPA has presented no proof of any attempt to exert any kind of reasonable effort to expedite delivery. There are no facts to support a constructive acceleration, and it is too late in the day to call a case of pure delay a constructive change.⁵

The record shows, however, that there was a period during which the lack of rock could have adversely affected Tyee. Tyee's attorneys, in their letter of February 10, 1967 (Appeal file item 23), refer to 15 days lost because of deep mud conditions that might otherwise have been alleviated by some gravel. Such adverse effect could have existed from January 3, 1967, when Tyee again commenced rigid bus installation, until the end of February, when roads were graded and graveled. Added costs associated with such adverse effects may, however, be duplicative of adjustments already allowed with respect to rigid bus installation. Our findings, however, do not preclude BPA from exercising its special authority to settle claims sounding in breach of contract.

4. *Miscellaneous Items*

In its claim Tyee also lists several minor items as delaying completion of the work. These are (1) disconnect switches (2) delivery of plans for power circuit breaker 47E conduit (3) 90° elbows for hydraulic systems on switches (4) Teflon tape (5) floodlight brackets, and (6) control wire.

The facts as to delivery of disconnect switches are not clear. Tyee's counsel proposed a stipulation on date of delivery (Tr. 35), but it does not appear to have been accepted. The proposed stipulation had 3 switches arriving on September 7, 1966, 2 on October 17, 4 on October 24, 2 on February 3, 1967, and 1 on May 3, 1967. There is no proof in the record as to how the delivery of switches delayed the job or affected costs.

The absence of plans for PCB 47E conduit was called to BPA's attention on November 11, 1966. They were delivered on November 22,

⁵ See e.g., *Allison & Haney, Inc.*, IBCA-642-5-67 (February 7, 1968), 68-1 BCA par. 6842.

1966 (Exhibit A). The 90° elbows to go with the disconnect switches were delivered on January 15 and January 18 (wrong kind and were reordered), the Teflon tape on January 10, 1966 (Exhibit A). It took one-half man-day to install the elbows (Tr. 281). Floodlight brackets were delivered on January 30, 1967 (Exhibit A). An 8-day time extension was granted as to the floodlight brackets (Appeal file item 1). There is no proof in the record as to how any delay in the delivery of these items delayed the job or affected costs.

The appeal is dismissed as to any claim based upon late delivery of these miscellaneous items.

Our conclusions with respect to the claim require us to reject Tyee's argument for a total cost approach. A total cost adjustment is not appropriate in a case where there is a large area of contractor delay, since the approach assumes all the fault to lie with the Government. Further, Tyee has demonstrated its ability to segregate its costs in its alternative presentation of its claim. See *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180, 193 (1965).

Tyee argues for a synergistic effect of all the delays in disrupting the job and also characterizes late delivery of component parts of steel as a delivery of defective material. On these premises it asks for compensation for job disruption, citing *Power City Construction and Equipment Co., supra*. Two things stand in the way: the proof does not support such an all-encompassing view, and *Power City* is not applicable. In *Power City* there were facts present which are absent here (1) there was a major misfabrication clause in the *Power City* contract providing for an equitable adjustment (2) there was major misfabrication in fact (3) the Government in effect admitted liability in change orders giving money adjustments, the dispute was over amount, and (4) the disruption and added costs were causally related to the major misfabrication. We cannot in this case go so far as to convert a matter of delayed delivery of materials into a defective materials case, particularly when the contract contains no provision allowing equitable adjustment either for "defective" or "misfabricated" material, or for delay. Nor is the causal relationship between BPA's late delivery of steel, rigid bus, and gravel, and subsequent events so clear and uncomplicated by Tyee's own delays that we can assign all the responsibility to BPA. Our analysis of the steel and rigid bus delays shows that both share responsibility for delay and disruption in the whole job.

Conclusions

1. The appeal is sustained and remanded to the contracting officer to work out the amount of an equitable adjustment for constructive accelerations resulting from late delivery of steel and rigid bus ac-

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ording to the guidelines and within the limits set out in this opinion.⁶

2. The appeal is dismissed as to all other matters.

ROBERT L. FONNER, *Member*.

I CONCUR:

SHERMAN P. KIMBALL, *Member*.

VERNARD E. JONES

A-30975

Decided June 30, 1969

Alaska: Homesites—Settlements on Public Lands

Rights to public land in Alaska may be acquired through settlement upon, and occupancy and improvement of, land as a homesite without prior approval of the Bureau of Land Management, but the filing of a notice of location of settlement in the appropriate land office is required in order to receive credit for any occupancy or use of land; however, the filing does not in itself establish any rights in a settler but serves only as notice that such rights are claimed, and the acceptance of a notice of location for recordation by a land office is not a bar to a subsequent finding that no rights were established in the attempted settlement.

**Alaska: Homesites—Act of June 8, 1906—Settlements on Public Lands—
Withdrawals and Reservations: Generally**

The Antiquities Act of June 8, 1906, which authorizes the reservation by Presidential proclamation of public lands containing historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest and which authorizes the issuance of permits for archaeological exploration does not itself effect a withdrawal of any lands from the operation of the public land laws, and the fact that land contains objects of possible historical or scientific interest or is included in a permit does not create a withdrawal of the land which constitutes a proper basis for refusing to accept for recordation a notice of location of a homesite claim on such land in Alaska.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Vernard E. Jones has appealed to the Secretary of the Interior from a decision dated March 13, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Bureau's Alaska State Office vacating an earlier decision which acknowledged his notice of location of a homesite claim and holding the notice of location to be unacceptable for recordation.¹

⁶ Insofar as the special Bonneville authority is not utilized.

¹ In the same decision the Office of Appeals and Hearings affirmed a decision of February 6, 1968, whereby the Alaska State Office held the notice of location of a homesite claim on adjacent land in the same section, Anchorage AA 346, of Hollis E. Justis to be unacceptable upon the same grounds relied upon in refusing recognition of appellant's claim. Justis did not appeal from the Bureau's decision, and the decision has become final as to him.

On July 22, 1966, appellant filed his notice of location, Anchorage AA 85, pursuant to section 5 of the act of April 29, 1950, 48 U.S.C. sec. 461a (1958), describing therein, by metes and bounds, a tract of land in unsurveyed sec. 6, T. 2 N., R. 28 W., Seward Mer., Alaska. Appellant stated in his notice that settlement was made on July 17, 1966. On September 20, 1966, the Anchorage district and land office acknowledged appellant's claim, stating that:

Our records show that the lands are subject to settlement or occupancy. Your notice of location is therefore recognized as of the date filed.

On October 20, 1966, Joseph McGill and Grant H. Pearson, members of the Alaska State legislature, protested to the Director, Division of Lands, State of Alaska, against allowance of appellant's homesite claim, asserting that:

The location where his homestead is staked in [sic] on the old Russian Church that was built in 1896. The old Indian graveyard is located near this church and is also on the area staked.

It is very important that these Historical remains be protected and we highly recommend that this homestead be disallowed.

The matter was referred to the Bureau of Land Management where it was treated as a protest. By a decision dated February 6, 1968, the State Office vacated the acknowledgment of appellant's claim, and it declared appellant's notice of location of settlement or occupancy to be unacceptable, after reporting that:

A field investigation shows that the subject lands are within the old Kijik Native Village which contains the ruins of an old Russian Orthodox church, archaeological deposits, and between two and three hundred Native graves.

Jurisdiction over ruins, archaeological sites, historic and prehistoric monuments and structures, objects of antiquity, historic landmarks, and other objects of historic or scientific interest, shall be exercised, under the act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431-433), by the Secretary of the Interior over all lands owned or controlled by the Government of the United States, which are not under the jurisdiction of the Secretary of Agriculture or the Secretary of the Army.

* * * * *

Additionally, Public Land Order 2171, dated August 3, 1960, provides that public lands customarily used by Indians, Eskimos, and Aleuts as burial places for their dead are withdrawn from all forms of appropriation under the public land laws and reserved under the jurisdiction of the Secretary of the Interior as cemeteries for use in connection with the administration of the affairs of the Natives.

The order is effective immediately with respect to those native cemeteries delineated as such on the plat of survey, and as to others upon the filing of an accepted plat of survey designating an area as a cemetery.

In appealing to the Director, Bureau of Land Management, appellant asserted that he actually settled on the property on May 17, 1966, that he spent six months there in 1966, that he cut logs for a cabin by hand and floated them down the lake to the cabin site to build a cabin,

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and that, at great expense, he had completed his cabin prior to the State Office's decision of February 6, 1968. He denied that he was destroying grave markers as had been reported, asserting that when he "finally found the few very old crosses" he "put them in an upright position with the intention of putting a wire around this small area." He also denied the accuracy of reports that there are 200 to 300 graves in the area, estimating that "there would be at the most six or ten," and he stated that any archaeological findings or objects of antiquity on the land had been "sought after and dug for by the people from the University of Manitoba [sic]." He also criticized the Bureau for waiting nearly two years after the filing of his notice of location before determining that the notice was not acceptable, and he requested a hearing to ascertain the facts of the case.

In affirming the action of the State Office, the Office of Appeals and Hearings observed that the land claimed by appellant was not surveyed at the time of his settlement,² that, normally, it is not until after lands have been surveyed that objects on the ground are identified and noted on Bureau records, and that those who make settlement claims on unsurveyed lands must assume the risk that the lands are unreserved. The Office of Appeals and Hearings found that a report from an assistant professor, Department of Anthropology, University of Manitoba, stated that archaeological studies were carried out in the area of appellant's claim between June 15 and September 1, 1966. It further observed that a report from a Bureau of Land Management natural resources specialist, dated June 12, 1967, indicated that the allowance of appellant's homesite would be incompatible with the protection and preservation of the archaeological and historical values of the Kijik site and recommended that the claim be rejected in accordance with the provisions of the Antiquities Act of 1906, 16 U.S.C. sec. 431 *et seq.* (1964). The provisions of the act and of the Departmental regulations thereunder (43 CFR, Part 3), the Office of Appeals and Hearings held, made it unmistakably clear that even injury to antiquities may be severely punished, and it concluded that the determination that homesites were incompatible with the 1906 law was correct. At the same time, it denied appellant's request for a hearing, finding that, in view of the unequivocal language of the 1906 act, no useful purpose would be served by a hearing.

In appealing to the Secretary, appellant contends that the Bureau of Land Management, having been fully advised of all the facts, allowed him to file on the land in question and should now be estopped from taking any action to prevent him from obtaining a patent, that there have been, in fact, no graves officially established on the property but only the location of five or six old crosses, that the only right of the

² So far as the record discloses, the land remains unsurveyed at this date.

United States to withdraw this land from the public domain would be under Public Land Order No. 2171, which withdrew public lands for the protection of Indian cemeteries, and that the refusal of the United States to issue a patent at this time would deprive appellant of property without due process of law. Again, appellant requests that he be granted a hearing or an opportunity for oral argument.

The reasons offered by the Bureau for its action in this matter and the reasons advanced by appellant for his appeal from that action suggest some misapprehension on the part of both parties with respect to the nature of a notice of location or settlement in Alaska and the effect of its filing in a land office. Both parties appear to have viewed appellant's notice of location as the equivalent of an application for land which, in the view of the Bureau, was subject to rejection upon a determination by that agency that the land applied for should not be disposed of in the manner contemplated in the filing of the notice and which, in appellant's view, upon its approval by the land office, authorized his entry upon the land. Such is not the nature of a notice of location.

Except in Alaska, appropriation of, or entry upon, the public domain under the nonmineral public land laws is authorized only after application has been filed, the land applied for has been classified as suitable for the desired usage, and entry has been formally allowed. A determination by this Department that a tract of land has a greater value for some use other than that proposed by an applicant constitutes sufficient grounds for rejection of the application. In Alaska, however, such a determination is not a prerequisite to settlement upon the public lands. If land is vacant and unappropriated, that is, if no prior rights have been established and if the land has not been withdrawn or otherwise closed to operation of the public land laws, any person who is qualified to enter under those laws may, without seeking or obtaining permission from the land office, occupy or settle on a tract of land and, through compliance with one of the applicable laws, establish in himself rights in the land which will ultimately entitle him to receive patent to the land. It is immaterial in such a case that, in the view of the land office, the land may have greater value for some other purpose and that it may be, in fact, wholly unsuited to the type of settlement or occupancy that was made.³

Although prior approval by the land office is not needed in order to settle upon land in Alaska, a settler is required by the act of April 29, 1950, 48 U.S.C. secs. 371, 461a (1958), within 90 days after settling upon land, to file in the appropriate land office a notice of location or settlement. The purpose of such notice is to provide the land office with

³ The Classification and Multiple Use Act of September 19, 1964, 43 U.S.C. §§ 1411-1418 (1964), vests the Secretary of the Interior with a temporary authority to classify public lands, including those in Alaska, for certain types of disposal or retention, pursuant to criteria stated in the act. The statements made in the text above are to be read with this qualification in mind.

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information needed for the administration of public lands and to allow the settler to receive credit for his occupancy and use of the land, the statute expressly providing that, unless notice is filed in the time and manner prescribed, credit will not be given for occupancy maintained prior to the filing of notice of location or an application to purchase. The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title. See *Anne V. Hestnes*, A-27096 (June 27, 1955); *Loran John Whittington, Chester H. Cone*, A-28823 (August 18, 1961); *Albert L. Scepurek*, A-28798 (March 27, 1962).

The actual appropriation and occupancy of land generally are accomplished facts at the time a notice of location is filed. Thus, the acceptance of a notice of location for recordation is not the allowance of an application for land but is, in reality, nothing more than the acknowledgement that the initiation of settlement rights as of a particular date has been claimed and a noting of the land office records to reflect the existence of that claim, and the acceptance for recordation of a notice of location is not a bar to a subsequent finding that, in fact, no rights were established in the attempted settlement. See *Charles G. Forck et al.*, A-29108 (October 8, 1962). It is clear, then, that the acceptance of appellant's notice of location for recordation on September 20, 1966 did not preclude a later determination that the land which appellant claimed was not open to entry and that no rights were established by his settlement on the land.

The Department has provided by regulation (43 CFR 2233.9-2(e)) for the return of the service charge required for recording a notice of location where the notice is not acceptable for recordation because the described land is not subject to the form of disposition specified in the notice, and the Department has held it proper to reject a notice of location where the establishment of rights by the alleged settlement is barred by the existence of prior rights in the same land or the unavailability of land for the particular type of entry attempted. See, e.g., *Anne V. Hestnes, supra*; *Eugene T. Meyer*, A-27729 (December 17, 1958); *Edward W. Harrington*, A-27823 (June 15, 1959); *Bessie G. Stevens*, A-28039 (August 25, 1959); *Charles G. Forck et al., supra*; *William R. C. Croley*, A-30673 (May 11, 1967).

The action of the State Office in vacating its earlier acceptance of applicant's notice of location and in declaring the notice to be unacceptable was proper, then, if, at the time of settlement, the land was closed to such settlement. We turn now to an examination of the premises for the Bureau's determination that the land was closed to settlement.

As previously noted, the State Office based its conclusion that the land in question was not subject to settlement upon the findings that:

(1) The land contains ruins, archaeological deposits and graves which are protected by the Antiquities Act of June 8, 1906; and

(2) Public Land Order No. 2171 of August 3, 1960, withdrew from all forms of appropriation under the public land laws public lands which were customarily used by Indians, Eskimos and Aleuts as burial places for the dead.

The Office of Appeals and Hearings discussed only the first finding; we commence with an analysis of the second.

As the State Office found, Public Land Order No. 2171, 25 F.R. 7533 (1960), withdrew "tracts of public land in Alaska customarily used by Indians, Eskimos, or Aleuts as burial places for their dead" from all forms of appropriation under the public land laws, and it provided that the withdrawal should be effective

immediately with respect to those native cemeteries in Alaska which are delineated as such upon the approval and accepted plats of survey, and with respect to other native cemeteries in Alaska, upon the filing in the Land Office having jurisdiction of the area, of an accepted plat of survey designating an area as a cemetery, and the notation thereon of the character of such cemetery as a native cemetery.

The record clearly indicates that no plat of survey has been filed which delineates any native cemetery on the land in question. Thus, we cannot conclude from the present record that the land was withdrawn under Public Land Order 2171 on July 17, 1966, when appellant initiated his settlement.

Turning then to the other basis for refusal to accept appellant's notice, section 2 of the act of June 8, 1906, 16 U.S.C. sec. 431 (1964), authorizes the President of the United States, in his discretion, "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments" and to "reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

Sections 3 and 4 of the act, 16 U.S.C. sec. 432 (1964), provide for the granting of permits "for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity" and for the publication of rules and regulations by the heads of the administering governmental agencies for the purpose of carrying out the provisions of the act.

Section 1 of the act, 16 U.S.C. sec. 433 (1964), makes it a crime, punishable by fine and imprisonment, to "appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Gov-

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ernment of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which such antiquities are situated."

Section 2 of the act is the only section which on its face speaks of a reservation of lands but it provides for accomplishing this by a Presidential proclamation designating the reserved land as a national monument. This, of course, has not been done here.

As for sections 1, 3, and 4, nothing in the express language of those sections has anything to do with the reservation of lands. Can it be implied that they effect a reservation of lands containing historic ruins or objects of antiquity? We think not.

The Antiquities Act was the subject of a *Solicitor's opinion* dated February 1, 1928, 52 L.D. 269, which considered several questions raised by the Department archaeologist. One question was whether land included in a homestead entry was subject to the issuance of an archaeological permit. The answer was that at least until the entryman earned equitable title to the land it remained subject to the jurisdiction of the Department and therefore to the issuance of permits. Until that time, ruins and other objects of antiquities on land in an entry belonged to the United States. Another question was whether the Department could retain permanent jurisdiction over archaeological remains "included in present unperfected claims *and future entries*" (italics added). The answer was that jurisdiction would terminate with the issuance of patent.

The opinion is significant in that it appears to accept the fact that land subject to the Antiquities Act can also be subject to public land laws, such as the homestead law, providing for the entry and patenting of such land. This is particularly indicated by the question as to whether jurisdiction under the Antiquities Act could be retained over land to be included in future entries. Implicit in the answer was the conclusion that land subject to the act is not thereby withdrawn or reserved from future entry under the homestead law. Such land only remains subject to the issuance of permits under the act until patent issues or equitable title is earned by the entryman.

This view also appears to be reflected in the terms of permits issued under the Antiquities Act. The permit issued on April 25, 1966, to the University of Manitoba to conduct archaeological investigations, excavations, and collections in the area in question⁴ provided that

(a) This permit shall not be exclusive in character and the United States reserves the right to use, lease, or permit the use of said land or any part thereof for any purpose. * * *

⁴The permit covered "Department of the Interior lands lying within one mile of the shore lines of Lake Clark and Lake Iliamna, Alaska * * *." Appellant's claim falls easily within those limits.

Although this is not as broad a statement as would be one that the land in the permit remains subject to disposition under the public land laws, it does evince an understanding that the Antiquities Act itself has no segregative effect.

As the record does not show that the land in question has been withdrawn as an historic site or that it was withdrawn for any other purpose at the time of appellant's settlement, we cannot conclude that it was proper to refuse to accept appellant's notice of location.

It does not follow, of course, that we are ruling that appellant has established rights in himself through his acts of settlement. Inasmuch as the land embraced in appellant's homesite claim apparently was included in the site of Kijik Village, it may be that there are vested rights in the former villagers or their descendants which would preclude the obtaining of any rights through settlement on the land in 1966.

Because of unresolved conflicts involving questions of native rights in Alaska the Secretary of the Interior recently withdrew all unreserved public lands in the State from all forms of appropriation and disposition under the public land laws except locations for metaliferous minerals (Public Land Order No. 4582, 34 F.R. 1025). The withdrawal was made for the express purpose of determining and protecting the rights of native Aleuts, Eskimos and Indians, and it suspended action on pending applications until January 1, 1971, except in special circumstances. This withdrawal does not preclude the acknowledgement of appellant's claim that he has occupied the land in question since July 17, 1966.⁵ However, should it be determined that appellant's settlement was preceded by the establishment of rights in others, appellant's homesite location would necessarily have to be declared null and void. If, on the other hand, the land is found to have been vacant, unappropriated and unreserved on July 17, 1966, appellant is entitled to credit for his acts of occupancy and use after that date.

In view of the conclusions reached here we find no issue presently ripe for determination which calls for a hearing, and appellant's request for a hearing is denied.

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 action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

⁵ Although appellant asserted in his appeal to the Director that he actually settled on the property on May 17, 1966, that assertion was made long after the expiration of 90 days following the date of settlement, and appellant is entitled only to recognition of the occupancy which he claimed within that period.

APPEAL OF ALLISON & HANEY, INC.

IBCA-587-9-66

*Decided July 24, 1969***Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Construction and Operation: General Rules of Construction**

A contractor, under a contract calling for the installation of waterline pipe of four possible alternative types within one bidding schedule, who elected to utilize pretensioned concrete pipe and was required by the drawings to encase such pipe with concrete and cement encasements under certain conditions, was not entitled by virtue of the concrete and cement payment provisions (which did not specifically exclude such encasement from a list of exclusions from payment) to be separately compensated for such encasements. Not only did the pipe payment provision specifically provide that no separate payment would be made for such encasement, but the contract also stated that the cost of furnishing any item not provided for shall be included in the bid price for the work for which the item is required, and the presence of four different options within one bidding schedule should have alerted the contractor to the possibility that absorbing the cost of such encasements would be necessary in order to make pretensioned pipe equal in performance to the other options.

**Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Construction and Operation: Changes and Extras—Con-
tracts: Disputes and Remedies: Damages: Actual Damages**

A contractor, under a contract calling for the installation of waterline pipe of four possible alternative types, who elected to utilize pretensioned concrete pipe, was entitled to additional compensation for the extra work involved in encasing such pipe on certain curves, at the Government's insistence (which was based upon a general requirement in the drawings that encasement of pretensioned concrete pipe was required under certain conditions), where the pretensioned concrete pipe specification entitled "Curves and bends" provided that no concrete encasement was required on certain curves if the pipe was laid thereon in accordance with certain criteria. Upon a showing by the appellant that such criteria were met, the Board viewed the specific provision as an exception to the general requirement, under the circumstances of this claim; but the appellant was not entitled to be compensated for damages sustained to its work while awaiting encasement as a result of a heavy rainstorm, since (i) it appears that the damage might have occurred even if encasement were not involved and (ii) the Government is not an insurer of contractors against acts of nature.

**Rules of Practice: Evidence—Rules of Practice: Witnesses—Rules of Prac-
tice: Appeals: Hearings**

In an appeal involving a question of interpretation of specifications, an expert witness will be permitted to give an opinion as to whether a contractor's interpretation was reasonable, notwithstanding the Government's objec-

tion that such opinion invades the province of the Board, where such testimony may aid the Board in the resolution of the question; but such testimony is advisory in character and may be rejected or accepted by the Board in whole or in part, even though uncontradicted.

BOARD OF CONTRACT APPEALS

This appeal involves a dispute over the interpretation of specifications and drawings relating to the encasement of waterline pipe for the East Aqueduct of the Canadian River Project in Texas.¹ The appellant claims that it is entitled to be paid for concrete and cement used in the encasements at the unit prices bid for concrete and cement. It also contends that it should be compensated for the extra work entailed in encasing pipe around certain curves and bends, since the contract allegedly does not require such encasement there. The contracting officer held that encasement was required on curves and bends as well as straight runs of pipe and that no separate payment therefor was authorized by the contract.

Appellant's notice of appeal from the contracting officer's determination presents two claims. The first claim is for the cost of the alleged extra work involved in placing the encasement on the bends and curves. This, the parties stipulated at the hearing, amounted to \$26,136.52 (plus a reasonable profit) (Tr. 5). The second claim seeks to recover for the cement and concrete used in the encasements at their respective unit prices. According to the appellant the recovery for this should be \$203,809.06 (or \$243,245.14 if Claim I is rejected) (Tr. 6-8). Appellant also contends as an adjunct to Claim I that it is entitled to be compensated for the cost of correcting what it terms "flotation" damage to certain of the pipes, resulting from heavy rain.² The parties agreed at the hearing that if the Board upholds the appellant's right to reimbursement for the flotation damage, its recovery on Claim I should be increased to \$28,017.46 (Tr. 6). In the interest of clarity we are reversing the order of the claims in the discussion that follows.

The Claim for the Cost of Encasement at Concrete and Cement Unit Prices—\$203,809.06

The appellant was required, pursuant to par. 79 ("Pipe, General"), to lay the pipe "in trenches which are designated on the plan and

¹ The appellant undertook to furnish and install the pipe, *inter alia*, for an estimated price of \$4,114,450.29, pursuant to a contract dated March 17, 1965.

² Tr. 5-6; Appellant's Post-Hearing Brief, p. 47.

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profiles by symbols." The symbols referred to represent by a system of shorthand the class of pipe to be used wherever a particular symbol appears on the profile drawings. The symbols, as explained in par. 79, indicate the pipe diameter, the allowable depth of earth cover (A=5, B=10, C=15 and D=20 feet) and allowable hydrostatic head for each class of pipe. Thus, a symbol of 36B275 means pipe of 36 inches in diameter, 10 feet of earth cover and 275 feet of hydrostatic head. Under the heading "Furnishing and laying line pipe as follows" the various classes of pipe are separately listed in the bidding schedule, together with the quantities thereof and unit prices. According to subparagraph a. of par. 15 ("Quantities and Unit Prices"), the "quantities stated in the schedule are estimated."

Under subparagraph a. of par. 12 ("Description of the Work") and par. 80 ("Pipe Options") of the specifications, appellant had the option of choosing the type of pipe it would use in performing the work from among these four: concrete pressure pipe, non-cylinder prestressed—concrete pipe, pretensioned concrete pipe, and asbestos-cement pipe. Par. 80 (as amended by Supplemental Notice No. 1 dated February 12, 1965, and Supplemental Notice No. 2, dated February 18, 1965) refers to drawings numbered 143, 144, 145, 146, 146A and 147 which "show the types and classes of pipe which will be allowable * * *." These drawings are in chart form. They list the various classes of pipe, as symbolized on the profiles, with the comparable class for each option where applicable. By this means the pipe class shown on the profile and bidding schedule can be converted into the equivalent class of a particular option. For example, according to drawing 147, for the pretensioned type, the equivalent of profile class 36B275 is 36PT350.

The appellant elected to utilize pretensioned concrete pipe.³ The provisions relating to such pipe are found in par. 85 ("Pretensioned Concrete Pipe"). It (as well as pars. 79 and 80 referred to *supra*) is located under the subdivision of the specifications entitled "Line Pipe for Aqueduct." Par. 85 contains various subparagraphs, including subparagraph k. ("Curves and bends"), to which will refer *infra* in connection with that aspect of the appeal. Subparagraph o. ("Laying pipe") requires that such pipe be laid in accordance with par. 80. As we have seen, par. 80 in turn refers to the drawings which "show the types and classes of pipe which will be allowable." On all of the drawings but No. 143 certain classes of pretensioned concrete pipe are

³ Tr. 53; appellant's letter to the Government, dated April 1, 1965, with attachments (Government's Exhibit B-10).

asterisked. According to the notes appearing on the drawings, the asterisks signify pipes which "are acceptable provided they are encased as shown above."⁴ Directly above the notes on each drawing is a schematic diagram (called "Concrete Encasement") of what is designated thereon as "PT Pipe" with various dimensions pertaining to encasement.

During the course of performance the appellant was required to encase the pretensioned pipe with concrete and cement in accordance with the drawings. The appellant does not question this obligation, except as it applies to certain curves and bends.⁵ But in dispute is the manner of payment for the encasement. The appellant looked to the provisions dealing with payment for concrete and cement found under the subdivision of the specifications entitled "Concrete." They are par. 189 ("Payment") and subparagraph c. ("Measurement and payment") of par. 171 ("Cement").⁶ These provisions provide for payment at the

⁴ E.g., Drawing No. 144. By agreement of counsel, drawings are referred to by their page numbers appearing at the top of each drawing rather than by the number found in the lower corner of each drawing, Tr. 45-46.

⁵ Tr. 170 (stipulation of appellant's counsel).

⁶ "189. *Payment*

"Payment for concrete in the various parts of the work will be made at the unit prices per cubic yard bid therefor in the schedule, which unit prices shall include the cost of all labor and materials required in the construction, except that payment for furnishing and handling cement, and payment for furnishing and placing reinforcement bars will be made at the unit prices bid therefor in the schedule: *Provided*, That no direct payment will be made for concrete, or for cement or reinforcement bars in surge tanks including footings for such surge tanks, and no direct payment will be made for concrete, cement or reinforcement bars in certain pipe encasements at air valve and blowoff installations along pipelines of pretensioned concrete pipe, and asbestos-cement pipe which exceeds the cement required at these installations along pipelines of noncylinder prestressed concrete pipe and concrete pressure pipe."

"171. *Cement*

* * * * *
 "c. Measurement and payment.—* * *

"Payment will be made for cement used in concrete placed within the pay lines for concrete; and for cement used in concrete placed outside the concrete pay lines, unless the requirement for such concrete is determined by the contracting officer to be the result of careless excavation, or excavation intentionally performed by the contractor to facilitate his operations. No direct payment will be made for cement used in precast pipe, or for cement used in mortar or grout for precast pipe joints, cement used in surge tanks, and cement used in concrete encasement at air valve and manhole installations along pipelines of pretensioned concrete pipe, and asbestos-cement pipe which exceeds the cement required at these installations along pipelines of noncylinder prestressed concrete pipe and concrete pressure pipe. No payment will be made for cement used as follows: cement used in wasted concrete, mortar, or grout; cement used in the replacement of damaged or defective concrete; cement used in extra concrete required as a result of careless excavation; and cement used in concrete placed by the contractor in excavation intentionally performed by the contractor to facilitate his operations.

"Payment for furnishing and handling cement will be made at the unit price per barrel bid therefor in the schedule, which unit price shall include the cost of rail and truck transportation of the cement from the mill to the jobsite and the cost of storing the cement."

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unit prices in the schedule, with certain exceptions. Since encasement of pipe is not one of the exceptions mentioned, appellant concluded it is entitled to be paid at the concrete and cement unit prices for the encasement.⁷

The contracting officer, however, relied not on the payment provisions applicable to concrete, but on subparagraph p. ("Measurement and payment") of par. 85, the payment provision applicable to pretensioned concrete pipe, and denied the claim. Subparagraph p. provides that measurement and payment for pretensioned pipe shall conform to par. 81. Par. 81, which is found under the "Line Pipe for Aqueduct" section of the specifications, is entitled "Measurement and Payment for Line Pipe."⁸ It originally concluded with the sentence, "Concrete in * * * encasements will be paid for as provided elsewhere in these specifications for concrete in structures." By virtue of Supplemental Notice No. 2, the following proviso was added: "*Provided*, That no separate payment will be made for concrete, cement or reinforcement (including wire fabric reinforcement) used for line pipe encasements required about pretensioned concrete pipe shown on Drawings No. [144, 145, 146, 146A and 147, the drawings specified in par. 80 as amended by Supplemental Notice No. 1 and No. 2.]" The contracting officer's determination, based upon this proviso, was that there is no entitlement to separate payment for the concrete and cement encasements. He also held that there is "no conflict or ambiguity" between par. 81 and the provisions relied on by the appellant.

In its post-hearing brief, the Government has departed somewhat from the contracting officer's finding that there is no conflict or am-

⁷ Appellant's Post-Hearing Brief, p. 22; appellant's Reply Brief, p. 9.

⁸ "81. *Measurement and Payment for Line Pipe.*

"Except as otherwise provided in Paragraphs 89, 90, and 94, measurement and payment for line pipe in pipelines will be made as follows:

"Measurement, for payment, of furnishing and laying line pipe designated on the drawings by symbols will be made along the centerline from end to end, of the pipe in place, and no allowance will be made for lap at joints: *Provided*, That steel pipe in bends, tees, and crosses will be paid for in accordance with Paragraph 121. Payment for furnishing and laying the various sizes and classes of pipe will be made at the unit prices per linear foot bid therefor in the schedule, which unit prices shall include the cost of all materials for and the manufacturing of pipe, the cost of handling, hauling, storing and laying the pipe; the cost of wrapper plate reinforcement, collars, sleeves, nozzles, and covers for steel pipe outlets from line pipe as required at structures; the costs of the maintenance warranty as provided in Paragraph 82; the cost of compacting backfill and bedding between the bottom of the pipe to a height of 0.7D_o; the cost of coating and the cathodic protection required by Paragraph 83. Concrete in anchors and encasements will be paid for as provided elsewhere in these specifications for concrete in structures. *Provided*, That no separate payment will be made for concrete, cement or reinforcement (including wire fabric reinforcement) used for line pipe encasements required about pretensioned concrete pipe shown on Drawings No. 144 (40-D-5948), 145 (40-D-5950), 146 (40-D-5952), 146A (40-D-5953) and 147 (40-D-5956)."

biguity between the provisions cited by the Government and the provisions followed by the appellant. The Government now maintains that given appellant's interpretation, "there was sufficient information in the specifications to put" appellant on notice of a contrary interpretation which required it under the contract to seek clarification from the contracting officer.⁹ The point the Government emphasizes is that from the presence of four different options (having individual strengths and weaknesses) within one bidding schedule a contractor viewing the matter reasonably would have reached the conclusion that the cost of encasements required to make pretensioned pipe equal in performance to the other options was to be included or absorbed in the bid items for the pipe.¹⁰

However, for the first time in the course of this controversy, the Government also strenuously questions whether before the dispute arose appellant did in fact rely upon the interpretation outlined above. The contention is that the appellant actually did not recognize at the time it made its bid that the contract required encasement under certain conditions and so failed to provide for it in its bid.¹¹ In the Government's view, at best appellant simply made a unilateral mistake in bidding for which no relief is available from the Board, the Comptroller General, or the courts.¹² At worst, the Government intimates, the appellant may even have been well aware of the Government's interpretation and attempted to take advantage of the ambiguity by unbalancing its bid.¹³

If sustainable these new assertions by the Government would, without more, defeat appellant's claims. A contractor's interpretation of an ambiguity in a contract drawn by the Government is controlling only if he actually and reasonably relied upon it at the time of the bidding.¹⁴ Therefore, assuming the presence of an ambiguity here, whether appellant in fact made its bid on the basis of its alleged interpretation is a fundamental question. Since a contractor who is fully aware of an ambiguity before bidding cannot have it resolved

⁹ Government's Post-Hearing Brief, p. 47.

¹⁰ *Id.*, pp. 20-21.

¹¹ *Id.*, pp. 3-4, 17-19. According to the Government, the appellant "either missed or ignored [the encasement] requirement." *Id.*, p. 46.

¹² *Id.*, pp. 3-4. It is well settled that the Board lacks jurisdiction to reform a contract on account of a mistake-in-bid. *Campbell & Speir*, IBCA-705-2-68 (December 12, 1968), 68-2 BCA par. 7395.

¹³ Government's Post-Hearing Brief, p. 26.

¹⁴ *Randolph Engineering Co. v. United States*, 176 Ct. Cl. 872, 876 (1966); *Flora Construction Company*, IBCA-101 (September 4, 1959), 68 I.D. 315, 327-28, 59-2 BCA par. 2312, at 10,448. Compare *Bern Kane Products, Inc.*, ASBCA No. 8547 (July 19, 1963), 1963 BCA par. 3823, at 19,071.

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in his favor, whether appellant recognized the existence of an ambiguity and unbalanced its bid is equally significant.¹⁵

Throughout the pre-hearing history of this dispute, however, the Government gave no indication that it questioned appellant's *bona fides*. Early in the life of the contract appellant indicated that it did not interpret the specifications as the Government did.¹⁶ The contracting officer treated the claim purely as a matter of contract interpretation, although from the tenor of certain of appellant's inquiries at the time the possibility that a mistake had been made might have suggested itself. But the contracting officer did not pursue that matter at all, nor did department counsel in the Government's Statement of Position. It was not until the hearing that the Government raised the question of appellant's reliance on its pre-bid interpretation (Tr. 33-38).

Where interpretation is at issue, the line between a provision overlooked and a provision undervalued is exceedingly difficult to discern. Whether appellant missed or only discarded a provision obviously bears upon the reasonableness of its conduct, but the mere fact that the appellant may not have given full weight to the clauses the Government is relying on does not *ipso facto* mean that the appellant did not make the interpretation alleged. Moreover, we do not regard the markup of certain subcontracted items as indicating that appellant discovered an ambiguity and unbalanced its bid in order to take advantage of the ambiguity. The markups were not unreasonable.

The testimony which the Government cites on all of these points is at most inconclusive. In large measure the Government is relying on inference. While the appellant's evidence in this area might have been improved upon, we attribute this to the appellant's inability to respond fully to unanticipated charges made at a late hour (Tr. 37). There is, in any event, no direct proof that the appellant did not in good faith interpret the contract as it now claims it did. We do not look with favor upon a change of theory in midstream without giving reasonable notice to the other party.¹⁷ In the absence of clear and

¹⁵ See *Ring Construction Corporation v. United States*, 142 Ct. Cl. 731, 734 (1958); *Pioneer Electric Company, Inc.*, IBCA-222 (June 23, 1960), 67 I.D. 267, 60-2 BCA par. 2675.

¹⁶ Letter of appellant, dated June 25, 1965, attached as Exhibit 1 to the contracting officer's Findings of Fact and Decision, dated July 8, 1966 (Exhibit 23).

¹⁷ See *Rodale Press, Inc. v. F.T.C.*, 407 F. 2d 1252, 1256-7 (D.C. Cir. 1968); *Futuronics Inc.*, DOT CAB No. 67-15 (June 17, 1968), 68-2 BCA par. 7079, at 32,759; *Industrial Research Associates, Inc.*, DCAB No. WB-5 (April 27, 1967), 67-1 BCA par. 6309, at 29,193-4.

convincing evidence to the contrary we find that the appellant did in fact adopt the interpretation in question at the bidding stage.

Our inquiry now is addressed to the question: Did the appellant come to a reasonable conclusion with respect to what its contractual responsibility would be in the event it was the successful bidder? Although the appellant and the Government interpret the contract differently it must be borne in mind that a contract is not rendered ambiguous merely because there are conflicting interpretations of its terms by the parties.¹⁸ A contract is ambiguous only if it is susceptible of two different and reasonable interpretations each of which is found to be consistent with the contractual language.¹⁹ If it is, the Court of Claims has held that the ambiguity will be resolved against the Government (the drafter) and in favor of the contractor,²⁰ provided the conflict was not so obvious as to require the contractor to seek clarification.²¹

The appellant is not relying solely on its own analysis of the contractual language to support its interpretation. At the hearing, Mr. Haney, appellant's President, offered no extensive insight into the process by which its interpretation was reached, except that he followed paragraph 189 and did not include the cost of encasement anywhere in the bid (Tr. 55, 86). The appellant, instead, is seeking to demonstrate the reasonableness of its view almost entirely on the basis of third-party evidence.

The appellant called as a witness Mr. Gibbs, formerly an officer of Hyde Construction Corporation, one of the other bidders on this contract. Mr. Gibbs testified that he had supervised Hyde's bidding procedure and that Hyde contemplated using pretensioned pipe (Tr. 89). He stated that after examination of all of his records he could "find no evidence" that he absorbed the cost of concrete encasement "in the pipe items or anywhere else in the bid (Tr. 89-90)." This testimony is cited to show that at least one other bidder reacted similarly to the appellant in interpreting the specifications.²² To develop this point further the appellant introduced into evidence specifications in three other Bureau contracts, unrelated but purportedly similar

¹⁸ *Bishop Engineering Co. v. United States*, 180 Ct. Cl. 411, 416 (1967); *Shipley v. Pittsburgh & L.E.R. Co.*, 83 F. Supp. 722, 741 (W.D. Pa. 1949).

¹⁹ *Sun Shipbuilding and Dry Dock Co. v. United States*, 183 Ct. Cl. 358, 372 (1968).

²⁰ *Id.*

²¹ *J. A. Jones Constr. Co. v. United States*, 184 Ct. Cl. 1, 12-13 (1968).

²² Mr. Haney testified that the other three bidders would not advise how they interpreted the contract (Tr. 57).

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to this project.²³ According to the appellant, the sections in those contracts relating to concrete clearly provide that the concrete and cement in encasements will not be paid for at the unit prices bid for concrete and cement, and no provision therefor is contained in the pipe paragraphs. From this the appellant concludes that "the appropriate place" to see if concrete and cement in encasements will be paid for under the unit prices bid for concrete and cement is under the payment provisions for concrete and cement.²⁴

The brunt of appellant's case, though, was borne by two expert witnesses, Mr. Clough and Mr. Noe, whose qualifications as authorities in the field of construction contracting were not disputed by the Government. They testified that in their opinion it was "reasonable" for the appellant to interpret par. 189 and par. 171c. as providing for payment for the encasement required by the drawings (Tr. 147, 198-99). Their reasoning is that those provisions call for payment for concrete and cement generally, with certain exceptions; since encasements were not mentioned among the exceptions, they are not included within the exceptions (Tr. 199).²⁵ Mr. Clough testified that the Government's interpretation under which the cost of encasement was included in the unit price of pipe "is inconsistent with standard practice" (Tr. 143).

The Government objected to the introduction by the appellant of the Bureau's specifications under other contracts on the ground that they were issued after the date of this contract (and "perhaps" even after this dispute arose) and were irrelevant (Tr. 14-16). The opinions of the expert witnesses regarding the meaning of the various provisions were also objected to by the Government for the reason that they allegedly invade the province of the Board in violation of the "ultimate issue" doctrine (Tr. 130-132, 137). The hearing official overruled both objections subject to further review of his rulings by the members of the Board participating in this decision. (Tr. 19, 137).

In the area of admission or exclusion of evidence, a hearing official has substantial latitude.²⁶ As he presides over a hearing, he must deal

²³ Appellant's Exhibits C-2 (Specifications No. DC-6677, Southern Nevada Water Project, Nevada); C-3 (Specifications No. DC-6645, Central Valley Project, San Luis Unit, California); and C-4 (Specifications No. DC-6550, Central Valley Project, San Luis Unit, California).

²⁴ Appellant's Post-Hearing Brief, pp. 33-34.

²⁵ Mr. Clough testified that where some exceptions are listed, a contractor would normally rely "on the fact that they are all listed." (Tr. 144)

²⁶ See *General Insurance Co. of America v. Hercules Construction Co.*, 385 F. 2d 13, 24 (8th Cir. 1967); *Hawkins v. Missouri Pac. R. Co.*, 188 F. 2d 348, 351-52 (8th Cir. 1951).

with the exigencies of the case and he must perforce have considerable discretion in exercising his judgment. Matter which, standing alone, may appear remote may nevertheless be admissible when in connection with other evidence it may tend to prove or disprove a material or controlling issue or shed light upon the issue.²⁷ Considering the circumstances of this appeal, we believe the Bureau's specifications under the other contracts could have a bearing upon the reasonableness of the respective interpretations. The hearing official did not abuse his discretion. We therefore uphold his ruling in this regard, without intending to pass upon the probative value of such evidence at this time.

With respect to the other objection, expert testimony on matters "invading the province of the Board" is said by the Government to violate the ultimate issue doctrine. According to that doctrine, a witness is not to give an opinion which if accepted would be decisive of the case. However, the modern trend appears to be away from that view.²⁸ Current thinking, at least where technical questions are involved, is that expert testimony is admissible if it reasonably tends to aid the trier in the resolution of the decisive issue and is not rendered inadmissible simply because it allegedly invades the province of the trier.²⁹ We have such a situation here. We also point out that we are not bound to follow such testimony, as will be discussed *infra*. Moreover, we believe that a mechanical application of rules of evidence unduly restricts the proper functioning of a contract appeals board. In this instance, as in the previous situation, a hearing official should be permitted wide latitude.³⁰ We therefore will not disturb the hearing official's ruling.

The weight to be accorded this evidence, however, is another matter. Merely because appellant's expert witnesses testified that its interpretation is reasonable does not make it so. We are not bound to accept the opinion testimony of expert witnesses.³¹ As we said *supra*, we regard it as purely advisory in character. We may reject or accept

²⁷ See 29 Am. Jurisprudence 2d, *Evidence* secs. 252, 254, 836 (1967).

²⁸ See 32 C.J.S., *Evidence* sec. 446b (1964); 31 Am. Jur. 2d, *Expert and Opinion Evidence* sec. 22 (1967).

²⁹ See *Padgett v. Buaton-Smith Mercantile Company*, 262 F. 2d 39, 41 (10th Cir. 1958); *Jones v. Goodlove*, 334 F. 2d 90 (8th Cir. 1964); *Model Code of Evidence* rule 401 (1942). In *Shipley*, note 18, *supra*, at 742, the Court permitted expert testimony respecting a contract of a technical nature, saying "otherwise [it] could not have seen the trees due to being in the forest."

³⁰ See *Jones v. Goodlove*, note 29, *supra*, at 94.

³¹ *Phelps Dodge Corporation v. Atchison, T.S.F. Ry. Co.*, 400 F. 2d 20, 22 (10th Cir. 1968); *Western Stamping Corporation v. United States*, 289 F. Supp. 1016, 1023 (Cust. Ct. 1968).

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it in whole or in part.³² Even though uncontradicted, expert opinion testimony is not conclusive.³³

In our view the construction appellant has placed upon pars. 189 and 171c. standing alone is not unreasonable. Reading them by themselves one can reach the conclusion that concrete and cement line pipe encasement was not excepted from payment because it was not included in the list of exceptions. That is the type of situation to which the hoary maxim *expressio unius est exclusio alterius* applies.

But it is fundamental that provisions of a contract are not to be read alone. They are to be treated as part of an integrated and coherent entity, or, as usually put, as part of a harmonious whole. A contractor's duty is met by concentration on "the entire package, including all of its parts, rather than isolated preoccupation with the component parts taken out of the context of the entirety."³⁴ So it was incumbent upon the appellant to consider pars. 189 and 171c. not in isolation, but within the broader framework of the whole contract, which, of course, includes par. 81 with its apparently contradictory meaning.

Only in the event that the Government did not express its intent with clarity would a contractor be entitled to adopt a construction based upon less than the entire contract. The rationale in that case would be that the contractor was not given adequate notice of the contract requirements.³⁵ The question which thus arises is whether the Government did in fact express its intent with clarity; that is, was the appellant given adequate notice of the contract requirements?

We look to par. 81. It relates to measurement and payment for line pipe. As we have seen, *supra*, prior to its amendment by Supplemental Notice No. 2, it concluded with a provision relating to concrete in anchors and encasements. By virtue of Supplemental Notice No. 2, the provision with which we are now concerned was added. It is a specific provision. The inclusion of such a provision governing payment for concrete and cement pipe encasements in a paragraph dealing with measurement and payment for the pipe does not appear unreasonable to us. The fact that the provision was added by an addendum does not

³² *Sternberger v. United States*, 401 F. 2d 1012 (Ct. Cl. 1968); *Norfolk Dredging Co. v. United States*, 175 Ct. Cl. 594, 621 (1966). See generally 31 Am. Jur. 2d, *Expert and Opinion Evidence*, sec. 183 (1967).

³³ *Sternberger v. United States*, note 32, *supra*.

³⁴ *Acme Missiles & Construction Corp.*, ASBCA No. 9374 (April 30, 1964), 1964 BCA par. 4220, at 20,462.

³⁵ See *Tufano Contracting Corp. v. United States*, 174 Ct. Cl. 398 (1966); *Norair Engineering Corp.*, ASBCA No. 10134 (November 27, 1964), 65-1 BCA par. 4547; *Donovan Construction Co.*, ASBCA No. 6438 (January 30, 1963), 1963 BCA par. 3645.

diminish its significance, as Mr. Clough testified.³⁶ Moreover, Supplemental Notice No. 2 is a document only 2½ pages long. The amendment to par. 81 is not obscurely placed but appears on the first page of the Notice under the second numbered paragraph. We also note that the Notice is dated February 18, 1965, and the bid opening occurred March 2, 1965 (Tr. 169). We regard this as an adequate period within which to read and evaluate its contents.

The appellant, however, maintains that the Government's intent was not clearly expressed. It contends that it was justified in looking to the concrete and cement payment provisions rather than par. 81 because payment for concrete pipe encasement is not included in the pipe sections under standard practice. In support of this assertion, appellant refers to its exhibits C-2, C-3 and C-4, in which concrete and cement pipe encasements are specifically mentioned in the concrete and cement paragraphs. The appellant also criticizes the effectiveness of Supplemental Notice No. 2, claiming that the amendments made therein were inconsistent and inadequate.

We do not find persuasive the mere fact that in other contracts one may find concrete and cement encasements covered exclusively in concrete and cement paragraphs. It does not necessarily follow that a prudent contractor would look only there, particularly in the circumstances of this case where the language cited by the Government was added, and it would seem highlighted, by a short addendum.

Trade usage, though, is another matter. Whether or not specifications are ambiguous, we must consider trade usage, since it may supply a meaning that is not disclosed from a casual reading of a contract.³⁷ It may be (and we will so assume) that according to the custom of the trade, payment for concrete and cement pipe encasements is ordinarily governed by the concrete and cement provisions. We have not, however, been furnished with any proof that the appellant in construing the contract was actually influenced by or was even aware of the usage of the trade. The existence of a business custom alone is not enough; in order for a contractor to invoke it, he must have relied thereon.³⁸ The contractor must have read the specifications with the trade practice in mind. He must further show that the usage was so notorious that the

³⁶ Mr. Clough testified as follows on cross-examination (Tr. 169) :

"Q. In your experience and based on your knowledge of the construction industry, does a contractor typically pay more attention to supplemental notices, perhaps, than he does to the, even more attention than he does to the basic contract as it comes out?"

"A. This is a relative matter I would find hard to judge, but certainly he does pay attention to supplemental notices, for they are brought specifically to his attention and, as you are thoroughly aware, they become a part of the contract."

³⁷ *W. G. Cornell Co. v. United States*, 179 Ct. Cl. 651, 670-71 (1967).

³⁸ Restatement, Contracts, sec. 247 (c) (1932). See cases cited in note 14, *supra*.

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Government knew or should have known of its existence.³⁹ The record is devoid of such evidence. There is also no indication that in making its interpretation the appellant acted in the light of any past experience under prior similar contracts with the Government.⁴⁰

Let us nevertheless assume that the appellant was aware of the trade usage and was influenced by it in concluding that it would be paid separately for the concrete and cement pipe encasements, even though par. 81 provides that there will be no separate payment for the pipe encasements. This still does not, *ipso facto*, provide the appellant with any justification for paying little heed to par. 81. Business custom may not override an express contrary term of a contract; it may merely be used to explain or define that language in order to determine how it would be interpreted by a reasonably intelligent person acquainted with the contemporaneous circumstances.⁴¹ Reading the relevant portion of par. 81 in the light of such external usage, its meaning remains unaffected.

The appellant contends that the amendment to par. 81 made by Supplemental Notice No. 2 "can as easily be construed to provide that there will be no separate payment for this encasement other than that provided in paragraphs 171(c) and 189, such as the case of surge tanks, or * * * no separate payment will be provided in the nature of a bid item, such as concrete in encasements."⁴² The appellant also maintains that if Supplemental Notice No. 2 was intended to modify par. 81 in line with the Government's interpretation, pars. 171c. and 189, the payment provisions for concrete and cement, should also have been amended, particularly since par. 186c., dealing with payment for reinforcement bars was changed by Supplemental Notice No. 2. The amendment of 186c. reads: "*Provided*, That no separate payment will be made for any reinforcement * * * used for line pipe encasements required about pretensioned concrete pipe shown on" drawings 144 through 147.

We believe that the appellant's suggested construction of par. 81, *supra*, is strained and unnatural in view of its plain language. The amendment of 186c. is not, in our view, significant because it contrasts with the Government's failure similarly to amend 171c. and 189; the

³⁹ 1 McBride & Wachtel, *Government Contracts*, sec. 2.200 (1968).

⁴⁰ See *Ade L. Greenberg Co., Inc. v. United States*, 156 Ct. Cl. 434 (1962), holding that prior contracts, though not proof of what the parties intended under a subsequent contract, may indicate that a contractor's interpretation of an ambiguous provision was reasonable in view of its prior experience.

⁴¹ *W. G. Cornell Co. v. United States*, note 37, *supra*.

⁴² Appellant's Post-Hearing Brief, pp. 29-30.

issue here is the sufficiency of the amendment to par. 81. The real significance of the modification of 186c. is in whether it should have sounded an alarm bell, inasmuch as reinforcement, concrete and cement in encasements are under normal trade practice treated alike for payment purposes.⁴³ If, as the appellant recognized, reinforcement was not to be paid for separately,⁴⁴ should it not have become apprehensive concerning payment for the concrete and cement in the encasements and sought clarification by the contracting officer under Article 2 of the General Provisions? ⁴⁵ We think so.

Appellant's answer to this, however, is in the negative, as it is to other assertions by the Government that it should have inquired of the contracting officer. While pars. 186c., 189 and 171c. may be inconsistent under its interpretation, appellant maintains they are not ambiguous "when read alone or when read together."⁴⁶ The further claim is made that none of the other bidders "inquired because of the abnormality in the specifications."⁴⁷ The point of such an assertion is that if other bidders did not seek clarification, appellant could not have been unreasonable in also failing to seek clarification.

In our opinion, it does not necessarily follow that the appellant acted reasonably simply because four other bidders acted in like fashion. It is possible, though perhaps unlikely, that they were all unreasonable. In any event, the evidence does not support a conclusion that the other bidders took a view similar to the appellant's. On cross-examination Mr. Gibbs admitted that bidder Hyde may have missed the requirement for encasement (Tr. 93-94). The other bidders, Mr. Haney testified, would not advise if they had intended to use pretensioned pipe and if they included the cost of encasement in the cost of the pipe (Tr. 57). They may have exercised another option than pretensioned pipe and not have been confronted with the question of encasements. If they intended to utilize pretensioned pipe, their failure to seek clarification leads as directly to an inference in favor of the Government's interpretation as it does in favor of the appellant's.

The appellant's difficulty is that it violated the fundamental rule of contract interpretation of which we spoke above. That is, it con-

⁴³ Tr. 166-67, 237. Based upon the testimony of appellant's expert witnesses we hold that a reasonable contractor should have known this was the trade practice.

⁴⁴ Appellant's Reply Brief, p. 20.

⁴⁵ Standard Form 23-A (June 1964 Edition). The relevant portion of Article 2 provides: " * * * In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at his own risk and expense."

⁴⁶ Appellant's Reply Brief, p. 22.

⁴⁷ *Id.*

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centrated not on the entire package but only on certain of the component parts. This is highlighted by its attitude toward pars. 186c., 189 and 171c., previously mentioned. The point is not whether those provisions are ambiguous "when read alone or when read together," but how they fit into the general picture. As we have seen, the appellant on one basis or another apparently satisfied itself that the language of par. 81 does not overcome its interpretation. Under Article 2 appellant reached such a conclusion at its own risk. Assuming, *arguendo* that the appellant's reliance on pars. 189 and 171c. was soundly placed, there are other provisions in the contract which should have served to warn appellant that its interpretation was perhaps unreasonable or at least required clarification by the contracting officer.

Thus, it can be argued that the presence of four different pipe options within one bidding schedule would have alerted a reasonable contractor to the possibility it might have to absorb the cost of encasements in order to make pretensioned pipe equal in performance to other options.⁴⁸ Although there is some question respecting the impact such an arrangement would have on the ordinary contractor, particularly where as here certain of the alternatives were non-competitive,⁴⁹ we believe at the very least it should have given appellant some pause.

⁴⁸ After stating that the four different pipe options must be made to compete on an equal basis, Mr. Clough testified as follows on cross-examination (Tr. 148-149) :

"Q. And we have here four different kinds of pipe which are made by completely different methods and different materials and they have different characteristics, don't they?

"A. Yes.

"Q. Now there is not contained in the contract four different schedules for these four pipe items, right?

* * * * *

"A. No.

* * * * *

"Q. We have simply one payment schedule?

"A. Yes.

"Q. Listing various sizes and classes of pipe, right?

"A. Yes.

"Q. So that, if there are differences in the way these pipes must be treated, they have to be treated within the framework of that one schedule, don't they?

"A. Yes."

⁴⁹ Mr. Clough testified as follows on redirect examination (Tr. 179) :

"Q. Where you have four alternates such as you have here, and assuming you receive two bids on two of the alternates, would a reasonable contractor have examined more than cursorily those provisions of the bidding documents which provided to those alternates when you received those pipe bids?

"A. No, sir. If suppliers are non-responsive to alternatives, the contractor simply forgets these, for these are not practicable possibilities and he concentrates his time and his efforts on those which are practical and possible."

However, if as it appears, the appellant failed to grasp the significance of the four-alternate arrangement, there is also present in the specifications the following provision:

32. *Materials*

* * * When a separate item is not provided in the schedule for furnishing any material required to be furnished by the contractor, the cost of furnishing, hauling, storing, and handling shall be included in the bid price for the work for which the material is required.⁵⁰

This is but a restatement of the general rule of Government contract law that a contractor is not entitled to additional compensation where work is required by contract specifications or drawings, even though such work is not included in any specific payment item.⁵¹ The rationale behind the rule is that the specifications and drawings describe the work to be performed for the payment items set out in the contract. A payment item is considered merely a way of prorating payment for all the work included in the specifications and drawings and so a contractor is expected to include in his price for the payment items the compensation he expects for work not otherwise specifically within a payment item.

Considering this contractual background, we are of the opinion that the appellant acted unreasonably in concluding that it would be paid separately for line pipe encasements. We find no inconsistency or ambiguity present. We believe appellant's reliance on pars. 189 and 171c. was erroneous. But even if it had some merit, those paragraphs are at best general provisions. Par. 81, on the other hand, is a specific provision relating to payment for line pipe encasements. Where an agreement contains general and specific provisions which are in any respect inconsistent or conflicting, the provision directed to a particular matter controls over the provision which is general in its terms.⁵² Par. 81 therefore takes precedence.

However, were appellant's interpretation regarded as reasonable, the Government must still prevail. The appellant cannot escape the fact that it should have recognized the existence of a possible discrepancy in interpretation and inquired of the contracting officer pursuant to Article 2. It is not a defense that the appellant was unaware of the existence of a discrepancy. It is enough that the discrepancy existed and was so obvious that the appellant should have

⁵⁰ See, also, subparagraph as of paragraph 15 ("Quantities and Unit Prices") which provides in pertinent part: "* * * Payment at the prices agreed upon will be in full for the completed work and will cover materials * * * and all expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided."

⁵¹ *Liles Construction Company, Inc.*, ASBCA No. 11062 (December 10, 1965), 65-2 BCA par. 5270.

⁵² *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 396 (1965).

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recognized it.⁵³ The apparent inconsistency here was obvious and the appellant should have sought clarification thereof. Since the appellant failed to inquire, it assumed the risk under Article 2 and may not recover.

The claim is denied.

The Claim For Extra Work in Placing Encasement on Bends and Curves—\$26,136.52

This claim is for alleged extra work involved in placing encasement on pipe laid on certain curves and bends. Two questions are presented. The first is whether the appellant was required by the contract to encase the pipe laid on curves and bends of 400-foot radii or less. The second question is whether the appellant is entitled to be reimbursed for so-called flotation damage to its work sustained in the course of encasing on curves and bends. The parties have stipulated that appellant should recover (1) \$26,136.52 plus a reasonable profit, if only the first question is decided in its favor and (2) \$28,017.46 plus a reasonable profit, if it should prevail with respect to the flotation damage as well.⁵⁴

The appellant contends that under subparagraph k. of par. 85 pipe laid on curves and bends of 400-foot radii or less, did not have to be encased except at two specified locations. The pertinent portion of that provision reads as follows:

85. *Pretensioned Concrete Pipe*

* * * * *

"k. Curves and bends.— * * *

Where the pipe is laid on curves in accordance with the above criteria, no concrete blocking or encasement will be required at curves except from Station 92+02.47 to Station 91+23.73, and from Station 94+80.57 to Station 96+68.81. Concrete encasement shall be provided at these two locations as shown on Drawing No. 73 (662-D-1120) and payment therefor will be made for concrete in structures, furnishing and handling cement, and furnishing and placing, reinforcement bars.⁵⁵

The contracting officer denied the claim on two grounds. The first ground is that drawings 144-147 require encasement of certain classes of pretensioned concrete pipe without any distinction between pipe laid on tangents and that laid on curves. The second ground is that "encasement on curves * * * is necessary to prevent the pipe from 'kicking out' at the joints due to internal water forces in the event the

⁵³ *J. A. Jones Constr. Co. v. United States*, note 21 *supra*.

⁵⁴ Tr. 5-6.

⁵⁵ The language beginning with "at curves" was added pursuant to Supplemental Notice No. 2. Station 92+02.47 should read "90+02.47" (Tr. 325-27). Following inquiry by the appellant, the error was corrected by letter dated January 14, 1966, to the appellant (Exhibit 18). The correct station is shown on Drawing No. 73.

specified curve criteria is not followed.”⁵⁶ Also, according to the contracting officer, appellant’s interpretation is “contrary to common practice since it is well known that in pipelines, stresses at curves and bends are greater than in straight runs.”

We do not agree with the contracting officer’s conclusion. It is undeniable that encasement of pretensioned pipe is generally required in certain circumstances under the contract. This was brought out in our discussion of the previous claim, *supra*. We also believe that the Government intended to make no distinction in treatment for encasement purposes between pipe laid on tangents and pipe laid on curves. The engineering factors mentioned by the contracting officer in his decision may be significant. However, it is well settled that subjective intent cannot override the terms of a contract as written.⁵⁷

As written, subparagraph k. of par. 85 provides that where the pipe is laid on curves in accordance with certain criteria, no encasement is required except at two specified locations. At the hearing the Government stipulated that the appellant complied with the criteria referred to (Tr. 193), so that is not in issue. Under subparagraph k. once the standards specified were met, it is clear that no encasement was necessary. No further conditions or qualifications are stated. There is no ambiguity in the language. However, were we to adopt the Government’s interpretation, it would be necessary to render meaningless the term “no concrete blocking or encasement will be required,” and this we cannot do unless no other interpretation is possible.⁵⁸

The provisions of drawings 144–147 do not create an ambiguity either, when read alongside 85k. The drawings merely provide for encasement under certain conditions. They are in the nature of a general provision, referring neither to tangents nor to curves. Subparagraph k., on the other hand, states an exception. It is a specific provision relating solely to curves and bends. There is no inconsistency between them, in our opinion. If, however, a finding of inconsistency could not be avoided (which is not the case), paragraph 85k. would prevail over the drawings, inasmuch as a specific provision takes precedence over a more general provision.⁵⁹

As for the second reason the contracting officer relied on to deny this claim, there is insufficient proof in the record to sustain a finding that “in pipelines, stresses at curves and bends are greater than in straight runs” or that “encasement on curves * * * is necessary to prevent the pipe from ‘kicking out.’” There is no positive testimony or

⁵⁶ Contracting officer’s Findings of Fact and Decision, dated July 8, 1966, par. 6 (Exhibit 23).

⁵⁷ *Stanford Applied Engineering*, NASA BCA No. 101 (February 14, 1967), 67–1 BCA par. 6150. See *Monaco and Son, Inc.*, ASBCA No. 9121 (April 6, 1964), 1964 BCA par. 4179.

⁵⁸ *Power Line Erectors, Inc.*, IBCA–637–5–67 (December 18, 1968), 69–1 BCA par. 7417.

⁵⁹ *Hol-Gar Manufacturing Corp. v. United States*, note 52, *supra*.

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other evidence to support either assertion. A contractor is not required to be an engineer and it is therefore unreasonable for the Government to expect him to review all of the relatively minor engineering phases of a project (Tr. 134). Mr. Thorsky, an engineer who is assistant chief of the Bureau's Canal Branch, testified that pipeline stresses are "complex and * * * difficult to evaluate" (Tr. 427). According to Mr. Clough, formerly Dean of the University of New Mexico College of Engineering (Tr. 126), "Insofar as stresses and moments and loadings and potential failures, engineers themselves don't agree entirely on the engineering behavior of buried conduits" (Tr. 134-135). For these reasons we cannot fault the appellant if it did not make its interpretation in the light of the factors relied on by the contracting officer which are *de hors* the contract.

We therefore find that the appellant was not obliged to encase the pipe on curves and bends of 400-foot radii or less. Consequently, when it performed such encasement, at the Government's insistence, this constituted extra work for which the appellant is entitled to be compensated as the parties have stipulated.

The question that remains is whether the amount of compensation appellant receives should be restricted to \$26,136.52 plus a reasonable profit, or whether appellant should be compensated also for the damage it sustained to certain of the pipe resulting from heavy rain. Appellant's theory here is that the pipe would not have been exposed in an open trench and consequently damages by the rain had the Government not required it to be encased in the first place (Tr. 60-61, 100).

The rain occurred on the night of August 19, 1965, in the area of Station 1486 of the pipeline, at the bottom of a steep hill (Tr. 58, 265).⁶⁰ At that time the pipe lay in the trench and the trench was open in order to place the encasement. The rain caused the trench to be filled with dirt and damaged the exposed pipe. In order to correct the damage, the appellant sustained additional expenses of \$2,937.59 (appellant's Exhibit C-13). However, pursuant to its stipulation the appellant has reduced this amount and is seeking to recover only an additional \$1,880.94 (the difference between \$26,136.52 and \$28,017.46).

We are unable to sustain this aspect of appellant's claim. It is not at all clear that the damage would not have occurred had the appellant not been required to encase. Based upon the appellant's sequence of operations it appears that the damage might have occurred even if encasement was not involved; the pipe might still have been exposed at the time it rained (Tr. 350-51).

⁶⁰ The profile and alinement of the area are shown on Drawing No. 40.

In addition, there was an intervening or superseding development, viz., the heavy rainfall, which was the direct result of the damage. This is clearly an Act of God for which the Government was not responsible.⁶¹ The Government is not an insurer of contractors against acts of nature.⁶² Damage from that cause is a risk which contractors must bear.

We therefore limit appellant's recovery to \$26,136.52 plus a reasonable profit, as the parties have stipulated. The appellant urges that "10 percent per annum of the total cost represents a reasonable profit."⁶³ This is in the nature of a claim for interest, which cannot be recovered against the United States in the absence of an express provision therefor in the contract or relevant statute.⁶⁴ There is no such express provision in this contract and appellant has cited no statute authorizing payment of interest. However, we note no objection was made by the Government to the percentage requested and we regard it as reasonable under the circumstances.⁶⁵ Accordingly, we allow the appellant a profit of 10 percent of \$26,136.52, or \$2,613.65.

The claim is sustained and appellant is awarded a total of \$28,750.17.

Conclusion

Appellant's claim for the cost of encasement is denied.

Appellant's claim for extra work is sustained in the amount of \$28,750.17.

SHERMAN P. KIMBALL, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

UNITED STATES

v.

FRANK AND WANITA MELLUZZO

A-30595

Decided July 31, 1969

Mining Claims: Common Varieties of Minerals

Whether a deposit of sand, gravel, or stone within a mining claim is a common variety no longer locatable under the mining laws since the act of July 23,

⁶¹ *Amino Brothers Co. v. United States*, 178 Ct. Cl. 515 (1967), *cert. den.* 389 U.S. 846 (1967).

⁶² *Banks Constr. Co. v. United States*, 176 Ct. Cl. 1302 (1966).

⁶³ Appellant's Post-Hearing Brief, p. 54.

⁶⁴ *Flora Construction Company*, note 14, *supra*, 66 I.D. at 320, 59-2 BCA at 10,440. *Accord: Eastern Service Management Company v. United States*, 363 F. 2d 729 (4th Cir. 1966). See, generally, Ackerman, "Payment of Interest by the Government on Amounts Owing Under Government Contracts," 19 *Business Lawyer* 527 (1964).

⁶⁵ *Cf. Norair Engineering Corporation*, ASBCA No. 10856 (September 29, 1967), 67-2 BCA par. 6619; *Consolidated Contractors*, ASBCA Nos. 9133 and 9165 (July 17, 1964), 1964 BCA par. 4327.

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1955, or is still locatable as an uncommon variety depends on whether it has a unique property and whether the unique property gives it a special and distinct value.

Mining Claims: Common Varieties of Minerals

The fact that a deposit of sand and gravel has a location closer to the market than others does not make it an "uncommon variety" as location is not a unique property inherent in the deposit but only an extrinsic factor.

Mining Claims: Common Varieties of Minerals

A deposit of sand and gravel which has physical characteristics that surpass those of some operating sand and gravel deposits in the marketing area but which is not shown to be significantly superior in physical properties to the predominant commercial sand and gravel deposits in the area is not an uncommon variety.

Mining Claims: Common Varieties of Minerals

A mining claim located for deposits of sand, stone and gravel prior to the act of July 23, 1955, which are common varieties of such materials, is invalid where it is not shown that the material could have been marketed at a profit prior to the date of the statute.

Administrative Practice—Administrative Procedure Act: Adjudication

The procedures followed by the Department of the Interior in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the Administrative Procedure Act and its requirements of separation of function in decision making and do not deny due process.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frank and Wanita Melluzzo have appealed to the Secretary of the Interior from a decision dated February 11, 1966, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner declaring the Rena Nos. 1 to 6 placer mining claims in secs. 3 and 4, T. 4 N., R. 3 E., G.S.R. Meridian, Maricopa County, Arizona, to be null and void.

The six claims are situated about 15 to 20 miles north of Phoenix on Cave Creek immediately south of the Cave Creek Dam (Tr. 10; Ex. 3, 9).¹ They were located for deposits of sand, gravel, water-washed rounded basaltic boulders, and field stones, which lie in a wash approximately 600 feet wide that traverses all of the contested claims (Tr. 445, 57-58). While there is some dispute as to the quality of the sand and gravel deposit, there was no question but that there is a sufficient quantity of it suitable for use as concrete aggregate for the construction of roads and highways (Tr. 59, 60). The boulders and field stones from the claims offer a variety of colors, shapes, sizes and surfaces and are

¹ These and similar references are to the pages of the transcript of the official report of proceedings before the hearing examiner and to the exhibits offered.

used as building stones in the construction of walls, patios, and fireplaces, and for decorative landscaping (Tr. 446, 448, 449, 452-456). The stone is gathered from the claims and transported to the Melluzzo stone yard where it is offered for sale along with stone gathered from other claims.

The hearing examiner related the history of the Melluzzo stone operation in some detail:

Briefly, the background for the Melluzzo stone operation began many years ago. Over an extended period of time Frank Melluzzo and his brother Dino hunted in the mountains throughout Maricopa County, and while doing so they often picked up from one to a jeep-load of rock containing various attractive colors. The rocks were taken home and kept in the yard in front of Dino Melluzzo's house. Occasionally, people passing by the yard would buy small quantities of the rock from Dino, his wife, the children, or whichever member of the Melluzzo family happened to be home. In 1953 or 1954 Frank Melluzzo recognized the possibilities in the stone business and started actively collecting stone. Thus, over a period of years a hobby became an avocation and then developed into a vocation.

During this early period and up to and including 1956, Frank Melluzzo was in the window cleaning business and had a house and store rental business in and near Phoenix. By 1956 he had become more and more occupied with stone and gradually turned the window cleaning business over to his brother. In 1954 and 1955 the Melluzzo brothers, a brother-in-law, and several employees of the window cleaning business worked on a part-time basis collecting stone. In the fall of 1955 two quarrymen were employed solely for the collection of stone.

Prior to July 23, 1955, Frank Melluzzo and the members of his family allegedly located 8 or 9 groups of placer claims comprising approximately 50 individual claims containing from 20 to 160 acres each in Maricopa County for field stone, slate, or other building material including sand and gravel. The claims for which location notices have been recorded in Maricopa County are the Rena Nos. 1 through 6, the Nita Jean Nos. 1 through 4, the Enterprise groups of 18 claims, the White Shale group with 8 claims, the P and M Enterprise group with 6 claims, the Sunburnt group with 6 claims, the Concetta, and the Dino S (Exh. 37). In addition Mr. Melluzzo stated that there are an unknown number of claims which have not yet been recorded. At the hearing he could not remember the number or the names of the unrecorded claims. This list does not include the claims purchased by him such as the Arizona Placer claim nor does it include claims outside of Maricopa County such as the claims in Northern Arizona which were located for flagstone. And it does not include 900 acres of lode claims known as the El Rame group, part of which embrace the Rena claims.

In the early part of the 1950's most, if not all, of the stone used in Arizona for construction purposes was flagstone. By 1957 the trend changed and the rough, irregular field stone became more popular. The contestee testified that walls, fireplaces, etc., are now being constructed with stone from many different locations or claims to give a variegated appearance. This testimony is amply supported by the colored photographs received in evidence at the hearing. These photographs show the uses of the field stone both before and after July 1955.

In the operation of his stone business Mr. Melluzzo sends employees out to different groups of claims with instructions to bring back a volume of stone. The stone is picked off the ground in most cases and is then delivered to the stone yard which is used both for storage and display. Customers go to the yard and select the colors they want and order the stone on a ton or yardage basis.

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Many contractors and stone masons who are familiar with the product place their orders by telephone. Some of the stone is delivered by the company to the construction site and some stone is sold at the yard. On the larger jobs the stone is delivered directly to the construction site from the various claims. Mr. Melluzzo testified that the product sold contains many colors and that each color comes from a different claim or area. He stated that the business is possible only because he has many claims with a wide variety of colors. Some claims contain more than one color of stone but no one color can be sold by itself.

Mr. Melluzzo does not keep records of production by individual claims and until quite recently he did not keep records of total production. He testified that there was never any apparent reason for keeping such records. At this time he can only guess how much stone came from each claim in any one year. This is also true of the income from the individual claims, particularly in the early years during the hobby and avocation period when every member of the family was selling the stone.

* * * * *

Over the past ten years in which Mr. Melluzzo has been mining stone he has had many contacts with the Bureau of Land Management through patent applications, previous contest hearings, a contest hearing held after this case was heard, and through the information counter at the Land Office. His patented claims include the Dino S., on which he built his attractive home.

The previous hearings involving Mr. Melluzzo which were referred to at the present hearing were Contest No. 9946, *Melluzzo v. Call* heard on February 14, 1956, which involved the Nita Jean group, and Contest No. 9866, *United States v. Melluzzo*, heard on April 4, 1958, which involved the Arizona Placer claim. The subsequent hearings, Contest 10549, *United States v. Melluzzo*, held on November 13, 1963, involved part of the El Rame lode group, and Contest Nos. 10591, 10592, 10593, and 10594 which were held as a combined hearing and started on May 5, 1964. These latter cases involved two Nita Jean claims, the Concetta and the Enterprise group. The information for this background summary has been liberally extracted from the transcripts in the various hearings, from the patent application for the Dino S., and from decisions of the Bureau and the Department resulting from hearings.

The validity of the claims was challenged in a contest complaint filed on March 26, 1963, on the grounds that:

1. The Rena Nos. 1, 2, 3, 4, 5, and 6, placer mining claims are for common varieties of minerals affected by Public Law 167 (act of July 23, 1955—84th Congress; 69 Stat. 367; 30 U.S.C., sec. 601).²
2. These claims were not located until after July 23, 1955, the effective date of Public Law 167, supra.
3. There was no validating discovery of mineral as required by the United States mining law within the limits of the Rena * * * placer mining claims.

² Section 3 of the act of July 23, 1955, as amended, provides:

"No deposit of common varieties of sand, stone, gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: * * *. 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it a distinct and special value * * *."

The hearing examiner held that the sand, gravel and stone were common varieties of sand, gravel and stone and were excluded from location by the act of July 23, 1955, *supra*. This being so, for the claims to be locatable, he stated, the claimant must establish the marketability of the materials before July 23, 1955. He then analyzed at length and in detail the evidence in this and the other proceedings involving these and other claims of the contestees and the sand, gravel and stone markets in the Phoenix area. He concluded that the evidence did not establish that "any particular 10-acre subdivision within the group of claims was valuable for its mineral content or that the materials on the claims could have been profitably sold in a market for which there were many other more readily available deposits prior to July 23, 1955." Finally he determined that the Rena placer claims were not located in December 1954 as the contestees claimed and, in fact, were not located prior to the effective date of the act of July 23, 1955.

On appeal, the Chief, Office of Appeals and Hearings, affirmed. He held that the mineral materials in the claims are common varieties, that the contestees had not established that the claims were located prior to July 23, 1955, that claims located for common varieties of sand, gravel and stone after that date are null and void, and that they had also failed to establish that the sand, gravel and building stone from the claims were marketable prior to July 23, 1955. He also rejected appellants' contention that the Department's hearing procedure was in violation of section 5 of the Administrative Procedure Act, 60 Stat. 239, now 5 U.S.C. sec. 554 (Supp. IV, 1969), because the hearing examiner was under the control of the administrative bureau that initiated the mining contest.³ Finally he found nothing in the hearing examiner's reference to other mining contests in which the Melluzzos were parties that amounted to a denial of due process.

On appeal, the Melluzzos contend that the claims were located prior to July 23, 1955, that a market existed prior to July 23, 1955, for the materials produced from the claims, that the materials on the claims are of special and distinct value, and that they have not been accorded due process.

The principles controlling the disposition of mining claims located for sand, gravel and building stone are well established. As we have seen, the act of July 23, 1955, *supra*, removed "common varieties" of such materials from location under the mining laws. Thus if the materials on the claims are common varieties, the appellants in order to

³ Former section 5 provided in part:

"The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended or initial decision * * *. * * * nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * * except as witness or counsel in public proceedings."

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satisfy the requirement of discovery must show that as of July 23, 1955, the deposits could have been extracted, removed, and marketed at a profit. Marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the material, that is, a demand that existed when the deposit was subject to mining location. *United States v. Coleman*, 390 U.S. 599 (1968); *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, 75 I.D. 300 (1968).

If any of the deposits is of an uncommon variety of sand, stone, or gravel, then it remains subject to mining location and the date of discovery can be after July 23, 1955. Whether a deposit is or is not a common variety, there must be a discovery at a time when the land in the claim is open to location and the claimant must be able to demonstrate as a present fact that the claim is valuable for mining purposes. *United States v. Warren E. Wurts and James E. Harmon*, 76 I.D. 6 (1969).

If there is a deposit of an uncommon variety of sand, gravel, or stone on the claims which meets the other requirements of the mining laws, then the claims are valid and the other issues in the case will be rendered moot. We will examine this aspect of the appeal first.

The appellants allege that the superior qualities of the sand and gravel are "gradation, absence of plastic fines, alkali reactivity, abrasion, soundness and asphalt mix design." They also contend that the gravel from the Rena claims alone of all the gravel north of Northern Avenue, the line beyond which they say hauling of gravel from the Salt River, the major source of supply in the Phoenix area, becomes uneconomical, is usable without costly additives.

The mining claims, as we have seen, lie north of Phoenix, and are now in an area in which there is a market for sand and gravel (Tr. 50, 344, 621, 650). The sand and gravel from the claims is used for the same purposes as other sand and gravel deposits, that is, for the construction of roads and other building purposes.

The hearing examiner held that the sand and gravel deposit is a common variety, citing *United States v. Basich*, A-30017 (September 23, 1964):

* * * The Department has consistently held that materials of a superior quality which can be produced advantageously but which are used only for the same purposes as other less desirable deposits of the same materials are common varieties of material and are not locatable under the mining laws since these advantages do not give them a distinct and special value.

The Bureau of Land Management affirmed on the same ground, stating:

The sand and gravel deposit is of suitable quality for use as concrete aggregate or mineral aggregate for the construction of roads. The evidence shows there are

other sources of the material closer to the metropolitan area. Sand and gravel suitable for construction purposes, free from deleterious substances, and having proportions of hardness, soundness, stability, favorable gradation, non-reactivity, hydrophilia, and non-plasticity to meet construction specifications without expensive processing, but used only for the same purposes as other widely available, but less desirable deposits of sand and gravel, are common varieties of sand and gravel and not locatable under the mining laws since these facts do not give them a special, distinct value. See *United States v. J. R. Henderson*, 68 I.D. 26 (1961).

In a recent case the Department reviewed the cases it had decided which were concerned with the question whether building stone was a common or uncommon variety of stone and concluded:

It must be conceded that the language used in some of the Department's decisions on common varieties could lead to the conclusion that the Department would hold to be a common variety any mineral deposit that was used for the same purposes as deposits of admittedly common varieties of the same mineral. See the *Ligier*, *Melluzzo*, and *McClarty* cases, also *United States v. J. R. Henderson*, *supra*; *United States v. J. R. Cardwell and Frances H. Smart*, A-29819 (March 11, 1964); *United States v. R. R. Henster, Sr., et al.*, A-29973 (May 14, 1964); *United States v. L. N. Basich*, A-30017 (September 23, 1964). *United States v. U.S. Minerals Development Corporation*, 75 I.D. 127, 133 (1969).

It then went on to discuss the criteria pertinent to determining whether or not a material is a "common variety:"

In short, the Department interprets the 1955 act as requiring an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.

The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.

* * * * *

When the same classes of minerals used for the same purposes are being compared, about the only practical factor for determining whether one deposit of material has a special and distinct value because of some property is to ascertain

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the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold. *Id.*, 134, 135.

These criteria were generally approved in the recent case of *McClarty v. Secretary of Interior*, 408 F. 2d 907 (9th Cir. 1969).⁴ Since they are broader than the standard relied on by the hearing examiner and by the Office of Appeals and Hearings, the evidence must be re-evaluated in terms of the *Minerals Development* criteria.

The first criterion is that the deposit of material must have a unique property. Only if it has a unique property is it necessary to consider the second criterion, that the unique property must give the deposit a distinct and special value. We consider first then whether the Rena claims contain deposits of materials which have a unique property.

As we have noted, appellants strongly urge that the sand and gravel on the claims is unique because it is superior in several requisite properties: gradation, absence of plastic fines (non-plasticity), alkali reactivity, resistance to abrasion, soundness, and suitability for asphalt mix. These, however, are properties which must be met and are met to certain minimum standards by all sand and gravel that is used commercially. It was therefore incumbent upon appellants to show that the Rena sand and gravel is so superior to other sand and gravel that it can be claimed to be unique. This essentially is a matter of comparison and the obvious question, of course, is what sand and gravel the Rena sand and gravel is to be compared with. The easy answer is that it is to be compared with common varieties of sand and gravel, but the difficulty is in determining what is a common variety.

The difficulty in making this determination is that it inevitably leads to the question as to what area is to be considered in determining what is a common variety. This is strikingly pointed up by contestees' exhibit R, which shows the occurrence of sand and gravel sources in the Phoenix metropolitan area. This map shows that by far the largest source is the bed of the Salt River, which runs parallel to and approximately 9 miles south of Northern Avenue, an east-west street. Two other main sources are the Agua Fria River and the New River, which run in a north-south direction across Northern Avenue in the western part of Phoenix. Roughly parallel to the Agua Fria River and the New River and 8 to 10 miles to the east is Cave Creek, the southern terminus of which for our purposes is about 3 miles above Northern Avenue. From that point Cave Creek runs approximately 10 miles in

⁴ The court did question the Department's conclusion that where a material claimed to be an uncommon variety is used only for the same purposes as a common variety the only reasonably practical criterion for determining whether the alleged uncommon variety has special and distinct value is whether it commands a higher price in the market place. The court suggested that this "cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit." 408 F.2d at 909. The *McClarty* case concerned a deposit of building stone which had the unique property of a high percentage of stone naturally fractured into regular shapes requiring little or no fabrication for laying up in walls, etc.

a north-northeast direction to the Cave Creek Dam where the Rena claims are situated. The Rena claims lie 12 miles north of Northern Avenue and approximately 20 miles due north of the principal sand and gravel operations in the Salt River. Near the southern terminus of Cave Creek, about 5 miles north of Northern Avenue, are three pits, on 19th Avenue, held by Union, Allstate, and the city of Phoenix.

Appellants at the hearing predominantly compared the Rena sand and gravel with the deposits lying north of Northern Avenue. This excluded the major deposits in the Salt River. The reason given for using Northern Avenue as a limit was that it is the general practice of Salt River producers to charge a bonus of 6 to 10 cents a ton mile for haulage beyond Northern Avenue (Tr. 338-339). The significance of this is not brought out by appellants. The implication seems to be that Salt River material is not competitive with Rena material in the market area north of Northern Avenue and therefore should not be compared with it, but there is no evidence to this effect. On the contrary the fact that Salt River producers do have a system of charges for deliveries north of Northern Avenue indicates that they sell material in that area and are competitive with the Rena material.

Implicit in appellants' attempt to limit the area in which the sand and gravel deposits are to be compared is the assumption that a deposit can be unique within the contemplation of the common varieties statute merely because of its location. In *United States v. Mt. Pinos Development Corp.*, 75 I.D. 320 (1968), the Department rejected location as a factor for determining whether or not a deposit of sand and gravel is an uncommon variety. The Department pointed out that location is a significant element in determining whether a deposit of sand and gravel is marketable at a profit and thus satisfies the requirement of a discovery but that the test of discovery is not the same as the test of an uncommon variety.

The act of July 23, 1955, *supra*, states that "common varieties" do not include deposits of sand, gravel, etc. which are valuable "because the *deposit has some property* giving it a distinct and special value" (italics added). This suggests that a special physical property must inhere in the deposit itself and that factors extrinsic to the deposit are not to be determinative. Location is such an extrinsic factor. We are not aware of any sound basis for gleanings a Congressional intent to make a deposit an uncommon or common variety depending on whether it is located within or outside of a market area or even whether it is located in a particular part of a market area.

For these reasons we conclude that the Rena sand and gravel is to be compared not only with the sand and gravel deposits north of Northern Avenue, but also with the large deposits in the Salt River, particularly since only about 15 percent of the concrete aggregate market lies north of Northern Avenue (Tr. 344). With this ground

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rule established, let us see whether the appellants have shown by a preponderance of the evidence (*Foster v. Seaton, supra*) that the Rena sand and gravel has the unique properties claimed by the appellants.

Appellant's case in this respect rests almost entirely upon the testimony of Michael D. Obele, a soils and material engineer formerly with the Arizona Testing Laboratories, a private organization. Obele was in charge of testing materials and said that the company had tested samples from almost every pit in the Salt River Valley at one time or another (Tr. 337). He described the properties for which sand and gravel is tested—gradation, soundness, etc. (Tr. 329-337). One of the company's lab technicians took one sample each from the Rena Nos. 3, 4, and 6 to a depth of 16 feet (Tr. 346-348). The company first ran only a sieve analysis to determine gradation of the material and the plasticity of the fines (Tr. 362; Ex. S). Obele testified that, with only a screening to exclude material larger than 1½ inches and with no washing, the material in its natural condition met the gradation requirements specified for concrete aggregate by the American Society for Testing Materials (ASTM). (Tr. 363-364; Ex. T). The sieve analysis also showed the material to be non-plastic (Ex. S, pp. 4-6).

Further tests were then run but only on the sample from the Rena No. 6 because the material appeared to be uniform. The sample was tested for reactivity, soundness, and resistance to abrasion. The test showed that the material easily met specifications for soundness and abrasion and was non-reactive, thus permitting its use with any type of Portland cement (Tr. 365-371; Ex. S, p. 10). The test report concluded that the Rena material was an excellent concrete aggregate "if crushed, graded and stockpiled properly" (Ex. S., p. 10).

Although Obele was generally asked by contestees to compare the Rena material with other material from sources north of Northern Avenue, he was asked by them and by the contestant to make some comparisons with the Salt River material. On gradation he said that Salt River had more large boulders than the Rena claims; consequently more crushing would be required "if you wanted to use them" (Tr. 375, 404). On reactivity he said that "sometimes" there is reactivity with the Salt River aggregate and stripping agents are required in making asphaltic concrete, which is not true of the Rena material (Tr. 376). The latter is superior to Salt River material because it has more of the dark basic rock which has a better affinity for asphalt (Tr. 397-398). However, Obele later stated that the Rena material is only "a bit less reactive" than that from Salt River and that "reactivity is not a problem in this area because we have an excellent low [sic] supply of low alkali cement." The Rena material

will have "another separate and distinct value" because of its lower reactivity only "should the occasion ever arise for cement from another area, specialized cement" (Tr. 404).

Obele also testified that the Rena material was superior to the Salt River material in that it did not require washing (Tr. 397). However, the test report had stated that washing of the sand "may become necessary, although from our test data it would seem unnecessary" (Ex. S., p. 11). Obele indicated that the statement was cautionary since "it is so unusual that you can produce concrete aggregate without washing." He believed no washing was necessary to the depth of the samples, 16 feet (Tr. 383-384). He said that washing was "generally" needed for the Salt River material, but that he supposed there were places where no washing was necessary. In fact, he was only sure that one operator was washing (Tr. 385). Again, though, when asked whether the Rena material was superior with respect to fines and plasticity over the Salt River material, he replied that it was, in general, because there is "a great deal of washing done at the Salt River" and also there is a lot of larger rock (Tr. 405).

As to soundness Obele testified that the Rena material was comparable to the Salt River aggregate (Tr. 369). As for resistance to abrasion the Rena aggregate "would be perhaps just a bit tougher than Salt River, a percent or two" (Tr. 370).

An evaluation of Obele's testimony indicates that he believed the Rena material to be superior to the Salt River material in three respects, gradation, cleanliness, and reactivity, but only *generally* so. Thus he did not say that *all* Salt River aggregate had to be washed but, at the most, only "a great deal." On reactivity he indicated that the Salt River material was only "a bit" more reactive but that reactivity was not a present problem anyway. On gradation he was concerned only with the presence of more Salt River boulders, presumably over 1½ inches in size, which would have to be crushed *if they were to be used*. The Rena claims also have boulders over 1½ inches in size which have to be screened out and crushed if they are to be used.

The degree of superiority of Rena materials in these respects is hardly indicated to be of such magnitude as to warrant the conclusion that the Rena deposits possess unique properties which would set them apart as uncommon varieties. Perhaps the proper view to be given to Obele's testimony is to be found in his statement that "*no* concrete aggregate is a common variety aggregate" and that "*all* the pits along the Salt River and the other stream beds that we have talked about [Agua Fria, New River, etc.] are *not* common varieties" (Tr. 402; italics added). Obele seemed to consider as a common variety in the area only the ordinary silt or alluvium to be found everywhere (Tr. 341, 373-375).

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The principal expert witness for the Government was Charles H. McDonald, a highway engineer specializing in materials employed by the city of Phoenix since August 1963 (Tr. 595). Prior to that time and from 1930 he was with the Bureau of Public Roads, principally as a materials specialist but also as a construction engineer. He worked over the entire State but principally in the Phoenix area where he was in charge of materials going into all Federal aid highway projects (Tr. 596, 622-623).

McDonald testified as to tests made of two samples from stockpiles of sand and gravel on the Rena No. 4 (Tr. 600-601). The tests showed plasticity indexes of 4 and 8, determined by the wet method (Tr. 617; Ex. 24). He criticized the non-plasticity result of Obele's test (Ex. S.) for the reason that it was made by the dry method (Tr. 617). McDonald stated that it was a characteristic of all pits in southern Arizona—he had seen most of them—that the upper material is non-plastic but that plasticity increases at depth. This was true of Salt River. He had examined some of the lower layer in the pit on the Rena claims and noticed the plasticity was increasing (Tr. 610-611, 647-648). The only difference from one deposit to another was the depth of the non-plastic material. The clean materials were much deeper in the Salt River than in Cave Creek because the Salt River was a considerably larger stream. Even in Salt River, however, clay impregnated material would be encountered at 50 feet (Tr. 614-616).

Questioned as to the processing required for the Rena material, McDonald criticized Obele's test report (Ex. S.). He said that for concrete sand the maximum limit on sand passing the No. 200 screen is 5 percent and that Obele's report showed only 3, 4, and 4 percent, respectively, of the three samples passing the No. 200 screen. However, McDonald said, this was based on a composite sample whereas if the material was split between coarse and fine sizes, as is done in the normal production of concrete aggregate, the percentage of fine sand passing the No. 200 screen would double, going to 6 and 8 percent. The only practical way of removing the excess No. 200 material is to wash it, which is practiced generally in the Salt River "which is normally a cleaner material than Cave Creek." McDonald also said that in actual production, because of islands of silt deposits in a stream wash, general experience showed that the material produced would show anywhere from 2 to 10 percent more passing the No. 200 screen than tests would show. For that reason, in his opinion, production on a large scale would have to be washed to meet specifications (Tr. 618-620).

McDonald testified that it is quite rare to find a deposit which requires no crushing or screening and which would meet specifications just as extracted. He knew one at Mesquite Creek but Salt River and Cave Creek could not be used in that fashion (Tr. 657). He said

that the upper layers of the Rena deposit would be easier to work than the Salt River material and that the deposit would certainly be valuable "if it were as deep as the Salt River" (Tr. 657-658). He also said that if he had no outside knowledge of materials and had only the Obele test report before him, and a wet test showed nonplasticity, he would say that the material was good but not special (Tr. 661-662).

Obele testified on rebuttal that he ran a wet plasticity test on a stockpile sample and that it showed nonplasticity (Tr. 684).

McDonald's testimony and his test report, we believe, substantially controverts Obele's testimony and test report in critical respects, namely, whether the Rena sand and gravel is unique because it requires no washing and because it is nonplastic. The McDonald testimony, in our opinion, is entitled to as much weight as the Obele testimony, if not more, because it is based upon experience and wide observation of sand and gravel deposits all over southern Arizona and particularly in the Phoenix area. Obele's testimony was much more confined to laboratory tests. Even so, Obele's testimony showed no more than that there were minor variances in properties between the Rena sand and gravel and the Salt River deposits, and Obele testified that the 5 largest producers of sand and gravel in the Phoenix area had pits in the Salt River which presumably supplied most of the 85 percent of the market area existing below Northern Avenue (Tr. 344, 386-387).

We conclude therefore that the appellants have fallen far short of showing by a preponderance of evidence that the sand and gravel deposits in the Rena claims have unique properties which would set them apart from the common varieties of sand and gravel in the Phoenix area as exemplified by the extensive deposits in the Salt River. The first criterion necessary for establishing an uncommon variety of sand and gravel not having been established, the question of satisfying the second criterion, whether the unique property gives a special and distinct value to the deposit, is not reached.

We turn now to a consideration of whether the building stone or decorative field stone on the Rena claims is an uncommon variety. The stone is of two general types, one a rounded basalt ("nigger head") and the other a greenstone. As we have seen, the stone is used for decorative purposes in walls, fireplaces, and other structures and in landscaping.

As for the rounded basalt, appellants simply state in their present appeal that it does not commonly occur in the Phoenix area because it is rounded by tumbling downstream for long distances and there are few streams of such length. However, this is contradicted by testimony of McDonald that the rounded basalt is "very common" in the

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Phoenix area and "extremely common" in the Salt River (Tr. 675-679) and is plentiful in New River (Tr. 680).

As for the greenstone appellants assert only that the "area of these claims" is the only source of greenstone shown on the geological map of Maricopa County and is the only source close to the Phoenix metropolitan area. The geologic map (Ex. 19) shows that the claims are situated in a greenstone area approximately 6 miles long by $1\frac{1}{2}$ to 2 miles wide. The map also shows a smaller greenstone area, approximately 3 miles long and $\frac{1}{3}$ to 1 mile wide, about $1\frac{1}{2}$ miles north of the first area. The map shows 3 smaller areas of greenstone south of the claims area, that is, closer to Phoenix by as much as $2\frac{1}{2}$ miles. According to the map, then, there are over 7000 acres designated as greenstone.⁵

There is nothing in the record to show that the greenstone is rarer than the other decorative field stone which is used in the Phoenix area. It is apparently not used by itself but is mixed with a variety of other colored stone from other claims held by the appellants.

We find little to distinguish this case from the *Coleman* case, *supra*, decided by the Supreme Court. Coleman had 18 placer claims, comprising 720 acres, which contained decorative building stone. He said, like the appellants here, that he needed all the claims to provide a complete range of colors for ornamental use. The Department held that the stone was a common variety in view of the fact that similar stone occurred in the area of 28,000 acres of which the claims were a part. *United States v. Alfred Coleman*, A-28557 (March 27, 1962).

Before the Supreme Court Coleman argued that his stone was an uncommon variety. He stressed that even the Government witnesses admitted that the stone "ranged in colors from gray, buff, reds, pinks and rusty colored which grade into black * * * and that it, for many years, had been used for fireplaces, rock walls, and, to a limited extent, for veneer-type construction" (Coleman brief, p. 27). Coleman submitted as part of the record three color photographs (Exhibits P, Q, and R) showing the use of his vari-colored stone in the walls and columns of a commercial building. The court, however, agreed with the Department that the stone was a common variety.

Appellants' stone is not different from Coleman's stone. Both are used for the same purposes and Coleman's color photographs could have been photographs used in this case. Appellant's photographic exhibits show construction uses identical to Coleman's. There is no contention that decorative building stone is rare in the Phoenix area.

⁵ The map also shows far more extensive areas in the county which are designated as "schist." The legend on the map states that "schist" "locally includes diorite, rhyolite, and greenstone." A witness for the contestees indicated that that greenstone might not have the same color variations but his testimony was not at all clear on what the distinction might be (Tr. 269-271).

Melluzzo himself has located 56 placer claims (Ex. 37) and has 8 or 9 quarries (Tr. 476, 551). There are several other stone suppliers in the area (Tr. 427) who presumably have their own sources of supply.

Since none of the materials on the Rena claims is an uncommon variety, a location based on any of them is valid only if the material was marketable at a profit prior to July 23, 1955. *United States v. Coleman, supra; Foster v. Seaton, supra.*

The evidence is overwhelming that there was no market for the sand and gravel from the claims prior to July 23, 1955. McDonald testified that there were closer sources which supplied what demand there was in the area, that it would have been economic folly to open a pit at the Rena locations except for some local road building in the immediate area, and that a market did not develop until the 1960's (Tr. 620-621). Another Government witness placed the current main market at about an equal distance from the Rena claims and the Salt River deposits and said the New River deposits are closest to the northern market (Tr. 63-64). These other deposits have almost all been in operation for over 20 years and there has never been a shortage (Tr. 64). Obele testified to Union's operating pit on 19th Avenue, 4 miles north of Northern Avenue and 6 miles south of the Rena claims (Tr. 343-344). He also referred to at least 8 plants on the Agua Fria and 2 on New River (Tr. 389). All of these pits produce materials which, with varying degrees of processing, can be used as concrete aggregate (Tr. 383, 390). Obele said the market north and east of Phoenix (toward the Rena claims) developed significantly in the last 4 years; he had no knowledge of the situation prior to 1959 (Tr. 390).

The Rena material was first developed on a large scale between March and December 1962 by the Allstate Materials Company (Tr. 27, 31, 79), 7 years after the critical date. 20,000 to 30,000 tons were removed from the pit which was on the Rena No. 4 (Tr. 88). The only evidence as to any development prior to July 23, 1955, was Melluzzo's uncertain testimony that 600 tons of sand and gravel, mostly sand, were sold commencing in December 1954 (Tr. 467-468, 699). He used about 100 tons for houses he was building and Shorty Rutter took 500 tons for which he paid \$.25 per yard, he thought (Tr. 700, 721-724). This very limited disposal of sand and gravel, apparently for limited local use,⁶ falls short of establishing that the Rena sand and gravel could have been extracted and sold at a profit as of July 23, 1955.⁷ On the contrary, the market was adequately supplied by much closer regularly operated commercial pits.

⁶ The use of at least some of the sand and gravel is indicated by the testimony of Carlo Incardone, a Melluzzo employee from November 1954 to sometime in 1955, that in loading sand and gravel "we used to shovel everything that came along, grass, weeds and all" (Tr. 420). This type of material, without processing, could hardly have been sold in the concrete aggregate market.

⁷ As is shortly indicated in the extract from the hearing examiner's decision, the sale to Rutter might have been for as little as \$92.55.

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As to the marketability of the building stone prior to July 23, 1955, the hearing examiner carefully and thoroughly reviewed the testimony in this and other hearings in which Melluzzo presented evidence about his building stone operation. The hearing examiner stated:

Marketability

On the subject of marketability there were a number of witnesses who testified on behalf of the contestant. Lewis S. Zentner, a mining engineer employed by the Bureau of Land Management, stated that he made an investigation in the latter part of 1962 to determine the potential market for sand, gravel, and stone from the claims prior to July 1955. He interviewed several people in the stone business, apparently competitors of Mr. Melluzzo, and was informed that there was no market for the sand and gravel from the Rena claims in 1955.

Luther S. Clemmer, another mining engineer employed by the Bureau of Land Management, was in the area of the claims on 8 separate occasions in 1959 to determine the mineral character of the land in connection with small tract applications. At that time he saw no gravel operation and he was not aware that there were placer claims in the area.

Robert Krug, a weekend prospector, testified that in 1953 he was living in a house owned by Mr. Melluzzo's father and that Mr. Melluzzo was in the window cleaning business but was doing some mining. Mr. Melluzzo appeared to him to be fascinated and enthusiastic about mining. In the latter part of 1953 Mr. Krug moved to California but returned to Phoenix several years later. In 1956, 1957 and 1958 he prospected the area both above and below the Cave Creek Dam. While prospecting he looked for mining claim monuments in part to determine the land description but never found any in the area.

Jack Clarke, another weekend prospector, was in the Cave Creek dam area several times in 1956 or 1957 prospecting for placer gold. During this period there were no fresh diggings below the dam and nothing to suggest to him that there were placer claims in the area.

Charles H. McDonald, a highway engineer, testified that he was a material specialist employed by the Bureau of Public Roads in Arizona with headquarters in Phoenix during the period from 1930 to 1963. He expressed the opinion that there was no market for the sand and gravel in the Rena area prior to 1956 because there were sources of supply much closer to the potential demand. He stated that a person would be committing "an economic folly" (Tr. 621) to open a pit in the area prior to 1956, except for some local road building in the immediate area. He concluded that a market did develop for the material on the claims in the 1960's.

There were also a number of witnesses who testified for the contestees on this subject. Edward H. Barlow, a quarryman employed by the Melluzzo Stone Co., testified that he was first on the claims in January 1955, and that he gathered stone up and down the wash on both sides of the dam. He estimated that he removed several truck loads of stone and several loads of gravel from the claims during the period between January and July 1955.

Ross Palmer testified that he saw Mr. Melluzzo in the area during the first part of July 1955, and saw him haul a truck load of rock from the claims. Mr. Palmer remembered the date because he was first employed as a constable on July 1, 1955, and he went to the area immediately after being employed to practice pistol shooting.

Carlo Incardone, a plumber, testified that he moved from Chicago to Phoenix in 1953, and was first employed in the Phoenix area by Mr. Melluzzo. He was

with Mr. Melluzzo for approximately a year starting in November 1954. Originally he was employed in connection with the window business but later he collected stone from various Melluzzo claims. He recalled being on the Rena group in December 1954, and January 1955. During these two months he picked up a number of truck loads of material. One week in January he picked up four loads. Some gravel was secured and delivered to one of the Melluzzo houses.

Frank Melluzzo testified in his own behalf and stated that he located the Rena group in December 1954, and that during this month he removed 60 tons of sand and gravel for use in the foundation of two of his own houses he was building at 755 and 1515 East Hatcher Road (Tr. 700). On direct examination he estimated that between 100 to 150 tons of stone at \$9.00 a ton had been sold, and that 600 tons of sand and gravel had been removed from the claims in 1955 prior to July 23, 1955 (Tr. 466). Later, on cross examination, he stated that he had no record of production or sales (Tr. 689) and could not even guess how much material was removed from any one of his numerous claims (Tr. 541). Still later he went back to the figures of 100-500 tons of stone and 600 tons of sand and gravel and stated that an equal tonnage came from each claim (Tr. 698).

Of this sand and gravel Mr. Melluzzo stated that 100 tons were used by members of the family and 500 tons were sold to Shorty Rutter at 25 cents a yard, which amounted to \$250 or \$300 (Tr. 723). (Architrectural Graphic Standards by Ramsey and Sleeper, 5th Ed., gives the average weight of sand and gravel as 2700 lbs. per cubic yard. Thus, if 500 tons were sold to Mr. Rutter at 25 cents a yard it would amount to 370 yards or \$92.55. If the sale was for 25 cents a ton rather than a yard the sale price would be \$125.) In 1962 at a time when there was a much greater demand Mr. Melluzzo was selling the sand and gravel for 10 cents a ton (Tr. 482).

Numerous photographs were received in evidence at the hearing to show the uses of the stone from the Melluzzo claims both before and after July 23, 1955. Mr. Melluzzo stated that the "W" series 1 through 5 were pictures of walls and a culvert built with his stones, some of which came from the Rena group prior to July 23, 1955. Exhibits W-3, W-4, and W-5 are photographs of walls all built in the same neighborhood. He stated that the house shown on Exhibit W-4 is owned by Robert Wurzburger and that contestant's Exhibit 26 is a copy of a receipted bill for the stone sold to Mr. Wurzburger. This bill is dated August 1, 1954.

Another wall in the neighborhood which Mr. Melluzzo stated was built with his stone, part of which came from the Rena group, is owned by W. J. Caruthers. He testified that the Skyriders Hotel (Exh. X-4) was started prior to July 1955, and that the walls of the hotel were built with some of his stone. In each case numerous colors were used and each color came from a different area or group of claims. He could not estimate how much stone in any one of the exhibits came from any particular claim. Exhibit W-2 is a picture of a culvert in front of a house owned by Frank Melluzzo's father and was built in the spring of 1955 with Rena material. The county agreed to build the culvert if the Melluzzos would furnish the material. His father paid him \$40 or \$50 for delivering the material to the house. The culvert contains rounded boulders, and the only claims he owns with such boulders are the Rena claims. Also Mr. Melluzzo stated that he delivered stone from the Rena claims to the house at 118 West Hatcher Road and at Dr. Fusco's Clinic across the street before July 1955 (Tr. 464).

W. J. Caruthers testified on rebuttal (Tr. 871-891) that he moved into his house on December 8, 1954, and that he built the rock wall on the side of his yard with rock which he had secured from Melluzzo's 7th Avenue claims, not from the Rena group. Also, he stated that Wurzburger was his next door neighbor and that he had helped Wurzburger build his wall with stone from the 7th Avenue

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claims. He added that the other walls shown on Exhibit 43 (the same as Exhibits W-3, 4, and 5) were up at the time he moved into the area on December 8, 1954.

Harold Fox testified (Tr. 881-891) that he has lived at 118 West Hatcher Road since September 1952, and that none of the rock at his house came from the Melluzzo claims. He gathered the stone himself at numerous locations throughout the county. Also he stated that Dr. Fusco's Clinic across the street from his house was constructed in 1956 or afterwards.

In discussing the employees who worked for him on a part-time basis prior to July 23, 1955, in connection with his mining operation, Mr. Melluzzo named his brother Dino, Edward H. Barlow, Carlo Incardone, Keith E. Terrill, and a son of Harry Nichols (Tr. 754-761). Previously, on February 15, 1956, in the hearing of *Melluzzo v. Call*, Contest 9946 Mr. Melluzzo stated at page 272 of the transcript of that hearing (Exh. 34 A) :

"Q. Now, in your mining business how many employees do you have?

"A. I have two quarrymen.

"Q. Are they employed full time?

"A. What the demands and needs are. I have them now full time. I haven't had to use them up to this last year.

"Q. I see. Were they employed full time all during 1955?

"A. No.

"Q. How long a period did you employ them?

"A. I have been doing the quarrying myself, and I have employed these two men. They are paid by the tonnage, not as employees. They get \$3.00 a ton for quarrying the stone, and it has been approximately three months now. They have been working for me.

"Q. Employed for three months?

"A. Yes."

Mr. Melluzzo did not give the total income from the Rena group between the location in December 1954 and July 23, 1955, but he did mention \$40 to \$50 received from his father, \$250 to \$300 from Shorty Rutter and the sale of from 100 to 150 tons of rock at \$9.00 a ton making a total of from \$1190 to \$2700. At the previous *Call* hearing on February 14, 1956, which involved the Concetta, Nita Jean No. 1, and Nita Jean No. 2 claims, Mr. Melluzzo stated at page 97 of the transcript of that case (Exh. 34 B) :

"Q. What is your gross in 1955?

"A. 1955, I sold in the neighborhood of 202—some tons of stone and grossed 2800 and some dollars, plus I sold \$2200 of field [stone] from the Nita Jean to the Safeway. That brought my total for the year up to \$5000 some."

and page 99 he stated :

"Q. In 1955, you reported approximately only \$5000 of income from your mining claims?

"A. Yes.

"Q. Percentagewise, can you tell us how much came from the three claims—Nita Jean, Nita Jean 2 and the Concetta?

"A. Approximately 85 percent.

"Q. Came from these three claims?

"A. Yes."

In *United States v. Frank Melluzzo, Successor in Interest to the Estate of Victor E. Hanny*, Arizona No. 9866, the Arizona Placer mining claim, a 160 acre stone and slate claim, was involved. The Department had previously considered the validity of the claim in decisions dated March 5, 1952 (A-26280), November 9, 1956 (reported in 63 I.D. 369), and September 24, 1957 (A-27362). In the latter

decision the Department concluded that no discovery had been made on the claim prior to October 1, 1953 but allowed a rehearing to determine whether a discovery had been made between that date and July 23, 1955. Also the decision held that if discovery were established the claim would be valid to the extent of 20 acres.

The rehearing was held on April 4, 1958, and the Hearing Examiner in his decision of August 15, 1958, on page 5 summarized the testimony of Frank Melluzzo in part as follows:

"He said that the percentage of his stone shipments which come from the Arizona Placer depends on the job on which they are to be used. Stone from this claim sometimes comprises up to 90% of his shipments but generally in order to get the proper color variations 15 to 20% of the shipments come from this claim."

On the basis of the testimony at the rehearing, the Hearing Examiner found that 160 tons of stone were sold from the Arizona Placer claim in 1955 by Mr. Melluzzo and that some had been mined, removed, and disposed of at a profit during the years 1954, 1955, 1956, and 1957. These findings resulted in a conclusion that the claim was valid. The appellate decision by the Director dated April 10, 1959, affirmed the Hearing Examiner and authorized the issuance of a patent for 20 acres of this claim.

An excerpt from the transcript of the rehearing was read into the present record. On cross-examination by a Field Solicitor, Mr. Melluzzo (Exh. 35 page 120) responded as follows:

"Q. You had, I believe, or held 1, 2, 3, 4, 5, claims?"

"A. Yes.

"Q. Five claims adjoining the Arizona placer claims?"

"A. Yes.

"Q. You were removing material from those claims in 1957 and selling it?"

"A. That's right.

"Q. And that's also from the Arizona placer claims?"

"A. That's right.

"Q. That's six claims?"

"A. That would be more than that.

"Q. Now, were you also obtaining material from ground other than these six claims in 1957 and selling it?"

"A. Yes.

"Q. Now, where were those sources?"

"A. They were within a mile of there.

"Q. And they were also mining claims?"

"A. Right.

"Q. Patented or unpatented?"

"A. Some were patented and some of them were unpatented.

"Q. How many claims were there in that group?"

"A. Do you mean the acreage?"

"Q. Give us the number of claims first, and then the approximate acreages.

"A. I couldn't tell you how many I have got.

"Q. Can you give us an estimate? Three or four or five?"

"A. In twenty-acre claims, is that what you want? Do you mean—You see, I have a copper mine, 900 acres, and there is 42 claims up there.

"Q. In 1957 were you removing building material from those claims?"

"A. No. There was no building material there."

In 1958 at the time of this testimony there were 42 recorded El Rame lode claims (Exh. 37) including the El Rame Nos. 29, 30, 33, 34, and 46 which embrace the six Rena placer claims. Also the Rena claims are 9 miles due north of the Arizona placer claim (Exh. R).

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At the hearing of *United States v. Frank Melluzzo, et al.*, Contest Nos. 10591 through 10596 in Phoenix on May 5, 1964, Mr. Melluzzo testified regarding his production of stone from the Enterprise group of claims. Beginning on page 1110 of the transcript of that proceeding he testified:

"Q. Now, in 1955, can you give us an estimate of the amount of stone you removed and sold from the subject Enterprise claims?

"A. Well, we go back to these years and I don't know. I know I removed the stone and I know I sold it. It is like this man testifying—

"Q. Can you, to the best of your ability, make an estimation?

"A. I don't know how I could actually come up with a figure. I can give you a wild guess, say, approximately 300, 400 ton.

"Q. Between 3 and 4 hundred ton in the year what?

"A. 1955.

"Q. Year of 1955 the Enterprise claims. Now, what part of the year of 1955 would most of that have been removed?

"A. It is in the early part of the year, what you have here.

"Q. Do you do most of your quarrying in the winter or summer months?

"A. Well, your business slackens off and you do most of your quarrying in the early part of the year. Come summertime everyone in those years used to take off and left Phoenix."

Also Mr. Melluzzo produced stone from the Dino S claim in 1955. This claim was located on June 17, 1955, and the patent application was filed on September 1, 1956. In the patent application Mr. Melluzzo alleged that he produced 234 tons (\$2816.00) of stone from the Dino S between June 1955, and September 1956 (Exh. 42).

Then there are those building stone claims which have not yet been recorded. At the hearing Mr. Melluzzo could not remember their names or state where they were. There may have been some production from these claims, but when or how much remains unknown.

The evidence relating to marketability on behalf of the contestant established that there were numerous sources of supply for sand, stone, and gravel much closer to the Phoenix metropolitan area than the Rena group in 1955; that all of the deposits were usable for the same purposes; and that one of the major elements in determining the value of a deposit of such materials is its proximity to the demand.

The testimony on behalf of the contestees established that Mr. Melluzzo now has a prosperous stone business which is based on the ownership or control of numerous building stone deposits on many claims. But the question is not whether many deposits over a vast area are sufficiently valuable to support a business. The question is whether a mineral deposit on any one claim or on each of six claims is sufficiently valuable to be marketable.

At previous hearings when the subject was much fresher in his memory, Mr. Melluzzo gave his 1955 income from mining and the approximate percentages of production on the claims from which this income was derived. Although he accounted for 100% of his production, he made no mention of the Rena claims.

At the present hearing Mr. Melluzzo estimated the value of production from the Rena group but in the absence of some supporting record this testimony must be considered as nothing more than conjecture. He testified that members of the family used 100 tons and that a sale was made to Shorty Rutter but the testimony on this sale is not clear. In addition there was testimony by two employees that they each removed several truck loads of material from the Rena group prior to the critical date in 1955, and that the material was delivered either to

one of the Melluzzo houses or to the stone yard. Presumably, the material delivered to the stone yard was sold at some later date.

If this testimony is assumed to be correct, the only justifiable findings of fact are that the materials on the claims were usable by the Melluzzo family as long as they were free, and that occasional sales of minor quantities were possible in 1955. This evidence does not establish that any particular 10-acre subdivision within the group of claims was valuable for its mineral content or that the materials on any one of the six claims could have been profitably sold in a market for which there were many other more readily available deposits prior to July 23, 1955.

Accordingly, I find that the materials on the six Rena claims were not marketable as of that date.

We agree with the hearing examiner's conclusion that the contestees have not established that building stone or sand and gravel from *each* of the Rena claims was marketable prior to July 23, 1955.

Since we have concluded that the materials on the claims are common varieties of sand, gravel and stone, which were not marketable prior to July 23, 1955, it follows that the claims are invalid. Therefore we need not review extensively the dispute over the date on which the claims were located, for even if they were located prior to July 23, 1955, they are nonetheless invalid. However, if our view is material we agree with the decisions below that the claims were not located prior to July 23, 1955.

Finally, the contestees allege that they have been denied due process of law for several reasons. Their contentions that the fact that they were required to pay for cost of a reporter and again for a copy of the proceedings deprived a person of moderate means of an opportunity to defend himself properly is without merit, if for no other reason than that they have not shown that they could not afford the cost of a transcript. See *United States v. Gordon Marshall et al.*, A-30843 (Jan. 11, 1968).

Secondly, their assertion that the only expert testimony presented as to invalidity of the claims was that of Government employees who were presumably biased is clearly not accurate, but is without merit if it were.

They also contend that there was inadequate separation of judicial and administrative functions because the hearing examiner is under the direct control of the administrative office whose job it is to investigate mining claims and because the hearing examiner, the prosecutor and the investigative staff are too strongly influenced by each other and by the fact that they have a common superior.

This is a familiar argument which has been made time and again by counsel for the appellants and by others. In *United States v. Keith V. O'Leary et al.*, 66 I.D. 17 (1959), and in *United States v. Thomas R. Shuck et al.*, A-27965 (February 2, 1960), it was concluded that the procedure followed by this Department in the initiation, prosecution and deciding of contests in mining cases is in compliance with the Ad-

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ministrative Procedure Act, particularly with the requirements of section 5, 60 Stat. 239, now 5 U.S.C. sec. 554 (Supp. IV, 1969), relating to the separation of such functions in decision making. It was especially noted that Bureau of Land Management hearing examiners are appointed in accordance with the requirements made by the Civil Service Commission and with section 11 of the Administrative Procedure Act, 60 Stat. 244 (1946), now 5 U.S.C. sec. 3105 (Supp. IV, 1969). See also *United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965); *United States v. R. B. Johnson*, A-30405 (October 28, 1965); *United States v. Ernest Evon Moseley*, A-30791 (December 13, 1967); *United States v. Ralph Fairchild*, A-30803 (January 19, 1968); *United States v. Jesse W. Crawford*, A-30820 (January 29, 1968).

The *Shuck* case was sustained in *Shuck v. Helmandollar*, Civil No. 682 Pct. (D. Ariz., December 7, 1961), and the *R. B. Johnson* case in *Johnson v. Udall*, Civil No. 1071 Pct. (D. Ariz., November 21, 1967). Very recently the efforts of appellants' counsel in the *Moseley*, *Fairchild*, and *Crawford* cases to raise an issue of lack of due process did not persuade the courts. *Moseley v. Udall*, Civil No. 6939 Phx., *Minerals Trust Corp. v. Udall*, Civil No. 6960 Phx., and *Crawford v. Udall*, Civil No. 6969 Phx. (all D.C. Ariz., May 20, 1969), which affirmed the respective Departmental decisions.

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 Bureau of Land Management is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES

v.

FRANK AND WANITA MELLUZZO ET AL.

A-31042

Decided July 31, 1969

Mining Claims: Common Varieties of Minerals

Deposits of building stone which are of widespread occurrence and which are used for decorative construction and landscaping only because of the variety of colors in which the stone characteristically occurs are common varieties of stone not subject to mining location after July 23, 1955.

Mining Claims: Common Varieties of Minerals

Mining claims located prior to July 23, 1955, for common varieties of building stone are valid only if they meet all the requirements of the mining laws, including discovery, as of that date.

Rules of Practice: Evidence—Mining Claims: Hearings

In determining whether land on which a building stone claim is located is chiefly valuable for building stone, evidence submitted by the locator on

that point may be considered along with evidence by the United States as to the value of the land for other purposes, even though the United States does not submit any direct evidence on the value of the land for building stone.

Mining Claims: Determination of Validity

A building stone claim located on land which has some value for the stone but a greater value for non-mining purposes, even though it is not presently being used for such purposes, is invalid because the land is not chiefly valuable for building stone.

Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals

Mining claims located for common varieties of building stone will be declared invalid for lack of discovery where the evidence shows that at most small quantities of stone may have been sold from a few claims at an inconsequential profit prior to July 23, 1955, and the claimants declare that they could not make a business of operating any one of the claims.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frank Melluzzo and others¹ have appealed to the Secretary of the Interior from a decision dated July 15, 1968, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner holding 23 lode and placer mining claims null and void.²

The claims are in the Phoenix Mountains at the north edge of Phoenix. They are located in two groups, one, consisting of the Nita Jean, Nita Jean No. 2 and Concetta No. 1, lies along 7th Street and is known as the 7th Street group; the others lie about two miles to the southeast and are referred to as the Enterprise group. Some of the Enterprise claims overlap the entire Cram group of claims (contest 10596).

The 7th Street claims were located in July and August of 1954 while the Enterprise claims were located in April 1955, all for building stone.

¹ Wanita Melluzzo, Salvatore and Concetta Melluzzo, WJM Mining and Development Co., Inc., Jack R. Cram, Lynn Cram, Hazen Cram, James Cram, Jr., and Cram's Incorporated.

² The mining claimants, contest numbers and mining claims are as follows:

Frank Melluzzo	10591	Nita Jean and Nita Jean No. 2 placer mining claims (patent application AR-081156)
Wanita Melluzzo		
Salvatore Melluzzo	10592	Concetta No. 1 placer mining claim
Concetta Melluzzo		
WJM Mining & Development Co., Inc.	10593	Enterprise Nos. 20 and 21 placer mining claims
	10594	Enterprise Nos. 22 through 30, and 34 placer mining claims
Jack R. Cram, Lynn Cram, Hazen Cram, and James Cram, Jr., and Cram's Incorporated	10596	Copper Bottom, Fox Pass, Franklin Roosevelt, Hiland Queen, North Star, Shamrock, South Side Extension and Sunset lode and placer claims

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The Cram claims were located between 1928 and 1932 as lode claims valuable for mercury. On March 21, 1964, the locations were amended to building stone placer claims.

After some proceedings involving the Cram group,³ all the claims were contested on the grounds that the lands within their limits were not chiefly valuable for building stone and that no discovery of a valuable mineral had been made within the limits of the claims prior to July 23, 1955.

Whether the deposits on the claims are disposable under the mining laws depends upon two statutes. The first, the act of August 4, 1892, 30 U.S.C. sec. 161 (1964), authorizes the location of building stone claims on "lands that are chiefly valuable for building stone." The second, the act of July 23, 1955, provides in section 3, as amended (30 U.S.C. sec. 611 (1964)), that:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: * * *. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

The principles controlling the disposition of mining claims located for building stone are well established. The act of July 23, 1955, removed common varieties of building stone from location under the mining laws. Thus if the stone is a common variety, the appellants in order to satisfy the requirements of discovery must show that as of July 23, 1955, the deposits from each claim could have been extracted, removed, and marketed at a profit. Marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the material, that is, a demand that existed when the deposit was subject to location. *United States v. Coleman*, 390 U.S. 599 (1968); *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, 75 I.D. 300 (1968).

If the stone is an uncommon variety, it remains subject to location and the date of discovery can be after July 23, 1955. The claimant must, however, demonstrate that the mineral can meet the marketability test. *United States v. Harold Ladd Pierce*, 75 I.D. 255, 260 (1968).

Before discussing the pertinent legal principles in greater detail, it will be advisable first to consider generally the nature of the claims.

³ At the opening of the hearing on March 23, 1964, the contestees admitted that there were no lode minerals within the claims but stated that the claims had been amended as placer claims for building stone which had been produced from the dates of original location (Tr. 4-5).

All of the claims were located originally (or by amendment for the Cram group) for building stone used in the construction of walls, fireplaces, patios, etc. and for general landscaping purposes. The stone consists mainly of various forms of schists in beds which have been fractured and faulted. They are found in a variety of colors, caused by the weathering of iron oxide, manganese oxide and traces of other elements which occur in varying degrees through the deposits. There is no predictable pattern of colors. Some of the stone consists of rounded or massive boulders which are used for landscaping purposes.

Frank Melluzzo, who gathers stone through employees and sells it to builders, stone masons, and homeowners, stated that he began his stone operation in 1953 or 1954. He said that he uses these and other claims as a source of supply and that he must offer stones of many colors to meet the demand for construction of variegated appearance. He testified that his business is possible because he owns or controls many deposits with a wide variety of colors.⁴

If there is a deposit of an uncommon variety of building stone on each of the claims which meets the requirements of the mining laws, then each of the claims so qualifying is valid and the other issues in the case will be rendered moot. We will examine this aspect of the case first.

The appellants contend that the materials on the claims are not of widespread occurrence. We find, however, that the evidence submitted by the Government establishes that the rocks in the claims are primarily various forms of schist which are found throughout the Phoenix Mountains for 50 to 60 miles around Phoenix (Tr. 69, 70, 74, 250, 1573, Ex. 16). The appellants rely on the testimony of Donald P. McCarthy, a geologist, that less than one thousandth of one percent of the schist in the Phoenix Mountains is salable as decorative stone (Tr. 904). Even if true, this is meaningless in the absence of a total amount to which to apply the percentage. Obviously, .001 percent of millions of tons could be a substantial figure. McCarthy himself estimated that the 15 claims in issue contain 804,765 tons of salable stone (Ex. Y-1), and there is no contention that the claims cover all or most of the schist areas.

The hearing examiner held that the stone was not an uncommon variety because it was used for only the same purposes as other available building stone. The Bureau of Land Management agreed and pointed out that the Department has recently concluded that an uncommon variety of stone must possess a unique property and that the unique property must give the stone distinct and special value. For a material that is used for the same purposes as other deposits with which it is being compared, it must make manifest its special

⁴ A more detailed exposition of the history of the Melluzzo stone business is set out in *United States v. Frank and Wanita Melluzzo*, A-30595, July 31, 1969, *supra* p. 160.

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qualities by being able to demand a higher price than that at which the comparable deposits are sold. *United States v. U.S. Minerals Development Corporation*, 75 I.D. 127, 134, 135 (1968).

As pointed out in the *Minerals Development* case and the other *Melluzzo* case decided today, fn. 4, the first criterion of an uncommon variety is that the deposit must have a unique physical property. The unique property claimed for the stone here, as well as for the stone in the claims involved in the other *Melluzzo* case (Renas Nos. 1 to 6) and indeed for practically all the *Melluzzo* claims, is the varied colors in which the stone occurs. However, variety in coloration appears to be the common attribute of the vast amounts of decorative building stone which can be found in the Phoenix area and elsewhere in the State. And, as pointed out in the other *Melluzzo* case, the stone is substantially identical with the vari-colored building stone found to be a common variety by the Supreme Court in *United States v. Coleman, supra*. There too it was contended that a number of claims (18) were needed to provide the variety of colors required by the market, and there too the stone was used in walls, patios, etc. for decorative effect. The fact that the *Coleman* stone was a quartzite whereas the *Melluzzo* stone is predominantly schist is irrelevant since purchasers from *Melluzzo* were interested in color, not the geologic classification of the stone (Tr. 778, 868).

Therefore it is concluded that the stone is a common variety which after the act of July 23, 1955, was not locatable under the mining laws.

The contestees, however, contend that because the claims were located before July 23, 1955, they are not subject to the provisions of the act of that date. If the contention is based on the nature of the deposit, the Supreme Court held in *United States v. Coleman, supra*, that building stone is subject to the provisions of section 3 of the act of July 23, 1955. If it rests upon the concept that the claims were located prior to the critical date, then the Department has held that the act is applicable to mining claims located prior to July 23, 1955, but not perfected by discovery prior thereto. Its conclusion has been upheld on judicial review. *Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc.*, A-27967, A-27970 (December 29, 1959), *aff'd. Palmer v. Dredge Corporation*, 398 F.2d 791, 794-5 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *United States v. Charles H. and Oliver M. Henrikson*, 70 I.D. 212, 217 (1963), *aff'd. Henrikson v. Udall*, 229 F. Supp. 510 (N.D. Calif. 1964), 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966). Therefore the contestees must show that their claims, since we have found that the deposits on them are common varieties of stone, were validated by discovery and satisfied the other requirements of the mining laws prior to July 23, 1955.

This conclusion, we believe, removes the pertinency from the dispute about whether the Cram group could be relocated from lode to build-

ing stone placer after July 23, 1955. Since the stone is a common variety, the Cram claimants must show that the claims were valid prior to the crucial date before any question of amendment can arise. The Melluzzo claims must meet this test, too, and if none of them can, then there is no need to be concerned about an amendment of a claim that would be invalid if it had been originally located in accordance with the intention of the amendment.

The hearing examiner stated that for the claims to be valid it would have to be shown that the lands on which they were located were chiefly valuable for building stone prior to July 23, 1955, and, if they were, that a deposit of stone on each claim was marketable as of July 23, 1955. He then decided that the appraisal of Harvey Smith, a mining engineer witness for the contestees, showed a value of \$37,430 on the entire Melluzzo operation for all his claims and that an apportionment of the production between the two groups of claims in accordance with the testimony gave a value for mining purposes of \$1200 to each of twelve Enterprise claims and not more than \$5600 to each of the 7th Street group claims. He found that the appraisal made by James O. Wyatt, an appraiser employed by the Bureau of Land Management, based on sales for non-mining purposes of similar tracts of land in the vicinity from 1952 to 1955, which placed a value of \$17,000 on the entire 7th Street group and \$58,060 on the entire Enterprise group, was sound. He then concluded that the Enterprise group claims could not be chiefly valuable for building stone in 1955 and were invalid. He went on to analyze in detail the marketing of stone from the 7th Street group to see if production from them had amounted to 750 tons which would have given them in all a value of \$28,000 for mining purposes or \$5,600 per claim.⁵ He next reviewed extensively and minutely Melluzzo's testimony in this and other contests and his statements in patent applications and other statements about his production and sales from his various claims. He then stated:

To summarize briefly the testimony and affirmations made under oath either at hearings or in affidavits filed in connection with patent applications, Mr. Melluzzo stated that he had a ledger made up from sales receipts (*Call* hearing); that he never had a ledger and that the receipts were reconstructed several years after the events (present hearing); that 75% to 85% of the stone in the Mercer Mortuary, Skyriders Hotel, Caruthers house, and Wurzburger house came from the three 7th Street claims (*Call* hearing); that the stone in these buildings came from the Dino S claim (patent application); that from 20% to 90% of the stone on these buildings came from the Arizona Placer claim (*Hanny* hearing); that it came from the Rena group of claims (*Rena* hearing); and that from 40% to 75% of the stone on these claims came from the three 7th Street claims and the two adjoining claims to the east (present hearing).

⁵ He included the Nita Jean Nos. 3 and 4 in his computation although they are not involved in the contest.

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On production Mr. Melluzzo stated that he produced 86 tons and grossed \$300 in 1953 (present hearing); that he grossed \$735 from all claims in 1954 (*Call* hearing); that he produced 115 tons at \$9.00 a ton for a gross of \$1,035 from the Nita Jean and Nita Jean No. 2 in 1954 (patent application); that he sold 762 tons at \$9 a ton for a gross of \$6858, 40% from 7th Street, 40% from Enterprise group, and 20% from the remainder of his claims in 1954 (present hearing); that he produced and sold 202 tons of stone for \$2800 of which 75% to 85% came from the three 7th Street claims and sold \$2200 of fill material at 20¢ a yard for a gross, before deducting expenses, of \$5000 from all claims in 1955 (*Call* hearing); that he produced 116 [sic; should be 166] tons of stone at \$10 a ton for a total of \$1660 from the Nita Jean and Nita Jean No. 2 in 1955 (patent application); that he produced 160 tons of stone from the Arizona placer claim in 1955 (*Hanny* hearing); that he produced from 100 to 150 tons of stone from the Rena claims in 1955 (*Rena* hearing); that he sold stone at the rate of \$15 a ton for a total of \$2816 from the Dino S from June 1955 to September 1956 (patent application); and that he sold 940 tons of stone and traded 2200 yards of fill material to cancel an indebtedness of \$2200 for a net, after deducting expenses, of \$5000 in 1955 (present hearing). Then there are those apocryphal sales receipts that Mr. Melluzzo submitted to the Bureau of Land Management to support his patent application for the two Nita Jean claims which show sales of 30 tons for a gross of \$735 in 1954 and sales of 236 tons for a gross of \$2824 in 1955 (Exh. 26).

This maze of conflicting testimony all made under oath by Mr. Melluzzo cannot possibly be assembled into a logical or accurate arithmetical finding of fact. In the early 1956 *Call* hearing he claimed a production in 1955 from all of his claims of 202 tons of stone plus the sale of \$2200 of fill material at 20¢ a ton at a time when fill material across the street was selling at 10¢ a ton, for a gross profit before deducting expenses of \$5000. Now in 1964 at the last and present hearing he claimed a production in 1955 from all of his claims of 950 tons of stone and that he traded 2200 yards of fill material to cancel a \$2200 indebtedness apparently at \$1 a yard for a net profit after deducting expenses of \$5000. At the various hearings Mr. Melluzzo called a number of witnesses who had done business with him and had purchased stone from him in 1954 and 1955, but none could verify any particular tonnage from any one claim.

In the absence of some specific corroboration I am not convinced that Mr. Melluzzo produced the tonnage he claimed at the present hearing. Since the testimony at the first hearing was closer in time and more likely to be correct, I find that he did not produce more than 75% of 202 tons of stone (151.5 tons) from the three 7th Street claims in 1955. This tonnage is substantially below the amount of production necessary to support the Smith appraisal or a value of \$5600 per claim.

He concluded that none of the land upon which the claims are located was chiefly valuable for building stone in the years 1954 and 1955 and that, accordingly, the claims in the 7th Street group and the Enterprise group and also in the Cram group were invalid.

On appeal the Bureau of Land Management agreed that the land was not chiefly valuable for building stone at the times of location.

The appellants deny the validity of this conclusion and assert that the United States did not present a prima facie case to support its position. They say that Wyatt, the Government witness, testified only

as to the non-mining value of the land and made no comparison of it with the value of the land for mining purposes.

Whatever the defects, if any, in the Government's case may have been, the contestees introduced ample evidence on the issue of the mineral value of the lands. Once evidence is submitted, it becomes part of the record and may be and must be used in the disposition of the contest. *United States v. Everett Foster et al.*, 65 I.D. 1, 11 (1958), affirmed *Foster v. Seaton*, *supra*.

The contestees also contend that the value placed upon the claims by the Government witness was based upon speculation value, which, they say, is not a present value. This argument is without merit. While the expectation giving substance to the value placed upon the land involved in the comparative sales upon which Wyatt based his appraisal may be the prospect of future demand for the land for residential purposes, the values he used were those reflected in actual current sales of comparable properties in the vicinity of the claims. In other words, he used a present and real value, not a speculative value.

Common experience supports the basis of the Wyatt appraisal. Vacant lots in the downtown section of a city are often used as commercial parking lots pending the construction of an office or other commercial building. It is completely unrealistic to say that the lots are chiefly valuable for parking lots. Or, farm lands come within the influence of rapidly expanding suburbs. It is absurd to say that while the owner continues to farm pending the propitious moment for selling or developing the property for residences or shopping centers the land is chiefly valuable for farming. In both cases it is erroneous to say that until the land is actually used for its most profitable purposes it is chiefly valuable only for its current or interim usage and that its potential value is speculative or nonexistent.

Appellants specifically attack Wyatt's appraisal on the ground that he made it despite knowledge that land adjoining appellants' claims was actually selling for \$15 per acre between 1953 and 1958 (Tr. 528). Appellants ignore Wyatt's effective explanation that the land was sold by the Government as small tracts and not on the open market and that Government appraisals at the time did not reflect fair market value (Tr. 531, 561-562). They also ignore Wyatt's testimony that one small 5-acre tract very close to the Enterprise group was resold on January 21, 1955, for \$1,000, or \$200 per acre (Tr. 560-561).

The appellants object to the refusal of the hearing examiner and the Bureau of Land Management to give much weight to Frank Melluzzo's testimony. The hearing examiner's careful collation and summary of that testimony quoted above fully justifies the lack of credence placed in Melluzzo's most recent version of his early operations. We,

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too, conclude that Melluzzo produced no more than 75 percent of 202 tons of stone from the three 7th Street claims in 1955.⁶

The appellants' argument that the Smith appraisal placed a value of \$37,430 on *each* claim for building stone purposes rather than for all the claims, as the hearing examiner found, misses the point. Smith assigned that value to any claim that was producing 1,000 tons per year (Tr. 949-950) and agreed that a lesser and proportionate value would be given to a claim whose production was smaller than that total (Tr. 967-969, 984-985). As we have just seen, none of the individual claims came close to producing 1,000 tons per year. Smith merely took Melluzzo's estimate of an 800-ton production from *all* his claims in 1955 and, assuming an increase in production, arrived at a figure of 1,000 tons for the purpose of computing value (Tr. 949-951).

The contestees also urged that the comparative value of the Cram group is to be established as of 1928-1933, the original location dates. Since there is, of course, no evidence that the claims had any value at all for building stone at that time, it is difficult to see how they can be said to have been chiefly valuable for building stone at that time.

In sum, then, we agree with the hearing examiner and the Bureau of Land Management that the value of each of the claims was greater for non-mining purposes than it was for building stone as of the dates they were located and as of July 23, 1955. As a result, each of the claims is invalid because it was located on land that was not chiefly valuable for building stone as required by the act of August 4, 1892, *supra*.

This conclusion is sufficient to dispose of the appeals and makes unnecessary consideration of the question whether the claims are also invalid because of lack of discovery *on each of them*, as required by the mining law. However, since the issue has been much discussed, we turn to it. The controlling principles have been stated above. The appellants must show *as to each claim* that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine *on that claim*. This requires, especially for a mineral of widespread occurrence, a showing that the mineral from each claim could have been extracted, removed, and marketed at a profit as of July 23, 1955. *United States v. Coleman, supra*.

The appellants' allegation that all they need show is a general market for the types of building stone on the claims is without merit.

⁶ From the beginning Melluzzo has failed to keep records of his production and sales although his business grew steadily. His apparent dislike for bookkeeping is no reason to give credence to his inconsistent and contradictory recollections over the years.

The building stone is a mineral of widespread occurrence and each claim based upon it must meet the marketability test as of July 23, 1955. *United States v. Coleman, supra.*

What is the evidence as to production and sales from each of the 15 claims involved in this proceeding prior to July 23, 1955? As the hearing examiner's decision shows, the evidence is very confusing, inconsistent, and contradictory.

Considering first the evidence as to the 7th Street group, we have already noted that the most acceptable evidence is Melluzzo's testimony at the hearing in the Call case (Ex. 136-A). There he said that he took out \$735 worth of stone in 1954, all from the "Nita Jean, Nita Jean 1" [sic], he "had no other claims" (Ex. 136-A, pp. 98-99). He said that in 1955 he sold around 202 tons for \$2800 from *all* his claims, including the Last Chance (Nita Jean Nos. 3 and 4) and the Central (Dino S). He first stated that 85 percent came from the Concetta, Nita Jean, and Nita Jean No. 2 and then later said 75 percent (Ex. 136-A, p. 99; Ex. 136-B, p. 297). He did not say how much of the 202 tons was produced before July 23, 1955. 75 percent of 202 tons would be 151.5 tons for the entire year. Prorating 151.5 tons on a monthly basis, we would get approximately 88 tons as production prior to July 23, 1955, or 29.4 tons per claim. Although Melluzzo said that he had grossed \$2800, this was inconsistent with his testimony that he was getting \$12 per ton delivered (Ex. 136-A, p. 77), and also with his testimony that he permitted Joe Katich, a buyer, to remove the stone himself. Katich testified that he went to the claims most of the time to get the stone himself and that he paid \$7 per ton (Ex. 136-A, pp. 38, 45). But assuming the price was \$12 per ton, this meant gross sales from each claim prior to July 23, 1955, of approximately \$360 or about \$51 per month.

We seriously doubt that production of no more than 4½ tons of stone per month, little more than 2 or 3 truckloads, of a gross value of \$51 is sufficient to meet the standard of discovery in the circumstances of this case. Melluzzo testified at the Call hearing that he paid his men \$3 per ton to quarry and stock stone which he sold for \$12 per ton. This would not include the use of his trucks, their operating costs, or other expenses properly allocable to his operation, such as the construction and maintenance of roads. His profit was therefore appreciably less than \$9 per ton.⁷ He did say that the entire \$9 per ton selling price was all profit when someone came and took his own stone (Ex. 136-B, p. 302). But even so, it would appear that his profits, at a maximum, ran around \$30 per month or \$1 per day.

⁷ In the current hearing Melluzzo testified that his profit in 1955 at a \$12 per ton price was \$7 and at a \$9 price was \$4 (Tr. 1258).

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We do not believe that this operation satisfies the test of discovery, that it would warrant the issuance of a patent for the 7th Street group. We believe that the evidence shows at best that Melluzzo's stone sales were a small side operation, apart from his principal window-washing business, and that it was, prior to July 23, 1955, merely a means of making a little extra money. Melluzzo did not employ quarrymen until approximately November of 1955 when he hired them on a pay-by-tonnage basis (Ex. 136-B, p. 272). Before that time he worked himself or with his brother or ordered his window cleaners to pick up stone (Ex. 136-B, p. 273; Tr. 1260).

So far we have been discussing only the 7th Street group. When we examine the Enterprise group, we find practically no credible evidence as to production prior to July 23, 1955. We have only Melluzzo's testimony which is inconsistent with and contradictory to his testimony in earlier hearings and statements, as the hearing examiner has well pointed out. Such production as there was amounted to no more than the picking up of an occasional truckload of surface stone from *some* of the Enterprise claims. The appellants' evidence falls far short of the preponderance of evidence necessary to show a discovery of a valuable mineral deposit on *each* Enterprise claim.

Appellants' testimony in another direction points out the lack of a discovery on each claim in issue. Dino Melluzzo testified that their stone business could not have been maintained in 1955 if they did not have all their claims, including not only the ones in issue but also the Rena claims "and many others" (Tr. 370, 372, 373). In fact he said that 40 or 50 percent of their stone in 1953, 1954 and 1955 came from the other claims (Tr. 375-376). Frank Melluzzo testified more positively in the following colloquy with the hearing examiner (Tr. 1517-1519):

Q. If you owned only the Concetta claim, and no other claims, could you make a business out of the selling of the rock?

A. Out of which?

Q. Could you make a business out of the selling of rock from the one claim?

A. Absolutely not. You couldn't do it.

Q. Is that true in each of the other claims individually?

A. What you would have, you would have a business like, for example, I can show you something that everyone would understand.

You have a grocery store, and you have canned milk, and you have baby food. You might be all right for people that want canned milk and baby food, but I will guarantee you too many people aren't going to buy from your store for just that canned milk or baby food.

They want to come in there and get corn flakes and they want to get oranges and they want to get bananas, and the same way with a mining claim.

Yes, you could operate a business with one claim, but of one variety of stone, and when a man says, "I want red," you are out of business. If he says, "I want blue," you are out of business, and any other color he wants, if you don't have it. He has to go to another stoneyard, and that is what we are having the problem now. That is why I am still today buying stone from other claims, * * *.

Other assertions were made that all the claims are necessary to supply the variety of colors and even shapes that are desired by customers and that business will be lost unless the requests can be met (Tr. 681, 907, 1115, 1369).

This strongly supports the conclusion that none of the claims in issue can satisfy the test of discovery in that a prudent man would not invest time and money in any one claim with a reasonable prospect of success in developing a valuable deposit.

We refer at this juncture to what a prudent man would do because the ultimate test of discovery is the prudent man rule, that is, the rule that a discovery exists only when minerals have been found in such quantities and of such 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." *Castle v. Womble*, 19 L.D. 455, 457 (1894); *United States v. Coleman*, *supra*. The marketability test is but a refinement of that test, albeit it is an essential part of the test. *United States v. Coleman*, *supra*. Thus, although it may be argued that a claim literally or technically satisfies the marketability test if it returns a profit of \$1 per day, this will not satisfy the prudent man test if the prudent man will not invest his time and money to develop a deposit for such a meager return. As we have just noted, Melluzzo testified positively and flatly that he could not make a business of selling rock from any one of his claims.

For these reasons we conclude that even if the lands in the claims at issue were chiefly valuable for building stone prior to July 23, 1955, appellants have failed to show by a preponderance of the evidence that any single claim satisfied the test of discovery as of July 23, 1955.

Finally, the contestees allege that they have been denied due process of law. Their contentions are the same as those they made on the same issue in the other *Melluzzo* case decided today. The contentions are answered in that case.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision of the Bureau of Land Management is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

August 13, 1969

UNITED STATES

v.

KENNETH McCLARTY

A-29821 (Supp.) Decided August 13, 1969

Mining Claims: Generally—Mining Claims: Common Varieties of Minerals—
Mining Claims: Hearings

A Departmental decision holding a mining claim to be null and void because it was located after July 23, 1955, for a common variety of building stone will be vacated and the case remanded for a further hearing when so ordered by a final court decision.

United States v. Kenneth McClarty, 71 I.D. 331 (1964), vacated and case remanded.

ORDER TO REMAND

In a decision dated August 27, 1964, 71 I.D. 331, the Department held to be null and void Kenneth McClarty's Snoqueen placer mining claim situated within the Snoqualmie National Forest, Washington. The validity of the claim was challenged in a contest initiated by the Forest Service, Department of Agriculture. The claim was invalidated on the ground that it was located after July 23, 1955, for a common variety of building stone which was excluded from mining location after that date by section 3 of the act of July 23, 1955, 30 U.S.C. sec. 611(1964).

In ensuing litigation the Department's decision was sustained by the United States District Court for the Eastern District of Washington. However, in a decision dated February 20, 1969, the United States Court of Appeals for the Ninth Circuit reversed the District Court and remanded the case to that court with instructions to enter a judgment remanding the case to the Secretary of the Interior with the suggestion that he vacate the decision of August 27, 1964, and that the Department have further proceedings not inconsistent with the Circuit Court's opinion. *McClarty v. Secretary of Interior*, 408 F. 2d 907 (1969). Such a judgment was entered by the District Court on May 7, 1969, and the case is therefore before the Department again.

The Snoqueen claim was located for a deposit of building stone which is used for its decorative effect principally in the construction of walls of homes and commercial buildings, chimneys, fireplaces, patios and floors. The only unique property claimed for the deposit is the unusually high percentage of stone which is naturally fractured into elongated regular shapes, rectangular in cross-section, much like

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2 x 4 or other regularly dimensioned lumber. The regular shaping permits use of the stone with little cutting or shaping.

The Department's decision of August 27, 1964, held that the uniquely fractured stone had no special value because it was mixed in usage with irregularly shaped stone from the claim and it was used only for the same purposes as stone from other readily available deposits in the area.

The Court of Appeals stated that there had been significant developments in the law since the Department's decision and the District Court's decision. It referred specifically to *United States v. Coleman*, 390 U.S. 599 (1968), and the subsequent decision of the Department in *United States v. U.S. Minerals Development Corporation*, 75 I.D. 127 (1968). The court pointed out that in the latter case the Department had laid down guidelines for distinguishing between common and uncommon varieties of building stone, specifically, that to constitute an uncommon variety of building stone, a deposit of stone which has a unique property but which is used for the same purposes as an ordinary stone must be shown to have a special and distinct value for such use as reflected by its command of a higher price in the market place.

The court found that the Snoqueen deposit was unique because of the naturally fractured regularly shaped stone but that the evidence was sketchy as to whether it had a higher money value. It said that the only evidence in the record on money value was that the stone commanded a price of \$40 to \$45 per ton as compared with \$6 to \$7 per ton for common rock. The court therefore said that the Department might properly conclude that the case should be remanded to the hearing examiner for further evidence on the issue of money value.

The court went on, however, to suggest that because of the natural fracturing of the stone into regular shapes suitable for laying without further fabrication, its distinct and special economic value might not be indicated by its retail market price in comparison with the price of other building stone and that quite possibly "the special economic value of the stone would be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone." * * * The court said that all it was attempting to indicate was that the Department's criterion concerning higher market price "cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit." 408 F. 2d at 909.

In view of the criteria discussed by the Department in the *U.S. Minerals Development Corporation* case, *supra*, and the observations of

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the court in the *McClarty* case, *supra*, it is evident that a further hearing is necessary to develop evidence on several points:

1. Do the regularly shaped stone and the irregularly shaped stone from the Snoqueen claim sell for the same price or is the regularly shaped stone sold for a higher price? If the latter, what is the difference?

2. If the regularly shaped stone and the irregularly shaped stone from the Snoqueen claim are sold for the same price or for different prices, how does that price or how do those prices compare with the prices at which the same or similar stone, *i.e.*, andesitic lava, from other deposits in the vicinity is sold?

3. How do the Snoqueen prices compare with those for competitive stone of different origin, *i.e.*, not andesitic lava, which is used for the same purposes as the Snoqueen stone?

4. Does it cost McClarty less to produce the regularly shaped stone for sale than the irregularly shaped stone? If it does, what is the added work and expense that is required to produce the irregularly shaped stone? If McClarty sells all the stone for the same price, is there any way in which he derives a greater monetary benefit from selling the regularly shaped stone?

5. Assuming that the cost of laying up a wall or similar construction is less if all regularly shaped stone is used, is the cost advantage canceled out when regularly shaped stone is mixed with irregularly shaped stone in the same construction? How often does such mixing occur, that is, is there a significant usage of regular shaped stone by itself?

This is not intended to be an exclusive enumeration of points of which further evidence is needed; both parties are free to develop such other evidence as they believe to be pertinent. The parties are also free to stipulate as to the manner of submitting evidence. Of course, no further hearing is necessary if the parties agree as to some other final disposition of the case.

Upon the conclusion of a further hearing, the hearing examiner should prepare a recommended decision for submission to this office, together with the complete case record from the initiation of this case. A copy of the recommended decision should be served on each party and each will be allowed 30 days from service to file in this office any brief that it wishes. Thereupon, a final administrative decision will be issued in the case.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the Department's decision of August 27, 1964, is vacated and the case is remanded to the Bureau of Land Management for the holding of

a further hearing and the preparation and submission of a recommended decision by a hearing examiner as provided in this decision.

ERNEST F. HOM,
Assistant Solicitor.

TEXACO INC.

A-30997

Decided August 13, 1969

Oil and Gas Leases: Extensions—Oil and Gas Leases: Renewals—Oil and Gas Leases: Twenty-Year Leases

A 20-year oil and gas lease, subject to an approved unit agreement at the expiration of its initial term, is continued in force and made coterminous with the unit of which it is a part, which extension supersedes the provision of the lease for successive 10-year renewals; an application for a 10-year renewal of such a lease cannot, therefore, be accepted, and a renewal lease issued in response to such an application is a nullity.

Oil and Gas Leases: Renewals—Oil and Gas Leases: Twenty-Year Leases

The holder of a 20-year oil and gas lease is not given by his lease a contractual right to a 10-year renewal which prevails over all other extension provisions of the Mineral Leasing Act, but the right of renewal is expressly made subject to other provisions of the law, and, in the case of a lease subject to an approved unit agreement at the expiration of the initial lease term, is superseded by the statutory provision that such leases shall be continued in force until the termination of the unit plan.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Texaco Inc. has appealed to the Secretary of the Interior from a decision dated May 2, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed two decisions of the Wyoming land office denying its requests that renewal oil and gas leases Cheyenne 073809a, 044452, 044673, 044820 and 054497 and Wyoming 01864, 01865 and 01866, effective as of July 1, 1967, be declared of no effect and that the original leases be declared to be in full force and effect and extended for the life of the South Spring Creek unit agreement.

The record shows that the leases were originally issued, or were segregated by assignment from leases issued, effective December 28, 1939.¹ The leases embrace a total of 2,322.59 acres of land in sections

¹ Leases Cheyenne 044452, 044673, 044820 and 054497 were issued effective December 28, 1939. Lease Cheyenne 073809a was segregated by assignment from lease Cheyenne 044450, issued as of the same date, and leases Wyoming 01864, 01865 and 01866 were segregated by assignment from leases Cheyenne 044820, 054497 and 044452, respectively. The leases were issued pursuant to section 27 of the Mineral Leasing Act, as amended by the act of March 4, 1931, 46 Stat. 1523, for lands previously covered by oil and gas prospecting permits after those lands had been committed to the South Spring Creek unit by an agreement approved by the Secretary of the Interior on March 15, 1938.

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18 and 19, T. 49 N., R. 101 W., and secs. 2, 11, 12, 13, 14 and 24, and lot 44, T. 49 N., R. 102 W., 6th p.m., Wyoming, and the original leases called for payment of royalty on production at the fixed rate of 5 percent as to 1,247.89 acres of the leased land and on a step scale from 12½ to 33½ percent as to 1,074.70 acres. Each of the leases was issued for a term of 20 years, "with the preferential right in the lessee to renew this lease for successive periods of ten (10) years, upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods." By virtue of a suspension of the drilling, production and rental requirements for a period of 7 years and 7 months, the terms of the leases were extended to July 28, 1967.

On April 20, 1967, appellant filed applications for renewal leases to all of the leased lands "for the term of ten (10) years from the date of July 28, 1967," and, on June 5, 1967, renewal leases were issued pursuant to those applications, effective July 1, 1967. The renewal leases provided for royalty payment, on production from lands previously subject to a flat royalty rate of 5 percent, on a step scale from 12½ to 25 percent.

By a letter dated June 29, 1967, appellant requested, with respect to leases Cheyenne 073809a, 044452, 044673 and 044820, that the original 20-year leases be declared to be in full force and effect and extended for the life of the South Spring Creek unit agreement and that, contingent upon such declaration, the renewal leases issued pursuant to appellant's applications be declared of no force and effect. This action was sought upon the grounds that the original leases were, under the provisions of section 17 of the Mineral Leasing Act and Departmental regulation 43 CFR 3127.4, extended for the life of the unit and that the renewal leases, therefore, should not have been approved. Appellant asserted that there were previous cases in Wyoming in which the Department had taken care to extend the terms of 20-year unitized leases for the life of a unit even in the face of applications submitted for renewal leases, and it charged that the approval of renewal leases in this instance was completely inconsistent with the prior rulings. By a letter dated July 3, 1967, appellant made a similar request with respect to leases Cheyenne 054497 and Wyoming 01864, 01865 and 01866.

By decisions dated July 3 and 7, 1967, the land office denied appellant's respective requests. The land office observed that the lands in

² The lease terms embodied substantive provisions of section 17 of the Mineral Leasing Act, as enacted on February 25, 1920, 41 Stat. 443, which were made applicable to these leases by the provisions of sections 14 and 17 of the Mineral Leasing Act, as amended by the act of August 21, 1935, 49 Stat. 676.

each of the leases in question had been committed to the South Spring Creek unit agreement and that, since the unit was producing, each lease had a producing status and was entitled to continue in effect as long as it was in the producing unit. It found, however, that Departmental regulations (43 CFR 3122.4-2 (a) and (b) providing for the renewal of 20-year leases do not prohibit the issuance of renewals for 20-year leases which have a producing status. In response to Texaco's reference to extensions of unitized leases, the land office stated that it had been "the policy of this office for a number of years to issue renewal leases on producing 20-year leases upon proper application and a favorable recommendation by the Geological Survey." It then concluded that regulation 43 CFR 3123.5(a), which provides that a lease offer for a noncompetitive oil and gas lease may not be withdrawn after its acceptance by the United States, is applicable to applications for renewal leases and that, since appellant's requests were not filed until after the renewal leases were signed on behalf of the United States, the renewal leases must remain in effect.

In appealing to the Director, Bureau of Land Management, from the action of the land office, Texaco argued that section 17(j) of the Mineral Leasing Act, as amended, 30 U.S.C. sec. 226(j) (1964),³ explicitly extended the life of any 20-year lease committed to a producing unit for the life of the unit or until the leased lands should be removed from the unit and that the regulations issued thereunder (43 CFR 3127.4) similarly require 20-year leases committed to a unit to be extended for the life of the unit. Moreover, it argued, the Department had made it clear, both by its past actions and by its pronouncements,⁴ that an application for lease extension or renewal for lands included in an approved producing unit would not be accepted, and it cited the example of such an application filed by its own predecessor. The Texas Company, for lands partially committed to a producing unit, in which case the land office accepted the application as to the lands described therein which were outside of the Oregon Basin unit, Wyoming, while holding that the remainder of the lease was kept in force through commitment to the unit agreement. In the

³ The statute provides in pertinent part that:

"Any lease issued for a term of twenty years, or any renewal thereof, or any portion of such lease that has become the subject of a cooperative or unit plan of development or operation of a pool, field, or like area, which plan has the approval of the Secretary of the Interior, shall continue in force until the termination of such plan. * * *"

This language was included in section 17(b), as added to the Mineral Leasing Act by the act of August 8, 1946, 60 Stat. 952, and it has remained unchanged, although the section was generally revised by section 2 of the Mineral Leasing Act Revision of 1960, 74 Stat. 781.

⁴ In support of its arguments, appellant cited the Department's decisions in the cases of *General Petroleum Corporation et al.*, 59 I.D. 383 (1947); *Seaboard Oil Company*, 64 I.D. 405 (1957); and *Pan American Petroleum Corporation*, A-28832 (June 27, 1962), as well as Solicitor's Opinion, 69 I.D. 110 (1962).

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alternative, appellant contended, the renewal leases should be canceled on the ground that they were executed through mistake.

In affirming the decisions of the land office, the Office of Appeals and Hearings distinguished the law applicable to this case from the Departmental rulings in the cases relied upon by the appellant. It found that the cited cases involved applications for extension of 5-year noncompetitive oil and gas leases and were not analogous. The noncompetitive leases issued in those cases, it explained, were issued for terms of 5 years, and so long thereafter as oil or gas was produced in paying quantities, but were subject to a single extension at the expiration of the 5-year term unless otherwise provided by law. In each of the cited cases, the Office of Appeals and Hearings observed, the subject lease was considered to be extended by another provision of the law which overrode the conditional right of the lessee to the extension applied for under section 17 of the Mineral Leasing Act. The lessee of a noncompetitive oil and gas lease, it found is not given by his lease a contractual right to a 5-year extension which prevails over all other extension provisions of the Mineral Leasing Act. On the other hand, it found that a 20-year lease granted by law a preferential right to the lessee to renew the lease for successive periods of 10 years and that 20-year leases are not extended by production as are 5-year noncompetitive leases, and it observed that, although it has been held that the term of a 20-year lease may be extended beyond its normal expiration date, it could find no decision by the Department supporting the conclusion that the preference right to a renewal of a 20-year lease is or can be overridden by any other possible method or cause for extension of the lease. It concluded that the fact that land office employees in earlier situations denied applications for renewal leases to the extent that land was committed to approved unit agreements could not be considered to be a binding precedent and that the land office had acted properly in issuing renewal leases in response to Texaco's applications and in denying its subsequent requests to have the renewal leases rescinded.

In its present appeal Texaco relies upon the same basic premises previously advanced, and it contends that the Bureau erred in its attempt to distinguish the principles applicable in this case from those enunciated in the decisions previously cited, adding in a footnote that the *General Petroleum* case, *supra*, cannot possibly be explained away by the Bureau's reasoning. The rationale of the cited decisions, appellant argues is not limited to 5-year leases, and the reasoning and logic employed there apply equally to the entire concept of unitized leases.

In brief, it appears to be the position of the Bureau that the holder of a 20-year lease of lands within a producing unitized area has an option between obtaining a renewal of his lease at its normal expiration date in accordance with the stated terms of the lease or allowing the

lease to continue without renewal by virtue of its commitment to a unit agreement and the statutory provision for the continuation of such leases. Appellant, on the other hand, denies that such an option is available, contending that the statutory provision extending the life of a 20-year lease of unitized lands to coincide with the life of the unit itself precludes extension or renewal of the lease upon any other basis.

A related question arose in the case of *H. Leslie Parker, M. N. Wheeler*, 62 I.D. 88 (1955), in which case the Department was called upon to determine whether or not a 20-year lease, which had been committed to a unit agreement that terminated prior to the lease expiration date, was extended beyond that date for the remainder of its 20-year term and continued in effect thereafter as long as oil or gas should be produced in paying quantities by virtue of the last sentence of the fourth paragraph of section 17(b), as added by the act of August 8, 1946 (the same paragraph upon which appellant now relies).⁵ After finding that the statutory provision there in question was applicable to a 20-year lease without election by the lessee pursuant to section 15 of the 1946 act, 60 Stat. 958, the Department concluded that a lessee in the circumstances indicated had an option between renewing his lease or having it extended pursuant to the statute without action on the part of the lessee. Observing that the law, prior to August 8, 1946, contained no provision relating to the extension of leases which were in effect when a unit plan terminated and that the rights of the lessees in that case, prior to the 1946 amendments, were to have their lease run to the end of its 20-year term and then, by a proper application, to have it renewed for a 10-year term, the Department held that section 17(b) added the right to have the lease run for no less than 2 years from the termination of the unit agreement and so long thereafter as oil or gas was produced in paying quantities without altering in any way the lessees' right to renew their lease. In reaching this conclusion, the Department noted that application of the particular provision of section 17(b) would have the effect of changing a lease with a right to successive renewals of 10 years each, regardless of production, to one dependent on production for its existence, but it found that, as drastic a change as that might be, it did not affect any right acquired by the lessees prior to the enactment of the provision. It does not necessarily follow, however, that a similar option is available in the case of a lease which remains committed to a unit at the lease expiration date.

⁵ That sentence (now a part of section 17(j), as set forth in the Mineral Leasing Act Revision of 1960, 30 U.S.C. § 226(j) (1964)), provides that:

"* * * Any lease which shall be eliminated from any such approved or prescribed plan, or from any communitization or drilling agreement authorized by this section, and any lease which shall be in effect at the termination of any such approved or prescribed plan, or at the termination of any such communitization or drilling agreement, unless relinquished, shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities."

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In *Seaboard Oil Company, supra*, fn. 4, relied upon by appellant and distinguished by the Bureau, application was filed for a 5-year extension of a noncompetitive oil and gas lease issued on September 1, 1950, for a period of 5 years, which lease embraced land committed to a unit agreement but which was not included in the participating area of the unit and upon which there had never been a discovery of oil or gas. After reviewing the history of the applicable provisions of the Mineral Leasing Act, the Department stated that:

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. * * *

The question then is whether the extension of a noncompetitive lease committed to a unit agreement falls in the category of extensions of producing leases or in the category of extension provisions like the assignment provision. The history of the unitization provision shows clearly that a unitized lease falls in the category of producing leases. Prior to the 1946 act there was no statutory provision for the extension of unitized leases except 20-year leases. Unitized leases dependent upon production for continuance beyond their fixed terms were therefore seemingly dependent upon actual production for continuance. However, because of provisions in unit agreements that drilling and producing operations performed on any unitized land would be deemed to be operations under and for the benefit of all unitized leases, the Department held that all unitized noncompetitive leases would be extended so long as there was production in paying quantities anywhere in the unit area. All unitized leases were in effect deemed to be a single consolidated lease so far as production was concerned. When the 1946 act was before the Congress for consideration, the Department recommended the inclusion of a provision which would ratify and expressly sanction the Department's practice of extending unitized leases. Congress adopted the Department's proposal without change. [Footnote omitted.] It is indisputable therefore that the intent of section 17(b) was to extend unitized noncompetitive leases on the theory that they are all, in effect, a single consolidated lease so that production anywhere in the unit area will extend all the leases even though there is no actual production from or allocated to a particular lease and even though the land in a lease is not even deemed to be situated on the known geologic structure of a producing field. 64 I.D. at 410-411.

The Department then concluded that the lessee in that case was not entitled to a 5-year extension, the lease having continued past the end of its primary term until the leased land was eliminated from the Whistle Creek unit, after which time the lease was extended for a period of 2 years pursuant to the last sentence of the fourth paragraph of section 17(b) of the Mineral Leasing Act. In reaching that conclusion the Department expressly found that the lessee had no contractual right to a 5-year lease extension, the lease having been issued "subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistencies with the terms of this lease occur."

The present case, of course, differs in some respects from both of the cases just discussed. It involves leases which remained committed to a unit agreement at their normal expiration dates, as distinguished from a lease which continued in its initial term past the termination of the unit plan to which it was committed, and it is concerned with rights of the holder of 20-year leases, as distinguished from those of the holder of a 5-year lease. It therefore involves the application of statutory provisions which are distinctly different from those found to be controlling in either of the cited cases.

The Office of Appeals and Hearings, as we have previously noted, distinguished the present case from the *Seaboard* case, *supra*, upon a finding that the lessee in the latter case had only a conditional right to a lease extension which was overridden by another statutory provision for extension, whereas the holders of 20-year leases were granted by law a preferential right to renew their leases for successive periods of 10 years. In other words, it seemingly found that the appellant had an unconditional right to renew its 20-year leases, upon proper application, for successive 10-year periods. We are unable to find such terms either in the leases themselves or in the applicable statutory provisions, and, notwithstanding the differences which are apparent, we agree with appellant that, in principle, this case is analogous to the *Seaboard* case.

As we have previously noted, under the terms of each of the original leases with which we are concerned here, the lessee was entitled to full enjoyment of the rights and privileges granted under the lease "for a period of twenty (20) years, with the preferential right in the lessee to renew this lease for successive periods of ten (10) years, upon such reasonable terms and conditions as may be prescribed by the lessor, *unless otherwise provided by law at the time of the expiration of such periods.*" (Italics added.) It is clear

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then that the right to successive renewals was not made unconditional by the terms of the leases themselves.

What were the statutory provisions applicable upon expiration of the initial lease periods? Unlike the *Parker* case, *supra*, in which a legislative enactment after the issuance of the lease was found to have conferred added benefit upon the lessee without affecting the right of renewal provided for in the lease, and unlike the case of 5-year noncompetitive leases for which, prior to 1946, there was no statutory extension based upon unitization, there was, at the date of issuance of the leases here in question an express statutory provision prescribing the effect of unitization on the termination of 20-year leases, section 17 of the Mineral Leasing Act, as amended by the act of August 21, 1935, 49 Stat. 676, having provided that:

Leases issued prior to the effective date of this amendatory Act shall continue in force and effect in accordance with the terms of such leases and the laws under which issued: *Provided*, That any such lease that has become the subject of a cooperative or unit plan of development or operation, or other plan for the conservation of the oil and gas of a single area, field, or pool, which plan has the approval of the Secretary of the Department or Departments having jurisdiction over the Government lands included in said plan as necessary or convenient in the public interest, shall continue in force beyond said period of twenty years until the termination of such plan. * * *⁶

The critical question here is whether the proviso relating to unitized leases provided an *added* measure for continuing a lease in effect beyond the expiration of its initial term or a *substitute* measure. The Bureau has treated it as an additional provision for the extension of a lease which does not affect a lessee's basic right to have his lease renewed for successive 10-year periods at the expiration of the initial 20-year term. Such an interpretation, however, is not in accord with the effect normally to be attributed to a proviso in a statute, for a proviso generally has the effect of excluding or excepting something from the provision immediately preceding and does not extend or enlarge that provision.⁷

⁶ As noted earlier, although the leases in question were issued *after* August 21, 1935, the quoted provision was made applicable to them by the 1935 amendment of section 14 of the Mineral Leasing Act, 49 Stat. 676. The substance of this provision was retained in the 1946 and subsequent amendments to the Mineral Leasing Act (see fn. 3, *supra*).

⁷ * * * The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. * * * *Cow v. Hart*, 260 U.S. 427, 435 (1922).

* * * Now the general and usual function of a proviso is to exclude what follows from the general statement or provision which precedes it."

* * * * *
 "The meaning of a proviso, however, is to be determined from the language. It may extend or enlarge what precedes it in some cases, but as a general rule its office is not to extend or enlarge what precedes, but to limit and restrain a preceding general statement." *Jordan v. Town of South Boston*, 122 S.E. 265, 267 (Va. 1924).

"It is a rule of construction that a proviso in a statute is to be construed strictly. It is

Rephrased somewhat, the statute provided that:

Twenty-year leases shall continue in force and effect in accordance with the lease terms and the laws under which they were issued, *except* that any such lease that, at the expiration of its primary term, has become the subject of a cooperative or unit plan of development or operation, or other plan for the conservation of the oil and gas of a single area, field, or pool * * * shall continue in force beyond said period of twenty years until the termination of such plan.

The statute quite plainly did not add to the right of renewal an option to have a unitized lease made coextensive with the unit of which it was a part. It did not provide that 20-year leases subject to a unit plan "shall continue in force beyond said period of twenty years until the termination of such plan *or until the expiration thereafter of such period as they may be kept in force by renewals.*" Rather, it provided simply that such leases would become coterminous with the units to which they belonged. In other words, the terms set forth in the proviso were substituted for the provision for 10-year renewals which would otherwise be applicable.

The Department appears to have entertained this view of the proviso from the beginning. It was first adopted in an amendment of section 17 by the act of July 3, 1930, 46 Stat. 1007, which was a temporary measure. It was re-enacted as a permanent measure by the act of March 4, 1931, 46 Stat. 1523. In instructions issued shortly thereafter on June 4, 1931, 53 I.D. 386, 391 (1931), the Department said with reference to the proviso: "(5) Leases included in a plan approved by the Secretary of the Interior *will automatically continue* in force beyond the 20-year period for which issued until the termination of the plan." (Italics added.) This language was continued in the oil and gas regulations until their complete revision following the passage of the act of August 8, 1946, *supra*, 43 CFR 192.36 (1940 ed.). The language, especially the word "automatically," does not comport with the notion of a lessee's having an option either to renew or to permit continuance of the lease.

We conclude, therefore, that the leases in question were continued in effect beyond their stated expiration date by the force of law, that there was no basis for renewal of the leases at that time and that it was therefore improper to accept renewal applications, that the renewal leases issued in response to such applications are a nullity, and that the original leases remain in effect and will continue in accordance with the applicable statutory provisions. This conclusion finds support

intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it, or to except something from the body of the act, but not to enlarge the enactment, for to do so would be to operate as a substantive enactment itself. This is not the legitimate office of a proviso." [Citations omitted.] *State Public Utilities Commission v. Early*, 121 N.E. 63, 66 (Ill. 1918).

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not only in the language of the statute itself but, as well, in the views on the effect of unitization generally expressed by the Department in *General Petroleum Corporation et al., supra; Seaboard Oil Company, supra; Solicitor's Opinion, supra;* and *Continental Oil Company*, 70 I.D. 473 (1963), and it becomes unnecessary, in view thereof, to consider appellant's alternative grounds for seeking reversal of the Bureau's 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 appealed from is reversed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF MEVA CORPORATION

IBCA-648-6-67

Decided August 18, 1969

Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Subcontractors and Suppliers—Rules of Practice: Appeals: Dismissal

Where subsequent to award of a contract for the construction of a transmission line a contractor requests permission (i) to substitute a subcontractor having adequate financial resources for the subcontractor listed in its bid, or (ii) to be allowed to perform the work involved itself, and where the contracting officer denies the request for substitution on the grounds that there has been no showing of a change of circumstances since the time the contractor's bid was submitted, the Board dismisses the contractor's claim for increased costs attributed to being required to use a subcontractor lacking the required financial resources during the crucial early months of contract performance. The dismissal is based upon findings (i) that the subcontractor listing paragraph under which the request for substitution was made contains no provision for an equitable adjustment if a dispute arose as to the contracting officer's action thereunder; (ii) that a change in the specifications or in the scope of the work was not involved; and (iii) that appellant's allegation that the contracting officer's action in denying the request for substitution was arbitrary and capricious was not related to action taken under the Changes clause or other clause providing for an equitable adjustment even though appellant did indicate that the claim might be cognizable under the Changes clause.

BOARD OF CONTRACT APPEALS:

The contractor has timely appealed from the contracting officer's decision of May 2, 1967, denying its claim for \$2,264,364,¹ on the

¹ In the initial claim letter the amount shown is comprised of \$1,114,364 representing the direct increased cost of performance of subcontract items (footings), and \$1,150,000 repre-

ground that the contractor had failed to show that refusal of its request for substitution for a listed subcontractor constituted a change,² as well as on the alternative ground that any claim the contractor might have had had been waived by its failure to pursue the matter to a contracting officer's decision at the time the actions upon which the claim is predicated occurred.³

By stipulation the issues presented for decision have been limited to the question of liability.⁴ Appellant's counsel has consistently evinced doubt, however, as to whether the contract provides a remedy for the type of wrong alleged.

To facilitate an understanding of the issues as framed by the parties, we will relate in some detail the principal events that occurred during contract performance, as well as over a period of several months prior thereto, in the light of the exhibits and testimony in the case.

The contract was awarded on June 5, 1964, in the estimated amount of \$6,132,586.90.⁵ Payment for the work performed was to be made on a unit price or a lump-sum basis as specified in the schedule of unit prices. Prepared on standard forms for construction contracts,⁶ the contract called for the construction and completion of the Flagstaff-Pinnacle Peak 345-kilovolt Transmission Line No. 2 under Schedule Nos. 1 and 2. Prior to award the contractor was requested to and did submit additional information pertaining to its capability to perform the work.⁷ The Qualification Brochure forwarded with the contractor's

sending suspension of work and impact costs on assembly, erection and stringing operations (wire and steel). Exhibit 7-H, Letter of September 13, 1966, p. 4. According to the Government's Statement of Position, a claim for \$2,264,364 was excepted from the release executed by the contractor. Except as otherwise indicated, all references to exhibits are to those contained in the appeal file.

² " * * * I do not consider that any change, cognizable under Clause No. 3, is involved in the question presented here as to MeVA Corporation subcontracting with the subcontractor named by it in its bid. * * * " Exhibit 7, Findings of Fact and Decision of May 2, 1967, par. 11, p. 6.

³ Findings, note 2, *supra*, pars. 13 and 17f. Noting that the claim was not presented for more than two years after the events complained of took place, the contracting officer states: "I believe that this circumstance tends to discredit the claim to a significant degree." Findings, note 2, *supra*, par. 14.

⁴ Tr. 11.

⁵ The Abstract of Bids (Exhibit 10) shows the following comparison for bids received: MeVA Corp., \$6,148,581.28; Ets-Hokin Corp., \$7,001,398.65; Donovan Constr. Co., \$7,089,657; Commonwealth Elec. Co., \$7,163,845; Power City Constr. & Equip., Inc., \$7,302,418.10; Reynolds Elec. & Engr. Co., Inc., \$7,899,620.96; Irby Constr. Co., \$8,909,314.86.

⁶ Including General Provisions, Standard Form 23-A (April 1961 Edition).

⁷ The company had been issued a contractor's license in the State of California on December 11, 1961. At the time of award it had no prior experience in transmission line work. Exhibits 12 and 24; Tr. 146, 246, 265-268. The work entailed the construction of a transmission line 114 miles in length with 523 towers from the Winona Substation having an elevation of about 8,000 feet to the Pinnacle Peak Substation having an elevation of about 2,000 feet. Appellant's witness Sutton testified that weather was largely a function of altitude. Appellant's Exhibit R; Tr. 183, 190, 209, 233.

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letter of May 25, 1964, included an organization chart listing S. M. Rivers as Manager of the Transmission Line Department and a resume of Mr. Rivers' experience which emphasized that he would be directly in charge of the contract work.⁸ Investigation by the Bureau of Reclamation disclosed, however, that the representation in the resume that Rivers had supervised 390 miles of transmission line construction under Bureau contracts was misleading in that he had primarily been an office man (Tr. 266). By telegram of June 1, 1964,⁹ MevA confirmed that Rivers had only carried home office responsibility for the projects listed in the resume. In a telephone conversation on the following day, Mr. Rivers' supervisor¹⁰ advised the contracting officer that Mr. Carl Regier would be in charge of the work and that this would be confirmed by telegram. There is no evidence that such a telegram was ever received. In making the award to MevA on June 5, 1964, the contracting officer took into account the representation that Regier's services would be available to MevA.¹¹

On at least one occasion subsequent to receipt of the notice to proceed, Rivers addressed a letter to the Bureau which he signed as Manager, Transmission Line Department.¹² In MevA's letter of July 21, 1964, acknowledging receipt of the notice to proceed (signed R. T. Mantz, Manager), Rivers is described as the Manager, Transmission Line Division.¹³ In the Bureau's memorandum pertaining to the pre-construction conference on July 22, 1964, the representatives of MevA in attendance are listed in the following order: S. H. Swenson, Vice President; R. T. Mantz, Manager; S. M. Rivers, Manager, Transmission Line Division, and Carl O. Regier, Project Manager.¹⁴ None of these persons testified at the hearing. The record does not disclose what efforts, if any, were made by either party to obtain their testimony.

Witnesses for the appellant did testify, however, (i) that MevA had never had a department known formally or informally as the trans-

⁸ "If the MevA Corporation is successful in obtaining a contract for the Flagstaff-Pinnacle Peak 345 KV Transmission Line No. 2, Mr. Rivers will be directly responsible for its management and construction." Government Exhibit 12.

⁹ Government Exhibit 25.

¹⁰ Tr. 221.

¹¹ Appellant's Exhibit D; Tr. 268. Regier was employed by MevA on June 3, 1964, in the capacity of Field Project Manager (Tr. 220, 221).

¹² Government Exhibit 29; Letter of July 21, 1964, transmitting various purchase orders. Mr. Rivers apparently attended the bid opening on May 12, 1964 (Tr. 52). The letter of that date (Exhibit No. 11) stating that MevA's proposal was predicated on being awarded all or none of the two schedules involved was signed by Rivers as Manager, Transmission Line Department. The Board concurs in the receipt of this exhibit into evidence over the appellant's objection (Tr. 105-110).

¹³ Government Exhibit 23.

¹⁴ Government Exhibit 30; memorandum of July 31, 1964. At the conference Mantz introduced Rivers as the Manager of the Transmission Line Division (Tr. 448, 449).

mission line department; (ii) that the only department of the company at the time in question was the one entitled Power and Special Projects headed by Mr. Mantz; and (iii) that throughout his entire tenure with the company, Rivers was only an estimator.¹⁵

Meanwhile, MevA had undertaken to investigate the financial resources available to the Sun States Contracting Company—the firm listed in its bid for the clearing and footings work.¹⁶ The initial request to Sun States for financial information was refused pending the receipt of the proposed subcontract (Tr. 16–18). MevA's request for a Dun & Bradstreet report on Sun States resulted in the receipt on May 20, 1964 of a report on Harold L. Perry who had signed the Sun States bid in the capacity of General Manager.¹⁷ The report disclosed Mr. Perry's net worth to be in the amount of \$43,049 (Appellant's Exhibit A).

Following receipt of the credit report, MevA forwarded Sun States a copy of the standard Association of General Contractors' subcontract agreement. The form so forwarded is not in evidence but the letter of May 25, 1964 by which it was transmitted assured Sun States that the subcontract issued would contain clauses similar to and not any more stringent than those included in the standard form (Appellant's Exhibit B). There is a clear indication, however, that the provisions respecting bonds proposed by MevA for inclusion in the subcontract during the course of negotiations were in fact more stringent than the provisions of the standard form (Tr. 37). Prior to the hearing the appellant contended that the imposition of the bond requirements was justified by reason of the custom of the industry. After the evidence adduced at the hearing, however, the appellant made clear that it was not taking the position that the substitution request was improperly denied because of the inability of Sun States to make bond in itself.¹⁸ Nevertheless, during most of the period between May 25, 1964 and July 15, 1964, MevA was insisting that Sun States furnished bond (Tr. 37, 100).

The Request for Substitution

In the last week in May or the first week in June of 1964, Mr. Perry visited the Phoenix office of the Bureau and represented, in substance,

¹⁵ Tr. 147, 221, 253, 254.

¹⁶ Anchor Metals of Hurst, Texas, was listed in MevA's bid for the Steel Tower Supply. The second part of the claim for disruption has also been asserted by MevA against Anchor Metals with the litigation presently pending. Exhibit 7-J; MevA letter of February 17, 1967, par. 11, p. 9.

¹⁷ Appellant's Exhibit EE; Sun States letter to MevA of May 11, 1964, marked for the attention of Mr. Bud Rivers (Tr. 16–18, 48, 49).

¹⁸ Reply Brief, p. 19.

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that MevA was trying to get rid of Sun States by bid shopping.¹⁹ Queried as to the meaning of the term, the contracting officer stated: "Bid-shopping is what is alluded to in the industry as a contractor submitting a bid on the basis of a subcontract or his quotation, getting the contract awarded, and then starting to try to find someone who will do it for a cheaper price" (Tr. 303).

At the hearing the Government made no serious effort to prove by direct testimony that MevA had been involved in bid shopping. In its Post-Hearing Brief the Government places considerable reliance upon the inference it draws from the pattern of bidding in an effort to show that it would have been to MevA's advantage to get rid of Sun States.²⁰ The Government's request to Sun States for a copy of its bid to MevA and the comparison the Government made between MevA's bid and that of Sun States on the same items²¹ was attributed by Mr. Borge to the desire to see whether there was anything in what Perry was saying (Tr. 439).

On June 9, 1964, Messrs. Mantz and Trimbach of MevA²² came to Phoenix and inquired of Borge as to the prospects for obtaining approval of a request to substitute another concern for the listed subcontractor, Sun States, which they alleged was insolvent. The MevA representatives also raised a question of MevA doing the work itself.²³ By letter dated June 12, 1964, MevA requested permission to withdraw the name of Sun States as a subcontractor pursuant to the authority of Paragraph 24e of the contract.²⁴ In support of the request the contractor stated:

¹⁹ Testimony of Donald G. Borge, an engineer in the Phoenix office (Tr. 438). Mr. Perry confirmed that he had made such representations to Borge (Tr. 409, 410). Similar representations were made by Mr. Perry to Mr. Dolyniuk of the Bureau's Phoenix office (Tr. 456).

²⁰ See the Government's Post-Hearing Brief, pp. 12, 15, 16 and 90. Commenting upon one of these arguments, appellant's counsel states: "* * * Comparisons of figures, *without including the clearing*, which was a major part of the work subcontracted to Sun States, are meaningless. * * *" Reply Brief, p. 10.

²¹ Exhibit 7-A, pp. 18, 19; Tr. 439, 440. See Appellant's Exhibit EE; Tr. 251, 252.

²² Then the Manager and the Controller of MevA, respectively.

²³ The results of the conference were reported to the Denver headquarters and together with Sun States' allegation that MevA was bid shopping were transmitted through channels to the contracting officer (Tr. 440, 458, 269, 272).

²⁴ "24. *Listings of Subcontractors*

"a. The term 'subcontractor' shall mean an individual or firm who has a contract with the Prime Contractor to perform active duties on the site, involving construction, fabrication, or installation of materials or items of equipment in connection with one or more of the categories of work listed in 'Supplement to Bid Form, S. F. 21—List of Subcontractors' and shall not include suppliers of these items unless listed or so stated in the specifications, or unless the supplier and installer are one individual or firm by reason of construction practice.

"b. The bidder shall submit with his bid the firm name and address of each subcontractor to whom a subcontract will be awarded for each category of work listed in the 'Supplement to Bid Form, S. F. 21—List of Subcontractors' attached to S. F. 21. Except as otherwise provided herein, the bidder agrees, if awarded the contract, not to contract to have any of

Our detailed examination of the financial resources of this Corporation reveals that, in our opinion, they are inadequate to support performance of this sub-contract. We have examined the Corporation's financial statement and the personal financial statements of the Officers, have discussed this matter with the Sun States banking affiliate—The Valley National Bank, Mr. Norman J. Miles, Assistant Vice President, and have also obtained Dun and Bradstreet Reports. We believe that the satisfactory performance of this work covered by this sub-contract would be seriously affected by this lack of financial stability.

If approval is obtained for this withdrawal, we intend to provide a sub-contractor or contractors of definite financial responsibility or will provide performance by our own organization.²⁵

In its letter of June 17, 1964 (Exhibit 7-C), the Government, after referring to MevA's letter of June 12, 1964, stated: "It appears that there has been no change in the circumstances existing at time of submittal of your bid to justify substitution of subcontractors as requested. Accordingly, approval of any substitution is denied."

Prior to receipt of the Government's letter of June 17, MevA had had two conferences in Phoenix with Sun States. At the meeting on June 9, 1964, further information was developed with respect to the financial resources available to Sun States. There is some confusion

the listed categories of work performed by any subcontractor other than the subcontractor named for the performance of such work.

"c. With respect to a project listed in Category A herein, the bidder shall insert the name and address of the subcontractor selected to perform the particular item of work as listed. With respect to a project in Category B herein, and if no entries appear in the 'Categories of Work' column in the Supplement to Bid Form, S. F. 21, the contractor shall insert the categories of work he proposes to subcontract and the name and address of each proposed subcontractor. In case of either Category A or Category B, if no subcontract is to be awarded for any category of work listed, the bidder will be required to insert his name and address opposite each such category and to perform such work with his forces and all such personnel shall be carried on his own payroll.

"d. In the event the bidder fails in his bid (1) to identify the subcontractors as required by Subparagraph b., or (2) to comply with Subparagraph c. if the bidder himself intends to perform one or more listed categories of work, the bid will be rejected as nonresponsive to the invitation.

"e. No substitution for any named subcontractor will be permitted prior to award, and only in unusual situations after award and then only upon the contractor's submission, in writing, to the Contracting Officer of a complete justification therefor and after obtaining the Contracting Officer's written approval thereof. This provision applies also to those categories for which the bidder lists himself.

"CATEGORY A PROJECTS

* * * * *

"CATEGORY B PROJECTS

* * * * *

"Transmission Lines"

²⁵ Findings, note 2, *supra*; Exhibit 7-B. The financial statements and the Dun & Bradstreet reports mentioned did not accompany the letter. Commenting upon such letter and the meeting of June 24, 1964 in reference thereto, Government witness King stated: " * * * The Contractor made no offer, according to my recollection of this meeting, to furnish us anything else, and the only thing the letter states is that your investigation had established that the subcontractor was financially irresponsible. It does not state that, 'We have checked their assets and their assets are X dollars.' " (Tr. 549.)

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in the record as to whether the consolidated balance sheet²⁶ received in evidence over the Government's objection was obtained at this time or a week later.²⁷ The investigation by MevA did disclose, however, that as of the date of the conference no arrangements had been made for a line of credit through one of the Phoenix banks, as Mr. Perry had represented to be the case (Tr. 23). A second meeting between MevA and Sun States was held on June 16, 1964. Mr. Trimbach's testimony as to this meeting is related to his assertion (conceded by his counsel to be mistaken) that the consolidated balance sheet prepared by him was from information obtained then.

On June 16, 1964, Sun States retained Mr. Hale C. Tognoni, a Phoenix attorney, to represent the company before the Bureau and in the negotiations with MevA. At a meeting in the offices of the Valley National Bank in Phoenix on that date, Tognoni presented Sun States' position to the MevA representatives (Mantz and Trimbach) participating in the conference. According to Tognoni, such presentation included the fact that in all previous negotiations it had been Sun States' understanding that the finances were to be furnished by MevA; that the bonding was to be done by MevA; and that Sun States was merely to furnish the know-how through Mr. Perry. The following day Tognoni called Mr. S. H. Swenson for the stated purpose of getting the written contract taken care of.

In a meeting with Borge on June 17, 1964, in the Bureau's Phoenix office, Tognoni advanced the same position that he had stated to the MevA representatives the day before. He also emphasized to Borge that there had been no change of circumstances from the time of bidding except a possible change for the better due to the prospect of obtaining some financial assistance from sources other than Meva.²⁸

On June 22, 1964, Tognoni called upon officials of the Interior Department in Washington, D.C., for the purpose of presenting Sun States' position. He was advised that this was a matter which should be taken up with the contracting officer. By speedletter and telephone,

²⁶ Appellant's Exhibit E; Sun States Contracting Company, Officers And Principles (sic), Financial Statements. Commenting upon Trimbach's testimony, appellant's counsel states: "Government counsel correctly points out that Mr. Trimbach testified that he didn't get the financial data as to Sun States' officers until the 'second meeting' in Phoenix, or after MevA had written the Bureau and referred to them. The fact is Mr. Trimbach was mistaken, because by letter of June 12, 1964 (Ex. 7B) there is reference to these statements. The mistake is immaterial." Reply Brief, p. 14.

²⁷ The assumption upon which Trimbach proceeded (note 26, *supra*) was apparently responsible for the conclusion he expressed that nothing more was learned at the June 9 meeting than was known from the Dun & Bradstreet report (Tr. 23). In fact, the consolidated balance sheet shows stated net worth to be \$37,501 for Sun States, \$21,823 for J. A. Henderson, \$31,697 for E. C. Woodland and \$59,579 for H. L. Perry for an aggregate stated net worth of \$150,600. In contrast, the Dun & Bradstreet report (Appellant's Exhibit A) shows net worth for Harold L. Perry to be in the amount of \$43,049.

²⁸ Mr. Tognoni's testimony relating to the matters discussed in the preceding two paragraphs is at Tr. 344-349.

the contracting officer (Chief Engineer) was advised as to what had transpired at the June 22d meeting. This information was received prior to the contracting officer's meeting with MevA representatives in Denver on June 24. The contracting officer testified that the speed-letter (dated June 23) generally reflected the information received in the telephone conversation. Tognoni testified that such letter represented the substance of the conversations held with the Washington representatives of the Interior Department.²⁹

In a conference held in Denver on June 24, 1964,³⁰ MevA sought reconsideration by the contracting officer of the ruling of June 17th. The recollection of the witnesses differ to a considerable extent as to positions taken by the parties at the conference. Of the witnesses who appeared only the contracting officer had the benefit of contemporaneous notes to which he referred while testifying. We therefore consider his testimony to be more credible than the unaided recollection of appellant's witnesses Stricker and Trimbach, and Government witness King, in so far as there are differences in the recollection of the parties.³¹

At the conference MevA asserted that Sun States could not make bond; that it had no financing; and that MevA was anxious to get a financially solvent contractor to do the work but that the company might possibly consider doing the work itself. Another course of action mentioned was the possibility of Sun States subcontracting the work out to others.³² The contracting officer acknowledged that MevA had asked for a decision under Paragraph 24 but he denied that any decision was issued, stating: ³³ * * * We told them specifically that

²⁹ Appellant's Exhibit M ("* * * He (Tognoni) indicated that while there were alleged to be several reasons for MevA to not retain the subcontractor, the only concrete reason that he could ascertain was lack of finances. He was in the process of arranging for finances and indicated that Sun States should have this available early this week and be in a position to approach MevA for the execution of a contract between the two of them, something which he does not now have.

"Mr. Tognoni was advised that this was a matter which he should follow up with the contracting officer. Therefore, you may hear from this firm within the next few days.") (Tr. 282, 306, 307, 352).

³⁰ The conferees were Messrs. Mantz, Trimbach and Stricker for MevA and Messrs. Bellport, Trenam, Tyler and King for the Bureau (Tr. 29, 277).

³¹ Tr. 119, 277, 293, 294. Addressing himself to a conflict in the testimony offered by the contracting officer and Government witness Tognoni, appellant's counsel states: "* * * The Board will no doubt decide who is correct here. Suffice it to say we believe Mr. Bellport is a distinguished and honorable gentleman, a careful testifier, and a careful diarist—e.g., see T. 294." Brief of Appellant, p. 24.

³² The contracting officer testified as follows: "Q. Were any other alternatives mentioned? A. Yes. According to my notes they also told us that Sun States proposed to sub the work themselves to other subs in its entirety" (Tr. 278). The appellant's witnesses Trimbach and Stricker had no recollection, however, of such a matter having been discussed (Tr. 42, 63).

³³ Tr. 279. In response to a later question, the contracting officer repeated this testimony in almost identical language (Tr. 281). Mr. Stricker considered that the contracting officer's action constituted a final decision within the context of Paragraph 24 (note 24, *supra*) but that such decision did not involve a question of fact within the meaning of the Disputes clause (Tr. 92, 144, 145).

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if they wanted to make a substitution, they would have to give the detailed story of the difficulty, which they said they would do if they decided on it."³⁴

The question of MevA doing the work itself was referred to the Regional Solicitor, Mr. King. In explaining the referral the contracting officer noted that the Bureau had had no experience under the new clause and that it was unaware of the experience that the General Services Administration had had under a similar clause initiated a short time before. Mr. King agreed to check with Washington and suggested that the contractor call him the next day.³⁵

The contracting officer testified that MevA was told that Sun States was making allegations and that if it came down to an actual request for substitution that he would have to give Sun States a chance to be heard.³⁶ An entry from the contracting officer's diary pertaining to a telephone conversation with Mr. Tognoni only 2 days after the conference of June 24, 1964 corroborates part of the contracting officer's testimony, including the fact that Sun States would be given an opportunity to answer MevA's charges if the matter were pressed.³⁷ There is no doubt, however, that MevA's request for permission to substitute a different subcontractor for Sun States or to perform the work itself was denied by the contracting officer on the ground of a failure to show any change in circumstances.³⁸ Explaining the basis for the denial of the request contained in MevA's letter of June 12, 1964 (Exhibit 7-B), the contracting officer stated (Tr. 274): "* * * before we could even [give] it any real consideration it would certainly

³⁴ Mr. Stricker had no recollection, however, of MevA having been advised to make a detailed presentation (Tr. 63).

³⁵ Tr. 279. There is no evidence indicating that MevA made any effort to ascertain the results of King's inquiry until at the time it wrote its letter of July 9, 1964 (Exhibit 7-D).

³⁶ Tr. 281. Appellant's witness Stricker was unable to recall, however, that MevA representatives were told that Sun States would be given an opportunity to be heard before any decision was rendered. (Findings, note 2, *supra*, par. 7, p. 4; Tr. 64). But Government witness King had a distinct recollection that the MevA forces had been so informed, having told them so himself (Tr. 557).

Upon direct examination Stricker testified that he had no recollection of several matters referred to in the findings having occurred (notes 32, 34, *supra*, and instant note). He was more emphatic upon cross-examination, however, as is shown by the following colloquy: "Q. * * * my notes reflect that you testified on direct examination that you did not recall the statements having occurred or having been made at the meeting of June 24, 1964. Can you say categorically that they were not made or stated? A. Well, I would say categorically that they were not made because if they had been made I would have remembered them" (Tr. 90).

³⁷ "* * * He [Tognoni] said that before the bid opening MevA had told him that financing or bonding would not be necessary but has now changed their minds. I told him we had told MevA that if they wanted a substitution considered it would be necessary they present it formally and that we would give Sun States an opportunity to answer the charges. He requested that if this occurred we call him to arrange the meeting. * * *" Appellant's Exhibit HH; Excerpt from Diary, June 26, 1964.

³⁸ Exhibit 7-C; Letter of June 17, 1964. The differences in terminology employed by the various witnesses do not appear to involve any difference in concept.

have to be documented to show the circumstances had changed since the time they were listed as a subcontractor in the MevA bid." The contracting officer has consistently characterized the denial of MevA's request for substitution as tentative on the ground he had made clear at the June 24 conference that further consideration would be given to MevA's request if it could be shown that conditions had changed from those obtaining prior to May 12, 1964.³⁹ At the conclusion of the conference the contracting officer's position remained unchanged—he would give consideration to a "carefully documented case of what circumstances had changed since the time of the bid opening" (Tr. 297).

While the "change in circumstances" language does not appear in the clause requiring the listing of subcontractors, the contracting officer made clear that in employing such a test he was relying upon the provisions of subparagraph e. thereof under which the granting of a request for substitution is dependent upon a showing that an unusual situation is present.⁴⁰ At the hearing, appellant's counsel also referred to the unusual situations language of subparagraph e (Tr. 550). The parties appear to agree that this is the standard against which a request for substitution for a listed subcontractor is to be measured, subject to the additional requirement that the contractor's written submission to the contracting officer provide complete justification.⁴¹

One of the most surprising aspects of the conference of June 24, 1964, was the failure of both the contractor and the Government to tell the other party all that they knew of importance respecting the request for substitution. It has previously been noted that the Dun & Bradstreet report (Appellant's Exhibit A) and the consolidated balance sheet pertaining to Sun States, its officers and principals (Appellant's Exhibit E) did not accompany the request for substitution made in MevA's letter of June 12, 1964 (Exhibit 7-B); nor were the documents mentioned furnished to the Government at the conference held 12 days later. Trimbach attributed the failure to proffer such documents to the fact that MevA was told by the Government (i) that such information wouldn't in itself demonstrate that there were any changes, and (ii) that it would merely demonstrate the current financial position of Sun States (Tr. 32).

For its part the Government appears to have been equally reticent about disclosure of pertinent information. Prior to the conference the

³⁹ Tr. 327, 328. Appellant's witness Stricker acknowledged that such advice was received (Tr. 60).

⁴⁰ Tr. 328, 329. Upon direct examination the contracting officer stated that MevA's letter of June 12, 1964 (Exhibit 7-B) failed to satisfy the requirements of subparagraph e "[b]ecause I didn't consider it complete justification. It didn't set forth any unusual situations after award that presumably would not have been known at the time the bid was prepared" (Tr. 275).

⁴¹ Note 24, *supra*.

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Government knew that Sun States was accusing MeVA of bid shopping (Tr. 271, 443). The Government was also aware of Sun States' allegations that prior to bid MeVA had promised to finance Sun States and had agreed to waive bonds from Sun States (Tr. 349, 443). The testimony indicates, however, that the Government did not apprise MeVA of either the bid shopping charges or of the promises it had allegedly made to Sun States respecting financing (Tr. 33, 556).

According to the testimony offered by the contracting officer and Government witness King, the failure to make inquiries of MeVA respecting the alleged pre-bid dealings between MeVA and Sun States was the result of what they both understood the contractor's position to be, namely, that Sun States' bid had been received at the last minute and that consequently no time was available for investigation of Sun States' financial resources.⁴² Commenting upon a similar statement in the findings appellant's witness Stricker stated: "As to the allegation that Sun States' quotation was presented at the last minute and that there was insufficient time for an appraisal of Sun States, I think general reference was made to conditions under which a general contractor accepts a bid from a subcontractor or awards a contract, and that in many cases or instances there is not sufficient time to evaluate it. I don't think it was expressly intended for Sun States, however."⁴³

According to Government witness King, he had visualized that the conference would center around asking MeVA about their dealings with Sun States in advance of bid opening. But, in the words of King, "Now, at the outset we were met with the statement that they had had no dealings, at least the inferential statement that they had had no dealings with Sun States prior to bid opening * * *."⁴⁴ Having reason to believe that Sun States would challenge this view of the matter, Regional Solicitor King posed a hypothetical question to inject the idea that there had to be some change in circumstances and there had to be a showing. In the hypothetical⁴⁵ it was assumed that prior to sub-

⁴² Tr. 278, 541.

⁴³ Tr. 62. See also Stricker's testimony, Tr. 122, 123.

⁴⁴ Tr. 523, 524. In the Government's Brief at page 34, the Department Counsel states: "* * * Mr. Perry [testified] that he had been in contact with Mr. Rivers for some time, commencing perhaps six weeks prior to bidding, and had kept him informed from time to time by telephone, as to his figures as they were worked up (Tr. 402, 423). Certainly there was plenty of time to inquire about Sun States if MeVA knew the quotation was coming, even after April 27, 1964, when Rivers officially went on the MeVA payroll. The final, written quotation was admittedly presented the night before bidding (Tr. p. 407). * * *"

⁴⁵ On Cross-examination King gave the following explanation for the circumlocution: "* * * The Contractor, for reasons unknown to me, has never elected to talk about what the prebid understandings were, and he still hasn't to this day. Q. They told you there were none, didn't they, Mr. King? A. They told us this, but we heard from other sources that there were. This is why I put it in the hypothetical. I didn't want to insult them by saying, 'I don't believe you.' All I meant was that if there were contrary factual statements going around, this was an area that should be covered" (Tr. 555, 556).

mission of a subcontractor's bid to a prime contractor there had been an understanding under which the subcontractor (i) would not be required to furnish bond, and (ii) would be given financial assistance by the prime contractor. As to the hypothetical situation, King expressed the opinion that an unusual circumstance would not appear to exist, if, after the opening of bids, it was revealed that the subcontractor in the example could not make bond and did not have adequate finances to perform the work. He expressed the further opinion that in such circumstances the prime contractor might be obligated to put the subcontractor on the job and have the subcontractor prove he was unable to perform before there would be ground for substitution.⁴⁶

Following the conference of June 24, 1964, MevA continued to negotiate with Sun States with a view to reaching an agreement upon the terms of the subcontract.⁴⁷ At a negotiating conference in Phoenix on July 2, 1964, Mr. Tognoni presented a letter of that date indicating that Sun States had a line of credit from the Valley National Bank in the amount of \$50,000 (Tr. 69). This was the first time in the course of three conferences that Sun States had furnished evidence of a line of credit with which to commence performance. MevA continued to insist that Sun States furnish a bond, however, justifying the \$300,000 figure specified on the grounds (i) that Sun States had been unable or unwilling to furnish the financial and other information requested, and (ii) that analysis of the information furnished indicated that MevA would be taking a substantial risk if they awarded a subcontract to Sun States.

According to Tognoni he opened the conference of July 2, 1964 with a presentation of Sun States' case including specific reference to the pre-bid understanding with MevA (he considered Rivers to be MevA's representative) under which no bond was to be required of Sun States and finances were to be provided to Sun States by MevA. It was his testimony that MevA representatives neither agreed nor disagreed that such pre-bid commitments had been made by Rivers (Tr. 361, 368-370). Mr. Stricker denied, however, that either Perry or Tognoni had ever related Sun States' refusal to provide a bond to a promise from MevA's estimator, Mr. Rivers. He also denied that during their meeting Mr. Tognoni had asserted that Sun States was entitled to some sort of financial assistance from MevA (Tr. 81, 85).

⁴⁶ Tr. 528-531. It is clear from the testimony that the right of the contractor to terminate for default in such circumstances was discussed (Tr. 32, 33, 62, 528, 529).

⁴⁷ Appellant's witness Trimbach testified that after the conference MevA knew that it must make an award to Sun States (Tr. 35). Appellant's witness Stricker was of the same opinion (Tr. 84). This view of the matter was not shared by the contracting officer and Government witness King, however, both of whom pointed to the Government's readiness to reconsider the question whenever a change in circumstances could be shown (Tr. 297, 544).

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Upon cross-examination appellant's witness Trimbach⁴⁸ gave the following testimony as to the position advanced by Sun States with respect to pre-bid commitments by MevA:

Q. Did they take the position that they had been advised to the contrary: that a bond would not be required?

A. They made the statement that they had been told that there would be some sort of financial aid provided by MevA Corporation, and along with that there would be no bond requirement. They made that statement.

Q. And what was MevA Corporation's answer to that allegation or that position?

A. Well, all during the discussions I don't believe that MevA ever honored that position. We took the position that the bond would be required.

The HEARING OFFICER: They didn't honor it but did they deny it?

The WITNESS: Did we deny that?

The HEARING OFFICER: The allegation made by Sun States Contracting Company that Meva had said they would provide financing and consequently bond would not be required?

The WITNESS: Well, the position that Meva had made these promises, I believe always came out that they were made by the man who put the job together, who was Mr. Rivers, who, after all, built the estimate and carried it to the bid opening. It was Meva's position that he did not have the authority to state to the subcontractor that he would be provided with financial support or that he wasn't required to have a bond (Tr. 51, 52).

Following an objection by appellant's counsel that the record should be clarified to show whether the foregoing testimony was related to the July 2, 1964, conference, Mr. Trimbach continued his testimony:

A. Well, I don't believe that specific question was ever raised at the July 2 meeting, "Do you, Meva, deny that you made these promises?" I don't recall that at that particular meeting or that that particular question was raised at that meeting. By then we were to the point of writing terms and conditions, and the bond was still in question. Meva, other than the statement that Mr. Rivers made these promises, I don't believe ever held anybody other than Mr. Rivers made these promises. Meva couldn't deny that he had made the promises if it was stated that he had, but Meva denied that—and again getting back to Mr. Oles' position, I don't know that was a denial made at that meeting, but the relative positions of the parties throughout the period of time was that Meva officials themselves never ever promised anybody that the bond would not be required.

Now, Mr. Rivers acting in this capacity of preparing the estimate wasn't necessarily regarded as an official of the Meva Corporation for that purpose (Tr. 54).

In evaluating the testimony pertaining to what commitments, if any, MevA made in reference to financing and bonds, there are several factors for consideration. There is the fact that in the telegram of June 30, 1964 (Government Exhibit 14), Sun States specifically

⁴⁸ Mr. Trimbach and Mr. Mantz had represented MevA at the conference with Sun States on June 9 and June 16, 1964. Mr. Trimbach also attended the July 2, 1964 conference with Sun States in the company of Messrs. Mantz and Stricker (Tr. 67).

requested that Mr. Swenson and Mr. Rivers be present at the July 2, 1964 meeting "so that all information on MevA's oral representations be available." The parties are in disagreement over what was meant by the "pre-bid agreement" referred to in the telegram—MevA contends that it did not go beyond the bonding requirement. Although both Swenson and Rivers were then employed by MevA, neither was present at that meeting; nor had they attended the two earlier meetings in Phoenix. Addressing himself to the question of pre-bid commitments, appellant's counsel states: "* * * Mr. Stricker, who testified from careful notes made at the time, testified flatly that Tognoni, in the several meetings in June and July, 1964, *never* once mentioned Rivers' alleged pre-bid promises."⁴⁹ Transcript references cited in support of this statement (Tr. 81, 82, 85, 86) all pertain to July meetings between MevA and Sun States, however, as did the notes from which Stricker testified (Tr. 67). Mr. Tognoni's testimony is not subject to the same limitation as he participated not only in the July meetings but also that of June 16, 1964. His testimony concerning the various meetings is also supported by contemporaneous notes (Tr. 362). As to the meeting of June 16, 1964, Tognoni testified, without contradiction, that the MevA representatives were apprised of Sun States' understanding from previous negotiations that "the finances were to be furnished by MevA and the bonding was to be done by MevA, and Sun States was merely to furnish the know-how through Mr. Perry" (Tr. 346).

In the appellant's view Sun States' position respecting a pre-bid commitment by MevA to finance is seriously impaired by the undisputed fact that Sun States agreed to a split of the profits on the job with the James Rae Construction Co. in return for financing. The evidence offered by the Government indicates, however, that the agreement providing for financing by the James Rae Construction Co. was entered into by Sun States in order to avoid litigation with MevA (Government Exhibit 16). An identical consideration was cited as the basis for MevA's action some months later in entering into a termination arrangement with Sun States under which MevA agreed to execute and later did execute a promissory note to the James Rae Construction Co. for moneys advanced by that company to Sun States.⁵⁰ At that time and since there appears to have been a serious question as to whether Sun States was then in default.⁵¹ There is no dispute, however,

⁴⁹ Brief of Appellant, p. 14.

⁵⁰ Government Exhibit 15; Tr. 136.

⁵¹ "Page 48 Here the Government claims Sun States wasn't terminated for default, and Mr. Stricker's testimony is cited (T. 135-137). This is a quibble, a play on words. It is conceded that Sun States was not 'terminated for default' under the terms of its subcontract. It is also equally clear that Sun States' subcontract was terminated, by agreement, *because of* Sun States' default (T. 135, 136)." Reply Brief, pp. 25, 26.

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that the subcontract as executed contained no provisions for either financing by MevA or a bond from Sun States (Exhibit 7-A).

MevA Doing Work With Its Own Forces

By its letter of July 9, 1964, MevA gave the contracting officer a report on the progress of its negotiations with Sun States and renewed its request for a ruling on the question of whether Paragraph 24 applied to MevA doing the work involved itself. With respect to these matters, the letter states:

Since our meeting [of June 24, 1964] we have had several discussions and meetings with the proposed subcontractor with the view of consummating an acceptable subcontract agreement which would meet our requirements. We are hopeful that a subcontract will be consummated within the next few days. However, should we not be successful in our present subcontract negotiations, it is likely that a request will be made for a reconsideration of our request to substitute the proposed subcontractor, or that the work be performed by ourselves.

We wish to assure you, however, that every effort is being made to expeditiously come to a mutually satisfactory contractual arrangement with the proposed subcontractor.

When we previously met with you, a question was raised as to whether or not it would be necessary to obtain the consent of the Bureau of Reclamation in the event the prime contractor desired to perform the work instead of the proposed subcontractor. It would be appreciated if your office will advise us of its interpretation of the language contained in the contractual documents relating to "substitution of subcontractors" as it pertains to work performed by the prime contractor. One interpretation that possibly could be made is that it would not be necessary to obtain the consent of the Bureau of Reclamation when a prime contractor decides to perform work previously shown on the contract documents as work to be performed by a listed subcontractor. This interpretation would be based on the theory that when the work is performed by the prime contractor, there is no "substitution of subcontractors."⁵²

In its letter of July 28, 1964,⁵³ the Bureau disagreed that Paragraph 24 could be interpreted in the manner suggested by MevA. In any

⁵² Exhibit 7-D. In view of the assurances in the letter that every effort was being made to come to a mutually satisfactory arrangement with Sun States, the contracting officer construed the last paragraph as involving a hypothetical question that would probably guide MevA in bidding on future work (Tr. 284). This construction was in accord with the legal advice received from Regional Solicitor King (Tr. 532).

⁵³ Exhibit 7-E. The second paragraph of the letter reads: "In your letter, you state that one interpretation that could be made is that it would not be necessary for a contractor to obtain permission from the contracting officer when the prime contractor decides to perform work previously designated as work to be performed by a listed subcontractor. I cannot agree with this interpretation since Subparagraph 24e states in part 'No substitution for any named subcontractor' will be permitted prior to award, and only in unusual situations after award and then only upon the contractor's submission, in writing, to the contracting officer of a complete justification therefor and after obtaining the contracting officer's *written approval* thereof * * * (italics added). In my view, the words 'No substitution for any named subcontractor' contained in this paragraph precludes you as prime contractor from performing any work shown in the contract as work to be performed by a listed subcontractor unless written permission is obtained from the contracting officer."

event the question had become moot since a subcontract had been placed with Sun States under date of July 20, 1964 (Exhibit 7-A).

In view of the disposition made of this appeal, we offer no opinion on the dismetrically opposed views of the parties as to whether Paragraph 24 is applicable to a contractor desiring to perform work for which a subcontractor had been listed in its bid. We note, however, the apparent lack of vigor which characterized MevA's presentation of the inquiry involving performance of the work with its own forces up until the time the appeal was filed.

Testifying in reference to the June 24, 1964 conference, appellant's witness Stricker recalled MevA's questions as to whether or not it could properly take over the work and the fact that "the Bureau did indicate that they would at least consider this interpretation that we had placed upon the clause about the substitution of MevA to do the work in lieu of Sun States" (Tr. 63). There is no evidence, however, that MevA called the Bureau the following day for an answer to the question posed, as had been suggested to the contractor by Mr. King. When over two weeks later MevA raised the question again, the request for advice was said to involve "one interpretation that possibly could be made."

The failure of MevA to pursue the matter in a more forceful fashion may have been due to a lack of confidence in its own ability to perform the work involved. If so, such fears would appear to have been justified. This is indicated by the fact that shortly after MevA assumed direct responsibility for the work formerly subcontracted to Sun States, it hired a consultant to assist in planning the work whose services it retained for several months at a very substantial expense.⁵⁴ This was only a temporary arrangement, however, pending the consummation of negotiations for the purchase of Power City Construction and Equipment, Inc., which commenced seriously in mid-December of 1964. Although Power City did not become a subsidiary of MevA until April 1, 1965, the negotiations had progressed sufficiently by roughly the first of March so that arrangements were made for moving in Power City personnel to manage the job for MevA.⁵⁵

Outside Labor Agreement

In the course of a telephone conversation on July 10, 1964, Mr. Stricker advised Mr. Tognoni that the subcontract was in final form

⁵⁴ Testimony of appellant's witness Sutton (Tr. 238, 239).

⁵⁵ Power City Construction and Equipment, Inc. had also bid on the work for which the contract was awarded to MevA (note 5, *supra*). In its Post-Hearing Brief the Government offers its version of what caused excess costs on the project, at page 79: " * * * this entire claim is an obvious attempt to recoup losses caused principally by inept management, starting with the hiring of an 'estimator' 16 days prior to bidding and continuing until competent supervision was obtained from Power City Engineering in the spring of 1965."

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and that it would (i) provide for a bond, and (ii) require Sun States to become a signatory to a labor agreement with the International Brotherhood of Electrical Workers (Tr. 74). The telephone conversation was confirmed by letter of the same date (Appellant's Exhibit F). Prior to that time Tognoni appears not to have been aware of the IBEW labor requirement. He promptly advised Mr. Stricker that Sun States had an agreement with the operating engineers and that if electricians were going to be used, Sun States would have to increase its prices.⁵⁶ In response, Mr. Stricker asserted (i) that Perry had been aware of the IBEW agreement prior to bidding, and (ii) that the latter had advised MevA representatives that his prices were such that electricians could be hired.⁵⁷ It was apparently agreed that MevA would undertake to arrange for a meeting between the National Electrical Contractors Association (NECA), the IBEW local, Sun States and MevA.

According to Stricker the arrangements made for the meeting were related to the fact that Sun States had indicated that it would become a signatory to the IBEW agreement. Tognoni testified, however, that on July 13, 1964, he called Stricker and advised him that Sun States considered itself bound to deal with the operating engineers.⁵⁸ In any event, MevA did proceed with the arrangements for the meeting and the meeting was held on July 15, 1964.⁵⁹ At the meeting Sun States agreed to sign with the IBEW and MevA dropped its demand for a bond from Sun States. The following day the subcontract agreed upon was signed by Mr. Perry on behalf of Sun States (Tr. 100, 367).

Performance of Sun States

The Notice to Proceed was issued by the Bureau on July 17, 1964, and was received by MevA on July 20, 1964.⁶⁰ The same day MevA notified Sun States to that effect and advised that the subcontract and

⁵⁶ Tr. 76, 77, 98, 364.

⁵⁷ Tr. 77, 98, 99. Upon cross-examination, Perry acknowledged that even prior to bid he knew that the IBEW was claiming all of the labor on the work involved (Tr. 416, 417). Appellant's witness Pratt testified that after being informed of the IBEW labor requirement he had increased his bid prices for the work from \$1,263,720 to \$1,648,340 (Tr. 167-170; Appellant's Exhibit N).

⁵⁸ Tr. 78, 365, 366. There is no indication in the record that MevA called to the Bureau's attention the fact that Sun States was taking a position contrary to the conditions upon which its bid should have been predicated (note 57, *supra*), i.e., that a change of circumstances as the Government had defined the term at the conference of June 24, 1964, had occurred (See note 39, *supra*).

⁵⁹ Tr. 79, 80, 366. See Government Exhibit 26 for the agreement between Sun States and IBEW Local Union 769, executed under date of July 16, 1964.

⁶⁰ Appellant's Exhibit G. The record is not clear as to the extent to which the issuance of the notice to proceed may have been delayed pending the resolution of the Sun States' question (Government Exhibit 31; Appellant's Exhibit FF and GG; Tr. 315, 449-452).

the notice to proceed would follow. By letter of July 21, 1964, MevA gave Sun States official notice to proceed with the work and forwarded a copy of the signed subcontract. Sun States acknowledged receipt of the subcontract on July 24, 1964, and advised that work had commenced on July 28, 1964.⁶¹ Meanwhile, the Bureau had accepted the proposed construction schedule submitted by MevA at the preconstruction conference on July 22, 1964. This schedule was reflected generally in the subcontract with Sun States.⁶²

The 10 miles of acceptable tower leg foundations per month contemplated by the production schedule were never achieved. In fact, according to the testimony offered by the appellant, the total progress made by Sun States from August through December amounted to about 10 miles (Tr. 236). We have previously adverted to the position of the parties respecting the question of whether Sun States was in default at the time MevA assumed extensive obligations in return for Sun States relinquishing its right to proceed with the work,⁶³ and will not pursue the question further; nor shall we undertake to review the varying appraisals of MevA's performance from the time it took over the work directly until the job was accepted as substantially complete on May 21, 1966.⁶⁴ In both instances the questions presented relate to mitigation of damages which not only presuppose that we have jurisdiction of the claims involved but also that the record made in pursuance of the stipulation⁶⁵ is sufficient for the establishment of guidelines in the indicated areas.

Credibility of Witnesses

In the Reply Brief appellant's counsel states: "There is a question of veracity in this lawsuit, relating to the testimony of Mr. Perry and Mr. Tognoni * * *." Addressing himself to the testimony offered by Messrs. Stricker and Tognoni, appellant's counsel requests the Board

⁶¹ Appellant's Exhibits H, I and T.

⁶² Appellant's Exhibits P and Q, Government Exhibit 30. Tr. 137, 138, 235. The subcontract provided: "2. The Subcontractor shall * * * maintain a production schedule of an average of not less than ten (10) miles of acceptable tower leg foundations per calendar month. Footing excavation to begin fourteen (14) days after clearing work begins. Ten (10) mile a month production schedule to begin at same time as start of footing operation" (Exhibit 7-A, Attachment D, p. 16).

⁶³ The right of MevA to terminate for default is set forth in Paragraph 10 of the subcontract (Exhibit 7-A, p. 5). Appellant's witness Sutton testified that he did not consider that any of the documents introduced as Appellant's Exhibits T through DD constituted a 48-hour notice under the termination clause (Tr. 244). Appellant's witness Stricker expressed doubt that MevA could have made a case for termination for default (Tr. 137).

⁶⁴ Government Exhibit 33; Tr. 473. The job was not entirely completed until July of 1966 (Tr. 190).

⁶⁵ Note 4, *supra*.

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to review and compare this testimony.⁶⁶ We have previously considered Mr. Tognoni's testimony at some length and have narrowed the area of purported conflict by pointing out that Mr. Stricker's testimony and the notes upon which his testimony was based related only to the July 1964 meetings between MevA and Sun States. We shall give further consideration, however, to the question of the credence to be given to the testimony of the two witnesses concerning the remarks made at the July 2, 1964 meeting by Mr. Tognoni, if any, with respect to the alleged pre-bid commitments from MevA related to (i) financing of Sun States, and (ii) waiver of bond from Sun States. There is no doubt that this testimony is in conflict.

Contrary to the assertion made by appellant's counsel, Mr. Tognoni's testimony, in so far as it relates to the July 2, 1964 meeting, is based upon contemporaneous notes.⁶⁷ The fact that Mr. Stricker's contemporaneous notes fail to record remarks that Mr. Tognoni testified were made is not determinative, of course, of the question of whether, in fact, they were made. The general tenor of the testimony given by appellant's witness Trimbach clearly supports Mr. Tognoni's version of the representations made at the July 2, 1964 meeting with respect to pre-bid commitments by MevA, as well as at the earlier conferences attended by Trimbach⁶⁸ including a marked similarity in their description of the posture of the parties at the meetings in question.⁶⁹

In making these observations we do not intend to cast any aspersions upon Mr. Stricker's integrity. The absence from his notes of any record of Mr. Tognoni's remarks pertaining to these matters may reflect nothing more than the exercise of judgment at the time as to

⁶⁶ Reply Brief, p. 16. Because the case presents a novel question, we have made a detailed appraisal of the testimony and other evidence on the supposition that such action may be of assistance to the parties. See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 412; *James Know, dba JaK Enterprises*, IBCA-684-11-67 (February 13, 1968), 68-1 BCA par. 6854, p. 31,697.

⁶⁷ After asserting the nature of the pre-bid understanding, Mr. Tognoni referred to his notes (Tr. 361). A short while later he stated: "This is exactly what I told them. The notes I am taking this from are the notes that I made up that day for the presentation and which I spoke from * * *" (Tr. 362).

⁶⁸ See colloquy involving Trimbach reported in text, *supra*, and in particular his statement: "Well, the position that MevA had made these promises, I believe *always* came out that they were made by the man who put the job together, who was Mr. Rivers, who, after all, built the estimate and carried it to the bid opening. * * *" (Italics supplied.) We infer that the term "always" refers to the three meetings Trimbach attended in June and July of 1964 (note 48, *supra*).

⁶⁹ *Of.* Tognoni's testimony as reported at pages 368-370 of transcript and particularly the following colloquy upon cross-examination: "Q. Now, you are not testifying that Mr. Trimback (sic) and Mr. Swenson or Mr. Mentz ever agreed with you that any such agreement had been made, are you? A. I am testifying that they neither agreed nor disagreed" (Tr. 370) with Trimbach's statement reported in the text, *supra*: "* * * MevA, other than the statement that Mr. Rivers made these promises, I don't believe ever held anybody other than Mr. Rivers made these promises. MevA couldn't deny that he had made the promises if it was stated that he had. * * *" (Tr. 54).

what to record. There is no reason to assume, however, that independent of such a record Mr. Stricker's memory would provide a reliable guide to whether something had occurred at a meeting held over three years before.⁷⁰ Turning to the question of demeanor of the witnesses as a test for credibility, the hearing member was favorably impressed with the mien of both men throughout their testimony.

Another question raised by appellant's counsel affecting Mr. Tognoni's credibility is whether in the telephone conversation of June 26, 1964, Mr. Tognoni told the contracting officer that the alleged pre-bid commitments by MevA had been made to him personally, as is shown in Appellant's Exhibit HH. In his testimony Mr. Tognoni denied that the entry in the contracting officer's diary for June 26, 1964, was accurate, in so far as it conveys the impression that the pre-bid assurances had been given to him rather than to his client Sun States (Tr. 383, 384). It is undisputed that whatever pre-bid commitments were made by MevA, they were not made to Mr. Tognoni since he was not even retained by Sun States until June 16, 1964, or over a month after the bid opening on May 12, 1964.

According to the contracting officer's testimony, the material included in his diary was dictated to his secretary every day (Tr. 277). In the instant case, we note that there would be no conflict in the testimony of the contracting officer and that of Mr. Tognoni if the word "them" were substituted for the word "him." We also note that the words in question are sufficiently similar in sound that if there were a lack of clear enunciation or a relatively high level of background noise, the two words could be interchanged, i.e., the word "them" could have been understood as "him" either by the contracting officer or by his secretary. We do not say that this is what did happen. We merely note that it is at least plausible that one of the alternatives mentioned accounts for the conflict in the testimony.

It is possible, of course, that Mr. Tognoni told the contracting officer precisely what the excerpt from his diary offered in evidence records. For the reasons previously indicated, as well as Mr. Tognoni's demeanor when cross-examined in the area in question, we do not consider that such a conclusion would be warranted on the present record. This view of the matter is buttressed by the apparent absence of any motivation for Mr. Tognoni to say that the pre-bid representatives had been made by MevA to him when the only proof he could offer of

⁷⁰ Concerning the conference of June 24, 1964, between MevA and the Bureau, Mr. Stricker's testimony was without the benefit of contemporaneous notes (Tr. 119). As previously noted, there were material differences between his testimony and that of the contracting officer. The latter's testimony was supported by contemporaneous notes, however, as well as by Appellant's Exhibit HH.

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even an association with MevA personnel antedating the bid opening pertained to Mr. Perry.⁷¹

The Board's evaluation of the testimony of Mr. Perry is an entirely different matter. While at least some of the apparent inconsistencies in Mr. Perry's testimony may have been attributable to an inability to accurately recall events which had transpired over three years before,⁷² there are aspects of his testimony that we are unable to ascribe to understandable memory lapses. For example, it would strain credulity to the utmost to suppose that Mr. Perry was unable to recall the name of the company given to Mr. Borge as the firm to which MevA intended to shop Sun States' bid (Tr. 427, 439); nor do we place any more credence in the explanation Mr. Perry gave for having contacted the appellant's Mr. Sutton⁷³ during a recess in the hearing and in a telephone conversation with Mr. Sutton later, in which it was proposed by Mr. Perry that Mr. Sutton come to a meeting in Mr. Perry's office unaccompanied by anyone else.⁷⁴

The fact that the activities described above occurred within six weeks of the time that Mr. Perry had reasserted a claim against MevA that had been dormant for over two years; that the claim was reasserted only after Mr. Perry had been requested to testify on behalf of the Government; and that the communications with Mr. Sutton took place the day before Mr. Perry took the witness stand⁷⁵ raise serious questions as to Mr. Perry's integrity. On the issue of credibility there is also for consideration the fact that Mr. Perry's demeanor as a witness did not inspire confidence.

We do not think, however, that Mr. Perry's testimony should be rejected in its entirety.⁷⁶ In reaching this conclusion, we note the absence of any testimony from any of the MevA personnel who,

⁷¹ E.g., Appellant's Exhibit EE, Sun States' letter of May 11, 1964.

⁷² Even where this is the case, Mr. Perry is not entirely blameless. Knowing that he was going to testify for some two months before he did, Mr. Perry failed to bring the diary he had maintained to the hearing apparently because no one had requested that he do so (Tr. 425, 428).

⁷³ Vice President and Assistant General Manager of MevA (Tr. 218).

⁷⁴ The explanation suggested by Mr. Perry was that he desired to demonstrate some varmint calls to Mr. Sutton who had requested that they be obtained for him. There is nothing in Mr. Perry's testimony to indicate, however, that he informed Mr. Sutton of the innocuous purpose of the requested visit during the telephone conversation referred to in the text (Tr. 427, 428, 434, 435).

⁷⁵ Tr. 425-428, 433. The claim presented to MevA on August 9, 1965, was in the amount of \$5,584. The billing submitted on September 29, 1967, was in the amount of \$5,134.

⁷⁶ Cf. *Dreacel Dynamics Corporation*, ASBCA Nos. 9502 *et al.* (August 17, 1967), on reconsideration, 67-2 BCA par. 6531, p. 30,334 ("* * * Although it is not specifically mentioned, the Government is, in effect, urging upon us the maxim, 'FALSUS IN UNO, FALSUS IN OMNIBUS,' i.e., he who speaks falsely on one point will speak falsely upon all. This maxim is psychologically unsound and is generally rejected. It is certainly rejected by this board. * * *").

according to Perry, were involved in the pre-bid dealings with him.⁷⁷ We also note that Mr. Perry's testimony in important areas is corroborated not only by other Government witnesses, but by some of appellant's witnesses as well. While it is true that the corroborative testimony merely establishes that in June and July of 1964 Mr. Perry was saying to others what he said on the witness stand,⁷⁸ it also shows that MevA was aware of the Sun States' position respecting pre-bid commitments during the two months of subcontract negotiations between the parties.

Decision

From the time its initial claim was filed in mid-September of 1966 MevA has consistently maintained that in denying its request to substitute a different subcontractor for Sun States or to perform the work with its own forces, the contracting officer acted arbitrarily and capriciously.⁷⁹ Proof of these contentions may be a prerequisite to recovery in any forum.⁸⁰

MevA asserts that the contracting officer acted arbitrarily and capriciously in making approval of the substitution request dependent upon a showing of a change of circumstances since, according to MevA, there is nothing in the contract or in the law or in common logic to support the change of circumstances rule announced by the June 17, 1964 letter from the Bureau. Recurring throughout the appellant's briefs is the theme, however, that the real reason for the denial of the requested substitution was the Government's belief that MevA was engaged in bid shopping, as is illustrated by the following passage: "** * * Mr. Bellport knew the reason for the rule was to stop bid shopping (T. 303); he assumed MevA was guilty of this, based solely on fourth or fifth hand hearsay (T. 302); and this was why, as he flatly testified, he turned down the MevA request (T. 300, line 24), although*

⁷⁷ The record does not disclose whether at the time of the hearing Messrs. Swenson and Mantz were still employed by MevA. It is clear that Mr. Rivers was not (Tr. 254).

⁷⁸ To establish that the pre-bid commitments claimed were actually made, there is only Mr. Perry's testimony. This is unrefuted in the record, however, and could only be directly contested by the only other persons with first-hand knowledge of the events occurring prior to May 12, 1964, namely, Messrs. Rivers, Mantz and Swenson, none of whom testified.

⁷⁹ E.g., Exhibit 7-H; letter of September 18, 1966; Appellant's Brief, p. 27; and Reply Brief, p. 22 ("** * * This case doesn't rest, as counsel seems to feel, on any 'oral decision' but on a flat, unequivocal, erroneous, arbitrary, capricious, unjustifiable and written act of the Contracting Officer on June 17, 1964. * * **").

⁸⁰ Cf. *J. W. Bateson Co., Inc.*, ASBCA No. 6069 (September 27, 1962), 1962 BCA par. 3529, p. 17,942 ("** * * Most certainly, if the contracting officer is given any authority by the requirement that the contractor's representative be 'satisfactory' to him, it must allow the use of some discretion on his part. To entitle appellant to the claimed direct costs arising from the project manager's removal, there must have been an arbitrary and unwarranted abuse of this discretion. We make no such finding, but if the allegation is true, this would constitute a breach of the contract. Such action would fall under none of the contract provisions permitting additional compensation, thus it is beyond the authority of this Board to grant the requested amount.*").

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he used the 'change of circumstances' as the ostensible reason". (Appellant's Brief, pp. 26, 27).

Also cited as illustrative of the arbitrary and capricious nature of the denial of MevA's request is the fact that the Bureau made no effort to investigate Sun States' allegations that MevA was trying to bid shop,⁸¹ and the fact that it concedes that Sun States was without financial resources of its own to perform the contract.⁸² In developing the argument that the change of circumstances test provided no avenue of relief for MevA, the appellant's counsel states: "* * * Sun States was just as broke *before* as *after* May 12, 1964. * * *" (Appellant's Brief, 27).

While the Government acknowledges that the primary purpose of the subcontractor listing paragraph is to prevent bid shopping, it asserts that among the objectives to be achieved by the clause were (i) to encourage contractors to obtain bids from prospective subcontractors sufficiently far in advance of opening of bids to permit them to be properly evaluated, and (ii) to give prospective subcontractors some assurance that they would receive some measure of protection. In support of this position the Government places great reliance upon the decision of the Comptroller General in 43 Comp. Gen. 206 (1963),⁸³ and particularly the following portions of the decision :

GSA has reported to us that, in the absence of firm commitments for the subcontracting work, the general contractor can and frequently does bid shop and obtain more favorable subcontract prices than those upon which his bid was based, *with the probable dual result of inflated cost to the Government and substandard work by the subcontractors at their lower prices. Also, we are informed that under the present practices subbids are submitted at the last possible moment before prime bids are finally submitted, in order to minimize the extent of bid shopping before bid opening, and are usually inflated in order to allow for a later reduction.*

* * * * *

*The above hearings indicated that a substantial number of contractors do not bid on subcontracts for Federal construction work because they have no assurance of receiving the contract even if theirs is the lowest responsible bid. * * * GSA feels that if a subcontractor has assurance that his bid will be properly used and that he will receive the contract if he is low bidder, the general contractor*

⁸¹ Appellant's Brief, pp. 21, 22. Noted also therein is the fact that neither in the letter of June 17, 1964 (Exhibit 7-C), nor at any time thereafter did the Bureau apprise MevA of the bid shopping allegations by Sun States. It appears that prior to the transmittal of that letter a subordinate had reported the bid shopping allegations to the contracting officer (Tr. 300, 302).

⁸² Appellant's Brief, p. 19. At the time of the June 24, 1964 conference Sun States was representing that it could obtain the necessary finances from sources other than MevA. Speedletter of June 23, 1964 (Appellant's Exhibit M).

⁸³ Regional Solicitor King testified that he participated in the deliberations and rendered legal advice with respect to the letter of June 17, 1964 (Exhibit 7-C) before it was issued (Tr. 507). Upon direct examination Mr. King gave testimony concerning the decision cited in the text (Tr. 511). The decision in question was rendered on August 22, 1963.

*should be able to secure an adequate number of competitive bids from responsible subcontractors in sufficient time to properly evaluate them and estimate his costs on a businesslike basis. (Italics supplied.)*⁸⁴

Responding to the Government's argument, the appellant's counsel states in part:

* * * The reference to the Comptroller General's decision at 43 C. G. 206 does appear to support the contention that a purpose of the listing clause is to require prime contractors to look into the responsibility of subcontractors. However,

- the clause used in *this* case neither *says* nor *implies* anything of the kind.
- the Secretary of the Interior did not say so when he issued his press release in 1963.⁸⁵
- a policy of *rejecting* last minute sub-bids is at least questionable and probably contrary to the Government's interest.⁸⁶
- the Comptroller General's opinion was *not* reflected in GSPR sec. 5E-53.7001, *later* adopted by the GSA * * * (Reply Brief, p. 29).

Appellant's counsel also contends that the Comptroller General's decision in 45 Comp. Gen. 829 (1966) has the effect of overruling the earlier decision. In discussing the decision in 45 Comp. Gen. 829, and an earlier decision in 45 Comp. Gen. 84 (1965), however, the Department Counsel stresses the fact that the subcontractor listing clause involved here differs from the GSA clause in that the latter "has from the beginning contained specific authority in the contracting officer to disapprove irresponsible subcontractors."⁸⁷ Entirely aside from the

⁸⁴ In response to a question on direct examination concerning the relationship of the decision to a prebid understanding on the question of unusual situations under the subcontractor listing paragraph, Mr. King stated: "* * * there is a statement in the opinion to the effect that the GSA, as I recall, had represented to the GAO, which representation the GAO apparently had accepted, that the clause would lead to the eventual end result of prime contractors securing more responsible subcontractors. To me this indicated that the Comptroller General was thinking in terms of the prime contractor doing some investigation and some inquiry of the subcontractors before he listed them" (Tr. 517, 518).

⁸⁵ Exhibit 6; Press Release of December 6, 1963.

⁸⁶ According to the testimony offered by appellant's witness Sutton, it appears that Sun States would not have been listed as a subcontractor by MeVA if the procedures for investigation of subcontractors generally in effect in the construction industry had been followed (Tr. 241-243). Testifying upon cross-examination about a typical procedure, he states: "* * * We ordinarily check with our bonding company, with our banking connections * * * and Dun & Bradstreet, of course, and all those normal things" (Tr. 246, 247). The Dun & Bradstreet report obtained by MeVA about a week after the bid opening on May 12, 1964 reflected information compiled on August 28, 1963, and supplemented on March 17, 1964 (Appellant's Exhibit A). Appellant's witness Trimbach testified that if a Dun & Bradstreet report is on file it can be read to the person requesting it and that a copy can be obtained within a couple of days (Tr. 48).

⁸⁷ Government Brief, p. 68. The responsibility stemming from such authority is stressed in 45 Comp. Gen. 829 where, at page 837, the Comptroller General states: "* * * we are impressed by the fact that the contracting officer, had he been properly informed prior to award, could have found Belden to be nonresponsible under 2-09(g) of the Special Conditions, and could then have permitted Mike Bradford to substitute an acceptable subcontractor * * *. In view thereof, and since such oversight as may have occurred was compounded by the contracting agency in failing to ascertain, while checking Belden's technical qualifications, on or about December 6, 1965, that Belden was not a pile driving contractor, we are unable to conclude that the erroneous listing of Belden as the subcontractor for 'Foundation (Piles)' presents a proper basis for cancellation of the contract awarded to Mike Bradford and Company."

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considerations mentioned, there is the serious question of whether in the exercise of a discretionary function a contracting officer should be judged on the basis of changes made in the regulations or decisions rendered⁸⁸ subsequent to the time his discretion was exercised.

Another question raised by the Government is whether the claim submitted was timely. Appellant's counsel denies that the claim was untimely, stating: "* * * Counsel cites the *Vitro*⁸⁹ case on timeliness of claim. Here the claim was timely, assuming the claim falls under the contract remedies, as it preceded acceptance. No notice is required of constructive changes. *Merritt-Chapman & Scott Corp.*, ASBCA No. 9834 66-2 BCA par. 5768.⁹⁰ In any case the Contracting Officer in his decision passed upon the *merits* of the claim, thus waiving any claim of untimeliness.⁹¹ We may add that here the *appellant did protest* the denial of its request—that is exactly what the June 24, 1964 meeting in Denver was all about * * *" (Reply Brief, p. 34).

Reaffirming its earlier decision upon reconsideration in the case of *Eggers & Higgins et al.*, VACAB No. 537 (June 30, 1966), 66-1 BCA par. 5673, the Veterans Administration Contract Appeals Board reiterated its view that the "principles of 'constructive change' do not go so far as to eliminate all notice requirements or in all situations to relieve the contractor from any obligation with respect to furnishing timely notice of its intended claim."⁹²

Although MevA takes the position that it was proper to delay the presentation of the claim until the time it was submitted, the appellant introduced evidence at the hearing in an effort to show that the Bureau

⁸⁸ The earlier unpublished decision of the Comptroller General involving Mike Bradford and Company, Inc., Dec. B-158227 (January 28, 1966), and containing language which inferentially favors the Government's position is in this category. ("With reference to the solicitation of another electrical bid as evidence of bad faith on the part of Bradford, it would appear, in view of the close relationship of the two firms, that a legitimate reason, arising subsequent to bid opening, could exist for wishing to make a substitution. * * *" (Italics supplied.)

⁸⁹ *Vitro Corporation of America*, IBCA-876 (August 24, 1967), 74 I.D. 253, 67-2 BCA par. 6536. The Government also interposes the defense that the claim was waived by the failure of MevA to invoke the disputes process at the time the request for substitution was denied in the summer of 1964 (Government Brief, p. 84). Although the position is said to be primary, there are no citations to supporting authorities and our own research has failed to disclose any cases sufficiently analogous to that presented to merit mention.

⁹⁰ In the case cited the Armed Services Board specifically noted the apparent absence of prejudice in that case ("* * * Prejudice to the Government by any delay is neither shown nor alleged and largely controverted by the record of the hearing. * * *").

⁹¹ The contracting officer did note that the contractor had delayed for over two years in presenting the claim (note 3, *supra*), but his primary position was that the claim had been waived by the contractor's failure to pursue his administrative remedies (Findings, note 2, *supra*, par. 13, p. 8).

⁹² Subsequently, in *Eggers & Higgins et al. v. United States*, 185 Ct. Cl. 765 (1968), the Court of Claims affirmed the ruling by the Veterans Administration Board, stating at page 782 of the opinion: "* * * The accepted fact remains that the contracting officer under the circumstances could not have reasonably known that acceleration would be necessary, and the very purpose of the required notice is to reveal to the contracting officer information which will alert him to the need to take action in the best interests of his agency."

was notified of the forthcoming claim⁹³ almost a year before the claim letter of September 13, 1966 (Exhibit 7-H) was received.

There are a number of respects in which the *Vitro* case, *supra*, is clearly distinguishable from the instant appeal. In *Vitro* the claims presented were asserted under the Changes and Changed Conditions clause, but in presenting the claim counsel relied almost entirely upon the latter clause. The inferences drawn by the Board adverse to the appellant from the delayed submission of the claims have direct application only to situations where a contractor fails to notify the Government that a changed condition has been encountered prior to the time it is disturbed.⁹⁴ If we were to assume that the principles enunciated in *Vitro* could be applied analogously to claims asserted under other contract clauses, however, it would not materially assist us in the ultimate disposition of the present appeal. This is because fundamentally the appellant's claim is one for breach of contract. As to such claims the notice requirements may be materially different than for claims asserted under the contract.⁹⁵ In any event it is not our responsibility to determine the notice requirements applicable to breach of contract claims.

The parties differ in their appraisal of the law governing the Board's jurisdiction over the claims presented. In its initial claim letter (Exhibit 7-H) and at all times thereafter, the appellant has proceeded on the assumption that the claim asserted may be cognizable under the Changes clause but it has carefully reserved its right to make claim on any other proper ground including for breach of contract (Tr. 9-11). The Government has no reservations concerning the Board's authority to resolve the dispute, however, citing in support of its position *United*

⁹³ Appellant's Exhibit L; MevA letter of October 25, 1965, marked for the attention of Andrew K. Dolyniuk. Government witness Dolyniuk unequivocally denied that the conversations referred to in such letter related to Sun States (Tr. 487, 488). This testimony is uncontradicted. No reference to Exhibit L appears in either of appellant's post-hearing briefs.

⁹⁴ Failure to give timely notice may also entail serious consequences for the contractor or the Government under other clauses, as the decisions in the *Eggers & Higgins* case (note 92, *supra*, and accompanying text) demonstrate. (See also *Hoel-Steffen Construction Co.*, IBCA-656-7-67 (March 18, 1968), 75 I.D. 41, 68-1 BCA par. 6922 (Suspension of Work clause); *Southwestern Engineering Co.*, NASA BCA Nos. 87 *et al.* (March 20, 1968), 68-1 BCA par. 6977 (delay of over two years by Government in proceeding under the Changes clause found to bar entitlement to a downward equitable adjustment in the contract price). *Of. Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503, 518, 519 (1967) ("* * * Nor does the claimant in cases like the one before us have unlimited discretion as to when to file his claim. The standard changes clause [footnote omitted] requires him to present his claim within 30 days and most other clauses in government contracts calling for an equitable adjustment also contain their own time limitations. Where this is not true, the contractor cannot delay unreasonably in presenting his claim. This is the rule the Court of Claims follows. * * *").

⁹⁵ See *Montgomery-Macri Co. & Western Line Construction Co., Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 256 (1963), 1963 BCA par. 3819, p. 19,012 ("In the last analysis, the claim here at issue is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the contract.").

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States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), and *Dawson Construction Co.*, GSBCA No. 1452 (October 25, 1965), 65-2 BCA par. 5183.

The Board has had occasion to consider the question of its jurisdiction in the light of the guidelines established by *Utah* in a number of cases, notably in the two interlocutory decisions involving the *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (September 21, 1966), 73 I.D. 266, 66-2 BCA par. 5849, on reconsideration, 74 I.D. 15, 66-2 BCA par. 6065 (1967). In dismissing one of the claims in *American Cement* prior to hearing, the Board rejected the Government's attempt to restate the appellant's claim so as to confer jurisdiction where it found that such restatement would have fundamentally altered the claim as presented. Also rejected was the Government's argument that jurisdiction over the claim in question should be retained because there were factual issues to be resolved. As to the source of our jurisdiction we there stated:⁹⁶ "For a claim to be cognizable under the contract, however, it must be shown that there is a contract provision under which relief of the type sought could be granted. Absent such a showing, there is nothing to which the jurisdiction of either the contracting officer or the Board can attach. * * *" In both *American Cement* opinions we supported our finding that we were without jurisdiction over the claim for loss of commercial business by quoting the following passage from the *Utah* opinion:⁹⁷ "Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage, whether for purpose of granting relief or for purpose of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than de novo. * * *"

Turning to the instant appeal we note (i) that the subcontractor listing paragraph contains no provision for equitable adjustment in the event a dispute arises as to the propriety of a denial by the contracting officer of a request for substitution; (ii) that it is not even alleged that a change in the specification requirements or the scope of the work is involved;⁹⁸ (iii) that the appellant has consistently predicated its claim on the alleged arbitrary and capricious action of the contracting officer; (iv) that the Changes clause provides no

⁹⁶ 73 I.D. at 271, 66-2 BCA par. 5849 at 27,153.

⁹⁷ 384 U.S. at 412.

⁹⁸ See *Lenry, Inc. et al.*, ASBCA No. 4674 (June 26, 1958), 58-2 BCA par. 1849, p. 7345 ("* * * appellant relies, in part, upon Article 3, Changes. That article provides for a price and time adjustment when the contracting officer makes a change in the drawings and/or specifications. We fail to see where the article has any applicability in the instant case for it is clear beyond question that the Government made no change in the drawings or specifications * * *"). This ruling was sustained by the Court of Claims in *Lenry, Inc. et al. v. United States*, 156 Ct. Cl. 46 (1962).

remedy for arbitrary or capricious action not related to a change in the specifications or in the scope of the work;⁹⁹ and (v) that the contract contains no Suspension of Work¹⁰⁰ or other clause under which relief for the wrong alleged could be provided by way of equitable adjustment.

As to *Dawson*, there are significant differences between that case and the situation involved in this appeal. The opinion in *Dawson* contains no indication (i) that the question of the Board's jurisdiction over the claim asserted was raised by either party, or (ii) that the appellant had charged the contracting officer was arbitrary and capricious in denying the request for substitution. We also note that the decision was rendered prior to the Supreme Court's decision in the *Utah* case.¹⁰¹ Even if these differences did not exist, the *Dawson* decision would be considerably weakened as precedent by the fact that it appears to have been decided on the basis of a relatively skimpy record and with comparatively little effort having been made by the appellant to sustain its allegations. We note, for example (i) that much of the opinion is devoted to setting forth the allegations made by the parties; (ii) that the Board assumed for purposes of the decision that a mistake in bid had been made even though the "recap sheet" furnished by the bidder in support of the claimed mistake appeared to indicate otherwise; (iii) that the mistake in bid formed the rationale for the opinion; and (iv) that appellant's counsel waived its right to a hearing and filed no response to the Government's brief.

As the contract provides no remedy for the type of wrong alleged in the instant appeal, we find that we are without jurisdiction over the claims asserted. No relief can be afforded to the appellant under the terms of the contract. Accordingly, the appeal is dismissed.

The appeal is dismissed.

Conclusion

WILLIAM F. MCGRAW, *Member*.

WE CONCUR:

DEAN F. RATZMAN, *Chairman*.

SHERMAN P. KIMBALL, *Member*.

⁹⁹ *J. W. Bateson Co., Inc.*, note 80, *supra*.

¹⁰⁰ *R. G. Brown, Jr., and Company*, IBCA-356 (July 26, 1963), 1963 BCA par. 3799, p. 18,921 ("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 jurisdiction over a claim for expenses incurred as a result of Government interference or delay. * * *").

¹⁰¹ Prior to the time the *Dawson* decision was issued the Court of Claims had rejected the Justice Department's argument that all disputes pertaining to a Government contract are covered by the Disputes clause. See *Utah Construction & Mining Co. v. United States*, 168 Ct. Cl. 522 (1964). An influential segment of the public and private bar devoted to Government procurement matters remained committed to this view, however, until the Supreme Court decided otherwise in the *Utah* decision cited in the text, *supra*.

UNITED STATES
v.
ESTATE OF ALVIS F. DENISON

A-30991

Decided September 8, 1969

**Mining Claims: Determination of Validity—Mining Claims: Hearings—
Rules of Practice: Hearings—Rules of Practice: Evidence**

Where a court has remanded a case to this Department for further evidentiary proceedings on a finding that there was not a *prima facie* substantiation in the record for the standard employed in determining the validity of a mining claim, it is proper at the hearing on remand to consider all evidence relating to the validity of the claim; especially where any question raised by the court as to the standard has been resolved by subsequent rulings of other courts.

Mining Claims: Discovery

In applying the prudent man test of discovery to determine whether a mineral deposit is valuable, there is no dichotomy between present marketability and future marketability because the terms are simply relative terms used in determining whether the prudent man would have a reasonable prospect of success in developing a valuable mine.

Mining Claims: Determination of Validity—Mining Claims: Discovery

In determining whether a deposit of ore is a valuable deposit within the meaning of the mining laws, the prudent man test of *Castle v. Womble* is applied, and this may include a consideration of the marketability of the ore and whether a prudent man could expect to develop a valuable mine based upon rationally predictable economic circumstances from present known facts and not upon mere speculation of possible substantial, unpredictable changes in the market place resulting from severe changes in world political and economic conditions, or the unforeseen lowering of costs due to a dramatic technological breakthrough.

Mining Claims: Discovery

A prudent man could not reasonably expect to develop a valuable mine for manganese where the erratically disseminated ore tends to be of a low grade which is not marketable without prohibitively costly beneficiation and it is likely that even the beneficiation processes may not be able to upgrade the ore and remove the impurities adequately to meet commercial standards, and where, in any event, the quantity of the ore shown is insufficient to justify the costs of an operation to develop a valuable mine.

Mining Claims: Discovery

Facts which may warrant further exploration work on a mining claim but which do not justify development work to develop a valuable mine at the

time a patent applicant has done all that the law requires are not sufficient to show a discovery under the mining laws entitling the claimant to the issuance of a patent for the claims.

Mining Claims: Determination of Validity—Mining Claims: Discovery

Until a patent issues the Department of Interior in proper contest proceedings may challenge the validity of a mining claim and consider facts showing whether or not there is a valid discovery of a valuable mineral deposit which are in existence at least up to the time when the patent applicant has completed all the requirements imposed on him, including posting and publishing of his application and the payment of all fees; the Department is not restricted to facts in existence only at the time the patent application is filed.

SUPPLEMENTAL DECISION

This case is a continuation of contest proceedings initiated by the Forest Service, United States Department of Agriculture, in 1960, against mineral patent applications filed in 1959 by Alvis F. Denison for the following lode mining claims located in T. 11 N., Rs. 14 and 15 E., G. & S.R.M., Coconino County, Arizona, within the Sitgreaves National Forest: B.V.D. Nos. 1, 2, 3, 4, 5, Miss Lottie Nos. 4, 5, 6, D & W Nos. 3, 4, 5, Little Pine Nos. 7, 8, 9, and Hillcrest Nos. 22 and 23. The case was one of four proceedings culminating in the Departmental decision, *United States v. Alvis F. Denison et al.*, 71 I.D. 144 (1964), which ruled that the mining claims were null and void for lack of a present discovery of valuable mineral deposits within the claims as there was no market or reasonable prospect of a future market for the low grade manganese for which the claims were located. Upon judicial review of the Department's decision as to the Denison claims, the United States District Court for the District of Arizona in *Denison v. Udall*, 248 F. Supp. 942 (1965), reversed the Departmental decision and remanded the case to the Department for further evidentiary proceedings consonant with its opinion.

In accordance with the court's decision, a further hearing was held on October 25, 26, and 27, 1966. As instructed by this office, the hearing examiner has submitted his recommended decision of May 17, 1968, in which he concludes that the cumulative evidence of this hearing and the previous hearing in the earlier proceedings shows that no discovery of a valuable mineral deposit has been made within any of the claims and that they are not now being held in good faith for mining purposes. He denied the mineral patent applications and held the claims to be void.

Copies of the hearing examiner's recommended decision have been furnished to the parties and they have been allowed an opportunity

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to present any briefs in support of or opposition to it. A brief has been received in behalf of the Estate of Alvis F. Denison (hereafter referred to as "claimant") objecting to the recommended decision. Generally, the claimant disputes the allowance of certain evidence at the hearing and the findings and conclusions of the examiner's decision.

We have reviewed the entire record in these proceedings in light of all the specific objections and contentions raised in the claimant's brief and in its previous briefs. We conclude that the mining claims have been properly declared null and void and the patent applications properly rejected for the reason that there has not been a discovery of a valuable mineral deposit within these claims within the meaning of the mining laws. The hearing examiner's recommended decision is adopted insofar as it reaches this conclusion on this issue and is not otherwise inconsistent with the discussion following. A copy of the hearing examiner's decision is included as an appendix to this decision.¹

In attacking the examiner's decision, the claimant contends that it does not reflect the true character of the court's decision in *Denison v. Udall, supra*. Claimant quotes certain portions of this decision and contends that the court was voiding the previous Departmental decision because of a lack of evidence in the record to sustain the previous ruling on the issue of "future profitability" or prospective value. Therefore, claimant argues that only evidence relating to this issue should have been considered in the hearing on remand, and that matters relating to present value or present marketability should not have been considered. Claimant objected at the hearing to evidence of the resampling of the claims by Forest Service personnel and renews the objection now, contending that the evidence is repetitious of that received in the first administrative hearing.

In raising this objection, however, claimant does not point out how the introduction of such additional evidence was prejudicial or unfair nor do we see any basis for such a complaint. Indeed, as will be discussed later, claimant contends that the additional evidence tends to demonstrate a greater quantity of manganese ore within the claims than that shown at the first hearing by the Forest Service's witness. The Forest Service's principal witness at both hearings, its mineral examiner, E. Rowland Tragitt, indicated that he reexamined the

¹ Obvious typographical errors have been corrected and a few additions have been made, shown in brackets.

In our decision the transcript of the first hearing will be cited as I Tr. — (in the hearing examiner's decision it is Tr. I, p. —), and the transcript of the second hearing will be cited as II Tr. — (in the hearing examiner's decision it is Tr. II, p. —).

claims and took additional samples from pits which had been excavated after his examination of the claims in 1960 (prior to the first hearing). II Tr. 137. His efforts, therefore, were to gain additional information concerning the exposures of mineralization, not only those stated in the patent applications, but also those exposed subsequent to the filing of the applications.

Regardless, we do not read the court's opinion as limiting the scope of the evidentiary proceedings with respect to any evidence which would relate to the crucial issue of whether there has been a discovery of a valuable mineral deposit within each claim. In the previous Departmental decision in this case it was stated generally with respect to all four cases considered then that the evidence showed that deposits of manganese exist on the claims and that *some* of the manganese is of a grade that was mined and sold in the past from patented claims in the same area, but the decision expressly stated that * * * "[t]he quantity of such manganese in each claim is not clearly established and it is questionable to what extent minable deposits exist on the claims." 71 I.D. at 149. The decision held that a mining claim could lose its validity because of a lack of a present discovery of valuable mineral deposits due to changed economic conditions, thus *assuming* for the purpose of reaching that legal conclusion that there was sufficient mineralization to show a discovery under previous economic conditions. However, as indicated, the decision did not make any finding of fact that there was such a showing as would support a conclusion that the deposit was a valuable deposit within the meaning of the mining laws under earlier and more favorable economic conditions. The court also did not concern itself with the facts as to the quantity and quality of the manganese within the claims but only with the issue generally as to whether a reasonable man could expect that there might be a market in the future for the manganese. There thus has been no factual resolution by the Departmental decision or the court's decision of the questions as to the quantity and quality of the mineralization exposed on the claims. Further inquiry into those questions was appropriate since these are matters which must be considered in making any determination as to whether there has been a valid discovery.

Claimant's insistence that under the court's opinion the hearing should have been restricted to the receipt of evidence bearing only on the issue of future profitability or prospective value and that evidence on present value or present marketability should not have been received reflects a view of the law of discovery which is certainly now erroneous. There is no distinct dichotomy between present value and future value or between present marketability and future profitability.

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The basic rule of discovery has long been the "prudent man" test of *Castle v. Womble*, 19 L.D. 455, 457 (1894)—that a discovery has been made when a mineral deposit has been found that is of such quality and quantity "that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." In more recent years, in dealing with mining claims located for minerals of widespread occurrence, the Department has had occasion to apply as a test the so-called marketability rule, namely, that in order to establish a discovery of a deposit of such a mineral it must be shown that the mineral can be extracted, removed, and marketed at a profit. Although in earlier decisions the Department sometimes referred to the marketability test as an "additional" test applicable to minerals of widespread occurrence, the test was in actuality only a refinement of the prudent man rule and a logical complement to it. The Department so stated in a *Solicitor's opinion*, 69 I.D. 145 (1962).

The Department's position was finally sustained by the Supreme Court in *United States v. Coleman*, 390 U.S. 599 (1968), which reversed a Circuit Court opinion, 363 F. 2d 190 (9th Cir. 1966), holding that the marketability test was not a proper standard for determining whether a discovery had been made. The Supreme Court held that the marketability test was "an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable,'" that the intent of the mining laws was to reward the discovery of minerals "that are valuable in an economic sense," and, thus, that "profitability is an important consideration in applying the prudent man test" (p. 602).

Although the *Coleman* decision, dealt with building stone, *supra*, the court clearly indicated that the marketability test applied as well to other minerals. Any doubt on that score was laid at rest in *Converse v. Udall*, 399 F. 2d 616, 621 (9th Cir. 1968), where the court said flatly that "* * * the marketability test is applicable to all mining claims." The *Converse* case, *supra*, was concerned with claims located for some precious metals but primarily for copper, lead, and zinc. It is plain, therefore, that for claimant to prevail it must show that the low grade manganese on the Denison claims can be extracted and marketed at a profit.

We have given this brief history of the recent developments in the law of discovery because, when this case was before the court in 1965, the *Coleman* case, *supra*, had not yet been decided by the Ninth Circuit. Nonetheless, the court stated, by way of dictum, that the marketability test was applicable only to nonmetallic minerals of common occurrence and not to the metallic mineral claims located by Denison.

The court said that since the Government, in contesting a claim for common-occurrence nonmetallic minerals, had the burden of making at least a prima facie case of lack of a future market, *a fortiori* it had this burden in contesting a limited-occurrence metallic mineral claim. The court concluded that the Department had not met this burden in this case.

It is obvious, with the clarification of the law in the *Coleman* and *Converse* cases, *supra*, that this case must now be considered in the light of the law as it is now established. This leaves no room for narrow arguments as to what the court contemplated in this case since the court's ruling was predicated upon what has since been determined to be an erroneous view of the law.

In this connection we note that, in his recommended decision in this case, the hearing examiner, after quoting the Supreme Court's observations on the marketability rule in the *Coleman* case, said that there is an important distinction in applying the rule to nonmetallic minerals of widespread occurrence and metallic minerals of intrinsic value. He said that minerals of common occurrence must have present marketability while minerals of intrinsic value need have value only "in the reasonably foreseeable future."

We find no support for this distinction in either the *Coleman* or the *Converse* decision. Neither decision drew such a distinction. The examiner's statement instead appears to lead back to the Department's earlier decision in this case.

A reading of that decision shows that it was predicated on the Ninth Circuit's decision in *Mulkern v. Hammitt*, 326 F. 2d 896, 898 (9th Cir. 1964). The broad question there was whether a claim once valid remains so despite later changes in economic conditions. The court said that a problem was whether public lands should be perpetually encumbered because a claimant had located a mineral which then had a market in the building industry "but which, on account of a change in building practice, no longer has a market or a reasonable prospect of a future market." The Department said that there was no evidentiary basis for any reasonable expectation that in the reasonably near future high prices would return which would make it economic to mine the Denison claims and held the claims void "for lack of a *present* discovery of valuable mineral deposits due to changed economic conditions." 71 I.D. at 150; italic added.

It should be noted that the *Mulkern* reference to "a reasonable prospect of a future market" was made in the context of a case dealing with claims located for gypsum and silica, both of which are non-metallic minerals of widespread occurrence. Thus, it is evident that if the court was attempting to apply a future marketability test as

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distinguished from a present marketability test, it was applying it to nonmetallic minerals of widespread occurrence. We do not believe that the court was attempting to do any such thing and certainly the Department, in relying on the court's decision, was not interpreting it as making any such distinction. We, therefore, see no sound basis for the examiner's attempted distinction.

The whole question is one of semantics. In speaking of a "reasonable prospect of success in developing a valuable mine," the prudent man rule necessarily invokes a time concept. But it does not prescribe a time schedule as to when minerals might be extracted or sold. For example, the Department has never insisted, in applying the marketability test, that a claimant must show that he is actually mining and selling minerals at a profit when the validity of his claim is challenged. "Reasonable prospect of success" does not have such a restrictive connotation. On the other hand, while it has room for the future, it does not embrace a vague distant future. Thus, within the ambit of the prudent man rule, the terms "present marketability" and "future marketability" are relative. For example, suppose that the Government, instead of terminating the manganese purchase program referred to later on August 5, 1959, had merely announced a suspension of purchases for 30 days. It would not have been inaccurate to characterize manganese deposits from which sales had been made up to August 5, 1959, as still being "presently marketable." It would also not have been inaccurate to say that those deposits had a "reasonable prospect of a future market." The use of one term or the other does not express mutually exclusive concepts. The critical determination is whether, based on present facts, there is a reasonable prospect of success.

In this connection claimant contends that "rationally grounded speculation is as much a part of the prudent man concept as the element of profitability." In *Castle v. Womble, supra*, at 457, the concept of speculation was rejected. The decision expressly stated that:

* * * the requirement relating to discovery refers to *present facts*, and not to the *probabilities* of the future.

In this case the presence of mineral is not based upon probabilities, belief and speculation alone, but upon facts, which, in the judgment of the register and receiver and your office, show that with further work, a paying and valuable mine, so far as human foresight can determine, will be developed. (*Italics added.*)

Likewise, in an early case, *Davis's Administrator v. Weibbold*, 139 U.S. 507 522 (1891), the Supreme Court rejected the notion of speculation by quoting from *United States v. Reed*, 12 Sawyer 99, 104, that in determining the mineral value of land account cannot be taken—

* * * of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist or may be produced or expected in the ordinary course of such a pursuit or adventure on the land in question.

In a case similar to that here involving low-grade manganese deposits, the test of what constitutes a discovery of a valuable mineral deposit as to such deposits was set forth by the department as follows:

* * * The test is not whether there is an operating profitable mine, or whether a prudent man at some time in the future under more favorable circumstances might expect to develop a profitable mine, but whether under the circumstances *known at the time* a profitable mine might be expected to be developed. This expectation must be based upon present considerations as to the value of the deposit as determined by the extent of saleable mineral within it, and the market price for the mineral, and by comparing the expected costs of the mining operation. *United States v. Theodore R. Jenkins*, 75 I.D. 312, 318 (1968).

As the *Jenkins* case, *supra*, further indicates the expectation of future remunerative market prices must be based upon rational considerations, including normal market ups and downs, and not upon conjectures and speculation as to possible sharp increases in market prices due to unpredictable changes in world political and economic conditions, or to a Government subsidy, or to the unforeseen lowering of costs because of a dramatic technological breakthrough. Thus, the expectation of future profitability under the prudent man test must be based upon present economic circumstances known then and not upon mere speculation as to possible substantial changes in the market place.

In other words, contrary to claimant's contention, there can be no separation of considerations of future marketability at a profit from present facts and conditions. In this connection a brief review of the manganese market situation is in order. It is true, as claimant asserts, that manganese is a mineral which is critical to our country's needs, particularly in its use in the steel industry. As the record shows, this need for manganese has long existed in this country and economic projections as to future needs are great. However, as most of the known manganese ore deposits in this country, including those in this area in Arizona, are low grade deposits, for many years 90 percent and more of the manganese used by industry in this country has come from foreign imports and it is anticipated that this will continue, barring some international difficulty or conflict precluding shipments of the higher-grade imports (see, especially, Contestee's Exhibit RR, "Manganese" by Gilbert L. DeHuff, a chapter from *Mineral Facts and Problems*, 1965 Edition, Bureau of Mines Bulletin 630).

To help obtain a domestic reserve and to help the domestic mining industry, the Federal Government has engaged in exploration pro-

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grams and research programs to upgrade the low-grade domestic ores, and, of especial interest to us in this case, from a period from 1951 to August 5, 1959, purchased domestic manganese for stockpiling. This was done under two programs. Under the depot program, which was completed in May 1958, low-grade ores were purchased in quantities as small as 5 tons at three depots, including one at Deming, New Mexico, and one at Wenden, Arizona. Under the "car-lot" program which terminated August 5, 1959, metallurgical ore was purchased by the Government at railhead (see DeHuff, Contestee's Exhibit RR, *supra*).

With respect to prices, DeHuff states as follows:

All manganese ore prices are by negotiation, being dependent on chemical analysis, physical structure, quantity offered, included freight and insurance costs, delivery terms, whether duty is included or excluded, needs of the buyer, and availability of ores of the desired quality. As a result, published quotations can only reflect the general condition of the market. Continuing quotations of the same basis, for metallurgical-grade ore, are of value in showing the price trend over a period.

The cost of ocean freight makes up approximately one-third the price of imported ore delivered at eastern seaboard ports. Consequently, an appreciable change in ore price can be entirely apart from any demand or supply factors. Prices for domestic ore in commercial markets are governed by the price of foreign ore and relative transportation costs. *From 1951 to August 5, 1959, the Government price for domestic ore under the domestic purchase program remained constantly based at \$2.30 per long-ton unit of manganese for manganese ore containing 48 percent manganese. This was usually about twice the market price, but had been as much as three times. A long-ton unit of manganese is 22.4 pounds of contained manganese. Contestee's Exhibit RR, supra, pp. 14-16 (italics added).*

This stockpiling purchase program under the Defense Production Act of 1950, 64 Stat. 798, has been described as follows:

The stated purpose of the program was to obtain from marginal or submarginal sources manganese ore which would not be otherwise produced, with the reservation that the Government could exclude presently established production of manganese ore from participation in the program. *Northern Pacific Railway Co. v. United States*, 355 F. 2d 601, 602 (Ct. Cl. 1966).

As these statements indicate, the Government paid subsidy prices amounting to 2 to 3 times the usual commercial price for ore which otherwise probably could not have been sold in the commercial market. Contestant's Exhibit 63 is a list of commercial prices for manganese compiled by Tragitt from annuals of the *Engineering and Mining Journal* from 1941 to October 1966 (II Tr. 83). These were the prices paid generally for the imported manganese but would represent the prices a domestic producer could expect to get at the point of delivery

if he could sell his product. They reflect generally more stringent requirements than those in effect under the Government stockpiling program. For example, they show the price of manganese ore (or concentrates) with 46 to 48 percent or 48 percent and above manganese. For ore with less than those percentages, prices would have to be negotiated. Premiums are given for higher-grade ores and penalties for lower-grade ores and for impurities (see II Tr. 83-94). All of the prices are for long-ton units (LTU's) of manganese.

Generally the price list shows for the years 1941-42 prices per LTU of 53 cents to 70 cents; from 1946 to 1950 of 65 cents to 91 cents. From 1951 to 1959, the time during which the Government purchase program was in operation, the commercial rates varied for long-term contracts between 82 cents and 96 cents; for "nearby positions" (which Tragitt believed were those near seaports where the shipments can be brought in, II Tr. 88), the prices ranged from 87 cents to a high of \$1.55. From 1960 to 1966 the prices ranged from 72 cents to 91 cents.

In addition to the high manganese percentage in the ore, there are also industry requirements as to percentages of iron content and of maximum amounts of impurities.² Tragitt indicated that the Government in its purchase program allowed a silica impurity up to 15 percent, but that the usual industry maximum is 13 percent and some shippers want it down to 7 percent (II Tr. 95). He stated, in addition, that under the Government's specifications during the purchase program for ore of 40 percent manganese and better there was allowable a maximum of 16 percent iron, .3 percent phosphorous, 1 percent copper plus lead plus zinc, of which no more than .25 percent could be copper (II Tr. 154).

Assays showing the percentages of manganese and other minerals or "impurities" in the ore are used in the mining and smelting industry to make the commercial determinations as to whether the ore may be sold and at what price. *Northern Pacific Railway Company v. United States*, *supra*, 355 F. 2d at 605. Therefore, in determining the value of a given ore deposit, such tests to determine whether ore can be mined and shipped to meet the standards of the market place are important. Also of importance in making a proper evaluation under the prudent man test previously discussed is a consideration of all the costs of mining and selling the ore, including the costs of beneficiating the ore

² For example, Tragitt discussed the specifications of two major steel producers, Bethlehem Steel and U.S. Steel, which get their manganese from Africa and South America—primarily Brazil. On 48 to 50% manganese ore from Africa, there are penalties for alumina plus silica over 13%, phosphorous .05% and iron 9%. For Brazilian ore containing 48 to 50% manganese, the maximum iron allowed is 5%, phosphorous .1%, alumina plus silica 7%, and arsenic .2% (II Tr. 155). He indicated that the Brazilian ore runs 50 to 52% manganese generally without any processing as contrasted with the low-grade domestic ores which require beneficiation (II Tr. 252).

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to meet the commercial standards and transportation costs. See *Adams v. United States*, 318 F. 2d 861, 870 (9th Cir. 1963). It is also essential to have an estimate of the quantity of ore within the mining claims since a large quantity of ore would justify expenditures for equipment, etc. which a small deposit could not support. That the quantity of ore is important was established in early Supreme Court cases, such as *Davis's Administrator v. Weibbold*, *supra*, at 523-4, and *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). A recent case in the United States District Court for the District of Columbia, *Pressentin v. Udall*, March 19, 1969, Civil Action No. 1194-65, affirming *United States v. E. V. Pressentin et al.*, 71 I.D. 447 (1964), ruled that there had to be a sufficient quantity of mineral so that mining would be an "economically viable venture," and that even though the mineral is marketable, without a showing that the whole mining operation could be profitable mining claims were properly declared void for lack of a discovery of a valuable mineral deposit.

Let us now consider the hearing examiner's findings concerning the facts and claimant's objections to them, and analyze the evidence showing the quality and quantity of manganese within the claims and the probable costs of a mining venture on the claims.

First, the hearing examiner stated that there is no significant conflict in the record as to the quantity and quality of the manganese on the claims in question and that the value of the deposit can, without extensive exploration and development, be readily ascertained. We believe this is an oversimplification and is only partially true, as will be seen from the following discussion.

Table 3 of the hearing examiner's decision lists the sample taken by the Forest Service's witness, Tragitt, and the percentages of manganese as determined by assay tests. Of the 72 samples listed only 3 show manganese over 20 percent, the highest being 22.10 percent. Nine show percentages between 10 and 19.95 percent, and the remaining samples are under 10 percent. Table 4 appended to the examiner's decision is a tabulation of mill tests of some of Tragitt's samples, listing the concentrates with the percentages of manganese and of alumina plus silica, and also the percentage of manganese recovered. Of the 29 samples listed only 6 show manganese concentrate percentages over 40 percent. Seventeen show percentages of alumina plus silica over 13 percent, 11 of which were over 15 percent—which would even be above the specifications of the Government's purchasing program in the 1950's. The claimant has not pointed to any inaccuracies in these tabulations, but contends that the examiner refers to the table "as containing unrefuted evidence of the fact that the manganese on the claims in contest cannot be concentrated to as high a quality as Mr. Denison was selling in 1957

through 1959." Actually, the examiner stated that the table "shows that the material, when concentrated, is not as high a quality as the material Mr. Denison was selling from 1957 through 1959 from his patented claims."

The examiner also indicated that the table was a "summary of the unrefuted evidence offered by the Contestant as to the amount of recoverable manganese on the claims." This statement is too broad. It is more accurate to describe the table as the summary of the contestant's evidence of mill tests showing the amount of manganese recoverable and showing the amount of alumina and silica in the samples listed.

The claimant also objects to the examiner's statement to the effect that since the material from the claims cannot be concentrated to as high a quality as the material Denison sold from his patented claims, this fact partially explains his failure to remove ore (with one exception) from the claims under contest. Claimant asserts that Denison conceived the mining project in the area, including the patented and unpatented claims, as a lifelong project and that given time he would have eventually mined and shipped ore from some or all of the contested claims. The facts viewed objectively, however, support an assumption that it would not be unreasonable to assume that a prudent man who had explored a large area would choose to mine first those areas with the greatest promise of success and reward and leave for later development the poorer areas.

The claimant has attacked Tragitt's method of sampling as being inappropriate for making a meaningful evaluation of the manganese value, claiming that it has been discredited by claimant's witnesses. With this we cannot agree. At both hearings, Tragitt testified in great detail as to the manner in which each sample was taken. At the first hearing, he testified that the patent applicant, Alvis F. Denison, accompanied him on his examination of the claims and samples were taken where Denison said the best minerals were exposed (I Tr. 40). Most of Tragitt's samples at the first hearing were taken from channel cuts in the pits or trenches exposed, with some grab samples from the dumps. In his subsequent examinations in 1966 in preparation for the second hearing Tragitt testified that he took more dump samples because the condition of the pits made it impossible to dig in them without mechanical tools and later they were filled with water (II Tr. 144).

Claimant contends that the samples taken from the dumps do not reflect the mineralization within the claims, although Alvis Denison and Denison's witness, Harrison Schmitt, also took dump samples. Claimant states that Tragitt's dump samples were only from the top of each pit dump and that these were not the types of ore which Den-

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ison would have shipped to the mill. Claimant contends that the assay results between the 1966 samples from the dumps and the samples taken by Tragitt in 1960 are substantially different and this difference demonstrates the unreliability of such sampling. However, a comparison of the assay results does not show quite the great difference which claimant implies. Any difference is explained by Tragitt's testimony. He stated that the samples from the dumps are very representative of the mineralization from the pits, explaining that the samples are really high grade samples from the dump because the wind and rain would blow the lighter material away, leaving the heavier manganese which can be seen (II Tr. 148, 151). He testified that these dump samples compared very favorably with a good many channel samples he had taken at previous dates (II Tr. 215-216). He asserted generally that as to pits which he resampled in 1966 the results were very comparable to those in 1960, but that in the excavations exposed since his sampling in 1960, little valuable mineralization was shown and thus the majority of those samples were lower in manganese percentages than those from the pits which had been excavated previously (II Tr. 216-217). For example, with respect to 54 pits on the D & W #3 claim dug after the Government purchase program had ceased, he said that the pits and the dumps showed no more than a trace of any manganese (II Tr. 149).

Alvis Denison's son, Bill Denison, who admittedly had not done mining work and was not qualified to answer questions concerning mining operations (II Tr. 379), nevertheless was critical of Tragitt's sampling, although he left after observing Tragitt taking only one sample from an excavation because he did not agree with the way the sample was taken (II Tr. 392-394). He and his father were the only claimant witnesses who actually saw Tragitt taking samples and claimant relies on their testimony to discredit Tragitt's sampling methods. Alvis Denison, who was a qualified mining engineer, in discussing the fact that he accompanied Tragitt when he took his samples, responded as follows to a question whether he had any criticism of the manner in which Tragitt took his samples:

A. No. I have no criticism of the manner in which he took them. I have criticism of where he took them and what he took.

Q. You do object to the location from which they were taken?

A. Sometimes, yes.

Q. And did you in any case select the location from which he was to sample?

A. Let's put it this way: In several cases—now, I have no objection to Mr. Tragitt's sampling. I believe the man tried to do what was fair, but what he saw and what I see is an entirely different manner. He is looking to how he can reduce the sample. Now, I am looking to how I can prove it. That is the basic theory on which we sample. I am looking for the hard nodules that I know can

be recovered. In most cases he is looking for the stuff within two foot [sic] of which he thinks I am going to mine.

Q. The question was, did you or did you not help select some of the places from which he sampled?

A. Yes, I helped select some of the samples. I Tr. 449-450.

Testimony of other witnesses of claimant did not specifically go into the manner of Tragitt's sampling and examination of the claims, but may be summarized as going more to the conclusions reached by him based upon his examination and sampling of the claims. Neither the testimony of Bill Denison nor of Alvin Denison quoted previously demonstrates that Tragitt's testimony should be discounted. Alvis Denison's testimony actually shows that he did not criticize Tragitt's technical methodology as much as what he thought was a difference in emphasis between the two. His statement that Tragitt was trying to reduce the sample simply is a subjective supposition not borne out by the detailed evidence.

The assay results of Tragitt's samples correspond more closely to those of claimant's witness, Harrison Schmitt, than do Schmitt's to the samples of Alvis Denison. Claimant in an appendix to its brief to the hearing examiner has tabulated the samples. Schmitt has 16 samples; only one showed 35.42 percent manganese, 3 were from 24.94 to 27.39 percent, 1 was 20.66 percent, 3 were from 10.33 to 12.17 percent and the remaining 8 were under 10 percent. He stated that these represented the "best material you can see" (I Tr. 346). Alvis Denison had 19 samples, one at 44.72 percent, 1 at 39.27 percent, 3 from 31.02 to 35.64 percent, 5 from 27.39 to 29.20 percent, 1 at 22.24 percent, 3 from 14.52 to 18.15 percent and 5 under 10 percent. Ex. Q. Denison indicated that he took samples in a number of places where Tragitt and Schmitt took samples. However, Tragitt and Schmitt took larger cuttings more representative of actual mining conditions. For example, Denison indicated that Schmitt's cuts were 2 feet across a mineralized zone which would be the width of a backhoe—the best equipment for mining this deposit according to Denison and Schmitt (I Tr. 354)—but Denison's cuts were only 4 to 5 inches directly through the ore zone to get only the best ore (I Tr. 423-427). This explains why Denison's samples show much higher assay values than do those of Tragitt and Schmitt, but they do not reflect the probable value that could be achieved in actual mining operations.

Another witness of the claimant, Caswell Silver, had three samples assayed showing percentages of 38.44, 11.98 and 21.91. He also gave visual estimates of mineral exposures from 5 percent to 15 to 40 percent.

None of the samples by claimant's witnesses were assayed for alumina and silica; therefore, Tragitt's samples, which were concen-

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trated, are the only ones reflecting tests as to such impurities on ore from these claims. Tragitt concluded from these tests that the ore cannot be economically beneficiated to a grade high enough to meet industry standards or, if it can, that it still retains percentages of impurities too high to meet such standards and those of the Government under its past price support program.

Claimant has contended vigorously that the mill test which Tragitt requested the assayers to perform on the ore samples is not a good test and does not adequately establish the extent to which the manganese can be recovered from the mill heads. Claimant contends that the sample results and mill tests must be weighed in the context of Denison's experience with the ore on the adjacent patented claims, and that this shows that the sampling should be highly selective since that is how the ore must be mined and that it should be beneficiated by the method which has been demonstrated to be the best process for the ore. It contends that the sink float method of beneficiation which was used for Tragitt's 1966 samples was rejected by Denison who hand-picked the ore first, then washed it, crushed it and jigged it through varying degrees of mesh. As mentioned, the claimant has not submitted evidence of concentrate results to compare with this test, but relies on the fact that ore from adjoining patented claims was beneficiated to meet the specifications of the Government purchasing program. The fact that ore could be beneficiated to meet those standards does not mean that ore from these claims could be beneficiated to meet the more stringent requirements of the steel industry.

Tragitt testified that the highest Denison ever beneficiated ore from the patented claims was 45.38 percent (II Tr. 229). Although he indicated that the ore in several of his samples concentrated as high as ore milled and sold by Denison, he testified that to determine whether the ore could be concentrated to as high as 46 percent there would have to be a pilot test for this purpose, but that the sink float and gravity tests did not indicate that the ore could be concentrated to that percentage (II Tr. 94-98). However, certain of the samples which show high manganese percentages are from claims with high silica content and the concentrates are too high in silica to be acceptable (II Tr. 142-3). He concluded that the only ore which might be concentrated (on Miss Lottie No. 5) to be salable could not be done so economically since the cost of concentration and of shipping would be more than the value of the product (II Tr. 234). Actually claimant agrees generally that the ore within these claims is of a low grade and that costly beneficiation is necessary to upgrade it. Nothing has been shown that would overcome the difficulties Tragitt has indicated with respect to the beneficiation. Although the tests he used do not conclusively show the

extent to which the ores can be beneficiated, they cannot be discounted as claimant would do and are the best evidence presented as to their concentration potential.

As to the quantity of ore within the claims, claimant contends that Tragitt's testimony demonstrates that, with further development work, more mineralization will be found. This is because Tragitt estimated that there was enough manganese-bearing material exposed on the claims in 1960 to run a mill for 72½ days and in 1966 for 119 days, based upon a 300-ton per day mill feed. In making such estimates Tragitt measured the specific areas where mineralization had been exposed and used the percentages of manganese in the samples with estimates of milling recovery to reach his estimation of the amount of material in a given area (II Tr. 65-67). Claimant contends that the hearing examiner found as a fact that Table 2 contains a summary of the evidence as to the quantity of manganese-bearing material on the claims. We would agree with claimant's assertion that it is more accurate to say that the table represents the quantity of manganese on the claims estimated by Tragitt to exist in and about the excavations made by Alvis Denison on the claims prior to his death. However, this is evident from the examiner's statements concerning the totals shown in the table. Claimant contends, in effect, that the hearing examiner concluded that this shows all of the manganese on the claims; however, the examiner concluded only generally that there was not a sufficient quantity or quality of manganese within the claims to make them valuable for mining purposes. The examiner's decision reflects and it is apparent that Tragitt's computations are but estimates based upon objective means, but they certainly do not purport to establish that this is the exact quantity of manganese within the claims. Obviously, this could not be done without actual mining operations which might reveal more or even less manganese than his estimates. His computations are the best evidence that has been presented to give an objective evaluation or estimate as to the quantity of mineralization. For example, estimates by Caswell Silver as to the value of mineralization within an area are based simply upon hypothetical facts without any supporting data (see I Tr. 234, 292).

As claimant indicates, the testimony of its witnesses (and indeed Tragitt's also) shows that whatever ore is within the claims is scattered and discontinuous. Andrew J. Zinkle, claimant's mining engineer consultant, postulated that the additional LTU's which Tragitt computed based upon Denison's post-1960 excavations is indicative that additional exploration work could establish more LTU's (II Tr. 435). He indicated that a prudent man could possibly get a trend of mineralization to block out probably ore of sufficient grade and quantity to

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justify operating at some future date (II Tr. 436), but he did not indicate that there was sufficient mineralization of quality shown which a prudent man would attempt to mine. Caswell Silver, however, testified that the mineralization can't be completely defined before it is mined, that it can't be blocked out because the cost is prohibitive (I Tr. 293). Harrison Schmitt testified that the deposits were difficult to sample because of their erratic nature, that extensive drilling would be necessary to determine the value of the claims, and that lesser sampling may just show appreciable mineral in place without indicating that whole blocks of ground are of the same nature (I Tr. 334-346). He stated that there is enough mineral shown "in a few cases" to justify further development, but that they are inadequately developed (I Tr. 362).

This testimony as to the erratic and sporadic nature of the dissemination of the manganese mineralization demonstrates the uncertainty as to the extent of mineralization within the claims. Tragitt, in making his calculations as to quantity, indicated, in effect, that his estimates should not be considered as estimates of salable ore since they can't be concentrated to meet the standards of industry (II Tr. 234). Likewise, he indicated that there would not be enough material to guarantee a smelter shipment periodically at regular times even if a market could be found (II Tr. 235-236).

Claimant's position is that if the deposits are :

of a certain character, namely scattered, discontinuous and erratic, so that if that character of deposit appears within the limits of the claims and can be shown to contain beneficial manganese, a reasonable man can assume that similar mineralization continues throughout the claim area and needs only to be uncovered by development work.

In other words, claimant seeks to apply an inference that additional beneficiable mineralization will be discovered. However, claimant's assumption that the deposits are beneficiable in nature is not supported by the weight of the evidence nor indeed from the underlying assumption regarding the erratic nature of the deposits. The evidence demonstrates that there are wide differences in the quality of the manganese found within the claims, but that the overall trend of the mineralization is that it is of a low grade. The erratic nature of the quality and the deposition of the ore does not support a reasonable estimate of its value and justify a geologic inference that there is a valuable ore deposit. See *United States v. Frank Coston*, A-30835 (February 23, 1968). Furthermore, the fact that other mining claims in the vicinity have been patented is not a substitute for discovery upon the contested claims although it may raise a geologic inference that ore may be found on the claims, but this Department has never accepted such inferences

as substitutes for the discovery of a valuable mineral deposit. *United States v. Bert Lee Doane*, A-28094 (October 30, 1959); *State of California v. E. O. Rodeffer*, 75 I.D. 176, 180 (1968).

As to the costs of the mining operation, claimant disputes the hearing examiner's statement that no ore from these claims could be profitably marketed unless the price received for a LTU of manganese substantially exceeds the \$2.30 received by Denison under the carlot buying program. Table 5 of the examiner's decision is a tabulation of evidence in the record as to Denison's operating costs in connection with his mining activities during the latter years of the Government purchase program and also of the cost of a third mill. The record and this table do not show the cost of earlier mills or the cost of certain equipment listed therein as mining equipment, such as the trucks, tractor, etc., which Denison used in his contracting business and which had already been amortized. The finding of the examiner that Denison did not make a profit in his past mining apart from profits from cutting timber from the patented claims is clear. However, claimant contends that the cost of the mill should not be amortized over its established operating period of 1951-1959 to reach this conclusion. The fact is that the mill is no longer existent and a consideration of its replacement cost is necessary in considering probable costs of any future mining operations. Also, under the Government purchase program, the Government paid the transportation costs from the railhead. However, in the commercial market place, the total transportation costs to the point of delivery are paid by the seller. Thus, Denison's costs do not reflect the major costs of transportation, where there are no nearby steel mills. Clearly, the costs of a mining operation within these claims would exceed the probable price to be received in the market place, assuming that the ores could be beneficiated to acceptable commercial standards—an assumption not borne out by the record.

It is apparent in this case that, at least since of the cessation of the Government's stockpiling program in 1959, neither the claimant nor any of the witnesses at both hearings would propose that money and time be spent with the expectation of developing a valuable mine on any of the claims because the costs of mining operations would far exceed the expected commercial price for the ore, assuming it could be upgraded, as discussed above. At the most, claimant's witnesses would recommend holding the claims and doing further exploration work in an attempt to locate the ore bodies, but this is different from recommending development of the claims in the sense that "development" has been interpreted to mean under the mining laws. See *United States v. Converse*, *supra*. The evidence shows that further exploration work is necessary to establish adequately whether there is enough

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mineralization within the claims to warrant development work. Facts warranting further exploration work on a claim but which do not justify development work are not sufficient to show a discovery under the mining laws. *United States v. Converse, supra*; and *Pruess v. Udall*, 286 F. Supp. 138, 140 (D. Ore 1968), *affirmed Pruess v. Udall*, No. 23, 347 (9th Cir., April 22, 1969), where it was stated that a mineral patent cannot be granted where the evidence shows that further expenditures would be required to locate rather than to develop a mine.

Claimant contends that certain important facts were omitted by the hearing examiner in his chronology of the case which facts, it asserts, "provides factual relief for the issue of what date is the applicable time for determining the value of the mineral discovery and the bona fides of the Applicant." These asserted facts are (1) the dates on which Alvis F. Denison applied for mineral patent to the claims, namely, October 1, 1959, when one application was filed, and June 4, 1959, when the other two were filed (2) the fact that the applications were originally contested and administrative hearings held in Phoenix, Arizona, on September 21-23, 1960 (3) the fact that Alvis F. Denison, the applicant, died on July 22, 1964; (4) the fact that Mrs. Alvis F. Denison, the applicant's widow, inherited these mining claims as well as all of the surrounding patented claims then held by the applicant; and (5) the fact that the second administrative hearing was held in Phoenix, Arizona on October 25-27, 1966.

With respect to these facts, in connection with the issue as to whether patent to the claims is being sought in good faith, claimant agrees with a statement by the hearing examiner that the Government has the right to challenge the validity of a mining claim at any time until legal title has passed from the Government, citing *Cameron v. United States*, 252 U.S. 450 (1920). However, claimant contends that the examiner is in error in citing that case for the proposition that in passing on bona fides the Department is not limited to the good faith of the applicant for patent but, in effect, can consider the good faith of any successor to the applicant until legal title passes. Instead, claimant contends as follows:

The Court in the Cameron Case, citing the case of *Orchard v. Alexander*, 157 U.S. 372 (1895), held that when an applicant applies for patent and meets all the procedural requirements of the law, it is presumed that equitable title to the property has passed to the applicant and "he may not be dispossessed of his equitable rights without due process of law." According to the Court, the Land Department "has jurisdiction, however, after proper notice to the party claiming equitable title, and upon a hearing, to determine the question whether or not such title has passed." (Italics added.) Implicit in this statement is the limitation that the department must determine whether equitable title passed at the

time the law presumes it to have passed, and that time is the time when the patent applicant filed his application, paid his fees and otherwise completed the legal procedures for securing patent. Thus, *Cameron v. United States* stands for the proposition that the Secretary has the power to determine whether, upon completion of his application, equitable title passed to Alvis Denison.

Thus claimant's position appears to be that good faith can be inquired into only until equitable title passes, that is, in claimant's words, "when the patent applicant filed his application, paid his fees and otherwise completed the legal procedures for securing patent." This, claimant asserts, is the "relevant time" concept that it argued for in its previous briefs.

The argument was fully developed in claimant's pre-trial brief, dated August 20, 1966. There claimant stated:

Upon application for patent pursuant to 30 U.S.C. 29, notice is posted and published for a period of sixty days, a certificate of the United States Supervisor of Surveys is filed, and thereafter upon payment to the Government of \$5.00 per acre, if no adverse claim has been filed, a Certificate of Purchase shall be issued and the claimant shall be deemed to have equitable title to his claim. [p. 2.]

* * * * *

The conclusion Contestee draws from these cases is that, having performed all acts preliminary to the issuance of a patent, she now has a vested equitable title to the claim which can only be defeated by a finding of fraud, misrepresentation, or a failure by her predecessor, Alvis F. Denison, to have complied with the law respecting a discovery of mineral in place or location of the claims in good faith. With respect to discovery, the representation was made by the claimant at the time he filed his application for patent that he had made a legally sufficient discovery on each and every one of the claims. It is at this point that the claim of equitable title is asserted. It is this claim and this representation that the Government must contest if it is to prevail in this case. Therefore, the relevant time is the time of the application and the Government's evidence must relate to such time [pp. 3-4.]

It is obvious that claimant is either confused or inconsistent because, while it seemingly assumes that the "relevant time" is one date, it talks about two dates: (1) the time when the patent application is filed, and (2) the time when the applicant has done all that is necessary to perfect his application, including posting and publication of the application and the payment of the purchase price, all of which occurs well after the application is filed. Specifically, in this case, although two of the patent applications (Arizona 021383 and 021390) were filed in the land office on June 4, 1959, publication of the notices of the patent applications was not completed until October 2, 1959. Also, the purchase price for the claims was not paid to the land office until October 27, 1959. The third application (Arizona 023529) was filed on October 1, 1959, with the purchase money not being paid until April 26, 1960. Thus, under claimant's assertions, "equitable title" could not be deemed to have passed until the purchase moneys were paid and other acts were ac-

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complished. With respect to two of the applications, as indicated, this was not until October 27, 1959, and with the other application, April 26, 1960.

What was the situation as of those dates? Under the Government stockpiling program, as the contestee's own exhibits show, especially Ex. RR, there were quotas established. The quota for the depot program had been met and the program ceased in 1958. The Government announced in July of 1959 that the carlot program would terminate August 5, 1959, which it did. With the closing down of the programs there was no reasonable basis for a prudent man to believe in October 1959 that he could mine manganese from the claims on a profitable basis in the commercial market or that the Government support program would be resumed in the reasonably foreseeable future. Certainly claimant has produced no evidence upon which such a belief could have been based. Indeed the evidence is to the contrary. Denison appears to have stopped mining and milling operations on August 5, 1959, and he made his last sales on that date (I Tr. 385, 447). He testified that he could possibly break even but that he was not in business for his health; he would rather that his property sit idle (I Tr. 440-441).

If the determinative date for ascertaining whether a discovery has been made is the time when all the requirements for a patent application have been completed, we could only conclude that on October 27, 1959, and April 26, 1960, respectively, a prudent man would not have been justified in spending further time and money on the claims in issue with the reasonable expectation of developing a valuable mine, but at the most might try to hold the claims and do further exploratory work in an attempt to delineate the ore if conditions changed to make it worthwhile to engage in mining operations. This is what Denison did and it is not sufficient.

We are not unmindful that there has been language in some court cases and some Departmental Decisions which uses "date of the patent application" as the determinative time. However, these cases do not distinguish between the date of the initial filing and the date the filing is perfected.

Some cases have said that "* * * it must be shown as a present fact, *i.e.*, at the time of the application for patent, that the claim is valuable for minerals." This statement originated in *United States v. Margherita Logomarcini*, 60 I.D. 371, 373 (1949), and has been cited in other cases such as *Adams v. United States*, *supra*, 318 F. 2d at 871, and *Best v. Humboldt Mining Co.*, 371 U.S. 334, 336 (1963). The latter case also cited *United States v. Houston*, 66 I.D. 161, 168 (1959), which in turn followed the *Logomarcini* case but held that the evidence *at the hearing* showed "that only isolated pockets of mineral ores have been

shown to exist on the claims *at the present time*" (italics added). See also *Pruess v. Udall*, *supra*, 286 F. Supp. at 140, which cited the *Adams* case as indicating that the date of the application determines whether there has been discovery of a valuable mineral deposit. This, however, was in answer to a contention that the prudent man test must be applied as of the date of discovery in 1920 or 1930 rather than as of the much later date of the patent application. The significance of the reference to the date of the patent application was to distinguish it from the earlier dates and should not be interpreted as establishing that the initial filing date cut off the Department's authority to consider the facts as to discovery as of any later time.

This is also apparent in the court's opinion remanding the present case where, in referring to the *Adams* case, *supra*, the court stated that "as the mine [in the *Adams* case] was worked out, evidence [in that case] of the value of recoveries made 20 years prior to the final administrative decision had little relation to the value *at the time of the hearing*, and so was properly given little weight," even though it subsequently referred to the *Adams* statement that "it must be shown as a present fact, at the time of the application for patent that the claim is valuable for minerals." 248 F. Supp. 944-945. It also discusses the decision in *Mulkern v. Hammitt*, *supra*, as to the time the prudent man test should be applied, and states that the court held in the case that the "standard should be applied as of the time of the hearing, following *Adams v. United States*." 248 F. Supp. at 945.

In short, we are not aware of any case in which the courts or this Department has distinguished between the date of initial filing of a patent application and the subsequent date when all the requirements were completed and said that the issue of discovery was to be determined only as of the first date. Such a ruling would be completely inconsistent with the long line of cases cited by claimant and summarized in *State of Wisconsin et al.* 65 I.D. 265 (1958), also cited by claimant, as holding that "[t]he Secretary, however, can vacate the disposal [of land] and refuse to issue patent for proper grounds existing prior to or up to the time equitable title was earned" * * * (p. 272). We conclude therefore that the facts and circumstances in existence at least up to October 27, 1959, and April 26, 1960, respectively, must be considered in determining whether claimant is entitled to patents.³

We believe that the claimant has failed to show by a preponderance of evidence that, as of these dates, manganese ore existed on any or all

³ We do not intend to rule that even later dates may not be appropriate for consideration, at least in some circumstances (for example, where a mineral deposit is completely mined out after all the procedural requirements for a patent have been met but before issuance of the patent), but there is no necessity for such a ruling in this case.

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of the claims of such quality and in such quantity that it could have been mined and sold at a profit in the commercial manganese market, that the manganese ore, at least from the great majority of the claims, could have met the specifications for purchase under the then-terminated Government purchase program, and that there was any reasonable basis on those dates for expecting a market, Government or private, for the manganese so that a prudent man would have been justified in proceeding with development of the claims instead of merely holding them. We believe that the evidence shows clearly that the contrary was true, and therefore, that the claims are invalid for lack of discovery.

As to the issue of good faith, claimant contends that the hearing examiner's decision does not show who is lacking in good faith, and contends that the decision is denying Denison's widow of her inheritance rights in the claims. We see no aspect of the examiner's decision which suggests any ruling that Denison's rights in the claims and under his patent application could not pass to his heir or heirs. We find, however, in view of the conclusion on discovery that it is unnecessary in this case to make any ruling upon the issue of good faith as a basis for denying the patent applications here, which issue requires a subjective inquiry into intent. This is not to imply that such an inquiry cannot be made or that the lack of good faith may not be a reason to deny a patent application.⁴

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), we reaffirm the rejection of these mineral patent applications and the declaring of the mining claims involved in this case to be null and void for lack of a valid discovery.

ERNEST F. HOM,
Assistant Solicitor.

APPENDIX

May 17, 1968

RECOMMENDED DECISION

Contest proceedings were initiated by the filing of complaints in Arizona 10406, 10407 and 10408 against the B.V.D. Nos. 1, 2, 3, 4, 5, Miss Lottie Nos. 4, 5, 6, D & W Nos. 3, 4, 5, Little Pine Nos. 7, 8, 9,

⁴ The recent case of *United States v. Nogueira*, 403 F. 2d 816 (9th Cir. 1968), indicates the importance of good faith in the holding of a mining claim. It would follow that this question of good faith is also important in considering a patent application.

and Hillcrest Nos. 22 and 23 lode mining claims, all situated in Township [11] North, Ranges 14 and 15 East, Gila and Salt River Meridian (within the Sitgreaves National Forest), Coconino County, Arizona. The complaints alleged as cause of action that:

5a. A valid discovery of mineral does not exist within the limits of any of the claims; and

5b. The lands embraced within the limits of these claims is nonmineral in character.

For purposes of hearing and decision, the contests were consolidated and a hearing was held.

The Hearing Examiner, in a decision dated August 23, 1961, found that the deposits of manganese (the mineral for which the claims were located) were in placer form. Since a placer deposit cannot support a lode mining claim, he rejected the patent applications and held all of the claims to be void. The Contestee appealed and by decision dated October 30, 1962, the Assistant Director, Bureau of Land Management, rejected the Hearing Examiner's finding that the claims were improperly located as lodes. It was found that in the absence of persuasive evidence to the contrary, the form of location was proper. However, the Assistant Director held that the allegations of the complaints had been sustained as to all of the claims except the Miss Lottie Nos. 5 and 6, B.V.D. No. 3, and Little Pine No. 9. The case file was remanded to the State Director for appropriate action in issuance of patent to these four claims. Both parties appealed this decision to the Secretary of the Interior, the Contestant's appeal being limited to the four claims approved for patent.

The Secretary of the Interior, through the Deputy Solicitor, issued a decision on June 8, 1964, which consolidated the appeals of *United States v. Alvis F. Denison*, *United States v. Leo E. Shoup*, *United States v. Reed Smith*, *United States v. Estate of Robert F. Beecroft*. After quoting the "prudent man" test of discovery, as expressed in *Castle v. Womble*, 19 L.D. 455 (1894), the Secretary's decision set forth certain implementing criteria to this test. In essence, the decision states that a mining claim from which ore has been sold at a profit may lose its discovery and may be declared invalid if the ore sales from it have ceased due to a change in economic conditions, resulting in a loss of market or a drop in price and there being no reasonable prospect of a future market. The decision did not specifically consider the issue of whether the claims were properly located as lodes and whether the ground upon which the claims are located is mineral in character.

After an appeal filed by the Contestee, the United States District Court, in *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965), found

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there was insufficient evidence in the record to substantiate the finding that the claims have ceased to be valuable. The decision of the Secretary was set aside and the case remanded for further evidentiary proceedings.

Pursuant to the Court's instructions, the Department of the Interior remanded the case to the Office of Hearing Examiners, Salt Lake City, Utah, with instructions to receive evidence on the following subsidiary issues:

1. What quantity of manganese exists on each claim and what is the quality or grade of the manganese ore?
2. Was there a market for such ore at the time the patent applications were filed and is there a market at this time?
3. Assuming there is no present market, is there any reasonable basis for expecting a future market for such ore?
4. How do the costs of extracting, processing, and marketing the ore compare with the anticipated returns expected from the sale of the ore at the dates of the patent applications, now, and in the future?

Prior to the commencement of the second hearing, the Contestant filed a motion, which was granted, to amend the complaint to include the following charge:

That patent to these claims is not being sought in good faith for mining purposes.

As the second hearing, Contestant was represented by Mr. Richard L. Fowler, Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, and by Mr. Laurie K. Luoma, Office of the Solicitor, United States Department of the Interior, Phoenix, Arizona. The Contestee was represented by Mr. Frank Brophy of Riley, Carlock & Ralston, Attorneys at Law, Phoenix, Arizona.

From the evidence presented at both hearings, the following findings of fact are made:

Quality and Quantity of Manganese Exposed on the Claims

Mr. Rowland E. Tragitt, a mining engineer employed by the Forest Service, was the principal witness for the Contestant in both hearings. To supplement his earlier examinations, he re-examined the claims on June 8 to 16, July 6 to 9, and September 14 to 19, 1966, and testified in detail concerning the method of sampling and assaying. His testimony was not rebutted. The results of his examinations, combined with the information extracted from the settlement sheets covering all of Mr. Denison's sales under the Government carlot buying program which ended August 5, 1959, are tabulated in Tables 1, 2, 3, and 4, attached, pp. 264, 265, 266.

Table 2 is a summary of the evidence as to the quantity of manganese-bearing material on the claims. The totals shown in the table relate to certain areas of influence attributed to specific excavation and sample results based on Mr. Tragitt's 1960 and 1966 examinations (Tr. II, pp. 65-67). Mr. Bill Denison, who was in charge of the mill during its operation, testified that 300 to 500 tons of material were milled each day. On the basis of 300 tons daily mill feed, Table 2 indicates that there was manganese-bearing material on the D & W Nos. 3, 4, and 5, Little Pine Nos. 7 and 8, B.V.D. Nos. 3 and 4, and the Hillcrest No. 22 claims to operate the mill for a few minutes only. On five of these claims there was no mineral found in 1960 and but a negligible amount in 1966. On the B.V.D. No. 2 claim, there are no usable figures. The following table shows the number of days of mill feed supply found on the remaining seven claims in issue :

<i>Claim</i>	<i>1960</i>	<i>1966</i>
Little Pine No. 19	1 day	8 days.
B.V.D. No. 1	1 day	6 days.
Miss Lottie No. 4	5½ days	28 days.
Miss Lottie No. 5	40 days	40 days.
Miss Lottie No. 6	10 days	10 days.
B.V.D. No. 5	4 days	15½ days.
Hillcrest No. 23	10½ days	10½ days.

A 500-ton daily mill feed would result in a correspondingly lower available supply. However, based on the 300-ton per day mill feed, there was enough manganese-bearing material computed to exist on the claims as of 1960 to run the mill for 72½ days. Due to additional exposures found in Mr. Tragitt's 1966 examination, he estimated that the mill could run for 119 days before the deposits were exhausted.

Information obtained from the settlement sheets reveal that in the shipments made by Mr. Denison from patented claims, the percentages of manganese and aluminum, plus silica, ranged from 40.40 percent to 45.83 percent, with combined alumina and silica and impurities varying from 7.33 percent to 14.82 percent (Table 1, p. 264). Shipments containing impurities higher than 12.58 percent were subject to penalties. Near the end of the buying program, material has hastily forced across the jigs and some of Mr. Denison's shipments were penalized.

Table 3, p. 265 shows the grade of the pit run material in place on the claims in issue as reflected in all of Mr. Tragitt's samples.

Table 4, p. 266 constitutes a summary of the unrefuted evidence offered by the Contestant as to the amount of recoverable manganese on the claims. It shows that the material, when concentrated, is not as

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high a quality as the material Mr. Denison was selling from 1957 through 1959 from his patented claims. This fact partially explains his failure to remove ore (except in small amounts from Miss Lottie No. 5) from any of the claims now under contest (Tr. I. p. 434). Only five of the samples tested by either gravity separation or sink float show manganese content as high as Denison sold under the carlot buying program from his patented claims, and in no sample tested was the combined alumina and silica as low as 12.85 percent.

In neither 1960 nor in 1966 was there found on any of the contested claims material of sufficient quantity or quality to be suitable for mining purposes, regardless of whether a government-buying program was in effect.

Was there a market for such ore at the time patent applications were filed and is there a market at this time?

The date of the patent applications are:

MPA-023529 (MS 4483), October 1, 1959

MPA-021383 (MS 4462), June 4, 1959

MPA-021390 (MS 4463), June 4, 1959

Exhibit 66 shows that Mr. Denison received a base price of \$2.30 for a long dry-ton unit of manganese. Mr. Denison consistently received premiums for low iron content, but was penalized for high silica and alumina content. The adjusted base prices received by him were always slightly lower than the base price, with the highest price received at \$2.29 and the lowest at \$2.18.

As shown on exhibit 63 (a summary from the *Engineering Mining Journal*), in 1958 the open market price for ore containing 48 percent manganese was 87 cents to 90 cents per long ton unit. Subsequently, the market price has fluctuated, but the trend has been downward and as of October 1966, the market price for ore containing 46 percent manganese was 75 cents to 78 cents per long ton unit. Although, there is always a market for manganese, the material from the claims in issue cannot now, nor could it at the time of patent application, be sold because the recoverable product is below the acceptable grade.

Is there a reasonable basis for expecting a future market for the manganese-bearing material found on the claims in issue?

This is obviously a highly speculative area. Mrs. Denison testified that her husband believed that the carlot program was going to extend for a year beyond its actual August 5, 1959, termination date. Shortly after he filed mineral patent applications 021383 and 021390 the carlot buying program ended, at which time Mr. Denison ceased production on his adjacent patented claims. Subsequent to the termination of the

carlot program, he continued to explore for manganese deposits on the claims in issue with the idea that by locating the best manganese areas on the claims he would then be in a better position to exploit the expected favorable price change. He also continued to experiment with methods of treating the manganese chemically for the purpose of producing a marketable product. However, since August 5, 1959, there has been an unfavorable market price for low grade type manganese-bearing deposits and the reoccurrence of a favorable market price cannot be predicted with any degree of certitude. It is conceivable, and admitted, that at some time in the future manganese-bearing material of the quality found on these claims could become valuable, either by reason of a technological development or through a rise in price. The present price structure for manganese is due to the availability of high grade, low cost foreign ores from South America, Asia and Africa (exhibit RR), and a rise in the price of ocean freight costs or the interruption of ocean freight would favorably affect the price for domestic manganese. However, in the absence of a third world conflict, or unless technological developments make it economical to recover low grade manganese deposits, the present price structure, although it may fluctuate, will remain too low to enable these claims to be mined at a profit. Research on recovery of low grade manganese ore is now being conducted by the Bureau of Mines, but there is no evidence indicating that in the foreseeable future the deposits of manganese of the quality found on the claims in issue could become valuable.

How do the costs of mining the ore found on the claims compare with the price received from the sale of ore at the date of patent application, at the time of hearing, or in the future?

Little data is available as to the cost of extracting, processing and marketing the ore which might have been or might in the future be removed from these claims. The sketchy evidence adduced as to the costs of removing ore from the adjacent claims is summarized in Table 5. Although no precise calculations can be made, one thing is clear. Mr. Denison lost money on his mining operations. His total income for the years 1951-54 and 1957-59 was \$116,461.48. The cost of the third mill was \$95,500. When one takes into consideration the cost of the other previous two mills, labor, equipment, supplies, overhead and amortization of equipment, there can be little doubt that the operation was not profitable for mining in the years in which the claims were operated. No evidence was introduced showing anticipated future returns or possibilities of an advance in prices. The mill is no longer in operation and would have to be rebuilt. In any event, unless the price received for a long dry-ton unit of manganese substantially exceeds the \$2.30 received under the carlot buying program, no ore from these claims could be profitably marketed.

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Are patents being sought in good faith for mining purposes?

This allegation was added after the contest had been remanded by the Secretary for additional hearing. This is an unusual step, but there is no bar to this action provided the party against whom the charge is made has sufficient notice and opportunity to answer and defend. The Court, in the remand order, specifically stated that [the] issue [of] bona fides should not enter into the decision of the Secretary unless alleged and argued in the evidentiary proceedings.

Evidence was received as to the value of the land embraced by the contested claims for its timber. Exhibit 70, prepared by Mr. Wright¹ after an appraisal, shows that in 1966 the timber was valued at \$218.40 per acre, or a total value of \$69,888 for the 320 acres in the 16 claims. Mr. Denison received \$61,491.66 in 1957, \$47,175.24 in 1958, and \$59,921.02 in 1959, from timber that was cut and sold from his patented claims (exhibit 73). Although it was necessary to remove the timber so that mining operations could begin, it was the income from the timber sales that made the 1957-59 mining operations profitable. Had no timber been sold, the operations would have lost money.

The real estate potential of the claims was not exploited during the life of Mr. Alvis Denison. For example, after Mr. Denison had sold his residual title to the Hillcrest Nos. 6, 7, 9, and 12 through 19 claims to Mr. Ralph M. Miller, he borrowed \$70,000 and repurchased them for the express purpose of preserving them for mining operations. It was not until after Mr. Denison's death that Mrs. Denison sold the previously patented claims to the Mogollan Investment Company of which her son, Bill Denison, is Secretary-Treasurer. There is no doubt as to the intention of the Mogollan Investment Company. This land is being subdivided into homesites. It follows that, if patent is obtained to the claims in issue, they also would become part of the same real estate development.

From the foregoing findings of fact the following conclusions of law are made:

That marketability is an essential factor in determining whether there has been a "discovery" sufficient to validate a mining claim is made clear in the case of *U.S. v. Alfred E. Coleman et al.*, 390 U.S. 599 (decided April 22, 1968). The U.S. Supreme Court, in deciding that quartzite stone which could not be marketed at a profit did not qualify as a valuable mineral locatable under the mining laws, stated:

* * * Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "pru-

¹ Mr. Wright is an employee of the United States Forest. He is presently employed as assistant to the district ranger of the Heber Ranger District.

dent man test" which the Secretary has been using to interpret the mining laws since 1894. Under this "prudent man test" in order to qualify as "valuable mineral deposits," the discovered deposits must be 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). This Court has approved the prudent-man formulation and interpretation on numerous occasions. See, for example, *Chrisman v. Miller*, 197 U.S. 313, 322; *Cameron v. United States*, 252 U.S. 450, 459; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336. * * * Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for any other purpose. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable. * * *

There is one distinction between the facts in the *Coleman* case and the facts in issue here. Quartzite is a nonmetallic mineral of widespread occurrence, while manganese is a metallic mineral considered to be intrinsically valuable in that there is always a market for it. However, the similarities between common occurring quartzite and low grade manganese having no present value because it cannot, under present market conditions, be marketed at a profit, are obvious. There is no significant conflict in the record as to the quantity and quality of the manganese on the claims in question. As in the case of quartzite used for building material, the value of the deposit can, without extensive exploration and development, be readily ascertained. Logically, the marketability rule does apply to both types of deposits with one important distinction. Minerals of common occurrence must have present marketability to sustain the "discovery" requirement. In locations made for minerals having intrinsic value when the quantity and quality of the deposit can be determined, there must be persuasive evidence that the deposit will, in all probability, have value in the reasonably foreseeable future. The record in the present case is devoid of evidence sufficient to justify such a conclusion.

In the *Coleman* decision, *supra*, (p. 603) the Supreme Court emphasized the necessity of good faith on the part of the mining claimant:

The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuable-ness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. * * *

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In a footnote, the Court also quoted a portion of the statute setting forth the legal requirements for obtaining a patent, emphasizing the language of intent:

17 Stat. 92, 30 U.S.C. § 29, provides in pertinent part as follows: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person * * * having claimed and located a piece of land for such purposes * * * may file * * *." (Emphasis added.)

The Contestee argues that since the claims were located in 1950-51 and were generally part of Alvis F. Denison's effort to locate, develop and mine and patent some 90 claims and two millsites, the Department can only look to the intent of the original applicant for patent. This argument is not sound and is contrary to the principle stated by the United States Supreme Court in *Cameron v. United States*, 252 U.S. 450 (1920), wherein it was said, "* * * the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed."

In locating, holding, or seeking to patent a mining claim the claimant's intent must be consistent with the purposes for which the mining laws were passed. If it can be shown, as has been done here, that the claims are now being held and patents sought for purposes other than mining, the claims are voidable. Any other conclusion would subvert the intent of Congress in enacting the mining statutes.

Final Conclusion

The cumulative evidence adduced at both hearings shows that no discovery of a valuable mineral [deposit] has been made upon any of the claims under contest and that they are not now being held in good faith for mining purposes. Therefore, mineral patent applications 023529, 021383 and 021390 are denied. The Miss Lottie Nos. 4, 5, 6, D & W Nos. 3, 4, 5, Little Pine Nos. 7, 8, 9, B.V.D. Nos. 1, 2, 3, 4, 5, and Hillcrest Nos. 22 and 23 lode mining claims are held to be void.

Respectfully submitted,

JOHN R. RAMPTON, Jr.,
Hearing Examiner.

ATTACHMENTS
TABLES 1 THRU 5

TABLE 1¹

Date	Percent manganese	Percent silica/ alumina	L.D.T. ² units
9-13-57	40.40	11.99	2066.6378
10-3-57	43.38	7.80	2213.6640
11-1-57	43.60	8.59	2092.5297
12-6-57	41.40	7.67	2134.2197
6-27-58	42.58	8.36	2250.0975
7-17-58	43.61	11.28	2197.8088
8-15-58	45.36	7.92	2804.0373
8-22-58	43.27	8.84	2255.7776
9-29-58	44.56	8.93	2248.6090
10-15-58	45.38	7.33	2262.2656
11-3-58	43.26	8.24	2212.4894
12-3-58	42.74	10.33	1937.7846
1-5-59	41.37	13.56	2326.2847
6-5-59	41.49	11.17	2098.3028
6-9-59	40.52	12.58	1939.9760
8-4-59	40.90	14.82	4197.6202
8-11-59	42.20	14.19	2135.3706
9-1-59	42.70	14.16	3499.4999

¹ Extracted from contents of exhibit 66.

² L.D.T.—Long Dry Ton.

Although 18 items are listed, those under dates of August 4 and September 1, 1959, contain approximately twice the L.D.T. units. It is concluded from this that 20 carloads were shipped. Some of this material was purchased from others by Mr. Denison (Tr. II, p. 343).

TABLE 2¹

Claim	Tons mill dirt—1960	L.T.U.'s ² Mn—1960	Tons mill dirt—1966	L.T.U.'s ² Mn—1966
Miss Lottie No. 4.	1,685.00	3,363.00	8,424.00	16,818.00
Miss Lottie No. 5.	12,012.00	67,335.00	12,012.00	67,335.00
Miss Lottie No. 6.	3,120.00	11,655.00	3,120.00	11,655.00
D & W No. 3.	None	None	.9175	2.98
D & W No. 4.	2.13	10.50	6.45	32.49
D & W No. 5.	None	None	None	None
Little Pine No. 7.	5.76	12.62	5.76	12.62
Little Pine No. 8.	None	None	None	None
Little Pine No. 9.	259.50	619.00	2,594.70	6,192.00
B.V.D. No. 3.	None	None	None	None
B.V.D. No. 4.	None	None	None	None
B.V.D. No. 5.	1,170.00	2,040.00	4,680.00	8,160.00
Hillcrest No. 43.	3,193.20	13,159.00	3,193.20	13,159.00
B.V.D. No. 1.	312.00	1,825.00	1,768.00	10,462.00
B.V.D. No. 2.	(*)	522.00	(*)	740.00
Hillcrest No. 22.	None	None	None	None

¹ Extracted from II Tr. 65-83.

² L.T.U. equals Long Ton Unit, which is 1% of a Long Ton, II Tr. 65:

*Testimony is not clear in the transcript.

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TABLE 3¹

Claim	Sample ²	Percent Mn	Claim	Sample ²	Percent Mn
Miss Lottie No. 4	4462-3	3.64	B.V.D. No. 5	4463-2	5.95
	-13	4.65		-3	3.90
	-14	4.55		-19	3.46
	-21	4.20		-25	0.98
	-28	1.98		-26	1.16
	-29	3.47		Little Pine No. 7	4463-7
Miss Lottie No. 5	4462-2	6.94	-8	0.90	
	-8	20.05	-9	4.95	
	-24	6.48	-27	1.49	
	-30	1.32	Little Pine No. 8	4463-10	3.40
Miss Lottie No. 6	4462-1	16.87	-28	2.31	
	-7	5.35	-29	0.83	
	-23	4.23	Little Pine No. 9	4463-11	4.70
	-31	7.92	-12	8.65	
D & W No. 3	4462-6	1.17	-20	5.28	
	-17	3.25	-21	1.98	
	-19	7.42	-30	1.32	
	-25	0.83	Hillcrest No. 23	4463-6	12.75
D & W No. 4	4462-4	1.64	-13	19.95	
	-9	29.85	-15	6.51	
	-10	1.10	-16	6.37	
	-11	0.90	-17	5.12	
	-12	3.45	-31	0.66	
	-18	7.93	B.V.D. No. 1	4483-1	12.95
	-26	0.49	-6	21.45	
D & W No. 5	4462-5	1.44	-8	1.49	
	-15	0.85	-9	0.98	
	-16	0.55	B.V.D. No. 2	4483-2	14.25
	-20	2.48	-3	15.40	
	-27	0.66	-7	8.58	
B.V.D. No. 3	4463-1	11.47	-10	4.29	
	-18	1.65	-11	1.16	
	-22	2.31	Hillcrest No. 22	4483-4	22.10
B.V.D. No. 4	4463-4	0.65	-5	5.78	
	-5	13.45	-12	0.83	
	-23	2.65			
	-24	2.48			

¹ Extracted from exhibits 5-9, 12, 36 & 37, 50 & 51, 60 & 61.² Samples 4462-1 through 4462-17 were taken in 1960; Samples 4463-1 through 4463-14 were taken in 1960; Samples 4483-1 through 4483-4 were taken in 1960; all other samples were taken in 1966.

TABLE 4¹

Claim	Sample	Concentrates		Percent manganese recovered
		Percent manganese	Percent alumina + silica	
Miss Lottie No. 4	4462-13)	-----	-----	-----
	-14)	20.45	-----	-----
	-21	39.60	13.30	60.0
Miss Lottie No. 5	4462-24	43.73	14.20	64.0
Miss Lottie No. 6	4462-23	41.58	13.45	57.0
D & W No. 3	4462-17	16.75	-----	-----
	-19	34.65	13.40	49.0
D & W No. 4	4462-9	41.65	-----	-----
	-12	12.05	-----	-----
	-18	36.40	15.35	52.0
D & W No. 5	4462-20	28.05	30.70	50.0
B.V.D. No. 3	4463-18	25.58	23.50	-----
B.V.D. No. 5	4463-3	21.85	-----	-----
	-19	28.71	32.00	30.0
Little Pine No. 7	4463-7)	-----	-----	-----
	-8)	11.20	-----	50.0
	-9)	-----	-----	-----
Little Pine No. 8	4463-10	13.35	-----	-----
Little Pine No. 9	4463-11)	-----	-----	-----
	-12)	51.45	-----	-----
	-20	41.42	19.55	45.0
	-21	34.82	26.25	-----
Hillcrest No. 23	4463-6	32.10	-----	-----
	-13	33.25	-----	-----
	-15)	-----	-----	-----
	-16)	28.54	36.50	43.0
B.V.D. No. 1	4483-1	34.65	24.30	-----
	-6	33.75	-----	-----
B.V.D. No. 2	4483-1	40.26	13.15	50.5
	4483-7	32.83	27.90	50.5
Hillcrest No. 22	4483-4	24.55	55.27	(silica only)
	-5	22.44	51.70	34.0
Mill Concentrates	64-1	39.77	14.00	-----
Mill Tailings	64-2	15.01	-----	-----

¹ Extracted from exhibits 7, 10, 11, 15, 36, 50, 61 and I Tr. 130 and II Tr. 65-83.

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TABLE 5

1960 ¹	1966 ²
1. Mining equipment:	1. Nothing added.
Back-hoe (Total Cost	Exhibit GG reflects essen-
\$2,400)	tially what Mr. Denison stated
Three trucks	in 1960.
Tractor	
Dozer	
Michigan Loader	
2. Milling equipment:	2. Milling equipment:
Log washer	<i>Type</i>
Grizzly	<i>Expense</i>
Triple-deck screen	Jig----- \$1800. 00
18 inch crusher	Conveyer----- 153. 00
Bucket elevator	Motor-Vibrating
3 bins	Machine.
Pan-American jig	Conveyer----- 783. 14
Denver jig	Vibrating screen--- 265. 00
Vibrating screen	Spiral----- 500. 00
4 compartment jig	Michigan Loader-- 6000. 00
Total cost of mill including	
well, but not including	
cost of two earlier mills:	
\$95,500	
3. Labor:	3. Labor:
a. Mining—4 men	<i>Name</i>
Total cost of \$53 per 8	<i>Weekly</i>
hour day	<i>wage</i>
b. Milling—6 men	Bill Denison----- \$80. 77
Total cost of \$66 per 8	S. P. Vickers \$61.54 or 65. 50
hour day	Art Boultinghouse
	\$61.54 or 65. 50
	Jose Rios----- 56. 74
	J. E. Conway----- 76. 40
	Tom Kinder----- 55. 71
	In addition, exhibit GG con-
	forms to Mr. Denison's 1960
	testimony.

Table 5—Continued

1960 ¹	1966 ²
4. Operating Expense:	
a. Back-hoe, excluding driver, \$6 per hr. per 6 hour day	
b. Dozer, excluding driver, \$6 per hr. per 2 hour day	
c. Mill—\$100 per day.	
5. Transportation:	
6 cents per ton mile, or \$3 per ton	
Paid by U.S.	
6. Overhead—\$100 per day	

¹ 1960 data taken from testimony of Alvis Denison at I Tr. 435-439, 444-448.

² 1966 data taken from II Tr. 270, 346-352, 424-6, and exhibit G.G.

**APPEAL OF WEBBER CONSTRUCTORS, INC.
(FORMERLY HARRIS PAVING AND CONSTRUCTION COMPANY)**

IBCA-721-6-68 *Decided September 23, 1969*

Contracts: Disputes and Remedies: Equitable Adjustments

Although proof of the reasonableness of a unit bid price for excavation negates the contracting officer's conclusion of an improvident bid, that conclusion having led to the refusal of an equitable adjustment for a changed condition, it does not support the contractor's claim for an adjustment based upon total costs. In view of the less than satisfactory evidence of costs, the Board will use a jury verdict approach to establish the amount of the equitable adjustment.

BOARD OF CONTRACT APPEALS

This Board had previously decided¹ that the contractor was entitled to an equitable adjustment because of a changed condition and change in the requirements of its road construction contract in the Everglades National Park. The contractor's evidence as to quantum was developed on a total cost approach which the Board found unsatisfactory. The appeal was remanded to the contracting officer for the negotiation of an equitable adjustment with the recommendation that more reliable proof be developed as to the reasonableness of the unit bid price of \$1.60 per cubic yard for excavation and as to the costs of the work as changed.

¹ *Harris Paving and Construction Company*, IBCA-487-3-65 (July 31, 1967), 74 I.D. 218, 67-2 BCA par. 6468.

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In a Findings of Fact and Decision dated May 9, 1968, the contracting officer concluded that the contractor was not entitled to additional compensation because his bid price of \$1.60 per cubic yard for excavation was improvident. The contracting officer determined that the contractor could not have performed the contract, with no change or changed condition, without a loss on the bid item, and that the Government is under no duty to make up a contractor's loss resulting from improvident bidding.

At a hearing held after an appeal had been taken from the May 9, 1968 Findings of Fact and Decision, the contractor presented additional evidence on its costs and on the reasonableness of the unit bid price of \$1.60 per cubic yard.² The Board finds that the testimony of the contractor's engineering consultant established \$1.60 per cubic yard as within the range of reasonableness for a unit bid price for the kind of fill specified in the contract. The contracting officer's conclusion that the bid was improvident is contrary to the preponderance of the evidence. The contractor is entitled to an equitable adjustment.

However, the much lower estimated unit costs upon which the contractor claims to have built its unit bid price are not acceptable.³ Evidence to support the reasonableness of the estimates is scant or absent, as opposed to the reasonableness of the unit bid price. The contractor's request for a total cost adjustment is based upon the difference between these estimates and its total adjusted costs.⁴

It is true that in *J. D. Hedin Construction Co. v. United States*, 171 Ct. Cl. 70 (1965), cited by appellant, the court allowed extra costs due to delay to be based upon the difference between an estimate and total cost, excluding subcontracted work. As the court pointed out, the method can be used under proper safeguards where there is no other alternative. Proper safeguards, we think, should include at the least expert evidence of reasonableness of the estimate, supported by closeness of the bids,⁵ as stated in *J. D. Hedin*. Neither are present here.

Other cases which discuss the total cost approach predominantly refer to a difference between total costs and contract price, not estimated costs. See, e.g., *F. H. McGraw and Company v. United States*, 131

² The present record includes transcripts and exhibits from two hearings. The 1965 materials will be designated by the prefix 65, the 1969 materials by the prefix 69.

³ 65 Exhibit 6. The estimated cost figures in this exhibit apparently were first compiled into chart form during the last two weeks in January 1965, to support a claim letter dated February 1, 1965, see 65 Tr. 290-291. It is not clear in the record whether only the operations breakdown in the chart was used in preparing the bid price, or whether the estimated cost figures on the chart were also used. See 65 Tr. 270. There is some brief testimony that the estimated cost figures were so used (65 Tr. 292-293), but the testimony does not support the reasonableness of the estimated figures.

⁴ In its post-hearing brief the contractor asked for \$69,000, representing \$60,000 in costs over estimated costs, plus 10% profit and 5% overhead.

⁵ The other bids for the item were \$1.92 per yd., \$2, \$3.45, and \$3.50. The \$1.92 bid is 16% higher than the Webber (Harris) bid. This is a substantially greater difference than the 4% and 7% disparity remarked upon in *J. D. Hedin*.

Ct. Cl. 501 (1955); *River Construction Corporation v. United States*, 159 Ct. Cl. 254 (1962). In *Oliver-Finnie Company v. United States*, 150 Ct. Cl. 189 (1960), in assessing the breach of contract damage consequences of delay, the court referred to the difference between actual cost in labor of a bid item and the bid estimate for labor. However, the bid estimate for labor was essentially the same as a separate bid price for labor, since the bid estimate for labor was broken out as a component of the bid price and submitted to the contracting officer before award. We are impressed by the following admonition in *Oliver-Finnie*:

As we have said above, we view basing damages on the difference between bid estimate and actual costs with trepidation. We see no basis for carrying this even further, as plaintiff contends for, and basing damages on the difference between its "engineered" costs (lower than its bid estimate) and actual costs. 150 Ct. Cl. 189, at 201.

The total cost approach based on estimates as contended for by the contractor is not acceptable. We can go no further on this record than to accept the unit bid price as not constituting an improvident bid.

We also view the audited total adjusted costs of \$205,778 with misgivings. We have no doubts about the skill and integrity of the auditor. However, he only worked with what the contractor provided. The keystone in the distribution of costs to the bid item in issue or to other bid items was the timekeeper's records (69 Tr. 12). However, the timekeeper was never called upon to testify as to the accuracy of his records or as to the sources of his information. Further, the contractor did not have a job cost accounting system prior to May 20, 1964. The job costs for the first two and one-half months of the job were distributed among the bid items on an after the fact basis (69 Tr. 143-144).

There is no basis for including a requested \$855 in attorney's fees for successful litigation against a subcontractor, allegedly resulting in a reduction of the total adjusted cost and therefore a "benefit" to the Government. The litigation was undertaken primarily in the interests of the contractor. The legal fee was not paid incidental to furthering performance of the contract work, but in adjusting a private dispute between the contractor and a subcontractor which has relevance to the Government only in the context of a claim presented against it on an unacceptable total cost basis. The item is not allowable. *Cf. Power Equipment Corp.*, ASBCA No. 5904 (January 10, 1964), 1964 BCA par. 4025.

Because of reservations over the audited costs and the absence of verification of the estimated costs and other imponderables, the Board rejects a total cost approach, or any variant of it, to establish the equitable adjustment. To repeat, simply to acknowledge that the unit bid price was reasonable does not by itself indicate what it would have cost to perform absent a changed condition. It only furnishes an evidentiary

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basis to negate the contracting officer's charge of a loss bid, and a basis from which to infer that the contractor could have performed at \$1.60 per cubic yard.

Taking into account the whole record and the conflicting positions of the contractor and Government, a "jury verdict" approach is warranted.⁶ *Lincoln Construction Co.*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234. The Board finds that an adjustment of \$19,500 is equitable and appropriate. A reasonable amount for profit and overhead has been taken into account.

Conclusion

The appellant is entitled to an equitable adjustment of \$19,500.

ROBERT L. FONNER, *Member.*

I concur:

DEAN F. RATZMAN, *Chairman.*

STANDARD OIL COMPANY OF CALIFORNIA ET AL.

A-30977

Decided September 30, 1969

Oil and Gas Leases: Rentals—Oil and Gas Leases: Unit and Cooperative Agreements

Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit and the eliminated portion is situated in whole or in part on the known geologic structure of a producing oil or gas field, the rental rate for land within the known geologic structure of a producing oil and gas field is applicable to the lands eliminated and not the rental rate for unitized land which is not included in a participating area.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Standard Oil Company of California and Atlantic Richfield Company have jointly appealed to the Secretary of the Interior from a decision by the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, dated February 23, 1968, affirming a decision of the Anchorage land office of May 26, 1967, affecting oil and gas leases Anchorage 028990, 028993, 028996, 028997, and 029002. The appellants' appeal relates only to that portion of the land office decision giving notice of an increase in rental rate to \$1 per acre for the lease

⁶ This case has been heard twice. The record is extensive and, we believe, exhaustive. We are convinced that its deficiencies as to quantum are not curable.

year beginning September 1, 1967, for those portions of the leases which were eliminated, effective January 2, 1967, from the Soldotna Creek Unit Agreement but are partially on the known geologic structure of a producing oil and gas field.¹

There is no dispute in this case as to the facts. Basically, each of these leases was issued noncompetitively effective September 1, 1958, and each was included in the Soldotna Creek Unit Agreement approved by the Director, United States Geological Survey, on December 18, 1959. There has been production within the unit and each of the leases has acreage within the present participating area and receives an allocation of unit production. Prior to the contraction of the Soldotna Creek unit area, causing some acreage in each lease to fall outside the contracted unit boundary, the known geologic structure of the Swanson River-Soldotna Creek Field was defined and redefined, and a portion of the eliminated acreage in each lease is within the redefined structure.

The land office decision gave notice that certain lands in these and other leases not involved in this appeal were automatically eliminated from the Soldotna Creek Unit Agreement, effective January 2, 1967. As to these five leases, the land office decision stated that the eliminated portion of each lease and the portion which remains unitized continue to form one lease and that therefore the entire lease in each case is extended by production, either actual or constructive. The decision indicated that the records of the Geological Survey show the acreage to be distributed into three categories.² It indicated that as to these categories the rentals or royalties are:

First, the acreage within the participating area of the unit is on a minimum royalty basis. Second, the rental for acreage outside the participating area but within the unit is 50 cents per acre or fraction thereof, in accordance with the provisions of 43 CFR 3125.1(b)(2). And, third, the rental for acreage outside the unit but partially within a known geologic structure is set forth under sec. 2(d)(1)(b)(i) of

¹ The lessee of these leases is the Estate of Fred W. Axford. The appeals have been prosecuted by Standard Oil Company, as unit operator under the Soldotna Creek Unit Agreement and as a working interest owner in the leases committed thereto, and by Atlantic Richfield Company, as a working interest owner in leases committed to that unit.

² The acreage is shown in the land office decision to be distributed as follows:

Anchorage	(1)	(2)	(3)	Total acres
	Acres in participating area	Acres outside participating area but within unit	Acres outside unit but partially within KGS	
028990.....	332.50	67.50	2,000	2,400
028993.....	200.00	80.00	2,280	2,560
028996.....	810.00	190.00	120	1,120
028997.....	1,745.00	175.00	640	2,560
029002.....	7.50	32.50	2,520	2,560

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the leases, which prescribes a rental of \$1 per acre or fraction thereof for lands wholly or partly within the known geologic structure of a producing oil or gas field.

The appellants' appeal attacks only the third ruling prescribing a rental of \$1 per acre or fraction thereof for the acreage which has been eliminated from the unit but which is partially within a known geologic structure. This is an increase from the 50 cents per acre paid on nonparticipating acreage within the unit before such acreage was eliminated from the unit.

In affirming the land office decision, the decision of the Office of Appeals and Hearings stated that although there is no segregation into separate leases by the partial elimination of acreage of a lease from a unit plan, the rental requirements of an individual lease may vary, and depending upon the circumstances, the lease may be constructively segregated for rental and royalty purposes.

In this appeal, appellants attack the language and the reasoning of the decision below, contending that there is no support for a "constructive segregation" of a lease under these circumstances by statute, regulation, lease terms, or decision. Before discussing appellant's contentions in detail, the pertinent rental provisions of the lease in section 2(d) (1) will be set forth, since the Bureau's actions and appellant's contentions relate specifically to them. Basically, as the decision below pointed out and as appellants agree, the applicable rental under subparagraph (a) of section 2(d) (1) for "lands * * * wholly outside the known geologic structure of a producing oil or gas field" is 50 cents per acre for the sixth and succeeding years of the leases. (This will be referred to as the non-KGS rental.)³ The lease then provides as follows:

(b) If the lands are wholly or partly within the known geologic structure of a producing oil or gas field:

(i) Beginning with the first lease year after 30 days' notice that all or part of the land is included in such a structure and for each year thereafter, prior to a discovery of oil or gas on the lands leased, \$1 per acre or fraction thereof.

(ii) If this lease is committed to an approved cooperative or unit plan which includes a well capable of producing oil or gas and contains a general provision for allocation of production, the rental prescribed for the respective lease years in subparagraph (a) of this section, shall apply to the acreage not within a participating area, * * *.

Minimum royalty.—Commencing with the lease year beginning on or after a discovery on the leased land, to pay the lessor in lieu of rental, a minimum royalty of \$1 per acre or fraction thereof at the expiration of each lease year, or the difference between the actual royalty paid during the year if less than \$1 per acre, and the prescribed minimum royalty of \$1 per acre, provided that if this lease is unitized, the minimum royalty shall be payable only on the participat-

³ By section 10 of the act of July 3, 1958, 30 U.S.C. § 251 (1964), the rental rate for lands in Alaska not on a known geologic structure was made identical to that in the other States. This changes the original lease term which provided a rate of 25 cents per acre for lands in Alaska.

ing acreage and rental shall be payable on the nonparticipating acreage as provided in subparagraph (b) (ii) above.

In analyzing these provisions the decision below indicated that subparagraph (a) is not pertinent as it is applicable only to lands wholly outside a known geologic structure, with the exception provided in subparagraph (b) (ii). It indicated that the exception in subparagraph (b) (ii) is applicable only to acreage which is committed to a unit plan but is not within a participating area, and that as the acreage involved here has been eliminated from the unit it has ceased to be within the exception contemplated in subparagraph (b) (ii). It concluded that the acreage, considered as a separate entity for rental purposes, is therefore within the purview of subparagraph (b) (i) providing for an annual rental of \$1 per acre for land wholly or partly within the known geologic structure of a producing oil or gas field prior to a discovery of oil and gas on those leased lands. (This will be referred to as the KGS rental.)

The Bureau decision is supported by a Departmental decision, *T. Jack Foster*, 75 I.D. 81 (1968), which involved rentals due on an oil and gas lease, one category of which is similar to the factual situation involved here.⁴ As pertinent here, in the *Foster* case lands which had been committed to a unit agreement were eliminated from the unit. They were wholly or partly within the known geologic structure of a producing oil or gas field. It was held that the rental applicable to the eliminated land was that provided under the lease for lands within a known geologic structure, \$1 per acre.

The Bureau's decision also follows, although it does not cite, an earlier Bureau decision of July 22, 1964, in the case of *Continental Oil Company*, Billings 041107.⁵ In that case the Bureau held that the \$1 per acre KGS rental was payable on land eliminated from a unit agreement although remaining land in the lease continued subject to the agreement and was in a participating area. The unitized land was within the known geologic structure of a producing field but the eliminated land was not.

It is apparent from a reading of the rental provisions quoted from appellants' leases that they do not furnish a clear answer to the question presented on this appeal. We turn then to a consideration of the applicable statutory provisions and regulations and of their historical development to see if they supply the answer.

Prior to August 8, 1946, section 17 of the Mineral Leasing Act, as

⁴ Foster sued the Secretary on this decision, *Foster v. Udall*, Civil No. 7611 in the United States District Court for the District of New Mexico. A judgment against the defendant was entered June 2, 1969. However, as other issues were raised in the case and no opinion was issued, and as an appeal in the case has been recommended, the court's action cannot be considered decisive as to the single issue involved in this case.

⁵ An appeal to the Secretary of the Interior was taken by Continental but the appeal was dismissed because of Continental's failure to file a statement of reasons in support of the appeal. *Continental Oil Company*, A-30853 (November 23, 1964).

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amended, 49 Stat. 676, provided simply that leases should pay a rental to be fixed in the lease of not less than 25 cents per acre per year and that rentals should be credited against any royalties paid. Section 17 had provisions relating to the unitization of leases but they did not pertain to rentals or royalties. The regulations in effect on August 8, 1946, and section 2(d) of the lease form provided for a Rental of 50 cents per acre for the first year, none for the second and third years, and 25 cents for each succeeding year until discovery, whereupon the rental would increase to \$1 per acre for each following lease year. 5 F.R. 2864; 8 F.R. 7710.

The Department held that under these provisions the holder of a unitized noncompetitive lease embracing land whether or not within the known geologic structure of a producing field was required to pay rental at the rate of \$1 per acre. *General Petroleum Corporation et al.*, 59 I.D. 383 (1947). The theory upon which the ruling was based was that all unitized leases were deemed to be parts of one consolidated lease for the purposes of operations and production and, therefore, since production had been obtained in the unit at the time of unitization all the unitized leases were required to pay the \$1 rental required of producing leases.

When section 17 was amended by the act of August 8, 1946, 60 Stat. 951, the basic rental provision remained unchanged, *i.e.*, a minimum rental of 25 cents per acre was required. A change, however, was made in that upon discovery a minimum royalty of \$1 per acre was imposed in lieu of rental for each lease year commencing on or after the discovery. Another change was made specifically with reference to unitized leases. A new section 17(b) provided that the "minimum royalty or discovery rental" under any unitized lease "shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such [unit] plan." 60 Stat. 952.

In the complete revision of the oil and gas regulations which followed enactment of the act of August 8, 1946, the Department provided that rentals should be payable at the following rates:

(a) On noncompetitive leases issued under section 17 of the act, wholly outside of the known geologic structure of a producing oil or gas field:

* * * * *

[same non-KGS rates as previously imposed]

(b) On leases wholly or partly within the geologic structure of a producing oil or gas field:

(1) If issued noncompetitively * * * and not committed to a unit plan, beginning with the first lease year after * * * notice to the lessee that all or part of the land is included in such a structure * * *, prior to a discovery of oil or gas on the leased lands, rental of \$1 per acre.

(2) If issued noncompetitively * * * and committed to an approved cooperative or unit plan * * * for lands not within the participating area, an annual

rental of 50 cents per acre for the first and each succeeding year following discovery.

(43 CFR 192.80; 11 F.R. 12960)

The regulations provided that a minimum royalty of \$1 per acre in lieu of rental was payable for lease years commencing on or after a discovery "except that on unitized leases the minimum royalty shall be payable only on the participating acreage." 43 CFR 192.81; 11 F.R. 12960.

Subparagraph (b) (2) of 43 CFR 192.80 was later amended on November 29, 1950, 15 F.R. 8584, to read as follows:

(2) If issued noncompetitively * * *, and committed to an approved cooperative or unit plan * * * the rental prescribed for the respective lease years in paragraph (a) of this section, shall apply to the acreage not within a participating area * * *.

This was the status of the statute and of the regulations at the time when appellants' leases were issued, effective September 1, 1958.⁶ The lease provisions on rentals and royalties have already been set forth. It is obvious that neither the statute, regulations, nor lease terms provide specifically for the rental on a lease which is unitized in part and non-unitized in part. Provision is made in terms only for leases which are unitized or nonunitized in their entirety. This is made very clear in paragraph (b) of the rental regulation which provides symmetrically for leases (1) not committed to a unit plan and (2) committed to a unit plan. The lease terms, subparagraph (b) (i) and (ii), lack the same symmetry but are not inconsistent with the regulation. Subparagraph (b) (ii) speaks in terms of an entire lease committed to a unit agreement ("if this lease is committed") and so does the minimum royalty provision ("if this lease is unitized").

Appellants in analyzing the provisions of the statute, the regulations and the lease terms point to the gap in the provisions as to the factual circumstance involved here. There is no question under the regulations and the lease terms as to the rental rate for lands partly or wholly within a known geologic structure which are not within a unit or cooperative agreement. Under the lease terms subparagraph (b) (i) clearly prescribes the \$1 rental rate. Likewise as to lands committed to a unit, the minimum royalty provisions are clearly applicable to participating acreage and there is express provision for the unitized nonparticipating acreage. However, there is no explicit provision for the rental rate on lands eliminated from a unit and partly within a known geologic structure.

Appellants contend that the application of the KGS rental here would be contrary to the intent of the act of August 8, 1946, *supra*,

⁶ Sections 17 and 17(b) have since been revised by the Mineral Leasing Act Revision of 1960 but no substantive change has been made in the provisions pertinent here except that the minimum rental has been raised from 25 to 50 cents. 30 U.S.C. § 226 (d) and (j) (1960).

The regulations have also not been changed except to increase the KGS rental specified in subparagraph (b) (1) from \$1 to \$2. CFR 3125.1.

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which provided that the minimum royalty or discovery rental under any lease subject to a unit or cooperative plan "shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan." They point out that neither the statute nor the regulations distinguish between leases unitized in part and leases unitized in their entirety. However, the fact that the KGS rental rate in this case is the same as the minimum royalty of \$1 does not mean that the two are necessarily the same under the statute. Indeed, as mentioned (fn. 6, *supra*), KGS rental rate prescribed by the regulations is now \$2 whereas the minimum royalty rate has remained at \$1. 43 CFR 3125.2. We see nothing in the statute which would preclude the Secretary from providing by regulation or by lease terms for a different rental rate between nonparticipating acreage within a unit and acreage eliminated from a unit. The question here is whether or not such a different rental rate has already been prescribed.

Appellants argue that different rates have not been fixed. They base their argument on the premise that subparagraph (b) (i) of the lease prescribing a \$1 rental for land on a known geologic structure is applicable only if the lease has not been affected by any discovery of oil or gas. The subparagraph states that the \$1 rental is due only "prior to a discovery of oil or gas on the lands leased." Appellants contend that since each lease is considered a producing lease by receiving an allocation of production from the unit, it must be concluded that there has been a discovery on each lease (whether actual or constructive being immaterial) and that, therefore, subparagraph (b) (i) cannot apply. They state that, if one of the provisions must apply and subparagraph (b) (i) cannot apply, then it must follow that subparagraph (b) (ii) does apply and the decision below should be reversed.

In support of their contention concerning "discovery" on the leases, appellants rely in part upon *Continental Oil Company*, 70 I.D. 473 (1963), a decision by the Director, Bureau of Land Management, approved by the Secretary, for the proposition that where leases are fully committed to a unit agreement and then a portion of each lease is eliminated from the unit plan, there can be no segregation into separate leases upon such partial elimination and the eliminated portion remains an integral part of each of the original leases and continues to have the same term. The *Continental Oil Company* case, *supra*, did not involve the question raised here as to what rental is applicable on the elimination of part of the leased land from a unit plan, but considered only the issue as to whether or not production on the lands eliminated from the unit was necessary to extend the lease as to such lands. It was held that it was not, that so long as there was production in the unit the lease was extended by such production, including the portion of the lands eliminated from the unit. The rationale was that there is no authority under the Mineral Leasing Act to segregate the

lease in such circumstances and therefore the eliminated portions of the lease retain the same lease term as the portions of the lease committed to the unit agreement.

We believe that appellants' argument imparts to the word "discovery" in subparagraph (b) (i) a broader meaning than was intended. We think that "discovery" was intended to refer only to the event which shifts a lease from a rental status to a royalty status. This meaning is not so apparent from the rather confused juxtaposition of provisions in the lease but it emerges more clearly if the provisions are rearranged as follows with practically no change in the original language:

(b) If the lands are wholly or partly within the known geologic structure of a producing oil or gas field:

(i) Beginning with the first lease year after 30 days' notice that all or part of the land is included in such a structure and for each year thereafter, prior to a discovery of oil or gas on the lands leased, \$1 per acre or fraction thereof. Commencing with the lease year beginning on or after a discovery on the leased land, the lessee shall pay the lessor in lieu of rental, minimum royalty of \$1 per acre or fraction thereof at the expiration of each lease year [etc.].

(ii) If the lease is committed to an approved cooperative or unit plan which includes a well capable of producing oil or gas and contains a general provision for allocation of production, the rental prescribed for the respective lease years in subparagraph (a) of this section shall apply to the acreage not within a participating area and the minimum royalty shall be payable only on the participating acreage.

In this context, which we believe more clearly sets forth the meaning of the rental and minimum royalty provisions, it would appear obvious that the word "discovery" cannot mean "constructive production" or "constructive discovery" so far as the eliminated nonunitized portion of the lease is concerned. We say it is obvious because if "discovery" does have that meaning, then only minimum royalty and not rental would be payable on the eliminated land. This would lead to the anomalous situation that the unitized participating acreage would be subject to the minimum royalty provision, the unitized nonparticipating acreage would pay the non-KGS rental, and the nonunitized land would be subject to the minimum royalty provision. This would be directly contrary to the provision adopted by the act of August 8, 1946, *supra*, that the minimum royalty shall be payable only with respect to the lands to which production is allocated under a unit plan.

Contrary to appellants' assertion then, the application of subparagraph (b) (i) to their leases is not barred. We are left then with the question whether subparagraph (i) or subparagraph (ii) is applicable. As we have seen, subparagraph (ii) applies "[i]f this lease is committed" to a unit plan. The language is that of commitment of the lease in its entirety. Therefore when it goes on to provide for the rental to be paid on "the acreage not within a participating area," it

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seems clear that it is referring only to *unitized* nonparticipating acreage. This leaves applicable to the *nonunitized* acreage only the rental prescribed in subparagraph (i).

That this is the proper construction of the lease terms is, we believe, borne out by a consideration of the regulations. Paragraph (b) of the pertinent regulation prescribes the rental rates for nonunitized *leases* in subparagraph (1) and for unitized *leases* in subparagraph (2). Although it does not provide expressly for situations where a lease is only unitized in part, the only reasonable application of the regulation to such a situation would be to read "leases" as meaning "lands" so that subparagraph (1) would apply to *lands* not committed to a unit plan and subparagraph (2) to *lands* which are committed. Thus construing the regulation—and there does not appear to be any other reasonable way of interpreting it—it would follow that the \$1 KGS rental would be applicable to land eliminated from a unit agreement which is wholly or partly within a known geologic structure.

This interpretation of the regulation was more explicitly carried out by the terms of the lease involved in *T. Jack Foster, supra*, than by the terms of appellants' leases. The Foster lease, issued effective February 1, 1948, carried a rental schedule generally identical with subparagraph (b) of appellants' leases. However, paragraph (b) (2) of the Foster lease clearly provided that the non-KGS rental of 50 cents would apply "[o]n the *lands* committed to an approved cooperative or unit agreement * * * for the *lands* not within the participating area" (emphasis added). This made it clear that the 50-cent rental did not apply to nonunitized land.

Appellants assert that their leases now have the same status as leases unitized prior to July 29, 1954, and suggest that the Departmental practice in connection with such leases was to treat all nonparticipating acreage, whether or not unitized, the same for rental purpose. The significance of the date is that by the act of that date section 17(b) of the Mineral Leasing Act was amended to provide that any lease committed in part to a unit plan would be segregated into separate leases as to the lands committed and as to the lands not committed. Prior to July 29, 1954, there was no segregation of a lease that was partly committed so that it was possible to have a lease with both unitized and nonunitized lands. Now it is possible to have such a lease only when a unit area is contracted and leased lands are eliminated in part.

An inquiry into the Departmental practice reveals that for a period of time from 1949 to 1966, the Geological Survey, which administers unitized leases, recognizing that a question existed and that a definitive ruling had not been made, decided on a tentative basis that nonparticipating acreage, whether unitized or not, should pay the same rental. Memorandum for the Supervisors from the Chief, Oil and

Gas Leasing Branch, dated June 6, 1949; memorandum to the Oil and Gas Supervisor, Northwestern Region; from Chief, Branch of Oil and Gas Operations, dated June 28, 1963, pertaining to Buffalo 04408. The practice, however, was not completely uniform. The Southwestern Region of the Geological Survey followed the practice as to leases partially unitized prior to the 1954 act but did not follow it as to lands eliminated from a unit by contraction. The \$1 rental was charged on the nonunitized land if it was situated in whole or in part on a known geologic structure. Memorandum to Chief, Branch of Oil and Gas Operations, from Regional Oil and Gas Supervisor, Roswell, New Mexico, dated July 25, 1963.

In any event, following the Bureau of Land Management decision of July 22, 1964, in the *Continental Oil Company* case, Billings 041107, *supra*, the Geological Survey changed its practice, although indicating that it did not necessarily agree with the Bureau's position. Memorandum to Regional Oil and Gas Supervisors from Chief, Branch of Oil and Gas Operations, dated April 5, 1966. Thus, for a year prior to the land office decision in this case and for almost 9 months prior to the contraction of the Soldotna Creek unit area the practice of the Geological Survey had been conformed to the Bureau's decision of July 22, 1964, in the *Continental Oil Company* case.

This history does reveal some past confusion and uncertainty over the rental rate applicable in a situation like that presented here. Appellants contend that where a regulation is ambiguous or unclear a person should not be held to an interpretation of it which would deprive him of his rights. They cite in support *A. M. Shaffer et al., Betty B. Shaffer*, 73 I.D. 293 (1966), and other rulings.

These rulings are not in point. They deal with a situation where a person will lose a right to another person if it is determined that he did not meet a regulatory requirement by a time in the past. If she did not meet it then, he has no way of curing his default and preserving his right. The Department has therefore ruled that he will not be held to the requirement unless it was plainly stated.

We have no such situation here. Appellants are not in the position of losing rights to another if it is held that they must pay the KGS rental on the eliminated acreage. What we have here is simply a dispute over the meaning of a contract provision and a determination that one meaning shall govern.

For the reasons that have been set forth we agree with the decision below.

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 NELSON BROTHERS CONSTRUCTION COMPANY

IBCA-738-10-68

Decided October 22, 1969

**Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice:
Appeals: Dismissal**

A claim for compensation for the Government's taking possession after work was completed of a contractor-produced stockpile of excess gravel will be dismissed where no relief to the contractor is available under the contract.

**Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice:
Appeals: Generally**

The Board will remand to the contracting officer for appropriate findings of fact and decision a claim first presented to the Board during the course of an appeal on other claims, and which had not been previously submitted to the contracting officer, inasmuch as the Board's jurisdiction is appellate only.

BOARD OF CONTRACT APPEALS

This appeal involves three claims arising out of a contract to pave 8.228 miles of road on the Navajo Indian Reservation. Claim 1 is for \$282 labor charges for paving a road turnout as an extra. Claim 2 is for \$7,525 as the reasonable value of a stockpile of road mix aggregate allegedly appropriated by the Government. Claim 3 is for an extension of time of 11 days which would have the effect of obviating an assessment of liquidated damages of \$1,100.

At the hearing on June 25, 1969, in Albuquerque, New Mexico, Nelson Brothers raised a fourth claim for \$42,580 in connection with Change Order No. 1 covering a changed condition. Because this claim has not been presented to the contracting officer for his decision, the Board cannot entertain it. Under the Disputes clause the Board is empowered only to hear timely appeals from a contracting officer's decision. See, e.g., *Merritt-Chapman & Scott Corp.*, IBCA-257 (June 22, 1961), 68 I.D. 164, 61-1 BCA par. 3064. It is the practice of this Board to remand such claims to the contracting officer for appropriate action. See, e.g., *Paul A. Teegarden*, IBCA-419-1-64 (April 17, 1964), 1964 BCA par. 4189.

The contracting officer allowed Claim 1 as an extra in the amount of \$19.81 and a time extension of one day. Thus, the dispute as to Claim 1 is one of amount. The award of \$19.81 was based upon a contract rate of \$1,200 per mile for paving under Bid Schedule Item 316(1), applied to 87 feet of paving on the turnout. Nelson Brothers' request for payment at \$1 per square yard for 282 square yards was not acceptable to the Government because (i) there was no contract

item providing for payment on a square yard basis, and (ii) Nelson Brothers' on-the-job superintendent agreed to pave the turnout at no cost for labor. The materials used in the turnout were paid for at contract prices for materials.

Claim 1 must be denied. Suffice it to say that Mr. Oren Nelson, a Vice President of appellate company, admitted at the hearing that its job superintendent agreed to pave the turnout at no cost for labor (Tr. 187). Under such circumstances the contracting officer cannot be faulted for allowing a claim for labor at the contract unit price for paving. According to appellant's own principal witness it was entitled to nothing.

As to Claim 2, it appears that Nelson Brothers had crushed about 3,000 yards of excess road mix aggregate. On May 29, 1967, it requested permission to sell it, offering to pay the Navajo tribal royalty. On June 6, 1967, the contracting officer informed the contractor that his request would be "held in abeyance" until the contractor obtained written authorization from the Navajo Tribe and furnished evidence of such authority in writing to the contracting officer together with receipts showing payment of all royalties (Findings of Fact, Exhibit 25). It appears that the Government was never given evidence of compliance with these conditions (Tr. 153). The appellant's witness admitted that no royalties were ever paid to the Navajo Tribe (Tr. 57).

On July 13, 1967, the Government advised Nelson Brothers by letter (Findings of Fact, Exhibit 29) that authority to remove material as requested was granted, subject to the following conditions: (1) that the aggregate be removed by not later than July 25, 1967, and (2) that the conditions of the letter of June 6, 1967 be met. In other words, the contractor had 12 days to remove 3,000 yards of aggregate, to secure written authority to do so from the Tribe, and to pay the royalty.

Meanwhile, however, Nelson Brothers requested and received permission on June 17, 1967, from the Tribe to dispose of the aggregate to Lester Lucas Company of Gallup, New Mexico, on payment of a royalty of \$0.25 per yard. This permit appears to be specifically related to the proposed sale to Lester Lucas Company which was never, in fact, consummated. It was assumed, however, by the contractor, that the Tribe would grant like permission should he generate another sale (Tr. 59). On June 27, 1967, Nelson Brothers notified the Tribe of the failure of the Lucas sale and offered the aggregate to the Tribe at \$1.72 per ton, or \$2.53 per cubic yard.

In its conditioned permit of July 13, 1967, the Government noted that crushed material had been removed from the stockpile for private use. Testimony at the hearing confirmed that some gravel had been

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donated to non-contract uses by the contractor, specifically the graveling of an area around a trading post and the parking area of a church (Tr. 116). Although this fact of non-contract use is recited in the permit of July 13, 1967, it is not at all clear in the record whether these uses were conceived of by the Government as justification for the time condition in the permit. No such argument is made in the Government briefs.

On July 26, 1967, the Government advised Nelson Brothers that it was taking possession of all materials in the gravel stockpile in accordance with General Requirements paragraph 4.4.¹

Nelson Brothers claims that it was legitimate for it to have crushed the excess gravel because the contract in "General Requirements" paragraph 4.2 gave the Government the right to increase the length of the road by 25 percent.² However, the Government gave no indication of increasing either the length of the road or the thickness of the paving. Lengthening was indeed a most highly remote possibility since the 8.228 miles to be paved commenced at a recently paved road and terminated at the end of the prepared subgrade. We conclude that

¹"4.4 *Rights in and Use of Materials Found on the Work.* The contractor may use in the proposed construction suitable stone, gravel, or sand found in excavation and will be paid for the excavation of such materials at the corresponding contract unit price therefor, but he shall provide at his own expense sufficient suitable material to complete the portion of the work which was originally contemplated to be completed with such used material. No charge for material so used shall be made against the contractor except the replacement herein provided for. The contractor shall not excavate or remove any such material from within the right-of-way except that which is within the excavation indicated by the plans, without written authorization from the Contracting Officer.

"In the event the contractor has produced or processed materials from lands of the Federal Government in excess of the quantities required for performance of this contract, the Contracting Officer may take possession of such excess materials, including any waste material produced as a by-product, without obligation to reimburse the contractor for the cost of their production, or may require the contractor to remove such materials and restore the premises to a satisfactory condition at the contractor's expense."

²"4.2 *Changes in Drawings and Specifications—Adjustment in Quantities.* It is mutually agreed that it is inherent in the nature of the type of construction work to be performed under this contract that minor 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 Clause 3, 'Changes,' General Provisions, Standard Form 23A as not requiring or permitting any adjustment of contract prices, provided that any change or changes do not result in one of the following: (1) An increase or decrease of more than 25 percent in the original contract amount or in the quantity of any major item because of an over or under run in the quantities stated in the Bid Schedule. (2) a substantial change in the plans and specifications affecting the character of the work to be performed under a pay item or items. (3) An increase or decrease of not more than 25 percent in the original length of the road, it being understood that in no event shall the length of road be increased more than 25 percent.

"Any adjustment in contract time or compensation because of adjustments in quantities or changes resulting in one or more of the conditions described in (1), (2), and (3) of the foregoing paragraph shall be made in accordance with the provisions of articles 8.6 and 9.3 respectively."

under the facts the crushing of the excess gravel was not a contract requirement. Paragraph 4.2, when read in conjunction with paragraph 9.3,³ merely established 25 percent as the maximum of overruns and underruns in materials used that will be paid for at contract unit prices. Greater overruns or underruns would call for price adjustment. The article does not require a contractor to produce and stockpile 25 percent more materials than needed for the job.

Even though the facts as to the aggregate are not in real dispute, the Board of Contract Appeals is not the proper body to draw legal conclusions from these facts. This is for two reasons. First, even if the Board drew all legal conclusions in favor of the contractor, it could not give him any relief, and second, even if the Board ruled that the contracting officer had authority under the contract to take possession of the excess materials, it does not necessarily follow that Nelson Brothers did not develop some sort of non-contract compensable right in the aggregate by virtue of the conduct of both the Tribe and the Government after substantial completion of the contract.

The Board's authority is limited to disputes under the contract. Even more, our ability to afford relief is limited to disputes centering on the application of contract provisions which provide for money adjustments or time extensions. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966). None of those provisions are applicable to the dispute over the aggregate. There is no contention or evidence that the production of the excess aggregate falls within the purview of the Changes or Changed Conditions clauses.

Because the Board would consider it improper for it to prejudice either the Government or the appellant in any other forum by any

³ "9.3 Changes and Altered Quantities. Payment for work in excess of those stated in Article 4.2 shall be made as follows: It is mutually agreed pursuant to Article 4.2, that upon demand of either party an equitable adjustment satisfactory to both parties shall be made in the basis of payment if:

"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, because of an over or under run in the quantities stated in the Bid Schedule. 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. In the event of a decrease, any adjustment in payment shall apply to the quantity or quantities of work actually performed. The amount of the equitable adjustment and any extension in contract time shall be incorporated in the written Change Order.

"An equitable adjustment shall be made in the basis of payment as provided in Article 4.2, if:

"The changes ordered by the Contracting Officer under Clause 3, Changes, General Provisions, Standard Form 23A, involves substantial changes in the plans and specifications or in the character of the work to be performed under the contract. The amount of any equitable adjustment and any adjustment in contract time shall be incorporated in the written Change Order, subject to the provisions of Clause 3, Changes, General Provisions, Standard Form 23A.

"In the event the length of road is decreased more than 25 percent an equitable adjustment as provided in Clause 3, Changes, S. F. 23A, shall be made and the amount of the equitable adjustments shall be incorporated in the written Change Order."

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other findings and conclusions, we refrain from expressing our opinion on such question as the reasonableness of the conditions in the permit, and the consequences of the Government's conduct subsequent to substantial completion on June 3, 1967. We determine only that the dispute over payment for the Government's taking possession of the gravel is not one for the Board to decide. *Cf. Grey Construction Co., ASBCA No. 1994 (September 17, 1954).*

Claim 3 is a request for a time extension which would result in canceling out \$1,100 of liquidated damages. The contracting officer, in Change Order No. 2 (Findings of Fact, Exhibit 7), allowed a time extension of 80 days in conjunction with Change Order No. 1 (Findings of Fact, Exhibit 6), and 88 days with regard to a suspension of work order. Contract completion time was 120 days after receipt of the notice to proceed. The notice was received by the contractor on August 8, 1966 (Findings of Fact, Exhibit 4), and contract time commenced on August 9, 1966 (Findings of Fact, Exhibit 5). Change Order No. 1 was received by the appellant on October 27, 1966. The 80 days allowed exactly covers the interval commencing August 9, and ending on October 27.

The contracting officer arrived at 80 days by commencing the period of delay on August 30, 1966, when the existence of a changed condition became apparent, and ending it on November 17, 1966, when sand production at the new site was completed (Findings of Fact, p. 42). Change Order No. 1 covered a changed condition with regard to sources of supply of sand. The record shows that the appellant actually commenced processing sand from the new source at the end of September 1966 (Tr. 134). The appellant has adduced no proof that he is entitled to more time than allowed for Change Order No. 1.

Work was partially suspended commencing January 26, 1967, at the end of the day, through April 24, 1967. Change Order No. 2 allowed 88 days' additional time. Eighty-eight days is exactly equivalent to the time period commencing January 27, 1967, and ending on April 24, 1967. Again the appellant offered no proof of entitlement to any additional time. Claim No. 3 must be denied.

Conclusion

Claims 1 and 3 are denied. Claim 2 is dismissed. Claim 4 is remanded to the contracting officer for appropriate findings and decision.

ROBERT L. FONNER, *Member.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

EASTON E. BRODSKY**A-31035***Decided November 18, 1969***Oil and Gas Leases: Applications: Drawings**

Where the Bureau of Land Management discovers that it erroneously included land within a known geologic structure of a producing oil or gas field, which is not available for noncompetitive oil and gas leasing, in a parcel of lands posted as available for leasing in a simultaneous filing procedure under 43 CFR 3123.9, it is improper to reject the winning offer for the parcel at the drawing and to order a new drawing, instead the offer should only be rejected as to the land within the known geologic structure and a lease issued for the remaining lands within the parcel which are available for leasing, all else being regular.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Easton E. Brodsky has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated July 24, 1968, which affirmed a New Mexico land office decision of October 17, 1967, rejecting his non-competitive oil and gas lease offer New Mexico 3622.

The offer was the successful one of 1,298 offers filed in a simultaneous filing drawing procedure under 43 CFR 3123.9 for lands within a terminated lease, NM 02392. All of the lands within that lease were described as Parcel No. 136 in the list of lands posted as available for simultaneous filing, including a quarter section of land which had been previously determined to be within a known geologic structure (KGS) of a producing oil or gas field and which was not therefore available for noncompetitive leasing but only for leasing by competitive bidding. When the land office discovered the error in including the KGS land in Parcel No. 136, it revoked the posting of the parcel in its entirety and rejected Brodsky's successfully drawn offer. The Office of Appeals and Hearings affirmed this action on the ground that regulation 43 CFR 3123.9 provides for the leasing of lands only by complete leasing units identified by parcel numbers and that a lease could not be issued for less than the whole tract identified by the parcel number on the availability list.

The appellant does not dispute the determination that the KGS land was not available for noncompetitive leasing when his offer was filed. He contends, however, that the Bureau is wrong in concluding that the inclusion of the KGS land within the designation of Parcel No. 136 requires the rejection of his offer as to the remaining non-KGS lands. Appellant basically contends that the Bureau's interpretation and ap-

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plication of regulation 43 CFR 3123.9 is not warranted by the language of the regulation itself, is inconsistent with prior Departmental practices and rulings in other situations involving oil and gas lease offers, is contrary to the statutory requirement that a noncompetitive oil and gas lease be issued to the first qualified applicant, and that the result is not beneficial or practical for the Government.

In reaching its decision, the Office of Appeals and Hearings quoted and relied on the following specific language from 43 CFR 3123.9, the regulation concerning the availability of lands in terminated oil and gas leases:

(b) * * * The posted list will describe the lands *by leasing units identified by parcel numbers*, which will be supplemented by a description of the lands in accordance with § 3123.8, i.e., by subdivision, section, township and range if the lands are surveyed or officially protracted, or if unsurveyed, by metes and bounds. * * *

(c) *Offers to lease such designated leasing units by parcel numbers* must be submitted on a form approved by the Director, "Simultaneous Oil and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. *The entry card will constitute the applicant's offer to lease the numbered leasing unit* by participating in the drawing to determine the successful drawee. By signing and submitting the entry card, the applicant agrees that he will be bound to a lease on a current form approved by the Director *for the described parcel* if such a lease is issued to him as a result of the drawing. * * *

(1) *Only one complete leasing unit, identified by parcel number*, may be included in one entry card. * * * (Italics supplied.)

The Bureau concluded that this regulation provides for the receipt of lease offers for lands involved in a simultaneous filing procedure only by complete leasing units identified by parcel numbers, and that there is no provision for leasing less than a complete leasing unit in response to a drawing entry card lease offer, citing *F. S. Prince*, A-30801 (October 25, 1967). It stated that lease offers "may not be received for lands which, because of an erroneous land description, have not been made available for filing in accordance with the pertinent regulations." It concluded that the posting of lands which were not available for leasing rendered the posted notice defective as to the entire numbered parcel and therefore the posting must be regarded as ineffective as to the entire parcel, and offers for such parcel should have been returned without priority. It stated that the lands in Parcel No. 136 outside the KGS would not be available for filing of noncompetitive lease offers until a correct posting is made in the land office in accordance with 43 CFR 3123.9.

The *F. S. Prince* decision, *supra*, cited by the Bureau, pointed out that under the special leasing procedure provided by 43 CFR 3123.9 lands are to be leased only by leasing units which are established to

coincide to the extent possible with lands in an expired, canceled, relinquished or terminated lease except that where two or more such leases were contiguous and contained a total of 640 acres or less they may be consolidated into one leasing unit, and that the regulation makes no provision for the leasing of less than a complete leasing unit, and therefore under the regulation lands are not to be leased except as the complete units listed as available for leasing. The problem in the *F. S. Prince* case, however, was different from that involved here. In the *Prince* case the winning offeror was required to execute special stipulations for part of the lands in the parcel which were within a withdrawal by the Bureau of Reclamation. The offeror did not want to execute the stipulations, but wished instead to withdraw the offer as to those lands which were withdrawn. It was held that such a partial withdrawal of the offer would not be allowed and that the appellant in that case had to consent to the stipulations or suffer the rejection of the offer. The decision also emphasized that to allow a withdrawal of the offer as to the withdrawn lands in the *Prince* case would cause the offer to be for less than 640 acres of land, with land available for leasing adjoining those lands, and that this was inconsistent with the Department's policy against fragmentation of leased lands, as manifested by 43 CFR 3123.1(d).

The present case does not involve the problem presented in the *Prince* case of an offeror desiring to withdraw the winning offer in part when confronted with additional conditions for the issuance of a lease. There is no problem here about fragmented leases with adjoining lands being left available for noncompetitive leasing. Likewise, the situation here is different from that obtaining where the winning offeror, after the drawing has been held, desires to withdraw his entire offer and receive a refund of the first year's rental, such as occurred in *Duncan Miller*, A-30517 (April 28, 1966), *Duncan Miller*, A-30708 (November 16, 1966), and *Duncan Miller*, A-30797 (September 12, 1967). In those cases, it was held that the offeror could not revoke or withdraw his offer after the drawing had been held.

In this case, as the appellant has pointed out, the offeror did what regulation 43 CFR 3123.9 required and submitted the card upon which he agreed to be bound to a lease on a current form approved by the Bureau "for the described parcel if such a lease is issued to him as a result of the drawing." 43 CFR 3123.9(c), and statement on the lease offer simultaneous drawing card form. The problem in this case is what effect should be given to the fact that part of the lands embraced within the parcel were not available for noncompetitive leasing because they were within a KGS. It is obvious, as appellant agrees, that a

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lease cannot be issued noncompetitively for the KGS land. Does this mean, as the Bureau held, that the Bureau could not issue a lease for the remaining non-KGS lands in the parcel?

We do not believe that the language of the regulation, the cases cited above, or logic compel the result reached by the Bureau. The regulation does require that the lease offers be for the parcel as listed and described on the posted list of lands available for leasing. Certainly to be a valid offer the offer would have to comply with the terms of this regulatory procedure and requirement and, as the cases discussed above have held, a winning offeror is bound to a lease for his offer. However, the *Prince* case indicated that where an additional condition—such as the imposition of special stipulations for withdrawn lands—was imposed, the offeror must either agree to the condition or his offer would be rejected. In this case, the additional factor involved was the discovery by the Bureau, after the drawing that a portion of the lands was not available for noncompetitive leasing and should not have been included in the parcel. Appellant contends that the participants in a simultaneous filing procedure should not be burdened with the determination as to whether all of the lands in a parcel listed in postings for simultaneous filings are available for leasing, and that such a burden would lead to problems existing prior to the adoption of the drawing procedure of persons fighting in the land office for the books to determine the status of available lands. Appellant contends that the lease form provides that the offeror “hereby offers to lease all or any of the lands described,” that regulation 43 CFR 3123.5 provides that an offer may be accepted in whole or in part, and that the long established policy and practice of the Department had been to accept offers as to lands available for leasing and reject them only as to those lands described which are not available for leasing, but not to reject the entire offer, citing *William B. Collister*, 71 I.D. 124 (1964). He contends that there is no reason to depart from this practice in this case.

We agree with appellant that regulation 43 CFR 3123.9 should be interpreted in this situation in light of the practice and rulings by the Department concerning offers filed in the regular filing procedure for oil and gas lease offers. Thus, the listing of a parcel of land should be understood as meaning that offers will be accepted as to the lands within that parcel which are available for leasing. We do not think that regulation 43 CFR 3123.9 and the procedure involved therein requires a change from the past Departmental practice in this respect.¹

¹ This is not to say that an offeror can submit an entry card and remit advance rental only for that portion of a listed parcel which is available for leasing. He must comply fully with the procedure set forth in the regulation.

We see no apparent reason why a drawing should be set aside and a new one held simply because the Bureau erred and included land in a parcel which was not available for noncompetitive leasing. Therefore, unless there are any other reasons not readily apparent requiring the rejection of appellant's offer, when this case is returned to the Bureau a lease should be issued to him, all else being regular.

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 reversed and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

RAYMOND P. HEON

A-31096

Decided November 18, 1969

Mining Claims: Lands Subject to—Notice—Public Lands: Classification—Recreation and Public Purposes Act

Mining claims are properly declared null and void where they were located after the Bureau on its own motion had classified land as suitable for public recreational purposes and the classification was noted on the tract book, serial register, and plats, and an application under the Recreation and Public Purposes Act has been filed.

Mining Claims: Lands Subject to—Public Lands: Classification—Recreation and Public Purposes Act—Taylor Grazing Act: Classification

The classification of land under the Taylor Grazing Act as suitable for disposal under the Recreation and Public Purposes Act precludes the appropriation of the land under any other public land law, including the mining laws.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Raymond P. Heon has appealed to the Secretary of the Interior from a decision, by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated December 2, 1968, which affirmed a decision of the Colorado land office of August 12, 1968, declaring all or a portion of his 34 lode mining claims in conflict with a classification of land pursuant to the Recreation and Public Purposes Act, 43 U.S.C. sec. 869 *et seq.* (1964), to be null and void to the extent of the conflict.

The mining claims involved are the Eva Nos. 7, 8, 9, 10, 11, 12, 13, 29, 30, 32, 33, 34, 35, 36, 37, 39, 41, 42, 43, 51, 52, 54, 55, 56, 57, 70, 71, 72, 82, 83, 89, 104, 135, and 136, all within sections IV, 18 or 19, T. 4

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S., R. 74 W., 6th P.M., Colorado. These claims were all located and recorded in the Clear Creek County, Colorado, offices on or between June 14, 1967, and March 20, 1968.

The lands involved in the classification are three tracts within T. 4 S., R. 74 W., 6th P.M., Colorado, described as follows:

Tract 1.

Bounded by the following:

M.S. 859A—Peru

M.S. 2269—Independence

M.S. 447

M.S. 1653B

M.S. 5344—East Peru

containing approximately 3.0 acres.

Tract 2.

Bounded by the following:

M.S. 359

M.S. 972B

Silver Plume Townsite

containing approximately 1.0 acres.

Tract 3.

Sec. 17, $W\frac{1}{2}SW\frac{1}{4}$;

Sec. 18, $SE\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$, $S\frac{1}{2}SW\frac{1}{4}SE\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}SE\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}$;

Sec. 19, $N\frac{1}{2}N\frac{1}{2}NE\frac{1}{4}$, $NE\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$, $E\frac{1}{2}NW\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$;

Sec. 20, $N\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$;

Exclusive of patented mining claims but including the acres occupied by the following surveyed, unpatented mining claims:

M.S. 2168B

M.S. 4614A—Lion

M.S. 7188—Loop and Loop Extension

M.S. 4614B

The areas described in Tract 3 aggregate approximately 110 acres.

By a memorandum dated August 16, 1965, to the State Director of the Bureau for Colorado, the district manager at Denver declared the lands to be classified for public recreational use pursuant to the Recreation and Public Purposes Act, and section 7 of the act of June 28, 1934 (the Taylor Grazing Act), as amended, 43 U.S.C. sec. 315f (1964). He declared that the lands were segregated from all appropriations, including location under the mining laws, as provided by 43 CFR 2232.1-4. On August 18, 1965, the classification was noted under serial number Colorado 0126011 in the land office records, namely, the serial register, the plat for T. 4 S., R. 74 W., 6th P.M., and a supplemental plat showing the area and patented mining claims and mineral surveys in detail, and the tract book.

On August 25, 1966, The State Historical Society of Colorado filed an application (C-395) under the Recreation and Public Purposes Act, with a petition for classification, for these and other lands to be

used for a public historical and recreational site. On April 30, 1968, a proposed decision was issued by the district office at Glenwood Springs stating that the following lands in that application would be classified for lease under the Recreation and Public Purposes Act:

T. 4 S., R. 74 W., 6th P.M., Colo.

Sec. 17: NW $\frac{1}{4}$ SW $\frac{1}{4}$;

Sec. 18: SE $\frac{1}{4}$, lying south of Interstate 70 R/W;

Sec. 19: N $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$.

The following lands were indicated not to be proper for classification because they are mineral in character:

T. 4 S., R. 74 W., 6th P.M., Colo.

Sec. 17: SW $\frac{1}{4}$ SW $\frac{1}{4}$;

Sec. 19: W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$;

Sec. 20: W $\frac{1}{2}$ NW $\frac{1}{4}$.

T. 4 S., R. 75 W., 6th P.M., Colo.

Sec. 24: NE $\frac{1}{4}$, E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$.

Protests were filed against the proposed classification for recreational and public purposes by appellant Heon and others. In its decision dated August 12, 1968, the Colorado land office held that the classification of August 16, 1965, segregated the lands thereby classified from all appropriation, including locations under the mining laws, and that Heon's claims were therefore null and void *ab initio* to the extent that they are in the area classified.¹

The decision of the Office of Appeals and Hearings agreed that the action taken by the Bureau in classifying the land in 1965 on its own motion effectively segregated the land from location under the mining laws in accordance with section 1(a) of the Recreation and Public Purposes Act, as amended by the act of June 4, 1954, 43 U.S.C. sec. 869(a) (1964), and the regulations thereunder, especially 43 CFR 2232.1-4(a).

Appellant's appeal is not too clear but it seems to have two main thrusts. First, he attacks the 1965 classification as having no segregative effect. He asserts that this classification was made only under section 7 of the Taylor Grazing Act, *supra*, which he contends expressly allows entry under the mining laws. Secondly, addressing himself to the application filed by The State Historical Society on August 25, 1966, he contends that the Secretary has no authority to classify lands under the Recreation and Public Purposes Act except "(1) for public

¹ The land office decision did not mention Heon's protest and presumably was not intended as an answer to it. There also does not appear to have been any action taken on the other protests, including one filed by The State Historical Society as to the adverse classification proposed for some of the land. We therefore do not consider any of the protests in this decision.

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lands in Alaska, (2) upon application filed by a duly qualified applicant, or on its own motion under the due process, notice and protest provisions of the regulations set forth in 43 CFR 2411." He asserts that there can be no classification under the Recreation and Public Purposes Act without the Secretary's first making a determination that the land is to be used for an established or definitely proposed project and that no such determination was made before he located his claims.

In response to this appeal, The State Historical Society of Colorado has filed lengthy briefs which set forth the history of its interest in the land and the land's importance as a unique historical and recreational site, its plans for the land, and legal arguments in support of the Bureau's decision and in opposition to appellant's contentions.

The basic question in this case concerns the effect of the Bureau's action in 1965 in classifying the land pursuant to the Recreation and Public Purposes Act and section 7 of the Taylor Grazing Act.

Section 1(a) of the Recreation and Public Purposes Act, as amended, *supra*, provides as follows:

SECTION 1. (a) The Secretary of the Interior upon application filed by a duly qualified applicant under section 2 of this Act may, in the manner prescribed by this Act, dispose of any public lands to a State, Territory, county, municipality, or other State, Territorial, or Federal instrumentality or political subdivision for any public purposes, or to a nonprofit corporation or nonprofit association for any recreational or any public purpose consistent with its articles of incorporation or other creating authority. Before the land may be disposed of under this Act it must be shown to the satisfaction of the Secretary that the land is to be used for an established or definitely proposed project. *The Secretary may classify public lands in Alaska for disposition under this Act. Lands so classified may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of an interest in the lands under other applicable law.* If, within eighteen months following such classification, no application has been filed for the purpose for which the lands have been so classified, then the Secretary shall restore such lands to appropriation under the applicable public land laws. [Italics added.]

Section 7 of the Taylor Grazing Act, as amended, *supra*, provides as follows:

SECTION 7. That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by * * * [Executive Orders Nos. 6910 and 6964], or within a grazing district * * * and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws * * *. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws * * * may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act. * * *

43 CFR 2232.1-4 provides in part as follows:

(a) Lands in Alaska classified under the [Recreation and Public Purposes] act and lands in the States classified pursuant to the act under section 7 of the act of June 28, 1934 (48 Stat. 1272, 43 U.S.C. 315f), as amended, will be segregated from all appropriations, including locations under the mining laws * * *.

The meaning of the regulation is plain and the decisions below are strictly in accordance with it. The narrow question is whether the regulation accords with the two statutory provisions just quoted. The appellant contends that it is not and that it is unauthorized.

At first glance, the language in the Recreation and Public Purposes Act, emphasized above, appears to support appellant's position: "The Secretary may classify public lands in Alaska for disposition under this Act. Lands *so classified* may not be appropriated * * *." A literal reading is possible that the lands "so classified" can mean only the lands in Alaska classified by the Secretary.

The meaning to be given to a statute, however, is that which expresses the intent of Congress. Congress is not to be deemed to have intended an absurd result. We believe that the interpretation argued for by the appellant would produce such a result and we believe that it is vitiated by a consideration of the legislative history of the Recreation and Public Purposes Act.

This act is a revision of the earlier Recreation Act of June 14, 1926, 44 Stat. 741. The 1926 act authorized the Secretary

* * * in his discretion, to withhold from all forms of appropriation unreserved nonmineral public lands, which have been classified by him as chiefly valuable for recreational purposes * * * but only after a petition requesting such withdrawal has been signed and filed by the duly constituted authorities of the States or of the county or counties within which the lands are located * * *.

The statute provided that such lands could be sold or leased to the state or county or an adjacent municipality, with any patent to contain a reservation to the United States of all mineral deposits.

There can be no doubt that the 1926 act clearly authorized the Secretary, upon petition by an applicant, to withdraw from mining location land classified by him as chiefly valuable for recreational purposes.

It will be noted that the 1926 act did not apply to Alaska as it was not then a State. 43 CFR 254.2 (1940 ed).

When the act was amended by the act of June 4, 1954, 68 Stat. 173, it was greatly broadened in scope. The Secretary was authorized to dispose of land "for any public purposes," not merely recreational purposes, and the classes of applicants were expanded to include Territories and nonprofit organizations. The 1954 act, thereafter known under the broadened title of the Recreation and Public Purposes Act,

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also dropped the reference to "nonmineral public lands" and simply referred to "public lands."

In its complete revision of the 1926 act, the 1954 act recast the language on classification and withdrawal as follows:

The Secretary may classify public lands in Alaska for disposition under this Act. Lands so classified may not be appropriated under any other public land law * * *.

The first sentence applies only to Alaska. As we have noted, the second sentence, because of the word "so," applies to classifications in Alaska. But does the word "so" compel the conclusion that the second sentence does not apply to classifications of public lands outside Alaska made under other laws? Can "so classified" not merely mean "classified for disposal under this Act" without a geographical limitation? We believe that it can be given that meaning and that this was the intent of Congress.

There is no hint whatsoever in the legislative history of the 1954 act that Congress intended to do a complete about face, that it intended to convert an act which did not apply to Alaska and which provided for a segregative effect for classifications to be made outside Alaska into an act which would now apply to Alaska and give segregative effect to classifications in Alaska but completely eliminate such effect as to lands outside Alaska. It would be expected that such a complete reversal of policy would be evidenced by some expression in the legislative history. We find no such expression. All relevant expression indicates the contrary.

The language quoted above from section 1 was recommended by the House Committee on Interior and Insular Affairs. In its report on the legislation (H.R. 1815), the committee, after stating that the purpose of the bill was "to liberalize" the scope of the 1926 act and to "broaden" the Department's authority, said of the proposed amendment:

As amended by the committee, authorization is given the Secretary of the Interior to classify lands for disposition under the act; when so classified, such lands may not be appropriated under any other public-land law * * *. H.R. Rept. No. 353, 83d Cong., 1st sess. 2 (1953).

There is not the slightest suggestion here that the amendment as to segregative effect was intended to apply only to Alaska, which was still a Territory, and not to the States.

Later in its report the committee did say:

The committee has adopted some clarifying amendments. The first authorizes the Secretary of the Interior to classify public lands in Alaska for disposition under this proposed legislation. *Id.* 7.

While this statement talks about classifications in Alaska, it is not expressly or impliedly inconsistent with the earlier broader statement made by the committee. In fact, it followed the committee's quotation of a report by this Department, dated October 16, 1951, on a similar bill (H.R. 3166) in the previous Congress. This report was included in the committee report on H.R. 1815 as "further explaining the purpose of the legislation." The Department said:

Furthermore, under H.R. 3166, the Recreation Act, *supra*, would be generally recast to eliminate duplication of the pertinent provisions of the Taylor Grazing Act * * *. * * * The express requirement of classification prior to disposition also may be omitted from the latter measure [the 1926 act], was provided by the bill, in view of the classification provisions of section 7 of the Taylor Grazing Act, which would be applicable to the 1926 act, as thus amended. *Id.* 4.

When H.R. 1815 passed the House and was before the Senate Committee on Interior and Insular Affairs, this Department submitted a report dated March 5, 1954, on the bill as amended by the House. The Department said:

H.R. 1815 would also recast the Recreation Act, *supra*, to eliminate duplication of the pertinent provisions of the Taylor Grazing Act * * *. * * * The express requirement of classification prior to disposition is also omitted, in view of the classification provisions now contained in section 7 of the Taylor Grazing Act, which would be applicable to the 1926 act, as thus amended. Since section 7 does not apply to Alaska, a classification provision for Alaska is retained. The provision will prevent the defeat of the proposed disposition of a particular tract under the Recreation Act by locations, entries, or the acquisition of other interests after such classification. S. Rept. No. 1146, 83d Cong., 2d sess. (1954).

This statement explains again why the 1954 act contains only a provision for classifying land in Alaska. But while it refers to that provision in saying that it would prevent the defeat of a proposed disposition of land by a location or other appropriation made after the classification, there is not the slightest intimation that a classification of land outside Alaska under section 7 of the Taylor Grazing Act could be defeated by a subsequent appropriation. Surely in view of the stress placed upon protecting a classification, it is wholly inconceivable and unreasonable to attribute to Congress an intent to protect only classifications in Alaska and to strip such protection from classifications in the other States which had enjoyed it since 1926.

In the only discussion of the bill, Senator Butler, Chairman of the Senate Committee, stated: "The proposed act will have general application, but is of particular importance to Alaska, where almost all the land is owned by the Federal Government." 100 Cong. Rec. 5457. The fact that the legislation was deemed to be of particular importance

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to Alaska scarcely justifies the conclusion that Congress did not think it necessary to protect classifications made outside Alaska.

Any ambiguity in the act should be resolved in favor of implementing the broad purposes of the act. In this respect, the 1954 act not only broadened the types of dispositions under the act, to whom they might be made, and the purposes for which they might be made, but also did away with the limitation of "nonmineral" lands. It is not logical to reason that, with the limitation removed that the lands be nonmineral, Congress also intended to do away with the Secretary's authority to withdraw lands from mining locations and other dispositions by a classification of the lands, when he had such authority when that limitation was prescribed in the 1926 act. Also, there is no reason why Congress would take away that authority from the Secretary in the States outside Alaska, where it was granting such authority as to Alaska where the authority had not previously existed.

Regulation 43 CFR 2232.1-4 (then numbered 43 CFR 254.6(a) (1954 rev.)) was adopted shortly after enactment of the 1954 act. It clearly shows the contemporaneous administrative interpretation of the effect of the 1954 act.

We believe that the legislative history shows very clearly that section 7 of the Taylor Grazing Act and section 1 of the Recreation and Public Purposes Act are to be read together and are to be given a meaning which will comport with the purposes of both acts. To read the statutes as appellant would, as separate and independent enactments, would destroy the purpose of the later statute. This case is an illustration of the result—a project first conceived in 1958, discussed through the years with numerous governmental agencies and bodies and others, well-publicized, well in the process of execution, with the acquisition of private lands and properties and funds for planning and development, all subject to destruction by the location of mining claims 9 years after initiation of the project.

The interpretation that we place upon the statutes is the same as that made in *R. C. Buch*, 75 L.D. 140 (1968). We acknowledge that the *Buch* decision was reversed by the United States District Court for the Central District of California in *Buch v. Hickel*, Civil No. 68-1358-PH, March 21, 1969. However, the court's decision is not final as an appeal has been taken. Moreover, the court did not write an opinion. It simply adopted extensive findings of fact and conclusions of law prepared by the plaintiff which afforded several reasons, in the alternative, for overturning the Department's decision. Therefore, in the absence of any clear indication as to why the *Buch* decision was found to be in error, the action by the court does not establish that the

Department's interpretation of the law is erroneous. In any event, we believe that the facts in this case are significantly different from those in the *Buch* case. In the *Buch* case, there was a question as to whether there was adequate notice of the classification. In this case, appellant makes no contention with respect to notice and it is apparent that the classification was noted on the regular plat book and supplemental plats, in the serial register, and in the tract book. Also, in the *Buch* case the mining claims were relocated more than 18 months after the classification action, raising the point that the classification may have expired. Furthermore, in the *Buch* case, a formal application under the Recreation and Public Purposes Act was not filed prior to the location of the mining claims, whereas in this case the application had been filed and was pending during the period in which appellant located his mining claims. The general doctrine of relation-back as applied to the approval of applications under the public land laws precludes the vesting of rights in claimants alleging rights between the date of approval of the application and the date of the filing of the application. Cf. *United States v. Schaub*, 103 F. Supp. 873 (D. Alaska 1952), *aff'd Schaub v. United States*, 207 F.2d 325 (9th Cir. 1953).

The appellant has quoted excerpts from the case of *Richardson v. Udall*, 253 F. Supp. 72 (D. Idaho 1966), which he contends helps his position in this appeal that as the Recreation and Public Purposes Act contemplates sale, the land must be classified by the Secretary after he satisfies himself that the land is to be used for an established or definitely proposed project for recreational or public purpose and this classification must be supported by substantial evidence. He also contends that the procedures in 43 CFR subpart 2411 were not followed by the land office and that there was no initial decision of classification under the Recreation and Public Purposes Act by the State Director as required by 43 CFR 2411.1-1(d).

The short answer to these contentions is that they pertain to the action that is to be taken on The State Historical Society's application filed on August 25, 1966. Action on that application is still in progress. The only issue here, as we pointed out in the beginning, is the effect of the Bureau's classification made on August 16, 1965.

Because the lands in that classification were not open to appropriation under the mining laws at the time appellant's mining claims were located, the claims were properly declared null and void to the extent that they included such lands.

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. E. A. BARROWS AND ESTHER BARROWS

A-31023

*Decided November 28, 1969***Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals**

It is not necessary to show that minerals have actually been sold in order to satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, but it must be shown that the material on the claim could have been extracted, removed, and marketed at a profit prior to that date.

Mining Claims: Determination of Validity

The sale of sand and gravel from a mining claim for use as fill material, or for comparable purposes for which ordinary earth could be used, cannot be considered in determining the marketability of the material on the claim.

Mining Claims: Discovery

A mining claim located for sand and gravel prior to July 23, 1955, is properly held to be null and void, notwithstanding evidence of the sale of some material from the claim prior to that date and evidence that 5 years after that date a commercial sand and gravel operation was established on the claim, where the evidence of such sales is susceptible, because of the claimant's own vague and uncertain testimony, of the interpretation that such sales were so minimal and the profit so meager that a prudent man would not have been justified in developing the claim prior to July 23, 1955.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

E. A. Barrows and Esther Barrows¹ have appealed to the Secretary of the Interior from a decision dated June 28, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void the Grout Creek Gravel Pit placer mining claim in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 14, T. 2 N., R. 1 W., S.B. Mer., San Bernardino National Forest, California. The claim was located on July 25, 1953.

Upon the recommendation of the Forest Service, United States Department of Agriculture, a contest complaint was filed in the Riverside, California, land office on March 18, 1964, in which it was charged that:

- a. No discovery of a valuable mineral deposit was made prior to July 23, 1955.
- b. The involved material is a "common variety" within the meaning of the Mineral Material Act of 1947, as amended by the Act of July 23, 1955.
- c. The land is nonmineral in character.

¹ John B. Lonergan, attorney for the contestees, E. A. Barrows and Esther Barrows, was also named as a contestee in the decisions of the hearing examiner and the Office of Appeals and Hearings. For reasons to be set forth hereafter, Lonergan is not so designated in this decision.

A hearing was held at San Bernardino, California, on November 8, 1965, to resolve the issues raised by the charges of the complaint.²

At the close of the hearing appellants submitted the following proposed findings of fact:

(1) The claim in contest is situated adjacent to the north shore of Big Bear Lake in the San Bernardino Mountains and within San Bernardino National Forest. It is in the vicinity of the town of Fawnskin, and its surface area is not valuable for timber, vegetation, water, or recreational purposes. It includes a portion of the bed of Grout Creek which has been a source of sand and rock removed and used for construction purposes in concrete in the mountains area since many years prior to the location of the claim on July 25, 1953. The claim area is approximately 19 acres.

(2) The valuable mineral deposit within the claim is and at all times pertinent has been sand and gravel. When washed in a commercial aggregates plant, such as the one now operating on the claim, the material meets portland cement concrete specifications of the Forest Service and of the State of California, Division of Highways. Without washing, the native material meets State Division of Highway specifications for aggregate sub-base, and in several respects is considerably above the requirements. The material is equal or superior to other aggregate materials found in the Big Bear Lake area, and is used unwashed in the area for all concrete purposes except school construction.

(3) There was in 1953, 1954 and 1955, and now is, a Big Bear Lake market area for sand and gravel which has the lake and the lakeside communities of Fawnskin, Big Bear Lake Village (Big Bear) and Big Bear City as its heart, and which extends over an area of well over 100 square miles, being bounded generally by the high mountains which ring the lake and its adjoining areas. In each of the years 1953, 1954 and 1955 there was substantial new construction in the Big Bear area, averaging just under a million dollars each year, and this growth has continued so that building permits for 1964 approximated over \$5,000,000.

(4) In the years in question, almost all sand and rock for concrete construction in the area was "pit run", unwashed, although some small percentage of washed material was shipped into the area from San Bernardino Valley, a distance of over 37 miles, with a truck climb of from 1100 feet to about 8000 feet elevation, thence down into the market area of the lake and its surrounding communities.

(5) In such years the total use of aggregates in the market area was about 150,000 yards per year. One supplier, Burton, claimed 90 per cent of this, and the other 10 per cent was supplied by small operators such as Wirz, Barrows (contestees) and Tri-City (of San Bernardino Valley). Ninety per cent of Burton's aggregate production went into production of concrete/ready-mix.

(6) Burton's pit run aggregates (sand and rock together) delivered in the area at about \$4.50 per yard from Fawnskin, and ran about 1½ tons to the yard. Sales at the pit brought \$1.50 per yard, or \$3 when screened. Wirz sold at a delivered price of \$4 per yard, or \$1.50 at the pit. Barrows made delivered

² At the request of the contestees, a prehearing conference was held prior to the date of the hearing, at which conference it was stipulated that the issues of the contest were (1) whether or not the sand and gravel found on the claim is of a common variety and (2), if so, whether it is a discovery of valuable mineral deposits prior to July 23, 1955, within the purview of the mining law (Tr. 4).

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sales of \$5 per yard. Delivered prices from the San Bernardino Valley into the area were about \$5 per ton to \$5.60 per ton.

(7) Barrows was known to the other operators, in the years in question, to be the sand and gravel pit business. His costs of digging, loading and delivery material were from 40¢ per yard, including his own services at \$1.50 per hour and depending on the point of delivery. Burton claimed a cost of 50¢ and Wirz claimed \$1.50 per yard.

(8) Burton, in these years, claimed a profit of \$4 per yard. Wirz showed a profit of about \$2.50 per yard, and Barrows showed a profit ranging from \$4.60 per yard to \$3.50 per yard.

(9) Barrows sold material at the pit, with the buyer doing the loading, at 75¢ per yard, and Wirz received \$1.50, and Burton from \$1.50 for pit run per yard.

(10) Barrows did all his loading by hand, and had his own truck. He was also in the rock business, and cut and sold cord wood in the winter months.

(11) Refreshing his memory from sales tax returns, Barrows testified to delivered sales in 1953 of 300 tons, in 1954 of 405 *yards* [tons] and in the first part of 1955 prior to July 23rd, 145 *yards* [tons]. The estimates may have been excessive to some degree, but his sales tax returns for the period in question disclosed dollar sales from all sources (after July 1, 1953 to July 1, 1955) of \$3556.50. He admitted he sold small quantities of wood in the winter time, and that *half* [some] of the sales were of rock.

(12) In each of the years in question *some* [the] sand and gravel *on* [in] the claim *was* [could be] extracted, removed and marketed at a substantial profit of from \$2.50 to \$4.60 per yard, and *some* [could be and] was sold at the claim for 75¢ per yard [net].

(13) During each of the three years there was in existence a substantial, present demand which was served and satisfied by sales from several sources, including the subject claim operated by contestees.

(14) With the simple investment of time, hand shoveling and use of a dump truck, contestees extracted, removed and marketed the sand and gravel in the claim, in these three years, at substantial profits as given in (11) and (12) above. [By the expenditure of additional time and capital and with a certainty of a substantial profit, Barrows could have obtained a much greater portion of the market by normal competitive means.]³

In a decision dated March 14, 1966, the hearing examiner found that appellants' claim was located on July 23 [sic], 1953, for sand and gravel which the parties agreed were common varieties within the meaning of section 3 of the act of July 23, 1955, as amended, 30 U.S.C. sec. 611 (1964), not subject to location after that date.⁴ The hearing examiner adopted the contestees' proposed findings Nos. 1 through 10 and 13 without modification, while adopting proposed findings Nos. 11

³ Words in brackets in the proposed findings were supplanted by italic words in the findings adopted by the hearing examiner or were deleted.

⁴ The hearing examiner referred to "the Materials Act of 1947, as amended by section 3 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. 611 (1964)." The reference is somewhat confusing, inasmuch as section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), did not amend the Materials Act. However, it is reasonably clear that the hearing examiner meant that the material on the claim is a common variety within the meaning of section 1 of the Materials Act of 1947, as amended by section 1 of the act of July 23, 1955, 30 U.S.C. § 601 (1964), and of section 3 of the 1955 act.

and 12 with the alterations indicated and rejecting the second sentence in proposed finding No. 14. He also found that the evidence submitted on behalf of the Government established that a small quantity of material had been removed from the claim during the critical years from 1953 through 1955 but that most of the material was used for filling purposes and that no major pits or changes in the surface of the claim during those years were observed by witnesses for the contestant. This, he found, was sufficient to establish a prima facie case that there was not a market for the material on the claims as of July 23, 1955. The hearing examiner further found from the contestees' evidence that there is a large quantity of sand and gravel on the claim, that the quality is satisfactory for the uses described at the hearing, and that there was generally a market for a substantial volume of the material within the area of the claim. The only evidence of the quantity and value of the sand and gravel removed during the critical period, he found, was the testimony of contestee E. A. Barrows, whose testimony was based upon the limited State sales tax records he had retained and his memory of events 11 to 13 years before the time of the hearing. Although Barrows referred to an exact number of yards of sand and gravel for each of the years 1953 through 1955, the hearing examiner found, he could not explain how he arrived at those numbers, and he did not know how much of the material was used for non-qualifying purposes such as fill material.

The hearing examiner concluded that:

Although this evidence is deficient for an accurate finding, it is sufficient for a finding that for the three years from 1953 through 1955 at least 600 yards of sand and gravel were removed from the claim and sold for qualifying purposes. The value of this material on the claim according to the current lease is 10 cents a ton or approximately 13.4 cents a yard. Mr. Barrows made a living during the three years preceeding [sic] 1956 by his labor and his service of delivering material from the claim as well as other materials. But this labor and service had a value greatly in excess of the value of the material. The actual value of the material in place sold from the claim each year prior to 1956 was less than half the value of the \$100 annual assessment work. Mr. Barrows could have produced more material but there was no evidence that he could have disposed of it during the three critical years. Although the total market for sand and gravel was substantial, it was being supplied from other sources. Thus the contestees failed to establish by clear and unequivocal evidence that there was sufficient market for the sand and gravel on the claim for it to be a valuable deposit.

In appealing to the Director, Bureau of Land Management, from the hearing examiner's decision, appellants contended, in substance, that (1) the hearing examiner erred in holding that the use of sand and gravel as fill material was not a qualifying purpose; (2) although the evidence might support a finding that the material on the claim

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is a common variety under departmental interpretation, no agreement to that effect was made by the contestees, and, under the decision of the United States Court of Appeals for the Ninth Circuit in *Coleman v. United States*, 363 F. 2d 190 (9th Cir. 1966), the material is not a common variety; (3) there was an extensive market for sand and gravel in 1953 to 1955, and, although a small operator, Barrows was in the sand and gravel business; and (4) the fact that the market was there and that the prospect or expectation of success in developing a paying mine was reasonable is demonstrated by the developments of succeeding years. In a supplemental letter written after the decision of the Court of Appeals in the *Coleman* case was reversed by the Supreme Court in *United States v. Coleman*, 390 U.S. 599 (1968), appellants argued that the "marketability test," recognized by the Court in that case was a proper standard, had not been published in the Federal Register and should not, therefore, be applied in this case.

The Office of Appeals and Hearings agreed with the hearing examiner that the material on appellants' claim is a common variety of sand and gravel and that use of the material for filling purposes is not a basis for the validation of a mining claim. It found, however, that the royalty provided for in a lease entered into several years after 1955, which the hearing examiner accepted as the value of the sand and gravel in place, had no relevancy in determining the validity of the claim, and it modified the hearing examiner's decision to the extent of eliminating the royalty payments as a factor to be considered. The Office of Appeals and Hearings found the testimony of Barrows to be "so vague, confusing and inconclusive that it is impossible for anyone to arrive at an accurate finding, let alone even a guess, as to the amount of material he had sold." Rejecting appellants' argument that the validity of the claim was established by the prospects for development of a profitable mine in 1955, the Office of Appeals and Hearings found that "a thorough reading" of the Department's decision in *United States v. Alfred Coleman*, A-28557 (March 27, 1962), a decision which was ultimately sustained by the Supreme Court in *United States v. Coleman, supra*, "will reveal that it intended that actual sales at a profit from a particular claim or claims must be demonstrated." Such a showing, it concluded, had not been made. The Office of Appeals and Hearings also found appellants' contention that the "marketability rule" must be published in the Federal Register to be without merit, and it denied a request for oral argument, finding no reason to believe that oral argument would be of any particular usefulness.

In appealing to the Secretary, appellants argue, in essence, that:

- (1) The contestant presented no technical or other evidence of the

nature or value of the mineral on the claim, of the market or of the absence of economic profitability in an operation of the deposit;

(2) The marketability test applied by the Director is not the one approved by the Supreme Court in the *Coleman* case, and a showing that minerals can be sold, not that they have been sold, is all that is required;

(3) The hearing examiner's findings clearly show that a prudent man would have been justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine and that appellants had, in fact, mined and marketed sand and gravel at a profit; and

(4) The addition of Lonergan's name as a contestee was not authorized, and the complaint and all proceedings should be corrected or the matter dismissed for failure to name all interested parties in the complaint.

Appellants also renew their contention that the "marketability rule," although approved by the Supreme Court, is not effective until published in the Federal Register.

Appellants do not appear in their present appeal to continue in their objection to the hearing examiner's finding that the material found on their mining claim is a common variety of sand and gravel, and the evidence of record fully sustains that finding for reasons set forth at length in the decision of the Office of Appeals and Hearings.

Turning then to the charge of error in the designation of Lonergan as a contestee, it appears that Lonergan has a record interest in the claim, acquired, apparently, after the filing of the contest complaint. At the hearing it was agreed that Lonergan, and others for whom he held an interest in the claim, would be bound by the decision in the case without the necessity of any amendments of the pleadings (Tr. 5-6).

Appellants do not deny that it would have been proper to amend the complaint at the time of the hearing to include Lonergan as a contestee. Nor do they charge that the rights of Lonergan, or of any other party, were in any way impaired by the procedure that was followed, including the naming of Lonergan as a contestee in the decisions now on appeal. Indeed, appellants' objection appears to be based entirely upon form, without regard to substance. Nevertheless, the designation of Lonergan as a contestee does appear to be inconsistent with the agreement reached at the hearing, as would be the dismissal of the complaint for failure to name Lonergan as a party in interest, which appellants now seek. In the absence of any perceptible detriment to any party, the title of the proceeding is, therefore, modified to reflect the understanding reached at the hearing.

Appellants' contention that the so-called "marketability test,"

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approved by the Supreme Court in the *Coleman* case, *supra*, must be published in the Federal Register as a rule, regulation, statement of general policy or interpretation of general applicability clearly has no merit. The Department has for many years applied the test of marketability in determining whether or not various materials constituted "valuable mineral deposits" within the meaning of the mining laws. See, e.g., *Layman et al. v. Ellis*, 52 L.D. 714 (1929), and authorities cited. In approving the test employed by the Department in the *Coleman* case, the Court found, in essence, that that test was an inherent part of the "prudent man test" which has been employed since 1894, observing that the obvious intent of the law was "to reward and encourage the discovery of minerals that are valuable in an economic sense" and that minerals "which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable." Appellants' attempt to convert this recognized standard into a new substantive rule or statement of policy is simply unfounded.⁵

The more important question is whether the test of marketability employed by the Bureau in this case is the same as that which has received judicial approval. The Office of Appeals and Hearings appears to have held, as appellants charge, that a discovery can be demonstrated in this case only by showing that minerals were extracted and sold at a profit prior to July 23, 1955. After stating, on page 6 of its decision that "the Department has consistently held, and with judicial approval, that, in order to satisfy the requirement for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown that the materials *could have been* extracted, removed and marketed at a profit before that date," the Office of Appeals and Hearings found, on page 8, that the Department "intended that *actual sales at a profit* from a particular claim or claims *must be demonstrated*." [Italics added.]

While the first part of the Bureau's statement of the law is in accord with a long line of departmental decisions, the conclusion is not. The Department has, in fact, repeatedly stated that it "has never held that proof that minerals from a mining claim have actually been sold is an indispensable element in establishing their marketability." See, e.g., *United States v. Alfred N. Verrue*, 75 I.D. 300 (1968); ⁶ *United*

⁵ Moreover, contestant has pointed out that the same argument, *i.e.*, that the marketability rule must be published in the Federal Register to become effective, was made in *Coleman's* petition for rehearing before the Supreme Court. The Court denied the petition summarily. Appellants attempt to explain away the Court's action on the ground that the point was raised "a little late." Another explanation is that the Court did not consider the point to have any merit.

⁶ The Department's decision in the *Verrue* case has been challenged in an action entitled *Alfred N. Verrue v. United States of America et al.*, Civil No. 6898 Phx., in the United States District Court for the District of Arizona.

States v. W. S. Pekovich, A-30868 (September 27, 1968); *United States v. Warren E. Wurts and James E. Harmon*, 76 I.D. 6 (1969). It has, however, recognized the difficulty of proving marketability without showing any sales, pointing out in numerous cases that, while the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. See *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), affirmed in *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, *supra*.

The Department has also held that the sale of minor quantities of material at a profit, or the disposal of substantial quantities at no profit, does not demonstrate the existence of a market for the material found on a particular mining claim which would induce a man of ordinary prudence to expend his means in an attempt to develop a valuable mine on that claim. See *United States v. Alfred Coleman*, *supra*; *United States v. Joe H. York and Jemina York*, A-28806 (August 16, 1962); *United States v. William M. Hinde et al.*, A-30634 (July 9, 1968); *United States v. John C. Chapman et al.*, A-30581 (July 16, 1968); *United States v. Alfred N. Verrue*, *supra*. Moreover, as the hearing examiner and the Office of Appeals and Hearings have already pointed out, material suitable only for fill purposes or for road base or for comparable uses has never been locatable under the mining laws, and, even if the material is suitable for other purposes, the sale of material for the uses just enumerated cannot be considered in determining its marketability. See *United States v. William M. Hinde et al.*, *supra*, and cases cited.

In light of the foregoing criteria, then, what does the evidence of record show as to the marketability of sand and gravel from the Grout Creek Gravel Pit claim on July 23, 1955?

Barrows testified that since 1960 a large commercial sand and gravel plant has been in operation on the claim under lease (Tr. 176-177), and the marketability of the material on the claim at the time of the hearing for uses which would have been qualifying in 1955 has not been questioned.

The evidence presented on behalf of the Government was directed solely toward showing that the sales of material from the claim prior to July 23, 1955, were insufficient to demonstrate the existence of a market. Warren Smithson, Jr., a licensed contractor engaged in the business of excavating, grading and paving, testified that he located the

¹ The *Chapman* decision has been challenged in an action entitled *John C. Chapman et al. v. United States of America*, Civil No. 69-12 in the United States District Court for the District of Arizona.

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Lucky Strike mining claim in the same areas as appellants' claim in August 1950, that he abandoned the claim after about 3 years, and that, when contacted by Barrows, he did not object to Barrows' locating a claim in the same area as long as he (Smithson) could remove material from the claim without charge if he so desired (Tr. 29-32). He stated that he removed a "small quantity", possibly, not in excess of a couple of hundred yards over a period of two or three years after that," most of which was used for common fill (Tr. 32-33). Three other witnesses for the Government, nearby residents in the area of the claim, testified generally of their failure to observe activity on the claim during the period from 1953 to 1955 or evidence of the removal of more than minor quantities of material from the claim. Although they did not observe the claim every hour every day, their aggregate periods of observations were so great than any substantial removals of material would have been noticed by one or more of them.⁸

Cecil Burton, a witness for the mining claimants, testified that he had resided at Big Bear Lake for 20 years, that he had been in the ready-mix concrete business there for 15 years, and that he had been in the sand and gravel and excavating, grading and paving business since his first year in the area (Tr. 112-113). He stated that during the 1953-1955 period he had about 90 percent of the sand and gravel business in the Big Bear Lake area (of which part 80 to 90 percent was devoted to ready-mix), with the remaining 10 percent going to appellants, to Werner Wirz, another Big Bear Lake resident, and to Tri-City Rock Company of Redlands and Fourth Street Rock Crusher of San Bernardino (Tr. 120-123).⁹ Burton stated that during that period he obtained material from a pit on Holcomb Creek, 4 miles from his processing plant in Fawnskin, that, prior to opening the Holcomb Creek pit, he obtained material from Grout Creek, although not from the site of appellants' claim, approximately one-half mile from his plant, but that after he opened the Holcomb Creek pit he took no more material from Grout Creek, the Holcomb Creek material being, in his opinion, superior (Tr. 116-117, 129, 132-134). He also stated that he had never purchased any material from Barrows, although he believed

⁸ Thus Viggo B. Pedersen, operator of a sawmill less than half a mile from the claim, dug at least 4 large pits (300-400 cubic yards in size) on the claim from 1949 or 1950 to 1956 to dump sawdust. He was on the claim "several times a day" or "several times a day over a weekend," "several hundred" times since July 25, 1953 (Tr. 38-39, 41-42, 48, 50, 54). He saw no evidence of removal of materials from the claim (Tr. 40), no evidence of any quantity of sand removed in 1953, 1954, and 1955 (Tr. 43) although it was possible "some" might have been removed (Tr. 54).

⁹ Burton estimated annual sand and gravel production in the area at that time to be 150,000 yards. It is not entirely clear from his testimony whether the 150,000 yards represented total production or Burton's share of the market (see Tr. 122), although the hearing examiner found the former to be the case.

that Barrows had offered to sell him some (Tr. 136-137). At the time of the hearing he was obtaining sand and gravel from San Bernardino, 37 miles from his plant (Tr. 140).

Werner Wirz testified on behalf of the contestees that he was in the business of selling building rocks, that from 1953 to 1955 he "sold sand and a little rock, fill dirt," that in 1951 and 1952 his source of supply was Grout Creek, and that in 1953 he got about 150 yards of material from Grout Creek, after which time he hauled material from Boulder Bay and North Bay (Tr. 143-144, 147-148). Wirz did not indicate that he ever purchased sand and gravel from appellants or that he took material from their claim. He was, according to his testimony, in competition with appellants (Tr. 146-147).

None of the testimony considered up to now purports to state in dollars and cents or yardage or tonnage what material contestees removed and sold from the claim prior to July 23, 1955. The only evidence on this score is the testimony of Barrows himself. But after considering it, we agree with the finding of the Office of Appeals and Hearings that "Barrows' testimony was so vague, confusing and inconclusive that it is impossible for anyone to arrive at an accurate finding."

Barrows testified that he once had records of sales but that they were burned up. He did have quarterly States sales tax returns for the period from April 1, 1953, to July 1, 1955, from which he attempted to reconstruct his sales from the claim (Tr. 163, 167). The tax returns show total sales of \$3,556.50 for the 2-year period from July 1, 1953, to July 1, 1955, breaking down into sales of \$2,080 for the first year and \$1,476.50 for the second year (Ex. H-2 to H-9). This much is clear. Beyond this the significance of the figures as they relate to production and sales from the claim and costs and profits is uncertain and unclear.

In the first place, the revenues include receipts not only from the sale of sand and gravel from the claim but also sales of stone from other claims and sales of firewood. Barrows said his sales of stone and sales of sand and gravel were about equal but he could not say whether they were equal in money or in quantity. Since he sold the sand and gravel for \$5 per yard delivered and the stone for \$15 per yard, it would mean attributing one-half of the receipts to the sand and gravel sales (if the sales were equal on a money basis) or one-fourth (if the sales were equal on a quantity basis) (Tr. 164, 170-171, 189, 193-195). Barrows was inclined to think he sold more stone dollar-wise (Tr. 195) but then said that \$900 or \$960 seemed to be the correct figure for sand and gravel sales out of \$1,812.50 total sales for three quarters of 1953 (Tr. 198).

As for the sales of wood, Barrows was again completely uncertain

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as to how much he sold. He indicated that it was possible, although he did not remember, that he may have purchased and sold 30 cords of firewood in 1953 at a price of \$25 per cord and that his sales tax returns could have included \$750 for these sales (Tr. 198-200).¹⁰ He then said, inconsistently, that he sold around 10 cords in 1953 (Tr. 201). But again he said he sold sand and gravel during the summer months and whenever there was building, that "very likely" he sold "very little" sand and gravel in the first quarter of 1954, that usually in the first and fourth quarters of a year, unless it was an open winter, there was very little building (Tr. 168, 172, 173). His sales tax returns showed sales of \$690.50 for the fourth quarter of 1953, \$97.50 and \$488 for the first and fourth quarters of 1954, and no sales for the first quarter of 1955 (Ex. H-3, H-4, H-7, H-8). These sales totalled \$1,276 so it is entirely possible that he sold as much as \$750 in wood.

If we deduct \$750 from Barrows' total sales of \$3,556.50 for the 2-year period July 1, 1953, to July 1, 1955, we have \$2,806.50 left for both the stone and the sand gravel sales. As we have noted the sand and gravel sales could range from one-fourth of that amount (\$701.62) to one-half (\$1,403.25) or from \$350.81 to \$701.62 per year.

Now these amounts would represent gross receipts. How much would be profit is shrouded in uncertainty. Barrows testified that he sold his material for \$5 per yard delivered and for 75 cents per yard at the claim to those who would do their own loading (Tr. 157). He did not say what percentage of his sales was in each category except to indicate that his sales tax returns were of delivered material (Tr. 169).¹¹ This is the first uncertain factor. With respect to the delivered material, Barrows said that he could hand-shovel 3 yards into his truck "in considerably under a half hour" and that, with his labor worth \$1.50 per hour, he considered that "it cost me around 40 cents a yard to produce and deliver the material" (Tr. 158). He said a great deal of deliveries involved 10 miles of transportation so he could not conceive that it ever cost him more than \$1.50 per yard to load and deliver, including gas and oil, tires, batteries, insurance, and maintenance (Tr. 158). Barrows estimated his profit at \$4 a yard, not under \$3.50 even on longer hauls, at 3 yards per load (Tr. 182).

We cannot accept these statements as being fully credible, particularly the estimate of 40 cents per yard to load *and deliver*. This estimate followed Barrows' statement that he could load 3 yards "in considerably under a half hour." Later he said that it took him about

¹⁰ The transcript gives the total sales price as \$7.50, which is obviously in error. (Tr. 199, 200).

¹¹ We cannot read this statement as indicating that Barrows did not report his sales at the claim.

40 minutes to load 3 yards but that he could not keep it up all day (Tr. 181, 206-207). He had no idea how long it would take someone else to load (Tr. 206-207). Barrows said his truck was not a dump truck; he had to shovel the material off (Tr. 159). Even if he could unload in half the time, an hour would be required just to load and unload, so his labor cost would be at least \$1.50 per hour for 3 yards or 50 cents per yard.¹² Now as to trucking costs, Barrows made no mention of his labor cost for driving time. It is not clear either that he included depreciation of his truck. Finally, his cost figures of 40 cents to \$1.50 per yard were apparently based on a full load of 3 yards. He did not say whether he sold only on a full load basis or, if not, how many sales were of less than 3 yards, increasing the cost per yard.

Burton, the dominant operator in the area, testified that it cost him 50 cents a yard to load and deliver pit run material at his Holcomb Creek property (Tr. 125).¹³ He used a power shovel, skiploader, and dump truck, having abandoned the use of hand shovels because it was too hard and expensive (Tr. 130, 131). It seems unlikely that Barrows, with his far smaller operation, could match Burton in costs.

We are therefore not convinced that, with all costs properly figured, Barrows' estimate of even a \$3.50 profit per yard would stand up. Even if we were to accept it and if we assume his annual gross sales ran from \$350.81 to \$701.62 per year and were of delivered material at \$5 per yard, his annual profit would range from \$245 to \$490 per year.¹⁴ This would include profit from the sale of material as fill (Tr. 175).¹⁵

We do not believe a profit of as low as \$245 per year would satisfy the prudent man test of discovery. It might be argued that Barrows' claim satisfied the marketability rule in a narrow sense in that material was sold from it at a profit. But this would be true if Barrows had sold only one truckload (3 yards) of sand and gravel per year

¹² For this reason alone we cannot accept appellants' findings of fact (7) (8) and (12), agreed to by the hearing examiner, which accept the 40 cents cost figure and use it in computing profit ranging from \$4.60 to \$3.50.

¹³ Later he seemed to indicate this was the cost only for loading, not delivery (Tr. 139).

¹⁴ Annual sales of \$350.81 at \$5 per yard would mean sales of 70 yards; sales of \$701.62 would mean sales of 140 yards. Barrows made estimates of sales of 226.9 yards in 1953 (Tr. 169, 189, 190, 191, 200), 451 yards in 1954 (Tr. 175, 202), and 145 yards in 1955 prior to July 23, 1955, a total of 822.9 yards (Tr. 175, 176). (There are discrepancies in some of the figures but these seem to be the more accurate from the testimony). We place no credence in these estimates because Barrows was completely unable to explain how he arrived at them (Tr. 189-192). We also find little basis for the hearing examiner's generous assumption that Barrows sold 600 yards in 1953-1955. Even if Barrows' entire sales of \$3,556.50 represented sales of sand and gravel at \$5 per yard, the total amount sold would be 711.30 yards. But less than half of the sales were of sand and gravel so we cannot accept the examiner's finding.

¹⁵ We have disregarded the taking by the State of California of 900 yards from the claim for oil mix. Barrows said that in exchange the State left piles of rock for him to use, but there is no evidence as to the quantity or value of the rock which apparently came from the claim and was set aside by the State. Thus its only value appeared to result from the State's separating it from the sand (Tr. 161-162).

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at a profit of \$10.50. It would be ridiculous to say this would have met the test of discovery. We have pointed out recently that the prudent man rule is the ultimate test of discovery, that the marketability test is but a refinement of it, and that although a claim may literally or technically satisfy the marketability test if it returns a minimal profit this will not satisfy the prudent man test if a prudent man would not invest his labor and means for such small profit. *United States v. Frank and Wanita Melluzzo et al.*, 76 I.D. 181, 192 (1969).

It is well-established that the prudent man rule is an objective test, not a subjective one. That is, the test is not whether the particular mining claimant is willing to invest his time and money in the hope of developing a valuable mine but whether a person of ordinary prudence would be justified in doing so. *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). The question we have is whether, in view of the facts developed, a person of ordinary prudence would have been justified, on July 23, 1955, in investing his labor and means in developing the sand and gravel on appellants' claim with a reasonable prospect of success in developing a valuable mining operation.

We believe that the answer is no. We find it hard to believe that a prudent person would even have been willing to invest in a truck for the meager returns that Barrows derived. Barrows presumably already had the truck and could write off a substantial part of its capital cost on his stone and wood business. It appears too that he may have been selling his labor cheaply. Burton, as we have noted, gave up hand shoveling because it was too hard and expensive. Barrows did not know how long it would take someone else to hand load his truck and therefore whether his own labor cost of \$1 per 3-yard load (40 minutes at \$1.50 per hour) was a realistic cost.

In addition to these factors and in support of a finding that there was not a sufficient market for material from appellants' claim during the critical period to justify the development of a mining operation, we find the following:

(1) The testimony of Smithson that he was willing to abandon his claim in 1953 in return for assurance of the continuing right to remove such material as he needed without charge; and

(2) The testimony of Burton, who apparently had a near monopoly on the sand and gravel business in the area at that time, that he went 4 miles from his plant in Fawnskin to obtain sand and gravel from Holcomb Creek in preference to taking it from Grout Creek, one-half mile from his plant.

Evidence that the amount of money spent in construction work of all kinds in the Big Bear Lake-Fawnskin area increased approximately 5 times between 1955 and 1964, from \$1,000,000 to something

more than \$5,000,000 (Ex. D), that Burton, at the time of the hearing, had moved his rock plant from Fawnskin to Big Bear Lake and was, at that time obtaining sand and gravel for his operations from San Bernardino (Tr. 133, 138-140), and that Wirz had exhausted his source of material on Boulder Bay two years before the hearing (Tr. 144, 148, 151-152) suggests changes in conditions after 1955 which could have substantially altered the market for material from appellants' claim. The fact, of course, is that the present large scale operations on the claim did not commence until 1960, five years after the critical date of July 23, 1955.

It may be argued that our conclusions are based on an unfair downgrading of Barrows' testimony, that we are imposing on a small operator an obligation of maintaining records and proof which is far beyond that to be expected from a small businessman. It has long been held, however, that a mining claimant, once the Government has established a prima facie case, has the burden of showing by a preponderance of the evidence that his claim is valid. *Foster v. Seaton*, *supra*. In that case, which also involved the validity of sand and gravel claims, the court stated expressly that, if the rule were otherwise, anyone could enter on the public domain and ultimately obtain title unless the Government undertook the affirmative burden of pointing out that no valuable deposit existed. The court stated that it did not think that the Congress intended to place this burden on the Secretary.

A mining claimant cannot meet this burden by failing to keep adequate records or other means of proof. Or, if he has kept such records, he cannot be relieved of his burden if his records are lost or destroyed and he has only infirm or inconsistent recollection to substitute. As the court indicated in *Foster v. Seaton*, he cannot expect the validity of his claim to be established by his default.

Our conclusion from the entire record is that an increased demand in the area of the claim for sand and gravel, coupled with the depletion of better quality reserves, resulted after 1955 in a market for material from appellants' claim that did not exist in 1955 and that, although some use of the material and some sales were made prior to July 23, 1955, the material did not, at that time, constitute a "valuable mineral deposit" within the meaning of the mining law. Accordingly, we agree with the conclusion of the hearing examiner and of the Office of Appeals and Hearings that a discovery prior to July 23, 1955, has not been shown.

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 for the reasons stated herein.

ERNEST F. HOM,
Assistant Solicitor.

October 31, 1969

**DISPOSITION OF PROCEEDS FROM ROYALTIES, BONUSES, AND
OTHER REVENUES DERIVED FROM MINERAL DEPOSITS UNDER-
LYING LANDS PURCHASED IN OKLAHOMA FOR THE CHOCTAW
TRIBE UNDER AUTHORITY OF THE ACT OF JUNE 26, 1936, CH. 831,
49 STAT. 1967***

**Indian Reorganization Act—Act of June 18, 1934—Act of June 26, 1936—
Indian Lands: Sub-surface Estates—Indian Lands: Tribal Lands—
Indian Tribes: Fiscal and Financial Affairs**

The proviso clause of section 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), is applicable only to proceeds from mineral deposits underlying lands for which the consideration was derived from such appropriated funds; accordingly, lands acquired by gift or purchased with tribal funds are not subject to that proviso.

To the extent that offsets, which were claimed by the United States for sums paid to or on behalf of the Choctaw Nation as reflected by a stipulation approved by the Indian Claims Commission in Docket No. 16 on July 14, 1950, represented funds used to acquire trust title to parcels of land for the Choctaw Tribe pursuant to the acts of June 13, 1934, ch. 576, 48 Stat. 984, and of June 26, 1936, ch. 831, 49 Stat. 1967, the proceeds from mineral deposits underlying said parcels, arising from exploitation of such lands for minerals on and after July 14, 1950, have been since that date and now are properly creditable to the tribe instead of the special revenue account established, pursuant to section 7 of said 1936 act, for use in acquiring lands for, and making loans to, Indians in Oklahoma.

**Indian Reorganization Act—Act of June 18, 1934—Act of June 26, 1936—
Act of August 25, 1959—Indian Lands: Sub-surface Estates—Indian
Lands: Tribal Lands—Indian Tribes: Fiscal and Financial Affairs—
Indians: Termination of Status**

To the extent that the proviso clause of section 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), was, on the date of enactment of the act of August 25, 1959, Public Law No. 86-192, 73 Stat. 420 (Choctaw Termination Act), applicable to proceeds from such parcels theretofore purchased in trust for the Choctaw Tribe, said proviso remained applicable thereto upon enactment of the latter statute, inasmuch as the purpose of the

*Not in Chronological Order.

latter statute was to discontinue earlier statutory authorization to acquire additional parcels of land for the Choctaw Tribe and its members, but did not have the effect of altering the status of lands theretofore acquired under such authority.

M-36791

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TO: AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, MUSKOGEE.

SUBJECT: DISPOSITION OF PROCEEDS FROM ROYALTIES, BONUSES, AND OTHER REVENUES DERIVED FROM MINERAL DEPOSITS UNDERLYING LANDS PURCHASED IN OKLAHOMA FOR THE CHOCTAW TRIBE UNDER AUTHORITY OF THE ACT OF JUNE 26, 1936, CH. 831, 49 STAT. 1967.

This responds to your requests for advice concerning the above subject. The first section of the Act of June 26, 1936, *supra* (hereinafter referred to as the 1936 Act), provides:

That the Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * lands * * *. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe * * * for whose benefit such land is so acquired * * *.

Section 7 of this act further provides:

All funds appropriated under the several grants of authority contained in the Act of June 18, 1934 (48 Stat. 984), are hereby made available for use under the provisions of this Act, and Oklahoma Indians shall be accorded and allocated a fair and just share of any and all funds hereafter appropriated under the authorization herein set forth: *Provided, That any royalties, bonuses, or other revenues derived from mineral deposits underlying lands purchased in Oklahoma under the authority granted by this Act * * * shall be deposited in the Treasury of the United States, and such revenues are hereby made available for expenditure by the Secretary * * * for acquisition of lands and for loans to Indians in Oklahoma as authorized by this Act and by the Act of June 18, 1934 (48 Stat. 948).* [Italics supplied]

Funds appropriated pursuant to the statutes cited above were used to purchase various parcels of land in Oklahoma, which were conveyed to the United States in trust for the Choctaw Tribe. Royalties, bonuses, and other revenues derived from mineral deposits underlying some of these lands have been collected by the Bureau of Indian Affairs. Such revenues as originally accrued from such sources have properly been credited to the special revenue account in the Treasury of the United States, as authorized by the quoted section 7 of the 1936 Act, for use in acquiring lands for, and making loans to, Indians in Oklahoma. However, you question the legality of thus crediting revenues which accrued after the date of enactment of the act of August 25, 1959, P. L. No. 86-192, 73 Stat. 420, as amended (hereinafter

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referred to as the Choctaw Termination Act). The response to your specific question will be furnished herein after consideration has been given to the effect, on the disposition of funds derived from such sources, of certain intervening litigation between the Choctaw Tribe and the United States, which was not mentioned in your requests but became final before enactment of the Choctaw Termination Act, *supra*.

It should be noted at the outset that the proviso of section 7 of the 1936 Act is applicable only to the proceeds from mineral deposits for which the consideration was derived from funds appropriated pursuant to the statutes cited above. Accordingly, lands acquired by gift or purchased with tribal funds would not be subject to that proviso. This conclusion is in accord with the following views expressed in a memorandum of April 23, 1941, written for the Solicitor by W. H. Flanery to the Assistant Secretary, who approved the memorandum on April 25, 1941, and referred it to the Commissioner of Indian Affairs:

The wording of the proviso indicates that the minerals underlying "lands purchased in Oklahoma under the authority granted by this Act" belong to the United States and not to the group or individual for which the land is purchased. That this is indeed the purpose of the proviso is shown in the hearings held before the House Committee on Indian Affairs on this act; which was S. 2047. During the hearings held on April 6, 1936, Representative Sam C. Massingale of Oklahoma pointed out that the bill, as then worded, would result in giving the exclusive benefit of minerals found in the subsoil of land purchased under the act to the individual or group for which the land was purchased. He considered that an unjust advantage for those tribes of Indians who were located in the richer parts of Oklahoma as against those tribes who live in districts where there is no oil or other mineral wealth. The Committee thereupon amended the bill at its next meeting on April 8, 1936, so as to insert the proviso to section 7 as it now stands. The purpose of this proviso thus is that mineral wealth found on lands purchased in order to give Indian groups or individuals the use of more agricultural or grazing land should be used for the benefit of all Oklahoma Indians.

It would appear from this origin of the proviso that it is meant to cover only lands purchased with "funds appropriated under the several grants of authority contained in the Act of June 18, 1934," and "made available for use under the provisions of this Act." This language, which is drawn from the first part of section 7, also would appear to point to the interpretation that the proviso is intended only to see to it that funds of the United States used in the purchase of lands for certain Indians do not unduly enrich these Indians to the exclusion of other Oklahoma Indians. On the other hand, it may be fairly assumed that mineral wealth found on lands acquired by the United States in trust for Indian individuals or groups, either by gift or by purchase with funds belonging to the

Indians for which these lands are being purchased, should belong exclusively to those Indians for whom the United States holds such lands in trust. Under this view, which I think is correct, the mineral rights in the lands involved in the instant case belong to the minor children * * * for whom the United States acquired the land by gift under authority of the Oklahoma Indian Welfare Act.

It is our understanding that in Docket No. 16 before the Indian Claims Commission, an award was made to the Choctaw Nation in 1950, based on the following computation:

Value in 1866 of interests of the Choctaw and Chickasaw Nations in certain lands ceded under treaty of April 28, 1866-----	\$4, 499, 551. 00
Less value of an undivided one-fourth interest therein to which the Chickasaw Nation was entitled-----	<u>1, 124, 888. 00</u>
Value of the remaining undivided three-fourths interest therein to which the Choctaw Nation was entitled-----	3, 374, 663. 00
Less sums previously paid to the Choctaw Nation for its interest therein-----	<u>437, 750. 00</u>
Amount due the Choctaw Nation not previously paid for its interest therein-----	2, 936, 913. 00
Less compromise of offsets claimed by the United States for other sums paid to or on behalf of the Choctaw Nation, as reflected by a stipulation approved by the Indian Claims Commission on July 14, 1950-----	<u>349, 077. 53</u>
Net award to the Choctaw Nation by Judgment of the Indian Claims Commission filed on July 14, 1950-----	<u><u>2, 587, 835. 47</u></u>

Although we do not have detailed information concerning the items included in the aforementioned offsets claimed by the United States, it is quite probable that among the items included therein were sums expended for the purchase of some, or possibly all, of the various parcels of land held by the United States in trust for the Choctaw Tribe. To the extent that such items represented funds used to acquire such parcels of land, the proceeds from mineral deposits underlying said parcels, arising from exploitation of such lands for minerals on and after July 14, 1950, have been since that date and are now properly creditable to the tribe instead of the special revenue account established pursuant to section 7 of the 1936 Act. As indicated above, this is true because the proviso of said section is applicable only to the extent that funds of the United States were expended and thereafter

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continued to be impressed with the characteristics of having been derived from that source. While such lands were impressed with such characteristics from the date of purchase to July 14, 1950, they were freed therefrom upon approval of the stipulated settlement of the claim of the United States against the tribe for reimbursement thereof. In effect, the parcels in this category were purchased for the tribe with its own funds as of July 14, 1950, from which date the proviso of said section was and is inapplicable to those parcels.

In view of the foregoing, a response to your specific question would relate merely to those parcels of land for which the consideration paid was not included in the offsets claimed in the aforementioned litigation, either because of inadvertence or because of the fact that such parcels were purchased subsequent to the filing of the claim for offsets. If any parcels are held in trust for the tribe and are not within the category mentioned above, it is my opinion that, for the reasons herein-after stated, the applicability of the proviso of section 7 of the 1936 Act to the proceeds from the minerals underlying them has continued unchanged and will so continue until such time as such parcels are either sold or conveyed at the request of the tribe pursuant to the Choctaw Termination Act.

The basic purpose of the Choctaw Termination Act was to complete the disposition of the affairs of the Choctaws. To accomplish this purpose, the first section thereof authorizes and directs the Secretary either to sell or to convey at the request of the tribe to a successor entity created on behalf of the tribe all tribal lands and interests therein (except for the reservation of certain mineral interests not pertinent to the problem here considered). This section contains no language which would indicate that the status of such lands should be altered until the act of sale or conveyance has been accomplished. The only section of this statute which might be interpreted as altering that status prior to sale or conveyance is section 7 thereof, which provides:

The Act of June 18, 1934 (48 Stat. 984), as amended (25 U.S.C. 461), and the Act of June 26, 1936 (49 Stat. 1967), as amended (25 U.S.C. 501-509), shall not apply to the Choctaw Tribe and its members after the date of enactment of this Act, except that the provisions of section 1 of the Act of June 26, 1936, with respect to taxes on lands that are held by the United States in trust shall continue in effect until the trust is terminated * * *.

It is my opinion that the purpose of the section last quoted above was merely to discontinue the authorizations contained in the two earlier statutes to acquire additional parcels of land for the Choctaw Tribe and its members in conformity with the basic purpose of the Choctaw Termination Act, and did not have the effect of altering the status of lands theretofore acquired under such authority. This section does not vitiate the proviso of section 7 of the 1936 Act which designates the uses to which mineral proceeds are to be put for so long as trust title is in the United States.

RAYMOND F. SANFORD,
Regional Solicitor.

Approved:

RAYMOND C. COULTER

Deputy Solicitor.

UNITED STATES

v.

ALICE A. and CARRIE H. BOYLE

A-30922 (Supp.) *Decided December 2, 1969*

Mining Claims: Common Varieties of Minerals

If a deposit of decomposed granite which is used for the same purposes as other deposits of the same material which are a common variety does not command a higher price in the market, it does not have a special and distinct value and it too is a common variety of stone not locatable under the mining laws after July 23, 1955.

Mining Claims: Generally—Mining Claims: Discovery

The provisions of Rev. Stat. sec. 2332 do not provide an independent means of acquiring title to a mining claim and particularly do not dispense with the necessity of their being a valid discovery on the claim.

Mining Claims: Discovery

The requirements for discovery on a placer mining claim located for a deposit of a common variety of decomposed granite are not satisfied by a vague showing of intermittent sales of small amounts in the years from 1943 to 1955.

December 2, 1969

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In a decision dated March 26, 1969, 76 I.D. 61, the Department remanded this case for the development of fuller and clearer evidence on the competitive prices of decomposed granite in the Phoenix area.

The parties have each submitted a report and stipulated that no further administrative hearing need be held to receive more evidence.

The contestees' submission consists of a report by Hamilton A. Higbie, a registered geologist. Higbie's report adds little to the evidence presented at the hearing. After discussing the physical characteristics of the decomposed granite, he cites a statement of Earl Gudd, owner of the B & B Granite Company, who was a witness at the hearing. Gudd repeated his testimony that the price for landscaping granite varies from \$1.50 to \$3.50 per cubic yard; that competitors in the area of Apache Junction received approximately \$1 per cubic yard less for an inferior quality of granite.

Higbie then says that he spoke with other unspecified dealers selling landscaping granite in the area and that their prices were almost consistently \$2 less than that obtained by B & B. B & B, he says, gets \$6 per cubic yard for pit run material at Scottsdale, while its competitors were selling at prices of \$3.85 to \$4 per cubic yard. He also reports that at Mesa the owners of Dreamland Villa paid B & B \$1—\$1.50 per cubic yard more than they could get other granite for, but paid the higher price for the superior qualities of the B & B material. He further states that the Farnsworth Realty and Construction Company, the developers of Dreamland Villa, has used B & B's landscaping granite exclusively for the past "seven to eight years" due to its superior quality and that they purchase about \$1,000 worth of B & B granite per month.

The contestant, in turn, submitted a report of Charles K. Miller, a mining engineer. Miller made a detailed study of the location of pits selling decomposed granite in the general area of Phoenix and interviewed both buyers and sellers. He found that in the Mesa-Apache Junction area the best sources of decomposed granite are the contestees' claims, two pits in the Salt River Indian Reservation, about 10 miles northwest of contestees' claims, and six in the Tonto National Forest, which lie about a half mile north of the contestees' locations. He divided the market into five areas designated as Phoenix, Scottsdale, Tempe, Mesa, and Apache Junction. After consulting both sellers and buyers of decomposed granite, he compiled a table showing the delivered prices at which each seller sold a cubic yard of granite in each market area. The chart shows that, except in Phoenix, B & B, which is

the lessee of contestees' claims and sells all the materials taken from it, obtains no greater price for its product than any of its competitors. Several firms, one operating from the Salt River Indian Reservation, reported selling prices substantially higher than those of B & B and the other competitors.¹

While Miller found price variations among the various colors of decomposed granite, with red and pink commanding a higher price than bronze (gold), he found, except as noted above, no differences between suppliers for the same colors. The price variations from area to area were largely a matter of more intensive competition near the source of supply and the expense of haulage to the more distant area.

As to the Phoenix area, Miller said that Pit No. 1, some 20 miles north of the city, is considered the best source of decomposed granite from the standpoint of quality and quantity. Madison Granite, which operates Pit No. 1, reported that it sold and delivered to Zone 1 in Phoenix at \$3 to \$3.50 per cubic yard. Other sellers gave as their selling prices amounts ranging from \$2.50 for gray to \$7.40 for gold and red. B & B sold for \$5 to \$7 per yard.

The gold (bronze) granite is the best volume seller in the general market area and is preferred in the Phoenix, Scottsdale, and Tempe areas. The red is preferred in the Mesa and Apache Junction areas. As far as prices in Apache Junction are concerned, all 4 sellers in the area, including B & B, sold red, pink, and gold granite for the same price, \$1.50 per cubic yard.

The most this evidence establishes is that some of the relatively small demand for red and pink decomposed granite in Phoenix is met by material from the Apache Junction area, but at a price which, considering the distance and costs of haulage in the urban area, does not demonstrate any special value for it. In the nearest market, Apache Junction, where competition is keen, contestees' granite sells at the same price as the granite of 3 competitors. In the other marketing areas, also, as we have seen, it commands no higher price than that of its competitors and, in some instances, less.

Miller too consulted Gudd of B & B, which he described as the largest volume supplier of decomposed granite in the Apache Junction area. Gudd, he says, stated that B & B sold granite in Phoenix for \$5-\$7, in Scottsdale for \$3-\$4, in Tempe for \$3, in Mesa for \$2 to \$2.50, and in Apache Junction for \$1.50. Ross Farnsworth, of Dreamland Villa, said his firm paid \$2.50 for red and \$2 for gold granite per cubic yard at Mesa and that they will use about 2200 cubic yards in 1969.

¹ Miller commented that several suppliers said that the Reservation was the best red granite source in the area, but that the royalty it charged was so high that it could not compete with less desirable granite from other sources. The Reservation demands royalty of 52-72¢ per cubic yard while the Forest Service asks 10¢, as do the contestees.

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The material is used for both roads and landscaping.

The figures developed by Miller are at variance with those submitted by Higbie. We find the depth and detail of Miller's report more convincing and accept his statements as representing the actual conditions in the market.

We conclude then that as a material used for the same purposes as that taken from other deposits of widespread occurrence and as one which is not sold at a higher price than other similar materials, contestees' decomposed granite has no special and distinct value and is a "common variety" of stone within the meaning of the act of July 23, 1955, 30 U.S.C. sec. 611 (1964). Therefore, contestees' claims cannot be found valid on the basis that the deposit found on them is an uncommon variety of stone which is still open to location under the mining laws.

The contestees, however, allege that the claims are valid for other reasons. Having in the earlier decision left these for consideration, pending the resolution of the issue we have just discussed, we now turn to them.

First, the contestees contend that since they have held their claims as lode claims and worked them as placer for over 16 years prior to July 23, 1955, they are entitled to a patent, pursuant to Rev. Stat. sec. 2332, 30 U.S.C. sec. 38 (1964). This section provides:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working on the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The contestees assert that they have satisfied all the requirements of the statute.

However, if Rev. Stat. sec. 2332 is available to them, they still must do more than show compliance with it, for it is well established that Rev. Stat. sec. 2332 does not constitute an independent means of obtaining a patent to a mining claim. Most important of all, it does not dispense with the necessity of a valid discovery. *Cole v. Ralph*, 252 U.S. 286, 307 (1920); *Susie E. Cochran et al. v. Effie V. Bonebrake et al.*, 57 I.D. 105 (1940); *Harry A. Schultz et al.*, 61 I.D. 259, 263 (1953). Thus, until the claimants can demonstrate that there is a valid discovery on each of the claims within the meaning of the mining laws the claims cannot be patented.

The contestees asserted that the claims were valuable on account of several minerals. They offered testimony that the claims had been worked for gold obtained by mining and milling the decomposed granite, the mine dumps, and the mill tailings. But whatever the past history of the claims may have been, there is no evidence that the claims are now valuable for placer gold. Similarly the recounting of the past use of limestone (1914-1940) from the claims to make mortar was not joined with proof that there is a present market for it or that the limestone is still locatable as an uncommon variety of stone (Tr. 168; Ex. B). In the absence of proof that a mineral deposit is of present value, the claim is not valuable for that mineral within the meaning of the mining laws. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

The only other mineral on the claims that could support a discovery is, of course, the decomposed granite. But since we have concluded that it is not an uncommon variety of stone, it would have to be shown that a discovery of the material, within the ambit of the prudent man rule as refined by the marketability rule, had been made prior to July 23, 1955.

Before we consider that issue, however, we turn to the contestees' second major contention, which is that their placer locations, filed in 1964 as amendments of their lode locations, related back to the original lode locations made in 1939. The hearing examiner, as we noted in the original decision, held that the validity of the claims was to be judged as of the date of the location of the claims as placers in 1964. He refused to consider the placer locations to be amendments of the 1939 lode locations, as amended in 1941.

Here again the same considerations that were applicable to the discussion of Rev. Stat. sec. 2332 apply. The 1939 locations, if they were enough to sustain mining claims, lost their validity when the gold in lode, or even in placer form, and the limestone were worked out. A location without a discovery cannot validate a mining claim. *Cole v. Ralph, supra*, 295-296.

Again, therefore, if the relation back of the 1964 placer locations to 1939 is to aid appellants at all, it is necessary for them to show that they had made a valid discovery of the decomposed granite prior to July 23, 1955. We now address ourselves to that issue.²

In order to satisfy the requirements of discovery, the appellants must show that as of July 23, 1955, the deposits from each claim could have been extracted, removed, and marketed at a profit. Marketability

²This is not to be taken as an indication that we agree with appellants' arguments concerning the effect of Rev. Stat. § 2332 or the relation back of the placer locations in 1964. It is not necessary to rule on their contentions since the issue to be considered is dispositive of the case in any event.

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can be demonstrated by a favorable showing as to such factors as accessibility of the deposit, bona fide in development, proximity to market, and the existence of a present demand for the material, that is, a demand when the deposit was subject to location. *United States v. Coleman*, 390 U.S. 599 (1968); *Foster v. Seaton*, 271 F. 2d 836, (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, 75 I.D. 300 (1968).

What evidence did appellants present of marketability of the decomposed granite prior to July 23, 1955?

Robert Graham, a technical representative for the contracting officer at Williams Air Force Base, some 20 miles from the claims, who was in charge of all payments, maintenance, and new work, testified that "several hundred tons" of material from the Boyle claims were used in 1944-1947 to surface driveways, parking lots and even sidewalks on the airbase (Tr. 143, 144, 145), but that none had been used since 1947 (Tr. 147).

Elmer Boyle, the husband of Alice Boyle, testified that a lot of granite had been removed between 1947 and 1955, that it sold for 0.5 cent a yard if the purchaser loaded it himself (Tr. 171-173).

In an affidavit submitted as her testimony at the hearing (Ex. B), Alice Boyle stated that there has been "continuous" production of decomposed granite from the claims since the early 1940's, that a computation of the material removed could come to over 400,000 cubic yards, although Zentner, the Bureau of Land Management mineral examiner, had conservatively estimated it to be at least 30,000 cubic yards, that few records were kept of sales prior to June of 1955, but that Hubert Massey excavated and removed material in 1951 and 1952, and John Wing did the same in 1952, with one sale being for 1000 yards. She also said that Gail Boyle removed material from the claims in 1955 and 1956 for a small business he ran in Mesa, selling materials to residents there for driveways, and that there were numerous other small sales of which no records were kept.

She next states that in 1959 the claims were leased to Mr. Brisbois who removed 23,929 yards at 0.5 cent per yard from 1959 to 1962. Brisbois then assigned the lease to Earl Gudd who, she said, has since removed 18,215 yards at 0.6 cent per yard.

The crucial parts of Mrs. Boyle's testimony are those that relate to the sales made prior to July 23, 1955. Aside from general allegations that sales were made on a continuing basis, her testimony itself adverts only to a few sales in small amounts. She did not say what the airbase sales amounted to, but that a receipt dated February 19, 1948, representing only part of the sales, was for 500 cubic yards at 0.5 cent a yard (Tr. 110). We have noted that Graham testified that "several hundred

tons" were used on the base. At 0.5 cent a yard, a sale of 1,000 yards would have returned only \$50 for the period 1944-1948. The sales claimed for 1951 and 1952 were for unspecified amounts and were unsupported by any business records or other corroboration. Again the only definite sale recalled disposed of 1,000 cubic yards. Finally, the statement that Gail Boyle removed material in 1955 and 1956 is totally devoid of supporting details and besides refers to "a small business" run by Boyle; moreover, it does not necessarily indicate even that sales were made prior to July 23, 1955.

The most this testimony establishes is that there were a few intermittent sales of decomposed granite consummated on a rather off hand basis. Since it is a claimant's obligation to prove the validity of his claim, it is his responsibility to keep records adequate to demonstrate his assertions that he has disposed of material from the claims. His unsupported statements about matters that are, or should be, readily sustainable by other evidence are not persuasive.

We cannot conclude that the contestees have demonstrated by a preponderance of the evidence that they have satisfied the test to support a discovery of a common variety of decomposed granite prior to July 23, 1955, within the meaning of the mining laws.

Accordingly, the mining claims were properly declared invalid.

The appellants have recently requested an opportunity to present oral argument. We do not believe that oral argument is necessary or would be helpful to an understanding of the applicable law or evidence. Consequently the request is denied.

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 Office of Appeals and Hearings is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF RAY W. LYNCH

IBCA-764-2-69

Decided December 11, 1969

**Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice:
Appeals: Burden of Proof**

Under a construction contract provision which places the risk of loss before acceptance on the contractor unless the cause of damage is unforeseeable and beyond the control of, and without the fault of negligence of the contractor, the burden of proof of the existence of contractor fault or negligence, when alleged by the Government, is on the Government.

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Contracts: Construction and Operation: Generally

The standard of unusualness implied in the phrase "extraordinary action of the elements," in a construction contract provision allocating risk of loss before acceptance, must take into account the design criteria of the structure destroyed as well as the general departure from the norm of the weather for the place and season.

BOARD OF CONTRACT APPEALS

Ray W. Lynch contracted with the Bureau of Indian Affairs to grade and drain 6.075 miles of the Pawnee Road, in Pawnee County, Oklahoma. One part of the work was the installation of a 156-inch diameter corrugated multiplate culvert pipe 74 feet in length. During the night of September 20-21, 1965, about three weeks after the culvert was in place and back filled, a severe rain storm occurred. The fill around the culvert pipe was washed out and the outlet end of the corrugated tube collapsed.

The contractor replaced the culvert and on October 14, 1965 (Exhibit 17, Findings of Fact) lodged his claim for the cost of the replacement with the Contracting Officer. In his release of claims, the contractor excepted a claim of \$6,520 for the culvert replacement. The Government has stipulated that this is a reasonable and fair amount (Tr. 78). The Contracting Officer's decision denying the claim was issued January 31, 1969, and a hearing was held on August 14, 1969. For the reasons given below we sustain the appeal.

The contract contained a provision designed to allocate the risk of loss prior to final acceptance.¹ The provision places the risk generally on the contractor, but then provides for the Government to take the loss under the following conditions: if the cause of the damage is (i) unforeseeable; (ii) beyond the control of the contractor; and, (iii) without his fault or negligence. Several examples are given of

¹ "7.11 *Contractor's Responsibility for Work*—Until the final acceptance of the work by the Contracting Officer, as evidenced in writing, as provided in article 5.6, the contractor shall be responsible for the work as provided in Clause 12, General Provisions, Standard Form 23A, and shall take every precaution against injury or damage to any part thereof by the action of the elements, or from any other cause, whether arising from the execution or from the nonexecution of the work. The contractor, at his own expense, shall rebuild, repair, restore, and make good all damages to any portion of the work, except those damages due to the unforeseeable causes beyond the control of and without the fault, or negligence of the contractor, including, but not restricted to, acts of God, or the public enemy, acts of the Government, in either its sovereign or contractual capacity, extraordinary action of the elements, unavoidable slides, and ordinary wear and tear on any section of the road opened to traffic by order of the Contracting Officer: Provided, that the contractor shall immediately notify the Contracting Officer, in writing, of such damages. The Contracting Officer shall ascertain the facts and compensate the contractor for the restoration of the damaged work when in his judgment the findings of fact justify such payment, and his findings of fact thereon shall be final and conclusive on the parties thereto, subject only to appeal as provided in Clause 6, 'Disputes,' General Provisions, S.F. 23A."

causes, such as acts of God, or the public enemy, acts of the Government, and extraordinary action of the elements. Since the listing is expressly not exhaustive, causes of damage can be as varied as the facts of the case permit. However, the listing does establish a broad standard of unusualness of the causative event.

In the present case the cause of damage is clear, a very heavy intense rain and consequent flooding. Here the example of "extraordinary action of the elements" sets the standard of unusualness. "Extraordinary action of the elements," however, is not to be measured in absolute terms. Whether the event fits the standard requires an evaluation of the event in terms of the structures involved. For example, for the purpose of allocating risk of loss under the contract provision, this rain could not be considered as "extraordinary action of the elements" with respect to a structure designed to withstand hurricane force rains and associated floods. Thus, to gauge whether the event in issue approached the standard of "extraordinary action of the elements," one must take into account not only the intensity and volume of the rain and flood themselves, but also the design characteristics of the destroyed structure.

Weather Bureau data (Exhibit E-19) indicate that 1.95 inches of rain fell in the area on September 19, 4.28 on September 20, and .25 on September 21. The rain of September 19, while not intense, would serve to wet the soil of the run-off area, decrease its capacity to absorb a rain, and increase the subsequent run-off (Tr. 80). On the 20th the station at Stillwater 2W registered 1.65 inches between 10-11 p.m., and 1.53 inches between 11-12 p.m. According to uncontradicted testimony the intense rain fell during the period of 10:30-11.00 and 11:00-11:30 (Tr. 81) although recorded hourly in the published Weather Bureau data.

On this evidence it can be reasonably inferred that the damaging rain possibly achieved an intensity in the range of 3.10 inches per hour. This figure is not surpassed in the rainfall records for September for Stillwater 2W from 1948-1968. It was approached in 1962 when 3.08 inches were recorded for one hour on September 3 (Exhibit E-16), and possibly approached on September 23, 1958, when 3.5 inches were recorded in two hours (Exhibit E-13). On the Soil Conservation Service curves (Exhibit D) a rain of 3.10 inches falls much closer to the 25-year frequency than to the 10-year frequency for the area.

According to the evidence, the culvert was designed to accommodate the flood from a 10-year average frequency maximum one-hour rainfall (Tr. 56, 171), which, according to Soil Conservation Service

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curves introduced by the Government (Exhibit D) would be approximated by 2.7 inches of rain. The culvert was sized to provide for the immediate draining of some of the flood waters and impounding the remaining waters against the upstream side of the road embankment to a depth of about four feet above the top of the culvert pipe (Tr. 44, 159). The impoundment area would hold about 350 acre feet of water (Tr. 159). The culvert design did not include a headwall. The inlet end was beveled and bolted to a concrete toe.

Culvert design was based on the runoff from the area to be served by the culvert calculated according to the Talbot formula, $A=C\sqrt{M^3}$, A being the cross section of the necessary waterway in square feet, M is the area drained in acres, and C is a contour coefficient. The Government used 2400 acres for M, and .4 for C. .4 represents a contour appearance somewhere between an uneven valley very wide as compared to length, and a rolling farm area where the length of the valley is three to four times the width (Appellant's Exhibit 2, p. 91). Calculated on this basis, A equals 137.2 square feet. The Talbot formula does not directly take into account intensity of rainfall or velocity of flow. These aspects are apparently considered in the empirical factor C.

The Talbot formula gives a waterway requirement only 5 square feet larger than the 132.7 square feet of the 156 inch diameter corrugated pipe, yet the design also included ponding to a depth of four feet over the pipe. *The Handbook of Steel Drainage and Highway Construction Products* (Appellant's Exhibit 2) points out that ponding can increase discharge, but it also appreciably reduces peak discharge on flashy streams. The suggestion is that if ponding is to be used, one should design for ponding and add additional structures such as debris interceptors, special inlets, etc. (Exhibit 2, p. 103). The book quotes the American Association of State Highways Officials' specifications to the effect that a culvert designed with a slight head should also be protected against undermining by means of adequate pavement, and apron and cutoff walls (Exhibit 2, p. 104).

The Government attempted to verify its application of the Talbot formula by also calculating runoff by the Burkli-Ziegler formula,

$Q=MRC\sqrt{\frac{S}{M}}$, where Q is the quantity of water reaching the culvert in cubic feet per second, M the area drained in acres (2,400), S the slope in feet per thousand (17), C a contour factor (.5), and R a rainfall rate per hour in inches (3) (Tr. 162-167). According to the record, Q equals 1,090 cubic feet per second (Tr. 167).

Appellant, in his post-hearing brief, states that the 156 inch pipe has a capacity, when flowing full, of 1,100 cfs, or the equivalent of 91 acre feet per hour. Assuming for the moment the reliability of the Government's acreage figure of 2,400, and the per hour rainfall, as recorded (ignoring the testimony as to a greater intensity than shown in the data), then, in two hours, 3.18 inches fell on 2,400 acres, for a total of 636 acre feet. In view of the fact that the ground was already wetted by earlier rain, a substantial portion of the intense rain must have run off. The mount is obviously in excess of the no head capacity of the pipe, based upon appellant's rate of flow.

The Government maintains that the pipe could pass 1,900 cfs., (Tr. 167) or approximately 157 acre feet per hour. Even at this rate, the culvert was marginally designed even for a 10-year rain of 2.7 inches per hour, which would equal 540 acre feet of precipitation over 2,400 acres. If the pipe were to discharge under no head, 70 percent of the rainfall would have to be held back in the soil. On the basis of 3.18 inches in two hours, 50 percent would have to be retained to pass the flood without a head.

These calculations add weight to the conclusion that can be drawn from the record, that the culvert design was the minimum allowable under the circumstances. It was designed, without question, to discharge peak floods under a head of up to four feet above the top of the 156-inch pipe, yet the design omitted the recommended additional structures for a culvert with ponding, apparently simply because it was a secondary road and not worth the extra cost (Tr. 243, 250-251).

It can be concluded, on the record, with respect to a culvert ostensibly designed for a 10-year average frequency rain and flood and which anticipated ponding but did not incorporate recommended structures for a ponding design, that a rain and flood approaching the 25-year average frequency can well be called "extraordinary action of the elements" and unforeseeable. *Cf. Allied Contractors, Inc. IBCA-265* (September 26, 1962), 69 I.D. 147, 1962 BCA par. 3501.

Mr. Ray W. Lynch, the contractor, in his briefs and at the hearing took the position that the design of the culvert was inadequate for even a ten-year rain and flood (Tr. 141). Consequently, he did not view the damaging rain as particularly "outstanding" (Tr. 140). We have no doubt that Mr. Lynch, during his life in Oklahoma, has seen several rains of equal or greater intensity and that such rains have occurred at all seasons of the year. In his personal experience this rain may not be outstanding, but on this record and in terms of the design of the culvert, keeping in mind the purpose of the Government contract provision, the rain and flood were unusual enough to satisfy the broad

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standard established in article 7.11. What may not be unusual in one man's experience may be quite unusual in another context.

The second issue is the Government's contention that the contractor was at fault, or negligent, in his construction of the culvert. Specifically, the Government alleges that the backfill around the culvert was not up to the applicable specifications, and not compacted properly (Government's Post-hearing brief, p. 8). In making such allegations the Government assumes the burden of proving them. *Honeywell, Inc.*, GSBGA-2608 (November 26, 1968), 68-2 BCA par 7386.

Backfilling and compaction requirements for this contract are contained in sections 103-2.4, 103-3.7, 106-3.4 and 106-3.5 of *Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects*, FP-61, January 1961, published by the United States Department of Commerce. Section 106-3.5 was modified by deleting all after the first sentence of the third paragraph of the section and substituting the following: "Sufficient equipment shall be operated to produce compaction satisfactory to the contracting officer over the entire area of each layer of material." The deleted and unapplicable language provided for density testing by specified methods. Summarized briefly, the cited provisions call for backfill of fine compactible soil placed in layers not over six inches in depth. Layers shall be moistened or dried as necessary to "near optimum moisture content" and thoroughly compacted with mechanical tampers. To the extent the top of the pipe is above the top of the trench, embankment material shall be placed in six inch layers for a width of at least twice the horizontal inside measurement of the pipe or twelve feet, whichever is less. For a distance equal to the horizontal width of the pipe and until one foot above the top of the pipe is reached, embankment consists of the same type of material as for backfill, and is compacted in the same manner. Outside of the prescribed width, the fill can include stones that would pass a three-inch sieve. This somewhat rougher fill is to be compacted according to section 106-3.5; which allows the use of rollers. Over one foot above the top of the pipe, embankment shall follow section 106 generally. Section 106-3.4 permits the use of rock in such embankment, provided compaction can be achieved without voids.

The only evidence adduced by the Government as proof that the contractor did not comply with the specifications was the observation of some rock and roots (Tr. 189-190) in the eroded stream bed immediately after the flood. A Government inspector had viewed the assembly of the multiplate, and the placing of two feet of backfill (Findings of Fact, par. 20), but apparently no Government inspector ever viewed or inspected any more of the work of installation of the culvert (Tr. 227-228).

Mr. Lynch, the contractor, maintained that the fill met the specification and was properly placed and compacted (Tr. 31-36, 71). Although he admitted that he was not always present at the backfilling operation he pointed to alternative sources for the observed rock and woody materials. As to rock, 200-300 tons were wasted on the upstream side of the culvert backfill and embankment, at the invitation of the Government, to form a protective rip rap (Tr. 104). Above one foot above the pipe he used a different fill (Tr. 76), as permitted by the specifications. A layer of rock in fill pointed out by the Government (Exhibit 10 of Findings of Fact, photo 2) is in road embankment (Tr. 74). Finally, a Government witness testified that he "believed" that the rocks in the fill were over the top of the pipe (Tr. 237). In view of the specifications and evidence, it cannot be concluded that the presence of the rocks found in the eroded creek bed came from the "fine compactible soil" backfill and that therefore the contractor was at fault or negligent. The specification permitted rock in some part of the backfill and in embankment. Rock was wasted on the upstream slope. Either could have been the source of the rock found in the eroded bed.

The situation is the same as to the roots found in the eroded creek bed. It is uncontradicted testimony that no trees were growing where the backfill material was obtained (Tr. 115). Tree roots and branches are part of the normal debris of a flood (Tr. 72). Both large and small trees are to be found just upstream of the culvert (Tr. 197). The Government has not carried its burden of proof that tree roots were included in the fill, in either the fine compactible soil backfill, or the rougher embankment fill.

It is concluded, therefore, that the damage was caused by an unforeseeable cause, to wit, a rain and flood within the range of being "extraordinary action of the elements" with respect to the culvert, beyond the control of, and without the fault or negligence of the contractor. In this case the risk of loss falls upon the Government under the applicable contract provision.

Conclusion

The appeal is sustained.

ROBERT L. FONNER, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

December 29, 1969

UNITED STATES

v.

CHAS. PFIZER & CO., INC.

A-31015

Decided December 29, 1969

Mining Claims: Contests—Mining Claims: Common Varieties of Minerals

In a Government contest brought against a group of limestone placer mining claims located after July 23, 1955, on the charge that a discovery of a valuable mineral deposit has not been made within the limits of any of the claims, the charge is properly construed as raising the issue of whether or not the material found on the claims is a common variety of stone where it is clear that the mining claimant understood this issue to be one of the grounds for the contest prior to the commencement of the contest hearing, where a prehearing conference was granted for the express purpose of clarifying any question as to the meaning of the charge stated in the complaint, and where the claimant was prepared to and did submit evidence at the hearing on the issue.

Mining Claims: Common Varieties of Minerals

The common varieties of stone excluded from mining location by the act of July 23, 1955, are not restricted only to building stone.

Mining Claims: Common Varieties of Minerals

Limestone which contains at least 95 percent of calcium carbonate and magnesium carbonate is a chemical or metallurgical grade limestone which remains locatable under the mining laws as an uncommon variety of stone.

Mining Claims: Common Varieties of Minerals

When limestone is claimed to be an uncommon variety because it is uniquely white in character, a finding to that effect cannot be made when it appears that there are varying degrees of whiteness and the evidence does not show which degree is unique.

Mining Claims: Common Varieties of Minerals

Limestone which is crushed to some degree in its natural state is not to be deemed an uncommon variety of stone only for that reason where no value is added to the material in its use and the crushed condition merely lessens the cost of mining the stone and enables the producer to make a greater profit.

Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals

Where a deposit of limestone consists of both an uncommon variety and a common variety, the validity of a mining claim located for the deposit after July 23, 1955, depends upon whether a valid discovery has been made

only with respect to the uncommon variety; the determination must be made without any consideration of any value that the common variety may have.

Rules of Practice: Hearings—Administrative Procedure Act: Hearings

Where a hearing examiner's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing and the ruling on each finding and conclusion is clear, there is no requirement that the examiner rule separately as to each of the proposed findings and conclusions individually.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Chas. Pfizer & Co., Inc., as successor to Anchor Minerals and Chemicals, Inc., formerly the Victorville Lime Rock Co., has appealed to the Secretary of the Interior from a decision dated May 29, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner rejecting its application, Los Angeles 0154245, for patent to the Largo Vista Nos. 1 through 6 placer mining claims in sec. 19, T. 4 N., R. 8 W., S.B.M., Angeles National Forest, California, and declaring the claims to be null and void.

The record shows that appellant's predecessor, Victorville Lime Rock Co., filed its application for patent to the Largo Vista Nos. 1 through 8 mining claims¹ on December 30, 1957, reciting therein, *inter alia*, that the claims were located on April 22, 1957, that the "entire deposit covered by the claims consists of limestone and is about 99 percent calcium carbonate," and that the "lime rock in these claims is of such high purity that it is very adaptable for use in the chemical and metallurgical industries." The claimant further stated that the physical nature of the material on the claims is such that it is not suitable for building stone or roadworking purposes, the material being too soft for cutting or polishing or for use as riprap or building material.

On October 3, 1961, at the request of the Forest Service, Department of Agriculture, a contest complaint was filed by the Government in the Los Angeles, California, land office in which it was charged that:

1. A discovery of a valuable mineral deposit has not been made within the limits of any of the unpatented mining claims listed above.
2. The land within the claims is non-mineral in character within the meaning of the mining laws.²

¹ On June 4, 1963, subsequent to the hearing, appellant filed an amended patent application, excluding therefrom and abandoning the Largo Vista Nos. 7 and 8 mining claims in accordance with an agreement reached at the hearing (see Tr. 12-14). As a consequence, the lands embraced in those claims are not involved in the present controversy.

² A third charge, relating to failure to perform assessment work on the Largo Vista Nos. 7 and 8 claims, became moot when the appellant abandoned those claims.

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A hearing was held on those charges at Los Angeles, California, on May 21, 22 and 23, 1963,³ at the outset of which the mining claimant requested, and was granted, a prehearing conference for the purpose of clarifying the issues in the proceeding (Tr. 5-43).

Appellant is engaged in the business of producing limestone products and, at the time of the hearing, operated two plants for that purpose at Victorville and at Lucerne Valley, California. The Largo Vista claims are 34 miles from appellant's Victorville plant and would be utilized in connection with the operations of that plant, which, at the time of the hearing, was supplied with material from the company's Victorville quarry, some 4½ miles from the plant (Tr. 266-268, 278-281, 306-309). In 1962 appellant's sales of limestone products reportedly amounted to approximately \$2,500,000,⁴ 80 percent of which sales were in the Los Angeles area (Tr. 291-292). Approximately 30 percent of appellant's product is sold to the floor tile industry, 30 percent for paint fillers and extenders, approximately 20 percent for use in the building industries (stucco, plaster, joint cement, putty and like items), while the remaining 20 percent is used in a variety of products ranging from asphalt filler to phonograph records (Tr. 282-286, 371-372; Ex. A).

The Government's efforts in this proceeding were directed primarily toward showing that the limestone deposits occurring on appellant's claims are common varieties of limestone which are not subject to location under the mining laws of the United States but are subject to disposition under the Materials Disposal Act of July 31, 1947, as amended, 30 U.S.C. secs. 601-604 (1964).⁵ The testimony of a witness for the Government was to the effect that the material on the claims

³ There is some question as to the exact dates on which the hearing was held. The title page of the hearing transcript shows that the hearing was held on May 21, 22, and 23, while the transcript itself indicates that the last day of the hearing was Friday, May 24, 1963 (Tr. 261-263).

⁴ According to testimony given at the hearing, appellant had total sales in excess of \$2,000,000 in 1962, of which approximately \$2,500,000 was attributable to limestone products and the remainder to talc (Tr. 291-292). While it is not clear whether one of those figures is in error or appellant sustained a \$500,000 loss in its talc operation during the year, it would appear from the general tenor of the testimony that \$2,500,000 was the intended figure for limestone sales.

⁵ Section 3 of the act of July 23, 1955, as amended, 30 U.S.C. § 611 (1964), provides in pertinent part that:

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *. 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *."

Although appellant's claims apparently embrace land included in mining claims located prior to July 23, 1955 (see Tr. 309-312), appellant does not assert rights based upon locations preceding those of April 22, 1957.

is a common type of calcium-magnesium carbonate rock, varying in calcium carbonate content from 54 to 88 percent, interspersed with lenses or pods of extraneous material, such as granitics or metamorphics, and that it would be practically impossible to mine material from the claims in such a manner as to separate the carbonate material from the granitics (see Tr. 86-93, 106-107, 111, 136-137, 230-231).

Testimony of witnesses for the mining claimant, on the other hand, purported to show that the calcium carbonate content of the material to be processed in its plants is not a critical factor but that the total carbonate content (calcium and magnesium), the whiteness of the material and the absence of impurities are important, that the material on the Largo Vista claims is distinctive because of its high total carbonate content and whiteness, differing only in its calcium content from the material appellant is currently processing, that it can be mixed with the material from appellant's Victorville quarry without any problems, that white material is available on all six of the contested claims, that the carbonates on the claims can be successfully removed by selective mining, and that mining of these claims will be made easier and less expensive by virtue of the proximity of the claims to the San Andreas Fault and the resulting breaking up of the material to the extent that it is almost pre-crushed (see Tr. 284, 298-299, 302-307, 325, 332-334, 349-350, 452-453, 483-484).

From the evidence developed at the hearing the hearing examiner found, in a decision dated March 18, 1964, that the limestone deposits on the Largo Vista claims lack the special properties required for the manufacture of cement, that little, if any, of the material on the claims qualifies as a metallurgical or chemical grade limestone, and that the deposits do not possess a distinct, special or economic value for use over and above the general run of such material. He then concluded that the deposits on the claims "are of widespread occurrence," that they "do not meet any of the requirements necessary to remove them from the 'common variety of materials,'" and that they therefore are not locatable under the mining laws of the United States.

In affirming the decision of the hearing examiner, the Office of Appeals and Hearings found, after observing that the Department had indicated that limestone may be classified as a "common variety" within the meaning of section 3 of the act of July 23, 1955, unless it has some distinct and special properties not generally found in limestone deposits, that, although the deposits on appellant's claims may have value in trade, manufacture, the sciences or mechanical arts, they do not possess a distinct, special economic value for such uses over and above the normal uses of the general run of limestone deposits. In view of the testimony given by the witnesses as to what

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they had observed, the Office of Appeals and Hearings attached no particular significance to the fact that the Government's mineral examiner may not have taken any mineral samples from the Largo Vista Nos. 2 and 4 claims, a point upon which appellant attempted to raise an issue in its appeal to the Director, Bureau of Land Management.⁶

At the outset of the hearing appellant challenged the sufficiency of the contest complaint to raise the issue of whether or not the material on the Largo Vista claims is a common variety of stone. Again, in its present appeal, appellant charges that the Department's regulations, which require that a contest complaint contain a statement in clear and concise language of the facts constituting the grounds of contest (43 CFR 1852.1-4(a)(4)) and which provide that any issue not raised, which could have been raised, by a private contestant shall be deemed to have been waived (43 CFR 1852.1-4(e)), were ignored in this proceeding. In support of its argument appellant cites the Bureau's Instruction Memo No. M-18 of November 1, 1962 (Ex. X), which states that:

* * * If the Government believes a mining claim to be void by reason of having been located for a common variety of a mineral enumerated in section 3, a contest proceeding would be the correct forum for a determination of that fact. The contest complaint should explicitly charge that the mineral deposit is a common variety within the purview of the law. The mining claimant will be afforded an opportunity to demonstrate the "property giving it distinct and special value."

Appellant also attacks generally the Bureau's conclusion that the mineral deposits on the Largo Vista claims are of a common variety of stone. "The Director," appellant asserts, "applied the use test, which is contrary to law, and ignored other parts of the common varieties regulation," and he "apparently overlooked and misquoted evidence, and ignored the chemical and physical properties of the deposits and the admitted values of such properties, and therefore of the mineral, in use in an established industry and market."

The question of the sufficiency of the contest complaint was extensively aired at the prehearing conference granted for the express purpose of resolving any question as to the meaning of the charges of the complaint (Tr. 17-35), and we find appellant's attempt to revive the issue at this time to be without merit.

⁶ We do not understand the basis for appellant's contention that no samples were taken on the Largo Vista No. 2. Exhibit 4 shows that two samples were taken on the claim and none on Largo Vista No. 1. Appellant has credited the two samples to Largo Vista No. 1.

Because of the appellant's subsequent abandonment of the Largo Vista No. 4, discussed later, and the inclusion of part of that claim in the amended location of the Largo Vista No. 3, which was sampled, the pertinence of the lack of sampling of the Largo Vista No. 4 is now largely moot.

Aside from the question whether the charges in the complaint were literally sufficient to include a charge that the mineral deposits are a common variety, we think it is sufficient to note, first, that the Bureau instruction quoted above was issued more than a year after the complaint was filed in this case.

Second, and more important, the record clearly establishes that appellant was fully aware of the "common varieties" issue well in advance of the prehearing conference, appellant having stated in a "Morton to Assume Supervisory Jurisdiction," which was filed in the office of the Secretary in February 1962 and later withdrawn, that:

* * * Victorville is informed and believes that the Forest Service has initiated the contest on the ground that the Victorville Limestone deposit is one of the "common varieties" of minerals within the meaning of Section 3 of P.L. 167 (30 U.S.C. 611), and was not subject to location as a mining claim on December 30, 1957.* * *

Obviously, appellant was fully cognizant that the issue of "common varieties" was raised and appellant was not prejudiced in any manner by the statement of the charges. It was not taken by surprise at the hearing and was fully prepared to and did submit evidence to show that the limestone on its claims was an uncommon variety. Consequently the contention now that the complaint was deficient in raising the common varieties issue has no merit.

Two basic substantive issues are raised by this appeal. The first is whether or not the Largo Vista claims have been shown to contain material which is locatable under the mining laws, *i.e.*, material which is not a common variety of stone. The second question, assuming the answer to the first to be in the affirmative, is whether the deposits on the claims constitute valuable deposits of such material within the scope of the mining laws, that is, whether they meet the test of discovery.

Although the hearing examiner's decision in this case turned upon the question of the locatability of the material on appellant's claims, a showing of marketability of the material is as indispensable, if appellant is to prevail, as the establishment of the fact that the material is not a common variety of stone.⁷ That is, if the material on the claims is not a common variety of stone, it must be shown that there is a present profitable market for the material. See *United States v. Coleman*,

⁷ While a showing of economic value is an indispensable element in demonstrating the validity of any mining claim, economic value, *per se*, is not determinative of what constitutes a common or uncommon variety of mineral. That is, a determination that a particular deposit consists of a common variety of mineral does not necessarily connote the absence of economic value, and proof that a mineral deposit can be mined and marketed at a profit does not, *ipso facto*, remove that deposit from the category of "common varieties." See *United States v. Mary A. Matthey*, 67 I.D. 63 (1960); *United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965); *United States v. Gene DeZan et al.*, A-30515 (July 1, 1968). If the mineral is a common variety, so far as its locatability after July 23, 1955, is concerned, its marketability is immaterial.

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390 U.S. 599 (1968); *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States v. Harold Ladd Pierce*, 75 I.D. 255 (1968); *United States v. Harold Ladd Pierce*, *id.* 270; *United States v. Warren E. Wurts and James E. Harmon*, 76 I.D. 6 (1969).

On the issue of common varieties, in attacking the decisions of the hearing examiner and of the Office of Appeals and Hearings, appellant contends that the term "common varieties" of "stone", as used in the 1955 act, was intended to mean common varieties of *building* stone and should not be construed to mean more. "Common stone which is not building stone and is not a valuable mineral deposit," appellant asserts, "has never been locatable under the mining laws." Inasmuch as it has not been alleged that the material on the Largo Vista claims was located or desired, or is suitable, for building stone purposes, appellant argues, it was error to hold it to be a "common variety" of "stone" within the meaning of the act. Assuming, nevertheless, that "stone", as used in the act, means more than building stone, appellant further argues, the material on the claims falls within the categories of stone expressly excluded from "common varieties" by the act because of properties giving it a distinct and special value.

It is interesting to note that appellant's contention that the 1955 act applies only to building stone is exactly opposite to the ruling by the United States Court of Appeals for the Ninth Circuit in *Coleman v. United States*, 363 F. 2d 190 (1966), that building stone could not *per se* be a "common variety" of stone under the 1955 act, a ruling that was subsequently reversed by the Supreme Court in *United States v. Coleman*, *supra*. The Supreme Court, however, did not go to the other extreme and hold that the 1955 act applies *only* to building stone. The court said only that the legislative history made it clear that the act "was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws * * *." 390 U.S. at 604. We do not believe that the generic term "stone" in the statute can be given a restricted meaning as the Ninth Circuit attempted and as appellant attempts here.

Turning then to the question as to what is a "common variety" of stone, we find that the statute does not affirmatively define the term but provides negatively that the term "does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *." (Fn. 5, *supra*.) The only clues to the meaning of this provision are to be found in the statements of the Congressional committees considering the legislation. The House Committee on Interior and Insular Affairs stated merely that this language "would exclude materials such as limestone, gyp-

sum, etc., commercially valuable because of 'distinct and special' properties." H.R. Rept. No. 730, 84th Cong., 1st Sess. 9 (1955). The Senate Committee on Interior and Insular Affairs stated more explicitly that the "language is intended to exclude from disposal under the Materials Act materials that are commercially valuable because of 'distinct and special' properties, such as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like." S. Rept. No. 554, 84th Cong., 1st Sess. 8 (1955).

The language used by the Senate Committee served as a basis for the Department's regulation implementing the statute, which provides that:

"Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. *Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties."* 43 CFR 3511.1 (b) ; Italics added.

Limestone is, without question, a mineral of very widespread occurrence. Approximately 15 percent of the United States, according to testimony given at the hearing, is underlain by limestone or carbonate rock, and about 70 percent of all crushed stone used in the United States is made from such materials (Tr. 128; Exs. 11, 13).⁸ The Department has held that limestone is included within the meaning of the term "stone," as it is used in the 1955 act, and that a deposit of limestone is a common variety of stone within the meaning of the act if the material found therein does not satisfy the criteria of the statute and the regulation for exclusion from the category of "common varieties." See, e.g., Solicitor's opinion M-36619 (Supp.) (October 5,

⁸ In a strict sense, the term "limestone" is used in reference to rock composed almost entirely of calcium carbonate, while material with 10 percent or more of magnesium carbonate present is called "magnesian" or "dolomitic" limestone, and material with a magnesium carbonate content approaching 45 percent and a calcium carbonate content around 55 percent is known as "dolomit." In a broader sense, the term "limestone" is used to denote the entire spectrum of carbonate rock ranging from theoretically pure calcite (calcium carbonate) to dolomite (Exs. 12, 13, 18). It was in the broader sense that witnesses for both parties used the term "limestone" in their testimony at the hearing (Tr. 128-136, 271-272, 440-441).

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1961); *United States v. E. M. Johnson et al.*, *supra*, fn. 7; *United States v. Harold Ladd Pierce*, *supra* (75 I.D. 255 and 270).

Witnesses for the contestant stated that the material found on the Largo Vista claims is not suitable for use in the manufacture of cement because of its high magnesium content (Tr. 137, 229-230), and appellant makes no claim that it could be utilized for that purpose (see Tr. 421-422). In fact, appellant attempted to distinguish the Largo Vista deposits from other limestone deposits in the vicinity of Victorville by testimony that most of the limestone found in that area is of the type used in making cement and is not suitable for appellant's use (Tr. 352-353).

With respect to the question of whether the material found on the claims is metallurgical or chemical grade limestone, the testimony of witnesses for the respective parties was conflicting, both in the conclusions reached by the witnesses and in the understanding of the meaning of the terms "metallurgical" and "chemical" grade limestone exhibited by the witnesses.

William L. Johnson, a mining engineer employed by the Forest Service, stated that the friability of the material would make its use in metallurgy difficult and that it was his understanding that the industry prefers a high calcium carbonate stone, *i.e.*, one containing at least 95 percent calcium carbonate (Tr. 138-140). He stated that the chemical industry also preferred a material containing 95 percent calcium carbonate or more and that uniformity of the material was one of the most important requirements (Tr. 141-144). He did not believe that it was possible to take high-quality material with any degree of uniformity from the claims (Tr. 87-93, 144).

Donald Carlisle, associate professor of geology at the University of California at Los Angeles, testified, on behalf of the contestant, that metallurgical practice requires either a high calcium limestone or a high magnesium limestone, essentially a dolomite, but that in any case the chemical composition must be consistent from one day to the next. Controlling the mining and blending the materials so as to assure that consistency, he said, "would be essentially impossible on the Largo Vista claims" (Tr. 230-231). He similarly expressed the opinion that there is no large amount of chemical grade limestone on the claims, or material that could be blended to meet chemical specification, within his understanding of the term "chemical grade limestone," *i.e.*, "grades of limestone which are superior to ordinary run of the mine limestone and can be used in industries which are uniquely chemical as opposed to industries, such as agriculture or road building where the chemical composition of the limestone is of lesser or of insignificant importance" (Tr. 231-236).

Although the witnesses for the Government agreed that the Largo Vista limestone deposits are composed of a common variety of limestone, both witnesses found some ambiguity in the terms which they were called upon to use in giving their opinions. Johnson stated that "metallurgical" or "chemical grade" limestone is "a difficult term to define" (Tr. 154). Carlisle stated that the "term chemical grade is not well-defined" (Tr. 234); and, in response to a question as to whether the term "chemical grade limestone" included, "in the common vernacular," calcium carbonates, magnesium carbonates and magnesiumian limestone, he said that "the term 'chemical grade limestone' is not in the common vernacular," that it "has sneaked into some of these laws and regulations by some route group that I don't understand," and that "high calcium limestone" is more commonly used (Tr. 246).

Appellant contended at the hearing, as it does now, that total carbonate content, which directly affects the amount of impurities present in rock, rather than calcium carbonate content alone, is determinative of whether or not a particular limestone deposit is chemical grade. Elmer A. Piercy, vice president and general manager of Anchor Minerals and Chemicals, Inc., testified that, in 85 to 90 percent of the cases, customers are looking for a high carbonate content in the material which they use and are not concerned with the calcium-magnesium ratio and that he would classify all of the assay samples described in the report which accompanied appellant's patent application (Ex. D) as a chemical grade limestone (Tr. 302-304, 322-325).

In support of its position, appellant submitted in evidence a copy of the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Riddell v. Victorville Lime Rock Co.*, 292 F. 2d 427 (1961) (Ex. B), a case in which appellant was a party and which involved the interpretation of the terms "metallurgical grade" and "chemical grade" limestone, as used in section 114(b)(4)(A) of the Internal Revenue Code of 1939, as amended by the act of October 20, 1951, 65 Stat. 497.

That statute provided, in pertinent part, for depletion allowances at the following rates:

"(i) in the case of * * * stone * * * marble * * * 5 per centum,

"(ii) in the case of * * * dolomite, magnesite, * * * calcium carbonates, and magnesium carbonates, 10 per centum,

"(iii) in the case of * * * metallurgical grade limestone, chemical grade limestone, * * * 15 per centum * * *"

The court found in the *Riddell* case, *supra* that the limestone there in question, which was from appellant's Victorville quarry, was a medium to coarse grained, crystalline, metamorphosed, friable lime-

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stone with an average calcium carbonate content of 99.30 percent and an average silica content of .46 percent, and that the calcium carbonate content of all limestone quarried by the taxpayer was never less than 98 percent. Although it vacated a district court decision in favor of the taxpayer and remanded the case for further proceedings, the court of appeals nevertheless sustained the district court's determination that the material at issue was chemical and metallurgical grade limestone, finding that the determination was "supported by substantial evidence."

Although appellant does not pretend that the limestone found on the Largo Vista claims has a calcium carbonate content comparable with that found by the court in *Riddell* to constitute chemical and metallurgical grade limestone, it points out in its present appeal, as it did at the hearing, that the paint and tile industries (appellant's principal markets) formerly used only high calcium limestone but that in recent years they have accepted high carbonate material without regard to its relative calcium-magnesium content (see Tr. 377-381). Appellant seemingly reasons that, since high carbonate material will now satisfy a market which formerly required a high calcium material of chemical grade, the high carbonate material must also be classified as chemical grade.

Although the terms "chemical grade limestone" and "metallurgical grade limestone" do not appear in the act of July 23, 1955, and they were not defined by the Senate committee using the terms, and have not been defined by this Department in its regulation, the terms have been judicially interpreted many times in connection with their use in the Internal Revenue Code of 1939. There, too, Congress did not define the terms but did state, through the Senate Finance Committee, that the terms were "intended to have their commonly understood commercial meanings." *Riddell v. Victorville Lime Rock Co.*, *supra*, 292 F. 2d at 432 9th Cir. (1961); *Wagner Quarries Co. v. United States*, 154 F. Supp. 655, 659 (N. D. Ohio 1957); *Erie Stone Co. v. United States*, 304 F. 2d 331, 334 (6th Cir. 1962); *Vulcan Materials Co. v. Sauber*, 306 F. 2d 65, 67 (7th Cir. 1962). We have no reason to believe that the Senate Committee on Interior and Insular Affairs used the terms in its report on the 1955 act in any different sense. We believe therefore that the interpretation of the terms in the revenue laws is persuasive of their meaning with respect to the 1955 act.

None of the cases that we have found holding limestone to be chemical or metallurgical grade limestone required it to contain 95 percent or more *calcium* carbonate. The courts were satisfied if the total car-

bonate content was 95 percent or higher. *Wagner Quarries Co. v. United States*, *supra*, *aff'd United States v. Wagner Quarries Co.*, 260 F. 2d 907 (6th Cir. 1958) (95 percent average carbonate content, with up to 11.2 percent magnesium carbonates); *Centropolis Crusher Co. v. Bookwalter*, 168 F. Supp. 33 (W. D. Mo. 1958), *aff'd Bookwalter v. Centropolis Crusher Co.*, 305 F. 2d 27 (8th Cir. 1962) (equivalent of 95 percent calcium carbonate, but not 95 percent calcium carbonate, required); *Ideal Cement Co. v. United States*, 263 F. Supp. 594 (D. Colo. 1966) (95.35 percent average carbonates).⁹

One issue which divided the courts was whether dolomite, which is specifically listed in category (ii), could also qualify as a chemical or metallurgical grade limestone in category (iii). Two circuits finally concluded that it could, *National Lime & Stone Co. v. United States*, 384 F. 2d 381 (6th Cir. 1967); *James River Hydrate and Supply Co. v. United States*, 337 F. 2d 277 (4th Cir. 1964). One circuit held to the contrary, *Vulcan Materials Co. v. Sauber*, *supra*. Dolomite, of course, by definition contains far below 95 percent calcium carbonate but a high grade dolomite contains over 95 percent in total carbonates. Thus in *National Lime* the dolomite contained 54-55 percent calcium carbonate and 45-44 percent magnesium carbonate, and in *James River* the dolomite was approximately 54 percent calcium carbonate and 44 percent magnesium carbonate. The *Vulcan* case involved a 55 percent calcium carbonate—43 percent magnesium carbonate dolomite, but rested on the proposition that "dolomite" is a more specific term than "limestone" and that the material in question consequently fell in category (ii) rather than category (iii).

With only the possible exception of the *Vulcan* case, therefore, the courts have held that a limestone averaging 95 percent or more total carbonates constituted a chemical or metallurgical grade limestone within the meaning of the tax laws.¹⁰ Since the rulings were based on the findings that such was the commonly understood commercial meaning of the terms "chemical grade" and "metallurgical grade" limestone, we are persuaded that the same meaning should be given to the Senate committee's understanding of what would constitute an uncommon variety of limestone. We hold, therefore, that limestone containing 95 percent or more calcium and magnesium carbonates is

⁹ The court in the *Ideal* case adverted to Treasury Regulations 118 (1939 Code), sec. 39.23(m)-5(b), which fixed at 95 percent by weight the minimum calcium carbonate and magnesium carbonate required to qualify limestone as chemical grade or metallurgical grade.

¹⁰ Of course, the limestone held to be of chemical and metallurgical grade in the *Riddell* case averaged 99.30 percent calcium carbonate but the court did not hold that a calcium carbonate content below that percentage or below 95 percent would not qualify.

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an uncommon variety of limestone which remains subject to location under the mining laws.

Other distinctive properties claimed by appellant for the limestone deposits in the Largo Vista claims are freedom from impurities, whiteness of the material, and the pre-crushed nature of the material.

Freedom from impurities seems to be nothing more than a corollary of high carbonate content and requires no other consideration.

As for whiteness of the material, it is not clear whether it is inseparably correlated with carbonate content or independent of it or partially related to it. That is, would a 99 percent calcium carbonate limestone necessarily be whiter than a 95 percent calcium carbonate limestone? Would a 99 percent calcium carbonate limestone be whiter than a 55-44 percent calcium carbonate-magnesium carbonate dolomite? It is possible for a lower total carbonate limestone to be whiter than a higher carbonate stone? An answer is necessary because it is not clear whether appellant is claiming that it has limestone on the Largo Vista claims of less than 95 percent total carbonate content which is uncommon because of its whiteness and therefore subject to location irrespective of whether it is a chemical or metallurgical grade limestone.

Piercy seemed to indicate that the color of the limestone is independent of its chemical composition (Tr. 380) and this is suggested also by other evidence. Thus Piercy testified, as was also found in the *Riddell* case, *supra*, that the limestone from appellant's Victorville quarry was graded No. 1, No. 2, No. 3, and No. 4 according to degree of whiteness (Tr. 321).¹¹ No. 1 is the purest white in color and is sold to the paint and other industries where color is extremely important. No. 2 is slightly stained and is used where color is less important. No. 3 has somewhat darker discolorations, and No. 4 is used for purposes where color is of no importance.

There is no specific evidence as to which grade or grades are considered to be uniquely white. We would suppose that grade No. 4, at least, would not be considered to be unique in color since it is used for products where color is of no importance. Yet it is interesting that all four grades were produced from a deposit found in the *Riddell* case to have an average of 99.30 percent calcium carbonate and never less than 98 percent. It was found in the *Riddell* case that 74 percent of the limestone was sold to the paint industry, which predominantly was interested in No. 1 grade, possibly No. 2, that 24 percent was sold for roofing granules, stucco, and plaster, a No. 2 grade use, and the remain-

¹¹ It appears that the four grades have the following brightness on the appellant's reflectometer scale: No. 1, 97 percent; No. 2, 90-97 percent; No. 3, 85-90 percent; No. 4, presumably below 85 percent (Tr. 105-106, 373).

ing 2 percent for foundry stone, presumably a No. 4 grade. Nothing was said in the *Riddell* case of No. 3 grade sales for rubber floor tile, oil well drilling, etc.

There is a significant indication in Piercy's testimony that only the No. 1 grade is considered to be unique in color. He had apparently testified in the *Riddell* case that the processing and sale of grades Nos. 2, 3, and 4 were "to a substantial extent, efforts to dispose of what would otherwise have been quarry waste either on a cost recovery or a possibility for a profit supplement endeavor" (Tr. 419). He explained this by saying that it was correct in 1952 or 1953, that when the Victorville plant was started in 1948 the intention was to quarry only No. 1 grade rock and sell it to the paint trade. By 1950 it became apparent that this would be a costly operation, apparently because of the large tonnages of other material that would have to be removed and wasted. The Nos. 2, 3, and 4 grades were then developed to recover costs. (Tr. 419.) Although Piercy denied that those grades are primarily by-products sold to recover some of the operating costs, his testimony shows that at least for the years from 1948 to 1952 or 1953, the No. 1 grade was the only one believed to be valuable and unique.

It is interesting to note that at the time of the hearing on the Largo Vista claims Piercy testified that 30 percent of appellant's production was going to the paint industry, which requires a No. 1 grade, that 20 percent was used in the building industry, which has a No. 2 grade requirement, that 30 percent was sold to the floor tile industry, which asks for a No. 3 grade, and that the remaining 20 percent was used where there is no color requirement so is presumably No. 4 (Tr. 371-375, 379-381). Presumably this included the production from Lucerne Valley so it is not apparent whether there had been any change in the proportions of production from the Victorville quarry as to the four grades.

Now what is the evidence as to whiteness of the limestone on the Largo Vista claims? Johnson testified that the Largo Vista No. 5 had the whitest material, practically a pure dolomite (Tr. 92-93), but he expressed the opinion that it was practically or economically impossible to come up with other than a No. 4 grade from the claims (Tr. 106). Carlisle reported that instrumental whiteness tests had not been made, only comparative visual estimates by him with the material from the Victorville quarry. He said the material on the Largo Vista No. 5 was of the same order of whiteness as Victorville, that perhaps $\frac{1}{10}$ of the largest deposit on the claims (Block A, 6,800,000 tons, on Largo Vista Nos. 1, 2, 3, and 4) and $\frac{1}{10}$ of the next largest deposit (Block B, 700,000 tons, on Largo Vista Nos. 2 and 3) would compare physically with Victorville, including color. He said that an estimated $1\frac{1}{3}$

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million tons was "particularly white" but that the amount of "clean white limestone" in comparison with several dozen alternative sources was "small," and that highly selective mining would be required to produce "exceptionally white material." (Ex. 18, pp. 9-18; Tr. 252-253, 257-258). None of the Carlisle's testimony was in terms of grades, *i.e.*, No. 1, 2, etc.

Piercy gave no detailed testimony concerning the nature of the deposits on the claims. He merely said in general terms that the "white material" needed by appellant was available from the claims and that the "high white color" was a special property of the deposits (Tr. 332, 349). However, he testified that 2,500 tons of material had been removed from the claims and sold, the material being graded as No. 2 and some as No. 3 (Tr. 415, 417).

Appellant's witness Russell Wood, a consulting engineer, said that the whiteness of the Largo Vista deposits gave them special value (Tr. 486); however, he also said he was not qualified to classify limestone as to grade (Tr. 452). He said that a "large percentage" of the deposits was "a very large white rock" in comparison with other limestone deposits that he had seen, but only on the basis of a vague recollection could he say that the color compared "quite well" with the Victorville material (Tr. 452).

From this evidence we can draw only the conclusion that while there is white material on the Largo Vista claims, we know little of the degree or grade of whiteness and, particularly, whether such whiteness as does exist is unique or special in relation to other limestone deposits. And, again, we do not know whether whiteness is claimed as a property which would make limestone on the claims having a total carbonate content of less than 95 percent an uncommon variety. We conclude that the evidence in the record on whiteness as a special property is insufficient for a conclusion on this point.

We next consider the contention that the limestone on the claims is unique because, by virtue of its proximity to the San Andreas fault, it exists in a crushed state. Piercy testified that this natural state of the material made it easy to mine and that it would eliminate the necessity for a primary crushing on the claims, thus saving production costs. The Victorville material undergoes two crushing stages at the quarry (Tr. 333-334, 338-339).

This claimed special property is one that would presumably inhere in all the limestone on the claims, whether it be of chemical or metallurgical grade or not. Again, however, as in the case of color, it is not clear whether appellant is contending that limestone on the claims

of less than 95 percent total carbonate content is locatable as an uncommon variety because of this property alone.

Assuming that the natural crushed state of the limestone on the claims is a special property not found in the usual limestone deposit, the question is presented whether this property gives the limestone a distinct and special value so as to qualify it as an uncommon variety of stone. The only value claimed is that it will lessen the cost of production to the extent that it saves the cost of primary crushing at the claims. The limestone must still be crushed at the plant and further ground and processed as its ultimate uses demand.

In the recent case of *McClarty v. Secretary of the Interior*, 408 F. 2d 907 (9th Cir. 1969), the court suggested by way of dictum that the special value of a building stone which was naturally fractured into regular shapes and forms suitable for laying without further fabrication might be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price of the stone remained competitive with other stone. The court did not elaborate on its suggestion.

Whether the same reasoning might be applied to the situation here we do not know, but we are not, at least at this time, disposed to accept it as being in accord with the intent of the 1955 act. It is not likely that any two limestone deposits will be identical in their physical nature. One may occur in a solid mass, another in a series of beds. One may have a few beds of rather substantial and uniform thicknesses with nominal interspersions of extraneous matter; another may have numerous beds of erratic shapes and sizes with numerous irregular or substantial intrusions of extraneous matter. The beds of different deposits may dip at various angles. All these factors may affect the ease and therefore the cost of mining so that one producer's costs may be less than another's. However, the end-product would be exactly the same; it would be sold for the same uses; and so far as the user is concerned would have the same value. We do not believe that Congress intended that an ordinary sand, gravel, stone, etc., which is indistinguishable from other ordinary sand, gravel, stone, etc. should be subject to mining location merely because a deposit of it can be mined more cheaply than other deposits. In the instant case we cannot accept the conclusion that a No. 4 grade limestone from the Largo Vista claims would have a special and distinct value over a No. 4 limestone from the Victorville quarry merely because the latter requires more crushing and is therefore more costly to mine.¹²

¹² As noted earlier Johnson thought that the broken nature of the material impaired its metallurgical use (Tr. 138).

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To summarize at this point our conclusions with respect to the unique properties of the limestone deposits on the Largo Vista claims which are claimed to make them uncommon varieties of limestone still subject to mining location, we agree that limestone with a total carbonate content of 95 percent or more is a chemical or metallurgical grade limestone which is an uncommon variety. We cannot conclude whether the whiteness of the material on the claims is a unique property. And we reject the contention that the naturally crushed character of the stone is a unique property which gives the material a special and distinct value and makes it an uncommon variety.

We turn now to a consideration of the second principal issue, namely, whether a valid discovery of the uncommon variety of limestone has been made on each Largo Vista claim. At the outset changes in the claims made by the appellant since the taking of this appeal must be noted. With its brief filed on July 31, 1968, appellant filed copies of amended locations of Largo Vista Nos. 3 and 5 dated July 26, 1968. Prior to that time, the two claims comprised two end-to-end rectangles running in an east-west direction. The east end line of the Largo Vista No. 3 abutted on the west side line of the Largo Vista No. 2 claim. The latter claim and the Largo Vista No. 1 comprised side-by-side parallel rectangles running north and south. By the amendment of July 26, 1968, the Largo Vista No. 3 was turned 90 degrees so that it now lies parallel with the Largo Vista Nos. 1 and 2, the east side line of the Largo Vista No. 3 being coterminous with the west side line of the Largo Vista No. 2. The Largo Vista No. 5 has simply been shifted eastward so that its east end line now abuts the new west side line of the amended Largo Vista No. 3.

The effect of the amendments is that the east half of the amended Largo Vista No. 5 now embraces land formerly in the west half of the old Largo Vista No. 3. The west half of the old Largo Vista No. 5 is now excluded from the amended claim. The east half of the former Largo Vista No. 3 remains in the amended claim. However, there have been added 5 acres to the north formerly in the Largo Vista No. 4 and 5 acres to the south previously not included in any claim. The appellant has now abandoned the Largo Vista Nos. 4 and 6, leaving only four claims in issue, the unchanged Largo Vista Nos. 1 and 2 and the amended Largo Vista Nos. 3 and 5. Further references in this decision to the latter two claims are to them as amended.

So far as the evidence in the case is concerned, the amendments have had the following effects: Carlisle showed a portion of Block A as lying in the southeast corner of Largo Vista No. 4 (Ex. 19). That

portion is now included in the amended Largo Vista No. 3. Carlisle showed a portion of Block B as lying south of and outside of former Largo Vista No. 3. That portion is now included in amended Largo Vista No. 3. As far as sampling on the claims is concerned, sample 248 taken by Johnson and sample 19 taken by Wood, both in the west half of former Largo Vista No. 3, are now located in the east half of amended Largo Vista No. 5. This is the extent of the significant changes effected by the amendments.

In determining whether a discovery has been made on each of the four remaining claims, the critical consideration is whether a discovery has been made only of the *uncommon* variety of limestone on the claim. No consideration can be given to the value of the *common* variety of limestone that may exist on the claim even though that limestone may be marketable at a profit today. This is self-evident for since July 23, 1955, only an uncommon variety of limestone has been subject to mining location and it must stand on its own feet so far as discovery is concerned, unaided by its association with a common variety. It cannot ride piggy-back, as it were, on the shoulders of a common variety. See *United States v. Frank Melluzzo et al.*, 70 I.D. 184 (1963); cf. *United States v. Mt. Pinos Development Corp.*, 75 I.D. 320 (1968). Thus the common limestone on the claims must be treated like the other worthless rock on the claims in evaluating whether a discovery has been made of the uncommon limestone.

To put it more concretely, suppose that a 99 percent carbonate rock is so evenly intermingled with a No. 4 80 percent carbonate rock that in order to obtain one ton of the 99 percent rock it is necessary to mine two tons of the intermingled material. Suppose that mining costs are \$3 per ton so that it costs \$6 to extract the 2 tons of mixed material. Suppose further that the 99 percent rock sells for \$5.50 per ton and the No. 4 rock at \$1.50 per ton. Obviously it would be unprofitable to spend \$6 to produce \$5.50 worth of 99 percent rock, whereas it would be profitable if the \$1.50 return for the No. 4 material could be counted in. This is plainly impermissible, however, for it is tantamount to saying that the discovery of a locatable mineral, insufficient in itself, can be perfected by a discovery of a nonlocatable mineral on the claim.¹³ Thus, in our example, the intermingled No. 4 rock must be treated as if it were a granite or other worthless rock. To hold

¹³ In the *Mt. Pinos* case, the claimant attempted to establish the validity of a common variety sand and gravel claim on the basis that slight gold values, unprofitable to mine by themselves, could be profitably mined in conjunction with the extraction and sale of the sand and gravel in which the gold was found. The Department held that the gold would have to stand on its own and that on that basis there was an insufficient discovery of the gold.

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otherwise would be to permit the easy frustration of the Congressional intent to bar location of common varieties after July 23, 1955.

With this prescription in mind, what does the evidence show as to the existence of 95 percent or better carbonate limestone on the claims and as to its marketability at a profit? Carlisle mapped 3 blocks of limestone within the limits of the claims. His Block A, noted earlier as containing 6,800,000 tons, lies within the Largo Vista Nos. 1, 2, and 3. His Block B, also noted earlier as containing 700,000 tons, lies approximately half within Largo Vista No. 2 and half in Largo Vista No. 3. Block D, estimated as containing 600,000 tons, lies within Largo Vista No. 5. Carlisle took 6 samples, at least 3 from Blocks A and B, but while he had analyses of 4 of the samples at the hearing they were not introduced in evidence or explained (Tr. 237-240).

Johnson took 2 samples from the Largo Vista No. 2, one from the Largo Vista No. 3, and 3 from the Largo Vista No. 5, all appearing to be from Blocks A, B, and D (Ex. 4). All but one sample from the Largo Vista No. 2 and one from Largo Vista No. 5 showed total carbonates in excess of 98 percent (Ex. 7 and 8). The one exception from Largo Vista No. 5 (sample 248) showed 86.56 percent, and the one from the Largo Vista No. 2 (sample 161) showed 88.14 percent. The last sample has special significance. All the other samples were taken in 1958 in cuts pointed out by representatives of appellant. The samples were taken only of carbonate material believed to be usable (Tr. 83-84, 88, 97-100). Sample 161, however, which was taken in 1963 from Block A, was taken by chipping a piece of material at precise 5-foot intervals over a horizontal distance of at least 100 feet (Tr. 100-101, 198-199). This sample, then, would appear to be more representative of the material on the claims than the other samples which were of selected carbonate rock.

Wood took 12 samples from limestone outcrops on the 4 claims (Ex. G). None was a thorough channel sample but he made no effort to pick a darker or lighter rock (Tr. 477-479). Eight of the samples showed in excess of 95 percent total carbonates; 4 showed less. They broke down as follows: All 3 samples from the Largo Vista No. 1 and 4 of the 5 samples from the Largo Vista No. 2 showed over 95 percent; the one showed 93.9 percent. Both samples from the Largo Vista No. 3 showed less than 95 percent (92.2 and 94.8). One of the 2 samples from the Largo Vista No. 5 showed 95.9 percent, the other 91.5 percent (Ex. H).

An exhibit attached to appellant's application purported to show 8 samples from the original 8 claims each having a total carbonate

content in excess of 96 percent (Ex. D; Tr. 403). However, the exhibit was convincingly discredited as being exactly the same as exhibits attached to 5 other patent applications by appellant (Tr. 404-411).¹⁴

Of the total of 18 samples taken by Johnson and Wood from the 4 claims remaining in issue, 6 showed total carbonates below 95 percent. The 3 samples taken by them from Block D in Largo Vista No. 5 and the 3 taken by Wood (Johnson took none) from Largo Vista No. 1 showed in excess of 95 percent total carbonates. Of the remaining 12 samples taken by both from the Largo Vista Nos. 2, 3, and 5 (outside Block D), one-half were below 95 percent in total carbonates. The sampling shows, we believe, that chemical or metallurgical grade limestone does not occur uniformly and consistently throughout the claims remaining in issue.

There is other evidence as to the consistency of the deposit on the claims. Johnson testified that the limestone occurred in bands or lenses of carbonate material, varying in chemical-physical composition from one lense to another within an arm span, within granitic and metamorphic rock types (Tr. 86-88). He said that, except for Block D in the Largo Vista No. 5, a clean carbonate material such as represented by the assays of his samples could not be mined (Tr. 104-105). Johnson concluded that the type of material on the claims "is of practically no significance from the standpoint of mining carbonate material, carbonate rock. It's dirty. It's so intermixed that it is almost impossible to come up with what you would call a carbonate product. In my estimation, it is just no good, in so many words" (Tr. 111).

Carlisle reported that the lower 200 feet of Block A is "almost free of non-carbonate inclusions," that it is overlain by a zone 50-80 feet thick in which non-carbonate inclusions are "variously abundant," and that another zone of limestone above this may be as much as 100 feet thick. He referred to a cut in rather poor quality mixed limestone and non-carbonate rock and indicated that grey-white limestone was typical of Block A (Ex. 18, p. 10-12). He did not describe Block B except to refer to a cut as showing "very sheared, iron stained, dirty limestone" (Ex. 18, p. 13). He said that a cut in Block D exposed material most closely approximating that mined in the Victorville quarry and that some of the material would have to be separated from non-carbonate inclusions (Ex. 18, pp. 14-15).

Wood did not give any detailed testimony as to the nature of the occurrences of limestone. He gave an estimate that there were 14,000,000 tons of carbonate rock on the Largo Vista Nos. 1 to 6 but that only 5,800,000 tons were minable. The reasons for the full tonnage

¹⁴ The patent application was also admitted to be in error in stating that the entire deposit on the claims is about 99 percent *calcium* carbonate (Tr. 412-413).

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not being minable were that the maintenance of a proper slope in the quarry face would not permit the removal of all the limestone and that there are inclusions within the limestone which would have to be cast aside (Tr. 450-451).

This evidence, together with the evidence on the sampling and Carlisle's estimate that there is a total amount of 8,100,000 tons of limestone, 1,333,000 tons of which are "particularly white," in Blocks A, B, and D, do not permit a proper conclusion to be drawn at this time as to the extent and nature of the occurrence of metallurgical or chemical grade limestone, or of uniquely white limestone, if such there is, of less than that grade, in the 4 claims at issue. It is therefore not possible to decide at this time whether the uncommon limestone on the claims is marketable at a profit and thus meets the test of discovery.

Piercy testified generally as to the selective mining of limestone to remove undesirable intrusions and to upgrade the material, adverting to the processes employed at the Victorville quarry (Tr. 298-300, 353-354). He said the same procedures would be followed on the Largo Vista claims (Tr. 337). This testimony does not militate against the conclusion just expressed because of its generalized nature. Furthermore, the available evidence does not show that the Largo Vista deposits are comparable to the Victorville deposit. As we have noted, the latter is almost pure calcium carbonate. And, although Piercy testified that at Victorville appellant was removing 100 tons of waste for 100 tons of limestone, the waste was not in the limestone; there was only one or two percent of intrusives in the limestone (Tr. 382). Such purity of quality is not indicated for the Largo Vista deposits.

To conclude on the issue of discovery we believe that there is insufficient evidence in the record upon which to base a finding as to whether or not the chemical or metallurgical grade limestone on the 4 claims in issue can be marketed at a profit. The evidence is deficient as to the amount and the nature of occurrence of this grade of limestone in the claims and as to the costs of mining it in the state in which it exists on the claims.

The evidence is also insufficient for determining what degree of whiteness is claimed to be a unique property of the limestone and whether this unique property is claimed for any limestone of less than chemical or metallurgical grade on the claims. *A fortiori*, evidence is lacking as to whether limestone in that limited category is marketable at a profit.

The case must therefore be remanded for a further hearing to develop additional evidence on these points as to the limestone *on each*

claim. It is not sufficient for evidence to be developed simply for the 4 claims as a unit.

One additional point merits comment. Appellant contends that the hearing examiner erred in failing to rule upon each of appellant's proposed findings of fact and that his failure to comply with departmental regulation 43 CFR 1852.3-8(b)¹⁵ requires that his decision be set aside. The Department has held, however, that where a hearing examiner's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing, and the ruling on each finding and conclusion is clear, it is not necessary that the examiner rule separately upon each of the individual findings and conclusions. *United States v. Joe Driear*, 70 I.D. 10 (1963). Such is the case here, the hearing examiner having expressly found that:

The contestee has within the time allowed submitted proposed findings of fact and conclusions of law consisting of 31 typed pages. Pages 1 through 28 consist of the history of the mining claims and excerpts from the transcript of testimony, most of which is uncontroverted and a portion of which appears elsewhere in this decision. Of the six proposed conclusions of law submitted by the contestee, none are acceptable as submitted for the reason set forth in the decision. A portion of the proposed conclusions submitted appear in the decision.

The factual findings of the hearing examiner, as well as his conclusions of law and the basis therefor, were set forth in the decision, and, in effect, the hearing examiner held most of appellant's proposed findings of fact to be immaterial in determining the validity of the claims. If there was error in the decision, it lay in the substance of the rulings, not in the hearing examiner's failure to rule upon appellant's proposed findings and conclusions.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the case is remanded for a further hearing in accordance with this decision and for resubmission to this office for a final decision at the conclusion of the hearing.

ERNEST F. HOM,
Assistant Solicitor.

¹⁵ The regulation provides that :

"As promptly as possible after the time allowed for presenting proposed findings and conclusions, the examiner shall make findings of fact and conclusions of law (unless waiver has been stipulated), giving the reasons therefor, upon all the material issues of fact, law, or discretion presented on the record. The examiner may adopt the findings of fact and conclusions of law proposed by one or more of the parties if they are correct. He must rule upon each proposed finding and conclusion submitted by the parties and such ruling shall be shown in the record. The examiner will render a written decision in the case which shall become a part of the record and shall include a statement of his findings and conclusions, as well as the reasons or basis therefor, and his rulings upon the findings and conclusions proposed by the parties if such rulings do not appear elsewhere in the record. * * *"

December 10, 1969

CLASSIFICATION OF PERSONS AS ILLEGITIMATE FOR PURPOSES OF EXCLUSION FROM TRIBAL MEMBERSHIP REPUGNANT TO CIVIL RIGHTS ACT OF 1968 AND THEREFORE VOID*

Indian Tribes: Enrollment—Indian Tribes: Membership—Indians: Civil Rights—Indians: Tribal Enrollment—Statutes—Act of April 11, 1968

Where a tribal membership classification of the Jicarilla Apache constitution resulted in excluding illegitimate persons from membership or denied right of such persons to claim the Jicarilla Apache blood of their acknowledged or putative father, such classification was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was therefore repugnant to the equal protection clause of section 202, subsection (8), of the Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. sec. 1302 and void and of no effect.

M-36793

December 10, 1969

TO: SECRETARY OF THE INTERIOR.

SUBJECT: LEGALITY OF PROVISIONS OF REVISED CONSTITUTION OF JICARILLA APACHE TRIBE WHICH WOULD PRECLUDE ILLEGITIMATE CHILDREN OF TRIBAL MEMBERS FROM CLAIMING, PROVING, OR INCLUDING JICARILLA APACHE INDIAN BLOOD DERIVED FROM MOTHER OR PUTATIVE OR ACKNOWLEDGED FATHER IN QUALIFYING FOR TRIBAL MEMBERSHIP.

By letter of February 13 the Under Secretary approved, with the exception of the second sentence of section 2 of article III, a revised constitution of the Jicarilla Apache Tribe. Approval of sections 1 and 2 of article III was conditioned upon the tribe's taking no action on enrollment or adoption applications involving illegitimate children of tribal members pending a decision on the legality of treating as a class for purposes of exclusion, as these provisions do, the illegitimate children of tribal members. Our opinion in this regard was requested.

The pertinent provisions (critical portions herein *italics*) of article III of the Revised Constitution are as follows:

Section 1. Membership in the Jicarilla Apache Tribe shall extend to the following persons provided they do not renounce such membership or join another tribe:

* * * * *

(b). All persons of three-eighths or more Jicarilla Apache Indian blood *born in legal wedlock* from and after December 15, 1968, whose mother or father is a member of the Jicarilla Apache Tribe.

*Not in Chronological order.

Section 2. Membership in the Jicarilla Apache Tribe may be granted by a three-fourths majority vote of the whole tribal council to any person of three-eighths or more Jicarilla Indian blood who is not affiliated with another tribe. Persons *born out of wedlock*, from and after December 15, 1968, seeking or granted membership under this section shall be *conclusively deemed* to have no greater quantum of Jicarilla Apache Indian blood than one-half that amount shown for his or her mother on the official tribal membership roll. (Italics added.)

Thus, person possessing the requisite quantum of Jicarilla Apache blood whose parents were not wed are accorded a status inferior to that of other persons in other respects of the same class.

Until April of 1968 such action by a tribe was unlikely to be questioned as their acts in dealing with those under their jurisdiction was held not to be subject to restraints of the Federal constitution.¹ See *Talton v. Mayes*, 163 U.S. 376 (1896); *Martinez v. Southern Ute Tribe of Southern Ute Res.*, 249 F. 2d 915 (10th Cir. 1957); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (10th Cir. 1959); *United States v. Seneca Nation of New York Indians*, 274 F. 946 (W.D.N.Y. 1921); *Glover v. United States*, 219 F. Supp. 19 (D. Mont. 1963); *United States v. Blackfeet Tribal Court*, 244 F. Supp. 474 (D. Mont. 1965); *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968); *Spotted Eagle v. Blackfeet Tribe*, 301 F. Supp. 85 (D. Mont. 1969). That situation was, however, drastically altered by the Act of April 11, 1968, 82 Stat. 77, commonly known as the Civil Rights Act of 1968. Included in that act as section 202 are the provisions popularly called the Indian Bill of Rights. As codified in 25 U.S.C. sec. 1302 (Supp. IV, 1965-68), section 202 reads in pertinent part as follows:

§ 1302 Constitutional Rights.

No Indian tribe in exercising powers of self-government shall—

* * * * *

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

The question thus raised is whether the denial of or exclusion from membership in the tribe of persons born out of legal wedlock is a proper exclusionary classification under the equal protection clause of the Civil Rights Act of 1968. In my opinion it is not.

The purpose to be attained in excluding illegitimate issue of tribal members is not stated in the constitution. It appears, however, from the nature of the provision, and we are led to believe from communication with members of the tribal council, that the purpose is to deter sexual promiscuity. Whether classification of persons on the basis of

¹ But see *Colliflower v. Garland*, 342 F. 2d 369 (9th Cir. 1965).

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the marital status of their parents is a rational exercise of governmental authority in achieving that purpose in view of other fundamental rights denied by such classification is the crux of the problem.

It appears evident from the number and tenor of appeals from denials of tribal membership that membership in an Indian tribe is cherished no less by those involved than is that of American citizenship. Tribal membership is as fundamental to Indians as American citizenship is to Americans generally. To an Indian membership in an Indian tribe corresponds to that of citizenship rather than to membership in an organization, fraternity, class, or group.² In early dealings with Indian tribes, members were, indeed, referred to as citizens of those tribes.³ Such designation is more closely correlated with the designation of tribes as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641 (1890). Membership of non-Indians in the past as "naturalized citizens" of Indian tribes (see footnote 3, *supra*) reflects the political nature of Indian tribes; however, recognition given Indians and Indian tribes by the United States Government is in essence a recognition of race.⁴ Significance has been attached to the degree of Indian blood.⁵ We do not doubt that a tribe may establish a minimum blood quantum a person must possess in order to qualify for tribal membership. Such classification is reasonable in that it would preserve what is inherently essential to the terms Indian and Indian tribe—Indian blood.

We are not unaware of the cases holding that Indian tribes have been recognized as having complete authority to determine all questions of membership.⁶ Such authority is now, however, tempered by

² See 3 Am. Jur. 2d § 115 *Citizenship*: * * * "A 'citizen' in the popular and appropriate sense of the term, is one who, by birth, naturalization, or otherwise, is a member of an independent political society, called a state, kingdom, or empire, and as such subject to its laws and entitled to its protection in all his rights incident to that relation." * * *

³ See, e.g., Act of June 23, 1898, 30 Stat. 495, 502 ("Cherokee * * * lawfully admitted to citizenship by the tribal authorities, * * *"); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906) (Rights of non-Indians "naturalized citizens" of Cherokee Tribe); *Roff v. Burney*, 168 U.S. 218 (1897) (withdrawal by Chickasaw legislature of citizenship of non-Indians in Chickasaw Nation).

⁴ See purposes for Indian Reorganization Act stated in Sen. Rept. No. 1080, 73d Cong., 2d Sess.

⁵ See *Sully v. United States*, 195 F. 113, 129 (1912), where the court concluded that persons were " * * * of sufficient Indian blood to substantially handicap them in the struggle for existence. * * * they were and are of the class and of the persons that it was intended to include in the provisions of the treaty and statutes * * *"

⁶ See *Federal Indian Law*, United States Department of Interior (1958), pp. 413-423.

the requirement of equal protection. Where it was necessary in the past that the Federal Government step in to insure equal protection⁷ particularly in the distribution of tribal assets⁸ the requirement is now on the tribe itself to do so.

Illegitimate children of tribal members making application for tribal membership, even though living off the reservation, where such application on its face presents a claim of qualifying for such membership are "persons within its [the tribe's] jurisdiction," at least for purposes of the exercise of tribal authority to determine membership, and are afforded the protection of the provisions of section 202, *supra*. See *Dodge v. Nakai*, 298 F. Supp. 17, 24 (D. Ariz. 1968).

Denial of rights of illegitimate persons to membership is not a rational exercise of governmental power in the deterrence of illicit conduct. See *Levy v. Louisiana*, 391 U.S. 68 (1968). Nor would it be more acceptable were the purpose the deterrence of persons from having children in order to collect an additional share in the distribution of tribal assets. See *Glonn v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968). There is no substantial basis for support of a premise that exclusion of illegitimate persons from tribal membership would deter sexual promiscuity. And even though the expectation of its effectiveness were high, it is improbable that such an exclusion would be sanctioned by the courts, particularly in view of the fundamental right of membership involved. There are other means of combating illicit conduct available to the tribe in the exercise of its police powers.

Where, as here, a membership classification is made not based upon an essential requirement of an Indian tribe, serves no rational purpose, and abrogates other fundamental rights, that classification must be and is considered repugnant to the equal protection clause of section 202, subsection (8) of the Civil Rights Act of 1968, *supra*, and therefore void and of no effect.

A recognition of the substantive right of illegitimate children of tribal members to qualify for membership in the tribe necessarily includes the requirement that the illegitimate child must bear the procedural burden of proving the degree of blood claimed from the acknowledged or putative father. In providing procedures for such proof, it is necessary to keep in mind that the provisions of the due process clause of the tribal constitution as well as the Civil Rights Act of 1968,

⁷ See Sen. Rep. 377, 53d Cong., 2d Sess.: "* * * In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection, and for the security of life, liberty, and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust."

⁸ See *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); 25 U.S.C. § 163; Op. Sol. M-27759, Jan. 22, 1935.

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supra, must be complied with. *Dodge v. Nakai*, 298 F. Supp. 26, 29 (D. Ariz. 1969). In this regard, whether procedure is provided by ordinance enacted pursuant to article III, section 3, or by amendment of article III, section 2, we would see no denial of equal protection or due process were the tribe to establish as a *rebuttable* presumption that an illegitimate child is deemed to possess no greater quantum of Jicarilla Apache blood than one-half of that shown on the official tribal membership roll for his or her mother and, further, permitted the presumption to be rebutted either by oath or affirmation of the father or by determination of paternity by a court of competent jurisdiction.

In view of the foregoing, the tribe should be advised: first, that the second sentence of section 2 of article III from which approval was withheld is now disapproved; second, that the phrase "in legal wedlock" as employed in section 1, subsection (b) of article III is void as being repugnant to the equal protection provisions of section 202(8) of the act of April 11, 1968, 82 Stat. 77.

RAYMOND C. COULTER,
Deputy Solicitor.

UPPER COLORADO RIVER BASIN COMPACT—RESTRICTION ON USE OF UPPER BASIN WATER IN ARIZONA*

Water Compacts and Treaties

The Secretary of the Interior and all other Federal officers and agencies are required by Section 601(c) of the Colorado River Basin Project Act (Public Law 90-537) to comply with the Upper Colorado River Basin Compact, including the restriction against use for any purpose of Upper Basin water in Arizona in excess of 50,000 acre-feet a year.

Water Compacts and Treaties—Indian Water and Power Resources: Generally

To the extent that there are Indian reserved water rights in the Colorado River for use in the Upper Basin portion of Arizona, those rights must be satisfied out of the 50,000 acre-feet a year apportioned to Arizona by the Upper Colorado River Basin Compact.

M—36799

December 10, 1969

To: SECRETARY OF THE INTERIOR.

SUBJECT: NAVAJO STEAM GENERATING PROJECT—USE OF COLORADO
RIVER WATER.

The Bureau of Reclamation and five electric utilities, three investor owned and two public agencies, have completed negotiations and final contract drafts for construction and operation of the Navajo Project

*Not in Chronological order.

for the thermal generation of electric power. The project will be built on the Navajo Indian Reservation near Page, Ariz., using coal mined on the Reservation and Colorado River water from Lake Powell.

The Bureau of Reclamation's participation will entitle it to approximately one-fourth of the plant generating capability. This source of electric power has been determined to be the best alternative for supplying pumping power to the Central Arizona Project. The remainder of the plant capability will be used, and is urgently needed, by the other parties to supply immediately projected loads.

All parties except the United States have signed the basic contracts for the project, and it is now in order for the United States to execute the documents. However, at a meeting with the Congressional delegations of Wyoming and other Upper Basin States on October 29, 1969, objection was raised to the water service contract entered into by Interior with the Salt River Project on January 17, 1969. The Salt River Project is one of the participants in the Navajo Project.

The water service contract, which runs for a maximum of 40 years, allows the Navajo Project to use up to 34,100 acre-feet a year of Colorado River water. Under Article III of the Upper Colorado River Basin Compact, water used for the Navajo Project must be charged to the 50,000 acre-feet a year of Upper Basin water that has been apportioned to Arizona under the Compact. Lest there be any doubt as to this, Section 303(d) of the Colorado River Basin Project Act and Section 6(a) of the water service contract also specifically provide that water used by the Navajo Project shall be charged to the 50,000 acre-feet a year apportioned to Arizona.

The objection of the Upper Basin States to the water service contract is based on their assertion that when Indian and other miscellaneous uses of Upper Basin water in Arizona are added to the 34,100 acre-feet a year committed to the Navajo Project, the total demand in Arizona on Upper Basin water will exceed 50,000 acre-feet. They express concern that because of the reserved water rights the Indians are claimed to have, the Navajo Tribe may be able to insist that the Secretary of the Interior deliver water in excess of the 50,000 acre-feet a year apportioned to Arizona under the Compact.

There is, in my opinion, no legal basis for this concern. The Upper Colorado River Basin Compact is binding on the Secretary of the Interior, the Indians, and all others, and it flatly precludes total use of Upper Basin water in Arizona in excess of 50,000 acre-feet a year. It does not matter whether the use by the Indians of their reserved water rights is considered a use by the United States for the benefit of the Indians or whether it is considered a direct use by the Indians

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themselves; such use must be counted as part of Arizona's total use of Upper Basin water and charged against the 50,000 acre-feet. Article VII of the Compact states specifically:

The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made * * *.

Section 601(c) of the Colorado River Basin Project Act (Public Law 90-537) binds the Secretary of the Interior and all other Federal officers and agencies to comply with the Upper Colorado River Basin Compact "in the storage and release of water from all reservoirs and in the operation and maintenance of all facilities in the Colorado River system under the jurisdiction and supervision of the Secretary, and in the operation and maintenance of all works which may be authorized hereafter for the augmentation of the water supply of the Colorado River systems." No one, therefore, should entertain any doubt about the inviolability of the 50,000 acre-feet limitation.

However, the representatives of the Upper Basin States point to the Supreme Court decisions in *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963), as justifying their concern. As explained in *Arizona v. California*, the United States at the time of creating the Indian Reservation reserved water rights for the Indians sufficient to irrigate all practicably irrigable acreage on the Reservations. Therefore—it is contended—the United States is under an obligation to make available for Indian use the amount of Colorado River water necessary to satisfy their reserved water rights. If such an obligation exists, it has been preserved by article XIX of the Compact, which provides that nothing in the Compact shall be construed as affecting "the obligations of the United States of America to Indian tribes."

Even if the foregoing exposition of Indian reserved water rights is correct, it is not inconsistent with the Compact's absolute limitation on combined uses of Upper Basin water in Arizona. In fact, article III(b) (4) of the Compact declares that the apportionment to each state includes "all water necessary for the supply of any rights which now exist." It is clear, therefore, that to the extent the Navajo Tribe has reserved water rights in the Upper Basin portion of Arizona, those rights must be satisfied out of the 50,000 acre-feet a year apportioned to Arizona.

As a practical matter, the water-use experts of the Bureau of Reclamation assure us that the amount of water available—after the 34,100 acre-feet contracted for by the Navajo Project is deducted from 50,000 acre-feet apportioned to Arizona—will be adequate to meet the

Indians' reasonably foreseeable needs. If this estimate is wrong, the deficiency could be made up, under article XVII of the Compact, by augmentation through importation of water from another river basin or desalination, for example. But under no circumstances can the Navajo Tribe have any complaint against the United States for having entered into the water service contract. Section 15 of the plant-site lease, approved by the Tribe on September 29, 1969, states:

In consideration of the execution of this Lease and the benefits to the Tribe which shall accrue hereunder, the benefits to the Tribe from the construction and operation of Navajo Units #1, #2 and #3 and the benefits to the Tribe from Peabody's mining operations to provide coal fuel for said units, the Tribe agrees that during the term of this Lease or the operating life of the Navajo Generation Station, whichever is the shorter, of the 50,000 acre-feet of water allocated to the State of Arizona pursuant to Article III (a) (1) of the Upper Colorado River Basin Compact (63 Stat. 31), 34,100 acre-feet of water per year shall at all times be available for consumptive use by Lessees in the operation of the Navajo Generation Station and all other purposes related to such operation including coal transportation and ash disposal. The Tribe agrees the use of water on Reservation Lands within the Upper Basin of Arizona (as said Upper Basin is defined in the Upper Colorado River Basin Compact) shall not reduce or diminish the availability of said 34,100 acre-feet to the Lessees. This agreement shall not be construed in any manner as a waiver by the Tribe of any present or prospective water rights of the Tribe, other than as set forth above.

In this and other ways, the Navajo Tribe has encouraged the Navajo Project to go forward and the United States to cooperate. As a result of the Project's construction and operation on Navajo lands, including the lease of Navajo coal deposits for use in the Project, the Navajo Tribe will realize substantial profits. The water service contract was an indispensable element in the mosaic of events making this possible, and I do not believe that the Tribe could thus encourage the United States to enter into the contract for water service to the Navajo Project and later be heard to complain because the contract has reduced the availability of Upper Basin water for Indian use in Arizona.

In sum, the Upper Basin states are protected under the Upper Colorado River Basin Compact and the Navajo Project documents against any infraction of the 50,000 acre-feet a year limit on Arizona use of Upper Basin water. The Project—in addition to supplying the pumping-power needs of the Central Arizona Project and meeting imminent loads of the participating utilities—will provide substantial economic benefits to the Navajo Tribe. It will also serve as a prototype for similar projects to be built at Kaiparowits in Utah and elsewhere. It is our recommendation that you complete execution of the Navajo Project documents.

MITCHELL MELICH,
Solicitor.

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- 1. To the extent that the proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), was, on the date of enactment of the act of Aug. 25, 1959, Public Law No. 86-192, 73 Stat. 420 (Choctaw Termination Act), applicable to proceeds from such parcels theretofore purchased in trust for the Choctaw Tribe, said proviso remained applicable thereto upon enactment of the latter statute, inasmuch as the purpose of the latter statute was to discontinue earlier statutory authorization to acquire additional parcels of land for the Choctaw Tribe and its members, but did not have the effect of altering the status of lands theretofore acquired under such authority -----

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- 1. Where a tribal membership classification of the Jicarilla Apache constitution resulted in excluding illegitimate persons from membership or denied right of such persons to claim the Jicarilla Apache blood of their acknowledged or putative father, such classification was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was therefore repugnant to the equal protection clause of Section 202, subsection (8), of the Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. sec. 1302 and void and of no effect-----

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dismissal is based upon findings (i) that the subcontractor listing paragraph under which the request for substitution was made contains no provision for an equitable adjustment if a dispute arose as to the contracting officer's action thereunder; (ii) that a change in the specifications or in the scope of the work was not involved; and (iii) that appellant's allegations that the contracting officer's action in denying the request for substitution was arbitrary and capricious was not related to action taken under the Changes clause or other clause providing for an equitable adjustment even though appellant did indicate that the claim might be cognizable under the Changes clause.-----

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1. A bid schedule and specifications called for construction of the Gateway Arch and the installation of a transportation system in the Arch, and subsequently the schedule (but not the specifications) was revised to call only for construction of the Arch, and a contract was entered into between the parties providing for construction of the Arch to commence after receipt of a notice to proceed, and containing a clause providing for liquidated damages to be assessed for each day of delay in completing the Arch beyond the date fixed by the contract, until completion and acceptance of the Arch. Subsequently the parties entered into a second agreement (entitled "Transportation Supplement") which provided for the installation of the transportation system commencing on the date of execution of the Supplement and to be completed within 95 days after completion and acceptance of the Arch, and containing a clause providing for liquidated damages to be assessed for each day of delay beyond the time fixed "herein" for completion, and which also incorporated the specifications by reference (including a clause providing for liquidated damages to be assessed in connection with the transportation system if the system was not completed within a fixed period from the date of receipt of the notice to proceed). In the described situation the Board ruled that liquidated damages for delay in completing the Arch would run until the Arch was completed and accepted and liquidated damages for unexcused delay in completing the transportation system would commence 95 days after the Arch was completed and accepted. Since the designation of the subsequent contract as a "supplement" is not determinative, and in the absence of any proof that the parties intended the two instruments to be treated as one, the Board finds that they are separate and that the term "herein" in the Supplement referred only to the provision for completion of the transportation work specifically set forth therein and not to any such provision contained in the specifications; accordingly, the contracting officer erred (i) in looking to such clause in the specifications by which liquidated damages respecting the transportation work would be assessed within a fixed

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1. Where the Government required a construction contractor to utilize soil of a marginal quality in the processing of soil cement for a road, pursuant to a specification allowing the use of a single pass stabilizer (naming a specific manufacturer's product or its equal) and thereafter issued a sweeping modification of the specifications; the contractor, who prior to the modification attempted with a machine of the type named over a period of approximately three weeks to produce an acceptable road (including several days of processing performed under the direction of a Government engineer), was entitled to an equitable adjustment for the costs incurred during that period. The Board concluded that a case of legal or practical impossibility had been established, since an acceptable road could not be economically constructed under the specifications with the soil that had been made available by the Government

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2. A contractor, under a contract calling for the installation of water-line pipe of four possible alternative types within one bidding schedule, who elected to utilize pretensioned concrete pipe and was required by the drawings to encase such pipe with concrete and cement encasements under certain conditions, was not entitled by virtue of the concrete and cement payment provisions (which did not specifically exclude such encasement from a list of exclusions from payment) to be separately compensated for such encasements. Not only did the pipe payment provision specifically provide that no separate payment would be made for such encasement, but the contract also stated that the cost of furnishing any item not provided for shall be included in the bid price for the work for which the item is required, and the presence of four different options within one bidding schedule should have alerted the contractor to the possibility that absorbing the cost of such encasements would be necessary in order to make pretensioned pipe equal in performance to the other options.....

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3. A contractor, under a contract calling for the installation of water-line pipe of four possible alternative types, who elected to utilize pretensioned concrete pipe, was entitled to additional compensation for the extra work involved in encasing such pipe on certain curves, at the Government's insistence (which was based upon a general requirement in the drawings that encasement of pretensioned concrete pipe was required under certain conditions), where the pretensioned concrete pipe specification entitled "Curves and bends" provided that no concrete encasement was required on certain curves if the pipe was laid thereon in accord-

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CONSTRUCTION AND OPERATION—Continued

Drawings and Specifications—Continued

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ance with certain criteria. Upon a showing by the appellant that such criteria were met, the Board viewed the specific provision as an exception to the general requirement, under the circumstances of this claim; but the appellant was not entitled to be compensated for damages sustained to its work while awaiting encasement as a result of a heavy rainstorm, since (i) it appears that the damage might have occurred even if encasement were not involved and (ii) the Government is not an insurer of contractors against acts of nature-----

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General Rules of Construction

1. A bid schedule and specifications called for construction of the Gateway Arch and the installation of a transportation system in the Arch, and subsequently the schedule (but not the specifications) was revised to call only for construction of the Arch, and a contract was entered into between the parties providing for construction of the Arch to commence after receipt of a notice to proceed, and containing a clause providing for liquidated damages to be assessed for each day of delay in completing the arch beyond the date fixed by the contract, until completion and acceptance of the Arch. Subsequently the parties entered into a second agreement (entitled "Transportation Supplement") which provided for the installation of the transportation system commencing on the date of execution of the Supplement and to be completed within 95 days after completion and acceptance of the Arch, and containing a clause providing for liquidated damages to be assessed for each day of delay beyond the time fixed "herein" for completion, and which also incorporated the specifications by reference (including a clause providing for liquidated damages to be assessed in connection with the transportation system if the system was not completed within a fixed period from the date of receipt of the notice to proceed). In the described situation the Board ruled that liquidated damages for delay in completing the Arch would run until the Arch was completed and accepted and liquidated damages for unexcused delay in completing the transportation system would commence 95 days after the Arch was completed and accepted. Since the designation of the subsequent contract as a "supplement" is not determinative, and in the absence of any proof that the parties intended the two instruments to be treated as one, the Board finds that they are separate and that the term "herein" in the Supplement referred only to the provision for completion of the transportation work specifically set forth therein and not to any such provision contained in the specifications; accordingly, the contracting officer erred (i) in looking to such clause in the specifications by which liquidated damages respecting the transportation work would be assessed within a fixed period from the date of the notice to proceed, inasmuch as that clause was found inapplicable, and (ii) in conse-

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****General Rules of Construction—Continued**

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quently failing to assess such liquidated damages from a date controlled by the actual completion of the Arch and its acceptance -----

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2. A contractor, under a contract calling for the installation of water-line pipe of four possible alternative types within one bidding schedule, who elected to utilize pretensioned concrete pipe and was required by the drawings to encase such pipe with concrete and cement encasements under certain conditions, was not entitled by virtue of the concrete and cement payment provisions (which did not specifically exclude such encasement from a list of exclusions from payment) to be separately compensated for such encasements. Not only did the pipe payment provision specifically provide that no separate payment would be made for such encasement, but the contract also stated that the cost of furnishing any item not provided for shall be included in the bid price for the work for which the item is required, and the presence of four different options within one bidding schedule should have alerted the contractor to the possibility that absorbing the cost of such encasements would be necessary in order to make pretensioned pipe equal in performance to the other options -----

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Government-furnished Property

1. A contractor under a contract with the Bonneville Power Administration to construct a power substation is entitled to an equitable adjustment for constructive acceleration where the evidence showed a late delivery of Government-furnished steel for towers and bridges, a timely request for a time extension, a denial thereof, and an actual speed-up of the affected work. Under the standard Bonneville Power Administration Government-furnished property clause, a contractor is not entitled to delay costs for delay in delivery if the Government made a reasonable effort to secure delivery. However, the fact of delayed delivery may serve to support a claim for equitable adjustment based upon a constructive acceleration -----

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Intent of Parties

1. A bid schedule and specifications called for construction of the Gateway Arch and the Installation of a transportation system in the Arch, and subsequently the schedule (but not the specifications) was revised to call only for construction of the Arch, and a contract was entered into between the parties providing for construction of the Arch to commence after receipt of a notice to proceed, and containing a clause providing for liquidated damages to be assessed for each day of delay in completing the Arch beyond the date fixed by the contract, until completion and acceptance of the Arch. Subsequently the parties entered into a second agreement (entitled "Transportation Supplement") which provided for the

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Intent of Parties—Continued**

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installation of the transportation system commencing on the date of execution of the Supplement and to be completed within 95 days after completion and acceptance of the Arch, and containing a clause providing for liquidated damages to be assessed for each day of delay beyond the time fixed "herein" for completion, and which also incorporated the specifications by reference (including a clause providing for liquidated damages to be assessed in connection with the transportation system if the system was not completed within a fixed period from the date of receipt of the notice to proceed). In the described situation the Board ruled that liquidated damages for delay in completing the Arch would run until the Arch was completed and accepted and liquidated damages for unexcused delay in completing the transportation system would commence 95 days after the Arch was completed and accepted. Since the designation of the subsequent contract as a "supplement" is not determinative, and in the absence of any proof that the parties intended the two instruments to be treated as one, the Board finds that they are separate and that the term "herein" in the Supplement referred only to the provision for completion of the transportation work specifically set forth therein and not to any such provision contained in the specifications; accordingly, the contracting officer erred (i) in looking to such clause in the specifications by which liquidated damages respecting the transportation work would be assessed within a fixed period from the date of the notice to proceed, inasmuch as that clause was found inapplicable, and (ii) in consequently failing to assess such liquidated damages from a date controlled by the actual completion of the Arch and its acceptance-----

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Subcontractors and Suppliers

1. Where subsequent to award of a contract for the construction of a transmission line a contractor requests permission (i) to substitute a subcontractor having adequate financial resources for the subcontractor listed in its bid, or (ii) to be allowed to perform the work involved itself, and where the contracting officer denies the request for substitution on the grounds that there has been no showing of a change of circumstances since the time the contractor's bid was submitted, the Board dismisses the contractor's claim for increased costs attributed to being required to use a subcontractor lacking the required financial resources during the crucial early months of contract performance. The dismissal is based upon findings (i) that the subcontractor listing paragraph under which the request for substitution was made contains no provision for an equitable adjustment if a dispute arose as to the contracting officer's action thereunder; (ii) that a change in the specifications or in the scope of the work was not involved; and (iii) that appellant's allegations that the contracting officer's action in denying the request for substitution was arbitrary and

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Subcontractors and Supplies—Continued**

capricious was not related to action taken under the Changes clause or other clause providing for an equitable adjustment even though appellant did indicate that the claim might be cognizable under the Changes clause-----

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DISPUTES AND REMEDIES**Burden of Proof**

1. Under a construction contract provision which places the risk of loss before acceptance on the contractor unless the cause of damage is unforeseeable and beyond the control of, and without the fault of negligence of the contractor, the burden of proof of the existence of contractor fault or negligence, when alleged by the Government, is on the Government-----

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DAMAGES**Actual Damages**

1. A contractor, under a contract calling for the installation of water-line pipe of four possible alternative types, who elected to utilize pretensioned concrete pipe, was entitled to additional compensation for the extra work involved in encasing such pipe on certain curves, at the Government's insistence (which was based upon a general requirement in the drawings that encasement of pretensioned concrete pipe was required under certain conditions), where the pretensioned concrete pipe specification entitled "Curves and bends" provided that no concrete encasement was required on certain curves if the pipe was laid thereon in accordance with certain criteria. Upon a showing by the appellant that such criteria were met, the Board viewed the specific provision as an exception to the general requirement, under the circumstances of this claim; but the appellant was not entitled to be compensated for damages sustained to its work while awaiting encasement as a result of a heavy rainstorm, since (i) it appears that the damage might have occurred even if encasement were not involved and (ii) the Government is not an insurer of contractors against acts of nature---

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Liquidated Damages

1. A bid schedule and specifications called for construction of the Gateway Arch and the installation of a transportation system in the Arch, and subsequently the schedule (but not the specifications) was revised to call only for construction of the Arch, and a contract was entered into between the parties providing for construction of the Arch to commence after receipt of a notice to proceed, and containing a clause providing for liquidated damages to be assessed for each day of delay in completing the Arch beyond the date fixed by the contract, until completion and acceptance of the Arch. Subsequently the parties entered into a second agreement (entitled "Transportation Supplement") which provided for the installation of the transportation system commencing on the date of execution of the Supplement and to be completed within 95 days after com-

CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****DAMAGES—Continued****Liquidated Damages—Continued**

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pletion and acceptance of the Arch, and containing a clause providing for liquidated damages to be assessed for each day of delay beyond the time fixed "herein" for completion, and which also incorporated the specifications by reference (including a clause providing for liquidated damages to be assessed in connection with the transportation system if the system was not completed within a fixed period from the date of receipt of the notice to proceed). In the described situation the Board ruled that liquidated damages for delay in completing the Arch would run until the Arch was completed and accepted and liquidated damages for unexcused delay in completing the transportation system would commence 95 days after the Arch was completed and accepted. Since the designation of the subsequent contract as a "supplement" is not determinative, and in the absence of any proof that the parties intended the two instruments to be treated as one, the Board finds that they are separate and that the term "herein" in the Supplement referred only to the provision for completion of the transportation work specifically set forth therein and not to any such provision contained in the specifications; accordingly, the contracting officer erred (i) in looking to such clause in the specifications by which liquidated damages respecting the transportation work would be assessed within a fixed period from the date of the notice to proceed, inasmuch as that clause was found inapplicable, and (ii) in consequently failing to assess such liquidated damages from a date controlled by the actual completion of the Arch and its acceptance -----

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Equitable Adjustments

1. Where, in a related appeal, an equitable adjustment was allowed to a contractor for specified grading work performed prior to the issuance of a major contract modification involving the processing of soil cement for a road, which adjustment would include labor and equipment expense associated with such grading, the contractor was not entitled to isolate and be paid for additional grading on the basis of a contract unit price schedule found by the Board to be inapplicable. The grading in question was only one phase of the work performed under the modified method and additional costs that may have been incurred during that phase could not be considered separately, since the equitable price adjustment allowable for changed work should be determined on the basis of the difference between the work originally specified and the work as changed and actually performed by the contractor—here costs that would have been incurred under the originally specified processing method may have been saved under the modified method because certain steps (such as the use of designated equipment) were eliminated -----
2. A contractor is entitled to an equitable adjustment for a constructive acceleration based upon the late delivery of Government-furnished -----

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CONTRACTS—Continued

DISPUTES AND REMEDIES—Continued

Equitable Adjustments—Continued

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- rigid aluminum bus where the contractor timely requested, and the Government denied, a time extension asking for good summer days the following year, for good summer days lost due to the delay, and where the evidence showed that an essential operation in the installation of the bus was unusually vulnerable to adverse winter weather. While a lack of a reasonable effort on part of the Government to secure delivery of Government-furnished property may provide a basis for the Bonneville Power Administration to allow a contractor delay costs under the Bonneville Power Administration Government-furnished property clause, such delay costs may not be considered by the Board in an equitable adjustment based upon a constructive acceleration. The equitable adjustment is limited to consideration of costs incurred in the acceleration and not in the delay ----- 118
3. Although proof of the reasonableness of a unit bid price for excavation negates the contracting officer's conclusion of an improvident bid, that conclusion having led to the refusal of an equitable adjustment for a changed condition, it does not support the contractor's claim for an adjustment based upon total costs. In view of the less than satisfactory evidence of costs, the Board will use a jury verdict approach to establish the amount of the equitable adjustment ----- 268
- Jurisdiction**
1. The Board has no jurisdiction to grant relief for an unreasonable delay in delivery of Government-furnished property under the Bonneville Power Administration Government-furnished property clause ----- 118
2. Where subsequent to award of a contract for the construction of a transmission line a contractor requests permission (i) to substitute a subcontractor having adequate financial resources for the subcontractor listed in its bid, or (ii) to be allowed to perform the work involved itself, and where the contracting officer denies the request for substitution on the grounds that there has been no showing of a change of circumstances since the time the contractor's bid was submitted, the Board dismisses the contractor's claim for increased costs attributed to being required to use a subcontractor lacking the required financial resources during the crucial early months of contract performance. The dismissal is based upon findings (i) that the subcontractor listing paragraph under which the request for substitution was made contains no provision for an equitable adjustment if a dispute arose as to the contracting officer's action thereunder; (ii) that a change in the specifications or in the scope of the work was not involved; and (iii) that appellant's allegations that the contracting officer's action in denying the request for substitution was arbitrary and capricious was not related to action taken under the Changes clause or other clause

CONTRACTS—Continued

DISPUTES AND REMEDIES—Continued

Jurisdiction—Continued

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providing for an equitable adjustment even though appellant did indicate that the claim might be cognizable under the Changes clause -----

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3. A claim for compensation for the Government's taking possession after work was completed of a contractor-produced stockpile of excess gravel will be dismissed where no relief to the contractor is available under the contract -----

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4. The Board will remand to the contracting officer for appropriate findings of fact and decision a claim first presented to the Board during the course of an appeal on other claims, and which had not been previously submitted to the contracting officer, inasmuch as the Board's jurisdiction is appellate only -----

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FORMATION AND VALIDITY

Bid and Award

1. When a decision of the Secretary is challenged in the courts, and the litigation has been settled under an agreement which requires its revocation, the Secretary will revoke the prior decision -----

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PERFORMANCE OR DEFAULT

Acceleration

1. A contractor under a contract with the Bonneville Power Administration to construct a power substation is entitled to an equitable adjustment for constructive acceleration where the evidence showed a late delivery of Government-furnished steel for towers and bridges, a timely request for a time extension, a denial thereof, and an actual speed-up of the affected work. Under the standard Bonneville Power Administration Government-furnished property clause, a contractor is not entitled to delay costs for delay in delivery if the Government made a reasonable effort to secure delivery. However, the fact of delayed delivery may serve to support a claim for equitable adjustment based upon a constructive acceleration -----

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2. A contractor is entitled to an equitable adjustment for a constructive acceleration based upon the late delivery of Government-furnished rigid aluminum bus where the contractor timely requested, and the Government denied, a time extension asking for good summer days the following year, for good summer days lost due to the delay, and where the evidence showed that an essential operation in the installation of the bus was unusually vulnerable to adverse winter weather. While a lack of a reasonable effort on part of the Government to secure delivery of Government-furnished property may provide a basis for the Bonneville Power Administration to allow a contractor delay costs under the Bonneville Power Administration Government-furnished property clause, such delay costs may not be considered by the Board in an equitable adjustment is limited to consideration of costs incurred in the acceleration and not in the delay -----

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CONTRACTS—Continued

PERFORMANCE OR DEFAULT—Continued

Impossibility of Performance

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- 1. Where the Government required a construction contractor to utilize soil of a marginal quality in the processing of soil cement for a road, pursuant to a specification allowing the use of a single pass stabilizer (naming a specific manufacturer's product or its equal) and thereafter issued a sweeping modification of the specifications, the contractor, who prior to the modification attempted with a machine of the type named over a period of approximately three weeks to produce an acceptable road (including several days of processing performed under the direction of a Government engineer), was entitled to an equitable adjustment for the costs incurred during that period. The Board concluded that a case of legal or practical impossibility had been established, since an acceptable road could not be economically constructed under the specifications with the soil that had been made available by the Government.....

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EQUITABLE ADJUDICATION

- 1. Equitable adjudication is not available to a homestead entryman in the absence of substantial compliance with the requirements of the homestead laws.....

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HOMESTEADS (ORDINARY)

RESIDENCE

- 1. The homestead law requires an entryman in good faith to establish his home on his entry, and, although it does not prohibit him from maintaining a second residence elsewhere, the fact that such a second residence is maintained throughout the period of claimed residence on the homestead entry raises a rebuttable presumption that the entryman has not in good faith established his residence upon the entry; where residence on the entry is claimed for only seven months during the first entry year, the minimum period required after credit is allowed for military service, where the entryman maintained "living quarters" elsewhere which constituted his residence both before and after his sojourn at the entry and which he and his family occupied intermittently throughout that period, where the entryman and his family stayed only five or six nights at the entry during one of the seven months and spent only weekends there during another, commuting daily between the homestead entry and town during periods when they slept at the entry, and where no attempt was made to reside on the homestead after the first entry year or to improve the dwelling place to make it suitable as a permanent habitation, but the entryman did purchase a home elsewhere during the life of the entry, it must be concluded that the entryman intended only to satisfy the minimum requirements of the law rather than to establish his home on the entry, and the entry is properly canceled for failure to meet the residence requirements of the law.....

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INDIAN LANDS

GENERALLY

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1. The Makah Indian Tribe did not acquire any interest in the Ozette Indian Reservation merely because the class of Indians for whom the reservation was established may, whether for some or all purposes, be considered Makahs..... 14
2. Since the Executive Order of April 12, 1893, establishing the Ozette Indian Reservation, has not been rescinded or modified, the right of use and occupancy granted the Indians for whom the reservation was set aside remains intact, even though those Indians have all departed from Ozette and settled on other reservations, where many have become allottees..... 14

ALLOTMENTS

Generally

1. While it is clear that no Indian may receive an allotment on two reservations, *Josephine Valley*, 19 L.D. 329 (1894), there is nothing to preclude acceptance of an allotment on one reservation by an individual who is a member of a class of Indians for whom another reservation has been established..... 15

SUB-SURFACE ESTATES

1. The proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), is applicable only to proceeds from mineral deposits underlying lands for which the consideration was derived from such appropriated funds; accordingly, lands acquired by gift or purchased with tribal funds are not subject to that proviso..... 313
2. To the extent that offsets, which were claimed by the United States for sums paid to or on behalf of the Choctaw Nation as reflected by a stipulation approved by the Indian Claims Commission in Docket No. 16 on July 14, 1950, represented funds used to acquire trust title to parcels of land for the Choctaw Tribe pursuant to the Acts of June 13, 1934, ch. 576, 48 Stat. 984, and of June 26, 1936, ch. 831, 49 Stat. 1967, the proceeds from mineral deposits underlying said parcels, arising from exploitation of such lands for minerals on and after July 14, 1950, have been since that date and now are properly creditable to the tribe instead of the special revenue account established, pursuant to sec. 7 of said 1936 Act, for use in acquiring lands for, and making loans to, Indians in Oklahoma 313
3. To the extent that the proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), was, on the date of enactment of the act of Aug. 25, 1959, Public Law No. 86-192, 73 Stat. 420 (Choctaw Termination Act), applicable to proceeds from such parcels theretofore pur-

INDIAN LANDS—Continued**SUB-SURFACE ESTATES—Continued**

purchased in trust for the Choctaw Tribe, said proviso remained applicable thereto upon enactment of the latter statute, inasmuch as the purpose of the latter statute was to discontinue earlier statutory authorization to acquire additional parcels of land for the Choctaw Tribe and its members, but did not have the effect of altering the status of lands theretofore acquired under such authority -----

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TRIBAL LANDS

1. The proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), is applicable only to proceeds from mineral deposits underlying lands for which the consideration was derived from such appropriated funds; accordingly, lands acquired by gift or purchased with Tribal funds are not subject to that proviso -----

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2. To the extent that offsets, which were claimed by the United States for sums paid to or on behalf of the Choctaw Nation as reflected by a stipulation approved by the Indian Claims Commission in Docket No. 16 on July 14, 1950, represented funds used to acquire trust title to parcels of land for the Choctaw Tribe pursuant to the Acts of June 13, 1934, ch. 576, 48 Stat. 984, and of June 26, 1936, ch. 831, 49 Stat. 1967, the proceeds from mineral deposits underlying said parcels, arising from exploitation of such lands for minerals on and after July 14, 1950, have been since that date and now are properly creditable to the tribe instead of the special revenue account established, pursuant to sec. 7 of said 1936 Act, for use in acquiring lands for, and making loans to, Indians in Oklahoma -----

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3. To the extent that the proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), was, on the date of enactment of the act of Aug. 25, 1959, Public Law No. 86-192, 73 Stat. 420 (Choctaw Termination Act), applicable to proceeds from such parcels theretofore purchased in trust for the Choctaw Tribe, said proviso remained applicable thereto upon enactment of the latter statute, inasmuch as the purpose of the latter statute was to discontinue earlier statutory authorization to acquire additional parcels of land for the Choctaw Tribe and its members, but did not have the effect of altering the status of lands theretofore acquired under such authority -----

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INDIAN REORGANIZATION ACT

1. The occurrence of an election at which the voters choose to make the provisions of the Indian Reorganization Act applicable on a given

INDIAN REORGANIZATION ACT—Continued

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- reservation does not mean that the Indians having rights in the reservation must organize thereunder----- 15
- 2. The occurrence of an election to determine the applicability of the Indian Reorganization Act to the Ozette Reservation did not change or in any way affect the interests of the Indian beneficiaries named in the 1893 executive order establishing the not subject to that proviso----- 15
- 3. The proviso clause of sec. 7 of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), is applicable only to proceeds from mineral deposits underlying lands for which the consideration was derived from such appropriated funds; accordingly, lands acquired by gift or purchased with tribal funds are not subject to that proviso-----
- 4. To the extent that offsets, which were claimed by the United States for sums paid to or on behalf of the Choctaw Nation as reflected by a stipulation approved by the Indian Claims Commission in Docket No. 16 on July 14, 1950, represented funds used to acquire trust title to parcels of land for the Choctaw Tribe pursuant to the Acts of June 13, 1934, ch. 576, 48 Stat. 984, and of June 26, 1936, ch. 831, 49 Stat. 1967, the proceeds from mineral deposits underlying said parcels, arising from exploitation of such lands for minerals on and after July 14, 1950, have been since that date and now are properly creditable to the tribe instead of the special revenue account established, pursuant to sec. 7 of said 1936 Act, for use in acquiring lands for, and making loans to, Indians in Oklahoma----- 313
- 5. To the extent that the proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), was, on the date of enactment of the act of Aug. 25, 1959, Public Law No. 86-192, 73 Stat. 420 (Choctaw Termination Act), applicable to proceeds from such parcels theretofore purchased in trust for the Choctaw Tribe, said proviso remained applicable thereto upon enactment of the latter statute, inasmuch as the purpose of the latter statute was to discontinue earlier statutory authorization to acquire additional parcels of land for the Choctaw Tribe and its members, but did not have the effect of altering the status of lands theretofore acquired under such authority----- 313

INDIAN TRIBES

ENROLLMENT

- 1. Where a tribal membership classification of the Jicarilla Apache constitution resulted in excluding illegitimate persons from membership or denied right of such persons to claim the Jicarilla Apache blood of their acknowledged or putative father, such classification

INDIAN TRIBES—Continued

ENROLLMENT—Continued

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was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was therefore repugnant to the equal protection clause of Section 202, subsection (8), of the Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. sec. 1302 and void and of no effect -----

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FISCAL AND FINANCIAL AFFAIRS

1. The proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), is applicable only to proceeds from mineral deposits underlying lands for which the consideration was derived from such appropriated funds; accordingly, lands acquired by gift or purchased with tribal funds are not subject to that proviso-----
2. To the extent that offsets, which were claimed by the United States for sums paid to or on behalf of the Choctaw Nation as reflected by a stipulation approved by the Indian Claims Commission in Docket No. 16 on July 14, 1950, represented funds used to acquire trust title to parcels of land for the Choctaw Tribe pursuant to the Acts of June 13, 1934, ch. 576, 48 Stat. 984, and of June 26, 1936, ch. 831, 49 Stat. 1967, the proceeds from mineral deposits underlying said parcels, arising from exploitation of such lands for minerals on and after July 14, 1950, have been since that date and now are properly creditable to the tribe instead of the special revenue account established, pursuant to sec. 7 of said 1936 Act, for use in acquiring lands for, and making loans to, Indians in Oklahoma-----
3. To the extent that the proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), was, on the date of enactment of the act of Aug. 25, 1959, Public Law No. 86-192, 73 Stat. 420 (Choctaw Termination Act), applicable to proceeds from such parcels theretofore purchased in trust for the Choctaw Tribe, said proviso remained applicable thereto upon enactment of the latter statute, inasmuch as the purpose of the latter statute was to discontinue earlier statutory authorization to acquire additional parcels of land for the Choctaw Tribe and its members, but did not have the effect of altering the status of lands theretofore acquired under such authority-----

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MEMBERSHIP

1. Where a tribal membership classification of the Jicarilla Apache constitution resulted in excluding illegitimate persons from membership or denied right of such persons to claim the Jicarilla Apache blood of their acknowledged or putative father, such classifica-

INDIAN TRIBES—Continued

MEMBERSHIP—Continued

tion was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was therefore repugnant to the equal protection clause of Section 202, subsection (8), of the Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. sec. 1302 and void and of no effect.....

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INDIAN WATER AND POWER RESOURCES

GENERALLY

1. To the extent that there are Indian reserved water rights in the Colorado River for use in the Upper Basin portion of Arizona, those rights must be satisfied out of the 50,000 acre-feet a year apportioned to Arizona by the Upper Colorado River Basin Compact

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INDIANS

CIVIL RIGHTS

1. Where a tribal membership classification of the Jicarilla Apache constitution resulted in excluding illegitimate persons from membership or denied right of such persons to claim the Jicarilla Apache blood of their acknowledged or putative father, such classification was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was therefore repugnant to the equal protection clause of Section 202, subsection (8), of the Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. sec. 1302 and void and of no effect.....

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TERMINATION OF STATUS

1. To the extent that the proviso clause of sec. 7 of the act of June 26, 1936, ch. 831, 49 Stat. 1967 (which requires that proceeds from mineral deposits underlying lands purchased with funds appropriated pursuant thereto be credited to a special revenue account for use in acquiring lands for and making loans to Indians in Oklahoma), was, on the date of enactment of the act of Aug. 25, 1959, Public Law No. 86-192, 73 Stat. 420 (Choctaw Termination Act), applicable to proceeds from such parcels theretofore purchased in trust for the Choctaw Tribe, said proviso remained applicable thereto upon enactment of the latter statute, inasmuch as the purpose of the latter statute was to discontinue earlier statutory authorization to acquire additional parcels of land for the Choctaw Tribe and its members, but did not have the effect of altering the status of lands theretofore acquired under such authority

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TRIBAL ENROLLMENT

1. Where a tribal membership classification of the Jicarilla Apache constitution resulted in excluding illegitimate persons from membership or denied right of such persons to claim the Jicarilla Apache blood of their acknowledged or putative father, such classifica-

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TRIBAL ENROLLMENT—Continued

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tion was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was therefore repugnant to the equal protection clause of Section 202, subsection (8), of the Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. sec. 1302 and void and of no effect-----

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MINING CLAIMS

GENERALLY

1. A Departmental decision holding a mining claim to be null and void because it was located after July 23, 1955, for a common variety of building stone will be vacated and the case remanded for a further hearing when so ordered by a final court decision----- 193
2. The provisions of Rev. Stat. sec. 2332 do not provide an independent means of acquiring title to a mining claim and particularly do not dispense with the necessity of there being a valid discovery on the claim----- 318

COMMON VARIETIES OF MINERALS

1. A mining claim allegedly valuable for magnetite and sand and gravel located prior to the act of July 23, 1955, is properly declared null and void where the evidence supports a finding that there is not a valuable deposit of magnetite within the claims, and also supports a finding that the sand and gravel is a common variety for which no market was shown to exist prior to the act of July 23, 1955, which precluded the location of mining claims for common varieties of sand and gravel thereafter----- 57
2. If a deposit of decomposed granite which is used only for the same purposes as other similar deposits of decomposed granite which are a common variety possesses properties giving it a distinct and special value for such uses that is recognized by the premium price it commands in the market place, it is not a common variety of stone and is locatable under the mining laws, but where the evidence is not clear as to the competitive prices of decomposed granite in the market area, the case is to be remanded for the development of fuller and clearer evidence on that point----- 61
3. Whether a deposit of sand, gravel, or stone within a mining claim is a common variety no longer locatable under the mining laws since the act of July 23, 1955, or is still locatable as an uncommon variety depends on whether it has a unique property and whether the unique property gives it a special and distinct value----- 160
4. The fact that a deposit of sand and gravel has a location closer to the market than others does not make it an "uncommon variety" as location is not a unique property inherent in the deposit but only an extrinsic factor----- 161
5. A deposit of sand and gravel which has physical characteristics that surpass those of some operating sand and gravel deposits in the marketing area but which is not shown to be significantly superior in physical properties to the predominant commercial sand and gravel deposits in the area is not an uncommon variety----- 161

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COMMON VARIETIES OF MINERALS—Continued

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6. A mining claim located for deposits of sand, stone and gravel prior to the act of July 23, 1955, which are common varieties of such materials, is invalid where it is not shown that the material could have been marketed at a profit prior to the date of the statute....	161
7. Deposits of building stone which are of widespread occurrence and which are used for decorative construction and landscaping only because of the variety of colors in which the stone characteristically occurs are common varieties of stone not subject to mining location after July 23, 1955.....	181
8. Mining claims located prior to July 23, 1955, for common varieties of building stone are valid only if they meet all the requirements of the mining laws, including discovery, as of that date.....	181
9. Mining claims located for common varieties of building stone will be declared invalid for lack of discovery where the evidence shows that at most small quantities of stone may have been sold from a few claims at an inconsequential profit prior to July 23, 1955, and the claimants declare that they could not make a business of operating any one of the claims.....	182
10. A Departmental decision holding a mining claim to be null and void because it was located after July 23, 1955, for a common variety of building stone will be vacated and the case remanded for a further hearing when so ordered by a final court decision.....	193
11. It is not necessary to show that minerals have actually been sold in order to satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, but it must be shown that the material on the claim could have been extracted, removed, and marketed at a profit prior to the date.....	299
12. If a deposit of decomposed granite which is used for the same purposes as other deposits of the same material which are a common variety does not command a higher price in the market, it does not have a special and distinct value and it too is a common variety of stone not locatable under the mining laws after July 23, 1955.....	318
13. In a Government contest brought against a group of limestone placer mining claims located after July 23, 1955, on the charge that a discovery of a valuable mineral deposit has not been made within the limits of any of the claims, the charge is properly construed as raising the issue of whether or not the material found on the claims is a common variety of stone where it is clear that the mining claimant understood this issue to be one of the grounds for the contest prior to the commencement of the contest hearing, where a prehearing conference was granted for the express purpose of clarifying any question as to the meaning of the charge stated in the complaint, and where the claimant was prepared to and did submit evidence at the hearing on the issue.....	331
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COMMON VARIETIES OF MINERALS—Continued

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15. Limestone which contains at least 95 percent of calcium carbonate and magnesium carbonate is a chemical or metallurgical grade limestone which remains locatable under the mining laws as an uncommon variety of stone.....	331
16. When limestone is claimed to be an uncommon variety because it is uniquely white in character, a finding to that effect cannot be made when it appears that there are varying degrees of whiteness and the evidence does not show which degree is unique.....	331
17. Limestone which is crushed to some degree in its natural state is not to be deemed an uncommon variety of stone only for that reason where no value is added to the material in its use and the crushed condition merely lessens the cost of mining the stone and enables the producer to make a greater profit.....	331
18. Where a deposit of limestone consists of both an uncommon variety and a common variety, the validity of a mining claim located for the deposit after July 23, 1955, depends upon whether a valid discovery has been made only with respect to the uncommon variety; the determination must be made without any consideration of any value that the common variety may have.....	331

CONTESTS

1. Evidence tendered on appeal to the Secretary of the Interior after a hearing has been held in a Government mining contest case cannot be considered and weighed with the evidence presented at the hearing in making a decision on the merits of the contest since the record made at the hearing constitutes the sole basis for decision; however, such evidence may be considered in determining whether there is any justification for ordering a further hearing in the case and where it appears that most of the evidence pertains to a discovery on a portion of a claim which has been appropriated for a roadway by the Forest Service and the remaining evidence is insufficient to indicate a discovery on the remaining portions of the claim, a new hearing is not warranted....	37
2. A Government mineral examiner has no duty to do discovery work on a mining claim but merely to investigate the claim to determine whether a discovery has been made; therefore, testimony by an examiner that he examined a mining claim and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government as to the invalidity of the claim.....	56
3. The technical exclusionary rules of evidence applied in court proceedings need not be followed in administrative hearings; therefore, the fact that hearsay evidence, consisting primarily of assay reports, was presented by both parties in a Government contest together with other evidence is no reason for changing a decision invalidating a mining claim which is sustainable even without such evidence.....	56

MINING CLAIMS—Continued

CONTESTS—Continued

4. In a Government contest brought against a group of limestone placer mining claims located after July 23, 1955, on the charge that a discovery of a valuable mineral deposit has not been made within the limits of any of the claims, the charge is properly construed as raising the issue of whether or not the material found on the claims is a common variety of stone where it is clear that the mining claimant understood this issue to be one of the grounds for the contest prior to the commencement of the contest hearing, where a prehearing conference was granted for the express purpose of clarifying any question as to the meaning of the charge stated in the complaint, and where the claimant was prepared to and did submit evidence at the hearing on the issue.----- Page 331

DETERMINATION OF VALIDITY

1. In order to demonstrate the validity of a mining claim it must be shown as a present fact that the claim is valuable for mining purposes, and if that fact is not established by the evidence, the claim is properly declared null and void; it is immaterial that the claim may have been successfully mined at some time in the past or that at some time in the future, depending upon increased mineral prices or improved mining technology, it may become valuable for mining purposes.----- 7
2. Where a valid discovery of a valuable mineral deposit has not been made within a mining claim located in a national forest prior to the construction by the Forest Service of a logging road through the claim, the road was a valid appropriation by the United States of the land included in the right-of-way and is reserved from entry under the mining laws; therefore, whether or not the presence of the road caused some interference with mining activities on the claim does not excuse the mining claimant's failure to show a valid discovery thereafter or otherwise give him any rights in the unappropriated portion of the claim superior to the United States in the absence of a valid discovery.----- 37
3. A building stone claim located on land which has some value for the stone but a greater value for non-mining purposes, even though it is not presently being used for such purposes, is invalid because the land is not chiefly valuable for building stone.----- 182
4. Where a court has remanded a case to this Department for further evidentiary proceedings on a finding that there was not a *prima facie* substantiation in the record for the standard employed in determining the validity of a mining claim, it is proper at the hearing on remand to consider all evidence relating to the validity of the claim; especially where any question raised by the court as to the standard has been resolved by subsequent rulings of other courts.----- 233
5. In determining whether a deposit of ore is a valuable deposit within the meaning of the mining laws, the prudent man test of *Castle v. Womble* is applied, and this may include a consideration of the

MINING CLAIMS—Continued**DETERMINATION OF VALIDITY—Continued**

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| marketability of the ore and whether a prudent man could expect to develop a valuable mine based upon rationally predictable economic circumstances from present known facts and not upon mere speculation of possible substantial, unpredictable changes in the market place resulting from severe changes in world political and economic conditions, or the unforeseen lowering of costs due to a dramatic technological breakthrough----- | 233 |
| 6. Until a patent issues the Department of Interior in proper contest proceedings may challenge the validity of a mining claim and consider facts showing whether or not there is a valid discovery of a valuable mineral deposit which are in existence at least up to the time when the patent applicant has completed all the requirements imposed on him, including posting and publishing of his application and the payment of all fees; the Department is not restricted to facts in existence only at the time the patent application is filed----- | 234 |
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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----- | 6 |
| 2. In order to be "valuable" within the meaning of the mining laws, a deposit of limestone must be marketable, and where it is acknowledged that there is no market for the limestone found on a mining claim, even though it may be equal in quality to limestone which is marketed, the exposure of the limestone does not constitute the discovery of a valuable mineral deposit----- | 6 |
| 3. A Government mineral examiner has no duty to do discovery work on a mining claim but merely to investigate the claim to determine whether a discovery has been made; therefore, testimony by an examiner that he examined a mining claim and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government as to the invalidity of the claim----- | 56 |
| 4. A mining claim allegedly valuable for magnetite and sand and gravel located prior to the act of July 23, 1955, is properly declared null and void where the evidence supports a finding that there is not a valuable deposit of magnetite within the claims, and also supports a finding that the sand and gravel is a common variety for which no market was shown to exist prior to the act of July 23, 1955, which precluded the location of mining claims for common varieties of sand and gravel thereafter----- | 57 |

MINING CLAIMS—Continued

DISCOVERY—Continued

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5. Mining claims located for common varieties of building stone will be declared invalid for lack of discovery where the evidence shows that at most small quantities of stone may have been sold from a few claims at an inconsequential profit prior to July 23, 1955, and the claimants declare that they could not make a business of operating any one of the claims.----- 182
6. In applying the prudent man test of discovery to determine whether a mineral deposit is valuable, there is no dichotomy between present marketability and future marketability because the terms are simply relative terms used in determining whether the prudent man would have a reasonable prospect of success in developing a valuable mine.----- 233
7. In determining whether a deposit of ore is a valuable deposit within the meaning of the mining laws, the prudent man test of *Castle v. Womble* is applied, and this may include a consideration of the marketability of the ore and whether a prudent man could expect to develop a valuable mine based upon rationally predictable economic circumstances from present known facts and not upon mere speculation of possible substantial, unpredictable changes in the market place resulting from severe changes in world political and and economic conditions, or the unforeseen lowering of costs due to a dramatic technological breakthrough.----- 233
8. A prudent man could not reasonably expect to develop a valuable mine for manganese where the erratically disseminated ore tends to be of a low grade which is not marketable without prohibitively costly beneficiation and it is likely that even the beneficiation processes may not be able to upgrade the ore and remove the impurities adequately to meet commercial standards, and where, in any event, the quantity of the ore shown is insufficient to justify the costs of an operation to develop a valuable mine.----- 233
9. Facts which may warrant further exploration work on a mining claim but which do not justify development work to develop a valuable mine at the time a patent applicant has done all that the law requires are not sufficient to show a discovery under the mining laws entitling the claimant to the issuance of a patent for the claims.----- 233
10. Until a patent issues the Department of Interior in proper contest proceedings may challenge the validity of a mining claim and consider facts showing whether or not there is a valid discovery of a valuable mineral deposit which are in existence at least up to the time when the patent applicant has completed all the requirements imposed on him, including posting and publishing of his application and the payment of all fees; the Department is not restricted to facts in existence only at the time the patent application is filed.----- 234
11. It is not necessary to show that minerals have actually been sold in order to satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, but it must be shown that the material on the claim

MINING CLAIMS—Continued**DISCOVERY—Continued**

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| could have been extracted, removed, and marketed at a profit prior to that date..... | 299 |
| 12. A mining claim located for sand and gravel prior to July 23, 1955, is properly held to be null and void, notwithstanding evidence of the sale of some material from the claim prior to that date and evidence that 5 years after that date a commercial sand and gravel operation was established on the claim, where the evidence of such sales is susceptible, because of the claimant's own vague and uncertain testimony, of the interpretation that such sales were so minimal and the profit so meager that a prudent man would not have been justified in developing the claim prior to July 23, 1955..... | 299 |
| 13. The provisions of Rev. Stat. sec. 2332 do not provide an independent means of acquiring title to a mining claim and particularly do not dispense with the necessity of there being a valid discovery on the claim..... | 318 |
| 14. The requirements for discovery on a placer mining claim located for a deposit of a common variety of decomposed granite are not satisfied by a vague showing of intermittent sales of small amounts in the years from 1943 to 1955..... | 318 |
| 15. Where a deposit of limestone consists of both an uncommon variety and a common variety, the validity of a mining claim located for the deposit after July 23, 1955, depends upon whether a valid discovery has been made only with respect to the uncommon variety; the determination must be made without any consideration of any value that the common variety may have..... | 331 |

HEARINGS

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|---|----|
| 1. Evidence tendered on appeal to the Secretary of the Interior after a hearing has been held in a Government mining contest case cannot be considered and weighed with the evidence presented at the hearing in making a decision on the merits of the contest since the record made at the hearing constitutes the sole basis for decision; however, such evidence may be considered in determining whether there is any justification for ordering a further hearing in the case and where it appears that most of the evidence pertains to a discovery on a portion of a claim which has been appropriated for a roadway by the Forest Service and the remaining evidence is insufficient to indicate a discovery on the remaining portions of the claim, a new hearing is not warranted..... | 37 |
| 2. The technical exclusionary rules of evidence applied in court proceedings need not be followed in administrative hearings; therefore, the fact that hearsay evidence, consisting primarily of assay reports, was presented by both parties in a Government contest together with other evidence is no reason for changing a decision invalidating a mining claim which is sustainable even without such evidence..... | 56 |

MINING CLAIMS—Continued

HEARINGS—Continued

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- 3. In determining whether land on which a building stone claim is located is chiefly valuable for building stone, evidences submitted by the locator on that point may be considered along with evidence by the United States as to the value of the land for other purposes, even though the United States does not submit any direct evidence on the value of the land for building stone----- 181
- 4. A Departmental decision holding a mining claim to be null and void because it was located after July 23, 1955, for a common variety of building stone will be vacated and the case remanded for a further hearing when so ordered by a final court decision----- 193
- 5. Where a court has remanded a case to this Department for further evidentiary proceedings on a finding that there was not a *prima facie* substantiation in the record for the standard employed in determining the validity of a mining claim, it is proper at the hearing on remand to consider all evidence relating to the validity of the claim; especially where any question raised by the court as to the standard has been resolved by subsequent rulings of other courts----- 233

LANDS SUBJECT TO

- 1. Where a valid discovery of a valuable mineral deposit has not been made within a mining claim located in a national forest prior to the construction by the Forest Service of a logging road through the claim, the road was a valid appropriation by the United States of the land included in the right-of-way and is reserved from entry under the mining laws; therefore, whether or not the presence of the road cause some interference with mining activities on the claim does not excuse the mining claimant's failure to show a valid discovery thereafter or otherwise give him any rights in the unappropriated portion of the claim superior to the United States in the absence of a valid discovery----- 37
- 2. Mining claims are properly declared null and void where they were located after the Bureau on its own motion had classified land as suitable for public recreational purposes and the classification was noted on the tract book, serial register, and plats, and an application under the Recreation and Public Purposes Act has been filed----- 290
- 3. The classification of land under the Taylor Grazing Act as suitable for disposal under the Recreation and Public Purposes Act precludes the appropriation of the land under any other public land law, including the mining laws----- 290

WITHDRAWN LAND

- 1. Where a valid discovery of a valuable mineral deposit has not been made within a mining claim located in a national forest prior to the construction by the Forest Service of a logging road through the claim, the road was a valid appropriation by the United States of the land included in the right-of-way and is reserved from entry

MINING CLAIMS—Continued**WITHDRAWN LAND—Continued**

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| <p>under the mining laws; therefore, whether or not the presence of the road caused some interference with mining activities on the claim does not excuse the mining claimant's failure to show a valid discovery thereafter or otherwise give him any rights in the unappropriated portion of the claim superior to the United States in the absence of a valid discovery</p> | Page
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MINING OCCUPANCY ACT**GENERALLY**

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| <p>1. The Mining Claims Occupancy Act does not provide for the granting of relief to one who has occupied a claim principally for the purpose of operating a business thereon and only incidentally as a residence</p> | 105 |
| <p>2. An applicant under the Mining Claims Occupancy Act who attempts to rely upon his possession of a claim which has not been declared invalid or relinquished is not entitled to any relief under the act</p> | 105 |
| <p>3. An applicant under the Mining Claims Occupancy Act is not entitled to a hearing as a matter of due process and will not be granted one where he does not allege any facts which, if proved, would entitle him to relief</p> | 105 |

NOTICE

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| <p>1. Mining claims are properly declared null and void where they were located after the Bureau on its own motion had classified land as suitable for public recreational purposes and the classification was noted on the tract book, serial register, and plats, and an application under the Recreation and Public Purposes Act has been filed</p> | 290 |
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OIL AND GAS LEASES**APPLICATIONS****Drawings**

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|---|-----|
| <p>1. Where the Bureau of Land Management discovers that it erroneously included land within a known geologic structure of a producing oil or gas field, which is not available for noncompetitive oil and gas leasing, in a parcel of lands posted as available for leasing in a simultaneous filing procedure under 43 CFR 3123.9, it is improper to reject the winning offer for the parcel at the drawing and to order a new drawing, instead the offer should only be rejected as to the land within the known geologic structure and a lease issued for the remaining lands within the parcel which are available for leasing, all else being regular</p> | 286 |
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OIL AND GAS LEASES—Continued

APPLICATIONS—Continued

Description

Page

- 1. Where an acquired lands lease offer for a quarter-quarter section of land describes two tracts comprising 11 acres which are excluded from the offer, it is improper to reject the offer for an improper description merely because the 11-acre tract described differs substantially from an 11-acre tract which was excluded in the conveyance of the quarter-quarter section to the United States..... 30

ASSIGNMENTS OR TRANSFERS

- 1. The term "legal subdivision" as used in the proviso to section 30(a) of the Mineral Leasing Act means a quarter-quarter section. Consequently, the Secretary may not disapprove an assignment of a quarter-quarter section on the grounds that it is an assignment of only part of a legal subdivision..... 108

COMPETITIVE LEASES

- 1. When a decision of the Secretary is challenged in the courts, and the litigation has been settled under an agreement which requires its revocation, the Secretary will revoke the prior decision..... 69

DISCRETION TO LEASE

- 1. Lands outside the Bitter Lake Wildlife Refuge which were acquired for the same purposes as lands within the refuge but are no longer used for such purposes are not to be deemed to have been closed to leasing by a regulation barring the leasing of wildlife refuge lands, which are defined as lands withdrawn for such purposes, or by other equivalent action so as to require the rejection of offers filed for such lands prior to the publication of notice of availability of such lands for leasing..... 25
- 2. If the effect of the acceptance of an oil and gas lease offer for the lands described would leave unleased fragments of available land, it is within the discretion of the Secretary of the Interior to decide whether or not to accept the offer as it stands..... 30

EXTENSIONS

- 1. A 20-year oil and gas lease, subject to an approved unit agreement at the expiration of its initial term, is continued in force and made coterminous with the unit of which it is a part, which extension supersedes the provision of the lease for successive 10-year renewals; an application for a 10-year renewal of such a lease cannot, therefore, be accepted, and a renewal lease issued in response to such an application is a nullity..... 196

OIL AND GAS LEASES—Continued**LANDS SUBJECT TO**

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1. Lands outside the Bitter Lake Wildlife Refuge which were acquired for the same purposes as lands within the refuge but are no longer used for such purposes are not to be deemed to have been closed to leasing by a regulation barring the leasing of wildlife refuge lands, which are defined as lands withdrawn for such purposes, or by other equivalent action so as to require the rejection of offers filed for such lands prior to the publication of notice of availability of such lands for leasing-----

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RENEWALS

1. A 20-year oil and gas lease, subject to an approved unit agreement at the expiration of its initial term, is continued in force and made coterminous with the unit of which it is a part, which extension supersedes the provision of the lease for successive 10-year renewals; an application for a 10-year renewal of such a lease cannot, therefore, be accepted, and a renewal lease issued in response to such an application is a nullity-----
2. The holder of a 20-year oil and gas lease is not given by his lease a contractual right to a 10-year renewal which prevails over all other extension provisions of the Mineral Leasing Act, but the right of renewal is expressly made subject to other provisions of the law, and, in the case of a lease subject to an approved unit agreement at the expiration of the initial lease term, is superseded by the statutory provision that such leases shall be continued in force until the termination of the unit plan-----

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RENTALS

1. Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit and the eliminated portion is situated in whole or in part on the known geologic structure of a producing oil or gas field, the rental rate for land within the known geologic structure of a producing oil and gas field is applicable to the lands eliminated and not the rental rate for unitized land which is not included in a participating area-----

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TWENTY-YEAR LEASES

1. A 20-year oil and gas lease, subject to an approved unit agreement at the expiration of its initial term, is continued in force and made coterminous with the unit of which it is a part, which extension supersedes the provision of the lease for successive 10-year renewals; an application for a 10-year renewal of such a lease cannot, therefore, be accepted, and a renewal lease issued in response to such an application is a nullity-----

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OIL AND GAS LEASES—Continued

TWENTY-YEAR LEASES—Continued

Page

- 2. The holder of a 20-year oil and gas lease is not given by his lease a contractual right to a 10-year renewal which prevails over all other extension provisions of the Mineral Leasing Act, but the right of renewal is expressly made subject to other provisions of the law, and, in the case of a lease subject to an approved unit agreement at the expiration of the initial lease term, is superseded by the statutory provision that such leases shall be continued in force until the termination of the unit plan----- 196

UNIT AND COOPERATIVE AGREEMENTS

- 1. Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit and the eliminated portion is situated in whole or in part on the known geologic structure of a producing oil or gas field, the rental rate for land within the known geologic structure of a producing oil and gas field is applicable to the lands eliminated and not the rental rate for unitized land which is not included in a participating area----- 271

OUTER CONTINENTAL SHELF LANDS ACT

OIL AND GAS LEASES

- 1. When a decision of the Secretary is challenged in the courts, and the litigation has been settled under an agreement which requires its revocation, the Secretary will revoke the prior decision----- 69

PUBLIC LANDS

CLASSIFICATION

- 1. Mining claims are properly declared null and void where they were located after the Bureau on its own motion had classified land as suitable for public recreational purposes and the classification was noted on the tract book, serial register, and plats, and an application under the Recreation and Public Purposes Act has been filed----- 290
- 2. The classification of land under the Taylor Grazing Act as suitable for disposal under the Recreation and Public Purposes Act precludes the appropriation of the land under any other public land law, including the mining laws----- 290

RAILROAD GRANT LANDS

- 1. A railroad company asserting a right to patent on the ground that the land for which patent is sought was excepted from a release filed pursuant to section 321 (b) of the Transportation Act of 1940 must show that the land was sold prior to September 18, 1940, to an innocent purchaser for value and that the application for patent

RAILROAD GRANT LANDS—Continued

Page

is for the benefit of a grantee now entitled to the protection afforded an innocent purchaser for value; it is not enough to show that land was sold by a railroad company for valuable consideration where it is also shown that six weeks after the conveyance, the railroad reacquired the land, where the railroad company does not claim to be an innocent purchaser for value, and where it appears that, prior to execution of a release, the railroad company was entitled to a conveyance of the land from the United States irrespective of the effect of the deeds executed in connection with the earlier sale.

1

RECREATION AND PUBLIC PURPOSES ACT

1. Mining claims are properly declared null and void where they were located after the Bureau on its own motion had classified land as suitable for public recreational purposes and the classification was noted on the tract book, serial register, and plats, and an application under the Recreation and Public Purposes Act has been filed. 290
2. The classification of land under the Taylor Grazing Act as suitable for disposal under the Recreation and Public Purposes Act precludes the appropriation of the land under any other public land law, including the mining laws. 290

RULES OF PRACTICE

APPEALS

Generally

1. The Board will remand to the contracting officer for appropriate findings of fact and decision a claim first presented to the Board during the course of an appeal on other claims, and which had not been previously submitted to the contracting officer, inasmuch as the Board's jurisdiction is appellate only. 281

Burden of Proof

1. Under a construction contract provision which places the risk of loss before acceptance on the contractor unless the cause of damage is unforeseeable and beyond the control of, and without the fault of negligence of the contractor, the burden of proof of the existence of contractor fault or negligence, when alleged by the Government, is on the Government. 324

Dismissal

1. Where subsequent to award of a contract for the construction of a transmission line a contractor requests permission, (i) to substitute a subcontractor having adequate financial resources for the subcontractor listed in its bid, or (ii) to be allowed to perform the work involved itself, and where the contracting officer denies the request for substitution on the grounds that there has been no

RULES OF PRACTICE—Continued

APPEALS—Continued

Dismissal—Continued

showing of a change of circumstances since the time the contractor's bid was submitted, the Board dismisses the contractor's claim for increased costs attributed to being required to use a subcontractor lacking the required financial resources during the crucial early months of contract performance. The dismissal is based upon findings (i) that the subcontractor listing paragraph under which the request for substitution was made contains no provision for an equitable adjustment if a dispute arose as to the contracting officer's action thereunder; (ii) that a change in the specifications or in the scope of the work was not involved; and (iii) that appellant's allegations that the contracting officer's action in denying the request for substitution was arbitrary and capricious was not related to action taken under the Changes clause or other clause providing for an equitable adjustment even though appellant did indicate that the claim might be cognizable under the Changes clause-----

205

2. A claim for compensation for the Government's taking possession after work was completed of a contractor-produced stockpile of excess gravel will be dismissed where no relief to the contractor is available under the contract-----

281

Hearings

1. In an appeal involving a question of interpretation of specifications, an expert witness will be permitted to give an opinion as to whether a contractor's interpretation was reasonable, notwithstanding the Government's objection that such opinion invades the province of the Board, where such testimony may aid the Board in the resolution of the question; but such testimony is advisory in character and may be rejected or accepted by the Board in whole or in part, even though uncontradicted-----

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Standing to Appeal

1. An order by a hearing examiner denying a motion to dismiss for lack of jurisdiction a contest proceeding brought by the Government against a mining claim is an interlocutory order which is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the contest, and an appeal from such an order is properly dismissed as premature-----

23

Timely Filing

1. An appeal to the Secretary of the Interior must be dismissed where the notice of appeal was not transmitted until after the expiration of the 30-day period in which it was required to be filed-----

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RULES OF PRACTICE—Continued

EVIDENCE

- | | Page |
|---|------|
| 1. Evidence tendered on appeal to the Secretary of the Interior after a hearing has been held in a Government mining contest case cannot be considered and weighed with the evidence presented at the hearing in making a decision on the merits of the contest since the record made at the hearing constitutes the sole basis for decision; however, such evidence may be considered in determining whether there is any justification for ordering a further hearing in the case and where it appears that most of the evidence pertains to a discovery on a portion of a claim which has been appropriated for a roadway by the Forest Service and the remaining evidence is insufficient to indicate a discovery on the remaining portions of the claim, a new hearing is not warranted..... | 37 |
| 2. A Government mineral examiner has no duty to do discovery work on a mining claim but merely to investigate the claim to determine whether a discovery has been made; therefore, testimony by an examiner that he examined a mining claim and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government as to the invalidity of the claim..... | 56 |
| 3. The technical exclusionary rules of evidence applied in court proceedings need not be followed in administrative hearings; therefore, the fact that hearsay evidence, consisting primarily of assay reports, was presented by both parties in a Government contest together with other evidence is no reason for changing a decision invalidating a mining claim which is sustainable even without such evidence..... | 56 |
| 4. The Government is a party in interest in any proceeding before the Department of the Interior and may take advantage of any information developed in such a proceeding, and the transcript of hearing in a private contest of a homestead entry is properly received in evidence at the hearing held in connection with a subsequent Government contest of the same entry regardless of what may have been the final disposition of the private contest..... | 73 |
| 5. In an appeal involving a question of interpretation of specifications, an expert witness will be permitted to give an opinion as to whether a contractor's interpretation was reasonable, notwithstanding the Government's objection that such opinion invades the province of the Board, where such testimony may aid the Board in the resolution of the question; but such testimony is advisory in character and may be rejected or accepted by the Board in whole or in part, even though uncontradicted..... | 141 |
| 6. In determining whether land on which a building stone claim is located is chiefly valuable for building stone, evidence submitted by the locator on that point may be considered along with evidence by the United States as to the value of the land for other purposes, even though the United States does not submit any direct evidence on the value of the land for building stone..... | 181 |

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- 7. Where a court has remanded a case to this Department for further evidentiary proceedings on a finding that there was not a *prima facie* substantiation in the record for the standard employed in determining the validity of a mining claim, it is proper at the hearing on remand to consider all evidence relating to the validity of the claim; especially where any question raised by the court as to the standard has been resolved by subsequent rulings of other courts ----- 233

GOVERNMENT CONTESTS

- 1. An order by a hearing examiner denying a motion to dismiss for lack of jurisdiction a contest proceeding brought by the Government against a mining claim is an interlocutory order which is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the contest, and an appeal from such an order is properly dismissed as premature ----- 23
- 2. A Government mineral examiner has no duty to do discovery work on a mining claim but merely to investigate the claim to determine whether a discovery has been made; therefore, testimony by an examiner that he examined a mining claim and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a *prima facie* case by the Government as to the invalidity of the claim ----- 56

HEARINGS

- 1. Evidence tendered on appeal to the Secretary of the Interior after a hearing has been held in a Government mining contest case cannot be considered and weighed with the evidence presented at the hearing in making a decision on the merits of the contest since the record made at the hearing constitutes the sole basis for decision; however, such evidence may be considered in determining whether there is any justification for ordering a further hearing in the case and where it appears that most of the evidence pertains to a discovery on a portion of a claim which has been appropriated for a roadway by the Forest Service and the remaining evidence is insufficient to indicate a discovery on the remaining portions of the claim, a new hearing is not warranted ----- 37
- 2. The technical exclusionary rules of evidence applied in court proceedings need not be followed in administrative hearings; therefore, the fact that hearsay evidence, consisting primarily of assay reports, was presented by both parties in a Government contest together with other evidence is no reason for changing a decision invalidating a mining claim which is sustainable even without such evidence ----- 56
- 3. A hearing examiner is not disqualified, and his findings will not be set aside, in the absence of a showing of bias; the fact that a hearing examiner may have ruled against a homestead entryman in a previous proceeding involving, in part, the same issues that are again before him does not constitute such a showing ----- 73

RULES OF PRACTICE—Continued**HEARINGS—Continued**

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| 4. Where a court has remanded a case to this Department for further evidentiary proceedings on a finding that there was not a <i>prima facie</i> substantiation in the record for the standard employed in determining the validity of a mining claim, it is proper at the hearing on remand to consider all evidence relating to the validity of the claim; especially where any question raised by the court as to the standard has been resolved by subsequent rulings of other courts ----- | 233 |
| 5. Where a hearing examiner's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing and the ruling on each finding and conclusion is clear, there is no requirement that the examiner rule separately as to each of the proposed findings and conclusions individually ----- | 332 |

WITNESSES

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| 1. In an appeal involving a question of interpretation of specifications, an expert witness will be permitted to give an opinion as to whether a contractor's interpretation was reasonable, notwithstanding the Government's objection that such opinion invades the province of the Board, where such testimony may aid the Board in the resolution of the question; but such testimony is advisory in character and may be rejected or accepted by the Board in whole or in part, even though uncontradicted ----- | 141 |
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SETTLEMENTS OF PUBLIC LANDS

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| 1. Rights to public land in Alaska may be acquired through settlement upon, and occupancy and improvement of, land as a homesite without prior approval of the Bureau of Land Management, but the filing of a notice of location of settlement in the appropriate land office is required in order to receive credit for any occupancy or use of land; however, the filing does not in itself establish any rights in a settler but serves only as notice that such rights are claimed, and the acceptance of a notice of location for recordation by a land office is not a bar to a subsequent finding that no rights were established in the attempted settlement ----- | 133 |
| 2. The Antiquities Act of June 8, 1906, which authorizes the reservation by Presidential proclamation of public lands containing historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest and which authorizes the issuance of permits for archaeological exploration does not itself effect a withdrawal of any lands from the operation of the public land laws, and the fact that land contains objects of possible historical or scientific interest or is included in a permit does not create a withdrawal of the land which constitutes a proper basis for refusing to accept for recordation a notice of location of a homesite claim on such land in Alaska ----- | 133 |

STATUTES

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- 1. Where a tribal membership classification of the Jicarilla Apache constitution resulted in excluding illegitimate persons from membership or denied right of such persons to claim the Jicarilla Apache blood of their acknowledged or putative father, such classification was not based upon an essential requirement of an Indian tribe, served no rational purpose and abrogated a fundamental right of membership and was therefore repugnant to the equal protection clause of Section 202, subsection (8), of the Civil Rights Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. sec. 1302 and void and of no effect----- 353

TAYLOR GRAZING ACT

CLASSIFICATION

- 1. The classification of land under the Taylor Grazing Act as suitable for disposal under the Recreation and Public Purposes Act precludes the appropriation of the land under any other public land law, including the mining laws----- 290

WATER COMPACTS AND TREATIES

- 1. The Secretary of the Interior and all other Federal officers and agencies are required by sec. 601(c) of the Colorado River Basin Project Act (P.L. 90-537) to comply with the Upper Colorado River Basin Compact, including the restriction against use for any purpose of Upper Basin water in Arizona in excess of 50,000 acre-feet a year ----- 357
- 1. To the extent that there are Indian reserved water rights in the Colorado River for use in the Upper Basin portion of Arizona, those rights must be satisfied out of the 50,000 acre-feet a year apportioned to Arizona by the Upper Colorado River Basin Compact ----- 357

WITHDRAWALS AND RESERVATIONS

GENERALLY

- 1. The Antiquities Act of June 8, 1906, which authorizes the reservation by Presidential proclamation of public lands containing historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest and which authorizes the issuance of permits for archaeological exploration does not itself effect a withdrawal of any lands from the operation of the public land laws, and the fact the land contains objects of possible historical or scientific interest or is included in a permit does not create a withdrawal of the land which constitutes a proper basis for refusing to accept for recordation a notice of location of a homesite claim on such land in Alaska----- 133

WORDS AND PHRASES

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- 1. "Legal Subdivision." The term "legal subdivision" as used in the proviso to section 30(a) of the Mineral Leasing Act, means a quarter-quarter section. Consequently, the Secretary may not disapprove an assignment of a quarter-quarter section on the grounds that it is an assignment of only part of a legal subdivision----- 108