UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

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

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

Office of the Solicitor. . . Leo Krulitz, *Solicitor*

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

EDITED BY

VERA E. BURGIN

BETTY H. PERRY

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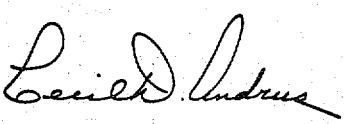
PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1977 to December 31, 1977. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

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

This volume will be cited within the Department of the Interior as "84 I. D."



Secretary of the Interior.

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ERRATA:

Page 3—Footnote 4, line 3, correct date of Act to read *Aug. 15, 1894.*
Page 30—Footnote 106, line 2, correct 43 U.S.C. § 671 to § *617.*
Page 36—Footnote 124, line 7, correct date of Act to read, Feb. *13*, 1891.
Page 46—Footnote 164, line 1, correct date of Act to read, Feb. *8*, 1887.
Page 49—Left col., par. 4, line 2, correct Act to read *1894.* Footnote 176, line 6, correct vol. to read *229* U.S. 498.
Page 84—Right col., line 7, correct legal cite to read Quechan Tribe *v. Rowe.*
Page 85—Left col., line 13 correct citation edition date to read *1918.*
Page 94—Left col., par. 1, line 19 legal citation of Iverson, edition date should read *1975.*
Page 126—Right col., line 7, correct edition date for Reliable to (*1971*).
Page 145—Left col., par. 2, line 3, correct date of Materials Act to July *31*, 1947.
Page 174—Left col., line 12, correct spelling *Commission.*
Page 190—Left col., line 17, correct citation to read *DuPuy v. Dupuy.*
Page 204—Right col., par. 2, line 4 from bottom of page, Regulation should read 30 CFR *100.5.*
Page 210—Left col., par. 1, line 5 correct phrase to read, *filed an Answer to SOCCO's.*
Page 233—Left col., line 24 legal citation should read 537 F.2d *780.*
Page 248—Left col., par. 2, line 26, correct 43 U.S.C. to *CFR.*
Page 305—Left col., line 7, correct legal citation title to *Iversen.*
Page 450—Left col., line 3 correct to read § *261* (sodium).
Page 453—Left col., lines 11 & 12 legal citation title misspelled, should read *United States v. Winegar.*
Page 463—Footnote 2, correct citation to read, Zeigler Coal Co., 7 IBMA 280, *84* I.D. 127, *1977–1978* OSHD par. *21,676.*
Page 555—Footnote 91, line 5, correct Act to read 90 Stat. *2641.*
Page 914—Right col., par. 4, line 10, legal citation should read (*43 Stat. 244*).
Page 938—Left col., par. 2, line 19, correct citation IBCA No. to *699–2–68.*
Page 980—Footnote 19, line 9 Citation should read Grunley-Walsh Construction, Co., Inc. Delete *v. United States.*
Page 1024—Left col., bottom of page, line 3, legal citation should read *214 Ct. Cl. 607* (*July 8, 1977*), *558 F.2d 985.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Raymond C. McMaster v. *U.S., Dept. of the Interior, Secretary of the Interior & Bureau of Indian Affairs*, Civil No. C76–129T, W.D. Wash. Suit pending.

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

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

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

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

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

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

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

Atlantic Richfield Co. & Pasco, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74–181, D. Wyo. Actions consolidated; judgment for plaintiff, 407 F. Supp. 1301 (1975); aff'd., 556 F. 2d 982 (10th Cir. 1977).

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

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

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

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

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

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

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

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

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

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

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

Duncan Miller, A–29231 (Feb. 5, 1963)

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

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

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

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

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

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

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

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

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

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

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

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

Navajo Tribe of Indians v. *Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior*, Civil No. C–308–73, D. Utah. Suit pending.

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

Richard L. Oelschlaeger v. *Stewart L. Udall*, Civil No. 4181–60. Dismissed, Nov. 15, 1963; case reinstated, Feb. 19, 1964; remanded, Apr. 4, 1967; rev'd. & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); *cert. den.* 392 U.S. 909 (1968).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See also:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Equity Oil Co. v. *Stewart L. Udall*, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Gabbs Exploration Co. v. *Stewart L. Udall,* Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Harlan H. Hugg, et al. v. *Stewart L. Udall,* Civil No. 9252, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

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

John W. Savage v. *Stewart L. Udall,* Civil No. 9458, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

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

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

Joseph B. Umpleby, et al. v. *Stewart L. Udall,* Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted,* 396 U.S. (1969); rev'd, & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied,* June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

Union Oil Co. of California, a Corp. v. *Stewart L. Udall,* Civil No. 9461, D. Colo. Order to Close Files & Stay Proceedings, Mar. 25, 1967.

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

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

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

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

United Mine Workers of America v. *Inland Steel Co.,* 83 I.D. 87 (1976)

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

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

Local Union No. 1993, United Mine Workers of America v. *Cecil D. Andrus*, No. 77–1582, United States Ct. of Appeals, D.C. Cir. Suit pending.

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

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

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

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

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

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

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California, State of *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335 (1902).

California, State of *v.* Pierce (9 C.L.O. 118); modified, 2 L.D. 854.

California, State of *v.* Smith (5 L.D. 543); overruled, 18 L.D. 343 (1894).

Call *v.* Swain (3 L.D. 46); overruled, 18 LD.. 373 (1894).

Cameron Lode (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518 (1897).

Camplan *v.* Northern Pacific R.R. Co. (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550 (1900).

Case *v.* Church (17 L.D. 578); overruled, 26 L.D. 453 (1898).

Case *v.* Kupferschmidt (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406 (1920).

Castello *v.* Bonnie (20 L.D. 311); overruled, 22 L.D. 174 (1896).

Cate *v.* Northern Pacific Ry. Co. (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60 (1914).

Cawood *v.* Dumas (22 L.D. 585); vacated, 25 L.D. 526 (1897).

Centerville Mining and Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17 (1921).

Central Pacific R.R. Co. (29 L.D. 589); modified, 48 L.D. 58 (1921).

Central Pacific R.R. Co. *v.* Orr. (2 L.D. 525); overruled, 11 L.D. 445 (1890).

Chapman *v.* Willamette Valley and Cascade Mountain Wagon Road Co. (13 L.D. 61); overruled, 20 L.D. 259 (1895).

Chappell *v.* Clark (27 L.D. 334); modified, 27 L.D. 532 (1898).

Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453 (1913).

Childress *et al. v.* Smith (15 L.D. 89); overruled, 26 L.D. 453 (1898).

Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.

Claflin *v.* Thompson (28 L.D. 279); overruled, 29 L.D. 693 (1900).

Claney *v.* Ragland (38 L.D. 550) (See 43 L.D. 485).

Clark, Yulu S. *et al.* (A-22852) February 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51 (1925).

Cline *v.* Urban (29 L.D. 96); overruled, 46 L.D. 492 (1918).

Clipper Mining Co. (22 L.D. 527); no longer followed in part, 67 I.D. 417 (1960).

Clipper Mining Co. *v.* The Eli Mining and Land Co. et al. (33 L.D. 660); no longer followed in part, 67 I.D. 417 (1960).

Cochran *v.* Dwyer (9 L.D. 478) (See 39 L.D. 162, 225 (1910)).

Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153 (1927).

Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51 (1925).

Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408 (1889).

Computation of Royalty Under Sec. 15, 51 L.D. 283 (1925), overruled, Solicitor's Opinion—Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause, M–36888 (Oct. 4, 1976), 84 I.D. 54 (1977).

Condict, W. C. *et al.* (A–23366) June 24, 1942, unreported; overruled so far as in conflict, 59 I.D. 258–260 (1946).

Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 225 (1910)).

Cooke *v.* Villa (17 L.D. 210); vacated, 19 L.D. 442 (1894).

Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113 (1897).

Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27); distinguished insofar as it applies to *ex parte* cases, 39 L.D. 574 (1911).

Copper Glance Lode (29 L.D. 542); modified so far as in conflict, 55 I.D. 348 (1935).

Corlis *v.* Northern Pacific R.R. Co. (23 L.D. 265); vacated, 26 L.D. 652 (1898).

Cornell *v.* Chilton (1 L.D. 153); overruled, 6 L.D. 483 (1888).

Cowles *v.* Huff (24 L.D. 81); modified, 28 L.D. 515 (1899).

Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114 (1901).

Crowston *v.* Seal (5 L.D. 213); overruled, 18 L.D. 586 (1894).

Culligan *v.* State of Minnesota (34 L.D. 22); modified, 34 L.D. 151 (1905).

Cunningham, John (32 L.D. 207); modified; 32 L.D. 456 (1904).

Dailey Clay Products Co., The (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656 (1924).

Dakota Central R.R. Co. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131 (1895).

Davis, E. W., A–29889 (March 25, 1964), no longer followed in part; 80 I.D. 698 (1973).

Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110 (1917).

DeLong *v.* Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54 (1916).

Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300 (1914).

Dennison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122 (1898).

Deseret Irrigation Co. *et al. v.* Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27 (1925).

Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429 (1887).

Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.

Dixon *v.* Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27 (1925).

Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128 (1914).

Dowman *v.* Moss (19 L.D. 526); overruled, 25 L.D. 82 (1897).

Dudymott *v.* Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.

Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561 (1908).

Dyche *v.* Beleele (24 L.D. 494); modified, 43 L.D. 56 (1914).

Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188 (1897).

Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974–1975 OSHD par. 18,706 (1974); overruled in part, Alabama By-Products Corporation (On Reconsideration), 7 IBMA 85, 83 I.D. 574 (1976); 5 IBMA 185, 82 I.D. 506, 1975–1976 OSHD par. 20,041 (1975); set aside in part on reconsideration, 7 IBMA 14, 83 I.D. 425 (1976); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355 (1900).

East Tintic Consolidated Mining Co. (on Rehearing) (41 L.D. 255); vacated, 43 L.D. 80 (1914).

*Elliot *v.* Ryan (7 L.D. 322); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199 (1911).

Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.

Emblen *v.* Weed (16 L.D. 28); modified, 17 L.D. 220 (1893).

Epley *v.* Trick (8 L.D. 110); overruled, 9 L.D. 360.

Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406 (1910).

Esping *v.* Johnson (37 L.D. 709); overruled, 41 L.D. 289 (1912).

Ewing *v.* Rickard (1 L.D. 146); overruled, 6 L.D. 483 (1888).

Falconer *v.* Price (19 L.D. 167); overruled, 24 L.D. 264 (1897).

Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348 (1935).

Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 472, 473 (1928).

Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183 (1914).

Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 287, 290 (1935).

Ferrell *et al. v.* Hoge *et al.* (18 L.D. 81); overruled, 25 L.D. 351 (1897).

Fette *v.* Christiansen (29 L.D. 710); overruled, 34 L.D. 167 (1905).

Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 472, 473 (1928).

Filtrol Co. *v.* Brittan and Echart (51 L.D. 649); distinguished, 55 I.D. 605 (1936).

Fish, Mary (10 L.D. 606); modified, 13 L.D. 511 (1891).

Fisher *v.* Heirs of Rule (42 L.D. 62, 64), vacated, 43 L.D. 217 (1914).

Fitch *v.* Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43 (1893).

Fleming *v.* Bowe (13 L.D. 78); overruled, 23 L.D. 175 (1896).

Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421 (1898).

Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237 (1889).

Florida, State of (17 L.D. 355); reversed, 19 L.D. 76 (1894).

Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).

Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629 (1890).

Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505 (1898).

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

Freeman Coal Mining Co., 3 IBMA 434, 81 I.D. 723, 1974–1975 OSHD par. 19,177 (1974); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63 (1912).

Freeman *v.* Summers, 52 L.D. 201 (1927), is overruled; United States *v.* Winegar, Frank W. et al., 16 IBLA 112, 81 I.D. 370 (1974).

Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 13, 18 (1888).

Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581 (1926).

Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181 (1962).

Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57 (1880).

Gallup *v.* Northern Pacific Ry Co. (unpublished); overruled so far as in conflict, 47 L.D. 303, 304 (1920).

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

Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158 (1886).

Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229 (1914).

Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336, 342 (1882).

Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81 (1897).

Glassford, A. W. *et al.*, 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159 (1963).

Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Gohrman *v.* Ford (8 C.L.O. 6); overruled, 4 L.D. 580 (1886).

Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250 (1908).

Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88 (1901).

Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580 (1936).

Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560 (1909).

Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240 (1899).

Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453 (1898).

Gowdy *et al. v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191 (1897).

Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495 (1897).

Gregg *et al. v.* State of Colorado (15 L.D. 151); vacated, 30 L.D. 310 (1900).

Grinnel *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489 (1896).

*Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R.R. Rousseau, 47 L.D. 590 (1920)).

Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399 (1912).

Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534 (1894).

Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442 (1918).

Gwyn, James R. (A-26806) December 17, 1953, unreported; distinguished, 66 I.D. 275 (1959).

Hagood, L. N., *et al.*, 65 I.D. 405 (1958); overruled, Beard Oil Company, 1 IBLA 42, 77 I.D. 166 (1970).

Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505 (1912).

Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59 (1899).

Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698 (1900).

Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698 (1900).

Hardin, James A. (10 L.D. 313); revoked, 14 I.D. 233 (1892).

Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93 (1910).

Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539 (1905).

Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413 (1923)).

Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L.D. 257); overruled, 28 L.D. 572 (1899).

Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629 (1922).

Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373 (1898).

Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150 (1933).

Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119 (1896).

Heinzman *et al. v.* Letroadec's Heirs *et al.* (28 L.D. 497); overruled, 38 L.D. 253 (1909).

Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110 (1917).

Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532 (1915).

*Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200 (1892).

Heirs of Vradenburg' *et al. v.* Orr *et al.* (25 L.D. 323); overruled, 38 L.D. 253 (1909).

Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472 (1913).

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

Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (1914) (See 44 L.D. 112 and 49 L.D. 484).

Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211 (1910).

Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275 (1959).

Herman *v.* Chase *et al.* (37 L.D. 590); overruled, 43 L.D. 246 (1914).

Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113 (1897).

Hess, Hoy Assignee of (46 L.D. 421); overruled, 51 L.D. 287 (1925).

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 (1917).

Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191 (1914).

Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538 (1914).

Holbeck, Halvor F., A–30376 (December 2, 1965); overruled, 79 I.D. 416 (1972).

Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166 (1899).

Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436 (1891).

Holland, William C. (M–27696); decided April 26, 1934; overruled in part, 55 I.D. 215, 221 (1935).

Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260 (1919).

Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590 (1920).

Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 196, 197 (1914).

Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284 (1899).

Howard *v.* Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126 (1899).

Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225 (1910)).

Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204 (1899).

Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411 (1910)).

Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287 (1925).

*Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413 (1923) (See 260 U.S. 427).

Hull *et al. v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258 (1900).

Huls, Clara (9 L.D. 401); modified, 21 L.D. 377 (1895).

Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316 (1958).

Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65 (1956).

Hurley, Bertha C. (TA–66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12 (1955).

Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284 (1899).

Hyde, F. A. *et al.* (40 L.D. 284); overruled, 43 L.D. 381 (1914).

*Hyde *et al. v.* Warren *et al.* (14 L.D. 576, 15 L.D. 415) (See 19 L.D. 64 (1894)).

*Ingram, John D. (37 L.D. 475) (See 43 L.D. 544 (1914).

Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 LD.. 95 (1899).

Instructions (4 L.D. 297); modified 24 L.D. 45 (1897).

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

Instructions (51 L.D. 51); overruled so far as conflict, 54 I.D. 36 (1932).

Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228 (1930).

Iowa Railroad Land Co. (23 L.D. 79); 24 L.D. 125); vacated, 29 L.D. 79 (1899).

Jacks *v.* Belard *et al.* (29 L.D. 369); vacated, 30 L.D. 345 (1900).

Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 21, 22 (1912).

Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448 (1889).

Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429 (1892).

Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 463, 464 (1893).

Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371 (1934).

Keating Gold Mining Company, Montana Power Company, Transferee, 52 L.D. 671 (1929), overruled in part, Arizona Public Service Company, 5 IBLA 137, 79 I.D. 67 (1972).

Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419 (1950).

Kemper *v.* St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101 (1894).

Kilner, Harold E. *et al.* (A–21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19 (1900).

Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228 (1930).

Kinsinger *v.* Peck (11 L.D. 202) (See 39 L.D. 162, 225 (1910)).

Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119 (1896).

Knight, Albert B. *et al.* (30 L.D. 227); overruled, 31 L.D. 64 (1901).

Knight *v.* Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242 (1914).

Kniskern *v.* Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362 (1883).

Kolberg, Peter F. (37 L.D. 453), overruled, 43 L.D. 181 (1914).

Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448 (1898).

*Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (1930) (See 280 U.S. 306).

Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715 (1909).

La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331 (1903).

Largent, Edward B. *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321 (1913).

Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242 (1914).

Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278 (1892).

Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683 (1898).

Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361 (1912).

Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40 (1895).

Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359 (1920).

Layne 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 (1898).

Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 463, 464 (1893).

Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil and Gas Leases, 58 I.D. 535 (1943); superseded to extent it is inconsistent with Solicitor's Opinion —Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M–36896, 84 I.D. 905 (1977).

Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299 (1885).

Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459 (1891).

*Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536 (1914)).

Liss, Merwin E., Cumberland & Allegheny Gas Company, 67 I.D. 385 (1960), is overruled, 80 I.D. 395 (1973).

Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550 (1897).

Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123 (1898).

Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200 (1895).

Lonergan *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199 (1907).

Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157 (1889).

Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5 (1898).

Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291 (1925).

Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291 (1925).

Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495 (1897).

Luse, Jeanette L. *et al.* (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243 (1964).

Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102 (1906).

Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221 (1914).

Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713 (1891).

Mabel Lode, 26 L.D. 675, distinguished; 57 I.D. 63 (1939).

Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448 (1898).

Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399 (1907).

Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472 (1913)).

Maher, John M. (34 L.D. 342); modified, 42 L.D. 472 (1913).

Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313 (1913).

Makela, Charles (46 L.D. 509); extended, 49 L.D. 244 (1922).

Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650 (1904).

Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110 (1914).

Maney, John J. (35 L.D. 250); modified, 48 L.D. 153 (1921).

Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181 (1914).

Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536 (1914).

Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 369 (1898).

Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111 (1897).

Mather *et al. v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48 (1894).

Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94 (1888).

Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 87, 88 (1921).

McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33 (1927).

McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277 (1900).

McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73 (1937).

McCornick, Williams S. (41 L.D. 661, 666); vacated, 43 L.D. 429 (1914).

*McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285 (1908).

*McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (1901) (See 35 L.D. 399).

McFadden *et al. v.* Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358 (1898).

McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166 (1899).

McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502 (1897).

McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148 (1909).

McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340 (1938).

McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494 (1893).

*McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317 (1913)).

McMicken, Herbert *et al.* (10 L.D. 97); (11 L.D. 96); distinguished, 58 I.D. 257, 260 (1942).

McNamara *et al. v.* State of California (17 L.D. 296); overruled, 22 L.D. 666 (1896).

McPeek *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26 (1907).

*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. 659, 660 (1923).

Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649 (1907).

Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225 (1910)).

Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436 (1891).

Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371 (1934).

Mikesell, Henry D., A–24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149 (1963).

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

Miller, Duncan, A–29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).

Miller, Duncan, A–30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).

Miller, Duncan, A–30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).

Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181 (1914).

Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448 (1898).

Milner 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 (1897).

Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112 (1899).

Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224 (1899).

Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359 (1924).

*Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (1912) (See 43 L.D. 520).

Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495 (1897).

Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348 (1935).

Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 481, 2 (1898).

Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303 (1886).

Morgan, Henry S. *et al.*, 65 I.D. 369; overruled to extent inconsistent, 71 I.D. 22 (1964).

Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618 (1909).

Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382 (1909).

Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319 (1908).

Morrow *et al. v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101 (1904).

Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.

Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551 (1908).

Mountain Fuel Supply Company, A–31053 (Dec. 19, 1969), overruled, 79 I.D. 416 (1972).

Mt. Whitney Military Reservation (40 L.D. 315 (1911)) (See 43 L.D. 33).

Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163 (1921).

Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360 (1910).

Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532 (1915).

Munsey, Glenn, Earnest Scott and Arnold Scott *v.* Smitty Baker Coal Company, Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509, distinguished, 80 I.D. 251 (1973).

Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).

National Livestock Company and Zack Cox, I.G.D. 55 (1938), is overruled, United States *v.* Maher, Charles *et al.*, 5 IBLA 209, 79 I.D. 109 (1972).

Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358 (1899).

Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123 (1898).

Neilsen *v.* Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216 (1900).

Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108 (1899).

Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364 (1914).

New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 97 (1921).

New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159 (1933).

Newton, Walter (22 L.D. 322); modified, 25 L.D. 188 (1897).

New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373 (1898).

*Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).

Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550 (1900).

*Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218 (1915); 117 U.S. 435).

Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224 (1894).

Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191 (1895).

Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464 (1898).

Northern Pacific R.R. Co. *v.* Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174 (1899).

Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229 (1893).

Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550 (1900).

Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95 (1899).

Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126 (1899).

Northern Pacific R.R. Co. *v.* Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391 (1922).

Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127 (1891).

*Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (1925) (See 52 L.D. 58 (1927)).

Nunez, Roman C. 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 (1888).

O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411 (1907).

Oil and Gas Privilege and License Tax, Ft. Peck Reservation, Under Laws of Montana, M–36318 (Oct. 13, 1955); is *superseded* to the extent that it is *inconsistent* with, Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Lease of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M–36896, 84 I.D. 905 (1977).

Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382 (1900).

Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342 (1908).

Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333 (1949).

*Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (1943) (See 59 I.D. 346, 350).

Opinion of Associate Solicitor, Oct. 22, 1947 (M–34999); distinguished, 68 I.D. 433 (1961).

Opinion of Associate Solicitor, M–36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).

Opinion of Associate Solicitor, M–36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159 (1963).

Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).

Opinion of Deputy Assistant Secretary (Dec. 2, 1966), affirming Oct. 27, 1966), is *superseded* to the extent that it is *inconsistent* with Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M–36896, 84 I.D. 905 (1977).

Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).

Opinion of Solicitor, Oct. 31, 1917 (D–40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96 (1942).

Opinion of Solicitor, Feb. 7, 1919 (D–44083); overruled, November 4, 1921 (M–6397) (See 58 I.D. 158, 160 (1942)).

Opinion of Solicitor, August 8, 1933 (M–27499); overruled so far as in conflict, 54 I.D. 402 (1934).

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

Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).

Opinion of Solicitor, M-28198 (Jan. 8, 1936), finding *inter alia*, that the Indian Title to Certain Lands within the Ft. Yuma Indian Reservation has been Extinguished, is well founded and is affirmed, Solicitor's Opinion, M–36886, 84 I.D. 1 (1977).

Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567 (1943).

Opinion of Solicitor, Aug. 31, 1943 (M–33183), distinguished, 58 I.D. 726, 729 (1944).

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

Opinion of Solicitor, M–34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M–36887, 84 I.D. 72 (1977).

Opinion of Solicitor, Oct. 22, 1947 (M–34999); distinguished, 68 I.D. 433 (1961).

Opinion of Solicitor, Mar. 28, 1949 (M–35093); overruled in part, 64 I.D. 70 (1957).

Opinion of Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).

Opinion of Solicitor, M–36051 (December 7, 1950), modified; Solicitor's Opinion, M–36863, 79 I.D. 513 (1972).

Opinion of Solicitor, Jan. 19, 1956 (M–36378); overruled to extent inconsistent, 64 I.D. 57 (1957).

Opinion of Solicitor, June 4, 1957 (M–36443); overruled in part, 65 I.D. 316 (1958).

Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388 (1958).

Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366 (1960).

Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).

Opinion of Solicitor, 64 I.D. 435 (1957); will not be followed to the extent that it conflicts with these views M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).

Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159 (1963).

Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).

Opinion of Solicitor, M-36767 (Nov. 1, 1967) (supplementing, M-36599), 69 I.D. 195 (1962).

Opinion of Solicitor, M-36735 (Jan. 31, 1968), is reversed and withdrawn, Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).

Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156 (1942)).

Oregon and California R.R. Co. *v.* Puckett (39 L.D. 169); modified, 53 I.D. 264 (1931).

Oregon Central Military Wagon Road Co. *v.* Hart (17 L.D. 480); overruled, 18 L.D. 543 (1894).

Owens *et al. v.* State of California (22 L.D. 369); overruled, 38 L.D. 253 (1909).

Pace *v.* Carstarphen *et al.* (50 L.D. 369); distinguished, 61 I.D. 459 (1954).

Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518 (1897).

Page, Ralph, 8 IBLA 435 (Dec. 22, 1972), explained; Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).

Papina *v.* Alderson (1 B.L.P. 91); modified, 5 L.D. 256 (1886).

Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 264, 626.

Paul Jarvis, Inc., Appeal of (64 I.D. 285); distinguished, 64 I.D. 388 (1957).

Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359 overruled, 57 I.D. 63 (1939).

Paul *v.* Wiseman (21 L.D. 12); overruled, 27 L.D. 522 (1898).

Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268 (1894).

Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66 (1914).

Perry *v.* Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 303, 304 (1920).

Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159 (1963).

Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854 (1884).

Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424 (1892).

Phillips *v.* Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93 (1910).

Phillips, Cecil H., A-30851 (November 16, 1967), overruled, 79 I.D. 416 (1972).

Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973) is modified by Vance W. Phillips and Aelisa A. Burnham, 19 IBLA 211 (Mar. 21. 1975).

Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374 (1914).

Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Pietkiewicz *et al. v.* Richmond (29 L.D. 195); overruled, 37 L.D. 145 (1908).

Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204, 48 L.D. 523 (1922).

Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204, 48 L.D. 523 (1922).

Popple, James (12 L.D. 433); overruled, 13 L.D. 588 (1891).

Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477 (1892).

Prange, Christ C. and William C. Braasch (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419 (1950).

Premo, George (9 L.D. 70) (See 39 L.D. 162, 225 (1910).

Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287 (1925).

Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599 (1900).

Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399 (1907).

Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409 (1905).

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

Puyallup Allotment (20 L.D. 157); modified, 29 L.D. 628 (1900).

Ramsey, George L., Heirs of Edwin C. Philbrick (A–16060), August 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290 (1942).

Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320 (1886).

Ranger Fuel Corporation, 2 IBMA 163 (July 17, 1973), 80 I.D. 708; Set aside by Memorandum Opinion and Order Upon Reconsideration in Ranger Fuel Corporation, 2 IBMA 186 (September 5, 1973), 80 I.D. 604.

Rankin, James D. *et al.* (7 L.D. 411); overruled, 35 L.D. 32 (1906).

Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404 (1895).

Rayburn, Ethel Cowgill, A–28866 (Sept. 6, 1962) is modified by T. T. Cowgill, *et al.*, 19 IBLA 274 (Apr. 7, 1975).

Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523 (1922).

*Reed *v.* Buffington (7 L.D. 154); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

Regione *v.* Rosseler (40 L.D. 93); vacated, 40 L.D. 420 (1912).

Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355 (1954).

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971) distinguished, Zeigler Coal Corporation, 1 IBMA 71, 78 I.D. 362 (1971).

Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M–36735 (Jan. 31, 1968); is reversed and withdrawn, M–36735 (Supp.), 83 I.D. 346 (1976).

Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250 (1908).

Rico Town Site (1 L.D. 556); modified 5 L.D. 256 (1886).

Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421 (1898).

Roberts *v.* Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174 (1901).

Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1 (1891).

Rogers *v.* Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165 (1889).

Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649 (1932).

Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321 (1892).

*Rogers *v.* Lukens (6 L.D. 111); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

Romero *v.* Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244 (1922).

Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197 (1924).

Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584 (1913).

St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194 (1930).

*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354 (1891) (See 32 L.D. 21).

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291); vacated, 30 L.D. 191 (1900).

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen (20 L.D. 249); overruled, 25 L.D. 86 (1897).

Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93 (1910).

Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88 (1921).

Santa Fe Pacific R.R. Co. *v.* Peterson (39 L.D. 442); overruled, 41 L.D. 383 (1912).

Satisfaction Extension Mill Site (14 L.D. 173 (1892)) (See 32 L.D. 128).

*Sayles, Henry P. (2 L.D. 88); modified 6 L.D. 797 (1888) (See 37 L.D. 330).

Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Schweitzer *v.* Hilliard *et al.* (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639 (1898).

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

Serry, John J. (27 L.D. 330); overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Shale Oil Company overruled so far as in conflict, (See 55 I.D. 287 (1935)).

Shanley *v.* Moran (1 L.D. 162); overruled, 15 L.D. 424 (1892).

Shillander, H. E., A–30279 (January 26, 1965), overruled, 79 I.D. 416 (1972).

Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202 (1889).

Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63 (1939).

Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205 (1907).

Simpson Robert E., A–4167 (June 22, 1970); overruled to extent inconsistent, United States *v.* Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Sipchen *v.* Ross (1 L.D. 634); modified, 4 L.D. 152 (1885).

Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135 (1899).

Smith, M. P., 51 L.D. 251 (1925); overruled, Solicitor's Opinion, Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause, M–36888 (Oct. 4, 1976), 84 I.D. 54 (1977).

Snook, Noah A. *et al.* (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364 (1914).

Sorli *v.* Berg (40 L.D. 259); overruled, 42 L.D. 557 (1913).

South Dakota Mining Co. *v.* McDonald 30 L.D. 357 (1900), distinguished, 28 IBLA 187, 83 I.D. 609 (1976).

Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275 (1894).

Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51 (1903).

Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528 (1905).

Southern Pacific R.R. Co. *v.* Bruns (31 L.D. 272); vacated, 37 L.D. 243 (1908).

South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523 (1922).

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

Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467 (1889).

Sprulli, Leila May (50 L.D. 549); overruled, 52 L.D. 339 (1928).

Standard Oil Company of California *et al.*, 76 I.D. 271 (1969), no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).

Standard Oil Company of California *v.* Morton, 450 F.2d 493 (9th Cir. 1971); 79 I.D. 23 (1972).

Standard Shales Products Co. (52 L.D. 522); overruled so far as in conflict, 53 I.D. 42 (1930).

Star Gold Mining Co. (47 L.D. 38); distinguished by U.S. *v.* Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).

State of California (14 L.D. 253); vacated, 23 L.D. 230 (1896). Overruled, 31 L.D. 335 (1902).

State of California (15 L.D. 10); overruled, 23 L.D. 423 (1896).

State of California (19 L.D. 585); vacated, 28 L.D. 57 (1899).

State of California (22 L.D. 428); overruled, 32 L.D. 34 (1903).

State of California (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499 and 46 L.D. 396).

State of California (44 L.D. 118, 468); overruled, 48 L.D. 97 (1921).

State of California *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335 (1902).

State of California *v.* Pierce (3 C.L.O. 118); modified, 2 L.D. 854 (1884).

State of California *v.* Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343 (1894).

State of Colorado (7 L.D. 490); overruled, 9 L.D. 408 (1889).

State of Florida (17 L.D. 355); reversed, 19 L.D. 76 (1894).

State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).

State of Louisiana (8 L.D. 126); modified, 9 L.D. 157 (1889).

State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5 (1898).

State of Louisiana (47 L.D. 366); 48 L.D. 201 overruled so far as in conflict, 51 L.D. 291 (1925).

State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358 (1899).

State of Nebraska *v.* Dorrington (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123 (1898).

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

State of New Mexico (49 L.D. 314); overruled, 54 I.D. 159 (1933).

State of Utah (45 L.D. 551); overruled, 48 L.D. 97 (1921).

State Production Taxes on Tribal Royalties from Leases Other than Oil and Gas, M–36345 (May 4, 1956), is *superseded* to the extent that it is *inconsistent* with Solicitor's Opinion —Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M–36896, 84 I.D. 905 (1977).

*Stevenson, Heirs of *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Stewart *et al. v.* Rees *et al.* (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401 (1900).

Stirling, Lillie E. (39 L.D. 346); overruled, 46 L.D. 110 (1917).

Stockley, Thomas J. (44 L.D. 178, 180); vacated, 260 U.S. 532 (See 49 L.D. 460, 461, 492 (1923)).

Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51 (1925).

Streit, Arnold (T–476 (Ir.)), Aug. 26, 1952 unreported; overruled, 62 I.D. 12 (1955).

Stricker, Lizzie (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283 (1894).

Stump, Alfred M. *et al.* (39 L.D. 437); vacated, 42 L.D. 566 (1913).

Sumner *v.* Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173 (1912).

Superior Oil Company, A–28897 (September 12, 1962) and William Wostenberg, A–26450 (September 5, 1952), distinguished in dictum; 6 IBLA 318, 79 I.D. 439 (1972).

Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394); overruled, 28 L.D. 174 (1899).

*Sweet, Eri P. (2 C.L.O. 18); overruled 41 L.D. 129 (1912) (See 42 L.D. 313).
Sweeten *v.* Stevenson (2 B.L.P. 42); overruled so far as in conflict, 3 L.D. 248 (1884).

Taft *v.* Chapin (14 L.D. 593); overruled, 17 L.D. 414, 417 (1893).
Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370 (1920).
Talkington's Heirs *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200 (1892).
Tate, Sarah J. (10 L.D. 469); overruled, 21 L.D. 209, 211 (1895).
Taylor, Josephine *et al.* (A–21994), June 27, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).
Taylor *v.* Yates *et al.* (8 L.D. 279); reversed, 10 L.D. 242 (1890).
*Teller, John C. (26 L.D. 484); overruled 36 L.D. 36 (1907) (See 37 L.D. 715).
Thorstenson, Even (45 L.D. 96); overruled so far as in conflict, 47 L.D. 258 (1919).
Tieck *v.* McNeil (48 L.D. 158); modified, 49 L.D. 260 (1922).
Toles *v.* Northern Pacific Ry. Co. *et al.* (39 L.D. 371); overruled so far as in conflict, 45 L.D. 92, 93 (1915).
Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27 (1925).
Traganza, Mertie C. (40 L.D. 300); overruled, 42 L.D. 611, 612 (1913).
Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98, 248 (1884).
Tripp *v.* Dunphy (28 L.D. 14); modified, 40 L.D. 128 (1911).
Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795 (1888).
Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233 (1897).
Tupper *v.* Schwarz (2 L.D. 623); overruled, 6 L.D. 624 (1888).
Turner *v.* Cartwright (17 L.D. 414); modified, 21 L.D. 40 (1895).
Turner *v.* Lang (1 C.L.O. 51); modified, 5 L.D. 256 (1886).
Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411 (1907).

Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549 (1907).
Union Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528 (1905).
United States *v.* Barngrover (On Rehearing), 57 I.D. 533 (1942), overruled in part by United States *v.* Robinson, Theresa B., 21 IBLA 363, 82 I.D. 414 (1975).
United States *v.* Bush (13 L.D. 529); overruled, 18 L.D. 441 (1894).
United States *v.* Central Pacific Ry. Co. (52 L.D. 81); modified, 52 L.D. 235 (1927).
United States *v.* Dana (18 L.D. 161); modified, 28 L.D. 45 (1899).
United States *v.* Kosanke Sand Corporation, 3 IBLA 189, 78 I.D. 285 (1971), set aside and case remanded, 12 IBLA 282, 80 I.D. 538 (1973).
United States *v.* McClarty, Kenneth, 71 I.D. 331 (1964), vacated and case remanded, 76 I.D. 193 (1969).
United States *v.* Melluzzo, Frank and Wanita, *et al.*, A–31042, 76 I.D. 181 (1969); reconsideration 1 IBLA 37, 77 I.D. 172 (1970).
United States *v.* Mouat, M. W. *et al.* (60 I.D. 473); modified 61 I.D. 289 (1954).
United States *v.* O'Leary, Keith V., *et al.* (63 I.D. 341); distinguished, 64 I.D. 210, 369.
Utah, State of (45 L.D. 551); overruled, 48 L.D. 97 (1921).

Veach, Heir of Natter (46 L.D. 496); overruled so far as in conflict, 49 L.D. 461, 464 (1923) (See 49 L.D. 492 for adherence in part).
Vine, James (14 L.D. 527); modified, 14 L.D. 622 (1892).
Virginia-Colorado Development Corp. (53 I.D. 666); overruled so far as in conflict, 55 I.D. 287, 289 (1935).
Vradenburg's Heirs *et al. v.* Orr *et al.* (25 L.D. 323); overruled, 38 L.D. 253 (1909).

Wagoner *v.* Hanson (50 L.D. 355); overruled, 56 I.D. 325, 328 (1938).

Wahe, John (41 L.D. 127); modified, 41 L.D. 636, 637 (1913).

Walker *v.* Prosser (17 L.D. 85); reversed, 18 L.D. 425 (1894).

Walker *v.* Southern Pacific R.R. Co. (24 L.D. 172); overruled, 28 L.D. 174 (1899).

Wallis, Floyd A. (65 I.D. 369); overruled to the extent that it is inconsistent, 71 I.D. 22 (1963).

Walters, David (15 L.D. 136); revoked, 24 L.D. 58 (1897).

Warren *v.* Northern Pacific R.R. Co. (22 L.D. 568); overruled so far as in conflict, 49 L.D. 391 (1922).

Wasmund *v.* Northern Pacific R.R. Co. (23 L.D. 445); vacated, 29 L.D. 224 (1899).

Wass *v.* Milward (5 L.D. 349); no longer followed (See 44 L.D. 72 and unreported case of Ebersold *v.* Dickson, September 25, 1918, D-36502).

Wasserman, Jacob N., A-30275 (September 22, 1964), overruled, 79 I.D. 416 (1972).

Waterhouse, William W. (9 L.D. 131); overruled, 18 L.D. 586 (1894).

Watson, Thomas E. (4 L.D. 169); recalled, 6 L.D. 71 (1887).

Weathers, Allen E., Frank N. Hartley (A-25128), May 27, 1949, unreported; overruled in part, 62 I.D. 62 (1955).

Weaver, Francis D. (53 I.D. 179); overruled so far as in conflict, 55 I.D. 287, 290 (1935).

Weber, Peter (7 L.D. 476); overruled, 9 L.D. 150 (1889).

Weisenborn, Ernest (42 L.D. 533); overruled, 43 L.D. 395 (1914).

Werden *v.* Schlecht (20 L.D. 523); overruled so far as in conflict, 24 L.D. 45 (1897).

Western Pacific Ry. Co. (40 L.D. 411; 41 L.D. 599); overruled, 43 L.D. 410 (1914).

Wheaton *v.* Wallace (24 L.D. 100); modified, 34 L.D. 383 (1906).

Wheeler, William D. (30 L.D. 355); distinguished, and to the extent of any possible inconsistency overruled, 56 I.D. 73 (1937).

White, Anderson (Probate 13570-35); overruled, 58 I.D. 149, 157 (1942).

White, Sarah V. (40 L.D. 630); overruled in part, 46 L.D. 55, 56 (1917).

Whitten *et al. v.* Read (49 L.D. 253, 260; 50 L.D. 10); vacated, 53 I.D. 447 (1928).

Wickstrom *v.* Calkins (20 L.D. 459); modified, 21 L.D. 553; overruled, 22 L.D. 392 (1896).

Widow of Emanuel Prue (6 L.D. 436); vacated, 33 L.D. 409 (1905).

Wiley, George P. (36 L.D. 305); modified so far as in conflict, 36 L.D. 417 (1908).

*Wilkerson, Jasper N. (41 L.D. 138); overruled, 50 L.D. 614 (1924) (See 42 L.D. 313).

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

Williamette Valley and Cascade Mountain Wagon Road Co. *v.* Bruner (22 L.D. 654); vacated, 26 L.D. 357 (1898).

Williams, John B., Richard and Gertrude Lamb (61 I.D. 31); overruled so far as in conflict, 61 I.D. 185 (1953).

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

Willis, Cornelius *et al.* (47 L.D. 135); overruled, 49 L.D. 461 (1923).

Willis, Eliza (22 L.D. 426); overruled, 26 L.D. 436 (1898).

Wilson *v.* Heirs of Smith (37 L.D. 519); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Winchester Land and Cattle Company, 65 I.D. 148 (1958), no longer followed in part, 80 I.D. 698 (1973).

Witbeck *v.* Hardeman (50 L.D. 413); overruled so far as in conflict, 51 L.D. 36 (1925).

Wolf Joint Ventures, 75 I.D. 137 (1968); distinguished, United States *v.* Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Wright *et al. v.* Smith (44 L.D. 226); overruled, 49 L.D. 374 (1922).

Zeigler, Coal Company, 4 IBMA 139, 82 I.D. 221, 1974–1975 OSHD par. 19,638 (1975); overruled in part, Alabama By-Products Corporation (on Reconsideration), 7 IBMA 85, 83 I.D. 574 (1976).

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

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

TABLE OF STATUTES CITED

(A) ACTS OF CONGRESS

ACTS CITED BY POPULAR NAME

(B) REVISED STATUTES

(C) UNITED STATES CODE

EXECUTIVE ORDERS

TREATIES

DEPARTMENTAL ORDERS AND REGULATIONS

MISCELLANEOUS REGULATIONS

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

Act of Aug. 15, 1894—Indian Lands: Ceded Lands—Withdrawals and Reservations: Generally

The Agreement of Dec. 4, 1893, between the Yuma (now Quechan) Indians and the United States, ratified in sec. 17 of the Act of Aug. 15, 1894, was an absolute, present cession of any and all interests of the Indians to the nonirrigable lands in the Fort Yuma Indian Reservation created by Executive Order of Jan. 9, 1884.

Act of Apr. 21, 1904—Indian Lands: Ceded Lands—Reclamation Lands: Generally—Statutory Construction: Implied Repeals

Sec. 25 of the Act of Apr. 21, 1904, which authorized the application of the Reclamation Act of 1902 to the Yuma Indian Reservation, did not repeal by implication sec. 17 of the Act of Aug. 15, 1894, which provided for the cession, reclamation and allotment of the Reservation, and is in no way inconsistent with the 1894 Act.

Act of Aug. 15, 1894—Indian Lands: Ceded Lands—Withdrawals and Reservations: Generally

Assuming that the Act of Aug. 15, 1894, was a conditional rather than an absolute cession by the Yuma (now Quechan) Indians of their rights to the nonirrigable lands in the Fort Yuma Indian Reservation, all material conditions on the part of the United States were met, and the cession has occurred.

Indian Lands: Ceded Lands—Public Lands: Administration—Statutory Construction: Administrative Construction

The administrative treatment of land as reservation land under the jurisdiction of the Bureau of Indian Affairs for many purposes is not dispositive of the status of the land in the face of clear legislation demonstrating that it was absolutely ceded, even without conflicting administrative treatment of the lands as public domain or under the jurisdiction of the Reclamation Service. The Department has the authority to resolve disputes and correct errors in the status of lands within its jurisdiction.

M–36886 *January 18, 1977*

OPINION BY SOLICITOR AUSTIN

OFFICE OF THE SOLICITOR

To: Secretary of the Interior

SUBJECT: Title to Certain Lands Within the Boundaries of the Ft. Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1884

LEGAL CONCLUSION: *Solicitor's Opinion* M–28198, dated January 8, 1936, finding, *inter alia*, that the Indian title to certain

lands within the Fort Yuma Indian Reservation has been extinguished, is well founded and is affirmed.

INTRODUCTION

This opinion considers the title to some 25,000 acres of land within the boundaries of the original Fort Yuma Indian Reservation. A 1936 unpublished opinion by Solicitor Margold concluded that the Quechan Tribe holds no interest in the lands. In 1973 the Tribe advanced to the Department a claim that the Margold Opinion is incorrect as a matter of law, and asked this office to re-examine Solicitor Margold's conclusion. After lengthy and careful investigation of the legal question and underlying facts, we concluded, in Jan. 1976, that the Opinion of Solicitor Margold is well-founded and should be affirmed. The President of the Quechan Tribal Council was promptly advised of this conclusion. Since the announcement of our decision, numerous inquiries have been made, culminating with oversight hearings by the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, as to the factual and legal justification for our decision. This opinion will respond to those inquiries.

STATEMENTS OF FACTS

1884 Executive Order Reservation

By Executive Order of Jan. 9, 1884,[1] President Arthur established the Fort Yuma Indian Reservation in California[2] for the Yuma (now called Quechan) Indians. The reservation consisted of seventy-two square miles, with its eastern boundary beginning at "a point in the channel of the Colorado River."[3]

[1] *I. C. Kappler, Indian Affairs-Laws and Treaties* 832 (1904) (hereinafter "*Kappler*").

This order canceled an Executive Order, dated July 6, 1883, that had set aside a different tract of land in Arizona as a reservation for these Indians. *Id.* at 831.

The 1884 Executive Order provided that the reservation was to be "for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Secretary has never settled any other group of Indians on this reservation.

[2] The Fort Yuma Indian Reservation, as established by the Executive Order of Jan. 9, 1884, will be referred to in this Memorandum as the "Yuma Reservation."

[3] The full boundary described in the Executive Order of Jan. 9, 1884, is as follows: "Beginning at a point in the channel of the Colorado River due east of the meander corner to sections nineteen and thirty, township fifteen south, range twenty-four east, San Bernardino meridian; thence west on the line between sections nineteen and thirty to the range line between townships twenty-three and twenty-four east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections twenty-two, twenty-three, twenty-six, and twenty-seven, in township fifteen south, range twenty-one east; thence south on the line between sections twenty-six and twenty-seven, in township fifteen south, range twenty-one east; and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections thirty-four and thirty-five, in township sixteen south, range twenty-one east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning * * *." *Id.* at 832.

The portion of the Fort Yuma Military Reservation in California was excepted from the described tract of land. However, the final paragraph of the Executive Order transferred the entire Fort Yuma Military Reservation, above and below the Colorado River, in California and Arizona respectively, "to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order." *Id.* On Feb. 11, 1892, the Assistant Attorney General for the Department of the Interior rendered a decision (approved by the Secretary on Mar. 5, 1892) in which it was

Some lands located within the exterior boundaries of the Yuma Reservation were in private ownership in 1884. For example, in 1871 Congress granted a right-of-way to the Southern Pacific Railroad Company for the purpose of constructing a railroad,[4] and in 1877 the lands which comprise the present city of Winterhaven had been patented in fee. These pre-existing private rights are expressly protected by the Executive Order, are unquestionably valid, and are not placed in dispute by the Tribe's claim.

Nature and Historical Use of Reservation Lands

Geographically, the Yuma Reservation consisted of two sharply contrasting areas separated by a diagonal divider which consisted of a cliff or bluff about 150 feet in height running from the northeast point of the reservation to the southwest point. To the north of this scarp lay the desert or upland or mesa, which comprises the bulk of the nonirrigable land on the Yuma Reservation. This is a desolate area of harsh desert character. Below the scarp lies the flood plain of the Colorado River, a relatively lush vegetated area.

The Quechans had historically been an agricultural tribe, deriving most of their food from the Colorado River flood plain. An anthropologist's report submitted to the Indian Claims Commission states:

> The Yumas, dependent upon agriculture, the mesquite and other wild plants which grow exclusively or almost exclusively on the bottomlands, hunting, and fishing appear to have derived less than two percent of their subsistence from the desert.[5]

While there is evidence that the Quechans made use of the non-

held that the lands in the Fort Yuma Military Reservation, both north and south of the Colorado River, "became a part of the Yuma Indian Reservation by virtue of the order of President Arthur dated Jan. 9, 1884." The decision of the Assistant Attorney General was implicitly endorsed by Congress one year later when, by the Act of Jan. 20, 1893, 27 Stat. 420, it granted the Yuma Pumping Irrigation Company two irrigation ditch rights-of-way across "the Yuma Indian Reservation, in Arizona (formerly the Fort Yuma military reservation) . . . ." On December 19, 1900, upon the recommendation of the Department, President McKinley issued an Executive Order revoking the Executive Order of Jan. 9, 1884, "as to that part of said military reservation lying south of the Colorado River" and placing the lands thereby withdrawn from the Indian reservation under the control of the Secretary of the Interior for disposition under the public land laws. The net result of all these actions was to make the detailed boundary described in the 1884 Executive Order a complete description of the Indian reservation, in effect striking out all references to the Fort Yuma Military Reservation in the 1884 Order.

[4] Act of March 3, 1871, 16 Stat. 573, 576 (1871). The right-of-way grant was reaffirmed by section 17 of the Act of August 17, 1894, 28 Stat. 282, 332, 333 (1894), and in three other grants of rights-of-way under the Act of March 2, 1899, 30 Stat. 990, *as amended*, approved by the Department of the Interior. This grant was authorized by Congress and its validity has not been questioned. Southern Pacific Pipelines, Inc., has constructed and presently operates an oil products pipeline on this railroad right-of-way. The claim of the Tribe would not, in any event, affect the validity of the use of these lands by Southern Pacific Pipelines, Inc.

[5] Indian Claims Commission Docket No. 320, filed Aug. 10, 1951, Def. Ex. H–74, at 54 (hereinafter referred to as "Docket No. 320").

irrigable lands, particularly in times of flood or famine,[6] that use was very limited.

The Indian Claims Commission found:

The Yuma and other tribes along the lower Colorado and Gila Rivers practiced a crude form of agriculture. Annual floods occurred as a rule. After the floods subsided the Indians would plant seeds and the moisture from the flooding lasted long enough for them to grow crops of corn, beans, pumpkins and melons. Another staple article of diet was the mesquite bean harvested from the trees which grew along the mesa and generally within about 5 miles of the river, but some mesquite grew as far as the foot of the mountains [citations omitted].

The two sources of both food and nonfood needs of the Yuma tribe were the river and the desert. Dr. A. L. Kroeber, former head of the Department of Anthropogy at the University of California, petitioner's expert, and Dr. Harold E. Driver, associate professor of anthropology, University of Indiana, defendant's expert, both estimated the Yuma obtained about one-half their food from the above described methods of agriculture [citations omitted]. Dr. Driver's estimate was 40% plus 10% dependence on "semi-cultivated" plants which grew wild but were also sown, especially the screw bean. [citation omitted].

The prime source of wild plant life food was the mesquite bean gathered from the mesquite trees which grew back from the flood plain with roots which extended 50 to 70 feet into the ground [citation omitted].

Construction of modern dams have greatly modified flood conditions of the lower Colorado River country. In aboriginal time Anza reported inundation was very extensive and the waters at flood stage spread over a distance of half a league (about 1.32 miles) on either side of the main stream [citation omitted]. Forde also states a few deer strayed along the cottonwood groves near the river and rabbits burrowed in its sandy banks but that game, both large and small, were relatively scarce in this arid country of the lower Colorado and Gila River bottoms.

Special Agent J. Ross Browne of the Interior Department wrote to Commissioner William P. Dole of Indian Affairs from Fort Yuma, Colorado River, Dec. 27, 1863, and is quoted as follows [citation omitted] with reference to Yuma subsistence on rats, frogs, mice and lizards:

"Under ordinary circumstances, when the usual overflow of the Colorado takes place, they cultivate the lowlands in their rude way, and generally succeed in raising considerable crops of grain and vegetables. These bottomlands are light, rich and easily worked, and afford ample means of subsistence to tribes bordering on the River. During the past year, however, there has been no overflow and consequently no crops have been put in by the Indians. To add to their misfortune, it has been a season of such unusual drought that the mesquite beans, berries and other wild crops upon which they are accustomed to depend in seasons of scarcity, have entirely failed so that they are left utterly destitute. Their seed, wheat and beans stored for planting have long since given out; and for sometime past, they have been compelled to subsist on rats, mice, frogs, lizards as they can gather on the deserts and the banks of the River."[7]

The Indian Claims Commission has found that the land in the area of the Yuma Reservation was worth approximately 25 cents per acre in

[6] *See* Docket No. 320, *supra* note 5, Pet. Proposed Findings of Fact, at 20–22.

[7] *The Quechan Tribe of the Fort Yuma Reservation* v. *United States*, 8 Ind. Cl. Comm'n. 111–a. 118–20 (1959) (hereinafter referred to as "Docket No. 319").

1853, and in 1884 was worth approximately 40 cents per acre.[8]

Origin of 1893 Agreement

Early in the 1890s, a number of private companies were constructing or planning to construct irrigation projects along the Colorado River. Without irrigation and some control over the flooding of the river, lands in the area had limited value.[9] By 1893, non-Indian farmers had moved into a region adjoining the Yuma Reservation and were practicing irrigated farming. In Jan. and Feb., 1893, the Congress enacted legislation enabling private companies to construct irrigation ditches to serve lands in the vicinity of the Yuma Reservation and included a provision requiring the companies to serve "the occupants" of the Yuma Reservation.[10]

In July 1893 the Quechans sent a petition [11] to the President and Congress in which they expressed the desire to have their lands irrigated and offered to cede their rights in the Yuma Reservation so that it might be opened for settlement and an irrigation ditch might be built, provided they be given individual allotments of land which could be irrigated. They pointed out that they had seen how much more productive and valuable the lands of the white settlers in the vicinity had become through irrigation; that they had heard of the possibility of the construction of an irrigation ditch which would serve them if part of the reservation were opened for settlement; [12] that "we want the ditch built so that we can get water and have early and large crops like our white friends;" and that for this purpose they were "willing to give up a large part of our reservation because as it is it is worthless to us."

The petition was critical of the government for not aiding members of the Tribe in any way except for maintaining a school among them. Mention was made that the Tribe considered that it was being dealt with "less liberally than almost any other Indian tribe," that nature provided very little for the members and that "we have never received any assistance in helping ourselves." The petition noted that the greater part of the Yuma Reservation was desert land, that the remainder lay on the low bottomland of the Colorado, and that the water from the

[8] *The Quechan Tribe of the Fort Yuma Reservation* v. *United States,* 15 Ind. Cl. Comm'n. 489, 490 (1965), Judgment on Joint Stipulation in Settlement.

[9] S. Exec. Doc. No. 68, 53d Cong., 2d Sess. 14–15 (1894).

[10] Act of Jan. 20, 1893, 27 Stat. 420; Act of Feb. 15, 1893, 27 Stat. 456, 457.

[11] S. Exec. Doc. No. 68, *supra* note 9, at 14–16. The material in this and the next five paragraphs is taken from this source.

[12] This was most likely the ditch referred to in the Act of Feb. 15, 1893, *supra,* whereby Congress had granted the Colorado River Irrigation Company a right-of-way for an irrigation canal which would run through the Yuma Reservation, subject to the proviso that the Company furnish water to the Indians on terms to be prescribed by the Secretary of the Interior.

annual overflow usually did not subside from the bottomland before July 15th. Thereafter, the petition continued, "we plant small crops of melons, corn, squash, and the like, when we secure the seed for the same, and thus obtain a meager supply of food for the winter and spring." The petition remarked upon the scarcity of game due to the desert character of the land, and noted there was no forest to supply food as was the case with many other tribes. It stated that the money the Quechans got was used to piece out crops and secure food and clothing.

The petitioners set out their belief that "if furnished with a small tract of land, with water to irrigate it and with the means of cultivating we could improve our fortunes to the extent of securing at least all the necessaries of life." The petition continued: if a portion of the land could be thrown open to settlement, an irrigating ditch would be built through the reservation which would give them work and, after completion, give them water for their land. With water the land would be fertile and produce "all sorts of vegetables and melons as well as fine fruits." The petition summed up the situation:

> Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, if we can have small tracts set apart for our use. We do not want a great deal of land, for we have noticed that the white man who in this country has small holdings, 5 and 10 acres, and cultivates his land well, is the most successful and the most certain to have what he wants and have it when he wants it.[13]

The five captains of the Tribe signed the petition as well as about one-half the male adults. The petition was signed on July 24, 1893, before a notary public who certified that the signatories were members of the Tribe, that their signatures appeared by their authority, and that "they were anxious to take lands in severalty." On the same day, the same five captains and about one-half the male adults of the tribe signed a proposed agreement. The same notary public certified to the signatures and again stated "they are anxious to take lands in severalty."

It has been suggested by parties representing the Quechan interests that the Commissioners who ultimately engaged in negotiations with the tribe drafted the petition. However, the Commissioners were not appointed until several months after signing of the petition,[14] and the petition was critical of the past conduct of the Government toward the Tribe.[15]

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[13] S. Exec. Doc. No. 68, *supra* note 9, at 15.

[14] The appointment was made under date of Oct. 19, 1893. See note 17 *infra*. The petition was signed in July 1893. S. Exec. Doc. No. 68, *supra* note 9, at 16.

[15] The petition states in part: "It is a fact probably known to your honorable selves, or, if not known, easy of verification, that the Government of the United States does not aid the Yumas in anyway except by maintaining a school among them, of which they try to show their appreciation by sending their children to it. We have been assured by those in a position to know that in the matter of Government aid we have been dealt with less liberally than almost any other Indian tribe." S. Exec. Doc. No. 68, *supra* note 9, at 14.

January 18, 1977

Negotiation of 1893 Agreement

By the Act of Mar. 3, 1893,[16] Congress enacted provisions, "[t]o enable the Secretary of the Interior, in his discretion, to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress * * *." By a letter dated Oct. 19, 1893, the Secretary of the Interior appointed a three-man Commission to "negotiate with the [Quechans] in California for the cession to the United States of such portions of their reservation as they might be willing to cede." [17] The course of these negotiations, and the circumstances surrounding them, as reported by the three Commissioners [18] and as reported in the minutes of the Councils of the Commissioners and the Indians,[19] maintained by the Commissioners, is summarized as follows.

In November 1893 the three Commissioners went to meet with the Quechans at Yuma. Shortly after their arrival, they met and talked with the Chief of the Tribe, Chief Palma, and some of his captains. At the chief's request, the date of the council was fixed for Nov. 24, 1893. On that day, over half the adult Indians met in council with the Commissioners, but the Indians' official interpreter was not present due to his attendance in court in Phoenix. As a consequence, little progress was made that day. Indian Agent Estudillo said that some of the Indians spoke and understood Spanish, and as he spoke both English and Spanish he would interpret the conversations through an Indian, Hutelome.

The petition, which had been signed by many of the Indians and addressed to the President and Congress in July 1893, was exhibited and translated to the Indians. They were asked if it was their petition, to which they answered in the affirmative. They understood it, it was their petition, and they were glad the Commissioners had come. The Quechans were informed of the grant of a right-of-way to the Colorado River Irrigation Company.[20] They stated that they knew of the proposed canal and were happy it was being built, because it would furnish them with water the year around and they would not have to rely on the overflow of the Colorado. The Commissioners felt that it was obvious that the Indians had observed irrigated lands across the river and were aware of the benefits

[16] 27 Stat. 612, 633 (1893).

[17] Letter to Secretary of the Interior from Acting Commissioner of Indian Affairs, dated Feb. 28, 1894. S. Exec. Doc. No. 68, *supra* note 9, at 2.

[18] Letter to Secretary of the Interior from Commissioners Houston, Gorman and Brady, dated Jan. 24, 1894. S. Exec. Doc. No. 68, *supra* note 9, at 6–13.

[19] S. Exec. Doc. No. 68, *supra* note 9, at 17–18.

[20] Act of Feb. 15, 1893, 27 Stat. 456.

of such a canal, and had often discussed such a canal.

The matter of acreage then came up. The Commissioners felt that the Quechans might not understand the quantity of land contained in an acre, so they measured off an acre and pointed it out to them. The Commissioners asked how many acres each head of family and each of the single Indians, both old and young, should have, and adjured them to careful consideration. The Quechans conferred among themselves for some time and seemed unable to reach a conclusion. The Commissioners asked them if 10 acres for each head of a family and five acres for each child under 18 years of age would be sufficient. Chief Palma said the Indians wanted more time to think this over and that they wanted their interpreter, Bill Mojave, present when they answered. The Quechans were told to take ample time to consider the question as it was "all-important" to them, and the council would adjourn to await the return of Bill Mojave. Since it appeared to be uncertain when Bill Mojave would return, the Commissioners asked the Chief and a committee of Indians to accompany them on a trip over the reservation, so the Indians could point out to them that portion of the reservation which would come under the water of the proposed canal and where they would prefer to have their allotments.

The greater part of the ensuing week was spent in conferences with the chiefs and Indian delegations and in traversing and inspecting the reservation. The Commissioners learned that there was a possibility of the interpreter's being kept at Phoenix for a considerable time so they wired the United States District Attorney who agreed to let him return to Yuma on condition that his expenses be paid. The Commission agreed to do this and advised the chief, who thereupon sent out runners to tell the Indians to meet the following Monday morning, December 4.

At this second council, the Commissioners learned that this was the largest meeting ever held by the Quechans. Bill Mojave, their interpreter, was present. The proceedings of the former council were referred to, as were the talks at the various conferences, and the interpreter was instructed to inform the Indians that the ideas, terms and conditions of both Indians and Commissioners had been incorporated into an agreement. The agreement was then read and its provisions discussed. The interpreter told the Indians that the agreement was ready for their signatures and each who was in favor should step up to the table and sign his name or make his mark. As this proceeded, the chief announced that the Quechans would like the Sisters of St. Joseph to get a particular half-section of land to make their homes, because of their help in teaching the children.[21]

[21] The Government maintained a school in the charge of the Sisters of St. Joseph in an old barracks on the Fort Yuma Military Reservation. *See* S. Exec. Doc. No. 68, *supra* note 9, at 11.

The Commissioners called the Indians' attention to Article VII of the proposed agreement which took care of this matter, and assured the Quechans that they would respect their wishes. Chief Palma was the first to make his mark, followed by the captains and other male adult Indians, totaling 203.

Of the missing adults, ex-chief Miguel and eight other Quechans were in the Los Angeles jail, and since Miguel was a former chief and a faction leader, the Commission thought it proper to visit him and obtain his views. His interpreter, Walter Averspun, also in jail, advised Miguel and the others of the object of the Commission's visit and asked them their wishes in regard to taking their land in allotments. They were all in favor, said they knew of the proposed canal and hoped it would soon be built.

Of the total number of 251 adult male members of the tribe, 203 signed the agreement and those in jail expressed their satisfaction with its terms. Of the remaining 40, many were at work off the reservation but nearly all, according to the Commissioners, would have signed if present.

Thus, under date of Dec. 4, 1893, an agreement [22] (the "1893 Agreement") was concluded between the Quechans and the Commissioners. It is the construction of the language and effect of the 1893 Agreement which is the primary subject of this Memorandum.

Allotment Policy

Through the earlier part of the Nineteenth Century the United States had followed a policy of working out accommodations with the Indian tribes on the basis of treaties by which the various Indian nations ceded to the United States vast expanses of their territory in return for settlement upon designated reservations. In the late 1800's, however, Congress decided to abandon its policy of segregating Indians from the mainstream of American life.

The 1893 Agreement reflected the then newly adopted national Indian policy. That policy was designed to reduce the size of Indian reservations, break down the pattern of communal tribal ownership, and direct individual Indians into agricultural pursuits in the manner of the non-Indian community. To that end it embodied a basic approach involving "allotments" of subsistence-size parcels of tribal reservation lands to individual tribal members. Unallotted lands were to be opened to settlement and sale, and the proceeds devoted to the Indians' benefit. The integration of non-Indian settlers with the Indian allottees was intended not only to

[22] The 1893 Agreement is set forth in full in S. Exec. Doc. No. 68, *supra* note 9, at 19–22, and, as ratified by Congress, in sec. 17 of the Act of Aug. 15, 1894, 28 Stat. 286, 332, and in I *Kappler, supra* note 1, at 542.

promote western development but also to foster a "civilizing" process among the Indians.[23]

The 1893 Agreement

The 1893 Agreement can be summarized as follows. By Article I, the Quechans relinquished all right, title, claim or interest in the Yuma Reservation. (Whether or not the relinquishment was conditional is one of the subjects of this Memorandum.) Specific language of the Article reads:

> Article 1. The said Yuma Indians, upon the conditions hereinafter expressed to hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following described tract of country in San Diego County, California, established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows: * * *.[24]

Article II provided for the allotment of five acres for each individual Indian.

Article III provided for the selection of allotments and the disposition of the residue of the reservation which was subject to irrigation. The unallotted irrigable lands were to be surveyed and subdivided into 10-acre tracts. The tracts were to be appraised subject to the approval of the Secretary of the Interior and sold at public sale for not less than the appraised value. After a second public offering, the Secretary of the Interior was empowered to sell the tracts at private sale for not less than the appraised value.

Article IV provided that the proceeds from such sales would be placed in the Treasury to the credit of the Quechans with interest at 5 percent per annum, subject to appropriation by Congress or application by the President for the payment of water rents, the building of levees, irrigation ditches and laterals, the construction and repair of buildings, the purchase of tools, farm implements and seeds, and the education of the Quechans.

Article V authorized the Secretary to issue 25-year trust patents to the allottees.

Article VI provided that all lands not subject to irrigation were to be opened to settlement under the general land laws.

Article VII excepted from the operation of the agreement a tract of land, with buildings, located on the hill on the north or California side of the Colorado River within the former Fort Yuma Military Reservation so long as it would be used as an Indian school, for religious, educational and hospital purposes for the benefit of the Indians. A tract of land adjacent to the hill was set aside for use as a farm for the school, the tract for the school site and school farm, not to exceed 320 acres.

The 1893 Agreement was followed by the certificate of the Indian interpreter:

> I, Bill Mojave, hereby certify that I am the official interpreter of the Yuma Indians, in the State of California; that I am an adopted member of said tribe, and

[23] *See* generally, *M. Price, Law and the American Indian* 531–51 (1973); *S. Tyler, A History of Indian Policy* 95–106 (1973).

[24] Sec. 17 of the Act of Aug. 15, 1894, 28 Stat. 286, 332.

speak and understand both the Yuma and English languages; that the foregoing contract was by me fully interpreted to said Indians, and they were made to fully understand the same before it was signed by them; and I further certify that I was personally present when each and every person's name was signed thereto, and witnessed the same, and that those whose signatures appear to said contract signed same understandingly, and when signed by mark or otherwise I attest the same.

Given under my hand at Fort Yuma, Cal., this 5th day of Dec. A.D. 1893.

BILL MOJAVE,
Interpreter.[25]

Under the authority of the Allotment Act enacted in 1887[26] a number of tribes entered into arrangements similar to that resulting under the 1893 Agreement.[27] While the allotments to different tribes varied in acreage, they were designed to provide agricultural self-sufficiency.[28]

Alleged Coercion, Misrepresentation and Fraud.

During the course of recent meetings with the Department,[29] representatives of the Quechans have stated that the Indian signatures on the 1893 Agreement were coerced and obtained by misrepresentations as to the effect of the agreement. Previously, in one of their petitions to the Indian Claims Commission, the Tribe alleged:

> In order to accomplish this purpose, agents of the Defendant threatened the members of the Petitioner that, unless they agreed to accept 5 acres of irrigable land per person and to relinquish the remainder of the Reservation, they would be entirely deprived of their lands. The agents of the Defendant carried out this threat by striking from the rolls of the Quechan Tribe numerous individuals who refused to sign such agreement.
>
> * * * * *
>
> [T]he signatures of most or all of the signers of said Agreement were either (1) forged, or (2) coerced by force or the threat of physical violence, including the imprisonment of one of the principal opponents of the measure, or (3) coerced under the threat of deprivation of land rights, or (4) secured by misrepresentation as to the effect of the Agreement and also concealment by the agents of the Defendant of the fact that without any agreement any allotments made to the members of the Petitioner would have been in substantially larger amounts than said Agreement provided.
>
> * * * Said Agreement of 1893 was further nugatory because, at all times during the negotiation and conclusion thereof, the following conditions existed: (a) the agents of the Defendants misled the Quechan Indians into believing that they would have free water for their lands in perpetuity, and otherwise failed or refused to inform or misled the Petitioner as to the meaning of the provisions of the Agreement; (b) the inter-

[25] S. Exec. Doc. No. 68, *supra* note 9, at 22.

[26] Act of Feb. 8, 1887, 25 U.S.C. §§ 331–348 (1970).

[27] *E.g.*, sec. 13 of the Act of Aug. 15, 1894, 28 Stat. 286, 320–21; sec. 15 of the Act of Aug. 15, 1894, 28 Stat. 286, 323.

[28] *See* text accompanying notes 183–85 *infra*. *See also* the Act of Jan. 12, 1891, 26 Stat. 712, providing for allotments to the Mission Indians of California; sec. 25 of the Act of Apr. 21, 1904, 33 Stat. 189, 224–25, providing for allotments on the Colorado River Indian Reservation.

[29] *E.g.*, meeting with Secretary Thomas S. Kleppe on Jan. 8, 1976. *See* text following note 119 *infra*, "Re-examination and Reconsideration."

preter for the Indians was an employee of the agents of the Defendant and was incompetent to explain the proceedings to the Petitioner; (c) the members of the Petitioner were ignorant of the English language and said Agreement contained words for which no comparable term or concept existed in the Quechan tongue * * *.[30]

No contemporaneous documentation of forgery, coercion or misrepresentation, such as correspondence, Bureau of Indian Affairs or Departmental reports, or legislative history of the 1894 Ratification Act, has been entered in the Indian Claims Commission actions or offered to the Department in connection with the reconsideration of the 1936 opinion of Solicitor Margold.[31] However, in Indian Claims Commission actions the depositions of four Quechans taken in 1951 were offered on this point.[32] One or more to sign were escorted by Quechan members of the tribe who hesitated to sign were escorted by Quechan Indian policemen to the signing table and forced to sign; [33] that signatures were "witnessed" although the witness was not present at the time of execution; [34] that the names and marks of some signatories were written by a local school physician in their presence; [35] that only one Indian signed voluntarily; [36] that the Commissioners, through the interpreter, misrepresented that the Indian allottees would receive water without cost; [37] that the tribe was given no notice that it would be ceding the unallotted portions of the reservation; [38] and that the interpreting was inadequate.[39]

It has also been alleged that eight members of the Tribe who were opposed to the 1893 Agreement were imprisoned in Los Angeles at the time it was signed, and that five of the dissidents were whipped and one died in jail.[40]

It should be noted that the four Quechans whose depositions were taken in 1951 did not state that physical force was used. The principal witness stated:

> Bill Mojave [the interpreter] called out an Indian who came from Algondones, Mexico. His name is Som ah sent and this Indian did not move. He called him again and the Indian says "I am not going to sign anything until I know what

[30] Docket No. 320, *supra* note 5, Petition for Loss of Reservation, filed Aug. 10, 1951, at 5–7.

[31] The Indian Claims Commission did not reach Docket No. 320. On Dec. 15, 1976, pursuant to P.L. 94–465, 90 Stat. 1990, the Commission transferred the case to the Court of Claims, where it is now pending under the same docket number. The Indian Claims Commission's findings in Docket No. 319, *supra* note 7, do not touch this issue.

[32] Docket No. 320, *supra* note 5. Deposition of Patrick Miguel taken Nov. 28, 1951, and depositions of Jack Kelly, John Cash and Steven Kelly, taken through Quechan Indian interpreter on Nov. 29, 1951. The four depositions are bound in a single document, and immediately following references will be to the pages in this document.

[33] *Id.* at 9, 22, 24, 25.

[34] *Id.* at 5.

[35] *Id.* at 9, 11–12.

[36] *Id.* at 10, 17. *But see id.* at 21.

[37] *Id.* at 6–7.

[38] *Id.* at 17–18.

[39] *Id.* at 6, 18–21.

[40] Memorandum, dated Apr. 15, 1970, from William H. Veeder, Water Conservation and Utilization Specialist, Bureau of Indian Affairs, to W. Wade Head, Bureau of Indian Affairs Area Director, Phoenix, Arizona, citing a report in "in the files of the Bureau of Indian Affairs" entitled "Yuma Indian Reservation Re: Agreement of 1893 and how it was made," signed by Walter Scott. The report cannot be located either in the BIA files or in Archives as of this time.

is what" so the policemen went out and brought him in to the table, over to the table, and Bill Mojave told the Commissioners what the Indian had said, that he was not going to sign until he knows what the paper contained, and one of the Commissioners (I do not know which one it was) but he was at the head of the table—near the head of the table) [*sic*] said "Well that is proper, that is right, he has a right to know what he is signing" and then he said "Well I do not think I will sign anyway even if I am told what is in it" and he left and nothing happened to him. If the police had their own way about it they would have slammed him in jail but they didn't.[41]

There is no record of any statement to the effect that the eight or nine dissidents incarcerated in Los Angeles were imprisoned because of their opposition to the 1893 Agreement.

The report of the Commissioners states that nine Quechans in jail in Los Angeles were consulted, through an interpreter, and indicated their desire to take allotments and have the irrigation canal built.[42]

One of the Quechans deposed testified, on cross examination, that except for the presence of the Quechan Indian policemen, the method of signing the 1894 Agreement by the Indians was the usual one:

Q. Mr. Miguel, what was the custom aside from the signing of this Agreement when an Indian who could not write was to make his mark, how was that usually done?

A. Well, it is usually done by making those crosses, that is holding the pen by the one who can write and making the Indian touch the tip of the pen but just recently they put a thumb mark on it.

Q. The signatures on this Agreement then were made in the same way by the Indian touching the tip of the pen as all other agreements were signed back in those earlier days?

A. Yes.

Q. There was nothing unusual about someone making the "X" and the Indian touching the tip of the pen?

A. Yes but the unusual part was that an Indian policeman was on each side of him.[43]

1894 Ratification Act

The 1893 Agreement was "accepted, ratified, and confirmed" by the Congress by sec. 17 of the Act of Aug. 15, 1894[44] (the "1894 Act"), which also provided for other matters with respect to the reservation. The 1894 Act confirmed a right-of-way through the Yuma Reservation to the Southern Pacific Railroad Company for its railroad, which had already been constructed. The Colorado River Irrigation Company, to which a right-of-way had previously been granted,[45] was required to begin the construction of the canal within 3 years or its right was to be forfeited. The Secretary of the Interior was

[41] Docket No. 320, *supra* note 5, Deposition of Patrick Miguel, at 10.

[42] Letter to Secretary of the Interior from Commissioners, dated Jan. 24, 1894, S. Exec. Doc. No. 68, *supra* note 9, at 8.

[43] Docket No. 320, *supra* note 5. Deposition of Patrick Miguel, at 14.

[44] 28 Stat. 286, 335 (1894).

[45] Act of Feb. 15, 1893, 27 Stat. 456.

authorized to fix the rate of water rents to be paid by the Quechans and each male adult Indian was to be granted water for one acre of allotted land free of all rent charges for 10 years, if he used the same for growing crops. The 1894 Act specifically provided:

> That all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws.[46]

Early Irrigation History

The 1893 Agreement itself did not promise the delivery of irrigation water to the Quechan lands, and did not specify the means by which water would be carried to the irrigable lands. It was apparently contemplated that the Colorado River Irrigation Company would provide the vehicle for this accomplishment. This is evident from the right-of-way granted in Feb. 1893,[47] the terms of the 1894 Act, which imposed a 3-year limitation on the company for the commencement of construction, and the committee report which accompanied the 1893 Act in the House.[48] However, there is no evidence which reflects any action on the part of the Colorado River Irrigation Company. It is probable that the company found that it had insufficient financial resources to undertake the project. It was generally being discovered at that time that private irrigating companies lacked the resources for projects of the size or character needed in the arid West.

In its study of the bill which became the Reclamation Act of 1902[49] (the "Reclamation Act"), the House Committee on Irrigation of Arid Lands took cognizance of this deep and underlying problem facing the Government when it officially stated:

> We have now reached a condition of affairs, at least in some portions of the arid region, where it is necessary to undertake enterprises of considerable magnitude and of such character as to clearly place them beyond the reach of private enterprise under the American system of land laws.
>
> * * * * *
>
> Further, the Government may profitably enter upon certain classes of work of this character which private enterprise could not, as private capital would lay upon the enterprise not only the cost of construction but interest charges as well, which would, in the course of a few years and before the works were finally in successful operation, impose so great a burden as to jeopardize the success of the project.[50]

Confronted by the inability of private irrigation resources to meet the need for irrigation on the arid public lands of many western states, Congress faced the responsibility squarely by legislating the Reclamation Act.[51] The Act applied generally to certain western states, and

[46] Act of Aug. 15, 1894, 28 Stat. 286, 336.
[47] Act of Feb. 15, 1893, 27 Stat. 456.
[48] H.R. Rep. No. 1145, 53d Cong., 2d Sess. (1894).
[49] Act of June 17, 1902, 32 Stat. 388, *as amended*, 43 U.S.C. § 371 *et seq.* (1970).
[50] H.R. Rep. No. 1468, 57th Cong., 1st Sess. 3 (1902).
[51] Act of June 17, 1902, 32 Stat. 388, *as amended*, 43 U.S.C. § 371 *et seq.* (1970).

made no mention of particular projects or specified areas such as the Quechan lands. Under this law, all moneys received from the sale of public lands in the affected states, with certain exceptions, were to be set aside in a special fund in the Treasury to be known as the "reclamation fund." This fund was to be used for the construction and maintenance of irrigation works in arid and semi-arid lands under the supervision of the Secretary of the Interior. Entries of the public lands to be irrigated were to be not less than 40 and not more than 160 acres, and the precise extent of land and amount of charges were to be determined by the Secretary of the Interior on an equitable basis, so as to return to the reclamation fund the estimated costs of construction.

The Geological Survey proceeded with investigations and surveys for reclamation projects on the Colorado River which would have included, in the early construction phases, the Yuma Reservation lands.[52] However, they could not be included under the authority of the Reclamation Act because it required that construction costs be returned to the reclamation fund,[53] and that the proceeds from sale of the lands not be held for the benefit of the Indians, as required under the 1893 Agreement.

[52] Letter to Secretary of the Interior from Director, Geological Survey, Jan. 23, 1904. S. Rep. No. 1660, 58th Cong., 2d Sess. 28 (1904).

[53] *Id.*

The 1904 Act

The Secretary of the Interior thereupon proposed to the Congress legislation which would extend to the Quechan lands the benefits of the Reclamation Act.[54] This provision was incorporated into the Indian Appropriations Act of 1904 (the "1904 Act").[55] Nothing in the legislative history indicates that the provision was intended to accomplish any purpose other than to apply the Reclamation Act to these lands, and remedy the failure of the private companies to develop their proposed canals.[56]

The relevant portion of the 1904 Act reads as follows:

> *Sec. 25.* That in carrying out any irrigation enterprise which may be undertaken under the provisions of the Reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided*, That there shall be reserved for and allotted to each of the Indians belonging on the said reservations

[54] Letter from Secretary of the Interior to the Chairman, House Committee on Indian Affairs, Feb. 9, 1904. S. Rep. No. 1660, *supra* note 52, at 30.

[55] Act of Apr. 21, 1904, 33 Stat. 189, 224.

[56] S. Rep. No. 1660, *supra* note 52, at 27–30.

five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the Reclamation Act: *Provided further*, That there shall be added to the charges required to be paid under said Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservations before reclamation; said sum to be paid in annual installments in the same manner as the charges under the Reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit.[57]

The effect of the 1904 Act was to change significantly the financial terms under which the Quechans were to receive irrigation water and under which unallotted irrigable lands were to be sold, so as to comply with the Reclamation Act. It appears, that while the financial terms of the 1893 Agreement together with the 1894 Act were more favorable to the Quechans than those of the 1904 Act, as actually administered the 1904 Act may have worked to their advantage.

[57] Sec. 25 of the Act of Apr. 21, 1904, 33 Stat. 189, 224–25. The fact that the provision treated the Colorado River Indian Reservation as well as the Quechan lands does not mean the two areas were identical in status, or so regarded by Congress. The Colorado River Indians had signed no cession agreement; the irrigable Quechan lands had been ceded with the right to allotments and to the proceeds of sales of the surplus irrigable lands. Both cases required legislation to authorize the application of the Reclamation Act, but that does not nullify the difference between the status of the lands.

In specific, the 1893 Agreement and the 1894 Act [58] provided for the full proceeds from the sale of the unallotted irrigable land to be placed in a fund, with interest at 5% per annum, for the benefit of the Tribe. However, the principal and interest of said fund was subject to appropriation by Congress or to application by the President for the payment of water rents or the building of levees, irrigating ditches and laterals, the purchase of tools, farming implements, and seeds, and for the education and civilization of the Tribe. The full amount of such fund could have been expended for those purposes.

In comparison, the 1904 Act required that there be added to the charges required to be paid under the Reclamation Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary fairly represented the value of the unallotted lands in the reservation before reclamation. The "value of the unallotted lands * * * before reclamation" under the 1904 Act cannot be distinguished from "not less than the appraised value" under the 1894 Act. Furthermore, the 1904 Act provided that this additional sum, representing the value of the unallotted lands before reclamation, was "to be used to pay into the reclamation fund the charges for the reclamation of said allotted lands and the remainder thereof shall be placed to credit of said Indians and shall be expended

[58] Act of Aug. 15, 1894, 28 Stat. 286, 336 (Article IV).

from time to time under the direction of the Secretary, for their benefit." [59]

Further, the 1894 Act (but not the 1893 Agreement) provides that the private canal company must for 10 years provide free water for one acre for each male adult Indian utilizing that water for growing crops. In contrast, under the 1904 Act, the Indians pay nothing for the water for their full allotments. While operation and maintenance charges are assessed, the Bureau of Indian Affairs gets annual appropriations for payment of the operation and maintenance charges which, if the Indians cannot afford to pay, are not repayable by the Indians so long as they own the lands.[60] In addition, the repayment of construction charges for the reclamation works has been deferred and, if beyond the financial ability or capacity of the Indian allottees, the construction charges have been declared nonreimbursable.[61]

There are other differences between the financial arrangements provided in the 1893 Agreement as ratified by the 1894 Act and those provided in the 1904 Act, but they are not substantial.[62]

In 1911, the Congress amended the 1904 Act to increase the 5-acre per capita allotment for the Quechans to 10 acres per capita.[63] The increase in the size of allotments had been under favorable consideration within the Bureau of Indian Affairs since at least 1904.[64]

Construction of Early Irrigation Works

The background work that formed the basis for the irrigation system that ultimately served the irrigable lands contained in the

[59] Act of Apr. 21, 1904, 33 Stat. 189, 224–25.

[60] Docket No. 320, *supra* note 5, Pet. Ex. 6 (GAO report), at 143, 36, 27. *See also id.*, Transcript Vol. I, 131–32; *id.*, Pet. Ex. 17 (referenced at note 70 *infra*). Adjustment or elimination of reimbursable charges is authorized by the Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. § 386a (1970).

[61] Memorandum dated June 10, 1974, from Field Solicitor, Riverside, to Associate Solicitor, Indian Affairs, at 11. *See also* Docket No. 320, *supra* note 5, Transcript Vol. I, 131–32; *id.*, Pet. Ex. 17 (referenced at note 70 *infra*). Deferral and cancellation of construction cost charges are authorized by the Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. § 386a (1970).

[62] The 1894 Act (not the 1893 Agreement) provided that the United States would bear the costs of surveying and appraising the surplus irrigable lands up to $3,000. While the 1904 Act contained no such provision, the full costs were borne by the United States.

The 1893 Agreement provided that unallotted lands that were subject to irrigation would be disposed of by public sale, and if no bids were received, then by private sale. The Act of 1904 provided that the lands would be disposed of under the terms of the Reclamation Act, which called for the lands to be disposed of by entry and cultivation under the homestead laws, with the addition of a charge for the value of the unallotted land before reclamation.

The 1893 Agreement provided for the unallotted irrigable lands to be appraised by a three-member board, their findings to be approved by the Secretary of the Interior. Under the 1904 Act, the Secretary was given sole responsibility for establishing the value.

[63] Act of Mar. 3, 1911, 36 Stat. 1058, 1063.

[64] Letter to Secretary of the Interior from Acting Commissioner of Indian Affairs of Feb. 3, 1904, recommending that the 1904 Act grant the Secretary the discretion to allot up to 10 acres per Indian. S. Rep. No. 1660, *supra* note 52, at 29.

Yuma Reservation commenced in 1902.[65] The Reclamation Service conducted surveys and general investigations along the Colorado River commencing in the Fall of 1902. The Department of Agriculture conducted a survey of the area to determine which lands were irrigable between 1902 and 1904. This was followed by a feasibility study by engineers, economists and soil scientists in Apr. 1904. The first project upon which work was started was the Laguna Dam on the Colorado River around July 1905. This was completed in 1909. Next, the distribution system was installed, the first unit being the Yuma Main Canal around 1909. The first water was delivered to the unallotted irrigable lands in 1910.

The laterals and distribution system serving the allotted lands were largely completed by 1915, but work continued on the drains for some years. Indian water rights applications were taken out from 1917 to 1921, to the extent of about 8,000 acres. Around 1922, the irrigation project insofar as it affected the Yuma Reservation was almost complete and the acreage was cropped.

The Reservation Division of the Yuma Irrigation Project consists of about 15,000 acres. The Project also includes a Valley Division in Arizona extending south from Yuma, Arizona, to the Mexican border, consisting of about 55,000 acres. By 1922, about 70 miles of laterals and canals had been constructed. Of this, the old Yuma Main Canal, on the subject land, made up about 13 miles, and there were about 13 miles of drains. The Picacho division dike was built to hold big flash floods, with outlets into drains which, in turn, carried these waters back to the Colorado River under controlled outlet conditions.

The Imperial Dam was completed in 1938 and is located about 5 miles upstream on the Colorado from Laguna Dam. The All-American Canal was eventually built, as well as a siphon to carry water which had been diverted by Imperial Dam into the All-American Canal. In 1948, the old Yuma Main Canal was closed off, and deliveries were thereafter made to the Reservation Division from the turnouts on the All-American Canal or at the siphon. The old Yuma Main Canal then started to serve as a toe drain for the All-American Canal.

In 1907–08, a levee was constructed as close to the channel of the Colorado River as safety permitted, and all the unallotted lands up to this levee were surveyed and eventually sold in accordance with the 1904 Act.

The great dams, Laguna, Im-

[65] The information concerning the development of irrigation and flood control projects contained in this and the succeeding five paragraphs is taken from uncontroverted testimony of Maurice N. Langley, a Government witness, in Docket No. 320, *supra* note 5, Transcript Vol. I, 123–136. Material on the surveys commencing in 1902 and the construction of the early levees, as well as the history to which Langley testified, is contained in the Annual Reports of the Reclamation Service. See, *e.g.*, Thirteenth Annual Report of the Reclamation Service 1913–14 (1915), at 73; Fifteenth Annual Report of the Reclamation Service 1915–16 (1916), at 73.

perial, Parker and Hoover, have, over the years, regulated the flow of the river and, by reducing the number and intensity of floods, have been a substantial factor in causing the channel of the river to move to the south, with a concomitant accretion to the north bank of the river.

In 1952, the United States constructed another levee, and an additional area has since come into being between the 1952 levee and the new river channel.

In 1912, 8,110 acres in the western part of the irrigable area were allotted to the Quechans. Twenty-five year trust patents were issued for 7,884 acres on Feb. 5, 1914. The eastern portion, known as the Bard Area, contained 7,756.54 acres and was opened to non-Indian settlers.[66]

Disposal of the nonallotted irrigable lands was promptly commenced in the same year as the first water was delivered to the area and continued unabated until the irrigable lands were fully disposed of in 1949. The Quechans' account was credited with $73,117.31 in net sales;[67] interest as of 1951 amounted to $5,349.96.[68] The charges against the allotments were eventually canceled by congressional action.[69] As of Sept. 20, 1963, of the aggregate expenditure of $499,319.53 for construction charges in the allotment area, all but $2,110.12 had been canceled.[70] Of the aggregate expenditure of $966,845.95 for operation and maintenance charges, all but $83,586.33 had been canceled.[71]

At no time have the non-irrigable lands been opened to settlement and sale by proclamation of the President, as provided in the 1894 Act. Withdrawal of the lands for reclamation purposes,[72] which took place in 1902, was for both the construction of irrigation works and for agricultural entry under the Reclamation Act,[73] which is one of the "general land laws."

[66] Docket No. 320, *supra* note 5, Ex. G–1, memorandum entitled "History of Reservation," transmitted in a letter to Director of Irrigation, Bureau of Indian Affairs, from Assistant Director of Irrigation (July 25, 1939).

[67] Docket No. 320, *supra* note 5, Pet. Ex. 6, at 143. Exhibit 6 is the report of the General Accounting Office dated Aug. 20, 1956, entitled "Re: Petitions of the Quechan Tribe of the Fort Yuma Reservation, California, Indian Claims Commission Nos. 86, 319, and 320."

[68] *Id.* at 137–38.

[69] *E.g.*, S. Doc. No. 207, 74th Cong., 2d Sess. (1935). Cancellation occurred pursuant to the Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. § 386a (1970).

[70] Docket No. 320, *supra* note 5, Pet. Ex. 17. Exhibit 17 is a letter to Fulton W. Hoge, Attorney for Quechan Tribe, from Acting Superintendent, Colorado River Agency, Bureau of Indian Affairs, dated Sept. 20, 1963.

[71] *Id.*

[72] Sec. 3 of the Act of June 17, 1902, 43 U.S.C. § 416 (1970), requires the Secretary to withdraw lands "required for any irrigation works" under the Act (a "first form withdrawal"). Sec. 3 also authorized the Secretary to withdraw lands believed to be susceptible of irrigation under the Act (a "second form withdrawal"). The Bureau of Land Management's Historical Indices for these areas show that a Secretarial Order of July 2, 1902, imposed a first-form withdrawal on these lands. A Secretarial Order of Aug. 26, 1902, changed the first form to a second form withdrawal.

[73] Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. § 371 *et seq.* See text accompanying note 51 *supra*.

Administrative Treatment of the Yuma Reservation Lands

During the period between the congressional ratification in 1894 and the issuance of the Margold opinion in 1936, there were substantial inconsistencies in the administrative treatment of ownership of the Yuma Reservation lands, and substantial defects in land title records that were maintained.

During that period, there was frequent recognition by the senior officials of the Department of the Interior that the nonirrigable lands had been ceded by the Quechans to the United States by action of the 1893 Agreement and the 1894 Act. The specific question of the status of the nonirrigable lands was addressed in a chain of correspondence involving officers of the Reclamation Service (in June of 1923, the name of the Reclamation Service was changed to the Bureau of Reclamation), Geological Survey, the Commissioner of Indian Affairs and the Secretary. In 1903 J. B. Lippincott, Supervising Engineer, U.S. Geological Survey, wrote to F. H. Newell, Chief Engineer, Reclamation Service, stating, "The Reservation is included within the general boundary of the land withdrawals along the Lower Colorado River for irrigation," and wanting to know if the "approximately 25,000 acres of high grade agricultural land there" would "be thrown open to entry during the year 1904." [74] In turn, the Director of the Geological Survey forwarded the question of the status of these lands to the Secretary, specifically stating:

> This Indian reservation is within the area withdrawn by order of the Secretary of the Interior dated July 2, 1902, and information is desired as to whether or not, in the event of the Indian Reservation being abolished, these lands would become subject to this order.[75]

The Secretary replied by forwarding to the Director a response prepared by the Commissioner of Indian Affairs. As to the status of the nonirrigable lands, the Commissioner stated:

> Reporting upon this matter the office has to state that by an agreement concluded December 4, 1893, ratified by the act of Congress of Aug. 15, 1894 (28 Stats. 286), the Indians of said reservation ceded to the United States, in fact, only the portion to become a part of the public domain and be subject to disposal under the provisions of the general land laws.[76]

Likewise, a 1904 memorandum to the Secretary stated that the 1893

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[74] Letter dated Oct. 2, 1903, from J. B. Lippincott to F. H. Newell, Yuma Project, "Indian Lands," File 154–A (hereinafter File 154–A), Document A609522. These references are to Bureau of Reclamation files on the Yuma Project.

[75] Letter dated Oct. 12, 1903, from Director, Geological Survey, to Secretary, File 154–A, *supra* note 74, A609523.

[76] Letter dated Oct. 27, 1903, from Commissioner, Bureau of Indian Affairs, to Secretary, at 2, File 154–A, *supra* note 74, A609543. The Commissioner went on to say, "only the lands not subject to irrigation can be thrown open to public settlement. In the opinion of this office no definite steps should be taken looking to the disposition of any of the surplus lands of that reservation, either irrigable or nonirrigable, until provision shall have been made to furnish the Indians with allotments of irrigated lands * * *." *Id.* at A609546.

Agreement provided "also for opening, under the general land laws of the United States, all lands on said reservation 'that cannot be irrigated.'"[77] Again, some years later, Samuel Adams, First Assistant Secretary, forwarded a memorandum dated May 21, 1912, to the United States Senate, which included the following statement:

> By agreement concluded Dec. 4, 1893, and ratified by Act of Congress Aug. 15, 1894, the Indians ceded to the United States all of their lands not susceptible to irrigation.[78]

Lastly, in 1928 the Acting Commissioner of Reclamation informed the Commissioner of Indian Affairs that the latter was wrong in informing Superintendent Jolley that the nonirrigable lands were to be disposed of for the benefit of the Indians. In interpreting the Act, the Acting Commissioner said as follows:

> All lands that can not be irrigated shall become a part of the public domain and shall be opened to settlement under the general land laws of the United States.[79]

The foregoing administrative interpretations of the effect of the 1893 Agreement and the 1894 Act were implemented in administrative action. The Public Survey Office's Special Instructions, Group 152, to John L. Warboys, Surveyor, stated:

> By letter dated Dec. 19, 1927, the Commissioner of Indian Affairs transmitted to the General Land Office a copy of a letter addressed to him from the Superintendent of the Fort Yuma Indian Agency, requesting to be informed of the status of a considerable area of land between the old channel of the Colorado River as shown upon a map made in 1912 and the present channel. The situation in this locality was subsequently brought to the attention of the General Land Office by Inspector Hanna who investigated the area in question, as a result of inquiries regarding the status of the lands immediately east of the Indian Reservation. A number of squatters have located on the area and have made some improvements with a view to acquiring title under the homestead laws, alleging that these lands are unsurveyed public lands in the State of Arizona. The Indians are objecting to these activities, claiming that the lands are a part of the Fort Yuma Reservation and that no one but the Indians has a right to settle thereon or to cut the timber.[80]

Acting upon the foregoing instructions, which squarely addressed the Reservation boundary question, Warboys made a determination of the Reservation boundary. The field notes accompanying his survey state:

> All of the land in T.16S., R.23E., S.B.M., has been eliminated from the Yuma Indian Reservation, leaving the range line

[77] Memorandum Jan. 1904 to Secretary, Yuma Project, "Lands—General," File 154 (hereinafter File 154), A608929.

[78] Memorandum dated May 21, 1912, from First Assistant Secretary to U.S. Senate, File 154–A, *supra* note 74, A609322 and A622596.

[79] Letter dated Aug. 23, 1928, from Acting Commissioner, Bureau of Reclamation, to Commissioner, Bureau of Indian Affairs, at 1. (BIA files Phoenix.)

[80] Special Instructions, Group 152, dated May 14, 1928, at 1–2.

on the West boundary of the township as the East Boundary of the Reservation.[81]

This determination defines the eastern boundary of the reservation as the line bounding the lands allotted to the Quechans. This excluded the irrigable Bard Area and the other lands between the reclamation levee and the river from the reservation.[82] The resulting survey map prepared by Warboys reflected this boundary line, which was in keeping with the foregoing administrative interpretation of the 1893 Agreement and the 1894 Act, that the Quechans ceded all but the lands to be allotted to them.

However, there is a great deal of administrative material that indicates that the subject nonirrigable lands were administered as Indian lands or were, at least, considered to be a part of the Yuma Reservation subsequent to 1894. In some cases, it will be noted that some of the same officers who determined that the Indians had ceded the subject lands also dealt with administrative details pertaining to those lands as though they were Indian lands.

There are numerous maps prepared or published between 1894 and 1936 showing the nonirrigable land as part of the "Yuma Indian Reservation." [83] Rights-of-way,[84]

[81] Field Notes of Survey executed by John L. Warboys, under Special Instructions of May 14, 1928, Group No. 152, at 4.

[82] The Warboys survey was also designed to determine the status of a large block of land on the right bank of the river which was asserted to be part of Arizona formed by an avulsive change in the river. Subsequent surveys did not uniformly follow this 1928 boundary, but referred to Executive Order reservation boundaries. *See* note 83 *infra*.

[83] *E.g.*, U.S.G.S. map, "Colorado River from Black Canyon, Ariz.-Nev. to Arizona-Sonora Boundary," surveyed in 1902 and 1903 (Docket No. 320, *supra* note 5, Ex. RO–13); U.S.G.S. map "Yuma Quadrangle, California-Arizona" edition of Apr. 1905 (BIA Files, Phoenix); 1936 reprint of Apr. 1905 U.S.G.S. map (Docket No. 320, *supra* note 5, Ex. RO–13); U.S. Reclamation Service maps of the Yuma Project in its annual reports to Congress (*e.g.*, Third Annual Report of the Reclamation Service 1903–04, at 192–93 (2d ed. 1905); Fifth Annual Report of the Reclamation Service 1906, at 100–01 (1907)); U.S. Reclamation Service Map No. 16774 (Jan. 1916) (Yuma Project, "Correspondence re Survey of Lands," File 154–D, A610158; File 154, *supra* note 77, A609223); U.S. Reclamation Service Map No. 17471 (1917) (*Id.*, A609224). The latter two maps, which were produced after issuance of the Indian allotment trust patents on Feb. 5, 1914, show the Indian Allotments (or Indian Unit) and continue to depict the entire area encompassed by the 1884 Executive Order as the Yuma Indian Reservation. The field notes, reports and official plats of survey prepared by General Land Office surveyor John L. Warboys between 1931 and 1934, as well as the underlying assignment instructions (Special Instructions, Group 264, California) refer to and adopt the "West Boundary of the Yuma Indian Reservation" as described in the 1884 Executive Order and fixed by the Ingalls survey in 1895 (Docket No. 320, *supra* note 5, Ex. RO–9), and relating to T. 16 S., R. 23 E., S.B.M., dated Apr. 15, 1932, refer to "that portion of the Yuma Indian Reservation lying between the Reclamation Levee and the abandoned channel of the Colorado River." Additional maps recognizing the continued existence of the reservation as described in the 1884 Executive Order are listed in note 84 *infra*.

[84] "Map of the Definite Location of the Southern Pacific Railroad in the Yuma Indian Reservation, California," G.L.O. No. 506131–1915, surveyed Dec. 1906, submitted to the Indian Agent, Yuma Indian Reservation, Mar. 13, 1907, and approved by Acting Secretary of the Interior George W. Woodruff on June 18, 1907, subject to the provisions of the Act of Mar. 2, 1899 (30 Stat. 990, *as amended*, 25 U.S.C. §§ 312–18 (1970)) (BIA Files, Phoenix) (the BLM master title plat for section 36, T. 16 S., R. 22 E., records issuance of another right-of-way to the railroad under the 1899 Act, with jurisdiction in the BIA, on July 29, 1926 (R 1359, S 3492)); "Map of the Definite Location of the Inter California Railway in Yuma Indian Reservation, California," received by Superintendent

trader's licenses,[85] and sand and gravel leases[86] were also granted with respect to the nonirrigable lands by reference to the "Yuma Indian Reservation."

A letter from the senior official of

Egan, Yuma Indian Reservation, Sept. 30, 1909, and approved by the Department Feb. 10, 1910, under the Act of Mar. 2, 1899, with the schedule of compensation to the Indians required by that Act being approved by First Assistant Secretary Frank Pierce on May 14, 1910, pursuant to the recommendation of Superintendent Egan and Commissioner of Indian Affairs Valentine (BIA Files, Phoenix); "Proposed Telephone and Telegraph Line Crossing the Yuma Indian Reservation," Pacific Telephone and Telegraph Company, Right of Way Map LA 011977, approved on July 3, 1913, pursuant to the Act of Mar. 4, 1911 (36 Stat. 1253, *as amended,* 43 U.S.C. § 961 (1970)), with the requisite finding for Indian reservation lands of compatibility with the public interest being made by the First Assistant Secretary by notation on the July 2, 1913, memorandum from the Second Assistant Commissioner of Indian Affairs to the Secretary recommending approval, and with rental, payable to the account of the Quechan Tribe, being set at $8.66 for the first year (Docket No. 320, *supra* note 5, Ex. RO–3) (related documents show the rental fee was collected on behalf of the Tribe for the full 50 year term of the right-of-way); "Center Line Location Map of Proposed Highline Canal from Laguna Dam to Imperial Valley and Location of Power Plant," dated June, 1915, showing the reservation boundaries as established in 1884, submitted for the approval of the Secretary of the Interior pursuant to secs. 18–21 of the Act of March 3, 1891 (26 Stat. 1095, 1101–02, *as amended,* 43 U.S.C. §§ 946–949 (1970)), sec. 2 of the Act of May 11, 1898 (30 Stat. 404, *as amended,* 43 U.S.C. § 951 (1970)), and the Act of Feb. 15, 1901 (31 Stat. 790, *as amended,* 43 U.S.C. § 959 (1970)), all of which authorize rights-of-way through Indian reservations as well as public lands (BIA Files, Phoenix) (no indication as to whether the right-of-way was approved); Memorandum dated June 6, 1917, from Assistant Commissioner of Indian Affairs Meritt to Commissioner Tallman of the General Land Office, responding to the latter's request for a report on the application of the Coachella Valley Ice and Electric Company for a right-of-way for an electrical transmission line across Yuma Indian lands (all in the nonirrigable western portion of the 1884 reservation), advising that "the proposed right of way involves no Indian allotments but crosses a portion of the Yuma Indian Reservation which is absolutely waste desert land and upon which no Indians reside," and recommending approval of the application with an annual charge of $5 per mile as compensation for damage to the Yuma Indian Reservation lands involved (BIA Files, Phoenix); "Proposed State Highway Through Yuma Indian Reservation," California Highway Commission, dated July 16, 1923, as amended by maps of changes "A" through "D", dated Sept. 28, 1923, through May 1924, approved by Assistant Secretary of the Interior John H. Edwards on Oct. 10, 1927, subject to the provisions of the Act of Mar. 3, 1901 (31 Stat. 1058, 1084, 25 U.S.C. § 311 (1970)), and amending the right-of-way as originally approved under the same Act on Nov. 9, 1917 (Docket No. 320, *supra* note 5, Exhibit RO–8; BLM Plat Records); Order of withdrawal and reservation of a right-of-way for a proposed Reclamation Service "power canal from siphon drop to Araz" across the Yuma Indian Reservation, withdrawing and reserving 236.05 acres of reservation land, of which approximately 3.5 acres were allotted lands, recommended by Director and Chief Engineer Davis of the U.S. Reclamation Service on Apr. 15, 1918, concurred in by Assistant Commissioner of Indian Affairs Meritt on the "understanding that adequate compensation be assessed and paid for damage to Indian lands involved," concurred in by Commissioner Tallman of the General Land Office, and approved on June 17, 1918, by Assistant Secretary of the Interior S. G. Hopkins under secs. 13 and 14 of the Act of June 25, 1910 (36 Stat. 855, 43 U.S.C. § 148 (1970)), 25 U.S.C. § 352 (1970) (Yuma Project, "Purchase of Lands-General, 1909 thru June 1919," File 150, A606156, A606163 and A606167–68); "Southern Pacific Railroad Station Grounds" map, received by the Superintendent of the Yuma India Reservation June 30, 1928, and approved by the Department on Dec. 18, 1928, pursuant to the Act of Mar. 2, 1899, *supra* (Docket No. 320, *supra* note 5, Ex. RO–11; BLM Master Title Plats, Sacramento). The Bureau of Land Management master title plats in Sacramento, California, show three additional rights-of-way issued under statutes governing Indian reservation lands and noted as being under the jurisdiction of the Bureau of Indian Affairs: a highway right-of-way, R 2704, issued Oct. 24, 1930, under the Act of Mar. 3, 1901, *supra;*

the Bureau of Indian Affairs to the Director of the Geological Survey described a portion of the nonirrigable lands as "Indian country

a telephone and telegraph line right-of-way, S 3489, issued June 14, 1927, under the Act of Mar. 3, 1901, *supra*; and a transmission and telephone line right-of-way, LA040525, issued Mar. 23, 1927, under the Act of Feb. 15, 1901, *supra*.

[85] Trader's License covering 80 acres in the N½NW¼ section 25, T. 16 S., R. 21 E., S.B.M., issued to Robert M. Goebel Jan. 1, 1928, to James H. Maxey Aug. 6, 1929, and thereafter to Maxey and later his widow, Mary A. Maxey, through various renewals (BIA Files, Phoenix).

[86] Letter dated June 18, 1935, from the Commissioner of Indian Affairs to Superintendent Jolley, Fort Yuma Agency (BIA Files, Phoenix); Letters dated Dec. 13, 1939, and Apr. 6, 1943, from Superintendent Gensler, Colorado River Indian Agency, to the United States Fidelity and Guaranty Company (Docket No. 320, *supra* note 5, Ex. RO–15); Letter dated Mar. 29, 1943, from BIA Field Agent Cox, Fort Yuma Sub-Agency, to Superintendent Gensler (BIA Files, Phoenix); Letter dated Nov. 16, 1934, from H. L. Gardner to the Quechan Tribal Council (Docket No. 320, *supra* note 5, Ex. RO–4); Letter dated Aug. 3, 1934, from H. L. Gardner to Superintendent Jolley, Fort Yuma Indian Agency (*id.*); Notices of location of placer mining claims by Rosa Lee Black and Patsy Black on Feb. 26, 1935, filed with the Fort Yuma Indian Agency on Mar. 18 and Apr. 2, 1935, within 60 days of location as required by sec. 26 of the Act of June 30, 1919, *as amended*, 25 U.S.C. § 399 (1970) (Docket No. 320, *supra* note 5, Ex. RO–12).

One document hints at management by the Bureau of Reclamation. On Oct. 28, 1953, an "Analysis of G.L. Account 271.22—Rental of Farming and Grazing Lands" was prepared to ascertain the portion of "Miscellaneous Non-operating Income—Other" attributable to the rental of grazing and farming lands covered into such account between 1910 and 1953. The entries are jumbled and clearly inaccurate in places. The covering memorandum states that "some of the income * * * was from Mining and Gravel Leases, and still a larger portion from lands lying outside both irrigation divisions. Probably all of the Mining and Gravel leases, as well as a sizeable portion of the Grazing and Farming leases, lie outside the two irrigation divisions." An inspection of the entries confirms that all of the leases listed in the "Gravel and Mining" column were on non-irrigable reservation lands, except perhaps Lease I24r–358 issued to Emil Frank. But all of them are entered in the ledgers after 1940, and most, if not all of them, are almost surely the same sand and gravel leases that were administered by the Bureau of Indian Affairs prior to 1936. *See, e.g.*, leases I24r–417 and I24r–504 issued to H. L. Gardner and the leases issued to C. H. Trigg and Emil Frank and compare them with the BIA leases issued to the same persons as described in the documents referred to in the preceding paragraph of this note. Similarly, all the leases except for one listed in the "Outside Area" column, although covering non-irrigable portions of the reservation, were entered in the ledgers after 1936. *See, e.g.*, lease I24r–415 issued to Mary E. Maxey for a gas station and lease I24r–456 issued to Callahan Construction Company for a "Piece of Ground at Pot Holes" (a site in section 25, T. 15 S., R. 23 E.). The Mary E. Maxey lease, inaccurately placed in T. 15 S. rather than T. 16 S. of R. 21 E., is undoubtedly a lease for the same ground that was utilized by Mrs. Maxey under a BIA trader's license prior to 1936. See note 85 *supra*. The one exception is lease L–30 issued to R. E. Whitmore and S. H. Flood and listed as an "Outside Area" between 1918 and 1924. However, the land description (sec. 19, T. 16 S., R. 23 E., and sec. 35, T. 15 S., R. 23 E.) includes both irrigable and non-irrigable lands, and the lease is actually listed (under Whitmore's name) for the period from 1925 to 1927 and again in 1928 in the "Reservation" Division column, which covers the irrigable lands in the Reservation Division of the Yuma Project. The "Outside Area" listing was, therefore, probably an error. The term "Reservation Division" described the irrigable lands and project works of the Yuma Project on the California side of the Colorado River (see text following note 65 *supra*). It did *not* cover the non-irrigable reservation lands not used for project works. Hence the use of the "Outside Area" column in the account analysis. A study of all of the entries in the "Reservation [Division]" column shows that all of them included irrigable as well as non-irrigable lands, and the leases were no doubt for a portion of the irrigable lands. The land descriptions in the analysis ordinarily give at most the section in which the lease was contained, without providing any more precise description. Where more precise descriptions are given, they refer to specific lots or farming units in the Bard area open to non-Indian settlement in 1910. *See, e.g.*, leases I1r–372, L–14, and 4–11. Other leases are in sections which are entirely, or almost entirely irrigable. *See, e.g.*, leases I24r–202, I24r–305, I24r–307, I24r–354. Lease I24r–409 was for a "track on levee in Cal. in Res. Div." One lease whose land description defies accurate interpretation is the lease originally issued to E. F. Sanguinetti under lease number 124r–169 and

within the meaning of the law." [87] However, the letter dealt with the limited subject of police jurisdiction and not the question of land ownership. The author pointed out that police jurisdiction for the Reclamation Service over these lands under the 1904 Act was the same as its police jurisdiction for public domain lands on other projects, indicating that no position on land ownership was necessary to the conclusion.

A letter from the Director of the Reclamation Service described lands in the project area as lands the disposal of which "is primarily within the control of the Indian Office." [88] Subsequently, a memorandum between two senior officials of the Bureau of Reclamation described the nonirrigable lands as "Indian lands * * * [which] are not public lands in the ordinary sense of the word." [89]

In 1906 District Engineer Homer Hamlin advised the Director of the Reclamation Service that "[t]he jurisdiction over [the non-irrigable land between the reservation levee and the Colorado River] will probably always remain with the Indian Bureau, as it will not be reclaimed or sold as a part of the cultivable area of the Yuma Project." [90] The letter, however, dealt chiefly with the subject of the Indians' right to cut timber, rather than the subject of ownership. The letter also stated that after allotment and disposal of the irrigable lands, "[t]he statement that the Indians will have no land from which they can cut timber is true." The latter statement indicates that the author believed that the nonirrigable lands were not owned by the Indians. It must also be noted that, on the question of jurisdiction, Hamlin was overruled by the Director of the Reclamation Service, who wrote in a memorandum, dated July 23, 1906, to the Secretary that the lands were under

described as sections 31, 36, 1, 6 in townships 15, 15, 16 and ranges 23, 22E. It is not clear which sections are to be matched with which townships and which ranges. Some of the probable combinations would include sections which contain only nonirrigable lands, but all of these would also contain substantial project works, except for section 6, T. 16 S., R. 22 E., which is high up in the rocky mesa and useless for farming or grazing.

[87] Letter dated Oct. 6, 1905, from Acting Commissioner of Indian Affairs Larabee to the Director, U.S. Geological Survey (in which the Reclamation Service was located), concerning police jurisdiction over the nonirrigable lands on the California side of the Colorado River being used for construction of the Laguna Dam, File 154–A, *supra* note 74, A609664–65.

[88] Letter dated June 23, 1914, from Director Newell, Reclamation Service, to U.S. Representative Carl Hayden, File 154–A, *supra* note 74, A609414.

[89] Memorandum dated Mar. 21, 1925, from Acting Chief Engineer Crowe, Bureau of Reclamation, to the Commissioner of Reclamation, concerning an application by Southern Sierra Power Company for a right-of-way "west of the east line of Sec. 19, T. 16 E., R. 22 E., S.B.M.," which would be "across Indian lands over which the Bureau of Reclamation has proposed to construct certain works in connection with the All-American Canal to Imperial Valley," Yuma Project, File 430, "Acquisition of Lands, Indian Lands through 1929."

[90] Letter dated May 28, 1906, from District Engineer to Director, Reclamation Service, File 154–A, *supra* note at 74, A609709–11. *Id.* at A609702–08 is related Secretarial level correspondence on the jurisdictional dispute between Indian Affairs and the Reclamation Service. See note 88 *supra*.

the jurisdiction of the Reclamation Service by reason of the 1904 Act.

In 1907, the Superintendent of the Yuma Reservation raised the question of the status of the nonirrigable land between the levee and the river, as well as the "27000 acres of rough mesa and mountainous land unfit for agricultural purpose," in light of the failure of Congress, in the Act of Apr. 21, 1904, to "provide for the disposition of the balance of the reservation that is not irrigable." [91]

The letter requested that a legal determination be made as to whether the nonirrigable lands were part of the public domain. The Secretary of the Interior subsequently directed Special Inspector Levi Chubbuck of the U.S. Indian Inspection Service to investigate and report on this and other matters. On April 6, 1907, Inspector Chubbuck reported to the Secretary, suggesting that the strip of land between the levee and the river "be formally reserved by the Indian Office" and that a parallel strip inside the levee which was not to be allotted to Indians or disposed of to non-Indians, as well as "other available places on the Yuma Reservation," be planted with fruit bearing trees, "subject to such regulations as the Reclamation Service desires to impose for the protection of the levees and ditches, the Indians' rights to the income from the products being recognized in consideration of the fact that the reservation as a whole is theirs." [92] Inspector Chubbuck's report simply contained his recommendations, and did not represent his view of the status of the ownership of the subject lands. The report did state that he understood that "the remainder of the land—unreclaimed bottom land and mesa land" was to be disposed of. Inspector Chubbuck also stated that "title to the remainder of the reservation will be extinguished;" but that this would leave the Indians without a fuel supply.

This may be the reason why he made the recommendations quoted above. Inspector Chubbuck's recommendations were not accepted and that same subject was at issue in later correspondence. [93]

In 1919, the Director of the Reclamation Service implicity recognized the right of the Indian office to irrigate certain lands which "lie outside of our levee and consequently are not included within the proposed Yuma Project," [94] but this

[91] Letter dated Apr. 11, 1907, from Superintendent Deaver, Yuma Reservation, to the Commissioner of Indian Affairs, referred by the latter to the Director of the Reclamation Service on May 7, 1907, File 154–A, *supra* note 74, A609721–28. Superintendent Deaver continued, "The question arises in my mind whether this non-irrigable land [the mesa and strip between the levee and the river] will not revert back to the public domain as soon as the Indians are allotted * * *." *Id.* at A609725.

[92] Letter dated Apr. 6, 1907, from Special Inspector Chubbuck to Secretary of the Interior, File 154–A, *supra* note 74, A609734–39.

[93] See letters referred to in note 90 *supra*. Inspector Chubbuck's remarks, and other correspondence (*e.g.*, A609725, quoted in note 91, *supra*), can be explained as based on the assumption that the cession of the nonirrigable lands would be effective upon issuance of allotments to the Indians.

[94] Letter dated Oct. 2, 1919, from Director Davis, U.S. Reclamation Service, to the Commissioner of Indian Affairs. Yuma Project, File 150, "Acquisition of Lands, Southern Pacific Ry. Co."

letter seems only to express a willingness to sell water from the Cocopah Canal for use on lands outside the Yuma Project, rather than a determination as to the ownership of those lands.

In a letter dated Oct. 26, 1929, the General Land office advised the Commissioner of Indian Affairs that:

> It is the opinion of this office that the reservation boundary is defined by the center of the abandoned channel [as it existed prior to the avulsive change of 1920] * * *. The area between the levee and the abandoned channel, constituting the present Yuma Indian Reservation boundary, appears therefore to be still in public ownership and a part of the Indian Reservation.[95]

Advocates of the Quechan point of view have suggested that Indian ownership of the nonirrigable lands was only challenged by the Bureau of Reclamation in order to avoid substantial claims for compensation and consideration on behalf of the Quechans by reason of the construction of the All-American Canal. The canal was originally proposed as a private project, passing through the 1884 reservation from the southwest corner to the northeast corner, crossing allotted and unallotted lands, mostly the latter. The entire right-of-way was to be within the reservation. The appraisal report prepared on this proposed canal route indicated that compensation would have to be paid to the Indians for both the allotted and unallotted lands.[96] When the Bureau of Reclamation decided to construct the canal itself, its shifted the right-of-way slightly north so that only nonirrigable lands would be involved and, in June 1934, requested the General Land Office to submit the proposed right-of-way for the canal, which would involve no Indian allotments but rather "exceedingly rough territory along the edge of the Yuma mesa, * * * to the Secretary of the Interior (through the Commissioner of Indian Affairs) for approval under Section 13 of the Act approved June 25, 1910 (36 Stat. 855)."[97] The cited Act, 43 U.S.C. § 148 (1970), applies to "lands within any Indian Reservation" and hence, as the Commissioner of the General Land Office noted in his transmittal letter to the Commissioner of Indian Affairs, administered by the Office of Indian Affairs. The Commissioner of the General Land Office also stated that "the right of way involves Indian lands."[98]

[95] Bureau of Indian Affairs files, Phoenix.

[96] *E.g.*, "Right of Way Plats of the All-American Canal through Tribal and Allotted Indian Lands of the Yuma Indian Reservation," dated Jan. 1928 (Docket No. 320, *supra* note 5, Ex. RO–10); "Schedule of Appraisements Covering Right-of-Way Across Yuma Indian Reservation, Etc.," covering unallotted lands therein, signed Apr. 27, 1928 (Docket No. 320, *supra* note 5, Ex. RO–7).

[97] Docket No. 320, *supra* note 5, Ex. RO–7, Letter from Acting Commissioner, Bureau of Reclamation, to Commissioner, General Land Office (June 27, 1934).

[98] Docket No. 320, *supra* note 5, Ex. RO–7, Letter from Commissioner, General Land Office, to Commissioner, Bureau of Indian Affairs (July 5, 1934).

The Bureau of Reclamation subsequently received a report dated Mar. 12, 1934, making substantial claims on behalf of the Quechans. On July 15, 1934, the Bureau of Reclamation advised the Bureau of Indian Affairs that the right-of-way was a part of the public domain, and that no compensation would be paid. In 1933 and 1935 two cases were decided in the United States District Court for the Southern District of California [99] to the effect that full title to the irrigable land vested immediately in the United States, upon passage of the 1894 Act. The available materials do not make clear whether the position taken by the Bureau of Reclamation in its reply to the Bureau of Indian Affairs was based upon questions of ownership raised as early as 1903,[100] upon issues raised in the two law suits, or upon certain costs.

Although Congress did not deal with these lands between 1894 and 1936 in any manner which would reveal its understanding of their status, there is a statement in the Congressional Record by Representative Stephens of Texas on Dec. 16, 1912, approximately two years after Congress enlarged the allotments to 10 acres, and near the time when the canal constructed through the reservation was completed, implying that the "large amount of land up on the mesa" (that is, nonirrigable land) was in Indian ownership at that time.[101]

And, during hearings in San Diego, California, on June 29, 1934, Chairman Wheeler of the Senate Committee on Indian Affairs referred to "the All-American Canal constructed in connection with the Boulder Dam Project and running across in lands of the Indians down there [in the Yuma Reservation]" and told John Curran, a Quechan concerned about compensation for the right-of-way, "They will have to pay you for it, if they take your land." [102] The Congressman's statement cannot, of course, be construed as a determination that the land to be taken actually belonged to Curran or his Tribe.

While the foregoing examples of administrative treatment of and comment on, the nonirrigable lands are by no means all-inclusive, they are representative of the conflicting views and uncertainty reflected in Departmental documents at that time.

The Department has regularly corrected errors and confusion over the mapping of and agency jurisdiction over lands within its jurisdiction, by finding lands thought to be public domain lands to be Indian lands, and by finding lands thought to be Indian lands to the public domain.[103]

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[99] *United States* v. *Johnson*, Civil No. 118–C (S.D. Cal., Aug. 2, 1935); *United States* v. *Walker*, Civil No. 126–J (S.D. Cal., Oct. 10, 1933).

[100] *See* note 74 *supra*, A609522.

[101] 49 Cong. Rec. 748.

[102] *See* note 74 *supra*.

[103] In *Solicitor's Opinion*, 54 I.D. 71, 76–78 (1932), Solicitor Finney ruled that lands thought for twenty years to have been unallotted tribal lands were in fact public domain lands, and that receipts from timber sale contracts should be paid into the Treasury as

Part of the confusion as to ownership of the land or jurisdiction over it undoubtedly resulted from delays in entering title transactions in the tract books originally maintained in the General Land Office, now the Bureau of Land Management. For example, our review of the records indicates that creation of the Yuma Reservation by the 1884 Executive Order was noted in the appropriate tract books no earlier than 1897, which was unquestionably after the cession of a portion of the lands had been effected. The 1893 Agreement, the 1894 Act, and the 1936 Margold Opinion notwithstanding, the cession of the nonirrigable lands was not actually entered in the tract books until the 1960's. Numerous other entries in these records made long after the fact indicate that these records have not accurately reflected the current status of title to the lands on a continuing basis.

A partial explanation for the delay in entering into the tract books the legal description of the ceded nonirrigable lands would be the uncertainty as to their area and location. As previously noted, early Reclamation estimates indicated that there were 25,000 irrigable acres on the Yuma Reservation, but by 1913–14, it had been determined that there were only some 15,000 irrigable acres.[104] The initial uncertainty as to the number of acres that might be irrigable would have made it impossible to develop accurate legal descriptions of the new boundary of the Reservation. In addition, the twenty-five year trust patents were not issued on the lands allotted to the Quechans until 1914.[105]

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miscellaneous receipts, rather than into a separate account for the benefit of the Georgetown Band of Indians. The Solicitor found that the reserve was abandoned by the Band's earlier acceptance of allotments on another reservation.

In *Navajo Indian Reservation,* 30 L.D. 515 (1901), an 1884 extension of the Navajo Reservation excepted any tracts "to which valid rights have attached." Although some mining claimants thought the extension order terminated their rights, and the Bureau of Indian Affairs had assumed that only the rights of original locators were protected, the Secretary ruled that the tracts so claimed in 1884 were not included in the reservation, by the terms of the order, even if subsequently abandoned and relocated. *Id.* at 520. The lands were surveyed, and are now shown as "segregated from Navajo Reservation, presumed public land" (Map of Survey approved Aug. 13, 1909, BLM files, Phoenix).

In *Solicitor's Opinion,* M–36770 (Jan. 17, 1969), the Solicitor ruled that the south boundary of the Salt River Indian Reservation was the south channel of the Salt River, not the north channel. Although the island formed by the river's braiding had been treated as public land, the Department recognized Indian ownership.

In a Memorandum dated Apr. 12, 1974, from the Associate Solicitor, Indian Affairs (concurred in by the Solicitor June 3, 1974), the Department defined the boundary of the Fort Mohave Hay and Wood Reserve to resolve a long-standing dispute between the Bureaus of Indian Affairs and Land Management over the administration of the lands thought to be in the reserve. Lands surveyed in 1928 and administered under the public land laws by the Bureau of Land Management were recognized as Indian reservation lands.

[104] Thirteenth Annual Report of Reclamation Service 1913–1914 (1915), at 75–76.

[105] The trust patents by date and parcel, are set out in the Historical Indices for the rele-

The administrative treatment of lands was certainly not uniform. The confusion over the status of these lands disclosed by the earlier documents can also be attributed to uncertainty over the effect of the 1894 Act prior to the granting of allotments and the opening of the remaining lands. These conditions alone, or in conjunction with the failure to note the cession on the tract books, help explain why some of those who administered the nonirrigable lands were uncertain as to the status of the lands.

Issuance of Margold Opinion

In 1928 Congress authorized construction of the All-American Canal, one of the largest irrigation canals in the United States.[106] The canal runs from the headworks of the Imperial Dam on the Colorado River, at a point 12 miles upstream from the City of Yuma, Arizona, thence southwesterly on the California side of the Colorado River to the boundary line between California and Mexico. The All-American Canal in its course crossed the nonirrigable portion of the original Yuma Reservation.

On May 10, 1935, the Commissioner of Indian Affairs wrote to the Commissioner of the Bureau of Reclamation setting forth seven claims emanating from the projected construction of the canal, several of which were based upon the assumption that the canal right-of-way crossed Indian tribal lands for which compensation should be paid.[107]

On July 15, 1935, the Bureau of Reclamation advised the Bureau of Indian Affairs that the right-of-way in question was a part of the public domain, and that no compensation would be paid. The Bureau of Indian Affairs then requested an opinion on the matter from the Secretary of the Interior who, in turn, referred the question to Solicitor Margold.

Solicitor Margold, on Jan. 8, 1936, issued the opinion which is the subject of this Memorandum, holding, *inter alia*, that the 1893 Agreement as ratified by the 1894 Act extinguished the Quechans' title to the nonirrigable lands of the 1884 reservation.[108]

Indian Claims Commission Actions

In 1950 the Quechan Tribe filed a petition with the Indian Claims

vant townships, *e.g.*, T. 16 S., R. 22 E., S.B.M., in the Bureau of Land Management.

[106] Sec. 1 of the Boulder Canyon Project Act of Dec. 21, 1928, 43 U.S.C. § 671 (1970).

[107] The claims and the correspondence surrounding them are detailed in *Solicitor's Opinion*, M–28198 (Jan. 8, 1936), at 2–5. The claims included total compensation of $2,602.50 for right-of-way, Indian ownership of mineral deposits discovered, compensation for sand and gravel, reimbursement for damages from canal seepage or failure, compensation for a power site, and a request for construction of four bridges.

[108] *Id.* at 10–12. The opinion also held that liability for canal seepage, breaks, etc. would depend upon ordinary rules of negligence, and denied all other claims. *Id.* at 16–17. In addition, the opinion held that the fact that the lands had not been opened to disposition under the general land laws by Presidential Proclamation did not mean that the Quechans retained any interest in the lands. *Id.* at 10–11.

Commission, Docket No. 86, asking for a general accounting of transactions involving the Tribe. In 1951, two additional companion claims were filed with the Commission. The first, Docket No. 319, asserted a taking by the Government without compensation of aboriginal lands of the Tribe adjoining what became the Yuma Reservation. The second, Docket No. 320, was based upon Government treatment of the Executive Order reservation lands.

In 1958, the Commission in effect transferred certain claims advanced by the Tribe in Docket No. 86 to Docket No. 320, and dismissed the earlier case.[109]

An interlocutory judgment of liability was entered against the government in Docket No. 319 on September 30, 1959. Both parties appealed the judgment to the Court of Claims. The appeal was dismissed without prejudice by the Court of Claims on Mar. 23, 1962. In 1965 the Indian Claims Commission issued its final order, in response to a joint settlement, assessing liability of $520,000, of which $167,000 was ascribed to the taking of Indian lands in California.[110]

In Docket No. 320, the Tribe's case was initially an action to set aside the cession of the nonirrigable lands and to recover the value of the reservation lands on the basis that the 1893 Agreement was induced by fraud, coercion, and misrepresentation. By the time of oral argument in 1965, the Tribe's counsel changed its main case to an action for breach of contract with respect to the 1893 Agreement, asking the Commission to enforce the 1893 Agreement.[111] The validity of the 1893 Agreement and the cession of lands were taken out of contention. Late in 1971, the Commission issued an Order staying the pro-

[109] Docket No. 320, *supra* note 5, Order Consolidating Causes of Action (Apr. 24, 1958). This Order transferred from Docket No. 86 to Docket No. 320 claims for the Government's failure to make allotments to members of the Tribe as required in 1893 Agreement and 1894 Act; failure to realize adequate price for irrigable land sold and account for same; and failure to hold allotments in trust and convey patents in fee as required by the 1893 Agreement.

[110] *Quechan Tribe of the Fort Yuma Reservation v. United States*, 15 Ind. Cl. Comm'n 489, 490 (1965). The judgment expressly excluded the lands within the 1884 reservation boundary. *Id.* at 492.

[111] In oral argument in Docket No. 320, *supra* note 5 (July 8, 1965, Tr. at 2), Fulton W. Hoge, attorney for the Quechans stated: "May it please the Commission, this case started out as a cause of action to set aside a cession of a reservation and to recover the value of the reservation lands. That's the main cause of action in the original petition. Since then it has developed into a breach of contract case and instead of trying to set aside the agreement on the ground of fraud, duress and unconscionable consideration we ask that the Commission enforce it and give us—we affirm it. We ask the Commission to affirm it and give us damages for its breach in two respects, although we have part of our original cause of action in that we ask that as to some of the land, the Mesa land which was included in the cession that the Commission exercise its power to revise the contract and to hold that there was no reason for including that land that it was unconscionable and that there should be an award of its value."

ceedings because of "legislation pending in the United States Congress to clarify the [Quechans'] title to certain land areas involved in this case * * *."[112] No such legislation was passed, and in 1971 counsel for the Quechans moved to vacate the order.

The Tribe's counsel in the proceedings through 1968 died, and his successor petitioned the Commission to, among other things, reopen the record to permit admission of further evidence and to permit the Commission to consider declaring the 1893 Agreement invalid. The Commission conditionally granted permission for introduction of further evidence,[113] but refused to consider the validity of the 1893 Agreement on the grounds that a treaty ratified by Congress is not subject to judicial revision or review.[114]

In the hearing held in connection with the Tribe's motion to reopen the record and introduce further exhibits, the Tribe's attorney expressed a willingness to dismiss the action without prejudice if a return of the 1884 Reservation lands could be effectuated under 25 U.S.C. § 463 (a) (1970),[115] which provides, in relevant part:

> The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or to any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States * * *.[116]

Subsequently, the Tribe passed a resolution[117] stating that a claim for damages under the Indians Claims Commission Act "is not proper" and authorizing counsel to file a motion for dismissal without prejudice. A motion to that effect was filed on behalf of the Tribe in July of 1972, again suggesting that the land could be returned under 25 U.S.C. § 463(a) (1970). The Government filed a response objecting solely to such a dismissal being granted without prejudice. Since July of 1972, Docket No. 320 has been held in suspense pending further administrative review within the Department of the Interior on the cession question.

[112] Docket No. 320, *supra* note 5, Order Staying Further Proceedings (Nov. 25, 1970).

[113] Docket No. 320, *supra* note 5, Order Granting Plaintiff's Motion to Vacate Order Staying Further Proceedings (July 21, 1971).

[114] Docket No. 320, *supra* note 5, Opinion on Motion to Reopen the Record (July 21, 1971), citing *Sac and Fox Tribe* v. *United States*, 7 Ind. Cl. Comm'n 675, 710–12 (1959), *aff'd on other grounds*, 161 Ct. Cl. 189, 198, *cert. denied*, 375 U.S. 921 (1963).

[115] Docket No. 320, *supra* note 5, Oral Argument (May 9, 1972), Trp. at 3, 16.

[116] Sec. 3 of the Act of June 18, 1934, 25 U.S.C. § 463(a) (1970). It is unclear whether the lands in question could be subject to this Act. *See Solicitor's Opinion*, 69 I.D. 195, 199 (1962); *Solicitor's Opinion*, 56 I.D. 330, 334 (1938). Were a portion of the lands in question to be restored to the Quechans *under this section*, the impacts on non-Indian interests would be insubstantial, since, although the question is unsettled, we think that the water-use priority date for the restored land would be as of this restoration date and subsequent to present water uses. Present non-Indian uses of the lands could be preserved, and impacts on Colorado salinity would be negligible.

[117] Docket No. 320, *supra* note 5, Quechan Tribal Resolution dated July 13, 1972, attached to Petitioner's Motion to Dismiss (July 26, 1972).

1968 Weinberg Opinion

In 1968, Solicitor Weinberg issued an opinion approving a Bureau of Land Management proposal to issue a lease to Yuma County, Arizona, of a portion of the non-irrigable lands within the boundaries of the Yuma Reservation.[118] Citing Solicitor Margold, Solicitor Weinberg held:

> The 1904 act left unaffected the stipulation of the 1894 act that extinguished the Indian interest in any non-irrigable lands.[119]

The Weinberg opinion implicitly endorsed the validity of the Margold Opinion but did not expand upon the analysis in the 1936 opinion.

Re-examination and Reconsideration

The Quechan Tribe's claim to the land in question—as distinguished from its claim for compensation—was first presented to the Department of the Interior during a meeting held between Solicitor Frizzell and the Tribe's attorney in July 1973. In the course of that meeting, Solicitor Frizzell agreed to initiate an examination of the legal question and the underlying facts. Solicitor Frizzell assigned the question to the Division of Indian Affairs with instructions that the Division develop the strongest case possible to support the Quechans' claim.

The Division of Indian Affairs in the Solicitor's Office, with the help of other lawyers in the Solicitor's Office, did exhaustive research into the factual and legal background of the matter, including: the history of the 1893 Agreement and the 1894 Act; a review of the files, many of which were stored at the Indian Claims Commission, relating to the Department's treatment of the lands in question between 1894 and 1936; a review of the files relating to every third-party interest created in the lands after 1936; extensive research into all of the legal aspects of the Tribe's claim; and preparation of a number of drafts of an opinion stating the strongest possible case for the Quechans' claims.

One of the drafts prepared by the Indian Affairs Division was circulated to all persons who might be affected, Indian and non-Indian alike, for legal suggestions, comment and criticism.

In Jan. 1976, two separate meetings were held by the Secretary of the Interior, the Under Secretary, the Solicitor and a number of other Departmental officials, first with representatives of the non-Indian interests, and then with the Quechan tribal leaders and their lawyers. During these meetings, the legal issues and factual background were discussed in detail.

The Secretary determined that the issues involved were exclusively legal in nature, and therefore in-

[118] Memorandum from Solicitor to the Secretary of the Interior, dated June 12, 1968.
[119] *Id.* at 2.

structed the Solicitor to decide the matter on its legal merits. After careful analysis of the draft opinion, consideration of the oral statements made during the meetings mentioned above, review of voluminous briefs on both sides of the issue which had previously been submitted to the Department, and personal study of source materials, the Solicitor was unable to accept the arguments which had been advanced on behalf of the Quechan Tribe by the Indian Affairs Division in its draft opinion.

On Jan. 30, 1976, the Solicitor advised the Secretary that he had concluded that the Margold Opinion was correct and should be affirmed. The Secretary acquiesced in this decision and ordered that the Chairman of the Quechan Tribal Council be advised of this decision. The Chairman was so advised by telephone, with a confirming letter sent to him by the Solicitor on Feb. 2, 1976.

DISCUSSION AND LEGAL ANALYSIS

Summary

In order to find that the Quechans hold title to the nonirrigable lands in question, we must determine: that the cession or relinquishment of reservation lands under the 1893 Agreement and 1894 Act was not absolute and immediate but, rather, was conditioned upon the occurrence of one or more subsequent events; that material conditions precedent to the relinquishment were not fulfilled prior to the enactment of the 1904 Act; and that the 1904 Act established an independent scheme for the allotment and sale of the irrigable reservation lands which completely replaced the scheme provided for under the 1893 Agreement and 1894 Act, rather than simply implementing the scheme called for under the 1893 Agreement and 1894 Act.

In interpreting the 1893 Agreement and the 1894 Act, together with the 1904 Act, we have taken into account, among other things: the special rules of construction which apply to Indian treaties and laws; the contemporaneous treatment of the lands in question by Departmental officials subsequent to 1894, as shown by correspondence, memoranda, testimony, maps, reports and other documents; and the policies underlying the General Allotment Act, and other congressional policies toward Indians in effect at the time.

As set forth in greater detail below, we have concluded that the 1893 Agreement as ratified by the 1894 Act effected an immediate relinquishment and cession of Yuma Reservation lands, including the nonirrigable lands in question, and that the 1904 Act, insofar as it pertained to the Yuma Reservation, concerned only the irrigable lands of the reservation and was intended solely to provide an arrangement under the 1902 Reclamation Act for irrigation of the lands as an alternative to irrigation which would have been provided by the private company which failed. The 1904

Act neither repealed the earlier Agreement and Act nor abandoned the underlying plan.

We have also concluded that even if there were convincing evidence that the 1893 Agreement and 1894 Act were grossly inequitable and unfair to the Quechan Indians, involving unconscionable consideration, or even if there were convincing evidence that the 1893 Agreement was entered into as a result of fraud, misrepresentation or duress (none of which convincing evidence we have found) neither the Secretary of the Interior nor the Solicitor would have authority to modify or set aside the ratified agreement.

Was Cession of Land Conditional?

Article I of the 1893 Agreement provides that "The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over" [120] the Yuma Reservation. The question presented by this language is whether the language of present cession, "do hereby surrender and relinquish," is absolute, or whether the words "upon the conditions hereinafter expressed" cause the language to be conditioned.

The "conditions" which are referred to in Article I are found in Articles II through VI. Among the provisions of these articles are the allotment of five-acre tracts to individual Indians in Article II; the disposal of surplus irrigable lands in Article III; the issuance of trust patents to Indian allottees in Article V; and the opening of nonirrigable lands to settlement under the general land laws in Article VI.

We have concluded that the plain language of present grant contained in Article I of the 1893 Agreement is not modified, or made conditional, by the reference to the obligations undertaken by the United States as "conditions." We conclude that the so-called "conditions" are promises to perform certain acts in the future, and the 1893 Agreement is a typical example of a contract formed by the performance of an act by one party, here the Quechan's cession of their lands, in return for a promise by the other, here the Government's promise to make allotments, provide irrigation for them, and sell surplus irrigable lands for the Indian's benefit. We reach this conclusion on the following four principal bases.

First, it would not have been possible for the Government to make allotments to individual Indians, to issue trust patents to the Indians, to sell surplus irrigable lands to non-Indians, or to open the nonirrigable lands to settlement by non-Indians under the public land laws unless the lands had been ceded and the Government had first obtained

[120] S. Exec. Doc. No. 68, *supra* note 9, at 19.

full title to the lands. The Agreement would have been impossible of performance on the part of the Government if the cession of the lands by the Indians only took place after performance of the obligations by the Government.[121]

Second, general principles of contract law favor construing the provisions of contracts as promises rather than as conditions,[122] and general principles of real estate law favor covenants over conditions.[123]

Third, those cases which we have been able to find dealing with "conditional" language in cession agreements support our conclusion that cession is immediate and absolute when such agreements are ratified by Congress.

There are more than 200 treaties and agreement involving cessions of Indian lands to the United States in return for promises to perform certain acts in the future, other than making a single lump-sum cash payment. The kinds of consideration promised by the United States are of a wide variety and include promises: (1) to expend funds for construction of various projects, such as agricultural or educational facilities; (2) to allot ceded lands to individual Indians; (3) to provide certain services, such as teachers, farmers, craftsmen, and physicians, as well as necessary supplies and facilities incident to such services; and (4) to survey and sell ceded lands under the public land laws and devote the proceeds to the benefit of the Indians. However, a relatively small number of these agreements contain the "conditional" language[124] and an even smaller number of these agreements have been subject to interpretation by the courts. The following are all of the cases of which we are aware.

In *United States* v. *Myers*,[125] the Eighth Circuit Court of Appeals had before it the 1900 congressional ratification[126] of an agreement, entered into in 1892, shortly before the 1893 Agreement, between the United States and the Kiowa, Comanche and Apache Tribes in Oklahoma. At issue was the effect of a tribal land cession to the United States in return for allotments of land to individual tribal members, the setting aside of certain grazing lands for the tribes' use, and the payment of $2 million. The effect of this agreement and the ratifying legislation was described by the Court as follows:

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[121] To hold that cession was conditional, and never took place, would also invalidate all sales of the irrigable lands to the non-Indians and the Indian trust patents.

[122] 3A *A. Corbin, Contracts*, § 635 (rev. ed. 1960); 5 *S. Williston, A Treatise on the Law of Contracts* § 644 (W. H. E. Jaeger ed. 1961).

[123] *See* 2 R. Powell, *The Law of Real Property* §§ 187, 188 (ed. 1976); *cf.* 1 *American Law of Property* § 2.8 (1952); 5 *id.* § 21.3(a).

[124] *E.g.*, Treaty with the Chippewa dated Oct. 18, 1864, 14 Stat. 657, II *Kappler, supra* note 1, at 868; Agreement with the Cheyenne and Arapahoe Tribes, Oct. 1890, sec. 13 of the Act of Mar. 3, 1891, 26 Stat. 989, 1022, I *Kappler, supra* note 1, at 415; Agreement with the Iowas, May 20, 1890, Act of Feb. 18, 1891, 26 Stat. 749, 753, I *Kappler, supra* note 1, at 393; Agreement with the Comanche, Kiowa and Apache, Oct. 21, 1892, section 6 of the Act of June 6, 1900, 31 Stat. 672, 676, I *Kappler, supra* note 1, at 708.

[125] 206 F. 387 (8th Cir. 1913).

[126] Sec. 6 of the Act of June 6, 1900, 31 Stat. 672, 676.

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The act of June 6, 1900, c. 813, 31 Stat. 676, was passed in ratification of an agreement between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma entered into October 21, 1892, whereby, in return for the allotment of land in severalty to the individual members of these tribes, and other good and valuable consideration specified, all these tribal lands, including that in question, were relinquished to the United States. The comprehensiveness of the grant made is disclosed by the following quotations from the act:

"*Subject to* the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and *subject to* the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and *subject to the conditions hereinafter imposed,* and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians *hereby cede, convey, transfer, relinquish, and surrender,* forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to wit: [Here follows the specific description.] * * *

"As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid, the United States agrees to pay to the Comanche, Kiowa, and Apache tribes of Indians, in the Indian Territory, the sum of two million (2,000,000) dollars.* * * "

* * * * *

* * * When the Kiowa, Comanche, and Apache tribes ceded this land to the United States, it ceased to be Indian country, unless by the treaty by which the Indians parted with their title, or by some act of authority, a different rule was made applicable to the case.

Was there any reservation, express or implied, incidental to the cession and relinquishment by these Indians by which their title to the lands in question was extinguished, that this or any other land conveyed should be devoted to these purposes? We can find none. The treaty of Oct. 31, 1892, confirmed by act of Congress of June 6, 1900, specifies explicitly the *conditions* and considerations *subject to which* the conveyance and cession was made. They are the allotment of land in severalty, the setting apart of 480,000 acres of grazing land, and the payment of $2,000,000 in the manner provided. For these considerations the Indians "ceded, conveyed, transferred, relinquished and surrendered forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest of any kind and character." It would be impossible to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal. * * *[127] (Italics added.)

The same agreement with the Comanches, Kiowas and Apaches was interpreted in *Ex Parte Moran*[128] where the court ignored the "conditional" language of the agreement and stated that "the Indian title to the reservation was extinguished on June 6, 1900, when the Agreement of Oct. 1892, was ratified by the United States."[129]

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[127] 206 F. 387, 389–392 (8th Cir. 1913); *see also Kickapoo Tribe of Kansas* v. *United States,* 372 F.2d 980, 984–85 (Ct. Cl. 1967).

[128] 144 F. 594 (8th Cir. 1906).

[129] *Id.* at 602. *Accord, In re Moran,* 203 U.S. 96, 105 (1906).

The statutory agreement with the Quechans is from the same mold as the agreement with the tribes involved in *Myers*, and should be similarly construed to have effected an immediate cession of the tribal lands in 1894 in return for the Government's promise to perform the specified acts.

The 1892 agreement and the 1900 Act involving the Kiowas, Comanches and Apaches were also considered in *United States* v. *Kiowa, Comanche and Apache Tribes*.[130] This case was an appeal from an Indian Claims Commission decision awarding the Indians the difference between the amount paid for the Indian lands and what they were actually worth. The court upheld the Commission's award of damages and made no comment with respect to restoring the land to the Indians, even though it found that "there appears to have been no contract executed by the parties" because "the Government was liable under a contract implied in fact (there having been no valid ratification by Congress of the 1892 Jerome Agreement)." [131] The Court of Claims found that there had been no ratification because the agreement contained a provision that it would become effective only when ratified by the Congress. As the court noted, the 1900 Act of Congress purportedly ratifying the 1892 agreement "made a number of changes in the terms agreed to by the Indians and the Commissioners in the Jerome Agreement and such changes were never resubmitted to the Indians for acceptance or rejection as required by Article XII of the Treaty of Oct. 21, 1867." [132]

Despite finding that the agreement had never been consummated, the Court held that title to the land in question had passed to the United States and only awarded money damages to the Indians. This case is of particular interest in that it held that a "conditional" cession was effected even though the agreement was not properly ratified by Congress.

By the Act of Mar. 3, 1891,[133] the Congress ratified a number of Indian agreements. One of these agreements contained language very similar to that of the 1893 Agreement. The agreement of Oct. 1890 between the United States and the Cheyenne and Arapahoe Tribes provided as follows:

> Subject to the allotment of land in severalty to the individual members of the Cheyenne and Arapahoe tribes of Indians, as hereinafter provided for and *subject to the conditions hereinafter imposed*, for the considerations hereinafter mentioned, the said Cheyenne and Arapahoe Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied all their claim, title and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory * * *. (Italics added).[134]

[130] 163 F. Supp. 602 (Ct. Cl. 1958), *reconsideration denied*, 166 F. Supp. 939 (Ct. Cl. 1958), *cert. denied*, 359 U.S. 934 (1959).

[131] *Id.* at 606.

[132] *Id.* at 607.

[133] 26 Stat. 989.

[134] Sec. 13 of the Act of Mar. 3, 1891, 26 Stat. at 1022; I *Kappler*, *supra* note 1, at 415.

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The Act of Mar. 3, 1891, was considered by the Supreme Court in *DeCoteau* v. *District County Court*,[135] wherein the Court construed the Sisseton-Wahpeton Agreement,[136] one of the other agreements ratified by that Act. This agreement contained no language of "condition." The Court compared the agreement with the other agreements, like that quoted above, ratified by the Act, and pronounced them to be "indistinguishable" and "virtually identical." The Court made no comment concerning the "conditional" language or any effect it might have on the cession:

> * * * the Congress included the Sisseton-Wahpeton Agreement in a comprehensive Act which also ratified several other agreements providing for the outright cession of surplus reservation lands to the Government. The other agreements employed cession language *virtually identical* to that in the Sisseton-Wahpeton Agreement, but in these other cases the Indians sold only a described portion of their lands, rather than all "unallotted" portions, the result being merely a reduction in the size of the affected reservations. The intended effect of all of these ratification agreements was made clear by the sponsors of the comprehensive legislation:
>
> "All the pending agreements or treaties for the purchase of Indian lands are ratified and confirmed by the provisions of this bill * * *
>
> "The bill carries the largest appropriation ever carried by an Indian appropriation bill, but it extinguishes the Indian title to a great domain and opens it to settlement by the hardy and progressive pioneers * * *."
>
> * * * * *
>
> * * * This language [of cession in the Sisseton-Wahpeton Agreement] is *virtually indistiguishable* from that used in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. * * * That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the "public domain."[137] (Italics added, footnotes and citations omitted.)

While the Supreme Court in *DeCoteau* did not deal directly and specifically with the "conditional" language of the Cheyenne and Arapahoe Agreement, the inference to be drawn from the case supports our interpretation of similar language.

Fourth, and finally the United States District Court for the Southern District of California decided two similar cases[138] in which it specifically found that the effect of the 1893 Agreement and the 1894 Act was to vest title to the irrigable

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[135] 420 U.S. 425, *rehearing denied*, 421 U.S. 939 (1975).

[136] Agreement of Dec. 12, 1889, sec. 26 of the Act of Mar. 3, 1891, 26 Stat. 989, 1035; I *Kappler, supra* note 1, at 429. Article I of this Agreement states that the "Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands * * * remaining after the allotments * * * provided for in article four of this agreement shall have been made." *Id.*

[137] 420 U.S. 425, 439–40, 446 (1975).

[138] *United States* v. *Johnson*, Civil No. 118–C (S.D. Cal., Aug. 2, 1935); *United States* v. *Walker*, Civil No. 126–J (S.D. Cal., Oct. 10, 1933).

lands of the Yuma Reservation in the Government effective immediately upon ratification of the Agreement, rather than at some future date. If the 1893 Agreement and 1894 Act resulted in cession of the unallotted irrigable lands to the United States, we infer that it must also have resulted in immediate cession of title to the nonirrigable lands; since the Agreement and Act provided for relinquishment of "all" of the reservation lands without distinction as to irrigability.

The two cases were ejectment actions brought by the United States against squatters on lands within the reservation which were susceptible of irrigation. The decisions interpreted the 1893 Agreement and 1894 Act as vesting full title in the United States immediately, subject only to the rights specifically reserved in the Indians, which reserved rights extended to the irrigable lands only. These opinions were cited and relied upon in the Margold Opinion.[139]

The Margold Opinion noted that, while the irrigable or nonirrigable character of the lands in question was not determined as of the time of the 1893 Agreement or the 1894 Act, "it is clear that the taking effect of the relinquishment or cession was not postponed until classification of the lands as nonirrigable." Solicitor Margold based his conclusion in this regard on a doctrine of widespread application for which he cited *United States* v. *Minnesota*.[140] The doctrine is well illustrated in *St. Paul & Pacific R.R. Co.* v. *Northern Pacific R.R. Co.*, where the Supreme Court stated:

> As seen by the terms of the third section of the Act, the grant is one *in praesenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is "that there be, and hereby is, granted" to the Company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.
>
> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the

[139] Our analysis, and that of Solicitor Margold, is reinforced by the brief of the United States in the *Johnson* case, in which the Government argued that the 1904 Act "superseded and amended the Act of Aug. 15, 1894, *supra*, insofar as those lands that may be susceptible of irrigation were or are included in the Yuma reclamation project [and as to] the unallotted lands susceptible of irrigation that are included within that project, changed the method of their disposal as though they were public domain lands within a reclamation project." Plaintiff's Opening Brief, at 5, in *United States* v. *Johnson, supra* note 138. The land in question in *Johnson* was deemed irrigable, but we note that it is described as lying "between the levee and the river." This is the same area, presumably rendered irrigable by the avulsive change of 1920, about which much of the correspondence detailed above was concerned.

[140] 270 U.S. 181, 206 (1926). Solicitor Margold also found that the situation was closely analogous to that involved in the grant of swamplands made to the states by the Act of Sept. 28, 1850, *as amended*, 43 U.S.C. §§ 981–994, where the character of lands was to be determined at a subsequent date, although rights vested on the date of statutory enactment.

date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. [141]

It has been argued on behalf of the Quechans that *United States* v. *Brindle*, [142] stands for the proposition that both the irrigable and the nonirrigable lands of the Yuma Reservation became trust lands following the 1893 Agreement and the 1894 Act. *Brindle* dealt with a treaty the United States had entered into with the Delaware Tribe,[143] and a treaty with the Kaskaskia and Peoria Indians,[144] providing for the cession of lands by the Tribes. The *Brindle* case is not in point, since the two treaties provided clearly by their terms that both the ceded lands and the proceeds of sale thereof were to be held in trust. The 1893 Agreement, on the other hand, provided that the nonirrigable part of the land was ceded directly to the United States and that the irrigable part was to be resold for the benefit of the Quechans.

Effect of 1904 Act

It has been argued by advocates of the Quechan point of view that the 1904 Act was intended to replace completely, and to supersede the 1894 Act, thereby eliminating the requirement of cession by the Quechans of their ownership of the nonirrigable lands. We have concluded to the contrary. We find that the legislative history clearly indicates that the 1904 Act was seen as being necessary because of the provisions of the Reclamation Act, which required that funds expended for irrigation projects be returned to the Reclamation Fund. Since the 1894 Act had provided that the money from the sale of the surplus irrigable lands would basically be placed in the Treasury of the United States for the benefit of the Indians, the revisions of the 1904 Act were necessary to allow some of those funds to be used to repay to the Reclamation Fund the cost of reclaiming the irrigable lands. We have concluded that the 1904 Act was intended merely to amend the 1894 Act to the extent necessary to provide for irrigation of the lands to be allotted to the Quechans under the Reclamation Act.

We have found that, with the exception of modifications made to bring the arrangement within the Reclamation Act, the terms of the 1904 Act are compatible with, and may be read together with, those of the 1893 Agreement and 1894 Act.[145] While it is not clear whether the irrigation provisions of the 1904 Act

[141] 139 U.S. 1, 5 (1891); *see also Schulenberg* v. *Harriman,* 88 U.S. (21 Wall.) 44, 60 (1875).

[142] 110 U.S. 688 (1884).

[143] Treaty of July 17, 1854, 10 Stat. 1048, 1049.

[144] Treaty of Aug. 10, 1854, 10 Stat. 1082, 1083.

[145] *See* text accompanying notes 54–56 *supra.*

were more or less favorable to the Quechans than the arrangement provided under the earlier Act and Agreement,[146] the Congress did have authority to vary the terms upon which irrigation was to be provided. In that the 1893 Agreement did not deal with the financial terms, or other terms, upon which irrigation was to be provided to the Quechan lands, and all such provisions appeared only in the 1894 Act, the Government had no obligation to deliver water on any particular basis.

Upon a review of the legislative history of the 1904 Act, and particularly upon analysis of Senate Report 1660, [147] it is clear that the Congress did not intend to abandon completely the scheme of the 1893 Agreement and 1894 Act. First in the report appears a letter by Charles D. Walcott, dated Jan. 23, 1904. Initially, Mr. Walcott mentions the Reclamation Act [148] and the reasons why special authority from Congress was required to utilize the Indian Reservation to accomplish the goals of the 1902 Reclamation Act. He then cites the 1893 Agreement with respect to the disposition of the surplus lands on the Reservation. The tenor of his words clearly and unequivocally conveys the concept that the irrigation, allotment, and sale of surplus lands had not come about, and therefore, should be done through the proposed 1904 Act. It is significant that he did not mention the nonirrigable lands in the very same letter wherein he shows that he had read and understood the 1894 Act and that he knew that Congress has the ultimate power to dispose of Indian lands, citing the *Cherokee Nation* and *Lone Wolf* cases.[149] The natural deduction from all that Mr. Walcott wrote is that the United States had no further obligations with respect to the nonirrigable reservation lands, which had already been disposed of by Congress.

Also in Senate Report 1660 is a letter from A. C. Tonner, Acting Commissioner of Indian Affairs, dated Feb. 3, 1904. He reinterates Walcott's words, but refers specifically to the Quechans' consent to the allotments of five acres each. At that time the only agreement on record was the 1893 Agreement. Tonner further stated:

> The problem of providing these two reservations with irrigation systems is one which this Office has thus far been unable to solve, and it therefore gives its hearty assent to the proposition of the Director of the Geological Survey, and earnestly recommends its adoption, believing that it promises relief to these Indians.[150]

The 1893 Agreement and 1894 Act were expressly mentioned in the Senate Report, and thus were expressly brought to the attention of Congress. It seems that Congress would have mentioned and/or restored the nonirrigable lands, and

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[146] *See* text accompanying notes 57–62 *supra*.
[147] S. Rep. No. 1660, *supra* note 52.
[148] *Id.* at 28.
[149] *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902), and *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).
[150] S. Rep. No. 1660, *supra* note 52, at 29.

specifically provided for the abandonment of the scheme of the 1894 enactment, if it so intended. This is particularly so in view of the negative attitude manifested by the courts about deciding that statutes have been repealed by implication, as discussed *infra*.

Finally, it would be difficult to understand how the Congress could provide in the 1904 Act that the Secretary of the Interior should dispose of the surplus irrigable lands "as though the same were part of the public domain" [151] if those lands had not been ceded to the United States under the 1893 Agreement and the 1894 Act.

Advocates of the Quechan point of view have argued that if one interprets the 1904 Act as a complete departure from the scheme of the 1893 Agreement and the 1894 Act, one is led to a permissible construction that there was a repeal by implication of the 1894 Act. For the proposition that answers this argument we cite *Posadas* v. *National City Bank*.[152] That case concerned the power of the Philippines by local law to impose capital and deposit taxes not permitted under United States law. The Philippine Supreme Court on appeal ordered a refund to the National City Bank of New York, a branch of which was taxed by the Philippine Government. The Philippine Government then appealed to the Supreme Court of the United States. The petitioner argued that section 25 of the Federal Reserve Act, which authorized branches of national banks to exist in dependencies of the United States, was repealed impliedly by an amendment to the Federal Reserve Act of Sept. 7, 1916. The Supreme Court held that the amendment did not impliedly repeal that portion of the Federal Reserve Act authorizing national banks to maintain branches in dependencies. In reaching that conclusion, the Supreme Court applied a well-established principle:

> The amending act just described contains no words of repeal; and if it effected a repeal of § 25 of the 1913 act, it did so by implication only. The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later one to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts

[151] Sec. 25 of the Act of Apr. 21, 1904, 33 Stat. 189, 224.

[152] 296 U.S. 497 (1936). United States Rev. Stat. § 5219 prohibited the types of taxes imposed by the Philippine law.

are the same, from the time of the first enactment.

The law on the subject as we have just stated it finds abundant support in the decisions of this court, as well as in those of lower federal and state courts. * * *[153]

Therefore, implied revocation or implied repeal of statutes is not favored in the law.[154]

Neither the 1904 nor any other congressional enactment of which we are aware contains language expressly repealing the 1894 Act. Nor does either contain material treating every provision of the 1894 Act, such as the Southern Pacific Railroad Company railroad right-of-way, the nonirrigable lands ceded in the 1894 Act, or the Indian school lands, to name a few of the more important items.

We find the congressional silence in the 1904 Act with respect to the nonirrigable lands to be more consistent with the conclusion that the Congress considered that the nonirrigable lands and other lands had been ceded to the United States, than with the conclusion that the 1904 Act was intended to repeal the 1894 Act and earlier Agreement in that regard. Finally, it cannot be said that the factual and legislative history shows any intention, much less a clear intention, of the Congress to repeal the 1894 Act. Therefore, the two acts are not irreconcilable and can be read together to give effect to all provisions of the 1894 Act not treated in the 1904 Act. Such a construction is preferred.[155]

If Cession Was Conditional, Were the Conditions Met?

If, for the sake of argument, we assume that cession of the nonirrigable lands under the 1893 Agreement and 1894 Act was conditioned upon the performance of certain acts on the part of the United States (we have reached the contrary conclusion), we would still find that all such material conditions were met, and that cession took place.

It has been argued on behalf of the Quechans that cession was conditioned upon a number of factors —allotment of certain irrigable lands to the tribal members, sale of other irrigable lands after appraisal and by public auction, provision of water by a private irrigation company and opening of nonirrigable lands to settlement—all of which were to be accomplished pursuant to specific procedures set out in the 1893 Agreement as ratified by the 1894 Act. It has been argued that these conditions were not properly met.

As previously noted, Indian allotments were not completed until 1912.[156] Substantial time was required to perform the necessary agricultural and engineering surveys prior to construction of irrigation works, and to construct the

[153] 296 U.S. 497, 503 (1936).
[154] 73 Am. Jur. 2d *Statutes* § 396 (1974).
[155] 73 Am. Jur. 2d *Statutes* §§ 249, 254 (1974).
[156] *See* text accompanying note 66 *supra.*

Yuma Irrigation Project itself;[157] it would have been desirable, from the Quechans' point of view, to delay the allotment process until substantial completion of the irrigation system; and the allotments to the Quechans were expanded to 10 acres per capita in 1911.[158] For these reasons we conclude that any condition created by the 1893 Agreement and 1894 Act requiring that allotments be made was substantially satisfied even though the allotments were not completed until 1912.

Although the method of appraisal and sale of the surplus irrigable lands called for by Article III of the 1893 Agreement and by the 1894 Act differ from the method of sale required under the 1904 Act,[159] we find that the difference was insubstantial, and that the change was made in the best interests of the Quechans so that the irrigation project could comply with the Reclamation Act. The modified performance could not properly be deemed a substantial failure of a condition.

While the 1893 Agreement contained no provision as to how irrigation water was to be provided to the Quechan lands, the following language appears in the 1894 Act:

> That the Colorado River Irrigating Company, which was granted a right of way for an irrigating canal through the said Yuma Indian Reservation by the Act of Congress approved February fifteenth, eighteen hundred and ninety-three, shall be required to begin the construction of said canal through said reservation within three years from the date of the passage of this Act, otherwise the rights granted by the Act *aforesaid* shall be forfeited. (Italics added.)[160]

It should be noted, however, that unlike the 1893 Agreement, the 1894 Act does not contain the "conditional" language. The conclusion that any provision of the 1894 Act created an implied condition to the cession of land involves an analysis of congressional intent and cannot be reached from the words of the statute alone. The very language of those provisions, however, limits the process of implication, as with the above-quoted provision. That provision mandates that the private company, the Colorado River Irrigation Company, build an irrigating canal within three years or lose its right-of-way granted by a previous Act of Congress ("the Act aforesaid"). The Company's loss of rights is the only consequence of its failure to build a canal within three years that is mentioned in the statute. There is no mention of such failure resulting in the nullification of the entire 1894 Act and with it, the cession of nonirrigable land. To imply such a consequence would, we

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[157] *See* text following note 65 *supra*, "Construction of Early Irrigation Works."

[158] Act of Mar. 3, 1911, 36 Stat. 1058, 1063.

[159] *See* note 62 and accompanying text *supra*.

[160] Act of Aug. 15, 1894, 28 Stat. 286, 336. The 1894 Act called the Company the Colorado River Irrigating Company, even though the 1893 Act granting the right-of-way called it the Colorado River Irrigation Company.

believe, be both improper and illogical.

While the Colorado River Irrigation Company did fail to construct the contemplated system, an irrigation system was in fact provided on the Yuma Reservation as a result of the Reclamation Act and the additional congressional authority provided by the 1904 Act. There is nothing in the 1894 Act which indicates that the proposed canal to be built by the Colorado River Irrigation Company was the only irrigating system which Congress believed would satisfy the requirements of the Act. The legislative history is unambiguous that the main purpose of the 1893 Agreement—from the standpoint of the Indians who signed it[161] and the Congress that ratified it[162]—was to provide irrigation to the Reservation, and this purpose was served.

While we note that Article VI of the 1893 Agreement provided for the nonirrigable lands of the Reservation to be opened to settlement under the general land laws of the United States, and the 1894 Act provided, "all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President,"[163] we do not believe that the opening of these lands was a material performance required for the benefit of the Quechans. To the extent that settlement of non-Indians in the proximity of the Quechan allotments was called for under the policy of the General Allotment Act,[164] that requirement was satisfied by the settlement of the surplus irrigable lands which actually took place. Because of the harsh, desert character of the nonirrigable lands, any settlement of those lands would have been sparse. Further, since the Quechans retained only irrigable lands, any model provided by the non-Indian use of nonirrigable lands would not have been of significant value to the Tribe.

Therefore, we find that any obligations of the Government under the 1893 Agreement and 1894 Act, the performance of which might have been deemed conditions, were substantially performed, and that those deviations from the exact pro-

[161] In a letter from the Quechans to the President and Congress, the Tribe explained why they were willing to cede their lands: "We believe if furnished with a small tract of land, with water to irrigate it and with the means of cultivating, we could improve our fortunes to the extent of securing at least all the necessaries of life. We believe from what we hear that if the land now embraced in our reservation could be thrown open to settlement an irrigation ditch would be built through the reservation * * *. While with water the soil is fertile, nothing will grow without irrigation, for there is no rain. Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, if we can have small tracts set apart for our use." S. Ex. Doc. 68, *supra* note 9, at 14–15.

[162] *See* H.R. Rep. No. 1145, *supra* note 48, at 2. *See also* S. Ex. Doc. 68, *supra* note 9.

[163] Act of Aug. 15, 1894, 28 Stat. 286, 336.

[164] Act of Feb. 2, 1887, *as amended,* 25 U.S.C. § 331 *et seq.* *See* text accompanying note 23 *supra,* "Allotment Policy." Additionally, under the 1894 Act the nonirrigable lands were not to be disposed of with the proceeds or any benefits accruing to the Quechans, unlike the irrigable lands.

visions of the Agreement and Act which did occur were insubstantial and resulted in no detriment to the Quechans.

There are a number of cases in which contract or treaty terms specifying the Government's obligations assumed in return for Indian cessions were not fully performed, or were performed (as here) in a manner somewhat different than originally agreed upon. The Supreme Court has viewed some of such actions by the United States as breaches of its obligations for which a claim for damages might lie.[165] We are aware of no cases where a simple breach of a contract or trust obligation by the United States has been construed to void the initial cession of lands by the Indians. Hence, even had we concluded that the cession was conditional, and a substantial condition had not been met, in the absence of evidence of something more than a simple breach of contract we might still not have found the cession voided.

Administrative Treatment of the Lands

Consistent with the methods of interpretation prescribed by the Supreme Court,[166] we have thoroughly reviewed the administrative treatment of the nonirrigable lands in question subsequent to the enactment of the 1894 Act in an attempt to ascertain the post-enactment understanding of the parties. Although we find a number of documents treating the nonirrigable lands as a part of the "Yuma Indian Reservation," or as being under the jurisdiction of the Bureau of Indian Affairs, there are relatively few documents that either treat the nonirrigable lands as being owned by the Quechans or that assert ownership on behalf of the Quechans.[167]

The Supreme Court has made it clear that land may be defined as "Indian country" for certain purposes, and retain its reservation status without being in Indian ownership. In *Mattz* v. *Arnett*,[168] the central issue was whether the Klamath Indian Reservation terminated by an Act of Congress in 1892, in order that the Court might determine whether Mattz had violated the provisions of the Fish and Game Code of the State of California. If the Reservation had in fact terminated, California law would have applied. The question in *Mattz* went to the issue of jurisdiction and not to the status of title of land. The Klamath

[165] *E.g., Peoria Tribe of Indians of Oklahoma* v. *United States*, 390 U.S. 468 (1968); *United States* v. *Mille Lac Band of Chippewa Indians in the State of Minnesota*, 229 U.S. 498, 500 (1913); *United States* v. *Blackfeather*, 155 U.S. 180, 190–91 (1894); *see also United States* v. *Kiowa, Comanche and Apache Tribes*, *supra* n. 130.

[166] *See* text accompanying note 175 *infra*, "Special Rules of Interpretation."

[167] *See* text accompanying notes 74–95 *supra*, "Administrative Treatment of the Yuma Reservation Lands."

[168] 412 U.S. 481 (1973).

Indian Reservation was established by an Executive Order of Oct. 16, 1891, and was disposed of through a cession, allotment, and sale of lands statute in 1892. Apparently, some allotments were made and some land was sold. The question was whether the statute terminated the Reservation for purposes of 18 U.S.C. § 1151 (1970). The Court held that despite the 1892 statute, the Reservation was not terminated. Interestingly enough, the court was influenced by a 1958 *statute* which restored to the Klamath Indians certain remaining ceded lands.[169] The court also noted that 18 U.S.C. § 1151 defined Indian country as all land within the limits of any Indian reservation "notwithstanding the issuance of any patent." [170]

Likewise, *Seymour* v. *Superintendent of Washington State Penitentary* [171] dealt with a jurisdictional but not an ownership question. The Supreme Court held that a 1906 statute providing for settlement an entry on Indian lands did not terminate the Colville Indian Reservation. The Court did not address itself to the issue of whether the land was ceded, nor did it resolve title or ownership issues. It simply ruled that the state court did not have jurisdiction over a crime committed on the Reservation.

Therefore, any administrative action dealing with the Yuma Reservation in a jurisdictional sense should not be weighed heavily in connection with the title problem on the Yuma Reservation.

There are a number of actions by senior Departmental officials indicating that ownership of the non-irrigable lands was ceded to the United States by virtue of the 1893 Agreement and 1894 Act, including a Secretarial Order withdrawing the lands under the Reclamation Act.[172] At the same time, the proceeds of some transactions concerning the land appear to have been credited to the Tribe. Much of the confusion with respect to ownership of the land and jurisdiction over the land may have resulted from the delays and errors in record-keeping described above, and from the uncertainty during the time prior to the issuance of allotments and disposition of the surplus irrigable lands.

As we have stated above, we believe that a clear determination can be made from the terms of the 1893 Agreement and the 1894 Act that absolute and immediate cession took place. Therefore, even if we had found a consistent administrative

[169] *Id.* at 505. The Supreme Court was strongly influenced by the Department of the Interior's contemporary conclusion that the 1892 Act did not terminate the reservation status of the land. *Crichton* v. *Shelton*, 33 L.D. 205 (1904). 412 U.S. 481, 505 (1973).

[170] *Id.* at 504, quoting the Act of June 25, 1948, 18 U.S.C. § 1151 (1970).

[171] 368 U.S. 351 (1962). The Court distinguished the statute governing the status of the land in question from prior legislation terminating another portion of the Reservation. The latter "vacated" the North Half of the reservation; the former, which treated the land where the crime was committed, "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government * * * regarded as beneficial to the development of its wards." *Id.* at 354, 356.

[172] Secretarial Order of July 2, 1902; Secretarial Order of Aug. 26, 1902. *See* note 72 *supra.*

recognition of Indian ownership of the lands in question subsequent to 1894, such administrative recognition would have to give way, because it was in conflict with the plain terms of the agreement and ratifying act. As the Supreme Court stated in *Harris* v. *Bell*,

> * * * This administrative view is, of course, entitled to respect, and those who have relied thereon ought not lightly to be put in peril. But is not controlling. * * *[173]

Similarly, the Department has corrected erroneous administrative construction of statutes, and has sought to correct errors and to resolve disputes within the Department over the administration of and jurisdiction over lands within its jurisdiction.[174] For this Department or for a court to hold that administrative action could override the plain language of an act would be the equivalent of assuming authority to modify an act of Congress in that fashion.

Special Rules of Interpretation

In our analysis of the 1893 Agreement, and in our analysis of the 1984 Act, the 1904 Act and the other congressional enactments pertaining to the subject of this Memorandum, we have had constantly in mind not only the trust obligations of the Solicitor and the Secretary of the Interior to the Indian people but also the special rules of statutory construction formulated by the Supreme Court for dealing with Indian statutes, agreements and treaties, which augment the normal rules of construction.[175] These rules have generally been formulated to give weight to what the Indians must have understood a particular document to mean, and to interpret language which is otherwise ambiguous in a manner most beneficial to the Indians. However, we have also had in mind the principle that rules of construction are not intended to alter the clear terms of statutes.

Solicitor Margold cited *United States* v. *Choctaw Nation*,[176] which is in accord with the legal principle that wherever possible one should apply the clear meaning of language in a statute. As a further example, in *Shoshone Indians* v. *United States*,[177] the Supreme Court said that it agreed that all doubts

[173] 254 U.S. 103, 109 (1920); *Tapp* v. *Stuart*, 9 F. Supp. 23, 24 (N.D. Okla. 1934), *rev'd. on other grounds*, 81 F.2d 155 (10th Cir. 1935).

[174] *E.g.*, *Solicitor's Opinion*, 74 I.D. 285 (1967). *See*, cases discussed in n. 103 and accompanying text *supra*.

[175] *E.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet. 515, 582), 214 (1832); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 398, 401–02 (1902); *Winters* v. *United States*, 207 U.S. 564, 576 (1908); *United States* v. *Celestine*, 215 U.S. 278, 290 (1909); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *United States* v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941); *Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945); *Arizona* v. *California*, 373 U.S. 546, 600 (1963).

[176] 179 U.S. 494, 535–36 (1900). *See also Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 179–80 (1947); *United States* v. *Mille Lac Band of Chippewa Indians*, 299 U.S. 498, 505–06 (1913); 73 Am. Jur. 2d *Statutes* § 151 (1974).

[177] 324 U.S. 335 (1945).

must be resolved in the Indians' favor. However, the Court went on to say that this rule:

> * * * meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties ment by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.[178]

In the *Choctaw Nation* case, *supra*, the contention was made that a treaty, the terms of which made an absolute cession, should be interpreted to create a trust for the benefit of the Indians. The court rejected the contention, saying, among other things:

> But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the Government to determine.[179]

The conclusions reached in this Memorandum are based upon what we find to be the clear meaning of the underlying statutory language. We generally find sufficient clarity in the statutory language, taken together with the legislative background, to leave no justification for the application of special rules of construction. However, even where, for the sake of argument, we have applied the special rules of construction, we have reached the same conclusions as Solicitor Margold. We think that the results obtained under the Margold Opinion and under the conclusions of this Memorandum are in fact the results intended by the Indian and the non-Indian parties to the 1893 Agreement.

Allegations of Fraud, Coercion or Inequity

In the Indian Claims Commission cases filed in connection with the subject matter of this Memorandum, the Quechan Tribe has charged that the signatures of the members of their Tribe to the 1893 Agreement were obtained by fraud and coercion.[180]

We have not found any documentation prior to the depositions filed with the Indians Claims Commission to support these allegations.[181] We note that fifty-eight years elapsed between the time of execution of the 1893 Agreement and the filing of the Indian Claims Commission petitions in 1951. The deponents were very young at the time of the events about which they tes-

[178] *Id.* at 353 (footnote omitted).
[179] 179 U.S. 494, 535 (1900).
[180] *See* text following n. 29 *supra*, "Alleged Coercion, Misrepresentation and Fraud."
[181] *See* text accompanying n. 31 *supra*.

tified, and they had a direct interest in the outcome of the legal proceeding at the time they testified. In a similar situation, the Indian Claims Commission, in *Potawatomi Tribe* v. *United States*, commented on claims of this nature:

> But the plaintiffs charge that signatures to the agreement were obtained by fraud and misrepresentation and have placed in evidence numerous affidavits made in 1936 and 1937 by Pottawatomie Indians and filed with a Senate Committee Report in 1939 on a proposed jurisdictional bill then pending in Congress. A number of aged Indians have also testified and some of these affiants and witnesses repudiated their signatures to the agreement while others say they signed but misunderstood what it was about, and a few thought it was to receive payment for a pledge to quit drinking liquor. We do not believe, however, that this evidence can be considered as sufficient to overcome what the contemporary documentary evidence discloses as to the explanation of the agreement to the Indians and the obtaining of their approval and signatures thereto. * * *
>
> There is nothing in the record reflecting on the honesty or integrity of the representatives of the Government who conducted the negotiation of the agreement, nor that the disinterested witnesses or the interpreter who certified that the agreement was fully explained to the Indians, had any personal interest in the matter that would cause them to make false certificates to that effect. The agreement was under consideration by the Indians for at least two months before it was completed and it is in evidence that in 1906 fifty percent of the Pottawatomie Tribe spoke and understood English sufficiently well to conduct their own business affairs. So, while we recognize the fact that it is quite impossible to say that every member signing the the agreement understood fully and completely the import of the agreement, it is quite evident that many of them did.[182]

Similarly, in the situation under consideration, there is no evidence which would reflect on the honesty or integrity of the Commissioners, or on the certificate of the official interpreter who certified the accuracy of the proceedings. The agreement was under consideration for five months before it was completed and there were ample safeguards to insure that the Indians knew what they were signing.

Further casting doubt on the allegations of fraud, coercion or inequity are the facts that the Quechan Tribe actually received under the 1893 Agreement and 1894 Act what they wanted; that what they received was fair and adequate for their purposes; and that the allotment of irrigable lands and cession of surplus lands was consistent with similar schemes being accepted by other tribes at that time.

In specific, in the original petition that the Quechans sent to the President and Congress, the Tribe stated: "We are willing to give up a large part of our reservation because as it is it is worthless to us;" and "[w]e do not want a great deal of land, for we have noticed that the

[182] 2 Ind. Cl. Comm'n 207, 219, 227–28 (1952); *see also Klamath and Moadoc Tribes* v. *United States*, 296 U.S. 244, 253–54 (1935).

white man who in this country has small holdings, 5 and 10 acres, and cultivates his land well, is the most successful * * *." [183] Some time later, Government experts determined that, with an average family consisting of four or five people, the twenty to twenty-five acres provided was adequate for subsistence.[184] In 1911, however, the allotments were increased from five to ten acres per Indian.[185]

In assessing the possibility that a fraud was worked upon the Quechan Tribe by the 1893 Agreement and the congressional ratification, it should be kept in mind that a long line of Supreme Court cases [186] hold that Congress has unfettered discretion to dispose of any lands of an Executive Order reservation for the public welfare and for the benefit of the Indians.

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. * * * [187]

Thus, since the Reservation was created by Executive Order, the Congress could have taken the Reservation without compensation had it deemed the action to be for the public welfare and for the benefit of the Tribe.

Finally, and perhaps conclusive of the question, is the fact that when a treaty has been made and ratified by the Congress, neither the executive branch nor the judicial branch has the authority to examine the basis of the treaty for the purpose of annulling the treaty in whole or in part. The basic rules on the validity of treaties and on treaty-making were discussed by the Supreme Court in *United States* v. *Minnesota:*

> But, while the earnestness of counsel has induced us to examine the basis of the argument advanced, there is another reason why the effort to overcome the cession must fail. Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress. Among the cases applying and enforcing this rule some are particularly in point here. In *United States* v. *Brooks*, 10 How. 442, where a grant made to certain individuals by the Caddo Indians in a treaty between them and the United States was assailed by the United States as induced by fraud practiced on the Indians, the Court held that "the influences which were used to secure" the grant could not be made the subject of judicial inquiry for the purpose of overthrowing the treaty provision making it.[188]

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[183] S. Exec. Doc. No. 68, *supra* n. 9, at 15; *see* text accompanying notes 9–15 *supra*, "Origin of 1893 Agreement."

[184] Letter from District Engineer, Geological Survey, Yuma to Chief Engineer, Reclamation Service, May 28, 1906, File 154–A, *supra* n. 74, A609709.

[185] Act of Mar. 3, 1911, 36 Stat. 1058, 1063.

[186] *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567 (1902); *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 175–76 (1947); *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 326 (1942).

[187] *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[188] 270 U.S. 181, 201 (1926).

Thus, we have found both that the evidence of fraud or coercion is not convincing and that, even if there were convincing evidence of fraud or coercion, neither the Solicitor nor the Secretary of the Interior would have authority to annul or modify the 1893 Agreement as ratified by the 1894 Act.

Legal Precedents

While we have attempted to reach our conclusions as to the effects of the 1893 Agreement and 1894 Act without being bound by prior legal interpretations of that Agreement and Act, this Memorandum would be incomplete without a recitation of those interpretations.

By 1935, the United States District Court for the Southern District of California had decided in two cases[189] that cession, at least insofar as surplus irrigable land was concerned, was effected immediately by the 1893 Agreement and the 1894 Act. We find no reason why the conclusion of that court would not pertain to nonirrigable lands.

In his 1936 opinion, Solicitor Margold specifically found that the Agreement and Act effected immediate cession. Officials throughout this Department as well as state and local officials and private parties have been acting in reliance upon the Margold Opinion for over forty years.

In 1968, Solicitor Weinberg issued an opinion relying on the conclusion that the Indian interest in the nonirrigable lands was extinguished under the 1894 Act, and implicitly endorsing the validity of the Margold Opinion.[190]

In *Arizona* v. *California*,[191] the Solicitor General took a position on the part of the United States which implicitly adopted the conclusion of the Margold Opinion. In the proposed findings, and conclusions submitted to the Special Master in that case, the Solicitor General interpreted the 1893 Agreement and 1894 Act as having resulted in immediate cession.[192] No Indian water rights were, therefore, awarded to the United States on behalf of the Quechans with respect to any Reservation lands other than the 7,743 acres of allotted lands.[193]

CONCLUSION

In conclusion, we find that Indian title to the nonirrigable lands of the Yuma Reservation was unconditionally extinguished on Aug. 15,

[189] *United States* v. *Johnson*, Civil No. 118–C (S.D. Cal., Aug. 2, 1935); *United States* v. *Walker*, Civil No. 126–J (S.D. Cal., Oct. 10, 1933).

[190] Memorandum from the Solicitor to the Secretary of the Interior, dated June 2, 1968.

[191] 373 U.S. 546 (1963).

[192] Federal Intervenor's Proposed Finding 4.8.3, *Arizona* v. *California*, 373 U.S. 546 (1963). *See* text following n. 120 *supra*, *"Was Cession of Land Conditional?"*

[193] Special Master's Report (Dec. 5, 1960), at 269, *Arizona* v. *California*, 373 U.S. 546, *Decree*, 376 U.S. 340, 344 (1964).

1894, upon ratification of the 1893 Agreement by Congress, and that the Opinion of Solicitor Margold is well founded and is affirmed.

H. GREGORY AUSTIN,
Solicitor.

APPROVED:

THOMAS S. KLEPPE,
Secretary of the Interior.

RESPONSE TO FEBRUARY 17, 1976, REQUEST FROM THE GENERAL ACCOUNTING OFFICE: INTERPRETATION OF MINERAL LEASING ACT OF 1920, AND OUTER CONTINENTAL SHELF LANDS ACT ROYALTY CLAUSE*

Oil and Gas Leases: Production—Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases—Words and Phrases

"Production" as used in all Federal oil and gas leases includes all oil and gas withdrawn from a reservoir.

Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases

In the absence of a specific statutory bar, such as is found in secs. 18 and 19 of the Mineral Leasing Act of 1920, royalty is due in the "amount or value" of all production from a federal oil and gas lease, including vented and flared gas and gas or oil leaked, spilled or used in producing operations.

Oil and Gas Leases: Generally—Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases

An assessment greater than the normal royalty charge may be required for oil and gas that are wasted.

M.P. Smith, 51 L.D. 251 (1925); *Computation of Royalty under Section 15*, 51 L.D. 283 (1925), overruled.

M–36888 *October 4, 1976*

OPINION BY
SOLICITOR AUSTIN

OFFICE OF THE SOLICITOR

To: Secretary

SUBJECT: Response to February 17, 1976, Request From General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause

This memorandum responds to a request dated Feb. 17, 1976, by the General Accounting Office for a report on the views of the Department of the Interior and to questions raised by appeals pending before the Director, Geological Survey, regarding the proper construction of the oil and gas royalty provisions of the Mineral Leasing Act of 1920, *as amended and supplemented*, 41 Stat. 437, 30 U.S.C. §§ 181–287 (1970), and the Outer Continental Shelf Lands Act, Aug. 7, 1953 (67 Stat. 462), 43 U.S.C. §§ 1331–43 (1970) (referred to as OCS Act).

The relevant portions of the Mineral Leasing Act say that the lessee shall pay a percentage of the "amount or value of the production

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removed or sold from the lease." 30 U.S.C. §§ 226 (b), (c), and (i), Act of August 8, 1946, 68 Stat. 583, amending the Mineral Leasing Act of 1920, *as amended and supplemented.* The corresponding provision of the OCS Act says that the lessee shall pay a percentage of the "amount or value of the production saved, removed or sold." 43 U.S.C. § 1337(a). The application of these royalty clauses to oil and gas sold, or to oil and gas removed from the leasehold for purposes of sale or transfer is unchallenged. In the last several years, the application of these royalty clauses to oil and gas that are vented or flared, used for production purposes on the leasehold, or unavoidably lost, has been the subject of considerable controversy.

Summary

My conclusions on the matter and the position I recommend to you for adoption by the Department of the Interior are:

1. "Production" as used in all Federal oil and gas leases includes all oil and gas withdrawn from a reservoir.

2. In the absence of a specific statutory bar such as in secs. 18 and 19 of the Mineral Leasing Act, royalty is due "in amount or value" on all production from a Federal oil and gas lease, including vented and flared gas, and gas or oil leaked, spilled, or used in producing operations.

3. An assessment greater than the normal royalty charge may be required for oil and gas that are wasted.

I also recommend that these rulings apply beginning June 28, 1974 for leases issued under the OCS Act, and Nov. 18, 1974, for leases issued under the Mineral Leasing Act.

Analysis of Royalty Requirements

The first step necessary to determine the proper interpretation of the royalty provisions of the Mineral Leasing Act and the Outer Continental Shelf Lands Act, is to define the meaning of the word "production" as it is used in those Acts.

As indicated in the summary I have concluded that "Production" means all oil and gas withdrawn from a reservoir.

A comparison of the language of secs. 14, 15, 17, 18, 19, and 20 of the Mineral Leasing Act as originally enacted, and secs. 6 and 8 of the Outer Continental Shelf Lands Act strongly supports this conclusion. These Acts established several primary categories of oil and gas leases, each with separate and distinct statutory requirements relating to the royalty to be paid to the United States.

The common element in each of the royalty requirements in these acts is that royalty is due and payable to the United States "in amount or value of production." In

only one instance does a statute exempt a portion of lease production from royalty payment.

Examining the development of the Mineral Leasing Act is helpful in resolving the questions addressed in this memorandum. The Mineral Leasing Act of 1920 created three separate classes of leasehold interests. First, it allowed certain holders of placer oil locations under the Mining Law of 1872, to exchange their unpatented mining claims for leases or prospecting permits under the new Act. Second, it gave certain types of agricultural entryman a preference right to a prospecting permit under the new Act. Third, it created a new way of obtaining mineral rights to oil and gas—through a prospecting permit or a competitive lease. For each of these new interests Congress specified what royalty the lessee should pay the Government.

For leases issued as the result of a discovery under a prospecting permit, sec. 14 of the Mineral Leasing Act said:

> * * * Such leases shall be for a term of twenty years upon a royalty of 5 per centum *in amount or value of the production* and the annual payment in advance of a rental of $1 per acre, * * * . The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum *in amount or value of the production* * * * the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulation prescribe. * * * (Italics added).

Sec. 15 of the Mineral Leasing Act instructed the Department what royalty a prospecting permittee had to pay before he applied for a lease and is significant because it sets forth in a complete and comprehensive way the elements that make up "production." Sec. 15 states:

> That until the permittee shall apply for lease to the one-quarter of the permit area heretofore provided he shall pay to the United States 20 per centum of the gross value of *all oil or gas secured* by him from the lands embraced within his permit and sold *or otherwise disposed of or held by him for sale or other disposition.* (Italics added).

The royalty provision of sec. 17 which covered competitive leasing of a known geological structure of a producing oil or gas field said:

> * * * such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall not be less than 12½ per centum *in amount or value of the production,* and the payment in advance of a rental of not less than $1 per acre per annum thereafter * * *. (Italics added).

For leases which were granted because a person had a location under the Mining Law of 1872, Congress provided in sec. 18 that a lease was to be issued:

> * * * upon payment as royalty to the United States of an amount equal to *the value at the time of production* of one-eighth *of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost,* * * * the claimant * * * shall be entitled to a lease thereon from the United States * * * at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for

production purposes on the claim, or unavoidably lost * * *. (Italics added.)

As a corollary to the exchange lease provided in secs. 18, 19 provided for the exchange of rights under certain mining claims for prospecting permits or leases. Leases obtained under the provisions of sec. 19 were to provide for a royalty of:

> not less than 12½ per centum of *all the oil or gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost* * * *. (Italics added).

Sec. 20 granted certain agricultural entrymen a preference right to a permit and to a lease and said:

> * * * Leases executed under this section * * * shall provide for the payment of royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under sec. 14 hereof.

The distinct differences in the language used by Congress to describe royalty requirements for each of the different categories of leases indicates: (1) that the term "production" included all oil and gas withdrawn from a reservoir; and (2) that where Congress intended to require that royalty be based upon less than all "production" Congress included in the statute a specific exception (*i.e.*, "except oil or gas used for production purposes on the claim, or unavoidably lost.")

If the term "production" did not include oil and gas lost through escape, *i.e.*, spillage, venting, etc., the specific exceptions contained in sections 18 and 19 of the Mineral Leasing Act would have no meaning. In order for oil or gas, or both, to be "excepted" from the requirement that a royalty be paid on it, that oil or gas, or both, must first be considered to be part of production from the leasehold.

The legislative history of the Mineral Leasing Act confirms the view that Congress intentionally made these distinctions. For example, amendments to secs. 18 and 19 were discussed on the floor of the House. *E.g.*, 57 Cong. Rec. 4489–90 (1919). Congress clearly realized it was imposing different royalty requirements for leases issued in exchange for relinquished mining claims from those imposed on other types of leases.

The Department failed, however, to fully recognize the distinctions contained in the Act. The first lease form published by the Department, 47 L.D. 447 (1920), incorporated the special constraint unique to leases that were to be issued in exchange for relinquishment of rights under valid mining claims. The royalty provisions of the first lease form stated that the lessee was to pay:

> * * * a royalty of ____ per cent of the value of oil or gas produced from the land leased herein (except oil or gas used for production purposes on said lands or unavoidably lost), or, on demand of the lessor, ____ per cent of the oil or gas produced (except oil or gas used for production purposes * * * or unavoidably lost) * * *. Sec. 2(c), 47 L.D. at 448.

The drafters of this first lease form may have expected that leases that would subsequently be issued under provisions of the Act other than secs. 18 and 19 would simply omit the language enclosed in parenthesis, but the omission was not made and the inappropriate language was included in leases issued pursuant to provisions of the Act other than secs. 18 and 19.

The Department's error was compounded in a case involving the computation of royalty required under sec. 15 of the Mineral Leasing Act of Feb. 25, 1920. *Computation of Royalty under sec. 15, Act of Feb. 25, 1920*, 51 L.D. 283 (1925). Sec. 15, 41 Stat. 437, said: "That until the permittee shall apply for lease to one-quarter of the permit area heretofore provided for he shall pay to the United States 20 per centum of the *gross* value of *all* oil or gas secured by him from the lands embraced within his permit and sold *or otherwise disposed of or held by him for sale or other disposition*." (Italics added.) Congress could hardly have expressed more clearly its intention to recoup royalties on all oil produced, regardless of how it was used. Congress stressed that the royalty applied to the "gross" value, to "all" oil, to oil and gas "otherwise disposed of" as well as "sold" and to "other disposition" as well as "held" oil. Despite the clear language of sec. 15, the Department concluded that payment of royalty under sec. 15 was not required for oil or gas used for production purposes on the permit lands or unavoidably lost. 51 L.D. at 283. Prior to this decision, the Bureau of Mines and the Geological Survey had interpreted sec. 15 to require payment for all oil produced.

The decision admits that the Bureau of Mines' and Geological Survey's interpretation is "fully warranted," but rejects it in order to be "consistent." In reaching its strained conclusion, the decision says, "Secs. 18 and 19 of the Leasing Act * * * provide for certain rates of royalty upon 'all the oil and gas produced except oil or gas used for production purposes upon the claim or unavoidably lost.' *This exception is not found in any other section of the act, but the Department has made it applicable* to all oil and gas leases." (Italics added.) 51 L.D. at 284. With the exception of a quotation from *M.P. Smith*, 51 L.D. 251 (1925) (which states that the Mineral Leasing Act, and regulations issued under the Act permit the use without charge, of fuel oil by permittees and lessees in drilling operations), the decision does not in any way explain why the Department made this exception applicable to the other lease sections. *M.P. Smith*, *supra*, provides no support for the position. *Computation* does note that the Geological Survey and the Bureau of Mines construed sec. 15 as requiring payment of royalty on all oil, without exception. 51 L.D. at 284. It adds that "such construction has been fully warranted." The decision goes on to reject this "fully warranted" construction.

* * * It seems that the rulings of the Department would be inconsistent if it were to hold that permittees, applicants for lease and lessees are not required to pay royalty on oil or gas * * * used for production purposes, but that after discovery and prior to application for lease permittees must pay a royalty of 20 per cent on oil or gas used for production purposes in addition to such royalty rate on all oil or gas sold or otherwise disposed of or held for sale or other disposition. * * * 51 L.D. at 285.

I conclude that *M.P. Smith*, 51 L.D. 251 (1925), and *Computation of Royalty under Sec. 15*, 51 L.D. 283 (1925), are incorrect and that the application of the exemption in secs. 18 and 19 to other sections is wrong.

Subsequent Legislative Actions

In 1930, an additional category of onshore oil and gas leases was created by the enactment of the Right-of-Way Lands Leasing Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. §§ 301–305 (1970). A lease or agreement entered under the Act of May 21, 1930, was to provide for a royalty to be paid to the United States of not less than "12½ per centum in amount or value of the production."

When Congress amended sec. 17 of the Mineral Leasing Act by the Act of Mar. 4, 1931, 46 Stat. 1523, to authorize the unitization of leasehold interests in Federal oil and gas leases, it retained the language of the 1920 Act with respect to the royalty requirements for leases issued under sec. 17.

The Act of Aug. 21, 1935, 49 Stat. 674, made extensive changes in the leasing procedures relating to Federal oil and gas lands. The royalty rates prescribed were in every case to be based upon a percentage "in amount or value of production."

The current language relating to the royalty requirements to be stipulated in Federal onshore oil and gas leases appeared first in the Aug. 8, 1946, modifications of sec. 17 of the Mineral Leasing Act and in the incentives contained in sec. 12 of that amendment to the Mineral Leasing Act. In each instance, the royalty to be paid the United States is to be paid "in amount or value of the production removed or sold from the lease."

We can find no explanation for the addition of the phrase "removed or sold from the lease." S. 1236 was first introduced in the 79th Congress, 1st Session. That draft repeated the language of the original sec. 14 of the Mineral Leasing Act, and referred to 12½ percent in "amount or value of the production." Sec. 2, S. 1236, July 6, 1945. On May 29, 1946, S. 1236 was reported from committee. Without explanation, sec. 2 of the earlier version, now sec. 3, was amended to read as eventually passed, "12½ per centum in amount or value of the production removed or sold from the lease." We have found no

explanation of this change in the committee report, the conference debates, or correspondence.

The Outer Continental Shelf Lands Act of Aug. 7, 1953, 67 Stat. 462, 43 U.S.C. §§ 1331–1343 (1970), incorporates two categories of leases normally distinguished as Section 6 and Section 8 leases. Although the details differ and the percentage of royalty required under each category of lease also differs, the royalty under both categories of Outer Continental Shelf lands oil and gas leases is to be paid "in amount or value of the production saved, removed, or sold from the lease."

The OCS Act is an amalgamation of two bills, S. 101 and H.R. 5134. The original draft of S. 1901 merely required the "payment of royalty of 12½ per centum." After the bill was reported out of the Senate Committee on Interior and Insular Affairs, the words "amount or value of the production saved, removed or sold" were added. The committee report noted that the additional language was clarifying, but did not say what was being clarified. Senate Report No. 411, 83d Congress, 1st Sess. 21, 25 (1953). The House version, H.R. 5134, included the "saved, removed, or sold" language from its inception.

The royalty requirements of the Mineral Leasing Act, as amended, and the Outer Continental Shelf Lands Act relate to payments "in amount or value of production removed or sold" and "in amount or value of production saved, removed, or sold from the lease," respectively. With the exception of leases issued under secs. 18 and 19, the Department must collect royalty on all substances withdrawn from the reservoir.

"Saved", "removed," and "sold" must also be defined. "Sold" means disposed of to a purchaser, whether through the exchange of money, commodities, services, or otherwise. "Saved" means "retained on the leasehold." "Saved" oil and gas would include oil or gas, or both, returned to a subsurface formation as occurs under flood operations and attic oil production procedures. "Removed" then includes all other production, *i.e.*, all other oil and gas secured from within the boundaries of the lease and disposed of in some other manner. It includes oil or gas, which is physically transported from the lease, as well as oil or gas, which is reinjected into a formation under the lease or which, through an action or failure to act by the lessee, is lost from the lease by escape through venting or leakage, through consumption in a flare or as fuel for leasehold production equipment.

Collection of Charges for Waste

The Department, in addition to collecting royalty payments on production may also collect for waste. Sec. 16, 30 U.S.C. § 225 (1970), prescribes that a permittee or lessee in the conduct of exploration and mining operations shall:

* * * use all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by him to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits. * * *

Although the last sentence of sec. 16 makes waste "grounds for the forfeiture of a permit or lease," sec. 31, 30 U.S.C. § 188(a) (1970), provides authority under which the Secretary may take somewhat less drastic action than the initiation of proceedings to cancel a permit or lease. Under sec. 31, the Secretary by regulation and lease provision "may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions of a lease."

Under the above-cited authority, the Secretary has established regulations, 30 CFR 221.35, which require the lessee to pay the lessor "the full value of all gas wasted by blowing, release, escape, or otherwise * * * unless, on application by the lessee, such waste of gas under the particular circumstances involved shall be determined by the Secretary to be sanctioned by the laws of the United States and of the State in which it occurs."

The onshore oil and gas operating regulations, 30 CFR 221.2(n), define waste as follows:

(n) *Waste of oil or gas.* Waste of oil or gas, in addition to its ordinary meaning, shall mean the physical waste of oil or gas, and waste, loss, or dissipation of reservoir energy existent in any deposit containing oil or gas and necessary or useful in obtaining the maximum recovery from such deposits.

(1) Physical waste of oil or gas shall be deemed to include the loss or destruction of oil or gas after recovery thereof such as to prevent proper utilization and beneficial use thereof, and the loss of oil or gas prior to recovery thereof by isolation or entrapment, by migration, by premature release of natural gas from solution in oil, or in any other manner such as to render impracticable the recovery of such oil or gas.

(2) Waste of reservoir energy shall be deemed to include the failure reasonably to maintain such energy by artificial means and also the dissipation of gas energy, hydrostatic energy, or other natural reservoir energy, at any time at a rate or in a manner which would constitute improvident use of the energy available or result in loss thereof without reasonably adequate recovery of oil.

Under the current regulations, waste, which the Secretary determines after application by the lessee "* * * to be sanctioned by the laws of the United States and of the State in which the loss occurs * * *" is subject to the royalty applicable to all production from a lease and to a greater assessment that may attach to a loss which the Secretary does not determine to be sanctioned either by the laws of the United States or of the State where the loss occurs. In the absence of an application by the lessee, favorably acted upon by the Secretary or his delegate, the assessment of the greater amount prescribed in the regulations attaches to lost oil or gas.

Application of this Opinion

I have concluded that both the Mineral Leasing Act and the OCS Act require the Department to collect royalty on all production, including oil and gas used for production purposes and oil and gas unavoidably lost and that inclusion of an exemption for this purpose in either a lease or Departmental regulation, except pursuant to the now dormant secs. 18 and 19 of the Mineral Leasing Act, is contrary to the enabling statutes and is a nullity. No effect will be given to these exemptions in the future. The question remains whether the Department will seek to recover royalties that were not paid as a result of past erroneous decisions of officers of this Department. In the case of leases issued under the Mineral Leasing Act, the error extends back to 1921. For the OCS Act, the error began in 1954. To some extent, the resolution of the question involves considerations of policy rather than questions of law. Generally, a decision overruling an earlier decision is retrospective as well as prospective in operation. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Safarik* v. *Udall*, 304 F.2d 944 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 901 (1962). The same considerations govern civil, criminal and administrative proceedings. *Retail Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) (Referred to as Retail Union); *Safarik* v. *Udall*, *supra*. A decision may be made prospective "where persons have contracted, acquired rights or acted in reliance on the prior decision and the operation of the later decision retrospectively would result in substantial harm to such persons." *Safarik* v. *Udall*, *supra* at 950. In deciding whether a decision should be made prospective, the decision-maker must weigh the detriment created by applying the incorrect law against the hardship the application of the new law would create. *Retail Union* v. *NLRB*, *supra*. The unauthorized acts of employees of the United States do not prevent it from enforcing the law. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); 43 CFR 1810.3 (1975); *but see*, *United States* v. *Lazy F.C. Ranch*, 481 F2d 985 (9th Cir. 1973) (estoppel possible if public interest not adversely affected).

Generally speaking, four factors govern the inquiry into the retroactivity of an interpretation: (1) the nature of reliance placed on the precedent by the parties; (2) the purpose of the rule in light of public policy; (3) the harm to the parties who relied on the prior decisions; and (4) the harm to the government or public purpose. *Linkletter* v. *Walker*, *supra*; *United States* v. *Winegar*, 81 I.D. 370 (1974), *appeal pending*, *Shell Oil Co.* v. *Kleppe*, Civil No. 74–F–739, D. Colo. In *Winegar*, for example, the Interior Board of Land Appeals reversed a longstanding decision of

October 4, 1976

the Department that established a different standard to be met by oil shale claimants under the Mining Law of 1872 from that for claimants of other minerals. The Board made its decision "retroactive" [1] because it felt that the interest of the United States in preventing improper disposition of public lands outweighed the speculative interest of the oil shale claimants.

In many other instances, however, the Department has recognized that legitimate interests of persons dealing with the Department were sufficient for a ruling to be made prospective only. In *Issuance of Noncompetitive Oil and Gas Leases on Lands Within The Geologic Structure of Producing Oil or Gas Fields*, 74 I.D. 285 (1967) (referred to as *Issuance*), the Solicitor concluded that a prior practice of the Department of accepting noncompetitive oil and gas lease offers that were included in a known geologic structure after the date of application, but before the date of issuance was unauthorized by statute. He ruled that an offer must be rejected if it was included in a known geologic structure any time before the lease was issued. 74 I.D. at 285–86. Failure to apply this principle in the past undoubtedly cost the United States much revenue—at a minimum, leases were obtained without competitive bidding, and without the payment of any bonus whatsoever. Applying the doctrine to existing leases would have, on the other hand, possibly resulted in the cancellation of scores of leases, some of which could have been almost fifty years old. Consequently, on the authority of *Franco Western Oil Co.* (*Supp.*), 65 I.D. 427 (1958), *Issuance* was made prospective only. 74 I.D. at 290. This position was approved in *McDade* v. *Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974).

Franco Western Oil Co. (*Supp.*), *supra approved Safarik* v. *Udall*, *supra*, considered whether a decision changing an interpretation of the Mineral Leasing Act should be given prospective effect. The decision noted that, "It has not been the practice of the Department to give its decisions retroactive effect so as to disturb actions taken in other cases on an overruled interpretation of law." 65 I.D. at 428. The court in *Safarik* v. *Udall*, 304 F. 2d at 950, agreed with this interpretation and added that the power to make "decisions operate only prospectively 'whenever injustice or hardship will thereby be averted' is undoubted." *Id.*

Here, until June 28, 1974, for the OCS, and Nov. 18, 1974, for the Mineral Leasing Act, oil and gas lessees relied on the regulations and lease forms of the Department in good faith. A requirement that they

[1] The decision in *Winegar* is not truly retroactive because it did not change a previously completed action, although it did reverse a longstanding rule.

repay funds now due under the present interpretation of the law would impose heavy burdens on these operators. In addition, there will be a difficult, if not impossible, problem of measuring what amounts of oil and gas were used or lost in the past. I do not believe that the purpose of either Act would be enhanced by applying this opinion to royalty collected in the period preceding June 28, 1974, for the OCS lessees, or Nov. 18, 1974, for Mineral Leasing Act lessees. Subsequent to that time, however, the lessees should have been aware that the Department was investigating the applicable royalty clauses, and on notice that the past interpretation of law might be incorrect. The conclusions I have reached should be made applicable from that time forward.

H. GREGORY AUSTIN,
Solicitor.

APPROVED:

THOMAS S. KLEPPE,
Secretary of the Interior.

COMPUTATION OF MONEYS DUE THE UNITED STATES ON OIL AND GAS LOST AS A RESULT OF PENNZOIL'S BLOWOUT

Oil and Gas Leases: Production—Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases—Words and Phrases

Oil or gas that is wasted is in a category by itself, distinctly separable from "production," when it is oil or gas that is lost on the surface or in the subsurface through the negligence of the lessee, *i.e.*, without the specific sanction of the supervisor.

Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases

The loss through waste to the lessor compensable under 30 CFR 250.20 is either the royalty or the full value and the choice between them is a matter which is committeed to the sound exercise of the supervisor's discretion.

Oil and Gas Leases: Generally—Oil and Gas Leases: Royalties

Whereas 30 CFR 221.48 and 221.50 clearly indicate the lessee must pay royalty on all production, the lessee is obligated to pay full value on all gas wasted (221.35), and the supervisor has no discretion to collect less than the full value of gas wasted.

M-36888 (Supp.)

January 19, 1977

OPINION BY SOLICITOR AUSTIN

OFFICE OF THE SOLICITOR

TO: Director, U.S. Geological Survey

SUBJECT: Computation of moneys due the United States on Oil and Gas Lost as a Result of Pennzoil's Blowout

This is written in response to your request for clarification of the portion of the *Solicitor's Opinion*, M-36888, Oct. 4, 1976, 84 I.D. 54 (1977) which related to the assessment of greater than normal royalty charges for oil or gas that is

wasted. The question you raise is whether the conclusion of the Solicitor's Opinion that an assessment greater than the normal royalty charge may be required for oil or gas that is wasted is applicable to leases issued under the Outer Continental Shelf Lands Act (43 U.S.C. § 1331–1343) as well as those issued pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. § 181–287). The Solicitor's Opinion did not specifically address the question of assessments for waste which may arise under an OCS oil and gas lease. Consequently, the question is discussed below as an addendum to that opinion.

Sec. 5(a) of the OCS Lands Act (43 U.S.C. § 1334(a)(1)(1970)) grants discretionary authority to the Secretary of the Interior to "prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer continental shelf * * *." That section also provides that "such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this Act." Sec. 5(a)(2) of the Act sec. 1334(a)(2) provides criminal penalties for willful violation of rules prescribed by the Secretary for the prevention of waste. Additionally, sec. 5 mandates the Secretary to administer the provisions of the Act relating to OCS leasing and to prescribe rules and regulations necessary to carry out those provisions.

Under this authority, the Secretary has promulgated regulations pertaining to oil and gas and sulphur operations in the outer continental shelf (30 CFR Part 250). Under CFR 250.30 of those regulations, the lessee is required to "take all necessary precautions to prevent damage to or waste of any natural resource * * *." "*Waste of oil and gas*" as defined in sec. 250.2(h) includes, among other things, "(1) physical waste as that term is generally understood in the oil and gas industry; * * * and (3) the locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations or which causes or tends to cause unnecessary or excessive surface loss or destruction of oil or gas * * *." When waste occurs, the supervisor is authorized by sec. 250.20 to determine, pursuant to the lease and regulations, "the loss through waste" and "the compensation due to the lessor as reimbursement for such loss."

There are three separate aspects of the statutory-regulatory scheme set forth above. It is evident throughout sec. 5 of the Act that Congress was clearly concerned with the prevention of waste. With

this regard, two separate sets of obligations for prevention of waste and penalties for violation of those obligations are provided in the Act itself and carried forward in the regulations.

The first set of obligations and penalties arises under the authorization of the Secretary to prescribe regulations to provide for the prevention of waste and is carried forward in regulations which make it the obligation of the lessee to "take all necessary precautions to prevent damage to or waste of any natural resource." The Secretary's regulatory prescription establishes an obligation on the part of the lessee to avoid negligent actions or omissions which result in waste. The statutory penalty for such negligence is cancellation of the lease by the Secretary or forfeiture of the lease through judicial proceedings for failure to comply with the regulations. (§ 5(b)) (*See also*, 30 CFR 250.80).

The second set of obligations and penalties arises under § 5(a)(2) of the statute. In that subsection, Congress established criminal penalties for the knowing and willful violation of any rule or regulation prescribed by the Secretary for the prevention of waste.

The third aspect of the statutory-regulatory scheme arises under the Secretary's statutory duty to administer the OCS Lands Act leasing provisions and to prescribe rules and regulations necessary to carry them out (§ 5(a)). It is pursuant to this authority that the Secretary has established regulations which provide for compensation to the United States as reimbursement for the loss of oil and gas through waste (30 CFR 250.20).[1] The regulation is based on a policy of strict liability of the lessee for waste as defined under the regulations (30 CFR 250.2(h)).

Sec. 250.20 of the regulations clearly gives to the supervisor the discretion to determine the loss through waste and the compensation due to the lessor as reimbursement for such loss. The first determination the supervisor must make under the regulation requires measurement or a reasonable estimate of the volume of oil or gas wasted. The second determination, of the compensation due the lessor as reimbursement for the loss, is the one on which you request our advice. Your question is whether that compensation may exceed the normal royalty charge.

We think the proper amount to be assessed as compensation for the loss is, in the supervisor's discretion, either the royalty or the full value of the oil or gas that is wasted. Sec. 250.20 of the regulations contains separate provisions for (1) the supervisor's determination of royalty due on production and (2) his determination of the amount due as

[1] "The supervisor shall determine pursuant to the lease and regulations the rental and the amount or value of production accruing to the lessor as royalty, the loss through waste or failure to drill and produce protection wells on the lease, and the compensation due to the lessor as reimbursement for such loss."

compensation for loss through waste. Hence, waste is clearly treated separately from that part of production on which only royalty is due. Reading together the definition of waste contained in sec. 250.2 (h) of the OCS regulations and sec. 250.2, it is clear that what distinguishes waste on which more than royalty may be collected from lost production on which only royalty may be collected is that the former was lost through negligence. Oil or gas that is wasted is in a category by itself, distinctly separable from "production," when it is oil or gas that is lost on the surface or in the subsurface through the negligence of the lessee, *i.e.*, without the specific sanction of the supervisor.

This distinction between production on which only royalty is due and waste for which a greater amount may be assessed is also found in the corresponding onshore oil and gas operating regulations. Under 30 CFR 221.35, waste of oil or gas is again defined in terms of unsanctioned loss. Whereas secs. 221.48 and 221.50 clearly indicate the lessee must pay royalty on production, the lessee is obligated to pay full value on all gas wasted (§ 221.-35), and the supervisor has no discretion to collect less than the full value of gas wasted.

Offshore, the supervisor has more flexibility. Under the OCS regulations, when loss of oil or gas is unsanctioned, strict liability attaches and the amount due the lessor under § 250.20 is "compensation * * * as reimbursement" for the loss. Since wasted oil or gas is oil or gas which is produced or producible, in the context of the definition of "production" in the *Solicitor's Opinion*, M–36888, Oct. 4, 1976, 84 I.D. 54 (1977) (all oil and gas withdrawn from a reservoir), the minimum amount accruing to the lessor on wasted oil or gas is the royalty. However, in 30 CFR 250.20, the Secretary has authorized the supervisor, in his discretion, to determine "the loss through waste" and "the compensation due to the lessor as reimbursement for such loss." The language of the regulation, which separates the supervisor's determination of royalty due on production from his determination of the amount due as compensation for loss through waste, suggests that the supervisor may determine that an amount greater than the normal royalty charge accrues to the lessor. Hence, the loss to the lessor compensable under sec. 250.20 is either the royalty or the full value and the choice between them is a matter which is committed to the sound exercise of the supervisor's discretion, subject to any instructions or guidelines contained in pertinent OCS Orders.

H. GREGORY AUSTIN,
Solicitor.

ESTATE OF DANIEL J. PIERRE

6 IBIA 17

Decided *January 28, 1977*

Appeal from an order denying petition for rehearing.

REVERSED AND REMANDED.

1. Indian Probate: Wills: State Law: Applicability to Indian Probate, Testate—425.27.2

A power of appointment is a power of disposition given to a person or persons over property not their own, by someone who directs the mode in which that power shall be exercised by a particular instrument. It is an authorization to do an act which the owner granting the power might himself by law fully perform.

2. Indian Probate: Wills: State Law: Applicability to Indian Probate, Testate—425.27.2

A power of appointment included in a purported Indian will concerning trust allotments or restricted personal property is not valid unless first approved by the Secretary of the Interior or his duly appointed subordinate.

APPEARANCES: Harry L. Johnsen, Esq., for appellants; Earl K. Nansen, Esq., for appellees.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

Agnes Pierre Cohen and Andrew Pierre, children of decedent, Daniel J. Pierre, enrolled Colville Indian, appeal from an order of Administrative Law Judge Robert C. Snashall denying petition for rehearing on approval of Will dated Nov. 4, 1957, and Decree of Distribution of Apr. 30, 1957.

In said Order and Decree of Distribution, Judge Snashall concluded among other things that the decedent's Last Will and Testament dated Nov. 4, 1957, be, and the same is, approved and the Superintendent of the Colville Indian Agency shall, after costs of administration and subject to allowed claims cause to be made a distribution of the trust estate in accordance with said Last Will and Testament as devised and bequeathed in clauses: four (to Ben Sloan and Clint Lilly [non-trust]) and as described in the estate inventory. By clause three, testator directs that a debt due Ben Sloan and Clint Lilly in the sum of $950 be paid; since the two named creditors are also the sole devisees of the estate, their claim and inheritance merge, eliminating special consideration of the claim.

The grounds for appeal in substance are:

1) The Administrative Law Judge in his Order Approving Distribution did not include a Finding of Fact and Conclusion of Law on a) whether the Will of Nov. 4, 1957, was in fact a security agreement and b) how the Judge determined the decedent was married at the time of his demise.

2) The Judge erred in approving the Will of Nov. 4, 1957.

3) The Judge erred in approving the residual clause of the Will in that it attempts to create a private trust in an Indian allotment.

Decedent, Daniel J. Pierre, an enrolled Colville Indian, made a will on Mar. 11, 1953, naming his son Andrew Pierre as sole beneficiary of the following trust property:

My undivided 4/6 interest in Alex Pierre, Dec'd, S–2365.

My sole interest in the Lena Pierre Allot. S–858 (ALL).

My undivided 1/2 interest in Alexander, Dec'd, C–149.

My undivided 1/21 interest in Chief Antoine, Dec'd. C–242.

My undivided interest (1/3) in Angeline Peone Pierre, Dec'd. C–165.

In 1955 the decedent leased his interest in the Lena Pierre Allotment referred to, *supra*, and described as S½NW¼, NW¼, SW¼, Sec. 11, T. 33 N., R. 27 E., Williamette Meridian, Washington, containing 120 acres, to Ben Sloan and Clint Lilly. The lease was approved by the Bureau of Indian Affairs, and apparently renewed from time to time through Dec. 22, 1973, date Daniel J. Pierre died. The lease fees were paid into the Bureau of Indian Affairs.

The lessees advanced or loaned the decedent money at certain intervals to 1957. On or about Nov. 4, 1957, the decedent approached the lessees for further loans. The lessees refused unless they were given some form of security. Whereupon decedent suggested that he make a will. Lessees accompanied the decedent to the office of their attorney in Bridgeport, Washington, and were present while the will was drafted and executed. It further appears that lessees paid the attorney for his services in preparing the will and they retained the original of said will.

Lessees testified that they made periodic loans to decedent subsequent to the execution of said will, mostly in cash aggregating approximately $6,000 to Dec. 22, 1973. Coincidentally the Bureau appraised the leased parcel referred to, *supra*, at $6,000. The lessees further testified they had no records of the cash disbursed to decedent nor did they report said loan to the Internal Revenue Division in their tax returns.

Decedent's children and sister-in-law testified decedent could neither read nor write except to read numbers and write his own name. They further testified that decedent frequently gambled for money at poker.

In Clause No. I of the Nov. 4, 1957, will, the testator declares that he is unmarried, his wife having died, although testimony elicited during the hearings establishes he lived openly as man and wife with Ellen Sarsarpkin for the last 20 years of his existence.

In Clause No. II the testator disinherits his children declaring they had left him and had not left him their addresses or informed him of their whereabouts. Uncontradicted testimony elicited from the decedent's children and sister-in-law shows the children lived within close proximity of testator and constantly visited with him.

In Clause No. III testator directs that all of his just debts be paid in-

cluding one in the amount of $950 to Ben Sloan and Clint Lilly, representing certain advances made by them to testator.

In Clause No. IV the testator further declares:

> All the rest and residue of my estate, of whatever nature and extent I hereby give, devise, and bequeath to the said Ben Sloan and Clint Lilly; being, however, a power of appointment to dispose of said property as they may see fit. They may make any person, including themselves, the beneficiary, as they, in their uncontrolled discretion, see fit.

It appears that the basic issues before the Board are: 1) whether or not the instrument dated Nov. 4, 1957, is in fact a will and 2) whether certain provisions contained in said instrument, after execution, require Secretarial approval in order to become valid.

No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his property, and, if testator's intention can be ascertained to a reasonable certainty from entire language of a will, such intention will be given effect even though language used by testator be informal or inartificial and fails to employ apt legal words in designating a bequest or devise. See *In re Lidston's Estate*, 202 P 2d 259, 32 Wash. 2d 408 (1949).

Extrinsic evidence is admissible, regardless of language of allegedly testamentary intention, to show absence of testamentary intention. See *In re Tillman's Estate*, 288 P 2d 892, 136 Cal. App. 2d 313 (1955).

Limitations prescribed by state law have no bearing on the validity of wills made by Indians in disposing of trust allotments or restricted personal property unless such provisions have been adopted in the regulations promulgated by the Secretary of the Interior respecting Indian wills. *Estate of Ke To Sah Jefferson*, IA-19 (May 4, 1950).

Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding. *Estate of Mary Ursula Rock Wellknown*, 1 IBIA 83, 78 I.D. 179 (1971).

The Act of June 25, 1910, 37 Stat. 678, sec. 2, *as amended*, 25 U.S.C. § 373 (1970), authorized an Indian allottee to devise by will property held in trust for said allottee; but the Act qualified this right of disposition by the following language:

> * * * *Provided, however*, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, * * *.

The Act additionally provided that the approval of an allottee's will by the Secretary and the death of the allottee shall not operate to terminate the trust of the land.

Congress has thus entrusted the Secretary with the role of protect-

ing Indians against alienation of their lands by either improvident *inter vivos* transactions of an allottee or his heirs or by improvident dispositions of allotted Indian lands by the will of the allottee.

The Act of June 25, 1910, 36 Stat. 857, sec. 5, 25 U.S.C. § 202 (1970) provides that:

> That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, * * *.

The general policy to keep Indian trust property in Indian hands is further exemplified by the Act of Nov. 24, 1942, 56 Stat. 1021, 25 U.S.C. § 373 (1970), which provides that the trust or restricted estate of an Indian who dies intestate without heirs escheats, not to the state or to the United States, but to his tribe. *Estate of Mary Ursula Rock Wellknown*, *supra*.

Looking at the Nov. 4, 1957, instrument, we find no specific devise to Ben Sloan or Clint Lilly or anyone else. We have only one other place to look for a clue and that is the residuary clause.

It appears from an examination of the residuary clause that this amounts to a general power of appointment, under which the executors Ben Sloan and Clint Lilly are directed, and therefore empowered to dispose of the estate, without limitation or restriction, and solely as their own discretion should dictate.

[1] A power of appointment is a power of disposition given to a person or persons over property not their own, by someone who directs the mode in which that power shall be exercised by a particular instrument. It is an authorization to do an act which the owner granting the power might himself by law fully perform. See *In re Lidston's Estate*, *supra*.

We are not concerned with the problem of nontrust property and the disposition thereof in a state probate proceeding. Such a power of appointment as applied to nontrust property in a state probate proceeding may very well have been sufficient to refute any contention of indefiniteness or enforcibility.

Here, we are dealing with a purported Indian will involving trust or restricted property. In other words, property held in trust by the Secretary of the Interior for the benefit of an Indian ward.

Restrictions imposed on alienation of Indian land are not personal to the allottee but run with the land. See *United States* v. *Reily*, 290 U.S. 33, 54 S. Ct. 41 (1933).

We find that Clause IV amounted to a general appointment authorizing the lessees to act as executors of decedent's estate which involves only trust property.

[2] We find that such an appointment is a usurpation of power belonging only to the Secretary of the

Interior bestowed upon him by Federal statute. We find that the Nov. 4, 1957, instrument did not amount to a testamentary disposition of trust property but did amount to a written recognition by the decedent of a debt owed to the lessees in the amount of $950. We find that this debt is a valid claim against the decedent's estate.

We further find that the Nov. 4, 1957, instrument did not revoke the previous will of Mar. 11, 1953. The matter should be remanded for the purpose of probate of the Mar. 11, 1953, will and for the incorporation of the $950 indebtedness referred to above in any future order and decree of distribution.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Order Approving the Nov. 4, 1957 will and Decree of Distribution, dated Apr. 30, 1975, for the reasons stated above, and REMAND the matter for consideration and probate of the Mar. 11, 1953, will and related matters in keeping with applicable rules and regulations.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Chief Administrative Judge.

WM. PHILIP HORTON,
Administrative Judge.

OPINION ON THE BOUNDARIES OF AND STATUS OF TITLE TO CERTAIN LANDS WITHIN THE COLVILLE AND SPOKANE INDIAN RESERVATIONS

Indian Lands: Reservation Boundary

Once boundaries of a reservation are established, neither the boundaries nor title to tracts within them can be altered or abolished without a clear statement of Congressional intent to do so.

State Lands

If the intent of the United States in administering lands now comprising a state was clearly to reserve the bed of a river for some particular purpose, then that intent, embodied in an appropriate legislative or administrative act, results in exclusion of the riverbed from lands passing to the state upon statehood.

Indian Tribes: Jurisdiction—Indian Tribes: Hunting and Fishing: On Reservation

18 U.S.C. § 1165 (1970) confirms the right of Indian Tribes to control, regulate and license hunting and fishing within their reservations.

59 I.D. 147 overruled in part.

M-36887 *February 2, 1977*

OPINION BY
SOLICITOR FRIZZELL
OFFICE OF THE SOLICITOR

June 3, 1974

To: SECRETARY OF THE INTERIOR.

SUBJECT: Opinion on the Boundaries of and Status of Title to Certain Lands Within the Colville and Spokane Indian Reservations.

February 2, 1977

This opinion sets forth my conclusions with respect to the following issues: (1) the present boundaries of the Colville and Spokane Indian Reservations in the reservoir area created on the Columbia River by Grand Coulee Dam; (2) the nature of title to certain portions of the original riverbed within those reservations and to the so-called "Indian zone" established in the reservoir area within lands taken in aid of construction of the dam; and (3) the jurisdiction of the Confederated Colville Tribes and Spokane Tribe to regulate hunting, fishing, and boating in that Indian zone.

The Colville and Spokane Indian Reservations were established in 1872 and 1877 respectively, on lands which were later included within the state of Washington. The Colville Reservation was created by an executive order issued by President Grant. Executive Order of July 2, 1872. Some confusion regarding creation of the Spokane Reservation has existed, but the Supreme Court has specifically held that that reservation was established on Aug. 18, 1877, the date of an agreement between agents of the United States and certain Spokane chiefs. *Northern Pac. Ry.* v. *Wismer*, 246 U.S. 283 (1918). A subsequent executive order issued by President Hayes was held by the Court merely to have confirmed the earlier reservation. Executive Order of Jan. 18, 1881.[1]

The Columbia River, taking a westerly turn from its initially southward flow, forms first the eastern and then the southern boundary of the Colville Reservation. The Spokane Reservation lies eastward across the Columbia from the Colville Reservation, just before the river turns west and just north of the Spokane River, a tributary of the Columbia; the Spokane River, flowing essentially from east to west at this point, forms the southern boundary of the Spokane Reservation.

In 1940 construction of Grand Coulee Dam, a federal reclamation project, was completed on a portion of the Columbia where it forms the southern boundary of the Colville Reservation. In an Act dated June 29, 1940 (54 Stat. 703), 16 U.S.C. § 835d, Congress required the Secretary of the Interior to designate the Indian lands to be taken in aid of the project, and granted "all right, title, and interest" in such designated lands to the United States, "subject to the provisions of this Act." [2] The following is the full text

[1] The 1945 Solicitor's Opinion referred to *infra* (M–34326, 59 I.D. 147), dealing with certain of the subjects considered herein, refers only to the 1881 executive order.

[2] Grand Coulee Dam was authorized to be constructed by the Rivers and Harbors Act of Aug. 30, 1935 (49 Stat. 1028, 1039), but no provision was included therein authorizing the taking of Indian lands. Some Indian lands were actually inundated prior to the 1940 Act. *See* 59 I.D. at 155.

of this portion of the Act as originally passed by Congress:

> That in aid of the construction of the Grand Coulee Dam project, authorized by the Act of Aug. 30, 1935 (49 Stat. 1028), there is hereby granted to the United States, subject to the provisions of this Act, (a) all the right, title, and interest of the Indians in and to the tribal and allotted lands within the Spokane and Colville Reservations, including sites of agency and school buildings and related structures and unsold lands in the Klaxta town site, as may be designated therefor by the Secretary of the Interior from time to time: *Provided*, That no lands shall be taken for reservoir purposes above the elevation of one thousand three hundred and ten feet above sea level as shown by General Land Office surveys, except in Klaxta town site; and (b) such other interests in or to any such lands and property within these reservations as may be required and as may be designated by the Secretary of the Interior from time to time for the construction of pipe lines, highways, railroads, telegraph, telephone, and electric-transmission lines in connection with the project, or for the relocation or reconstruction of such facilities made necessary by the construction of the project.

The area designated by the Secretary pursuant to this provision and thus taken by the United States in aid of the project extends from the original bed of the river (which was not designated) to the nearest contour line indicating an elevation of 1,310 feet above sea level.[3]

Another provision of the Act requires the Secretary to set aside approximately one-fourth of the reservoir area above the dam for the "paramount" use of the Colville and Spokane Tribes for hunting, fishing, and boating. (The reservoir, Lake Roosevelt, extends approximately 150 miles upstream from the dam into Canada, or about twice as far as the northern boundary of the Colville Reservation.) This provision of the Act reads as follows:

> The Secretary of the Interior, in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this Act, shall set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing, and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife: *Provided*, That the exercise of the Indians' rights shall not interfere with project operations. The Secretary shall also, where necessary, grant to the Indians reasonable rights of access to such area or areas across any project lands.

Pursuant to this provision, the Secretary in 1946 designated an area—the so-called "Indian zone"—which comprises essentially all of the "freeboard," "drawdown,"[4] and water area inside the original boundaries of the reservations (ex-

[3] The 1940 Act was amended by the Act of Dec. 16, 1944 (58 Stat. 813), to authorize a taking of some of the Indians' interest in the lands above the 1,310 contour line to protect against the danger of slides in the areas around the reservoir.

[4] "Freeboard" area is that land within the area taken for reservoir purposes which is above the high-water mark of the reservoir and must be crossed to gain access to the water area. "Drawdown" area comprises the exposed land between the high-water mark and the actual water level.

cept immediately around the dam).[5] The zone extends to the center line of Lake Roosevelt from the Colville side except where the Colville and Spokane Reservations are adjacent to one another across the Lake. There, the zone includes the entire reservoir with the exception of a strip in the center of the Lake half a mile wide, which was preserved by the Secretary as a navigation lane. In addition, the zone extends from the Spokane side to the center line of a separate arm of the Lake formed by the backup of the Spokane River. The Colville Reservation does not border this arm of the Lake.

Pursuant to a tri-party agreement among the National Park Service, the Office of Indian Affairs, and the Bureau of Reclamation, dated Dec. 18, 1946, the Bureau of Reclamation has primary responsibility for overseeing administration of the reservoir area.[6] The general public is presently permitted to have equal use of the Indian zone with the Indians, under the supervision of the National Park Service.

[5] The zone is really two zones—one including lands taken from within the Colville Reservation, and the other including areas taken from within the Spokane Reservation. For convenience, however, these areas are referred to jointly as the "Indian zone."

[6] It was the tri-party agreement (which was approved by the Assistant Secretary) that formally set aside the Indian zone. The agreement speaks of a "Colville Indian Zone" and a 'Spokane Indian Zone," and the map annexed as an exhibit to the agreement shows the navigation lane referred to above as being a separate area not included within either zone.

The 1946 tri-party agreement reflects the views expressed a year earlier in an opinion by Solicitor Gardner, dealing with, *inter alia*, certain of the questions considered herein. 59 I.D. 147 (1945). Solicitor Gardner indicated in that opinion that portions of the original pre-1940 riverbed in this area had been within the boundaries of the reservations, which had not been altered by the taking pursuant to the 1940 Act; and he appeared to suggest that since the original riverbed was not designated by the Secretary, title to the bed was unaffected by the Secretarial designation made pursuant to the Act. 59 I.D. at 152, 166–67, 175 n. 60.

I adopt these conclusions, and hold that the tribes do in fact hold the equitable title to those portions of the original riverbed within the boundaries of their reservations. I differ, however, with the 1945 opinion insofar as it dealt with the extent of the tribes' additional interests in the reservoir area. I hold that the tribes' hunting, fishing and boating rights in the zone set aside by the Secretary for their paramount use are reserved rights, preserved by Congress in the 1940 Act, and that those rights are exclusive of any such rights of non-Indians in that zone, although they do not encompass interference with project purposes and are subject to regulation by the Secretary to conserve fish and wildlife. In addition, I hold

that the tribes have the power to regulate hunting, fishing, and boating by non-Indians in the Indian zone (which is almost entirely within the boundaries of the reservations).[7] To the extent that the 1945 opinion conflicts with any of these conclusions, it is hereby overruled.

1. THE BOUNDARIES OF THE COLVILLE AND SPOKANE RESERVATIONS ALONG THE RIVER

A public land decision dated May 29, 1914, *J. H. Seupelt*, 43 L.D. 267, held that the Colville Reservation boundary was located at the middle of the channel of the Columbia River where it bordered the reservation. In my view this issue was correctly decided in *Seupelt* (which was followed in the subsequent 1945 Solicitor's Opinion, *see* 59 I.D. at 152).

An apparent conflict between the boundaries established for the Spokane and Colville Reservations along the Columbia should be noted, however. The boundary of the Spokane Reservation is described in the executive order ratifying creation of the reservation as being located on the west bank of the Columbia River, thus evidently overlapping with the Colville boundary. While I am cognizant of this conflict and of the consequent possibility that an area of joint rights may have been created in the area of overlap, I do not resolve this question herein, because both tribes, by a joint resolution dated Sept. 17, 1973, have requested that I refrain from doing so. In their resolution, the tribes agree that the Secretary may establish a boundary line between the Colville and Spokane portions of the Indian zone at the center of the reservoir despite the overlap,[8] and that the question of title to the underlying riverbed should be reserved for future determination. Determination of that narrow question is not necessary for decision of the remaining issues considered herein.

With respect to the effect of the 1940 Act, it is my conclusion that the boundaries of the reservations along the Columbia (and, in the case of the Spokanes, along the Spokane River), wherever their precise location, were unchanged by the Act. It is clear from the line

[7] The only locations in which the boundaries of the Indian zone might extend beyond those of either reservation would appear to be in places where, because of the meander of the original river or a difference in elevation on the two sides of the river, the center line of the original riverbed differs perceptibly from the center line of Lake Roosevelt. Such differences in fact have relevance only to the Colville Reservation, since the presence of the navigation lane in the middle of the Lake prevents the Spokane portion of the zone from approaching the center line of the original riverbed. (In addition, as set forth in the text *infra*, the Spokanes claim—not without support—that their reservation includes the entire riverbed.)

[8] The Secretary is directed by the 1940 Act to set aside "approximately one-quarter of the entire reservoir area" as an Indian zone. Thus the zone must at a minimum be close to that one-quarter standard. If, however, in the exercise of his discretion the Secretary should decide to expand the present zone—which may well encompass less than one-quarter of the entire reservoir area—it would appear that he could do so; and an expansion of the zone in the area where the Colville and Spokane Reservations are adjacent to one another could raise the problem of delineating the Colville and the Spokane portions of the zone.

of authority founded on *United States* v. *Celestine*, 215 U.S. 278, 285 (1909), that once the boundaries of an Indian reservation are established, neither those boundaries nor the status of title to the tracts included within them may be changed except upon a clear statement of an intent by Congress to change them. *See Mattz* v. *Arnett*, 412 U.S. 481 (1973); *City of New Town* v. *United States*, 454 F.2d 121, 125, 126 (8th Cir. 1972); 25 U.S.C. § 398d (1970). The Supreme Court concluded in *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), that the boundaries of the present Colville Reservation have not been affected by allotments, patents and other dispositions of land within the reservation made subsequent to its establisment. The current boundaries of that reservation thus remain as discussed in *J. H. Seupelt, supra*, and for similar reasons the boundaries of the Spokane Reservation remain unchanged by the Act.[9] This holding is in accord with the position taken in the 1945 Solicitor's Opinion. *See* 59 I.D. at 175 n. 60.

2. THE INDIANS' INTEREST IN THE ORIGINAL RIVERBED AND THE INDIAN ZONE[10]

Congress has recognized the Colville Confederated Tribes' full equitable title to tribal lands within the Colville Reservation, both in the 1940 Act and in prior legislation, *see United States* v. *Pelican*, 232 U.S. 442, 445 (1914); and similar

[9] An argument against the conclusion set out above conceivably could be based on *United States* v. *Oklahoma Gas and Elec. Co.*, 318 U.S. 206 (1943); *Ellis* v. *Page*, 351 F.2d 250 (10th Cir. 1965); and *Tooisgah* v. *United States*, 186 F.2d 93 (10th Cir. 1950). *Oklahoma Gas* and *Tooisgah*, however, were decided prior to the Supreme Court's decisions in *Seymour* v. *Superintendent, supra*, which reaffirmed the analysis of *Celestine* and applied it to a statute opening the Colville Reservation to white settlement and ownership, and *Mattz* v. *Arnett, supra*, in which the Court indicated that a congressional intent to alter reservation boundaries can be found only if such an intent is made express in the language of the statute in question or can be clearly perceived from its legislative history and other surrounding circumstances. (*DeMarrias* v. *South Dakota*, 319 F.2d 845 (9th Cir. 1963), a case similar to *Tooisgah*, was explicitly overruled in *United States ex rel. Feather* v. *Erickson*, 489 F.2d 99 (8th Cir. 1973), on the ground that its rationale had become untenable in light of recent decisions such as *Seymour* and *Mattz*.) And in any event, all three cases—*Oklahoma Gas*, *Ellis*, and *Tooisgah*—involved statutes which, unlike the 1940 Act, conveyed to the United States *all* of the lands within the reservations in question. The courts in those cases professed to perceive in such circumstances a clear congressional intent to dissolve tribal governments on those reservations. Plainly, no such intent can be imputed to Congress in connection with the 1940 Act. Indeed, as to that Act, *Seymour* clearly governs; for if, as *Seymour* holds, continued tribal jurisdiction is not inconsistent with ownership by non-Indians of certain lands in fee within a reservation, then such jurisdiction is *a fortiori* not inconsistent with similar ownership, for purposes of a reclamation project such as the one involved here, by the Indians' trustee.

[10] The bed of a river is that area covered by water during flood stage up to the normal high-water mark. With most rivers, much of this area is dry during the greater portion of the year, during which time it must be traversed to obtain access to the stream for fishing, hunting, boating, or other purposes. *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950). *See also United States* v. *Cress*, 243 U.S. 316 (1917).

recognition has been extended with respect to the Spokane Reservation.[11] Such title, having vested in the tribes, cannot be taken except as clearly and specifically authorized by Congress.[12] The following two subsections of this opinion deal, in light of this principle, with the nature of the tribes' interest in (a) the pre-1940 riverbed, and (b) the Indian zone.

a. Title to the pre-1940 Riverbed

The bed of the river (*i.e.*, of the Columbia and of its tributary the Spokane) was not designated by the Secretary pursuant to the 1940 Act, and the tribes were not compensated for any taking with respect to the riverbed. Accordingly, the action taken by the Secretary pursuant to the 1940 Act has not changed the tribes' title, and I hold that each tribe has full equitable title to that part of the riverbed which is within the exterior boundaries of its reservation.[13]

It could conceivably be argued that the lands in the riverbed are owned by the state of Washington because lands underlying navigable waters in territories of the United States are, as a general rule, held by the United States for the benefit of future states under the "equal footing" doctrine; and both the Colville and Spokane Reservations were created while what is now the state of Washington was still a territory. Some authority in this regard for a claim of ownership by the state might be found in *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1925), which indicates that "disposals by the United States during the territorial period are not lightly to be inferred." *Holt State Bank* held that the bed of Mud Lake had not been reserved for the use of the Indians on the Red Lake Reservation, and that title thereto consequently had passed to the state of Minnesota when that state entered the Union. The Supreme Court has recently made clear, however, that *Holt State Bank* turned on its particular facts, and has indicated that the focal question is the intent of the United States with respect to the land in question. In *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), the Court held that the bed

[11] Congressional enactments concerning the Colville Reservation such as the Act of June 21, 1906 (34 Stat. 325, 378), which provided for the payment of $1.5 million compensation for the lands taken by virtue of the Act of July 1, 1892 (27 Stat. 62), and the Act of March 22, 1906 (34 Stat. 80), which provided compensation for lands taken by settlement and entry, were statutes in which Congress recognized tribal ownership of the equitable title to reservation lands. With respect to the Spokane Reservation, *see*, in addition to the 1940 Act, the Act of May 29, 1908 (35 Stat. 458), authorizing, *inter alia*, the allotment of land within that reservation.

[12] *Mattz* v. *Arnett*, at 504 (1973); *Seymour* v. *Superintendent*, *supra*; *United States* v. *Celestine*, *supra*.

[13] *But see* page 7, *supra*. That title of course confers no rights conflicting with the provisions of the 1940 Act. The principle articulated at p. 8, *supra*, seems to me clearly to overcome the possible argument to the contrary noted by Solicitor Gardner in his 1945 Opinion. *See* 59 I.D. at 167 n. 48. That argument is based on the "ordinary rule" that absent the expression of a contrary intention, "the conveyance of title to the upland carries with it the title to the bed of the stream." As the 1945 Opinion acknowledged, however, in the present instance title was taken rather than conveyed. And in any event, the broad principles underlying *United States* v. *Celestine*, *supra*, and its progeny would make inappropriate the application of any such rule here, since title to the riverbed was not clearly and specifically taken.

of the Arkansas River in Oklahoma had been conveyed to the Cherokees, Choctaws, and Chickasaws prior to Oklahoma's becoming a state. The opinion emphasized that—

> * * * nothing in the *Holt State Bank* case or in the policy underlying its rule of construction * * * requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor. * * *

397 U.S. at 634.

Thus if the intent of the United States in administering lands now comprising a state was clearly to reserve the bed of a river for some particular purpose, then that intent, if embodied in an appropriate legislative or administrative act, would result in an exclusion of the riverbed from the lands passing to the state.

I find that the executive order creating the Colville Reservation and the agreement and executive order establishing the Spokane Reservation sufficiently embody such an intent. Particularly on point in this respect is a recent decision by the Court of Appeals for the Ninth Circuit. In *United States* v. *Alaska*, 423 F.2d 764 (9th Cir. 1970), that court held that although Alaska was admitted on an equal footing with other states, the state did not own a lakebed within a wildlife refuge previously created by executive order. The court stated that the equal footing doctrine—

> * * * does not mean that the President had no power to previously promulgate the executive order here under scrutiny. If, as we now hold, the language of the order is sufficiently clear to withdraw the water of the lake and the submerged land, the state's rights, if any, are subsequent in time and inferior in right * * *. [T]he United States had all the powers of a sovereign and, if it saw fit, it might even grant rights in and titles to lands which normally would go to a state on its admission. * * *

423 F.2d at 768.

Similarly, I conclude that the bed of the Columbia and Spokane Rivers in the area presently being considered were reserved for the use and benefit of the Colville and Spokane Tribes and therefore were not acquired by the state of Washington when it entered the Union. This Department determined in *J.H. Seupelt, supra*, that the land out to the middle of the Columbia River had been reserved to protect the fishing interests of the Colville Indians, who relied upon the fish as a source of subsistence. This aspect of the opinion in *Seupelt*, which was cited with approval in the 1945 Solicitor's Opinion, 59 I.D. at 152, is now reaffirmed. Nor is there any basis for distinguishing in this regard between the Colville and Spokane Tribes,[14] or between the Columbia and Spokane Rivers. Indeed, by placing the boundary of the Spokane Reservation on the far (west and south) banks of those rivers, the executive order confirming creation of that reservation makes it

[14] *See* 59 I.D. at 153.

doubly clear that the lands reserved for the use of the Indians included the riverbed.[15]

[15] The outcome of *Holt State Bank* was in large part dependent on the fact that the Red Lake Reservation, which was involved in that case, had been created by means which did not constitute an "express" setting aside of the lands in question. *See United States* v. *Pollmann,* 364 F.Supp. 995, 999 (D. Mont. 1973). As the opinion in *Holt* pointed out,

"* * * The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. * * * There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. * * * There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, * * * of treating such lands as held for the benefit of the future State." 270 U.S. at 58–59 (footnote omitted).

The Court in fact noted in *Holt* that "[o]ther reservations for particular bands were specially set apart, but those reservations and bands are not to be confused with the Red Lake Reservation and the bands occupying it." *Id.* at 58 n. These aspects of *Holt,* which distinguish that case from *United States* v. *Alaska, supra,* and from the situation now before me, were emphasized in the *Pollmann* decision, *supra.* That decision held that title to the bed of the south half of Flathead Lake, within the Flathead Reservation, did not pass to Montana when that state joined the Union; instead, the court concluded, since the reservation clearly had been set aside for Indian use prior to Montana's becoming a state, the bed continued to be equitably owned by the tribes in question. *See also Montana Power Co.* v. *Rochester,* 127 F. 2d 189 (9th Cir. 1942).

It should also be noted that in *United States* v. *Big Bend Transit Co.,* 42 F. Supp. 459 (E.D. Wash. 1941), the court held that the bed of the Spokane River was part of the Spokane Reservation. The opinion observed that "[t]he State of Washington specifically disclaimed all title to all lands held by any Indian or Indian Tribes provided that the Indian lands should remain under the absolute jurisdiction and control of the Congress." 42 F. Supp. at 467 (citing Enabling Act, Rem. Rev. Stats. of Wash. Vol. 1, pp. 332, 333; 25 Stat. 676, 677, sec. 4, par. 2).

b. *The Tribes' Interest in the Indian Zone*

As outlined above, the Secretary designated all lands between the original riverbed and the nearest 1,310–foot contour line to be taken in aid of the Grand Coulee project. Under the Act, accordingly, the United States was granted all of the "right, title, and interest" of the Indians in and to all Indian lands so designated and taken, "subject to the provisions of this Act* * *." And one of those provisions specified that the Secretary should "set aside" approximately one-quarter of the reservoir area for the "paramount use of the Indians" for hunting, fishing, and boating purposes.

The question to which I now turn concerns the precise nature of the Indians' interest in the so-called Indian zone designated by the Secretary pursuant to that provision. Solicitor Gardner concluded in 1945 that that interest was not necessarily an exclusive one. I am constrained to disagree with this position in view of my conclusion with respect to an issue not specifically considered in the 1945 opinion. In my view the Indians have a reserved and therefore exclusive interest in the Indian zone under the 1940 Act.[16]

[16] This opinion concerns only the boundaries of the Colville and Spokane Reservations in the reservoir area, the title to certain portions of the riverbed in that area, the right of tribal members to use the Indian zone designated by the Secretary pursuant to the 1940 statute for hunting, fishing, and boating purposes, and the power of the tribes under that statute to control the use of that zone for those purposes by others. The opinion does

Solicitor Gardner viewed the word "paramount" in the Act as reflecting a congressional purpose to create a "flexible scheme" giving the Secretary discretion to determine whether exclusive use of the zone by the Indians is "necessary to ensure the realization of their privileges." 59 I.D. at 170. Standing alone, however, the term "paramount" clearly does not determine the issue of whether exclusivity was intended. As Solicitor Gardner himself pointed out, congressional "reliance upon the adjective 'paramount' alone in this context was probably unfortunate," *id.* at 169, since the word is ambiguous with respect to connotations of exclusivity. The relevant legislative history, however, while not altogether consistent, serves in my view to resolve the question along lines somewhat different from those articulated in the 1945 Solicitor's Opinion.

The legislative history of the Act concededly does not point unequivocally in a single direction. In its report to Congress with regard to the proposed legislation, for example, the Department suggested that "the rights of the Indians to use this area for hunting, fishing, and boating will not necessarily be exclusive rights." H.R. Rep. No. 2350, 76th Cong., 3d Sess. 2 (1940). This suggestion represents the strongest support for the position taken in the 1945 Opinion. On the other hand, the bill which became the 1940 Act was drafted in its final form by the Office of Indian Affairs jointly with the Bureau of Reclamation shortly after the Assistant Commissioner of Indian Affairs had indicated that he contemplated the "setting aside of a particular part or parts of the reservoir *for the exclusive use of the Indians* in exercising their rights, subject, of course, to the primary use of the reservoir for reservoir purposes." 59 I.D. at 157 (Italics added). Indeed, the very memorandum which set forth that contemplation of "exclusive" use expressed the notion in proposed statutory language utilizing the word "paramount." *Id.*

Early drafts of the Act prepared within the Department provided that the title to be granted to the United States should be "subject to the reservation for the Indians of an easement to use such lands for hunting, fishing, boating, and other purposes." 59 I.D. at 156. The Bureau of Reclamation resisted this approach, not only out of opposition to the open-ended reservation of easements for unspecified "other purposes," but also on the basis of a concern that administration of the project should not be made unduly complicated. The Indian lands to be taken were not contiguous, but rather were arranged in a "checker-

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not affect or change any of the governmental and institutional arrangements under which Grand Coulee Dam and the Third Powerplant connected therewith are now being operated and maintained.

board" pattern—extending, in fact, upriver beyond the boundaries of the reservations.[17] This situation obviously would have rendered the simple reservation of an easement with respect to the particular lands taken difficult to oversee and administer. Indeed, it was feared that a scheme under which the Indians retained scattered "rights in all parts of the reservoir area * * * would interfere with the proper development of its recreational possibilities." *Id.* at 156.

Thus the scheme of the Act was modified, and the present statutory language, authorizing the creation of a contiguous Indian zone, was agreed upon. There is no persuasive evidence of any determination at the time of this modification that the *nature* of the Indians' rights was to be different than had originally been contemplated when the reservation of an easement was specified, nor is there any apparent reason or basis for such a determination. In this context, given the background outlined above and the limited purpose that the change in approach evidently was designed to accomplish, the soundest inference is that only the *location* of the areas to which such rights were applicable was changed.[18] It is the failure of Solicitor Gardner to draw this inference, or even to deal with the question of whether the Indians' rights were reserved rights, which represents the chief point of departure between his analysis of the Act and mine.

This view of the Act also comports more closely with an agreement dated June 14, 1940, between the Office of Indian Affairs and the Bureau of Reclamation, relating to acquisition of Indian lands for the project. Paragraph 7 of that agreement, which was concluded only fifteen days prior to the date of the Act, reflects an understanding that "existing" rights of hunting and fishing in the areas to be taken were to be "satisfied" by the Act, thus arguably, at least, suggesting a reservation of preexisting rights.[19]

[17] Congress had opened both the Spokane and Colville Reservations to entry and settlement by non-Indians. *See* the Acts of June 19, 1902 (32 Stat. 744) (Spokane), Mar. 22, 1906 (34 Stat. 80) (Colville), and May 29, 1908 (35 Stat. 458) (Spokane). *See also* the title opinion dated May 2, 1973, issued by the Title Plant, Portland Area Director's Office, Bureau of Indian Affairs, which includes 11 color-coded maps depicting the boundaries of the Colville Reservation and the source of title for each parcel of land in the designated area. That title opinion and all related documents are on file in the above office.

As for the area upriver from the reservations, the Colville Reservation originally extended considerably north of its present northern boundary but was diminished by the Act of July 1, 1892 (27 Stat. 62), which provided for allotments to Indians living in the severed portion. *See* 59 I.D. at 151.

[18] Since the Indian zone is located almost totally within the exterior boundaries of the Colville and Spokane Reservations, there is no geographical anomaly involved in the conclusion that the Indians' rights in the zone are reserved rights.

[19] The 1945 Solicitor's Opinion includes the following passage: "It is important to realize that the acquisition of Indian allotted lands for the reservoir began long in advance of the passage of the act of June 29, 1940, and that some of these lands were inundated prior to their acquisition. The plan at this time was to reserve easements to the Indian owners which would enable them to make use of the reservoir without any limitation upon these uses, and therefore the riparian factor of severance damage was not taken into consideration in appraising the Indian lands, either at this time or subsequently, the lands of the

The above analysis is reinforced by the language of the Act. The Secretary is directed to "set aside" an Indian zone from the lands taken for project purposes—terminology that at least is consistent with, and may well be indicative of, a contemplation that already existing Indian rights to the lands designated were being preserved. Moreover, the directive is to set aside the zone "in lieu of" reserving to the Indians hunting, fishing, and boating rights "in the areas granted under this Act"—language which would appear to suggest the notion outlined above, to the effect that the Act merely imposed a geographical shift of those preexisting rights. Indeed, the Indians are specifically said to have "rights" in the zone set aside, which rights are "subject only" to (a) the Secretary's authority to promulgate conservation regulations, and (b) the overriding proviso that the rights "shall not interfere with project operations." [20] The implication thus is that those rights are not "subject" to any concurrent rights of other persons in the Indian zone.[21]

The conclusion that the Act contemplates retention by the Indians of preexisting (and therefore reserved and exclusive) rights is, in addition, strongly supported by the principle that enactments permitting a taking of Indian property are to be construed narrowly, as giving congressional consent only to the most limited extinguishment of Indian proprietary rights necessary for fulfillment of the purpose of the taking. *Mattz* v. *Arnett*, *supra*, 412 U.S. at 504; *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Santa Fe Pac. RR. Co.*, 314 U.S. 339 (1941); *Seymour* v. *Superintendent*, *supra*; *United States* v. *Nice*, 241 U.S. 591 (1916); *United States* v. *Celestine*, *supra*. There is no provision in the 1940 Act for any non-Indian use of areas included within the Indian zone.

Similar support for this view of the Act stems from the well-established principle that statutes affecting Indian interests are, where am-

Indians and non-Indians alike being appraised upon the same basis. The Indian allotted lands were acquired under memoranda of understanding between the Indian Office and the Bureau of Reclamation approved by the Department on Apr. 6, 1939, and June 14, 1940. Paragraph 7 of the latter memorandum of understanding provided: 'Nothing in this agreement shall affect *existing* hunting and fishing rights of the Indians in the Columbia River Reservoir area *intended to be satisfied* by the enactment into law of the provisions of the second paragraph of Section 1 of S. 3766 and H.R. 9445 * * * (76th Congress, 3d Session).' " 59 I.D. at 155 (Italics added; footnotes omitted).

[20] The existence of these two limitations on the Indians' rights may well explain why the term "paramount" rather than "exclusive" was used in the Act, and may also perhaps underlie the comment in the Department's report quoted on page 15, *supra*.

[21] I do not mean to suggest that this analysis of the language of the Act is conclusive of the questions considered herein; indeed, my construction of that language is not the only plausible construction. I do, however, believe that my reading of the language is the soundest of the various possible readings, and that in combination with the analysis of the history and purposes of the Act set out above and the rules of statutory interpretation referred to in the text *infra*, it provides a sound basis for my ultimate conclusions.

biguous, to be construed most favorably to the Indians involved. *E.g.*, *Squire* v. *Capoeman*, 351 U.S. 1, 6–9 (1956); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *United States* v. *Santa Fe Pac. R. Co.*, *supra*, 314 U.S. at 353–54; *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Cherokee Intermarriage cases*, 203 U.S. 76, 94 (1906).

Accordingly, although neither the Act nor the legislative history underlying it is crystal clear, I am compelled by the above considerations to hold that the Indians' rights to "paramount use" of the Indian zone are reserved rights held by the United States in trust for them, and that those rights are therefore exclusive (except as limited by the prohibition against interference with project operations and by the Secretary's explicitly conferred power to prescribe conservation regulations). Those rights are a condition to and a burden upon whatever title the United States received pursuant to the 1940 Act. *Cf. Seufert Bros.* v. *United States*, 249 U.S. 194 (1919).

3. THE JURISDICTION OF THE TRIBES TO REGULATE FISHING, HUNTING, AND BOATING IN THE INDIAN ZONE

Given my holding in the preceding section, the question arises whether in addition to having exclusive hunting, fishing, and boating rights in the Indian zone, the tribes also have the authority to regulate the use of that area by others for such purposes. It is my conclusion that they do.

With respect to hunting and fishing, such a right is clearly inferable from 18 U.S.C. § 1165 (1970), which, as was held in *Quechan Tribe* v. *Powe*, 350 F. Supp. 106, 110 (S.D. Cal. 1972), "makes it a crime for any person to enter an Indian Reservation for the purpose of hunting, fishing, or trapping unless such person has tribal permission to do so." [22] *Quechan* held that section 1165 "confirmed" the right of tribes to "control, regulate and license hunting and fishing" within their reservations.[23] *See also United*

[22] Sec. 1165 reads as follows: "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited."

[23] In theory there may be some question about whether the tribes enjoy regulatory power in those few portions of the Indian zone which are not within the boundaries of the reservations, and whether 18 U.S.C. § 1165 (1970) would be applicable to those areas in view of the general principle that criminal statutes are to be strictly construed. I am inclined, on the basis of the reasoning set out in the text at note 26, *infra*, toward the view that the tribes do have jurisdiction in those areas; and I am similarly inclined to conclude that the language of sec. 1165—which speaks of "lands of the United States that are reserved for Indian use"—is applicable to all portions of the Indian zone, in light of my holding above that the tribes' hunting, fishing, and boating rights in the zone are reserved rights. (With respect to the latter point, I note that section 1165 requires that the substantive terms of the statute be violated "knowingly and willfully," so that my view of the statute would not operate to ensnare the unwary. *See United States* v.

States v. *Pollmann*, 364 F. Supp. 995, 1001–02 (D. Mont. 1973). Thus any tribal ordinances properly enacted to regulate hunting and fishing in the Indian zone must be regarded as valid and may be enforced by the Colville and Spokane tribal courts so long as the requirements of all pertinent federal statutes, such as 25 U.S.C. §§ 1301 *et seq.* (1970), are observed.[24] *See Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78 (1916); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). Such ordinances may also, of course, in effect be enforced in the federal courts through application of section 1165.

The right to regulate boating in the Indian zone is not specifically conferred upon the tribes by section 1165, which speaks only of hunting and fishing. In my view, however, the tribes' regulatory authority in the zone extends to boating as well.

It has long been settled that Indian tribes, bands, and nations originally possessed all aspects of sovereignty, and that those groups today retain such sovereignty, at least in terms of power over their internal affairs, except as limited by act of Congress. *Williams* v. *Lee*, 358 U.S. 217, 220, 223 (1959); *Worcester* v. *Georgia*, 31 U.S. 214 (6 Pet.) 515 (1832); *Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965); *Iron Crow* v. *Oglala Sioux Tribe*, *supra*, 231 F.2d at 91–94, 98; *Oliphant* v. *Schlie*, _____ F. Supp. _____, No. 511–73C2 (W.D. Wash., filed March 21, 1974; *see* 55 I.D. 14 (1934). In *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172–173 (1973), the Supreme Court recently emphasized the pertinence of these principles to questions such as the one now before me:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of [such] issues * * *, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one and of a complex character. * * * They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a sepa-

Pollmann, supra.) These questions probably are of no realistic significance, however, in view of the minimal extent of such geographical discrepancies and the practical difficulty of ascertaining their location.

[24] The Colville Constitution, which has been approved by the Secretary, provides in Article V, sec. 1(a), that the elected tribal council has the responsibility and authority "to protect and preserve the tribal property, wildlife and natural resources * * *." A similar provision appears in Article VII, sec. 1(c) of the Spokane Constitution.

rate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside." *United States* v. *Kagama*, 118 U.S. at 381–382. (Footnotes omitted.) [25]

On the basis of this approach, the 1940 Act's reservation of exclusive boating rights to the tribes provides in my view a sufficient basis for tribal jurisdiction to regulate that activity in the Indian zone.[26] The conferral of such exclusive rights would be futile unless there existed some appropriate means of enforcing those rights. It is reasonable, therefore, especially absent any other clearly effective mechanism for the enforcement of such rights, to conclude that a concomitant enforcement authority rests in the tribes themselves.

The Indian zone is, as I have noted, almost entirely within the boundaries of the reservations. A properly drafted tribal ordinance could provide that anyone entering the reservation subjects himself to tribal regulations dealing with activities as to which the Indians have exclusive rights, and to the jurisdiction of the tribal courts in such respects. *See, e.g., Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *app. dismissed*, 203 U.S. 599 (1906); *cf. Oliphant* v. *Schlie*, *supra*, ------ F. Supp. at ------:

> [A]n Indian tribe's powers of local self-government originally included the power to enact criminal laws pertaining to non-Indians and to confer upon its tribal court jurisdiction over the person of a non-Indian to enforce such laws on those lands reserved for such Indians within the established boundaries of their reservation. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government, *i.e.*, the United States Government.[27]

Nor is the tribal authority outlined above undercut by the regulatory authority of the state of Washington under its criminal law and Public Law 280, 18 U.S.C. § 1162. It is immaterial, in fact, whether the state has full jurisdiction over the Colville and Spokane reservations in the respects authorized by that statute; for 18 U.S.C. § 1162(b) in any event precludes

[25] While decisions concerning the recognition and preservation of tribal sovereignty have basically dealt with reservations established by treaty, I can perceive no reason for any different conclusion where an executive order reservation is involved, at least so long as the executive order does not clearly and specifically indicate that the reservation was created for an exceptional purpose incompatible with ordinary notions of tribal sovereignty.

[26] I see no sound basis or reason for distinguishing commercial navigation from pleasure boating in this regard. The Act is not in terms limited to rights of the latter sort; indeed, excessive or unregulated commercial navigation might well interfere with the Indians' hunting and fishing as well as boating rights. In this connection I note that navigation rights exist from one end of the lake to the other in the non-Indian zone (including the "navigation lane" established by the Secretary between the Colville and Spokane portions of the Indian zone.)

[27] The court in *Oliphant* restricted its holding to offenses "occurring on land held in trust by the United States Government for the benefit of Indians within the exterior boundaries of the * * * Reservation. Jurisdiction * * * over non-Indians on fee patent lands within the reservation is not presently before the Court, and the Court expresses no views on the question." ------ F. Supp. at ------.

Similarly, I deal above only with tribal authority to regulate activities as to which the Colville and Spokane Tribes have exclusive and reserved rights, in areas to which such rights are applicable.

state regulation of Indian trust property "in a manner inconsistent with any Federal * * * statute," and likewise prevents the state from—

> depriv[ing] * * * any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal * * * statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Such rights are granted both by the 1940 Act and by 18 U.S.C. § 1165 (1970), so that state regulatory law of the sort referred to above can in no way undermine the Indians' exclusive right to hunt, fish, or boat in the Indian zone or their right to regulate those activities there. Any state law conflicting with tribal ordinances in these areas, or purporting to undercut such tribal jurisdiction, would be invalid. *See United States* v. *Pollmann*, *supra*, 364 F. Supp. at 1002; *Quechan Tribe* v. *Rowe*, *supra*.[28]

KENT FRIZZELL,
Solicitor.

PARK CENTER WATER DISTRICT AND THE CANON HEIGHTS IRRIGATION AND RESERVOIR COMPANY

28 IBLA 368

Decided *February 3, 1977*

Appeal from decision of the Colorado State Office, Bureau of Land Management, increasing charge for water from well on public land, Pueblo 057197.

Affirmed.

1. Administrative Procedure: Burden of Proof—Appraisals—Evidence: Presumptions—Water and Water Rights: Generally

One challenging the accuracy of an appraisal of water based on fair market value must show by substantial evidence the nature of the alleged error; where the appraisal has been conducted in accordance with generally accepted appraisal principles, allegations of error unsupported by evidence will be given little weight.

2. Water and Water Rights: Generally—Water and Water Rights: State Laws

An attempted adjudication of federal water rights will not be recognized where the state court 1) lacked jurisdiction over the United States for failure to serve process upon the Attorney General of the United States or his designated representative pursuant to 43 U.S.C. § 666(b) (1970); and 2) lacked jurisdiction over the subject matter for failure of the litigation to conform to the requirements of a general litigation of all water rights pursuant to 43 U.S.C. § 666(a) (1970).

3. Water and Water Rights: Federally Reserved Water Rights—Water and Water Rights: State Laws—Withdrawals and Reservations: Springs and Waterholes

[28] As noted above, there are in reality two Indian zones—a Colville zone and a Spokane zone—rather than one. Consistent with this fact and with the 1945 *Solicitor's Opinion*, 59 I.D. at 159–60, each tribe in effect has jurisdiction as described above over its portion of the zone.

Where a waterhole and the surrounding land were withdrawn pursuant to both an Executive Order and an Act of Congress and reserved exclusively for use by the public before the water had been appropriated by others, the federally reserved water right is superior to and precludes any acquisition of rights to the water by others.

4. Contracts: Generally—Estoppel—Water and Water Rights: Generally

A lessee of the water from a well owned by the federal government, who agrees that his use of the water will not be used as a basis for obtaining a permanent water right and who nevertheless proceeds to try to obtain a water right in state court based on that use, will be estopped from asserting any resulting decree of the state court for any purpose.

APPEARANCES: William V. Crossman, Esq., and Larry Dean Allen, Esq., Canon City, Colorado, for appellants; Harold J. Baer, Jr., Esq., Office of the Solicitor, United States Department of the Interior, Denver, Colorado, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Park Center Water District and The Canon Heights Irrigation and Reservoir Company appeal from the Feb. 24, 1976, decision of the Colorado State Office, Bureau of Land Management (BLM), increasing the charges for water withdrawn from a well owned by the United States from 2 cents per thousand gallons to 6 cents per thousand gallons.[1] Appellants argue that the BLM's decision is arbitrary and capricious for two reasons. First, they assert that there is simply no justification for an increase in costs; and, second, they have obtained from the State of Colorado a decree granting them the right to the use of the water.

[1] The BLM decided to raise the rate for this water due to a reappraisal of its value. Sec. 2 of the lease provides in part that

> * * * The water fees and charges set forth above will be reviewed by the lessor at five year intervals, commencing with the effective date of this instrument [July 1, 1971], to determine the *fair market value* of this lease and water charges to be made for the next successive five year period. [Italics added.]

In accordance with that provision, the BLM conducted a survey of the existing market for well water in this area of Colorado. The conclusion of the appraiser, Jerry J. Rohr, was that the fair market value of the water is 6 cents per 1,000 gallons. The study appears to have been conducted with due regard to professional standards, and the conclusions are well supported by the facts marshalled by Rohr. Where the fair market value of the land or water has been determined

[1] The actual difference in charges between the two rates is not as drastic as it might seem. The appellants consumed 24,302,366 gallons of water in the most recent year of the lease. At 2 cents per 1,000 gallons the charge would be $486.05. However, the lease in § 2(B)2 provides for a minimum charge of $1,000 per year. At 6 cents per 1,000 gallons the charge would be $1,458.14. Therefore, in practical terms, the difference is between $1,000 per year and $1,458.14 per year, a difference of $458.14.

in accordance with generally accepted appraisal procedures the conclusions of the appraisal will not be disturbed in the absence of a showing of error. *See George D. Jackson*, 20 IBLA 253, 257 (1975); *Eugene G. Roguszka*, 15 IBLA 1, 11 (1974). As appellants have failed to point to any specific error in the report, the conclusions of the appraisal are accepted as correct.

[2] Appellants' alternative basis for appeal apparently rests on a decree granted them by a Colorado court giving them the right to put the water to beneficial use.[2] This, assert the appellants, gives them the right to continue to receive the water without paying increased charges.[3] In support of this assertion they cite but one case, *Colorado River Water Conservation Dist.* v. *United States*, 96 S. Ct. 1236 (1976). Apparently the case is cited for the proposition that water rights of the United States may be adjudicated in state court proceedings.

State courts may adjudicate water rights of the United States under certain conditions set forth in the "McCarran Act," 43 U.S.C. § 666 (1970). First, the state must serve notice of the proceeding on the Attorney General of the United States or his designated representative. 43 U.S.C. § 666(b) (1970); *see United States* v. *Cappaert*, 508 F.2d 313, 321 (9th Cir. 1974), *aff'd* 96 S. Ct. 2062 (1976). The Solicitor asserts that neither the Attorney General nor his designated representative has ever been served with process in this case, and there is no contrary allegation or evidence. For that reason the state court never had jurisdiction over the United States.

Second, the provisions of the McCarran Act provide a limited waiver of soverign immunity only where the state court proceeding involves a general, area-wide adjudication of the water rights of all parties, not simply where one water user wishes to challenge the United States' right to the water. *Cappaert* v. *United States*, 96 S. Ct. 2062, 2073 (1976); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *United States* v. *Hennen*, 300 F. Supp. 256, 261 (D. Nev. 1968). This adjudication was not the general adjudication contemplated by the McCarran Act, and, therefore, the Colorado court had neither jurisdiction nor authority to affect the rights of the United States.

[3] Moreover, it is clear that the right to the use of the water is and always has been vested in the United States. The water in this well was struck by a lessee of the United

[2] No such decree is included in the record before us, nor have appellants specifically identified any such decree. They allege only that they have "Applied for and obtained" a right to the water pursuant to Colorado law. However, the record does contain a published legal notice which indicates that appellants are referring to case No. W-1499 in the District Court of Colorado in and for Water Division No. 2.

[3] Why the appellants believe they are obliged to pay anything at all, in view of their asserted belief in the validity of the court's decree, is not explained.

States who was exploring for oil and gas. Sec. 40 of the Mineral Leasing Act, 30 U.S.C. § 229a (1970), was enacted in 1934 and gave the authority to the Secretary of the Interior to purchase the casing of the well and to lease the well to the public. This was done.[4] The legislation also provided that the land on which the well was located would be withdrawn as a waterhole. 30 U.S.C. § 229a(a) (1970).

All waterholes on public lands and the surrounding acreage were withdrawn by Executive Order No. 107 of Apr. 17, 1926, 30 CFR 241.5, n. 1, pursuant to § 10 of the Act of Dec. 29, 1916, 39 Stat. 865, 43 U.S.C. § 300 (1970); 43 CFR 2311; the Act of Aug. 24, 1912, 37 Stat. 497 and the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. §§ 141, 142 (1970). Therefore, it is clear that the well and the land surrounding it have been reserved from disposition since before the first lease was issued. *Jack A. Medd*, 60 I.D. 83, 98–100 (1947). In fact, the notice of the first offer to lease in 1936 contains the statement of the withdrawal of the land pursuant to Executive Order No. 107, as does every subsequent lease up to and including the present one.

[4] By letter "L" PJA, dated Apr. 4, 1936, the Commissioner of the General Land Office reported to the Secretary that the casing in this well had been purchased and the well conditioned as a water well by the Geological Survey, and he recommended that the water be offered for lease. On Apr. 18, 1936, the First Assistant Secretary authorized the leasing of this water in accordance with the Act of June 16, 1934, 48 Stat. 977. The first lease of this water issued effective on Jan. 1, 1937.

> The federal government was not obligated to secure permission of and from the State Engineer's Office * * * before it could make use of the underground or percolating waters developed in its own wells * * * upon its reserved lands * * * , nor was the State * * * entitled to enjoin the federal government from the use of such waters because its representatives failed to comply with statutory procedural law and regulation in force covering the field of appropriation and use of water .

State of Nev. ex rel. Shamberger v. *U.S.*, 165 F. Supp. 600, 601 (D. Nev. 1958).

See also Gunvald Landheim, 52 L.D. 554 (1929).

The Supreme Court stated in the *Cappaert* case that

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 p. ____, 96 S. Ct. 1236, p. 1240, 47 L.Ed2d 483 (1976); *United States* v. *District Court for Eagle County*, 401 U.S. 520, 522–523, 91 S.Ct. 998, 1000–1001, 28 L.Ed.2d 278, 280–281 (1971); *Arizona* v. *California*, 373 U.S. 546, 601, 83 S.Ct. 1468, 1498, 10 L.Ed2d 542, 578 (1963); *FPC* v. *Oregon*, 349 U.S.

435, 75 S. Ct. 832, 99 L.Ed. 1215 (1955); *United States* v. *Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939); *Winters* v. *United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L.Ed. 340 (1908).

96 S. Ct. at 2069–70.

The Supreme Court also held in that case that the doctrine of implied reservation applied to both underground and surface water. 96 S. Ct. at 2072. Consequently, it is clear that this well and its water are withdrawn from any other disposition, including the attempted disposition under state law. The attempt by the state court to determine and dispose of the rights of the United States to the water is simply without effect.

[4] Finally, it should be noted that the appellants are estopped by contract from asserting any sort of permanent water right against the United States. In every lease since the first one beginning on Jan. 1, 1937, lessees have agreed that

> The furnishing of water hereunder shall under no circumstances become the basis of a permanent water right.

Lease, Section 1.

That provision is part of the most recent lease, a lease effective on July 1, 1971, for a period of 20 years. Appellants acted in total disregard of the terms of their lease in seeking a permanent water right. Having nevertheless obtained a decree in their favor, a decree invalid for numerous other reasons, appellants are estopped from asserting it as a basis for relief. *Woodard* v. *General Motors Corp.*, 298 F.2d 121, 129 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962); *Gress* v. *Gress*, 209 S.W. 2d 1003 (Tex. Civ. App. 1948).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

JOSEPH W. GOSS,
Administrative Judge.

OIL RESOURCES, INC.

23 IBLA 394

Decided *February 7, 1977*

Appeal from decision of the Utah State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease U–13666.

Affirmed.

1. Oil and Gas Leases: Extensions—Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

The lessee of an oil and gas lease, issued after Sept. 2, 1960, which has reached the end of its primary term, must submit the rental for the first year of an anticipated extended term under 30 U.S.C. § 226(e) (1970) on or before the regular anniversary date of the lease. Failure to submit the rental timely will result in the automatic termination of the lease by operation of

law under 30 U.S.C. § 188(b) (1970). Unless the lessee can show that he is entitled to reinstatement of his lease under 30 U.S.C. § 188(c) (1970), he cannot obtain the extension.

2. Oil and Gas Leases: Extensions—Oil and Gas Leases: Reinstatement

The discretionary authority granted to the Secretary of the Interior by 30 U.S.C. § 188(d) (1970) to reinstate oil and gas leases terminated for failure to pay rental timely, which leases are eligible for extensions under 30 U.S.C. § 226–1(d) (1970) because drilling operations commenced prior to the end of the term of the lease and were being diligently prosecuted at that time, applies only to oil and gas leases issued before Sept. 2, 1960. An oil and gas lease issued after that date, which has terminated for failure to pay rental timely, can be reinstated only under the provisions of 30 U.S.C. § 188(c) (1970).

3. Oil and Gas Leases: Competitive Leases—Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Termination

The provisions of 30 U.S.C. §§ 188 (b) and (c), and decisions of the board discussing those provisions, are generally applicable to both competitive and noncompetitive oil and gas leases on which there is no well capable of producing oil or gas in paying quantities.

4. Oil and Gas Leases: Cancellation—Oil and Gas Leases: Termination—Words and Phrases

"Cancellation" and *"termination."* The "cancellation" and the "termination" of oil and gas leases are separate, distinct concepts. Cancellation requires a specific act by the Department authorized by various statutes. Termination under 30 U.S.C. § 188(b) (1970) is automatic, occurring by operation of law when the lessee fails to pay his rental timely.

5. Oil and Gas Leases: Reinstatement

An oil and gas lease which has terminated by operation of law for failure to pay the annual rental timely may not be reinstated under 30 U.S.C. § 188(c) (1970) unless, among other things, payment has been tendered at the proper office within 20 days of the date due.

APPEARANCES: James A. Murphy, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Oil Resources, Inc., appeals from the May 21, 1976, decision of the Utah State Office, Bureau of Land Management (BLM), denying its petition for reinstatement of its oil and gas lease U–13666. BLM denied the petition because appellant did not exercise reasonable diligence in failing to submit rental on or before the anniversary date of the lease, Apr. 1, 1976, and also did not submit the payment within 20 days thereafter as required by 30 U.S.C. § 188(c) (1970).

Appellant's lease was issued competitively on Apr. 1, 1971, for a primary term of 5 years ending Mar. 31, 1976. An oil and gas lease "on which actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years." 30 U.S.C. § 226(e) (1970). The regulations governing these drilling extensions are set out at 43 CFR 3107.2.

By memorandum dated Apr. 2, 1976, the United States Geological Survey (Survey) informed BLM that appellant was conducting actual drilling operations on the lease but that it could not yet determine whether appellant had met the requirements for extension specified in 43 CFR 3107.2–2. Survey then informed BLM on Apr. 26, 1976, that the drilling requirements of 43 CFR 3107.2–2 had been met by appellant and that Survey had no objection to granting appellant an extension under 43 CFR 3107.2–3. However, by letter dated May 5, 1976, BLM notified appellant that because it had not paid the rental on or before the anniversary date, Apr. 1, 1976, the lease had automatically terminated by operation of law.

Appellant filed the petition for reinstatement and tendered the rental payment on May 14, 1976. In the petition, appellant stated that it had completed the well on the lease, that the well was awaiting hook-up to a gathering system and that more than $100,000 had been expended. Appellant further stated that the "non-payment of rentals occurred through inadvertance [*sic*]."

Appellant now presents several arguments alleging error in the BLM decision denying its petition. First, it argues that the language of 30 U.S.C. § 226(e) (1970) authorizing extensions is mandatory and therefore an extension cannot be denied for failure to pay rental. Second, appellant argues that there is no requirement in the statutes or the regulations that a lessee must submit rental prior to the expiration of the lease in order to obtain an extension. Third, appellant argues that the decision cited by BLM as authority for denying the petition, *Merilyn K. Buxton*, 24 IBLA 269 (1976), is not applicable to competitive leases. Fourth, appellant argues that even if 30 U.S.C. § 188 (1970) were applicable to its lease, sec. 188(d) would allow reinstatement at the discretion of the Secretary of the Interior. Finally, appellant argues that because the lease contains valuable deposits of oil and gas, it may only be canceled by judicial proceedings as provided in 43 CFR 3108.3.

Appellant's arguments misconstrue the relevant amendments to the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et. seq.* (1970), passed by Congress since 1960. By failing to pay its rental timely, appellant has placed itself in a position where it can obtain no relief under existing law. For the following reasons, we must affirm the decision of the BLM State Office.

[1, 2] Several of appellant's arguments are concerned with the interaction of the extension by drilling provisions and the rental provisions of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970). Appellant's position would give the extension provisions a precedence over the rental provisions which is neither warranted by the language of the statutes nor indicated by the legislative history.

An oil and gas lessee such as appellant qualifies for an extension of his lease by complying with the requirements of 30 U.S.C. § 226(e) (1970). However, in order for anyone to exercise rights granted by the mineral leasing laws, the lease involved must be maintained in good standing in accordance with the provisions of those laws and with the terms of the lease. For example, neither communitization agreements nor assignments should be approved if the particular lease has terminated for failure to pay rental timely before BLM can issue such approval. *See e.g., C. J. Iverson*, 21 IBLA 312, 323, 82 I.D. 386, 391 (1970), *appeal dismissed with prejudice, Iverson* v. *Frizzell*, Civil No. 75-106 (D. Mont., Sept. 9, 1976); *Clarence Zuspann*, 18 IBLA 1, 4–5 (1974). Appellant's argument that the language of 30 U.S.C. § 226(e) (1970) is mandatory ignores this basic concept.

The mineral leasing laws require that rental must be paid "for each year of the lease" (30 U.S.C. § 226 (d) (1970)) "on or before the anniversary date." (30 U.S.C. § 188 (b) (1970)). This requirement is repeated in "Schedule B" to appellant's lease. Sec. 1 of appellant's lease does state that the lease is for a period of five (5) years. However, an oil and gas lease may be extended beyond its primary term by compliance with various provisions of law, some of which are described in section 1 of appellant's lease. The requirement to pay rental set out in "Schedule B" does not limit the payments to any specific numbers. Rather it is simply a declaration that rental must be paid for *each* lease year. *See Texas Eastern Transmission Corp.* 14 IBLA 361, 365 (1974).

Without submission of a rental payment for the sixth lease year, or what would be the first year of the extended term, the lease expires by its terms and the lessee is in the position of a trespasser if he continues his drilling operations past the expiration date. A key element in demonstrating the diligent prosecution of actual drilling operations necessary to qualify for an extension is drilling activity after the expiration date of the lease. *Charles M. Goad*, 25 IBLA 130 (1976). A lessee continuing his drilling operations without paying the rental would be able to abandon his operations at any time prior to receiving an extension, having assumed no obligations with regard to the lease. Such a situation is contrary to the whole structure of the mineral leasing laws requiring advance rentals on oil and gas leases.

That Congress was cognizant of, and approved, an application of the termination provision to leases eligible for a 2-year extension where diligent drilling operations were being conducted on the expiration date of the lease is evident from an examination of the language and legislative history of the amendments to the Mineral Leasing Act of 1920 passed since 1960. The extension by drilling provision, presently codified as 30 U.S.C. § 226(e)

(1970), was enacted as part of the Act of Sept. 2, 1960, 74 Stat. 781. Also included in that Act was a similar extension by drilling provision, codified as 30 U.S.C. § 226–1(d) (1970), for leases in effect on the enactment date.

In 1962, Congress amended 30 U.S.C. § 188 (1954), which had required the termination of a lease for failure to pay rental timely, by enacting general reinstatement provisions applicable only to leases which had terminated prior to the enactment of the amendments. The Act of Oct. 15, 1962, 76 Stat. 943, 30 U.S.C. § 188(c) (1964). In those amendments, Congress also gave the Secretary special discretionary authority to reinstate an oil and gas lease on which "drilling operations were being diligently conducted on the last day of the primary term of the lease, and, except for nonpayment of rental, the lessee would have been entitled to extension of his lease, pursuant to sec. 4(d) of the Act of Sept. 2, 1960 (74 Stat. 790)." Act of Oct. 15, 1962, 76 Stat. 943, 30 U.S.C. § 188(d) (1970). Since section 4(d), now codified as 30 U.S.C. § 226–1(d) (1970), applies only to oil and gas leases issued before Sept. 2, 1960, discretionary reinstatement under 30 U.S.C. § 188(d) applies only to leases issued before that date and therefore does not apply to appellant's lease, which was issued in 1971.[1]

Senate Report No. 87–2165, which accompanied the amendments, contained this comment on the granting of the 2-year extension under 30 U.S.C. § 226–1(d) where diligent drilling operations were being conducted at the end of the lease term.[2]

* * * However, the Department of the Interior has held that this extension is also subject to the provision of the act of July 29, 1954, in that, if the rental for the next lease year is not paid prior to the expiration date, the lease terminates automatically, notwithstanding the diligent drilling operations being conducted.

1962 U.S. Code Cong. & Adm. News 3236, 3238. Clearly, Congress would not have authorized special reinstatement of such leases under 30 U.S.C. § 188(d) (1970) if it was not in agreement with the Department that failure to pay rental on or before the anniversary date of the first year of the extended term resulted in the termination of the lease.

Congress, in 1970, again amended 30 U.S.C. § 188 (1964) to allow reinstatement, under certain conditions, of any lease which had been or

[1] The language of 30 U.S.C. § 188(d) (1970) is slightly different from the quoted language of the law passed by Congress and set out at 76 Stat. 943. The version set out at 30 U.S.C. § 188(d) refers to "section 226–1 of this title" rather than merely to "section 4(d)" or 30 U.S.C. § 226–1(*d*). However, the entire section 4 of the Act of Sept. 2, 1960, 74 Stat. 789–90, codified as 30 U.S.C. § 226–1 (1970), is concerned only with oil and gas leases issued prior to the enactment of the Act, Sept. 2, 1960.

[2] As stated above, extensions granted under 30 U.S.C. § 226(e) (1970) are applicable only to oil and gas leases issued after Sept. 2, 1960. In 1962, when Senate Report No. 87–2165 was written, no oil and gas leases were eligible for extensions under 30 U.S.C. § 226(e) (1970) because the primary term of any relevant competitive lease was 5 years and of any relevant noncompetitive lease was 10 years.

would thereafter be terminated automatically by operation of law for failure to pay rental timely. The Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. § 188(c) (1970). These amendments and the related committee reports (*e.g.*, 1970 U.S. Code Cong. & Adm. News 3002) contain no indication that Congress considered erroneous the Department's position that a lease, qualified for an extension by drilling, will terminate for failure to pay rental timely.

To summarize the above discussion of Congressional action, we find that: (1) In 1962, Congress was aware that the Department considered a lessee obligated to submit rental for the first year of an anticipated extended term or his lease would terminate under 30 U.S.C. § 188 (1954), now, *as amended*, 30 U.S.C. § 188(b) (1970); (2) Congress concurred in this position by providing special reinstatement relief to lessees holding leases issued prior to Sept. 2, 1960; and (3) In 1970 Congress again, by its silence, declined to overrule the Department in this matter, or to provide special relief for post-1960 leases eligible for extension under 30 U.S.C. § 226(e) (1970), but which have terminated for failure to pay rental timely.

We find, therefore, that appellant was required to pay rental for the lease year beginning Apr. 1, 1976, the first year of its anticipated extended term, on or before the anniversary date of the lease, Apr. 1, 1976. Since appellant did not do so, its lease terminated automatically by operation of law as provided by 30 U.S.C. § 188(b) (1970). Unless appellant can show that it is entitled to reinstatement of its lease under 30 U.S.C. § 188(c) (1970), it cannot obtain an extension under 30 U.S.C. § 226(e) (1970).

[3] Appellant's argument that there is a distinction between noncompetitive oil and gas leases and competitive ones with regard to termination for failure to pay rental timely under 30 U.S.C. § 188(b) (1970) and reinstatement of terminated leases under 30 U.S.C. § 188 (c) (1970) is incorrect. The only oil and gas leases excepted from those provisions are leases containing a "well capable of producing oil or gas in paying quantities." 30 U.S.C. § 188(b) (1970). Since appellant did not have such a well on its lease on Apr. 1, 1976, when it failed to pay the rental timely, but was only conducting drilling operations, the provisions of 30 U.S.C. §§ 188(b) and (c) are applicable to its lease. *See Texas Eastern Transmission Corp.*, *supra.*, at 363–64. Moreover, any decision of the Board discussing those provisions, such as *Merilyn K. Buxton*, *supra*, is generally applicable to both competitive and noncompetitive oil and gas leases, regardless of the type of lease involved in the particular decision.

[4] Appellant also argues that a lease known to contain valuable deposits of oil or gas may be canceled only through judicial proceedings. This argument confuses the separate and distinct concepts

of "cancellation" and "termination." Appellant's lease has not been canceled. In order to cancel a lease, the Department must take specific action, including, in some instances, judicial proceedings. *E.g.*, 30 U.S.C. §§ 184(h)(1); 188(a); 188(b) (1970). Rather, appellant, by failing to pay its rental timely, has caused its lease to become subject to the directive of Congress set out in 30 U.S.C. § 188(b) (1970) that in such a situation "the lease shall automatically terminate by operation of law." The Department takes no action to cause such a termination; it is triggered solely by the failure of the lessee to pay its rental timely. *See C. J. Iverson*, *supra* at 314, 82 I.D. at 389.

[5] Finally, appellant has not argued that it is entitled to reinstatement of its lease under the only applicable statute, 30 U.S.C. § 188 (c) (1970). The BLM State Office decision correctly ruled that appellant is not entitled to such reinstatement. A lease, terminated for failure to pay rental timely, is eligible for reinstatement only if the rental is tendered at the proper office within 20 days of the date due, 30 U.S.C. § 188(c) (1970). The fact that appellant did not submit its rental until May 13, 1976, well past the 20-day period beginning Apr. 1, 1976, prevents consideration of the possibility of reinstating appellant's lease. *A. E. White*, 28 IBLA 91 (1976); *Merilyn K. Buxton*, *supra*; *Texas Eastern Transmission Corp.*, *supra* at 367. As Congress noted when it amended § 188 to allow reinstatement:

> It is recognized that this 20-day limitation on reinstatements means that a small percentage of terminated leases, otherwise deserving, may not be reinstated under this legislation. However, in balancing the advantage of a more liberal relief provision against the committee's desire to reduce the incentive for "intentional" mistakes, the latter course was chosen. In the event truly deserving cases arise that cannot meet the 20-day provision recourse to private relief legislation may be necessary.

H.R. Rep. No. 91-1005, 1970 U.S. Code Cong. & Adm. News 3005.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

JOSEPH W. GOSS,
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

ESTATE OF CHARLES RED BREATH BEAR

6 IBIA 36

Decided *February 14, 1977*

Appeal from Administrative Law Judge's order denying petitions for rehearing.

DENIED.

1. Indian Probate: Compromise Settlement: Generally—175.0—Indian

Probate: Determination of Heirs by Waiver or Agreement: Generally—200.0

Absent approval by an authorized representative of the Secretary of the Interior a document purporting to constitute a primary devisee's relinquishment of her inherited interest of a deceased Indian's trust estate can be given no effect. Nor can such an instrument be the basis for a compromise settlement pursuant to 43 CFR 4.207 when the primary devisee disavows the alleged agreement before the Administrative Law Judge.

APPEARANCES: Agnes Red Breath Bear Iron Elk, Gladys Red Breath Bear Two Bulls and Pearl Red Breath Bear Lakota, appellants, assisted by Walter Lakota.

OPINION BY ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal from an order denying petitions for rehearing entered by Administrative Law Judge Garry V. Fisher on July 15, 1976. Charles Red Breath Bear, deceased Oglala Sioux allottee No. 7551, died testate on Oct. 29, 1973. He was survived by four daughters, who, in the absence of a valid last will and testment of the deceased, would be entitled to equal one-fourth shares in decedent's trust estate. Decedent's will, dated Feb. 1, 1966, devised the bulk of his estate to Myrtle Red Breath Bear Johnson, appellee herein. Appellants are the other three daughters of the testator who received lesser interests from the will.

Appellants allege that Judge Fisher erred in refusing to give effect to an alleged family settlement agreement or written compromise signed by testator's four daughters on Jan. 22, 1974. In the alternative, appellants allege the evidence establishes that decedent lacked requisite mental capacity to execute a will in 1966 and that the same should therefore be declared invalid.

Based on a complete review of the record on appeal the Board is satisfied that Judge Fisher's order denying petitions for rehearing and his Apr. 12, 1976 order approving will were proper.

[1] The written document signed by Myrtle Red Breath Bear Johnson in which she states her willingness for her sisters to share equally in the estate of their deceased father is not binding on her. Absent approval by an authorized representative of the Secretary of the Interior, it has consistently been held that such an instrument cannot constitute a relinquishment of inherited interest in a deceased Indian's trust estate. *Estate of Maggie Weipah (Weipa) (Maggie George)*, IA–1409 (July 5, 1966). Nor does the record reflect that the document in question constitutes a compromise settlement by the parties pursuant to 43 CFR 4.207. As stated by Judge Fisher in his original order: "* * * Myrtle Johnson is cognizant of the effect of compromise of her rights under the will, refuses to so

compromise, and disavows the agreement." Order, p. 2.[1]

Appellants' other ground of appeal is their claim that the testator was too old and sick at the time his will was prepared for him to have understood the nature of his actions. It is further alleged that the testator could not have understood the will because it was not prepared in his native tongue. These allegations were raised at the probate hearing and Judge Fisher addressed them thoroughly in his Apr. 12, 1976 decision. From our independent review of the record, we find his conclusions on these points to be supported by substantial evidence. With respect to testator's mental capacity Judge Fisher concluded: "Charles Red Breath Bear, though elderly and enfeebled with the ravages of tuberculosis, was, on Feb. 1, 1966, a rational man, contemplating the possible effect of his illness, was aware of the scope and extent of his assets and consciously formulated disposition of those assets in his last will and testament." (Order, p. 5.) The order approving will also explains that two disinterested persons who assisted testator in preparing his will understood the spoken Sioux language. (Order, p. 3.)

Appellants offered no newly discovered evidence in support of their petitions for rehearing or any compelling argument to suggest that the order approving will was in error. As with their petitions for rehearing, the present appeal merely argues questions of fact originally determined and disagrees with conclusions based thereon.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of Agnes Red Breath Bear Iron Elk, Gladys Red Breath Bear Two Bulls and Pearl Red Breath Bear Lakota from Administrative Law Judge Garry V. Fisher's July 15, 1976 Order Denying Petitions for Rehearing, be, and the same is, hereby DENIED.

This decision is final for the Department.

WM. PHILIP HORTON,
Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Chief Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

[1] We point out, however, that our ruling on the ineffectiveness of the document dated Jan. 22, 1974, does not preclude Myrtle Red Breath Bear Johnson from requesting approval in the future from the Secretary of the Interior or his duly authorized representative for the conveyance of any of her inherited interest on the Pine Ridge Reservation to her sisters. *See* 25 U.S.C. § 483 (1970) which applies to rights of individual Indian owners of land encompassed by the terms of the Indian Reorganization Act.

GAY COAL, INC.

7 IBMA 245

Decided March 10, 1977

Appeal by Gay Coal, Inc. from a decision and order by Administrative Law Judge Sweeney in Docket Nos. BARB

76-111-P, BARB 76-160-P, and BARB 76-161-P, assessing $3,500 in civil penalties and vacating a determination of liability with respect to one alleged violation of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Hearings: Amendments to Pleadings

The Interior Board of Mine Operations Appeals will not overturn a procedural ruling by an Administrative Law Judge disallowing an amendment to a pleading unless the record manifests an abuse of discretion by showing such ruling to have a clear prejudicial effect upon the objecting party.

2. Federal Coal Mine Health and Safety Act of 1969: Penalties: Amounts

In a sec. 109 de novo proceeding, an Administrative Law Judge may determine an amount of civil penalty for violations charged and found to have occurred higher than that proposed by the MESA Assessment Office for such violations where such determination is based upon consideration of the statutory criteria and findings which justify his assessments.

APPEARANCES: George H. Buxton, Jr., Esq., for appellant, Gay Coal, Inc.; Robert J. Phares, Esq., Acting Assistant Solicitor, Marcus P. McGraw, Esq., Trial Attorney for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

Petitions for assessment of civil penalty were filed by the Mining Enforcement and Safety Administration in Docket Nos. BARB 76-111-P, BARB 76-160-P, and BARB 76-161-P involving a total of 17 alleged violations. In response, appellant Gay Coal, Inc. (Gay) on Apr. 7, 1976, filed what amounts to a confession and avoidance as to penalty assessments, but did not deny the occurrence or existence of the 17 violations charged.

A Prehearing Order, issued on Apr. 8, 1976, recognized Gay's failure to deny the allegations of violation in its Response filed on Apr. 7, 1976. The order indicated no need for an evidentiary hearing on any issue of liability and required Gay to show cause, by Apr. 23, 1976, why each alleged violative condition or practice should not be deemed admitted by the pleadings. On Apr. 26, 1976, Gay filed its "Prehearing Response" which reiterated reliance on its previous answer and stated the necessity for a hearing to determine the appropriate penalties to be assessed under sec. 109 (a) of the Federal Coal Mine Health and Safety Act (the Act). 30 U.S.C. § 819(a) (1970).

On Apr. 27, 1976, Judge Sweeney

issued an Order, termed "Determination of Liability: and Notice of Hearing" finding that the 17 violations existed as alleged and setting a hearing date at which time the six criteria set forth in sec. 109 (a) (1) of the Act would be applied in order to determine the amount of each penalty assessment.

On May 3, 1976, a further reply by Gay was received which was not accepted by the Judge as it was late-filed. Following an evidentiary hearing on May 25, 1976, in a decision dated July 19, 1976, the Judge assessed civil penalties of $3,500 for 16 of the 17 alleged violations of the Act or of the safety standards promulgated thereunder. The proposed assessment with respect to one notice of violation, No. 2 CAL, Mar. 6, 1975, was vacated as was the determination of liability under this notice as set forth in the Judge's Order of Apr. 27, 1976.

On Aug. 9, 1976, Gay appealed to the Board pursuant to 43 CFR 4.600 contending, in part, that the penalties assessed are arbitrary and excessive. In support of this contention appellant asserts that the Judge failed to consider relevant evidence and erred in raising the amount of at least one penalty assessment over that made by the MESA Assessment Office. Additionally, Gay asserts that its amendment, termed "Additional Prehearing Response," filed on May 3, 1976, should have been accepted by the Judge and that it was an abuse of discretion not to accept it.

Issues Presented on Appeal

A. Whether the Judge erred in not permitting a late-filed amendment to the pleadings.

B. Whether the amount of the penalties assessed by the Judge was appropriate in light of the evidence adduced at the hearing.

Discussion

A.

On appeal Gay contends that it was an abuse of discretion not to allow the amendment to its answer but does not state how it was prejudiced thereby.

As noted in the initial decision, Gay has never specifically denied the occurrence or existence of any of the alleged violations and its late-filed response merely indicated that the allegations were not admitted. In these circumstances the late-filed response did nothing more than require a prima facie showing of violation. Our examination of the record convinces us that even though the Judge's order of Apr. 27, 1976, determined liability for each of the alleged violations, the Judge permitted, and MESA did in fact present, a prima facie showing with respect to 16 of the 17 violations charged. As to one allegation, the Judge found that MESA had failed in its proof, and subsequently dismissed the charge and vacated any prior assessment thereon (Dec. 9). Furthermore, Gay was afforded the opportunity and did in fact conduct cross-examination on the alleged violations.

In sum, the Board concludes that the Judge did not abuse his discretion in failing to consider the late-filed response of Gay and that even if Gay's response should have been considered, the failure to do so was harmless error as Gay was not prejudiced thereby.

B.

In contending that the assessed penalties are arbitrary and capricious Gay asserts that the Judge failed to consider evidence with respect to its rapid compliance following notification of a violation, its economic condition, the difficulty in hiring skilled employees, and the unavailability of certain equipment at its No. 5 Mine.

The Judge's through, individual analysis of each of the 17 alleged violations adequately demonstrates that all of the relevant evidence regarding the criteria of sec. 109(a)(1) of the Act was given full and fair consideration.

With respect to Gay's assertions dealing with competence of employees and the unavailability of equipment, the Board finds that such contentions, being merely general assertions without supportive evidence or testimony, are properly disregarded.

Regarding the alleged excessiveness, Gay references only one violation, 1 BCL, Mar. 24, 1975, wherein the Judge assessed a penalty of $500, the MESA Assessment Office having set a penalty of $82 for this same violation.

It is well settled that a hearing on a petition for civil penalty assessment is de novo and that pursuant to 43 CFR 4.545(c) the Judge is not bound by the informal proposal for assessment made by the Assessment Office. *See Black Watch Coal Corporation*, 6 IBMA 252, 1976-1977 OSHD par. 20,894 (1976); *Boggs Construction Company*, 6 IBMA 145, 1976-1977 OSHD par. 20,724 (1976); *Old Ben Coal Company*, 4 IBMA 198, 222, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975); *Buffalo Mining Company*, 2 IBMA 226, 246, 80 I.D. 630 (1973); *Spring Branch Coal Company*, 2 IBMA 154, 158, 80 I.D. 438, 1971-1973 OSHD par. 16,240 (1973).

The penalties assessed herein are amply supported by the record and, therefore, will not be disturbed on appeal by the Board.

The Board concludes that the Judge gave full and fair consideration to all relevant testimony and evidence and that the findings, conclusions and resulting assessments made with respect to the violations at issue herein are supported by the record.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED. IT IS FURTHER ORDERED that Gay Coal, Inc. pay the penalties assessed in the total amount of $3,500

within 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.
Administrative Judge.

WE CONCUR:

DAVID DOANE,
Chief Administrative Judge.

LOUIS E. STRIEGEL,
Administrative Judge.

LONE STAR STEEL COMPANY

7 IBMA 257

Decided *March 15, 1977*

Appeal by Lone Star Steel Company from that part of an initial decision by Administrative Law Judge John R. Rampton, Jr. (Docket No. DENV 75-56-P) dated July 7, 1976, assessing a civil penalty of $50 for one violation pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Appeals

In a civil penalty proceeding, where an Administrative Law Judge applies an amended version of a mandatory standard alleged to have been violated in lieu of the version in effect at the time the citation was issued, he errs, and where he has made all of the basic findings necessary to apply the correct version of the pertinent mandatory standard to the facts, the Board may so apply the correct standard in the interests of saving time and expense, rather than remanding. 30 U.S.C. § 819 (1970); 43 CFR 4.603, 4.605, 4.505(b).

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Protective Equipment

Under 30 CFR 77.403, 36 FR 9364, May 22, 1971, an operator was obliged to provide front-end loaders with roll protection, conditioned, however, on there being a necessity therefor, and when there was only an extremely slight chance of roll over, there was no such necessity and accordingly no obligation to do so.

APPEARANCES: Jerry J. Fulton, Esq., for appellant, Lone Star Steel Company; Sam E. Taylor, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE STRIEGEL

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

The instant proceeding concerns a sec. 104(b), 30 U.S.C. § 814(b) (1970), notice of violation, Notice No. 2 CED, issued on Aug. 8, 1973, to Lone Star Steel Company (Lone Star) at its Starlight Mine in McCurtin, Oklahoma. Mr. Clyde Davis, a duly authorized representative of the Mining Enforcement and Safety Administration (MESA), cited a violation of 30 CFR 77.403,[1] and described the violative condition thus:

[1] The language of 30 CFR 77.403 reads:
"Forklift trucks, front-end loaders, and bulldozers shall be provided with substantial can-

The front-end loader, serial No. 87A3359, operating in pit number one was not equipped with roll protection.

After compliance with all required procedural prerequisites a hearing was held on Feb. 24, 1976, at Fort Smith, Arkansas. On July 7, 1976, Administrative Law Judge John R. Rampton, Jr., (Judge) issued an initial decision in which he concluded, *inter alia*, that a violation of 30 CFR 77.403a occurred and assessed a civil penalty of $50 therefor.

A Notice of Appeal from the Judge's opinion was filed, by Lone Star, with the Board on July 26, 1976. A "Brief of Appellant" was filed by Lone Star with the Board on Aug. 12, 1976.

On Aug. 30, 1976, MESA filed a "Motion for Additional Time in which to File Appellee's Brief." There being no objection from Lone Star to the motion, the motion was granted. MESA subsequently filed its brief on Sept. 7, 1976.

Contentions of the Parties

Lone Star contends a more stringent standard than was in existence at the time of the alleged violation was considered by the Judge and furthermore, had the Judge applied the correct standard, *i.e.*, the standard which was in existence at the time of the alleged violation to the evidence adduced at the hearing, he would have concluded there was, in fact, no violation.

While MESA conceded the Judge erroneously applied a standard nonexistent at the time of the violation to the evidence, it argues the Judge would have reached the same conclusion had he used the proper standard. MESA therefore argues the Judge committed harmless error.

Issue Presented on Appeal

Whether the evidence of record is sufficient to establish that MESA proved a violation of the regulation cited in the sec. 104(b) Notice of Violation, No. 2 CED, Aug. 8, 1973.

Discussion

The Board, on more than one occasion, has previously held that a Misstatement by an Administrative Law Judge which is deemed to be harmless error is not sufficient to disturb the findings of the Administrative Law Judge.[2]

There is, however, the strong implication in those cases that if the evidence of record, upon correction of the error, would not support the Judge's conclusion, justice would require further scrutiny.

[1] The standard which Lone Star is alleged to have violated is 30 CFR 77.403 which reads as follows:

Forklift trucks, front-end loaders, and bulldozers, shall be provided with substantial canopies and roll protection when necessary to protect the operator.

opies and roll protection when necessary to protect the operator." The regulation first appeared at 36 FR 9364, May 22, 1971.

[2] *Zeigler Coal Company*, 3 IBMA 78, 81 I.D. 173, 1973–1974 OSHD par. 17,615 (1974); *Peggs Run Coal Company*, 3 IBMA 404, 81 I.D. 669, 1974–1975 OSHD par. 19,065 (1974).

The standard which the Judge used in his decision is an amended version of the same regulation. The amendment first appeared in the *Federal Register* on June 28, 1974, at 39 FR 24007 (more than 10 months after the issuance of the Notice of Violation in question). The corresponding pertinent portion of the amended regulations is 30 CFR 77.403(a) which reads as follows:

> All rubber-tired or crawler-mounted self-propelled scrapers, front-end loaders, dozers, graders, loaders and tractors, with or without attachments, that are used in surface coal mines or the surface work areas of underground coal mines shall be provided with rollover protection structures * * *.

The obvious difference is that while the regulation Lone Star is accused of having violated is conditional, *i.e.*, "* * * (rollover protection) shall be provided * * * when necessary to protect the operator," the amended regulation is unconditional, *i.e.*, "All * * * front-end loaders * * * shall be provided with rollover protective structures * * *."

[2] In the Judge's summation of the relevant evidence in the record he concluded that the subject piece of equipment was being operated in an area "* * * 80 feet wide with a 3% grade"; that this piece of equipment "* * * would never leave the pit except when the excavation on the pit was completed and a drag line brought up behind it to start another pit"; and that "* * * the chances of a roll-over were extremely slight."[3] It is obvious, therefore, that canopies and roll protection were not necessary in this circumstance to protect the operator, and we so find.

The Board is of the opinion that in light of the Judge's findings of fact, set out above, there was no violation of 30 CFR 77.403 as that regulation existed when the subject notice was issued.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order with respect to Notice of Violation, No. 2 CED, Aug. 8, 1973, IS REVERSED, the assessment of penalty SET ASIDE, and said Notice IS VACATED.

LOUIS E. STRIEGEL,
Administrative Judge.

WE CONCUR:

DAVID DOANE,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, Jr.,
Administrative Judge.

APPEAL OF EKLUTNA, INC.

1 ANCAB 305

Decided *March 15, 1977*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management, in reserving easements

[3] Page 5 of the Judge's decision.

in Patent #50–74–0164, dated June 10, 1974, and Interim Conveyance #002, dated June 13, 1974, and issued pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decision determining jurisdiction and Ordering further response.

1. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Easements: Review

For the purpose of determining whether or not the Secretary of the Interior retains jurisdiction to review easement interests reserved to the Federal government, interim conveyance and patent, pursuant to 43 CFR 2650.0–5(h) and (i), are documents of equal significance in the granting of title under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976).

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Conveyances: Generally

When an interim conveyance and/or patent has been issued pursuant to the Alaska Native Claims Settlement Act, the Secretary of the Interior and this Board lose all authority and jurisdiction over those interests in land which have been conveyed.

3. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Easements: Review

Pursuant to 43 CFR 2650.4–7(c)(1) and Secretarial Order No. 2982, the Secretary of the Interior does have jurisdiction to review those easement interests reserved to the Federal government in an interim conveyance or patent issued under the Alaska Native Claims Settlement Act.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Easements: Review

Under 43 CFR Part 4, Subpart J, and 43 CFR 2650 appeals to the Secretary under ANSCA relating to land selection are to the Alaska Native Claims Appeal Board. In the absence of regulations establishing a procedure by which the Secretary will review easements reserved in conveyances as contemplated by 43 CFR 2650.4–7(c)(1) and Secretarial Order No. 2982, the Board is not precluded from exercising the Secretary's authority to review easement reservations when such review is requested through an appeal to the Board.

5. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Easements: Review

When an interim conveyance or patent has issued, the Secretary of the Interior is without jurisdiction to reserve any easements not originally contained in the conveyance, or to deprive the grantee of the interim conveyance or patent of any interest conveyed therein.

APPEARANCES: John W. Burke, Esq., Office of the Regional Solicitor, on behalf of the State Director, Bureau of Land Management; Saul R. Friedman, Esq., firm of Rice, Hoppner, Blair & Hedland, and Edward G. Burton, Esq., firm of Burr, Pease and Kurtz, Inc., on behalf of Eklutna, Inc.; James Vollintine, Esq., John R. Snodgrass, Esq., and James D. Linxwiler, Esq., on behalf of Cook Inlet Region, Inc.; James N. Reeves, Esq.,

Assistant Attorney General, on behalf of the State of Alaska.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

In this case, Eklutna, Inc., and Cook Inlet Region, Inc., have appealed the reservation of easements in a patent dated June 10, 1974, and an interim conveyance dated June 13, 1974, issued to Eklunta, Inc., by the Bureau of Land Management. Eklunta alleges that these reservations are in violation of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and affect their selection rights in that these reservations cloud the title of Eklunta's selection. The Bureau of Land Management, through the Office of the Solicitor, argues that after patent and interim conveyance were issued, the Department of the Interior and this Board have no jurisdiction to adjudicate the terms or conditions of such conveyances.

This case was filed over two years ago by Eklunta, Inc. A decision was held in abeyance by this Board pending issuance of regulations by the Department of the Interior governing the reservation of easements. The Secretary of the Interior on Feb. 12, 1976, published in the Federal Register, Secretarial Order No. 2982, dated Feb. 5, 1976, which set forth guidelines for the reservation of easements, and published in the Federal Register on Mar. 18, 1976, Secretarial Order No. 2987, dated Mar. 3, 1976, which reserved easements for the transportation of energy, fuel, and natural resources. These Secretarial Orders were contested by several Alaska Native Regional Corporations in a lawsuit which has been referred to as *Calista Corporation, et al.* v. *Kleppe*, and which was filed on May 5, 1976, in the United States District Court, District of Columbia. The Board is also aware that several regional corporations, including Cook Inlet Region, Inc., recently signed procedural agreements with the Secretary of the Interior. However, since this agreement is not part of the record on this appeal, the Board makes no finding on its affect on the disposition of this case.

It appears that additional time may lapse before the resolution of the above-mentioned lawsuit. Therefore, the Board will now rule on those questions of law which will allow the parties to proceed to a conclusion of this appeal.

The threshold issue to be resolved is whether the Secretary of the Interior and this Board have jurisdiction over those easement interests reserved to the Federal government in an interim conveyance and/or patent issued pursuant to the Alaska Native Claims Settlement Act?

Appellant Eklutna asserts, without contradiction from the record, that:

* * * * *

At least in some instances, the only notice Eklutna has received respecting the

determination to reserve easements has been the reservation itself in the conveyance document. * * *

(Appellant's Brief on Jurisdiction, p. 2.)

* * * * *

Further, the patent and interim conveyance subject to this appeal were conveyed prior to the issuance of regulation 43 CFR 2650.7 (41 FR 14737, Apr. 7, 1976), requiring publication of the Bureau of Land Management's proposed decisions to convey land under ANCSA and allowing a 30 day appeal period.

There being no indication in the record that appellant Eklutna was given opportunity to appeal easement reservations prior to the issuance of interim conveyance and patent, the question of under what circumstances easements reserved in conveyances issued subsequent to publication may be appealed, does not arise in this case.

All parties agree that for purposes of determining ownership of land conveyed under ANCSA, interim conveyance, by regulation, confers the same legal status as patent.

"Interim conveyance" as used in these regulations means the conveyance granting to the recipient legal title to unsurveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law, subject only to confirmation of the boundary descriptions after approval of the survey of the conveyed land.

43 CFR 2650.0–5(h).

"Patent" as used in these regulations means the original conveyance granting legal title to the recipient to surveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law; or the document issued after approval of the survey by the Bureau of Land Management, to confirm the boundary description of the unsurveyed land.

43 CFR 2650.0–5(i).

"Conveyance" as used in these regulations means the transfer of title pursuant to the provisions of the act whether by interim conveyance or patent, whichever occurs first.

43 CFR 2650.0–5(j).

[1] The Board finds for purposes of determining whether or not the Secretary of the Interior retains jurisdiction to review easement interests reserved to the Federal government, that interim conveyance and patent are documents of equal significance in the granting of title under the Alaska Native Claims Settlement Act, pursuant to 43 CFR 2650.

In this appeal, the Department of the Interior issued an interim conveyance and a patent which contained reservations that the appellant claims are erroneous. There is no indication that the appellant Eklutna, Inc., refused to accept the patent and interim conveyance as issued. They did, however, file an appeal with this Board within two months of the issuance of the patent and interim conveyance concerning reservation of easements.

The Bureau of Land Management, through the Office of the Regional Solicitor, argues that ap-

pellant's appeal must be dismissed because:

* * * * *

Irregardless of the merits of the inclusion of the disputed reservations, the specific issue before the Board concerns the authority of the Secretary of the Interior to adjudicate the terms or conditions of an issued patent or interim conveyance. * * *

(Answer to Appellant's Brief on Jurisdiction, p. 1.)

* * * * *

Citing *Moore* v. *Robbins*, 96 U.S. 530, 533 (1877), BLM argues that:

* * * With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. * * * If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. * * *

Asserting that the Department has consistently upheld the finality of a patent in its own decisions (*Everett Elvin Tibbets*, 61 I.D. 397, 399 (1954); *Clarence March*, 3 IBLA 262 (1971); *Lewis* v. *Superintendent of the Eastern Navajo Agency*, 4 IBIA 147, 150, 82 I.D. 521 (1975)), the BLM concludes that:

* * * * *

* * * the distinction which Eklutna attempts to make in its brief that this proceeding is different from those from which the general rule was formulated since "here the *patentee seeks* review and necessarily acknowledges the jurisdiction of the Secretary" is without merit since a review of the discretion of the Secretary in this instance would necessarily be a review of "errors of law" and could only be adjudicated in a judicial proceeding. (Answer to Appellant's Brief on Jurisdiction, p. 3.)

* * * * *

In *Moore* v. *Robbins*, *supra*, it was held that once a patent for public land has been issued, recorded and accepted, all authority or control over the land or title to the land passes away from the land department. This case involved the question of contested rights between private parties to a certain parcel of land.

In the case of *United States* v. *Schurz*, 102 U.S. 378 (1880), it was held that once a patent was signed, sealed, countersigned and recorded in the proper recording office, the power of the government officials to deal with a patent ceased. The court ruled that a patentee could compel the government to deliver the patent since the patentee's rights in the land had vested.

[2] The Board, therefore, concurs in part with the BLM's position, and finds that when an interim conveyance and/or patent has been issued, the Secretary of the Interior and this Board, lose all authority and jurisdiction over those interests in lands which have been conveyed. *Moore* v. *Robbins*, *supra*; *United States* v. *Schurz*, *supra*.

However, in this appeal, appellant is not questioning the title to land conveyed and is not asking the Secretary to cancel or annul a patent from the government to a third party. Eklutna, Inc., and Cook Inlet Region, Inc., merely contend that the reservation to the government

of certain interests in their patent were improperly made and seek to have such interests conveyed to them.

The issue remains then, as to whether the Secretary of the Interior maintains jurisdiction over easements reserved in an interim conveyance and/or patent, and if so, whether the terms of such easements may be adjudicated by the Secretary and this Board.

The Department of the Interior has recognized its jurisdiction to review, both by regulation and Secretarial Order. 43 CFR 2650.4–7(c)(1) states:

> The Secretary shall terminate a public easement if it is not used for its purpose by the date specified in the conveyance, but in any event not later than Dec. 18, 2001, or if he finds that conditions are such that its retention is no longer needed for public use or governmental function. * * *

Secretarial Order No. 2982, published in the Federal Register Feb. 12, 1976, sec. 4, *Policy* states:

> * * * * *
>
> * * * All public easements will be periodically reviewed to determine if they continue to be required or if they should be vacated.
>
> * * * * *

[3] The Board finds that pursuant to 43 CFR 2650.4–7(c)(1) and Secretarial Order No. 2982, the Secretary of the Interior does have jurisdiction to review those easement interests reserved to the Federal government in an interim conveyance and/or patent issued pursuant to the Alaska Native Claims Settlement Act.

[4] It is anticipated that the Secretary of the Interior will, at some future date, publish regulations establishing review procedures for those easement interests reserved to the Federal government in an interim conveyance or patent issued under ANCSA. However, under current regulations, 43 CFR Part 4, Subpart J, and 43 CFR 2650 appeals to the Secretary under ANCSA relating to land selection are to the Alaska Native Claims Appeal Board. In the absence of regulations establishing a procedure by which the Secretary will review easements reserved in conveyances as contemplated by 43 CFR 2650.4–7(c)(1) and Secretarial Order No. 2982, the Board is not precluded from exercising the Secretary's authority to review easement reservations when such review is requested through an appeal to the Board.

The Board has determined the above-made findings that the Secretary of the Interior, and this Board, have jurisdiction over easement interests reserved to the Federal government in conveyances under ANCSA, do not conflict with principles of *Moore* v. *Robbins*, *supra*, or with other similar cases cited by parties to this appeal, as none of those cases hold that the power to exercise jurisdiction over interests retained by the government in pat-

ented land ceases to exist with the issuance of patent.

However, the principle established in *Moore*, *supra*, that, "with title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed," does act to limit the jurisdiction of the Secretary and this Board over review of interests reserved in conveyances issued under ANCSA. Because interim conveyance and/or patent, removes the land interests conveyed from jurisdiction of the Secretary, subsequent review of interests reserved to the Federal government is necessarily confined to only those reserved interests identified in the conveyance document.

[5] The Board therefore finds that once an interim conveyance or patent issues, the Secretary of the Interior is without jurisdiction to reserve any easements not originally contained in the conveyance, or to deprive the grantee of the interim conveyance or patent of any interest conveyed therein.

In view of the length of time which has elapsed since the original pleadings were filed in this case, the Board requests that Eklutna, Inc., review its pleadings in light of Secretarial Order No. 2982, Secretarial Order No. 2987, and the *Calista, et al* v. *Kleppe* lawsuit. This Board Orders that the parties to this appeal who wish to file supplemental briefing, documentation, or request a conference with this Board, do so within 30 days from the date of this Order.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Chairman.

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

WEBSTER COUNTY COAL CORPORATION

7 IBMA 264

Decided March 16, 1977

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Cook in Docket No. BARB 76-78-P dismissing a petition for the assessment of a civil penalty.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Negligence

An operator can be liable for a civil penalty under sec. 109 of the Act even though there is no showing of negligence on his part. Negligence is considered solely in determining the amount of the penalty.

APPEARANCES: Robert J. Phares, Esq., Acting Assistant Solicitor, Stephen Kramer, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On Nov. 30, 1973, Order of Withdrawal No. 1 LEB was issued pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act (Act) at the Dotiki Mine of Webster County Coal Corporation (Webster Co.). This order was issued following a fatality arising out of a violation of 30 CFR 75.1726(b) in that work was being performed on a loading machine without the head blocked in a raised position.[1] A petition for the assessment of a civil penalty based on this violation was filed against Webster Co. on Oct. 7, 1975, by the Mining Enforcement and Safety Administration (MESA).

An evidentiary hearing was waived below and the parties requested that the Judge decide the matter at issue on the pleadings and written record, including stipulations and proposed findings to be submitted by the parties. On Apr. 12, 1976, MESA filed a recommended penalty and a reply thereto was filed by Webster Co. on Apr. 26, 1976.

In a decision issued Oct. 15, 1976, the Judge dismissed the petition for assessment of penalty, concluding that Webster Co. could not be charged with a violation of 30 CFR 75.1726(b) in the absence of negligence.

MESA filed an appeal with the Board on Oct. 29, 1976, contending that an operator can be charged, in a petition for assessment of a civil penalty, even though there is no negligence on its part. MESA requests that the Board impose a penalty of $3,750 pursuant to its de novo review power. Webster Co. did not file any reply brief nor otherwise participate in this appeal.

Issue on Appeal

Whether the Judge erred in considering the issue of operator negligence in determining whether the operator could be charged with a violation.

Discussion

In support of his conclusion that the operator could not be charged because it was not negligent in causing this violation, the Judge relied on a footnote to the Board's opinion in *North American Coal Corporation*, 3 IBMA 93, 81 I.D. 204, 1973-1974 OSHD par. 17,658 (1974), as a rule of law.

The rule applicable in this case, however, was first enunciated by the Board in *Valley Camp Coal Company*, 1 IBMA 196, 79 I.D. 625, 1971-1973 OSHD par. 15,385 (1972), and reaffirmed in *Valley Camp Coal Company*, 1 IBMA 243, 79 I.D. 730, 1971-1973 OSHD par.

[1] 30 CFR 75.1726(b):
"(b) No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

15,390 (1972), and has consistently been adhered to since that time. The question of whether an operator can be liable for civil penalties even though there is no showing of negligence on his part, was never discussed in *North American*, *supra*, nor raised or argued by the parties.

The operator's contention in *North American* was that he had fully complied with the cited regulation and therefore was not in violation of 30 CFR 75.1720. The regulation directed the operator to *require* a miner to wear goggles. On the facts of that case the Board found that the operator had complied with the standard by providing glasses and replacements, by having a system designed to assure the wearing of glasses, and by enforcing his requirement with due diligence. Based on the express provision of this regulation, the Board found that the operator was in compliance.

The footnote to *North American*, relied upon by the Judge, was not intended to, nor did it in fact, set out any rule of law contrary to the holding in the case. The footnote stated:

> [10] Where a miner intentionally, knowingly, recklessly, or negligently fails to comply with a requirement designed solely for his own protection, and where such failure does not endanger or create a hazard to anyone but himself, and where the operator has not condoned such conduct, we do not believe a violation may properly be charged to the operator. *Cf. Cam Industries, Inc.*, CCH Employment Safety and Health Guide par. 15,113 (1972).

North American, *supra* at 108–109, 81 I.D. at 211, 1973–1974 OSHD at 22,062, n. 10.

Rather than setting out a rule of law, its intent was merely to reflect that a similar result was reached by OSHRC and to suggest that the result may be different where any operator condones the intentional, or negligent non-use of safety glasses by a miner. In such event he may be held to be in violation of not fulfilling his obligations under the standard.

The Board concludes that the Judge erroneously considered whether the operator was negligent in causing a violation in determining whether it could be charged with such violation.

Based upon the stipulation of the parties as to the underlying facts, the Board finds a violation of 30 CFR 75.1726(b). Having found a violation to have existed, the Board has decided to exercise its de novo review power in imposing a civil penalty. The absence of negligence by Webster Co. and its subsequent good faith compliance were also stipulated by the parties and are considered in mitigation of an otherwise higher penalty. The Judge made findings with respect to the operator's history of previous violations, the appropriateness of the penalty in relation to the size of the operator's business, and the effect of a penalty on its ability to continue in business which we hereby adopt. The record is therefore

complete pursuant to the mandate of sec. 109(a)(1).

Owing to the serious nature of the violation, which resulted in a fatality, MESA recommended a penalty of $3,750. In its response thereto before the trial judge Webster Co. merely asserted that such an amount "could negatively affect future safety efforts." No further contentions or arguments were offered by Webster nor was evidence offered in support of the above assertion. On appeal MESA urges the Board to impose a penalty in this amount and Webster Co. has filed no reply thereto. In light of the foregoing, the Board has analyzed the penalty sought, mindful of the statutory criteria, and has concluded that this amount is fair and reasonable. The Board, therefore, adopts MESA's recommendation and imposes a penalty of $3,750.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS REVERSED, and that a penalty of $3,750 is HEREBY ASSESSED for the violation described in Order of Withdrawal No. 1 LEB, Nov. 30, 1973, and that Webster County Coal Corporation IS HEREBY ORDERED to pay this penalty assessment on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, Jr.,
Administrative Judge.

WE CONCUR:

DAVID DOANE,
Chief Administrative Judge.

LOUIS E. STRIEGEL,
Administrative Judge.

ALASKA OIL AND MINERALS CORPORATION

29 IBLA 224

Decided *March 23, 1977*

Appeal from decision of the Manager, Alaska Outer Continental Shelf Office, Bureau of Land Management, denying request for reconsideration of a bid submitted in Outer Continental Shelf Oil and Gas Lease Sale No. 39.

Set aside and remanded.

1. Oil and Gas Leases: Competitive Leases—Outer Continental Shelf Lands Act: Generally

In order to constitute a clear and definite offer, a bid for an outer continental shelf oil and gas lease must adequately identify the tract which is the subject of the bid.

2. Federal Employees and Officers: Generally—Oil and Gas Leases: Competitive Leases—Outer Continental Shelf Lands Act: Generally

It is not the responsibility of Bureau of Land Management employees to decipher ambiguous bids for outer continental shelf oil and gas leases in order to save the bidder from the consequences of his own negligence. A bid which was apparently intended for one tract and contains data appropriate for that tract, but identifies a different tract as the subject of the bid, is properly considered, and rejected as too low, for the identified tract.

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

A rejected bid in an outer continental shelf oil and gas lease sale may be reconsidered and accepted when it is in the public interest to do so. The essential elements in allowing such a reconsideration are the fairness and impartiality of the sale toward all bidders. In a situation where a bid was initially rejected as too low for the tract identified in the bid and the bidder immediately requests reconsideration because he intended to bid for a different tract, where the tract number stated in the bid corresponds to the block number of the intended tract, where all other relevant data in the bid corresponds to the intended tract and only to the intended tract, and where no other person submitted a bid for the intended tract, it is proper to reconsider the bid to determine if it is in the public interest to accept the bid for the intended tract.

APPEARANCES: J. G. Cassity, President, Alaska Oil and Minerals Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Alaska Oil and Minerals Corporation appeals from the June 2, 1976, decision of the Manager, Alaska Outer Continental Shelf Office, Bureau of Land Management (BLM), denying its request for reconsideration of a bid it submitted in Outer Continental Shelf (OCS) Oil and Gas Lease Sale No. 39. Appellant alleges that it intended the bid to be considered for Tract No. 39–6, and it requested the reconsideration because BLM considered, and rejected, the bid as applicable to Tract No. 39–9. The OCS Manager denied the request for reconsideration because 43 CFR 3302.4(a) requires that a separate bid must be submitted for each lease unit described in the notice of sale.

OCS Lease Sale No. 39 involved 205 tracts, numbered 39–1 to 39–205, for which sealed bids could be submitted. The OCS Official Protraction Diagram, NO 7–1, Icy Bay, published at 41 FR 10797, describes the two tracts involved here as follows:

Tract No.	Block	Description	Hectares	Acreage
*	*	*	*	*
39–6	9	(1)	101. 17	250. 00
*	*	*	*	*
39–9	25	All	2304. 00	5693. 18
*	*	*	*	*

[1] That portion seaward of the three geographical mile line.

The bid submitted by appellant stated the following:

> The following bid is submitted for an oil and gas lease on the tract of the Outer Continental Shelf specific [*sic*] below:
> Tract No. 9 Total Amount Bid: $6,290.01
> Amount per Hectare: $62.17
> Amount of Cash Bonus Submitted with bid: $1,258.02

All the bids on OCS Lease Sale No. 39 were opened on Apr. 13, 1976. Since appellant's bid indicates "Tract No. 9," BLM considered it with the bids for Tract No. 39–9.

Appellant's bid was not the high bid for this tract and was therefore rejected.

On Apr. 14, 1976, appellant requested that its bid be reconsidered for Tract No. 39–6. At that time, and now on appeal, it argues that the digit "9" in the bid refers to block 9, not Tract No. 39–9, that dollar amounts in the bid do not fit the acreage of any tract but No. 39–6, and that no other bids were submitted on Tract No. 39–6. On appeal, appellant further argues that the Notice for OCS Lease Sale No. 39 did not require the bids to include any specific part of the descriptions of the tracts.

[1, 2] The rules and procedures for bidding on OCS leases are set out at 43 CFR Subpart 3302 and in the notice of this particular sale published in the Federal Register at 41 FR 10792. There is no express regulatory requirement concerning the description to be furnished for the tract sought. However, it is fundamental under basic contract principles that the bid must adequately identify the tract to constitute a definite and clear offer. *See, e.g.*, 17 Am. Jur. 2d *Contracts* §§ 31, 75 (1964); 17 C.J.S. *Contracts* § 36 (2) (1963); 1 WILLISTON ON CONTRACTS §§ 37, 42 (1957). There is certainly no difficulty in ascertaining how the parcel sought could be identified. Regulation 43 CFR 3302.1 refers to tracts to be offered for lease by competitive sealed bidding. The notice invited sealed bids for "tracts described in paragraph 12 herein." 41 FR 10792. That paragraph, as the quoted listing above shows, refers to the "Tract No.," which is a sequential number devised for Sale No. 39, to a "Block" number referring to the tract's location off the coast of Alaska, and then to other figures indicating how much of the "Block" is in the tract and the area of the tract in hectares and in acres. Furthermore, the notice of sale contained a suggested bid form which appellant followed. 41 FR at 10813. The first item in the suggested form, and the first item in appellant's bid, is headed "Tract No."; the other items relate to the amount of the bid.

The references to the "tract" in the notice and regulations obviously refer to the tract as it is listed under its tract number. Use of the tract number is the clearest means of identifying the parcels listed for competitive bidding. While it is true that the dollar amounts in appellant's bid are only compatible with the hectares in Tract No. 39–6, the bid identifies the tract as "Tract No. 9." In arguing that the single-digit "9" coincides with the block number in Tract No. 39–6, appellant ignores the fact that in the bid, the number is clearly labeled "Tract No."

It is not the responsibility of BLM employees to decipher ambiguous bids in order to save the bidder from the consequences of his own negligence. *See Stanley J. Pirtle*, 26 IBLA 348 (1976); *Richard V. Bowman*, 19 IBLA 261 (1975). To require BLM to inter-

pret a bid in order to determine what tract is applied for, other than by the tract number listed in the bid, would open a Pandora's box of complications disruptive of an orderly bidding process. Therefore, the Alaska OCS office could not originally have considered the bid for any parcel other than Tract No. 39–9, the tract identified in the bid. Since the bid was not the high bid for Tract No. 39–9, it was properly rejected for that tract. Appellant's concern, however, is with Tract No. 39–6 and whether its subsequent clarification of the correct identification of the tract sought may now be considered.

[3] Although the OCS leasing regulations do not authorize reconsideration of rejected bids, neither do they prohibit it. *See* 43 CFR Part 3300. Regarding reconsideration of a rejected bid for an upland competitive oil and gas lease, this Board found that BLM does have the authority to reconsider, and accept, a rejected bid. *Phillips Petroleum Co.*, 28 IBLA 175 (1976). The Board, at 177 of the *Phillips* decision, relied on the following principle as the basis of its holding:

> The Comptroller General has held repeatedly that the public interest in protecting the integrity of the competitive bidding system is so great that the United States may accept a once-rejected bid when it is in the public interest to do so. 53 Comp. Gen. 775 (1974); 48 Comp. Gen. 19 (1968); 46 Comp. Gen. 371 (1966); 42 Comp. Gen. 604 (1963).

We believe the same principle is applicable to OCS oil and gas lease sales. The OCS Manager may reconsider and accept rejected bids if it is in the public interest to do so. This requires a two-step process: first, does the situation warrant reconsideration; and second, if reconsidered, is it in the public interest to accept the bid.

Unlike the situation in *Phillips Petroleum Co.*, *supra*, appellant is requesting reconsideration of a bid that requires clarification. In the area of competitive bidding for mineral leases, the Department of the Interior has referred to decisions of the Comptroller General for general guidance in the processing of requested bid modifications and reconsiderations. For example, in *Malcolm N. McKinnon*, A–29979 (June 12, 1964), the sole bidder for a competitive coal lease requested modification of his accepted bid in the form of a reduction in the required minimum bonus payment. In denying the request, the Assistant Solicitor quoted decisions of the Comptroller General, particularly 31 Comp. Gen. 660, 661 (1952):

> With respect to the matter of whether a bidder may be permitted to change a provision in its bid subsequent to the opening of the bid, it has been held that if the provision be material and in any way affects the price, quality, quantity, limits the bidder's liability for delays or for failure to perform, or the like, a change may not be permitted. See 17 Comp. Gen. 554; 20 *id.* 4; 30 *id.* 179. * * *

In *North American Coal Corp.*, 74 I.D. 209 (1967), the high bid for a competitive coal lease was rejected because the bidder failed to include

statements of citizenship and coal lease interests with his bid. The Department allowed a late filing of the required statements under Departmental regulations and, relying on decisions of the Comptroller General, accepted the high bid.[1] The Solicitor reasoned, as summarized by this Board in *Phillips Petroleum Co., supra* at 177, that

> * * * the essential elements in competitive sales are fairness and impartiality to all bidders and not an undeviating compliance with the regulations. * * *

As shown by the above decisions, the question of reconsideration and/or clarification requires an examination of the reason the bid was rejected and the effect the requested action will have on the bidding process. Appellant's bid was originally rejected on Tract No. 39–9 because it was too low. The case file indicates that appellant's bid was considerably lower than the successful high bid on that tract. Appellant is not attempting to change any part of its bid. Since there were no other bids submitted for Tract No. 39–6, no other bidders are unfairly prejudiced by reconsideration of appellant's bid for that tract. Except for the confusion over the proper tract number, appellant's bid complies in all respects with the description of Tract No. 39–6. Moreover, Tract No. 39–6 has a total area (101.17 hectares or 250 acres) which is different than the total area in any of the other 204 tracts listed in OCS Lease Sale. No. 39. The differences between Tract No. 39–6 and Tract No. 39–9 are sufficient to remove any question that appellant's timely request for reconsideration was not an attempt to have one bid considered for two tracts in violation of 43 CFR 3302.4(a).

We note that regulation 43 CFR 3302.5 provides, *inter alia*, that if the authorized officer fails to accept the highest bid for a lease within 30 days after the date on which the bids are opened, all bids for that lease will be considered rejected. This regulation, however, does not directly or impliedly prevent reconsideration of the bid in the circumstances of this case. Therefore, since there is no legal barrier to reconsideration, we conclude the public interest will best be served by reconsidering appellant's bid for Tract No. 39–6. On remand, all else being regular, the Alaska OCS manager should determine whether it is in the public interest to accept the bid at this time or whether the bid should be rejected on its merits. *See Phillips Petroleum Co., supra;* 53 Comp. Gen. 737, 739–40 (1974).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further con-

[1] A key distinction was made in this decision between bids on competitive mineral leases and offers on noncompetitive mineral leases. For noncompetitive mineral lease offers, strict compliance with regulations is required because the essential element is determining the *first* qualified offeror. For competitive lease offers, however, the amount of the bid replaces priority of filing as the determining factor. *Id.* at 211; *Ballard E. Spencer Trust, Inc.*, 18 IBLA 25, 28 (1974), *aff'd, Ballard E. Spencer Trust, Inc.* v. *Morton*, 544 F.2d 1067 (10th Cir. 1976); *Silver Monument Minerals, Inc.*, 14 IBLA 137, 139 (1974).

sideration consistent with this opinion.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

MARTIN RITVO,
Administrative Judge.

APPEAL OF DIVIDE CONSTRUCTORS, INC., SUBCONTRACTOR TO GRANITE CONSTRUCTION COMPANY

IBCA-1134-12-76

Decided *March 29, 1977*

Contract No. and Master Document No. 6/07/DC71440, Specifications No. DC-7144, Bureau of Reclamation.

Dismissed.

1. Contracts: Construction and Operation: Privity of Contract—Contracts: Construction and Operation: Subcontractors and Suppliers—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal: Rules of Practice: Appeals: Standing to Appeal

An appeal taken by a subcontractor in its own name is dismissed where the Board finds the subcontractor has no standing to invoke the provisions of the Disputes Clause as a means of securing an adjudication by the Board of the rights and obligations of the contesting parties.

2. Contracts: Construction and Operation: Privity of Contract—Contracts: Construction and Operation: Notices—Contracts: Construction and Operation: Subcontractors and Suppliers—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Standing to Appeal

An appeal is dismissed where the prime contractor has stated that nothing will be done to further an appeal taken by a subcontractor in its own name and the Board finds that the action of the prime contractor in giving the Government written notice of a potential claim of changed conditions by the subcontractor and any statements made by the prime contractor endorsing the potential claim at the time such notice was given are not a sufficient basis upon which to ground jurisdiction over the appeal.

APPEARANCES: Mr. Joseph M. Fanganello, Attorney at Law, Mr. David D. Dominick, Attorney at Law, Cogswell, Chilson, Dominick & Whitelaw, Denver, Colorado, for the appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

By Order to Show Cause dated Jan. 14, 1977, the parties were apprised of the apparent absence of any privity (contractual relationship) between the appellant subcontractor and the Government and the absence of any reference to a find-

ing [1] by the contracting officer from which the instant appeal was taken. The Order notified the parties of the Board's intention to dismiss the appeal for want of jurisdiction, unless, based upon any submission made by them within the time allowed, the Board should conclude otherwise.

Only the appellant subcontractor has responded to the Order to Show Cause.[2] The submission consists of (i) a copy of a two-page letter dated Feb. 2, 1977, to Elber Pybrum, Esq. (apparently an attorney for Granite Construction Company), from Mr. David D. Dominick, an attorney representing Divide Constructors, Inc., and (ii) a copy of a three-page "Reply to Order to Show Cause" prepared for the signature of Mr. Elber Pybrum but not signed by him. The latter document is also dated Feb. 2, 1977, and is accompanied by Exhibits A and B. The exhibits consist of copies of the following: (i) letter dated Aug. 6, 1976, from Divide Constructors, Inc., to Granite Construction Company requesting the latter to "notify the Bureau of Reclamation immediately of a potential claim for changed conditions at the Parry Peak Quarry"; (ii) letter dated Aug. 12, 1976,[3] from John W. Larson, Construction Engineer, Bureau of Reclamation to Granite Construction Company outlining measures to be taken before conditions at the quarry could be investigated; and (iii) letter dated Sept. 13, 1976,[4] to Granite Construction Company in which Mr. Larson summarizes the results of the investigation made at the quarry and concludes that no differing site condition exists [5] as contended by Granite and its subcontractor, Divide Constructors, Inc. The letter addressed to Mr. Pybrum under date of Feb. 2, 1977, is quoted, in part, below:

> In your recent letter of Jan. 25, 1977, you stated that Granite Construction

[1] A contracting officer's final decision is ordinarily a prerequisite to the exercise by the Board of its appellate jurisdiction, *VTN Colorado, Inc.*, IBCA-1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542. To remand the instant appeal would serve no useful purpose, however, where, as here, the record before us is sufficient for a decision by the Board on the other question presented which is, in any event, controlling (*i.e.*, the apparent absence of any privity between the appellant subcontractor and the Government).

[2] The appeal was docketed in the name of the prime contractor, Granite Construction Company. The Order to Show Cause adhered to the same format as the docketing notice insofar as the caption of the order is concerned. The apparent failure of the prime contractor to espouse the appeal was reflected in the text of the order, however, which noted that while the appeal had been docketed in the name of Granite Construction Company, the Notice of Appeal itself disclosed (i) that the appeal had been taken by an attorney representing Divide Constructors, Inc., and (ii) that the appeal involves a dispute between that company and Granite Construction Company. The caption of the instant appeal has been corrected to accurately reflect the relationship of the two contractors to each other and to the Government.

[3] In especially pertinent part the letter reads:

> "The information furnished in your letter and Divide Contractors, Inc. letter, both dated Aug. 6, 1976, has been reviewed and does not appear to support your allegation of changed condition. * * *"

[4] "Based on the Government's findings after cleanup of loose materials, I do not agree that a differing site condition exists as contended by your and your subcontractor's letters, both dated Aug. 6, 1976, and I consider the specifications provisions, test cores, and logs adequately cover the rock conditions in the quarry."

[5] The contract between Granite Construction Company and the Government, dated Aug. 12, 1975, includes the General Provisions for Construction Contracts set forth in Standard Form 23-A (Oct. 1969 Edition).

Company would do nothing to further the Notice of Appeal filed on behalf of Divide Constructor's, Inc., based on your belief that the Bureau of Reclamation had nothing to do with Granite Construction Company's defaulting Divide Constructor's, Inc. We do not agree with this position and demand that Granite Construction Company file, on behalf of Divide Constructors, Inc., a Reply to the Order to Show Cause, a draft Reply being enclosed herein, for the following reasons:

* * * * *

2. As seen from the enclosed draft Reply, Granite Construction Company's termination and default of Divide Constructors, Inc. was the direct and proximate result of the Government's failure to recognize changed conditions at Parry Peak Quarry which resulted in the impossibility for Divide Constructors, Inc. to perform according to the subcontracts. * * *

A Reply to Order to Show Cause must be filed with the Board of Contract Appeals, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203 on or before Monday, February 7, 1977. The enclosed draft Reply can be utilized or modified as necessary for the prosecution by Granite Construction Company of this appeal on behalf of Divide Constructors, Inc. In order to ensure that a Reply is filed, we need telephonic confirmation of Granite Construction Company's intention to file such a Reply on behalf of Divide Constructors, Inc., on or before 12:00 noon, MST, Friday, Feb. 4, 1977.

* * * * *

The record before us does not disclose what response, if any, Granite Construction Company made to the letter of Feb. 2, 1977, from which we have quoted above. No "Reply to Order to Show Cause" has been filed with the Board by Granite Construction Company, however, and that Company has not otherwise communicated with the Board in any way with respect to the instant appeal.

DECISION

The principal question presented by the appeal is whether a subcontractor under a standard form of construction contract may prosecute an appeal in its own name when the prime contractor refuses to prosecute an appeal on behalf of the subcontractor either directly or by allowing the subcontractor to prosecute the appeal in the prime contractor's name. A second question raised by this record is whether the actions of the prime contractor in relaying to the Government the subcontractor's notice of a potential claim of changed conditions and apparently associating itself in some manner with the subcontractor's contentions with respect thereto are sufficient grounds for our retention of jurisdiction.

The case of *United States* v. *Blair*, 321 U.S. 730 (1944), and its progeny [6] are considered to be dispositive of the jurisdictional questions presented by the instant appeal. In *Blair* the Supreme Court stated at pages 737–38:

Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express

[6] For an early application of the Blair rationale by the Board, *see Wiscombe Painting Company*, IBCA–78 (Oct. 26, 1956), 56–2 BCA par. 1106, at 2850–51.

or implied contract between him and the Government. *Merritt* v. *United States*, 267 U.S. 338. But it does not follow that respondent is barred from suing for this amount. Respondent was the only person legally bound to perform his contract with the Government and he had the undoubted right to recover from the Government the contract price for the tile, terrazzo, marble and soapstone work whether that work was performed personally or through another. This necessarily implies the right to recover extra costs and services wrongfully demanded of respondent under the contract, regardless of whether such costs were incurred or such services were performed personally or through a subcontractor. * * *

[1] It is clear that a board of contract appeals will not refuse to retain jurisdiction over a changed conditions claim presented by a prime contractor on behalf of his subcontractor.[7] In the case with which we are concerned, however, the prime contractor has not only failed to present the claim on behalf of the subcontractor but has asserted that it would do nothing to further the appeal. There are no provisions in the prime contract or apparently in the subcontract[8] which authorize the subcontractor to take a direct appeal. The evidence of record negates any inference that the prime contractor either has authorized the use of its name in taking the instant appeal or has ratified the prosecution thereof. We therefore find that the subcontractor is without any standing to invoke the provisions of Clause 6, Disputes, from which the Board's jurisdiction is derived, as a means of securing an adjudication[9] by the Board of the rights and obligations of the contesting parties.

[2] Remaining for consideration is the effect of Granite Construction Company, as prime contractor, having forwarded to the Government the notice of a potential claim of changed conditions received from its subcontractor, Divide Constructors, Inc. The notice was given to Granite by Divide Constructors in the latter's letter of Aug. 6, 1976, and apparently transmitted to the Bureau of Reclamation by Granite's letter of the same date. While the record does not contain a copy of Granite's letter of Aug. 6, 1976, we have inferred from the construction engineer's letters of Aug. 12, 1976, and Sept. 13, 1976 (notes 3 and 4, *supra*), that at least that official considered Granite had espoused the contentions advanced by the appellant subcontractor in its letter of Aug. 6, 1976.

The only specific action Divide Constructors requested Granite to take in the letter of Aug. 6, 1976,

[7] *See*, for example, *A. S. Horner Construction Co.*, ABSCA No. 5334 (Aug. 26, 1959), 59-2 BCA par. 2321.

[8] The subcontract has not been made a part of the record; nor has the appellant subcontractor quoted or cited any provisions from the subcontract.

[9] *See Beacon Construction Co. of Mass., Inc.* v. *Prepakt Concrete Co.*, 375 F.2d 977, 981 (1st Cir. 1967) in which the Court stated:

"* * * For the requirement of privity is not merely technical, but reflects the purpose of the disputes clause. The Contracting Officer does not agree to act as general arbiter for the project; rather, his decision on disputes is made authoritative for the benefit of the government, to provide for efficient settlement of matters affecting the government's liability under the general contract. And, at least under the usual form of general contract, that liability is only to the general contractor, not to the subcontractors. * * *"

however, was to give immediate notice to the Government of a potential claim for changed conditions at Parry Peak Quarry in accordance with sec. 4 of the General Provisions. While we are without any specific knowledge of the contents of Granite's Aug. 6, 1976, letter to the Bureau of Reclamation, it appears highly unlikely that Granite's assertions were any stronger or more definite than those made by Divide Constructors in its letter to Granite of the same date, *i.e.*, conditions encountered at Parry Peak Quarry were potentially changed conditions within the meaning of sec. 4 of the General Provisions. We need not decide this question, however, since no matter what position Granite advanced in the Aug. 6, 1976, letter with respect to the changed conditions claim, it would not thereby have irrevocably committed itself to prosecuting such claim on behalf of the subcontractor, irrespective of what Granite's subsequent assessment of the changed conditions claim might be.

In this case Granite may have decided not to prosecute the changed conditions claim on behalf of the subcontractor as a result of having concluded that the analysis of the construction engineer (notes 3 and 4, *supra* and accompanying text) was sound or it may have conducted its own investigation and decided that there was little prospect that the matter would be resolved amicably at the contracting officer level or prosecuted successfully at the board level or in a court action.

There is no evidence in this case indicating that a decision by the contracting officer was ever requested. Even if the contractor had requested a decision by the contracting officer, however, and a decision adverse to the claim of changed conditions had been received, the contractor would not be precluded at that stage from refusing to prosecute the claim on behalf of the subcontractor any further, as our decision in *Young and Smith Construction Company*, IBCA–151 (June 18, 1958), 65 I.D. 274, 58–1 BCA par. 1803 makes clear. There the Board stated at 277:

> It is true, of course, that a prime contractor may file, with the contracting officer, a claim on behalf of its subcontractor, and appeal from an adverse determination by the contracting officer. The prime contractor presented the claims in the present case to the contracting officer on behalf of its subcontractor * * * but the prime contractor has wholly failed to give even an indication that it wishes to join in the appeal from the adverse decision of the contracting officer. The question presented is, therefore, whether the action of the prime contractor in filing the claims on behalf of the subcontractor sufficed also to ground the appeal.
>
> The Board must answer this question in the negative, since [C]lause 6 of the General Provisions of the contract—the "disputes" clause—clearly envisages two separate steps in the handling of a dispute "which is not disposed of by agreement." (65 I.D. 277; 58–1 BCA par. 1803 at 7065).

In this case the contracting officer has neither rendered nor been requested to render a decision on the claim presented. The appeal does not involve any action taken by the contracting officer but rather is directed to the action of the prime contractor in terminating the subcontracts of Divide Constructors, Inc., for default. The appellant subcontractor contends that the termination for default action was the direct and proximate result of the Government's failure to recognize changed conditions at Parry Peak Quarry. The prime contractor denies that the Government had anything to do with the action it took in terminating the subcontracts in question for default. Of record in these proceedings is the statement attributed to the prime contractor by the subcontractor that "Granite Construction Company would do nothing to further the Notice of Appeal filed on behalf of Divide Constructors, Inc."

We find that the action of the prime contractor in giving written notice to the Government of a potential claim for changed conditions by the appellant subcontractor and any statements made by the prime contractor endorsing the potential claim at the time such notice was given are not a sufficient basis upon which to ground our jurisdiction over the appeal.

Conclusion

The appeal is dismissed as not within the purview of our jurisdiction. *United States* v. *Blair*, *supra*; *Young and Smith Construction Company*, *supra*.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

I CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

IN THE MATTER OF OLD BEN COAL COMPANY (NOS. 21, 24, 26 MINE)

7 IBMA 272

Decided *March 30, 1977*

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

The filing of a timely notice of appeal stays the effect of an initial decision by an Administrative Law Judge by operation of law, preventing it from becoming final, but such a stay is not a restraint on further enforcement action by MESA based upon the notice of violation or order of withdrawal under review. 43 CFR 4.594

2. Federal Coal Mine Health and Safety Act of 1969: Temporary Relief: Generally

Temporary relief from the effect of a notice of violation issued under section 104(b) in the form of an order by the Board restraining MESA from issuing an order of withdrawal thereunder during the pendency of a review proceeding pursuant to sec. 105 of the Act is expressly barred as a matter of law. 30 U.S.C. § 815(d) (1970), 43 CFR 4.572

APPEARANCES: Edmund J. Moriarty, Esq., and Mark M. Pierce, Esq., for appellant, Old Ben Coal Company.

MEMORANDUM OPINION AND ORDER

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This case is before the Board on a motion by appellant, Old Ben Coal Company (Old Ben), for a stay of the effect of the initial decision below, 43 CFR 4.594, and an application by Old Ben for temporary relief in the form of an order restraining appellee, Mining Enforcement and Safety Administration (MESA), from issuing orders of withdrawal under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969 pending the outcome on appeal, 30 U.S.C. § 814(b) (1970), 43 CFR 4.570. This appeal arises out of applications for review of three notices of violation issued under section 104(b) of the Act. In each instance, Old Ben was cited under 30 CFR 75.200 for failure to adopt appropriate revisions to existing roof control plans. Proceeding under sec. 105(a) of the Act, 30 U.S.C. § 815 (1970), Old Ben contended that each of the subject notices did not fix a reasonable time for abatement because there allegedly was no violation in the first place. Following an expedited hearing under 43 CFR 4.514, Administrative Law Judge Sweeney concluded that in each instance Old Ben had violated 30 CFR 75.200, and he held accordingly that the time for abatement was reasonably fixed in each notice.

During the pendency of these applications for review below, MESA agreed not to issue any sec. 104(b) orders of withdrawal based on the subject notices. Old Ben has represented to us that MESA is unwilling to stay further enforcement pending disposition of the instant appeal, but has filed no affidavits in support of its motion for a stay of the effect of the Administrative Law Judge's decision or of its application for temporary relief.

[1] Dealing initially with Old Ben's motion for stay, we are of the opinion that it is without merit. In the first place, under 43 CFR 4.594, a stay of the effect of an initial decision goes into effect by operation of law once a timely notice of appeal has been filed. Inasmuch as the subject notice of appeal was filed by Old Ben on Mar. 24, 1977, a stay has been in effect since that date. Secondly, given Old Ben's objective in filing its superfluous motion for stay and even assuming that a stay under 43 CFR 4.594 goes into effect only by order of the Board, the motion would still be without merit. A stay on the effect of an initial decision merely prevents such a decision from becoming final for the Secretary. It is not synonomous with a stay of enforcement, and underlying Old Ben's motion is an erroneous assumption to the contrary. The motion for stay will therefore be denied.

[2] Turning now to Old Ben's application for temporary relief, we

are of the view that it too is without merit. Each of the notices challenged in the subject applications for review has the effect of providing the basis for issuance of orders of withdrawal under sec. 104(b). In seeking a restraining order against issuance of such withdrawal orders pending the outcome on appeal, Old Ben is asking for temporary relief from the effect of the sec. 104(b) notices now before us. We are *expressly* barred from granting such relief by section 105(d) of the Act, 30 U.S.C. § 815(d) (1970), and by 43 CFR 4.572. Accordingly, even if we accept all of Old Ben's factual assertion in its application, including the unverified ones, we must deny the temporary relief sought.

We observe before closing that Old Ben's motion for stay and its application for temporary relief is based upon a fear that if it abates so that withdrawal orders are avoided, it will waive its claim for relief. Old Ben's fear in this respect is based upon footnote 7 in *Bishop Coal Company*, 5 IBMA 231, 244, 82 I.D. 533, 1975–1976 OSHD par. 20,165 (1975), and is groundless. We said there that:

> Compliance with the provisions of an approved revised plan by an operator would appear to result in the waiver of a claim that the District Manager failed to follow the regulations or that the plan was never adopted.

That footnote is inapplicable in a situation where the operator has not slept on its rights and compliance is induced by a notice of violation. Thus, all that will occur here, if Old Ben elects to abate prior to issuance of a withdrawal order, is the mooting of the subject applications for review under *Reliable Coal Corp.*, 1 IBMA 51, 78 I.D. 199, 1971–1973 OSHD par. 15,368 (1970), and postponement of a final ruling by the Board on the validity of the notices now before us until MESA files a petition for assessment of civil penalty. If on the other hand, Old Ben elects to run the gauntlet and suffer withdrawal orders, it can then seek temporary relief under 43 CFR 4.570. We are well aware that Old Ben may find this choice unpalatable because of the high price paid to retain the litigating initiative, but congressional policy as manifested in section 105 is to promote abatement and then provide for litigation in the interests of safeguarding miners. *See Lucas Coal Co.* v. *Interior Board of Mine Operations Appeals*, 522 F.2d 581 (3d Cir. 1975). We have no authority to depart from that policy despite its harsh effects upon operators with meritorious claims.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the motion by Old Ben for a stay of the effect of the initial decision below IS DENIED.

IT IS FURTHER ORDERED that the application by Old Ben, as supplemented, for temporary relief IS DENIED without prejudice to

refiling in the event that MESA issues orders of withdrawal under sec. 104(b) of the Act.

DAVID DOANE,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

ZEIGLER COAL COMPANY

7 IBMA 280

Decided *March 31, 1977*

Appeal by Zeigler Coal Company from a decision by Administrative Law Judge Broderick in Docket No. VINC 72–75 dismissing an application for review of a sec. 104(c)(1) withdrawal order. On remand from the United States Court of Appeals for the District of Columbia Circuit.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Generally

The phrase unwarrantable failure to comply means the failure of an operator to abate a condition or practice constituting a violation of a mandatory standard it knew or should have known existed, or the failure to abate such a condition or practice because of a lack of due diligence, or because of indifference or lack of reasonable care. 30 U.S.C. § 814(c) (1970).

Board decision, Eastern Associated Coal Corporation, 3 IBMA 331, 81 I.D. 567, 1974–1975 OSHD par. 18,706 (1974), overruled in part.

Board decision, Freeman Coal Mining Company, 3 IBMA 434, 81 I.D. 723, 1974–1975 OSHD par. 19,177 (1974), overruled in part.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor, Robert J. Phares, Esq., Acting Assistant Solicitor, and Frederick W. Moncrief, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., for intervenor, United Mine Workers of America; Guy A. Farmer, Esq., and William Gershuny, Esq., for intervenor, Bituminous Coal Operators' Assn., Inc.; L. Thomas Galloway, Esq., for amicus curiae, Council of the Southern Mountains, Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This appeal arises out of a withdrawal order, denominated 1 HG, May 11, 1972, which was issued by an inspector of the Mining Enforcement and Safety Administration (MESA) to Zeigler Coal Company (Zeigler) at its No. 4 Mine. The order cited an alleged violation of 30 CFR 75.400 and was issued pursuant to sec 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969.[1] When this case

[1] Sec. 104(c) provides in its entirety as follows:

"(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any

was first before us, we vacated Order 1 HG on the ground that the conditions found by the inspector, even if assumed to constitute a violation of 30 CFR 75.400, could not have significantly and substantially contributed to the cause and effect of a mine safety or health hazard within the meaning of section 104(c)(1). *Zeigler Coal Company*, 3 IBMA 448, 81 I.D. 729, 1974–1975 OSHD par. 19,131 (1974), *aff'd on reconsideration*, 4 IBMA 139, 82 I.D. 221, 1974–1975 OSHD par. 19,638 (1975). Subsequently, upon a petition for review by the International Union, United Mine Workers of America (UMWA), 30 U.S.C. 816 (1970), the United States Court of Appeals for the District of Columbia Circuit reversed, holding that an inspector, in issuing a sec. 104(c)(1) withdrawal order, need not find that the subject violation "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." *UMWA* v. *Kleppe*, 532 F.2d 1403 (D.C. Cir. 1976), *cert. denied sub nom. Bituminous Coal Operators' Assn., Inc.* v. *Kleppe*, _____ U.S. _____, No. 76-40 (Oct. 5, 1976). Although acknowledging that the "significant and substantial" language states an express prerequisite for the issuance of a notice of violation under section 104(c)(1), the Court concluded, contrary to our previous holding, that that language is not impliedly applicable to withdrawal orders issued under the same provision.

This case is now before us pursuant to remand by the Court of Appeals, a remand ordered so that we could address ourselves to two outstanding issues which we found it unnecessary to reach previously. The issues are whether the Administrative Law Judge erred in upholding the inspector's finding of a violation of 30 CFR 75.400, and secondly, whether he erred in sustain-

mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsec. (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

"(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine."

Sec. 75.400 of 30 CFR provides as follows:

"Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

ing the inspector's finding that the alleged violation was caused by an "unwarrantable failure * * * to comply * * * " within the meaning of sec. 104(c)(1). 30 U.S.C. § 814 (c)(1) (1970).

With respect to the former issue, we note that the parties stipulated that there were accumulations of loose coal and coal dust in three entries of the subject mine, spanning a distance of 300 feet and varying from 12 to 18 inches in width and from 4 to 15 inches in depth (Tr. 4–5). Given that stipulation, Zeigler has *not* argued that the Administrative Law Judge erred in sustaining the inspector's finding of violation because MESA failed to establish a prima facie case under 30 CFR 75.400. In other words, Zeigler does not now suggest that there was no deposit of combustible material, including coal, in the affected area; nor does Zeigler suggest that it did not permit the deposit in question to accumulated. Rather, its principal contention is that, in upholding the inspector's finding of violation, the Administrative Law Judge erred in rejecting its affirmative defense of wetness.[2] The evidence on the matter of wetness is in conflict. The inspector acknowledged that there were some "damp" areas (Tr. 61), but that the samples he handled were not wet enough to stick to his hands (Tr. 83). He also testified that each sample was passed through a screen prior to bagging for transmittal to a laboratory for analysis (Tr. 82–83). Zeigler's sole evidence on this issue was the testimony of its Safety Director, Stanton Roberts, who was present during only part of the inspection. He stated that the accumulated material was too wet to be combustible on the basis of visual observation of only a part of the area covered by the subject withdrawal order (Tr. 335).

The above-described evidence consists largely of conflicting oral statements relating to uncorroborated visual observations and physical handling. In attacking the Administrative Law Judge's apparent preference for the inspector's testimony over that of the witness Roberts, Zeigler challenges a determination as to credibility and weight. Insofar as that determination was dependent upon an assessment of relative credibility, Zeigler has made no showing sufficient to cause us to substitute our assessment of relative believability for that of the Judge. *See Shapiro* v. *Bishop Coal Company*, 6 IBMA 28, 51, 83 I.D. 59, 1975–1976 OSHD par. 20,469 (1976), *aff'd per curiam sub nom. Bishop Coal Company* v. *Kleppe*, ____ F. 2d ____, No. 76–1368 (4th Cir., Jan. 17, 1977). Moreover, to the extent that the Judge's finding of violation reflects a calcu-

[2] By denominating wetness as an affirmative defense, we mean only that the operator has the burden of going forward in raising that issue.

Apart from the wetness issue, Zeigler also observed in this phase of its appeal that it was in the process of abandoning the area in question due to adverse conditions. Brief of Zeigler, p. 3. That assertion, even if true, is irrelevant to the question of whether the inspector correctly found a violation.

lation of relative weight, Zeigler has failed likewise to make any showing that the apparent rejection of Roberts' testimony represented an abuse of fact-finding discretion in gauging probative value. Accordingly, we hold that all the accumulated materials in question were not too wet to be combustible, and we affirm the Judge's conclusion that the inspector correctly found a violation of 30 CFR 75.400.

We come then to the remaining issue in this case which is whether the Judge erred by concluding that the inspector correctly found that the violation in question was caused by an unwarrantable failure on the part of Zeigler to comply with 30 CFR 75.400.

Sec. 104(c)(1), it bears repeating, specifically provides that a withdrawal order thereunder, citing a violation by an operator, may only be issued where an authorized representative of the Secretary finds "* * * such violation to be also caused by an unwarrantable failure of such operator to so comply * * *." 30 U.S.C. § 814(c)(1) (1970). In past cases, we have taken the position that an inspector's finding of an unwarrantable failure to comply should be sustained where MESA establishes by a preponderance of the evidence that the violation in question was the product of intentional or knowing failure to comply or a reckless disregard for the health and safety of the miners. We rejected the theory that the term "unwarrantable failure to comply" is synonymous with ordinary negligence in the occurrence of a violation. *Eastern Associateed Coal Corp.*, 3 IBMA 331, 356, 81 I.D. 567, 1974–1975 OSHD par. 18,706, *aff'd on reconsideration*, 3 IBMA 383 (1974); *Freeman Coal Mining Company*, 3 IBMA 434, 81 I.D. 723, 1974–1975 OSHD par. 19,177 (1974).

The initial decision in this case was handed down by the Administrative Law Judge on November 13, 1973, prior to our decisions in *Eastern Associated Coal Corp.*, *supra*, and *Freeman Coal Mining Company*, *supra*. The Judge upheld the inspector's finding of an unwarrantable failure to comply, and on appeal, Zeigler has contended that the Judge erred in failing to give decisive weight to some of the evidence that it produced.

Although we found it unnecessary to review the Judge's "unwarrantable failure" finding when this case was first before us, the UMWA, who did not participate below and only intervened at the Board level, nevertheless asked the Court of Appeals to review the interpretation impressed by the Board in *Eastern Associated Coal Corp.*, *supra*, upon the statutory "unwarrantable failure" language. Finding it appropriate to dispose of the UMWA's appeal on other grounds, the Court expressed no final conclusion with respect to the UMWA's contentions regarding the proper interpretation of the stautory "unwarrantable fail-

ure" language. The Court, however, did choose to respond obliquely to the UMWA's arguments in a footnote on the basis of a gratuitous assertion made on our behalf. That footnote reads as follows, 532 F.2d 1403, 1407, n. 7:

> Since the Board did not consider whether the operator's violation was "unwarrantable," we do not reach petitioner's claim that the Board's definition of "unwarrantable" misinterprets the statute. Although the Board has previously decided this question adversely to petitioner's position, *Eastern Associated Coal Co.*, 3 IBMA 331, 349 (1974), J.A. 177, 195, we accept the Government's representation that the Board on remand will "take into account the legislative history upon which the Union relies * * *" Br. at 50. The issue of the proper definition of "unwarrantable" will, of course, be open on any appeal following the remand proceedings.

In *Eastern Associated Coal Corp.*, *supra*, 3 IBMA at 356, we gave the legislative history only passing reference, preferring instead to place our own gloss upon the statutory language. We did so primarily in order to integrate the element of fault smoothly into an overall interpretation of sec. 104 compatible with the literal words and with our view that "* * * the only rational interpretation of sec. 104(c) is one which is in harmony with an overall construction of section 104 calling for more severe enforcement actions as a function of the increasing gravity of the transgressions of an operator. * * *" *See Alabama By-Products Corp.*, 7 IBMA 85, 92, 83 I.D. 574, 1976-1977 OSHD par. 20,756 (1976). *Compare UMWA* v. *Kleppe*, *supra*, *with Zeigler Coal Company* v. *Kleppe*, 536 F.2d 398, 403 (D.C. Cir. 1976). We also thought that the failure of Congress to include a definition of the term "unwarrantable failure" in the list of legislative definitions set forth in sec. 3 of the Act, 30 U.S.C. § 802 (1970), left us leeway in treating a definition embodied only in the legislative history.

In *UMWA* v. *Kleppe*, *supra*, the Court of Appeals rejected the interpretative approach toward section 104 we took in *Eastern Associated Coal Corp.*, *supra*, and indicated that clear and authoritative legislative history is determinative in resolving ambiguities in statutory words and phrases so long as that history is not at odds with the statutory objectives. With the appellate court's opinion firmly in mind, and most especially, its footnoted implication of dissatisfaction with our treatment in *Eastern* of the statutory "unwarrantable failure" phraseology, we focus now on the pertinent parts of that history.

The primary piece of legislative history is the definition of the term "unwarrantable failure" set forth in the report of the Conference Committee, House Comm. on Ed. and Labor, *Legislative History, Federal Coal Mine Health and Safety Act*, Comm. Print, 91st Congress, 2d Session (hereinafter referred to as *Leg. Hist.*), pp. 1108-

1151. At page 1119, the Committee defined that term as follows:

> The term "unwarrantable failure" means the failure of an operator to abate a violation he knew or should have known existed.

A secondary source of pertinent legislative history is the Statement of the House Managers which was a report by the House conferees to the full House on the outcome of the Conference Committee's deliberations. In relevant part, the House Managers stated at *Leg. Hist.*, p. 1030:

> * * * The managers note that an "*unwarrantable failure* of the operator to comply" *means the failure of an operator to abate a violation he knew or should have known existed,* or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part. [Emphasis added.]

The latter quotation encompasses all the words of the former. Those words, italicized above, form the kernel of the "unwarrantable failure" concept as set forth in the legislative history.

There are two main verbal distinctions between these quotations which are noteworthy. The first of these is that the conferees purported to be defining the statutory term "unwarrantable failure," whereas the House Managers purported to be defining the phrase "unwarrantable failure to comply," a distinction which does not appear to indicate a substantive difference. The second distinction concerns phrases in the quotation drawn from the Statement of the House Manager's which are descriptive of fault and which are in addition to those appearing in the quotation from the Conference Committee's report. Those phrases relate the failure to abate a violation to "* * * a lack of due diligence, * * * indifference or lack of reasonable care, on the operator's part." We think that these additional phrases are redundant embellishments because proof that a given failure to abate a violation was the proximate result of "* * * a lack of due diligence, * * * indifference or lack of reasonable care * * *" would also establish that the failure to abate occurred with respect to a violation the operator "* * * knew or should have known existed * * *." In short then, there does not appear to have been any qualitative differences between the understanding of the Conference Committee and of the House Managers as to the precise meaning that the "unwarrantable failure" language of sec. 104(c) was supposed to convey.

We turn now to the question of whether the foregoing legislative history should be adopted as the touchstone for determining the appropriate interpretation of the "unwarrantable failure" requirement. At the outset, we note that adoption of the legislative history for that purpose would not be contrary to the overall statutory objective of achieving a sustained elevation of prevailing standards of care in the coal mining industry. Indeed no one has argued here or elsewhere that it would, and the UMWA urged in

the Court of Appeals that the Board should have followed the legislative history strictly. Accordingly, given the circuit court's opinion in *UMWA* v. *Kleppe*, *supra*, we would readily adopt the legislative history of the "unwarrantable failure" concept analyzed above without further ado were it not for one difficulty.

Ordinarily, congressional definitions control the meanings of words and phrases used in statutes, and the former may be freely substituted for the latter wherever the latter may appear therein. Here, however, free substitution of either above-quoted portion of the legislative history for the respective words purportedly defined yields a result that is circular and nonsensical. With the appropriate substitution from the Conference Committee report and assuming both the existence of a timely underlying notice and a present finding of violation, sec. 104(c)(1) would mandate issuance of a withdrawal order if the issuing inspector:

> * * * finds such *violation* to be also *caused by* [*the failure* of an operator *to abate a violation* he knew or should have known existed] * * *. [Italics added.]

Similarly, with the appropriate substitution for the Statement of the House Managers and making the same assumptions, sec. 104(c)(1) would mandate issuance of a withdrawal order if the issuing inspector:

> * * * finds such *violation* to be also *caused by* [*the failure* of an operator *to abate a violation* he knew or should have known existed, *or the failure to abate a violation* because of a lack of due diligence, or because of indifference or lack of reasonable care, on the operator's part] * * *.

On its face, sec. 104(c)(1) indicates that the fault referred to in the "unwarrantable failure" language is a proximate causative factor in the occurrence of a violation. However, the conferees and the House Managers each relate the fault in question to the failure to abate a violation, an act which follows the occurrence of a violation and would not appear to be a causative factor therefor. *See* 30 U.S.C. § 814(b) (1970). And the discrepancy between the literal phraseology of the "unwarrantable failure" requirement in the Act on the one hand, and the verbatim legislative history of that requirement on the other, yields the circular, nonsensical results captured in the phrases just quoted when the latter is substituted for the former. With those substitutions, the "unwarrantable failure" language in sec. 104(c)(1) talks in terms of a violation caused by a failure to abate a violation, such failure being caused by some degree of fault. Since we must assume that Congress could not have intended such a confounding result, it follows that the ordinary rule with regard to free substitution of congressional definitions for statutory words and phrases they purport to define was not meant to apply, and further, that the legislative history, for all its seeming surface clarity, nevertheless requires

some interpretation and cannot be taken literally.

Further study in light of the foregoing has led us to conclude preliminarily that, in "defining" the terms "unwarrantable failure" and "unwarrantable failure to comply," the conferees and the House Managers never intended to supply a freely substitutable definition. Rather, it appears that they intended merely to supply an authoritative guide for construing the "unwarrantable failure" requirement. We draw support for this view from the placement of these "definitions" in the legislative history instead of in the list of statutory definitions set forth in sec. 3 of the Act. 30 U.S.C. § 802 (1970). Given the critical nature of the "unwarrantable failure" concept to the enforcement scheme, it is unlikely that such placement was a random and meaningless circumstance. Moreover, regarding the legislative history in this instance as an authoritative guide for construction rather than a freely substitutable definition rationalizes an otherwise meaningless discrepancy between the above-quoted portions of the conference report and the House Manager's statement. As noted above, the former purports to define the term "unwarrantable failure" while the latter purports to define the phrase "unwarrantable failure to comply." It is reasonable to suppose that had the Conference Committee intended to supply such a substitutable definition, the conferees and the House Managers would have defined the exact same words from the statute.

Additional thought about the discrepancy between the language of sec. 104(c) and its legislative history, focusing largely upon the latter, has persuaded us that in reality such discrepancy is more apparent than real and stems from a certain lack of precision on the part of both the conferees and the House Managers. On the surface, the fault referred to in the legislative history concerns the knowledgeability of the operator with regard to a matter of law, namely, whether it has committeed a violation. It is most unlikely that the conferees and the House Managers meant any such thing. Normally, liability is not dependent upon a determination of fault based upon a person's knowledgeability as to a conclusion of law. Usually, where liability is dependent upon a determination of fault with regard to a person's knowledge, the fault tyically concerns the person's knowledgeability as to matters of *fact*. Given the foregoing and inasmuch as the literal language of sec. 104(c) implies that the fault encompassed in the "unwarrantable failure" requirement is of the typical kind, we are of the opinion that both the conferees and the House Managers were talking about an operator's failure to abate *conditions or practices* constituting a violation of the mandatory standards, *conditions or practices* the operator knew or should have known existed and therefore should

have abated prior to discovery by an inspector. The conferees and the House Managers simply used the word "violation" as a shorthand reference to such conditions or practices, a usage which is not unnatural and to which we ourselves have resorted from time to time.[3]

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care. The inspector's judgment in this regard must be based upon a thorough investigation and must be reasonable. When that judgment is timely challenged by application for review, it is up to an Administrative Law Judge initially, and the Board ultimately, to decide whether the inspector's finding was actually reasonable as a matter of ultimate fact and law. Naturally, the reasonableness of a given finding of an unwarrantable failure to comply will turn on the peculiar relevant facts and circumstances regarding such a finding. In accordance with this holding, we now overrule *Eastern Associated Coal Corp.*, *supra*, and *Freeman Coal Mining Company*, *supra*, to the extent that they hold to the contrary.[4]

In light of our holding, we turn our attention to Zeigler's appellate contentions with regard to the Administrative Law Judge's affirmance of the inspector's finding of

[3] It should also be noted that the only ambiguity in the statutory "unwarrantable failure" language is the degree of fault that the inspector is obliged to find as a prerequisite for issuing a notice of violation or an order of withdrawal under sec. 104(c) of the Act. That language is not ambiguous as to the acts of omission or commission to which the degree of fault refers. Sec. 104(c) refers to fault in the failure to comply with a mandatory standard which plainly means fault in the occurrence of the conditions or practices an inspector finds to be a violation of such standard rather than fault in failure to abate conditions or practices which the operator has concluded or should have concluded were in violation of such standard. Thus, in looking to the legislative history, our focus should be limited to the degree of fault implicit in the term "unwarrantable failure," rather than the act to which such fault refers. It would be error to use the legislative history, even if it were perfectly clear, as a basis for finding an ambiguity in sec. 104(c) which does not exist.

[4] In so holding, we are well aware that the terms of fault employed by the conferees and the House Managers are largely synonymous with negligence, one of the most familiar terms in American law. We recognize that some who read our decisions with an accountant's eye, searching only for the "bottom line," and who also perceive that negligence is the test of unwarrantable failure, may well object to that conclusion, arguing that if Congress had meant negligence, it would have said so rather than opting for an exercise in calculated ambiguity and circumlocution at the expense of clarity. However, granting, as we must, that Congress could have expressed itself with greater economy and certainty, we think that such an objection would amount to an *ad hominem* argument. So far as we are aware, there is no requirement in law that Congress draft its legislation so as to maximize economy of expression and minimize ambiguity, and Congress habitually expresses itself with a wide variety of words and phrases duplicative of well-established terms of art.

unwarrantable failure in the subject withdrawal order. In doing so, we note that this case was litigated below and briefed on appeal prior to our decision in *Eastern Associated Coal Corp.*, *supra*, and upon the assumption that the legislative history provided the touchstone for determining the true meaning of the statutory unwarrantable failure language in sec. 104(c). It is therefore unnecessary to remand.

In attacking the Administrative Law Judge's conclusion of law as to its alleged unwarrantable failure to comply, Zeigler does *not* argue that MESA failed to establish a prima facie case. Rather, it points out that it had a cleanup program involving use of a uni-track which was being followed at the time the subject withdrawal order was issued.[5] Based on that fact, Zeigler argues that the Judge erred in upholding the inspector's finding of an unwarrantable failure to comply because "* * * the uni-track had cleaned up other entries in the area when its battery ran down and it was out for a change of batteries and returning to complete the clean-up when this order was entered (Tr. 25)."

In his opinion, the Administrative Law Judge neither addressed himself directly to the evidence upon which Zeigler relies nor made general credibility findings, but, having delved into the record ourselves, we are persuaded that Zeigler's argument is without merit because its cleanup program was not completely efficacious. The record shows that the uni-track was not designed to remove and did not in fact remove combustible materials accumulated in niches along the ribs, and hand shoveling was admittedly not a part of the regular cleanup program (Tr. 44). It follows accordingly that Zeigler was not in the process of *effectively* abating and thus is in no position to ask that we deem it *not* to have failed to abate. Inasmuch as Zeigler did not prove that it was in the process of effectively abating the violative condition found by the inspector, we need not decide here whether an operator can be so deemed even if it does successfully establish that it was so engaged.

Having rejected the remaining challenges to the Judge's decision posed by Zeigler's arguments on appeal, we now agree that Order 1 HG, May 11, 1972, was properly issued.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the initial decision in Docket No. VINC 72-75 IS AFFIRMED.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

[5] A uni-track is a battery-operated machine equipped with a scoop.

UNITED STATES v. THOMAS J. PECK, ET AL.

29 IBLA 357

Decided March 31, 1977

Appeal from decision of Administrative Law Judge Harvey C. Sweitzer declaring mining claims null and void.

Affirmed as modified.

1. Mining Claims: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Mineral Involved: Clay

In determining whether a deposit of clay is locatable as a valuable mineral deposit under the mining laws, there is a distinction between a deposit considered to be a common or ordinary clay, which is not locatable, and a locatable deposit having exceptional qualities useful and marketable for purposes for which common clays cannot be used.

2. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Hearings—Mining Claims: Specific Mineral Involved: Clay—Rules of Practice: Evidence

In a Government contest challenging the validity of mining claims located for a clay-type material, an adequate prima facie case is established where there are expert witness opinions that the deposit is only a common clay or shale and it cannot meet refractory standards. The contestees then must go forward with evidence to rebut the Government's case with a preponderance of the evidence.

3. Mining Claims: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Mineral Involved: Clay—Words and Phrases

"Common Clay." A "common clay" not locatable under the mining laws does not include clay having exceptional qualities which meets refractory and other quality standards for highgrade ceramic products or other products requiring a high refractoriness, or which is useful for certain industrial uses, such as in the oil and oil well drilling industries, outside the manufacture of general clay products. It does include, however, clay usable or used only for structural and other heavy clay products, for pressed or face brick, as well as ordinary brick, and for pottery and ordinary earthenware and stoneware. The fact industrial and technological changes may make a certain clay deposit valuable for a given major manufacturer of brick, tile and other clay products, because it meets its peculiar specifications for blends with other raw materials, does not warrant a change from Departmental precedents and a strong Congressional policy establishing that clay usable only for such purposes is a common clay not locatable under the mining laws.

APPEARANCES: Richard M. Mollinet, Esq., Salt Lake City, Utah, for appellants; Erol R. Benson, Esq., Office of the General Counsel, U.S. Department of Agriculture, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIM BOARD OF LAND APPEALS

By decision dated Apr. 16, 1975, Administrative Law Judge Harvey C. Sweitzer declared the Unitah Nos. 1 through 10 (inclusive) lode mining claims to be null and void. Thomas J. Peck & Son, Inc., Anthony T. Peck and Tony Peck, the mining claimants, appeal raising the

basic issue of whether the claims were properly found to be invalid.

The Judge's decision extensively discusses much of the evidence in this case and the law, and is attached as an appendix to this decision. Repetition of that discussion shall be made only for clarity, emphasis, and an understanding of the issues raised by appellants.

The contestees are in the business of mining and hauling clays and other types of materials (Tr. 112). The material for which they located the claims is variously described throughout these proceedings as "Kamas clay," or "red pine shale." The claims are in the Wasatch National Forest in sec. 21, T. 2 S., R. 7 E., S.L.M., Summit County, Utah, near Kamas, Utah, and in an area adjacent to the Mirror Lake Highway, a scenic route (Tr. 10–11).

The Forest Service initiated the contest through the Bureau of Land Management charging: the claims were invalid because there were not minerals "sufficient in quantity, quality, and value to constitute a discovery;" the land is nonmineral in character; and the mineral material "is a common variety of clay not subject to location under the mining laws." The primary rulings by the Judge are: (1) that the Government had established a prima facie case of lack of discovery of valuable minerals under the mining laws—"specifically, that the material in dispute is not of a quality which can be marketed profitably for commercial purposes for which common clay cannot be sold;" (2) that the contestees had failed to produce evidence of possible profitability of a mining operation, showing only "an expression of hope rather than anything supported by facts;" and (3) that the "deposits on the claims have not been shown to possess characteristics giving unusual value distinguishing them from common clays, so that they can be marketed profitably for commercial purposes for which common clay cannot be sold."

Appellants contend generally that these rulings are erroneous. They dispute the finding that the Government established a prima facie case of lack of discovery. They assert the Judge's decision is contrary to the weight of the evidence and a fair inference to be made from the evidence. They contend the Judge erred in his interpretation of the prudent man and marketability test, in his application of that test, and in ignoring certain evidence relating to the test. They have raised the issue of what the term "common clay" should mean with regard to the locatability of a deposit of clay materials under the mining laws. They state that term was never defined by the Judge and he confused the term as applied to a classification of minerals with the word when used in relation to the frequency of occurrence of minerals. They contend, in effect, that cases involving so-called "common clay" are not applicable here.

We have recently pointed out in determining the locatability of a particular mineral deposit under

the mining laws that the tests of locatability have stemmed from interpretations of the phrases in the mining laws "lands valuable for minerals" (R.S. § 2318, 30 U.S.C. § 21 (1970)) and "valuable mineral deposits" (R.S. § 2319, 30 U.S.C. § 22 (1970)). *United States* v. *Bolinder*, 28 IBLA 187, 83 I.D. 609 (1976). In contexts considering whether land was mineral in character so as to except it from certain nonmineral public land laws, as well as cases directly pertaining to the location of mining claims for a particular substance, very general definitions have evolved. These definitions have included classifications of minerals by standard authorities, in industrial practices, and certain economic values for commercial uses. *Id.* The interpretations of these very general phrases have resulted in many disparate materials considered as locatable mineral deposits under the mining laws, while others have not. *E.g.*, see cases cited in *United States* v. *Bolinder*, *supra*. In *Bolinder* there had been only one case specifically concerning geodes, and that case was distinguished because of its peculiar factual circumstances, and because it had not involved actual mining operations for a deposit of geodes.

[1] Unlike the *Bolinder* case where there was no clear precedent nor Departmental policy manifest concerning the locatability of geodes, here there are many precedents, a strong Departmental policy, and a manifest Congressional policy concerning the locatability of deposits of clay. In short, as will be discussed, *infra*, there has been a distinction between what has been called "common" or "ordinary" clay which has *not* been considered a "valuable mineral deposit" within the meaning of the mining laws, and deposits of clays having exceptional qualities useful for purposes for which common clays cannot be used, which make them locatable as valuable mineral deposits.

While neither the Judge, nor we, can probably fashion a definition of "common clay" which would satisfy lexicographers, semanticists, or appellants, some meaning can be enfused into the term by considering the authorities involving the locatability of clay under the mining laws and comparing them with the evidence in this case.[1]

[1] Before considering the cases involving clay and clay-type materials, we take official notice of some relevant dictionary definitions of clay, some constituents of clay, and certain clay substances and products. These definitions are contained in *A Dictionary of Mining, Mineral and Related Terms*, Bureau of Mines, U.S. Department of the Interior (1968). This is a work of noted repute which has brought together technical, scientific and industrial definitions from many sources. The words or phrases, their quoted definition and in brackets the page of the dictionary in which they are found, are set forth below:

"*Clay.* a. A fine-grained, natural, earthy material composed primarily of hydrous aluminum silicates. It may be a mixture of clay minerals and small amounts of nonclay materials or it may be predominantly one clay mineral. The type clay is determined by the predominant clay mineral present (that is, kaolin, montmorillonite, illite, halloysite, etc.). *Bureau of Mines Staff.* It is plastic when sufficiently wetted, rigid when dried en masse, and vitrified when fired to a sufficiently high temperature. *ASTM C242–60T. See also* fire clay; clay mineral; bentonite. b. It has three aspects: (1) a

There is no dictionary definition of "common clay," although there is a dictionary definition, quoted in footnote 1, of "commonbrick clay." Other dictionary definitions given in footnote 1 show distinctions be-

natural material with plastic properties; (2) an essential composition of particles of very fine size; and (3) an essential composition of crystalline fragments of minerals that are essentially hydrous aluminum silicates or occasionally hydrous magnesium silicates. The term implies nothing regarding origin but is based on properties, texture, and composition, that are interrelated, for example, the plastic properties are the result of the constituent minerals and their small grain size. *A.G.I.* c. Soil consisting of inorganic material, the grains of which have diameters smaller than 0.005 millimeter. *A.G.I.* d. According to international classification, it has a grain size less than 0.002 millimeter. *C.T.D.* e. A general term applied to the material added to water to prepare a drilling mud. *Long.* [214]

"*illite.* A silicate of potassium, aluminum, iron, and magnesium with water. * * * gray, light green, or yellowish-brown color. A general term for the clay-mineral constituent of argillaceous sediments belonging to the mica group. The relation of illite to similar or identical material known variously as hydromica, hydrous micas, hydromuscovite, and hydrated mica group is not clearly established. Occurs in micaceous particles less than one micron. Obtained from clays and shales in Illinois. *Compare* pholidoide; phyllite. *English; Stokes and Varnes.* b. A discredited term equal to bravaisite. *American Mineralogist, v. 28, No. 3, March 1943, p. 214.* [570]

"*kaolin.* a. A clay, mainly hydrous aluminum silicate, from which porcelain may be made. Also called China clay; porcelain clay. *See also* kaolinite. *Sanford.* b. A refractory clay consisting essentially of minerals of the kaolin group and which fires to a white or nearly white color. *ASTM C242–60.* c. A white or nearly white clay resulting from the decomposition of feldspar. *B.S. 3618, 1964, sec. 5.* [606]

"*kaolinite.* A common clay mineral. A two-layer hydrous aluminum silicate, * * *. It consists of sheets of tetrahedrally coordinated silicon joined by an oxygen shared with octahedrally coordinated aluminum. Essentially, there is no isomorphous substitution. Monoclinic. The mineral characteristic of the rock kaolin. The kaolin group of minerals includes also the recently recognized isomers, dickite and nacrite. *A.G.I.; Dana 17.* [606]

"*brick clay.* An impure clay, containing iron and other ingredients. In industry the term is applied to any clay, loam, or earth suitable for the manufacture of bricks or coarse pottery. Also called brick earth. *C.T.D.* [139]

"*common-brick clay.* A red-to-brown burning clay which usually has a high percentage of fluxing impurities, is plastic enough for shaping, and fires to a very hard and strong solid with little warping or cracking at a relatively low temperature. [240]

"*pressed brick clay.* A better grade clay than that usable for common brick. It must have a uniform color, must not warp or crack, be fairly hard and have low absorption when burned at a moderate temperature, and must be free from soluble salts. *CCD 3d, 1942, p. 195* [860]

"*fire clay.* a. A clay that is high in alumina or silica; diffusion is not less than cone 19 (1,515 degrees C.). Fire clays may be sedimentary or residual, plastic or nonplastic, and are dominantly composed of kaolinite. The classification of fire clays may be related to the composition, fiscal characteristics, refractoriness, use, association with other materials, etc., such as plastic fire clays, nonplastic fire clays, highalumina fire clay, siliceous fire clay, flint clay, coal measure fire clay, sagger clay, high-heat duty fire clay, etc. *Bureau of Mines Staff.* b. An earthy or stony mineral aggregate which is composed essentially of hydrous silicates of aluminum with or without free silica. It is plastic when sufficiently pulverized and wetted, rigid when subsequently dried, and of sufficient purity and refractoriness for use in commercial refractory products. *HW.* c. Formerly used for almost any soft nonbedded clay immediately underlying a coalbed, many of which are not refractory. *Compare* underclay. *A.G.I. Supp.* d. Soft, unbedded, gray or white clay, high in silica and hydrated aluminum silicates, and low in iron and alkalies. Fire clay forms the seat earth of many coalbeds and has value as refractory clay. Also called bottom stone. *Raistrick and Marshall, p. 22.* e. A stratum of rock found in anthracite mines which disintegrates on exposure to air. *Hudson.* [429]

"*brick.* a. A molded block of clay or other material, usually fired and sintered together to form a coherent mass. The standard size building brick unit is 8½ x 4¼ x 2¼ inch, while the standard size firebrick unit is 9 x 4½ x 2½ inch. However, many firebrick consumers now prefer to use a 9 x 4½ x 3 inch brick as the standard unit. *A.I.S.I. No. 24.* b. A solid masonary unit of clay or shale, usually formed while plastic into a rectangular prism and burned or fired in a kiln. *ASTM C43–65T.* c. A block of bonded abrasive used for rubbing down castings, scouring chilled iron rolls, polishing marble, and work of like nature. *ACSG, 1963.* [139]

"*brick, alumina; high-alumina brick.* A refractory brick of a higher alumina content than ordinary fire clay brick. It is made from

tween a type of clay and clay product based upon the use of the materials, the chemical make up of the materials, their physical properties, and their characteristics when fired. Some of these same distinctions have been made in the case law involving clay. The use of the material, of course, may depend upon the other characteristics since they will affect the usability of the material for a given purpose.

Appellants object to references to Bureau of Mines classifications of clay as not comporting with industrial classifications. However, they have not pointed to any definite industrial classifications which could serve to define or limit the term common clay. As the evidence to be discussed, *infra*, will reflect, the use of clay materials may depend upon the particular specifications of a clay product manufacturer. This is also reflected in a publication of the Bureau of Mines. In addition to the definitions in the footnote, we take official notice of this Bureau of Mines publication, *Mineral Facts and Problems*, 1975

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several alumina materials, such as disapore, bauxite, kaolin, etc. A large use of brick of this type is in the hot zone portion of rotary lime, cement, or dolomite kilns as well as in the firing zone of shaft lime kilns. High-alumina brick is also used in certain portions of large boiler settings and in ceramic kilns of both the continuous and the periodic types; in brief, it finds application under certain types of conditions where the service is very severe. *See also* refractories. *CCD 6d, 1961.* [139]

"*clay building brick.* Brick for normal constructional purposes; such brick can be made from a variety of brick clays. Relevant British Standards are B.S.–657 (Dimensions) and B.S.–1257 (Testing). The United States Standards are—ASTM–C62 (Building Brick); ASTM–C216 (Facing Brick), and ASTM–C67 (Sampling and Testing). *Dodd.* [214]

"*fire clay brick.* A refractory brick manufactured substantially or entirely from fire clay. *HW. See also* first quality fire clay brick; second quality fire clay brick; third quality fire clay brick. *AISI, No. 24.* [429]

"*pressed brick.* A high-grade brick used for exposed surface work. *Crispin.* [860]

"*refractory brick.* a. A brick made from refractory material such as fire clay, bauxite, disapore, etc., used to withstand high temperatures. Refractory brick are made in various sizes and shapes; the most common sizes are 9 x 4 7/16 x 2½ inches, 9 x 6 x 2½ inches, and 13½ x 6 x 2½ inches. *Bureau of Mines Staff.* b. A brick which is used as a lining for the interior of fireboxes in furnaces and boilers. Refractory brick is constructed so that it can withstand very high temperatures, but it is not a very good insulator. *API Glossary.* [908]

"*refractory clay.* Any clay showing a pyrometric cone equivalent of not less than cone 27. *ACSB–1. See also* fire clay [908]

"*potter's clay; pipe clay.* a. A pure plastic clay, free from iron, and consequently white after burning. *Fay.* b. A clay adapted for use on a potter's wheel, for the manufacture of pottery. *A.G.I.* [854]

"*earthenware clay.* A plastic, fine textured clay, nearly free from lime and gypsum (as they cause blistering); air shrinkage less than 8 percent; slakes in a few minutes or requires grinding which is usually too expensive; no cracking in air; tensile strength, 125 pounds per square inch, or more; incipient vitrification reached between cones 010 and 05; vitrification at least two cones higher; color, burned usually, not important unless very bad; fire shrinkage, 8 percent maximum. *Hess.* [368]

"*stoneware.* a. Ceramic ware fired to a hard dense condition and with an absorption of less than 5 percent; not translucent; it may be underglazed, salt glazed, or glazed with hard feldspathic glazes. *ACSG.* b. A vitreous or semivitreous ceramic ware of fine texture, made primarily from nonrefractory fire clay. *ACSG.* [1081]

"*stoneware clay.* a. A clay suitable for the manufacture of stoneware; it possesses good plasticity, vitrifies between cones 4 and 10, and has a long firing range. The fired color is buff to gray. *ASCB–1.* b. Clay which ranges from inferior material through semi-refractory to firebrick clay. It should have a tensile strength of 125 pounds or more pounds per square inch; low fire shrinkage; enough plasticity and toughness for shaping; no lime or Fe-bearing concretions; and very little coarse sand. *CCD 3d, 1942, pp. 195–196.* [1081]"

ed., which, at 254–55, defines common clay as one of six different classification groups of clay, as follows:

> Common clay is defined as a clay or claylike material that is sufficiently plastic to permit ready molding and vitrification below 1,100 [degrees] C. Shale is a consolidated sedimentary rock composed chiefly of clay minerals that has been both laminated and indurated while buried under other sediments. The common clays and shales are chiefly illitic or chloritic. The materials may also contain some kaolins and montmorillonites and are usually higher in alkalies, alkaline earths, and ferruginous minerals and much lower in aluminum than the high-quality kaolins, fire clays, and ball clays. The presence of iron usually imparts a reddish hue after firing. There are no specific recognized grades based on preparation, and very little terminology based on usage, although such a clay may sometimes be referred to as common, brick, sewer pipe, or tile clay. Specifications are based on the physical and chemical tests of the products.
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> Although many specifications have been established by the American Society for Testing and Materials, American Foundrymen's Association, American Oil Chemists Society, American Petroleum Institute, Technical Association of the Pulp and Paper Industry, and other national organizations, many producers and consumers rely on their own tests and specifications applicable to their specific needs. The tolerance limits of mineralogical composition, particle size, and other physical and chemical properties also are determined largely by individual requirements. Detailed data on specifications are included in Bureau of Mines Bulletin 565 (8) * * *.

We next turn to the case authorities involving clays for particular understanding of the applicability or non-applicability of the mining laws to clay deposits.

Early in the administration of the General Mining Laws of May 10, 1872, 30 U.S.C. § 21 *et seq.* (1970), the mineral character of land or locatability of a clay deposit depended upon the usability of the deposit for various purposes. Thus, it was held that ordinary brick clay suitable for making ordinary brick and tile products did not make the land mineral in character and the deposit was not locatable under the mining laws. *King* v. *Bradford*, 31 L.D. 108 (1901); *Dunluce Placer Mine*, 6 L.D. 761 (1888); and *Blake Placer*, decided Jan. 17, 1889 (unreported but discussed in *King* v. *Bradford*, at 109–10).

In 1891 the Commissioner of the General Land Office gave his opinion that a mining claim containing a deposit of "ordinary potter's clay is not subject to entry under the mineral laws." 18 Copp's Land Owner 15. In an opinion to the Register and Receiver, Helena, Montana, that same year, he also indicated that "deposits of ordinary earthenware, pottery, pipe, or brick clay" are not subject to entry. 18 Copp's Land Owner 15. He recognized that a deposit of "fire clay" or "Kaolin" could be located, but emphasized that "it must be positively established" that the deposits are in sufficient quantity to make it of pecuniary advantage to work for that purpose, that such lands are more valuable for the "fire clay" than any other purpose, and that the entry is made in good faith for the purpose of developing and working

its mineral resources and for no other purpose. *Id.* In a much later case, *Mrs. A. T. Van Dolan*, A-26443 (October 14, 1952), evidence that clay could be used for making fire-resistant products and ceramics was not sufficient to make the clay an uncommon type which was locatable.

The question of the locatability of deposits of fire clay is not completely clear from the cases and may depend upon the quality of the deposit and its uses. The Secretary of the Interior had ruled in *The Dobbs Placer Mine*, 1 L.D. 565 (1883), that a deposit of fire-clay or kaolin should be located as a placer location and not a vein or lode. In *Alldritt* v. *Northern Pacific R.R. Co.*, 25 L.D. 349 (1897), the Acting Secretary ruled that land chiefly valuable for deposits of fire clay is subject to entry under the mining laws and excepted as "mineral lands from a railroad grant." He noted that the evidence showed the land was not valuable for other purposes, but was underlaid with fire clay "of a superior quality, which crops out in various places." 25 L.D. at 351. Nevertheless, in *Jordan* v. *The Idaho Aluminum Mining and Mf'g Co.*, 20 L.D. 500 (1895), a deposit was alleged to be valuable for fire clay, kaolin and aluminum. The evidence indicated an immense deposit of clay which was valuable for the manufacture of pressed brick. No other use was indicated except testimony that the deposit contained aluminum, but there was not a sufficient quantity of aluminum to be in paying quantities. The decision decided the deposit did not make the land mineral in character. It is apparent that the fire clay or kaolin and its commercial use for pressed brick was not considered as sufficient to make the land mineral in character. Similarly, in *Holman* v. *State of Utah*, 41 L.D. 314 (1912), there was an allegedly valuable deposit of fire clay within an area selected by the State. This was not considered sufficient to warrant the land classified as mineral in character. The decision did not discuss the material except to point out the fact there are vast deposits of clay which, because of a temporary local demand for brick, could be used profitably. It concluded, however, that except for deposits of clay of such exceptional nature as to warrant entry of the lands under the mining laws, the lands should not be considered mineral. It appears, therefore, that even if a deposit contains fire clay, if it is only usable for brick, including pressed brick, the deposit is not locatable under the mining laws.

Clay which was suitable for use in the manufacture of Portland cement was not locatable under the mining laws. *Bettancourt* v. *Fitzgerald*, 40 L.D. 620 (1912). In reaching this conclusion, the decision emphasized the following: the widespread distribution of the clay, the small element of cost of the manufactured product in relation to the value of the clay in its nat-

ural state in place, the fact the practicable availability of the clay as a cement ingredient was "so largely dependent upon the existence of certain extremely favorable artificial as well as natural conditions, it cannot properly be regarded in and of itself as a valuable mineral deposit within the meaning of the mining laws" [at 621]. Where clay had been sold to a plaster contractor but evidence showed it was not naturally absorbent and probably could not be used as a catalytic agent, it was deemed common clay not locatable under the mining laws. *United States* v. *Shannon*, 70 I.D. 136 (1963). Likewise, in *United States* v. *O'Callaghan*, 8 IBLA 324, 79 I.D. 689 (1972), clay sold as an additive in cattle feed, but which did not possess characteristics distinguishing it from common clays, was not locatable. The case was affirmed in *O'Callaghan* v. *Morton*, Civil No. 73–129–S (S.D. Cal., May 13, 1974), but remanded in part to determine the validity of one claim based on sand and gravel deposits.

On the other hand, the exceptional clay deposits which have been recognized as locatable under the mining laws are: *Fred B. Ortman*, 52 L.D. 467, 469 (1928), a "colloidal clay, which has value for different purposes, principally the filtering of oils in the process of refining" (however, the nature of the deposit was not in issue in that case); *United States* v. *Barngrover* (*On Rehearing*), 57 I.D. 533, 534 (1942), "one of the better, if not the best, grade of rotary mud used in the oil fields of Southern California." In *United States* v. *Gunn*, 7 IBLA 237, 79 I.D. 588 (1972), a deposit of bentonite clay did not meet commercial standards for certain uses for which some other bentonite clays are suitable; namely, for a bleaching clay for decolorization of crude oils, or as a rotary drilling mud. The latter is the use recognized in *Barngrover* and the former is similar to that in *Ortman*. Because the bentonite in *Gunn* was not of a quality and quantity which could be marketed profitably for commercial purposes for which common clay cannot be sold, the clay was not locatable.

One of the leading cases concerning the locatability of clay, *United States* v. *Mattey*, 67 I.D. 63 (1960), recognized that deposits of clay of an exceptional nature may be locatable. However, the Department pointed out that the only unusual qualities attributed to the deposit in that case were certain "impurities" or flux materials useful in the manufacture of vitrified sewer pipe. The decision noted that sewer pipe, brick and drain tile are usually classified as heavy clay products and clay deposits usable only for such purposes are generally not locatable. However, it noted (at 68):

> * * * if the deposit is in itself of the type of clay not subject to location under mining laws, the fact that it is used in combination with purer clays cannot remove it from the proscribed category. In

other words, the use to which a common clay is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent upon any unusual characteristics of the clay itself. It would be different if a clay with unusual characteristics which could be used in the manufacture of ordinary brick were used to ma[k]e a product for which its unusual characteristics were essential. * * *

We turn now to the manifested Congressional policy. By section 1 of the Materials Act of July 3, 1947, *as amended*, 30 U.S.C. § 601 (1970), Congress has authorized the disposal of mineral materials "including but not limited to common varieties of sand, gravel, * * * clay" unless disposal is not otherwise expressly authorized by law, including the mining laws of the United States. In *United States* v. *Mattey*, *supra* at 65–66, the legislative history of this bill was quoted in part where the Under Secretary of this Department reported on the bill, indicating it would apply to:

> 2. Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.
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> * * * * *
>
> 4. Common earth to be used for road fills, earth dams, stock-watering reservoirs and similar uses.
>
> 5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products. (S. Rept. No. 204, 80th Cong., 1st Sess.)

This quotation indicates the understanding of Congress concerning the locatability of the substances mentioned. It is interesting to compare the statement concerning sand, stone and gravel with that concerning clay. There was recognition that a deposit of sand and gravel of a certain quantity and quality may be subject to the mining laws, whereas other deposits would not even though there would be a local economic demand for such materials. However, the statement regarding clay was more similar to the statement concerning common earth which has never been considered to be locatable under the mining laws. The statement on clay specifically referred to certain uses, the manufacture of bricks, tile, pottery, and similar products. There was no recognition that any deposit of clay of a certain quality or quantity used for such purposes could be locatable under the mining laws. This understanding of Congress concerning the nonlocatability of common earth and of clay used for the enumerated purposes was undoubtedly the reason Congress saw no need to list either clay or common earth as one of the "common varieties" of materials excluded from the mining laws by section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1970), because common earth and common clay were never considered locatable under the mining laws.

We noted in *United States* v. *Gunn*, *supra* at 248, that although many of the criteria in determining what constitutes a common variety of material under section 3 of the Surface Resources Act may be applicable in determining whether a deposit of clay is locatable generally, the basis for the determination should not be confused.

[2] With this background of the law and policy that has developed concerning the locatability of clay deposits, we turn to appellants' contentions. We cannot agree with appellants that the Government failed to make a prima facie case. As the law and policy discussed above indicates, there has been a sharp distinction between clay deemed to be a common or ordinary clay and a deposit having exceptional qualities which makes the clay suitable for purposes for which ordinary clay could not be used. There were opinions by the Government's expert witnesses that the clay or shale material within these claims is similar to that found in great abundance in that particular local area of Utah, that the material cannot meet refractory standards, and that the material is only a common or ordinary material not having any exceptional qualities. These opinions and evidence were sufficient to establish a prima facie case that the material within the claims was not locatable under the mining laws. It was, therefore, incumbent upon the appellants-contestees, who bear the ultimate risk of nonpersuasion, to go forward with their own evidence to rebut the Government's case with a preponderance of the evidence. *Cf. Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). In reviewing the evidentiary record, we must consider all the evidence presented. Thus, even if there were any deficiencies or weaknesses in the Government's case, evidence submitted by appellants which tends to support the Government's position may be used to overcome those deficiencies. *United States* v. *Taylor*, 19 IBLA 9, 82 I.D. 68 (1975).

[3] Appellants attempted to establish that these clay deposits should not be considered as common or ordinary, but that the material has unique and exceptional qualities. The General Manager of the Interstate Brick Company, one of two brick manufacturers in Utah, testified. He gave a brief history of brick manufacture in Utah and the Intermountain West. When the area was first settled, certain clays found in abundance in valleys in the Intermountain area, and which he calls "valley clays," were used locally for brickmaking by many different brick dealers and the settlers. However, instead of there being hundreds of brickmakers, now there are only two. The manufacture of brick and other clay products has become sophisticated and specifications for the clay materials have changed. Certain qualities in a clay deposit

are sought. Many tests are conducted on various clay deposits to ascertain if it will meet the specifications of the company, and only a very few deposits are found which are acceptable to the needs and requirements of the company. His company found this deposit desirable in part because it was a color the company had been seeking (Tr. 105). His company proposed to use the clay in blends combining other clays and silica sand for manufacturing brick, floor tile and similar products.

Another witness of the appellants, Dr. Ivan Cutler, an expert in the field of ceramic engineering, disputes the classification of this deposit as a common clay. He testified that the term "common clay" is not generally used in industry classifications, but that if he were to use it, he would apply it to the so-called "valley clays" from which brick had formerly been made locally. He testified the deposit had several unique characteristics including its strength, firing temperature range (in the lower range), its plasticity, and permeability which make it desirable for use in a modern face-brick industry. On cross-examination he admitted (at Tr. 166) that there are many deposits of clay and types of clay, and each one might be different and thus "unique" in that sense. He also testified the material could probably be used in making stoneware.

Appellants' evidence generally shows that the material from the claims, at least that from the one exposed pit, may be of good quality for brick and tile making. It is evident the material meets the particular specifications of the Interstate Brick Company as it can be used with its particular blends for manufacturing brick, tile and other clay products. Although the low firing temperature of the Kamas clay may be desirable for a mix with a material having a higher temperature range to achieve a desired manufacturing effect, it is conceivable that a mix with other materials would not achieve the desired effect. The evidence did not show whether the clay meets special specifications or requirements for other manufacturers of clay products.

There was little, if any, probative evidence that the material from these claims could be marketed successfully for use in making stoneware or other products except for those structural products made by the Interstate Brick Company. The gist of appellants' case rests upon the desirability of the deposit for that company's particular blend requirements.

The crucial issues this appeal raises are whether the changes in the brick and other clay-product manufacturing industry warrant a change in the interpretation of the mining laws for clay deposits. In other words, does the fact a given

clay deposit may meet the particular specifications of a large brick and tile manufacturer, whereas many other available deposits would not meet those specifications, impel a determination that the desired clay deposit should be considered a valuable mineral deposit under the mining laws? Or does the fact a particular deposit may be of a better quality for the manufacture of certain other clay products, as possibly pottery, earthenware, or stoneware, than other widespread clay deposits, impel such a conclusion? We must answer no to these questions.

We appreciate that technological and industrial changes may imbue minerals with economic values that did not exist before such developments created a particular demand for the mineral. The history of uranium most dramatically demonstrates this. However, the change in technology which created a demand for uranium was not simply an improvement of existing techniques and manufacturing processes using similar substances. It was a completely new technology created by new theoretical and practical concepts and applications. The use to which uranium is put is not a use that any ordinary material could serve if necessary. Uranium has an intrinsic value which may be affected, as is the case with most metallics, by circumstances causing changes in world-wide and national prices for the mineral.

With this deposit of clay, however, there is no intrinsic value which can be measured by a world-wide or national market for the mineral. The major value which can be imparted to this deposit depends primarily upon the special needs and requirements of one major local manufacturer of clay products. We do not know whether this particular deposit would meet the needs and specifications of other manufacturers. Further, although this deposit is of better quality and would meet the specifications of that manufacturer, the major proposed use for the material could be served, if needed, and as was done in the past, by other commonly available clays with some alterations in the manufacturing processes.

Undoubtedly by 1947 when the Materials Act was passed, as well as at the time of the hearing in this case, there had been technological changes in the manufacture of brick and clay products from the early days when the area was being settled. Nevertheless, brick, tile, pottery and similar uses were expressly mentioned in the legislative history as uses for clay which could be sold under that Act, rather than located under the mining laws. We are not persuaded that there is a sufficient evidentiary basis or other reason for distinguishing this case from the past precedents and strong Congressional policy. While for the purposes of a major manufacturer, this deposit may have uniquely desirable qualities in comparison with other widespread clay deposits, it may not be so uniquely desirable for

other manufacturers with different specifications and requirements.

In referring to "common clay" which is not locatable under the mining laws, the precedents demonstrate that clay used only for structural brick, tile, and other heavy clay products, and pressed or face brick, falls within that classification. They also demonstrate that clay deposits useful only for pottery, earthenware, or stoneware which cannot meet the refractory and other quality standards for high-grade ceramic products, such as china, come within that classification. The exceptional qualities that have been recognized as taking a deposit outside the classification of a common or ordinary clay within the meaning of the mining laws are, as mentioned, clays having a sufficiently high refractoriness to meet the standards for products requiring such special qualities. In addition, certain clays with special characteristics making them useful for particular uses, such as in the oil and oil well drilling industries, outside the manufacture of general clay-products, have been considered locatable. We realize that the classification of clay deposits as locatable or nonlocatable because they do not have these special characteristics and uses may not coincide with some classifications used by industry, if there are any such definite classifications, which has not been shown. See quotation from *Mineral Facts and Problems*, *supra*. However, these distinctions are well engrained in the interpretations of the mining laws. We adhere to such distinctions.

We note that it is not significant in this case whether the deposit could be profitably marketed for use in the manufacture of brick, tile, pottery and such other clay products, or whether the deposit may be of better quality than many other deposits for those purposes. *United States* v. *Mattey*, *supra*. The fact material may be marketable at a profit for purposes not recognizable under the mining laws may not be considered in determining the locatability and marketability of a deposit for cognizable purposes. *Cf. United States* v. *Taylor*, *supra*. The uses to which appellants propose to sell these materials are not uses which have been recognizable under the mining laws. They are limited to the structural or heavy clay products, face brick, and possibly pottery, stoneware or earthenware. Appellants have not shown that the material from this deposit can meet refractory standards for high-grade ceramic products. They have not shown the deposit can be used for other industrial purposes for which ordinary clays cannot be used such as those in the oil and oil well drilling industries. In short, they have not shown the deposit has the type of exceptional qualities which have been recognized as distinguishing the deposit from other clay deposits considered as common or ordinary clays under the mining laws.

We agree with the Administrative Law Judge that appellants have not shown the clay can be marketed profitably for uses for which common clays cannot be used. We modify the decision to the extent of emphasizing that there is an insufficient showing that this deposit has the exceptional qualities which would take it outside the purview of being considered a common clay under the mining laws.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

HEARINGS DIVISION
6432 Federal Building
Salt Lake City, Utah 84138

April 16, 1975.

UNITED STATES OF AMERICA, *Contestant*, *v.* THOMAS J. PECK & SON, INC., ANTHONY T. PECK and TONY PECK, *Contestees.*

UTAH 10704, involving Uintah Lode Mining Claims #1 through #10, inclusive, situated in sec. 21, T. 2 S., R. 7 E., Salt Lake Meridian, Summit County, Utah.

DECISION

Appearances: Erol R. Benson, Esq., Department of Agriculture, Ogden, Utah, for Contestant; Richard M. Mollinet, Esq., Hatch, Kirsch, Mollinet, Bates, Crofts & Gill, Salt Lake City, Utah, for Contestees.

Before: Administrative Law Judge Sweitzer.

This proceeding was initiated by a complaint dated Aug. 31, 1973, issued by the Utah State Office, Bureau of Land Management, U.S. Department of the Interior, at the behest of the Forest Service, U.S. Department of Agriculture. The complaint alleges that the subject mining claims are not valid because:

"1. There are not presently disclosed, within the boundaries of the mining claims, minerals of a variety subject to the mining laws sufficient in quantity, quality, and value to constitute a discovery.

2. The land is nonmineral in character.

3. The mineral material claimed as the basis for the mining claims is a common variety of clay not subject to location under the mining laws."

Contestees answered and generally denied the said charges. Pursuant to due notice a hearing was held in Salt Lake City, Utah. Thereafter, contestant and contestees filed briefs. Said briefs, as well as the complete evidentiary record of the case, have been considered in writing this decision.

Summation of the Evidence

Stephen A. Scott testified to being the District Forest Ranger administering the Forest Service land within the boundaries of which lie the contested claims. He stated the land covered by the claims has significant value for such purposes as scenery, recreation, watershed protection, grazing and wildlife.

David H. Crockett testified as a mineral examiner with the Forest Service. He related receipt of a Bachelor of Science degree in geology and of twenty-odd years experience in the field of geology. He testified to familiarity with the contested claims and as to certain studies he had made to familiarize himself with clay minerals. His testimony shows that

for his professional knowledge pertaining to clays and like materials, he relied in significant part on professional publications of the Bureau of Mines and other geology related agencies. He described the general geologic setting of the claims as being composed largely of a formation known as "Red Pine Shale" (Tr. 29), and said that formation "rings the Uintah Mountains in general on both the north and west ends and the south flank." (Tr. 30.)

Mr. Crockett told of making examinations of the claims in the early 1970's and obtaining samples from an exposed pit on Uintah Lode No. 2. (Tr. 31–32, Ex. 2.) He said he took four such samples in the company of a representative of contestees and delivered them to the Pittsburg Testing Laboratory office, located in Salt Lake City, for testing. Following splitting and combining, they were sent to various laboratories for a series of tests for such things as hardness, percentage of shrinkability, water plasticity, drying strength and potential uses of this type of material. He stated that the requested tests included testing for "pyrometric cone equivalent" (PCE), which he explained to be a test of refractory characteristics of a material when subjected to increasing temperatures. He said his limited research indicated material having a PCE below 19 is not considered refractory material.[1]

Based on the testing results received (Ex. 3), including PCE showings of below 19, Mr. Crockett concluded the material to not be a refractory clay; rather, he characterized it as follows, "It is a common variety of a shale or shale-like material, which there is an awful lot of it. It is not refractory." (Tr. 37) Mr. Crockett calculated a cost of approximately $3.35 per ton to load and deliver the materials from the claims to Salt Lake City, a distance of some 67 miles.[2] (Tr. 38–41.)

Respecting samples of materials from the claims fired at temperatures of between 1800 and 2300 degrees Fahrenheit, Mr. Crockett gave as his opinion of the differences created by the various firing temperatures:

"Well, the first noticeable thing that I saw was a color change as the temperature increased. The next thing that I noticed, personally, was that as the temperature increased, the degree of deformation began to take place, a little checking, and what appears to me, as far as I can tell, a little bloating, as it got higher." (Tr. 43.)

Illustrating with a map (Ex. 4), Mr. Crockett gave the following observations relative to the existence of the same or similar materials to that which he observed on the mining claims at issue:

"Well, I have observed this particular formation in a number of different places, for an equal number of different reasons, and have found it to be fairly consistent in its nature. There are certain local variations. You might get an increase in imbedded quartzite within the formation. In other localities you may even find that the same formation may disappear for a short distance. Whether this is a structural geologic problem or not, I'm not prepared to state, but it's a fairly consistent formation that rings at least the western half of the Uintah Mountains.

* * * * *

[1] *A Dictionary of Mining, Mineral, and Related Terms* (U.S. Bureau of Mines, 1968, at p. 908) defines "refractory" in part as "A material of a very high melting point with properties that make it suitable for such uses as furnace linings and kiln construction. * * *" and "refractory clay" as "Any clay showing a pyrometric cone equivalent of not less than cone 27. * * *"

[2] Actually the testimony at Tr. 38–41 is confusing, as to whether the 67 miles, and the calculation based thereon, intends Salt Lake City or West Jordan, Utah where contestees' witness Cahoon subsequently stated the Interstate Brick Company plant is situate (see p. 7 *infra*). However, for purposes of this decision the confusion on this point is not material. I take official notice that West Jordan, Utah is some ten miles, more or less, southwesterly of Salt Lake City.

"It would run into billions of tons of material. I might state, though, that the average thickness of the formation where it can be measured is around 1,000 or 1,200 feet." (Tr. 46–47.)

Mr. Crockett described a microscopic study he made of the material from the claims in the following manner:

"Well, I observed the fact that it was predominately a mixture of what appeared to be fine grained chlorite, some sericite mica, which is common muscovite, and quartze [sic]. Under the polarizing microscope it appeared to have some small parts of barite and there were some iron oxides that were also present, but I did not make a determination of the amounts. There was a lot of the material that was extremely fine-grained, probably of the five micron or two micron class, which would place it as a clay. Then in conjunction with Mr. Cather, an employee and geologist with the Bureau of Mines, we ran a differential thermal analysis on the sample. I was merely an observer, and the test failed to produce a thermogram typical of either a montmorillonite or a kaolinite clay.

* * * * *

"* * * The sample appeared to have some very poor bedding to it, that is, the bedding planes as it was deposited as a sediment. It apparently was deposited under rather mixed conditions, and the bedding is not a clearly defined structural bedding, as you might find in a sandstone. I felt, from my examination under the microscope, that the large predominant amount of particle size was siltstone. However, that is a subject of conjecture, I'm sure. We did not get a thermogram that did show either a montmorillonite or a kaolinite, but that does not say that there are not clay-sized particles in the material." (Tr. 59–60.)

In response to whether he would classify the materials as a "lode or placer type of deposit," he stated, "I would be most inclined to classify that as a placer because of its size and extent." (Tr. 60.)

On cross-examination Mr. Crockett admitted that his studies relating to usages of, and values of, clay materials were limited. He acknowledged that clays could be used for purposes other than making refractory products. He stated that he knew of no place where "Red Pine Shale" could be found except the area around the foot of the Uintah Mountains. He said that although he believed the materials in question were not truly clay but siltstone, that illite is also one of the clay minerals, and that he made no tests to determine whether illite was present. He conceded also that he did not know how local variations in clays would affect the usability or the profitability of clay. (Tr. 72.)

William L. Johnson testified as a Forest Service mining engineer. He testified to his having been employed for about 15 years as a mining engineer and geologist and stated that while employed in California he examined numerous clay deposits in that state. He testified to his having examined the claims at issue. He stated that based upon his examination, and upon the results of the tests of samples that "* * * I would conclude that the material is a common variety of shaley siltstone or silty sandstone. It is not a true clay, in the sense of the word or in the mineralogical definition." (Tr. 75–76.) With regard to whether the material would be properly locatable as a placer or a lode claim, he stated that in his opinion it was a placer material, and he said that there were "numerous clay sources" in Utah. (Tr. 82.)

On cross-examination, he responded in part as follows:

Q. Do you know whether the clays from any one particular source are used exclusively in the manufacture of face brick, without mixing with any other material?

A. Normally, from my experience in California, I can say that it is quite common to have a blend of clays.

Q. Then, is it not possible, Mr. Johnson, from your previous testimony, that clays might be located for different char-

acteristics which they could contribute to a finished product?

A. This is correct. If clay happened to be low, say, in iron, for coloration they may have to bring in either iron oxide or some clay that was higher in iron. There may be mixing of clays to obtain a desired color and a uniformity.

Q. * * * Do you know of any location within a 200 mile radius of Salt Lake City where a clay with these identical characteristics of the red pine shale can be located?

* * * * *

A. I do not know of any—from my own personal knowledge I do not know of any other deposits of a shale identical to this shale in composition and characterization. I have had no occasion to sample it, but I do not know of any. (Tr. 83–84.)

Harold P. Cahoon, called to testify by contestees, advised that he is the General Manager of Interstate Brick Company located at West Jordan, Utah. He testified that he has a Doctorate degree in ceramic engineering, and degrees also in mineralogy, and that he has been actively engaged in the field of ceramic engineering since completing his education in the 1950's. He is a member of the American Ceramics Society. With respect to research he has done in the testing and classification of clays, he testified "At the University of Utah I did a lot of work on the classification of clays by mineralogy tests." (Tr. 93.) He referred also to other testings of clays that he has been involved in, and he indicated that he has been closely associated with the brick manufacturing industry for 30-odd years.

He stated his company utilizes about 15 different clay deposits for the manufacture of bricks, and that the furthest distance from which his company hauled clay was approximately 200 miles. He estimated that his company might have to test 1,000 samples before finding a clay deposit suitable for its purposes, and that it locates a new satisfactory deposit only about once in every five to ten years. His explanation on direct examination continued:

Q. Do you use clays from any of these pits alone in manufacturing a product?

A. No.

Q. Do you have to mix clays from various pit locations to obtain a desirable end product?

A. We do not make one product that is made out of one clay. We blend all of our—each product that we make has a particular blend of clays in it, for the reasons which each clay gives to that product.

* * * * *

Q. The specific reference to the red pine shale, which I would like to refer to hereafter as Kamas clay; how did you locate that clay?

A. A sample was brought into our plant.

Q. Did you take this sample through the testing procedure?

A. Yes.

* * * * *

Q. Did you arrive at any conclusions with respect to the usability of this particular clay in your operation?

A. Yes.

Q. Can you tell us what those were?

A. It gave us a very dense, hard body, and it exhibited a very wide maturing range.

It gave us a color which we had been seeking for quite a long time. (Tr. 100–105.)

Mr. Cahoon defined "maturing range" as "a firing temperature" upon which you can burn this material and obtain a satisfactory product, and he gave the following as "important distinctions" between the "Kamas clay" and "clay which might usually be found on the surface of the Salt Lake Valley":

"It's those properties which I have reiterated; the extrusionability, which is tied into its plasticity, its ability to be dried, its maturing range, its lack of soluable salts, and the finished firing property of hardness, toughness, that pleasing

color, and its strength, all these things were good." (Tr. 106.)

He said the Kamas clay was particularly usable in the making of floor tile by his company, and was also usable in making its structural load-bearing brick and cast shingles. (Tr. 106.)

The following exchange also took place during direct examination of Mr. Cahoon:

Q. Let me ask you: Is there any market for clays which we have previously referred to in this testimony as "valley" clays?

A. No.

Q. In your opinion, Mr. Cahoon, is there any market for the Kamas clay?

A. Yes.

Q. Would the Kamas clay demand a higher price on the market than valley clays?

A. Yes.

Q. Mr. Cahoon, if, in fact, the Kamas clay is deemed to be a locatable mineral, are you prepared to commit money and time and other means to the development of a mine at that location?

A. Yes.

Q. Is it your opinion that you can extract this clay and use it and obtain a profit from the product?

A. Yes.

Q. Are the characteristics of this clay essential to a brick operation?

A. Yes.

Q. Let me ask you this: Are the products which you could make from the Kamas clay such that they would command a higher price in the market than the products made from valley clays?

A. Yes.

* * * * *

Q. Where are the products made by Interstate Brick Company sold?

A. The floor tile is sold all over the United States, Hawaii and Puerto Rico. The roofing tile is sold in all the Intermountain West, California, and we have an inquiry for a large order even in Florida. The brick is being sold in Utah, Idaho, parts of Wyoming, parts of Colorado, parts of California and parts of Arizona. (Tr. 107–108.)

On cross-examination, Mr. Cahoon explained that when he was talking about "valley clay," he intended:

A. That would be a surface clay found in practically any valley in the State of Utah.

* * * * *

Q. Is it your testimony, and do I understand you correctly, that the valley clay is simply not useful for any purpose to you?

A. To us, no.

* * * * *

Q. You talked about blending. Now, you left me, perhaps, with the impression that this Uintah clay could be used without blending it; am I right in that?

A. No.

Q. It has to be blended?

A. We would blend it.

Q. What do you mix when you blend clays?

A. Different clays.

Q. Do you mix anything in besides clay?

A. We have a mix that we add, silica sand. (Tr. 109–110.)

Anthony T. Peck testified that he is President of Thomas J. Peck & Sons Trucking and Mining Corporation, which is engaged in the mining and hauling of clays. He is one of the locators of the claims under contest. His direct examination included:

Q. And did an officer or employee of Interstate [Brick Company] enter into negotiations with you for a lease of this clay location?

A. Yes.

Q. Mr. Peck, are you prepared to move mining machinery on to this location in order to mine and remove this clay if a location is established?

A. Yes.

Q. Do you have any other parties interested in purchasing this clay from you?

A. Yes.

Q. Can you mine and remove this clay and sell it at a profit?

A. Yes. (Tr. 115.)

On cross-examination Mr. Peck said that he was prepared to place mining equipment within the boundaries of Uintah Lode Mining Claim No. 2. He explained:

A. I would like to mine in that particular spot [the existing pit on Uintah Claim No. 2] because there's already been some eight to ten thousand tons removed. It's an ideal spot, and it's already been exposed and opened up, and anybody in the mining business would be crazy not to. There are alternate spots on the opposite side of this hill where you could take out approximately, upwards of a million or two tons and still couldn't be—

Q. Where would that be?

A. Number one, or number one and number two both. It would be somewhere between the line of number one and number two both.

Q. You could take out a million tons in that area, then, with no particular difficulty; is that correct?

A. Yes. Without it being visible from the highway.

Q. And what arrangements for sale do you contemplate, in terms of tons per year?

A. We have a standing offer of 25,000 tons. Not necessarily per year, but that's the amount negotiated on to deliver into the plant.

Q. So, then, you would have a fifty year, or more, supply on claims 1 and 2?

A. Yes. (Tr. 118–119.)

Ivan B. Cutler, Professor of Ceramic Engineering at the University of Utah, with a Doctorate in ceramics, testified that since obtaining this degree in 1951 he has been actively engaged in the field of ceramic engineering. He testified to familiarity with testing of characteristics and properties of clays and to having authored numerous articles in the ceramic engineering field. The following exchange occurred during direct examination:

Q. Have you, during the years 1973 and the first part of 1974, performed any tests or made any investigations with respect to the physical properties of various types of clays found in the State of Utah?

A. Yes.

Q. What was the purpose of your investigation?

A. Really, to measure their ceramic properties.

Q. Can you describe for us what the investigation consisted of?

A. It consisted of locating some clays, some valley clays, for example, crushing and grinding these, if need be, and extruding them into test samples. We then measured the plastic properties, drying shrinkage, firing and firing shrinkage, porosity, and what absorption to see how they would react to ceramic processing procedures. (Tr. 123–124.)

Exhibits B and C are large boards containing numerous fired clay samples. As described by Dr. Cutler:

"Exhibit B refers to the section of samples of extruded bars that I and some of my workers at the University processed through a regular firing procedure to measure their properties. You can see that this refers to some of the Kamas clays and mixtures.

"This Exhibit C shows some local surface clays that we obtained and likewise processed." (Tr. 124.)

Dr. Cutler identified Exhibit D as being a compilation containing "* * * the data for the fired product of these clays that are shown in Exhibits B and C." He stated that Exhibits B, C and D were prepared either by him or under his supervision. By the use of illustrations, the witness expressed the following conclusions:

"The characteristics of local surface clays is that they contain considerable amounts of calcium carbonate, and that gives a very unusual characteristic to the response to high temperatures, as you may well imagine. Calcium, or limestone, decomposes when heated, and this decom-

position with the carbon dioxide leaving, means that the material is very porous. If it were to become very dense, then it would have to shrink a great deal.

"As we fire, what we find out, of course, is that the water absorption is very high. You will notice that water absorption here ranges above 10 percent, because as soon as you heat these up and decompose that limestone, you leave a lot of room in the material and as soon as you put that in water, the water will absorb into all of the pores that were left from the decomposition of the limestone contained in these local surface clays.

"Now, if you heat it high enough, it will begin to shrink, and that shrinkage, then, will lower the water absorption. But the problem with these is that this isn't anything that—this shrinkage process cannot be controlled. As you can see, it occurs very sharply here. As a matter of fact, we have some samples, and I'll show those a bit later, that show how critical this shrinkage process is.

"The thing I want to emphasize to the Court is that we are dealing with materials that have very high water absorption because of the decomposition of this limestone, which is contained as very, very tiny particles in the local surface clays. (Tr. 128–129.)

Dr. Cutler continued that the temperature at which these "local surface" clays begin to shrink is about 2000 degrees Fahrenheit and that:

"* * * If you go up to 2,100 fahrenheit [sic], then you are in severe danger of losing the material because it will be so soft that it won't be able to withstand the load of one brick being placed on top of another." (Tr. 129.)

Dr. Cutler testified that the normal range of firing temperatures in a modern brick plant would be between 1800 and 2300 degrees Fahrenheit, noting again that the clays on Exhibit C began to shrink at about 2000 degrees Fahrenheit which is in about the middle of that range. He added:

"But it's a very disastrous type of shrinkage that occurs, and I can illustrate that here with this exhibit C. It shows each of the same clays. This is the one right here—this is where you really like to be able to fire, but you will notice that this sample right here, even in our laboratory, we can't hold the temperature constant enough, and it was just a little bit hotter on one side of the sample than the other [pointing to sample No. 5 fired at 2012 Fahrenheit"]. (Tr. 130.)

He illustrated that some of the higher firing temperatures, such as those above 2100 degrees Fahrenheit as respects the so-called valley or local surface clays can cause some 25 percent shrinkage and added:

"It's just not possible to manufacture products when you are involved with twenty-five percent dimensional change in the product." (Tr. 132.)

With reference to certain additional samples of fired valley clays, Dr. Cutler explained:

"These exhibits represent the difficulty in trying to get a hard, dense material from clays 1, 2, and 3, by firing at approximately 2,100 degrees farenheit [sic]. Once again, they have considerable distortion, as you can see from the nature of the exhibits [referring to exhibits E, F and G], plus there's an extra large amount of shrinkage involved in that densification.

"Now, because porosity, as indicated from water absorption, is an indication of weakness in the fired material, it is almost a one-to-one corrolation, that if you make the material dense you will also have it very strong. Conversely, if it's porous, and if it absorbs a lot of water, it will be weak." (Tr. 134.)

Dr. Cutler compared and contrasted the fired characteristics of the "Kamas clay" (i.e., "red pine shale"). He stated that the showings on Exhibit D of "very low linear shrinkage" under different firing temperatures is an "unusual property of this particular clay." (Tr. 139.)

He went on to explain further:

"Now, one wonders, then, why do we have the material here that has such a limited amount of shrinkage, and at the same time shows a considerable decrease

in the water absorption. Now, that can only take place if something happens to fill in the spaces there without getting any shrinkage involved. One of the likely explanations for this behavior comes from the nature of the mineral itself that's contained in this Kamas clay. Our examination of this Kamas clay indicates that it's prominently an illite or hydrus mica.

"* * * That's a unique type of clay mineral. It's unique because it contains within the structure a flux. The cations that go in between the layers of minerals are mostly potassium ions. This, of course, means that we have, right in the clay mineral itself, the necessary ingredients for a good porcelain type of composition. * * *" (Tr. 141–142.)

He explained that the Kamas clay's porcelain type of composition would permit use in a "low temperature range" of between 1900 to 2000 degrees Fahrenheit. He called this one of this clay's "unusual characteristics," and also stated:

"Another unusual characteristic of this clay is that it contains, according to our analysis, about a quarter of a percent of manganese, in addition to some titanium dioxide and iron oxide. The iron oxide gives this reddish-brown type color, but manganese and especially in conjuntion with titanium and iron will give that brown color that is characteristic of fired Kamas clay . . . That's an unusual characteristic. You don't find that very often.

"Now, how can this characteristic of this material help out in manufacturing other types of ceramic materials? Let me just show here how this material can be mixed with, for instance, Koosharem clay"—(Tr. 143–144.)

He explained that a mixture of the Kamas clay, with its characteristic of low firing temperature along with the high firing characteristics of the Koosharem clay, can cause a minimizing of the shrinkage involved in the mixture and at the same time make the mixture of the two materials dense:

"* * * As we mix this Kamas clay with the Koosharem clay, we get a water absorption minimum here at a higher temperature. * * * So, it's obvious, to me, at least, from my experience, that you could make a mixture of these two and utilize the best characteristics of the Kamas clay to reduce the firing temperature of the Koosharem or some other clay. So, this Kamas clay has a nature that it could be used very well with other types of materials in lowering their firing temperature, and probably reducing their shrinkage as well. That's the kind of tests that we have carried out. * * *" (Tr. 145–146.)

Dr. Cutler said he obtained the Kamas clay samples by going up to the deposit with Thomas Peck, and "sampled across the deposit in two different locations, along the vein that had been opened up * * * in the pit which has previously been referred to in this proceeding." With regard to whether the "red pine shale" (also referred to by contestees as "Kamas clay") is in fact "a clay within the accepted definition of that word," Dr. Cutler stated:

"Well, there are several criteria for whether material is a clay, and according to the geological definition, only part of the Kamas clay would be a clay because only part of it would fall within the minus five micron range. My guess would be, from looking at the scanning electron microscope pictures of the material and working with it, that something on the order of maybe twenty to thirty percent of it would be in this minus five micron range."

"If you talk about it from the point of view of its crystal or mineralogical character, you are driven to the point that it's a hydrus mica or an illite type of clay mineral, so it really depends on how you make that definition." (Tr. 146–147.)

He noted that a hydrus mica or illite type material is commonly referred to as a "clay."

Again referring to his comparisons of various "valley clays" with the so-called

Kamas clay obtained from the mining claims, he was asked:

"* * * From this comparison have you been able to form any opinion with respect to whether the Kamas clay has any characteristics which are exceptional?" (Tr. 147.)

Stating that he had, he said:

"Well, in my opinion, the Kamas clay is very desireable [sic] because of its characteristic of showing very little fired change, and at the same time, developing considerable mollite at the firing temperature and becoming very dense, nonporous. I would expect, from the relationship between porosity and strength, that its strength would also be very high." (Tr. 147.)

Dr. Cutler stated that of several criteria utilized in classifying clays, in his opinion the ultimate use of the clay is one of the proper criteria. He gave his opinion that the Kamas clay exhibited qualities pertaining to strength, plasticity, and shrinkage which would make it particularly adaptable to the face brick industry, as distinguished from the "common brick" industry. (Tr. 149.) He advised that so far as he knows, there are no bricks manufactured in Utah by the "common brick method." (Tr. 150.) Further direct examination included the following:

Q. Are there any other purposes for which this clay might be used, other than face brick?

A. Well, it follows, at least from the German literature, that it would be a very good candidate for stoneware.

Q. Have you attempted to make any stoneware with this clay?

A. Yes. We have an exhibit here. (Tr. 151–152.)

Explaining two samples of stoneware which he exhibited (Exs. H and I), Dr. Cutler stated that a mixture of about 75 percent Kamas clay and 25 percent "ball clay" gives more plasticity and can be utilized to make stoneware pots. He concluded "* * * Through these pots we show that they had the kind of plasticity and the kind of characteristics that would make a good stoneware clay." (Tr. 154.) He said the water absorption of the product was very low, describing it as being about "one-half percent." (Tr. 154.) He also said that "the material forms a very dense and nonporous type of structure, and I can conclude that it would make a good stoneware clay." (Tr. 154.)

Dr. Cutler reiterated that in his opinion the Kamas clay has several properties that make it "unique." (Tr. 159.) And he elaborated that he believed the unique properties of the Kamas clay would make it "desirable from the point of view of manufacturing some products." Enumerating the "products" he said:

"Well, the properties of forming mollite at low temperatures gives you an opportunity of making a very hard and dense material that has already found a great deal of use in floor tile. It could also make it very usable for stoneware, and, of course, it could be used in face brick as well." (Tr. 160.)

He said that in making such products as floor tiles, face brick and stoneware, mixtures with other clays would be desirable and that mixtures are the general rule in the making of clay products. He observed that there are numerous kinds of clay deposits and that generally speaking, any particular deposit or deposits would contain properties different or unusual from other given clay deposits.

Evaluation and Findings

Prior to discussing the charges of the complaint, it seems appropriate to consider a matter not included in any of the charges, but raised for the first time by contestant at the hearing prior to the taking of evidence. This is whether on the basis of the record now before me I may properly consider the propriety of the claims having been located as lodes rather than as placers. In my opinion I may not and, accordingly, do not. I shall explain my reason.

Discussions at the hearing between counsel indicated the same land, or some of the same land, covered by the con-

tested lode claims may also be covered by placer claims held by contestees, but counsel for contestees declined to stipulate in this regard or to stipulate that any such placer claims may be considered as a part of this proceeding or that the issue of the propriety of location as lodes be considered. Contestant presented no satisfactory explanation for its failure to duly charge the asserted improper mode of location nor for its failure to include any such placer claims as a part of the proceeding. Contestees "reserve[d] any rights we may have under the placer location laws, as opposed to the lode laws." (Tr. 8.)

When contestant raised this matter at the hearing assertion was made that *United States* v. *Stevens*, 77 I.D. 97 (1970), implicitly requires consideration of the question, although not charged in the complaint or by due amendment thereto, where it is reasonably raised by the evidence. Contestant did introduce some evidence indicating the materials on the claims to be of a placer nature. Presumably the portion of the *Stevens* case relied on by contestant for its argument in this regard is the following paragraph appearing at page 103:

"There is an additional reason, which was overlooked in the decisions below, for concluding that all of these claims, including the Slab Sugar Granite (No. 1) are invalid if they contain no other minerals than building stone. All of these claims were located as lode claims. However, building stone is subject to the act of August 4, 1892, 30 U.S.C. sec. 161 (1964), authorizing the location of mining claims for lands chiefly valuable for building stone 'under the provisions of the law in relation to placer-mineral claims.' Since the claims were not located as placer claims for the building stone, the deposits of building stone within the lode claims could not validate the claims."

This foregoing statement is not apropos to the case at hand. *Stevens* dealt with building stone claims required to be located as placers as a matter of express statutory law, a situation not present in this case.

Rather, the following language, as found in *United States* v. *McClarty*, 81 I.D. 472, 485 (1974), is applicable:

"* * * 43 CFR 4.450-4(a)(4) requires that the complaint contain a statement in clear and concise language of the facts constituting the grounds of the contest. It must give notice to the adverse party of the claims that are to be adjudicated so that he may prepare his case. *United States* v. *Harold Ladd Pierce*, 3 IBLA 29 (1971); *Douds* v. *International Longshoremen's Assn*, 241 F. 2d 278, 283 (2d Cir. 1957). * * * A ground not alleged in a contest complaint cannot be used to find a claim invalid, unless it has been raised at the hearing and the contestee has not objected. *United States* v. *Northwest Mine and Milling, Inc.*, 11 IBLA 271 (1973); *United States* v. *Harold Ladd Pierce, supra.* * * *" [3]

Having disposed of the matter not charged in the complaint, I now set forth law applicable to the charges and a dis-

[3] I observe that *United States* v. *Guzman*, 18 IBLA 109, 131 (December 5, 1974) points out that a showing of compliance with the provisions of 30 U.S.C. § 38 (1970) could serve to "* * * regularize the possession of placer deposits by claimants who had entered, located, held and worked such deposits under the law relating to lode claims. * * *" 30 U.S.C. § 38 provides in pertinent part:

"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 of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim; * * *"

Contestees did not show compliance with the quoted statute. Of course, for reasons I have set forth, there existed no reason for them to do so, they not having been put on due notice of the later asserted deficiency in mode of location; thus there was no basis for them to have anticipated that they should show adherence to the statute or else that the claims were properly located as lodes.

cussion thereof and findings based thereon.

Where the Government contests mining claims alleging lack of valid discovery, it has the burden of going forward with sufficient evidence to make a *prima facie* case of lack of discovery. If and when that is accomplished, the affirmative burden of disproving the Government's case by a preponderance of the evidence devolves upon the claimant, here the contestees. Thus, the ultimate burden of proving discovery is the burden of contestees. *Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States* v. *Taylor*, 19 IBLA 9, 22–23 (1975). And a showing must also be made that a discovery has been made on *each* claim in order for that certain claim to be valid. *United States* v. *Foresyth*, 15 IBLA 43, 58 (1974).

A discovery exists where:

"* * * minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with the reasonable prospect of success in developing a valuable mine * * *. *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), approved in *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905)."

This "prudent-man" test is approved in *Coleman* v. *United States*, 390 U.S. 599 (1968), and refined with the requirement that a showing must be made that the mineral can be extracted, removed and marketed at a profit. The marketability refinement of the prudent man test of discovery thus requires that the mineral locator must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit. See *Foster* v. *Seaton*, *supra* at 838, and *Coleman* v. *United States*, *supra* at 603.

The claims in issue were all located in 1970, thus subsequent to the Surface Resources Act of July 23, 1955, sec. 3 of which, 30 U.S.C. § 611 (1970), declared that common varieties of certain minerals are not valuable mineral deposits under the mining laws (30 U.S.C. § 22 *et seq.* (1970)); *Coleman* v. *United States*, 390 U.S. 599 (1968). Specifically: "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * 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' * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value. * * *"

Significant factors in consideration of the cited act to determine whether or not minerals are an uncommon variety are: Whether the deposit has a unique property, whether the unique property gives the deposit a distinct and special value (*United States* v. *U.S. Minerals Development Corp.*, 75 I.D. 127 (1968)); and whether "* * * the distinct and special value * * * [is] reflected by the higher price which the material commands in the market place." (*McClarty* v. *Secretary of the Interior*, 408 F. 2d 907, 908 (1969)).

Even prior to the said Act of July 23, 1955, it was the long established rule that common clay is not subject to disposition under the mining laws even though a market may exist for the clay. Thus, in *Holman* v. *State of Utah*, 41 L.D. 314, 315 (1912), it was stated:

"It is not the understanding of the Department that Congress has intended that land shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime

or for brick. * * * It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining laws."

One of the principal decisions involving the question of locatability of clay deposits under the mining laws (and a case cited by each of the parties as being a decision in support of its respective position) is *United States* v. *Mattey*, 67 I.D. 63 (1960)[4] wherein it was held that to satisfy the requirements for a discovery of a mining claim located for a deposit of clay, it must be shown that the clay is not only marketable at a profit but that it is not a common clay suitable only for the manufacture of brick, tile, pottery and similar products.

The *Mattey* decision recognizes that lands containing deposits of clay of "an exceptional nature" may be entered under the mining laws. The decision then goes on at pp. 67–68 to hold that in the facts of the case there being considered:

"The only unusual qualities attributed to the deposit are that it contains certain 'impurities' and is used in the manufacture of vitrified sewer pipe. The impurities, or flux materials, however, are merely the ordinary substances found in common clay. Indeed, it is their presence in appreciable amounts which differentiates the common clays from the less common clays. * * * There is nothing in the record to indicate that the Mattey shale contains flux materials in unusual combinations or that it is different in composition from any other common clay. The only comparison made was between the shale and common dirt as a bulk material for the clay mixture used in manufacturing the sewer pipe. The fact that there the advantages are in favor of using shale over common earth is hardly sufficient to warrant classifying the shale as uncommon.

"* * * the use to which a common clay is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent upon any unusual characteristics of the clay itself. It would be different if a clay with unusual characteristics which could be used in the manufacture of ordinary brick were used to make a product for which its unusual characteristics were essential. In this case the Mattey shale has no qualities that it does not share with other common clays and it is used only as any other common clay could be used."

Mattey held that the clay it involved was not a mineral subject to location under the general mining law and therefore found it unnecessary to consider the act of July 23, 1955, *supra*.[5] The decision refers, with approval, to Department of the Interior comment on the bill which became the Materials Act of July 31, 1947, 30 U.S.C. § 601 *et seq.* (1970), which authorizes the Department to sell certain materials on public lands. Said comment is quoted in part at pp. 65–66 of the decision, and the part applicable to the present case is as follows:

"There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. * * *

Included in the materials to which it is contemplated the proposed bill would apply are:

* * * * *

5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products. (S. Rept. No. 204, 80th Cong., 1st sess.)."

A *prima facie* case was established by the Government through the testimony of

[4] *See also United States* v. *Nogueira et al.*, 403 F. 2d. 816 (9th Cir., 1968), involving the same claim as that in the *Mattey* case.

[5] In accord, the more recent decision of *United States* v. *O'Callaghan*, 8 IBLA 324, 328 (1972) states: "The status of common clay was not changed by the Act of July 23, 1955"; and, "ordinary clay" is not locatable (citing *Holman* v. *Utah*, *supra*).

its mineral examiners who had examined the claims. Their testimony has the effect of showing no discovery of valuable minerals under the mining laws; specifically, that the material in dispute is not of a quality which can be marketed profitably for commercial purposes for which common clay cannot be sold. Although their testimony indicates all the samples which are tested, and to which they testified, were taken from the pit which Exhibit 2 shows to be on Uintah Lode Mining Claim No. 2, the evidence does not disclose any working existed on any of the other nine claims. A Government mineral examiner is not required to do the discovery work upon a claim. *United States* v. *Coston*, A-30835 (Feb. 23, 1968). It is only necessary that he examine the exposed areas of the claim and the workings on a claim to verify if a discovery has been made by a mining claimant. *United States* v. *McGuire*, 4 IBLA 407 (1972). Moreover, contestees' evidence indicates their samples which represented materials from any of the contested claims were from this same pit.

Thus, the burden of proving the nature and value of the material on the claims comes to rest upon contestees.

Dr. Cutler's categorization of the "Kamas clay" as being that it's an "illite or hydrus mica" (Tr. 141, 147) itself indicates the material called "Kamas clay" would fit within the "common" category in the definition of "clay mineral" in *A Dictionary of Mining, Mineral, and Related Terms* (U.S. Bureau of Mines, 1968 Ed., at 215)[6] *viz:*

"* * * The most common clay minerals belong to the Kaolinite, montmorillonite, attapulgite, and illite (or hydromica) groups. * * *"

Evidence presented by contestees' witnesses distinguishing the "Kamas clay" from the so-called "valley clays" (*i.e.*, "surface clay[s] found in practically any valley in the State of Utah," Tr. 109; *see also* Tr. 105, 124, 128) is not sufficient to remove the "Kamas clay" from the "common clay" category as defined in the *Mattey* decision, *supra*. *See also United States* v. *Bienick*, 14 IBLA 290 (1974) (esp. concurring opinion at 297); and *United States* v. *O'Callaghan*, *supra* (footnote 5). This only indicates the "Kamas clay" to be of less widespread occurrence than some other material ("valley clays") which admittedly have no market. (Tr. 107.)

By and large, the evidence suggests the "Kamas clay" to be usable "for the manufacture of bricks, tile, pottery, and similar products, and within the context of *Mattey* such usability does not render it locatable.

I do observe that reference is made to its being usable for the making of stoneware (Tr. 106, 143, 151–154, Exs. H and I), porcelain (Tr. 141–142), other types of ceramic materials (Tr. 123–124, 143–146, Exs. B and D), floor tile (Tr. 106, 160), structural load-bearing brick (Tr. 106), cast shingles (Tr. 106), and face brick (Tr. 149, 160). It would serve no real purpose and would seem academic to discuss in this decision whether usability of the material in question for the listed purposes or any of them, was adequately shown, or whether such purposes, or any of them, would suffice to render the deposit uncommon. This, because the record is devoid of evidence showing the "Kamas clay" could be marketed profitably for any such purposes.

United States v. *Gunn*, 79 I.D. 588, 593–594 (1972) contains the following applicable language:

"* * * Although the decisions below found that the deposit was a common clay, they did not rule that the clay was no longer locatable under the mining laws because of sec. 3 of that Act [of July 23, 1955] which provided that a deposit of common varieties of sand, stone,

[6] I take official notice of this U.S. Bureau of Mines publication albeit no reference was made thereto by either counsel. *Cf.*, *United States* v. *O'Callaghan*, *supra*, footnote 5, at p. 26.

That it is appropriate to utilize evidence presented by contestees in support of the contest charges, *see United States* v. *Foster*, 65 I.D. 1, 11 (1958), *aff'd Foster* v. *Seaton*, *supra*; *United States* v. *Taylor*, *supra*, at 23–24.

gravel, pumice, pumicite, or cinders, shall not be deemed a valuable mineral deposit within the meaning of the mining laws so as to give validity to any claim located after the Act. Rather, they relied on the ruling [in *United States* v. *Mattey*, *supra*] * * * that common clays have never been locatable under the mining laws, instead only a deposit of clay of an exceptional nature which can be marketed for uses for which ordinary clays cannot be used may be located. Common varieties of clay are included in the category of material disposable by the United States under the Materials Act of July 31, 1947, 30 U.S.C. § 601 (1970). Appellant [mining claimant] seems to be confusing common varieties under section 3 of the Surface Resources Act with the ruling reached below which found the deposit to be a common clay. Although many of the criteria in detemining what constitutes a common variety under section 3 of the Act of July 23, 1955, as set forth in regulation 43 CFR 3711.1(b), are also applicable in determining whether a clay is locatable generally, the basis for the determination should not be confused.

"Appellants cite definitions and discussions of bentonite [*Gunn* involved the alleged discovery of a bentonitic clay] generally in various texts to support their contention that it is a special clay because it has been classified as such. The fact that bentonite clay has been given a special name, as appellants contend, is not determinative. The evidence in this case did not cover all types of bentonite, but was limited to the clay found on these claims. There is no factual basis in this case to make any general ruling concerning the locatability of all types of bentonitic clays. Our inquiry is limited to the clay deposit within these claims.

* * * * *

"[A witness testified that the clay 'might be competitive because of lower freight rates' than for other clay and that 'there might be more prospective purchasers of the material.'] Most of his testimony, however, is actually more in the nature of advice for future work to be done on the claims and for investigating market possibilities. There is insufficient evidence that there is clay of a quality that can be marketed profitably for commercial purposes for which common clays cannot be sold. * * * Other than the discussion concerning freight costs, there is no evidence concerning the economic realities of a mining operation within the claims, such as evidence concerning possible prices for which the clay could be sold and possible costs of a mining operation. Without an adequate showing that the clay is of a quality and quantity which can be marketed profitably for commercial purposes for which common clay cannot be sold, the claim is not a valid claim based on the clay alone. * * *"

Contestees clearly established the existence of a sufficient *quantity* of the material (to meet that aspect of the first charge of the complaint). (E.g. Tr. 46, 118–119.) But even assuming *arguendo*, that contestees had shown the "Kamas clay" to be a locatable mineral, they failed to show it could be marketed at a profit. Contestees' witness Peck stated "there's already been some eight to ten thousand tons removed" from the pit on Uintah Lode Mining Claim No. 2 (Tr. 118), but it was never established that amount, or any amount, was sold at a profit. And his testimony that "We have a standing offer of 25,000 tons" (Tr. 119; quoted in context at p. 12 hereof) is unsupported by anything showing profitability.

Contestant's witness testified to a calculation of $3.35 per ton to load and deliver the materials to West Jordan, Utah, or Salt Lake City, Utah (*see* footnote 2, *supra*) which was the closest possible market indicated by the evidence. Contestees showed neither that this calculation was in error, or that the price paid for the delivered material would exceed this amount.

Any evidence pertaining to profit is unsupported as respects "the economic realities of a mining operation within the

claims [or any of them], such as evidence concerning possible prices for which the clay could be sold and possible costs of a mining operation." (Excerpt from quotation from *United States* v. *Gunn, supra.*) Contestees' evidence in this regard is in reality an expression of hope rather than anything supported by facts. (See especially Tr. 107–108, 115 and 118–119, as quoted hereinbefore at pp. 9–12.)

I, therefore, conclude that the deposits on the claims have not been shown to possess characteristics giving unusual value distinguishing them from common clays, so that they can be marketed profitably for commercial purposes for which common clay cannot be sold. Accordingly, pursuant to the prayer of the complaint, the above-captioned mining claims are declared null and void.

HARVEY C. SWEITZER,
Administrative Law Judge.

APPEAL INFORMATION

The contestees have the right of appeal from this decision to the Board of Land Appeals. The appeal must be in strict compliance with the regulations in Title 43, Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken by the contestees, the adverse party to be notified is: Office of the General Counsel, U.S. Department of Agriculture, Forest Service Building, Ogden, Utah 84401.

APPEAL OF TRAYER ENGINEERING CORPORATION

IBCA–1100–3–76

Decided *March 31, 1977*

Contract No. 14–06–600–540A, Bureau of Reclamation.

Sustained.

[1] Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Notices—Contracts: Performance or Default: Inspection

Where a transformer failed shortly after being placed in service and the contractor acted promptly after notice to return the transformer to the factory for repairs at no cost to the Government, the Board held that the Government could not invoke provisions of the inspection clause of the contract relating solely to correction of defects at the point of installation to charge the contractor with the costs of removing and reinstalling the transformer.

APPEARANCES: Mr. Frank Trayer, President, Trayer Engineering Corporation, San Francisco, California, for appellant; Mr. Edward F. Bartlett, Department Counsel, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the contracting officer's decision to withhold the sum of $3,489.91 from the contract price to cover costs incurred by the Bureau of Reclamation in removing and reinstalling a power transformer which failed shortly after initial energization.

Findings of Fact

1. Contract No. 14–06–600–540A for purchase of a power transformer was awarded to the Trayer Engineering Corporation by the Bureau of Reclamation on June 29, 1972. Standard Form 32 for supply

contracts, Nov. 1969 Edition, was made a part of the contract. The original contract price of $21,658 was increased to $22,703 by Extra Work Order No. 1, dated Oct. 17, 1972. The contract required shipment of the transformer by May 29, 1973. The transformer was actually shipped much earlier and was received by the Government at Edgeley, South Dakota, on Mar. 7, 1973. The transformer was energized for the first time on May 17, 1973, at 7:13 p.m. It remained in service for 47 minutes until 8 p.m., when it was manually deenergized due to unusual noise. The transformer was removed by Government forces and returned to the manufacturer at Belmont, California, for repairs. The manufacturer paid all freight charges and corrected the defect in the transformer at the factory at no cost to the Government. The transformer was returned to Edgeley, South Dakota, on September 25, 1973, and was reinstalled in the Edgeley substation by Government forces (Appeal File, Tab No. 15).

2. The contracting officer wrote to Trayer on March 4, 1974, as follows:

> You will be pleased to know that the above equipment is now operating satisfactorily and that payment for the contract is now in order.
>
> However, there remains for consideration expenses incurred by the Bureau of Reclamation which were directly related to removal of the transformer from service at the time of its failure on May 17, 1973, and its subsequent reinstallation beginning on September 26, 1973. You will recall that the transformer was returned to the manufacturer for repairs in accordance with its instructions, with which you concurred. An itemization of the costs is attached showing that removal and reinstallation costs involving labor, vehicle expense, and per diem amounted to $3,034.70. To this amount, we must add an additional 15 percent for Government inspection, supervision and overhead, in accordance with Paragraph A–7 of the Special Provisions (Form 7–1431) of the contract. Therefore, total costs directly attributable to failure of the transformer amount to $3,489.91, and accordingly, we are, upon advice of our attorneys, deducting this amount from the payment voucher.
>
> We regret any inconvenience caused you and will be happy to answer any questions you may have in regard to this matter. (Appeal File, Tab No. 4.)

3. By letter of Mar. 19, 1974 (Appeal File, Tab No. 5), Trayer asserted that Paragraph A–7 applies only where correction is required at the point of installation and that the transformer in this case was returned to the factory for correction so that it did not fall within the provisions of Paragraph A–7. The paragraph in question reads:

> A–7. *Inspection*
>
> The following is added to Paragraph (b) of Clause No. 5 entitled "Inspection" Standard Form 32 (General Provisions):
>
> If the correction of the supplies or equipment is required at the point of installation or delivery because of non-conformity with requirements of this contract, and limitations of time will not permit correction thereof by the contractor, the Government may nevertheless proceed with such necessary correction, after notice to the contractor, and charge to the contractor the cost of correcting the supplies or equipment. If any corrective work is performed by the Government with its own forces, the contractor

shall reimburse the Government for its costs of labor and materials, an appropriate allowance for the use of plant and equipment, and other expenditures which are directly assignable to the corrective work, plus 15 percent of such costs for Government inspection, supervision, and overhead. If corrective work is performed by a contractor, other than the supplier, and is paid for by the Government upon a cost reimbursement basis, the contractor under this contract shall reimburse the Government for such other contractors costs which are directly assignable to the corrective work, as defined above for correction by Government forces, plus 15 percent of such cost for such contractors overhead and profit, plus 15 percent of the total amount paid such contractor for Government inspection, supervision and overhead. If corrective work is performed by a contractor, other than the supplier, and is paid for by the Government upon a lump sum basis, the contractor under this contract shall reimburse to the Government the lump sum so paid, plus 15 percent for Government inspection, supervision and overhead.

4. On May 13, 1974 (Appeal File, Tab No. 6), the contracting officer responded with an affirmation of his previous decision to withhold the amount of $3,489.91. He did not dispute Trayer's observation that Paragraph A–7 does not apply in this instance, but instead asserted that "reference to Paragraph No. A–7 of the Special Provisions was for recovery of 15 percent for Government inspection, supervision and overhead." The letter concluded with the statement that if Trayer wished to pursue the matter further, its request would be forwarded to the proper authorities for a decision as to the propriety of paying the amount withheld.

5. When Trayer continued to insist on payment of the amount withheld, by letters of June 4, 1974, and Oct. 4, 1974, the Government's response was a submission of the matter by an authorized certifying officer to the General Accounting Office on Dec. 13, 1974 (Appeal File, Tab No. 9).

6. On August 27, 1975, the General Accounting Office's Transportation and Claims Division issued a "Certificate of Settlement" upholding the Government's right to withhold $3,489.91. After Trayer requested a reconsideration of the settlement letter of Aug. 27, 1975, the case came to the attention of GAO's General Counsel, who, in his capacity as Acting Comptroller General, held that the matter was cognizable under the standard disputes clause and was improperly forwarded to, and considered by, the General Accounting Office. The matter was returned to the Department of the Interior for handling under the disputes clause.

7. On Feb. 4, 1976, the successor to the original contracting officer issued a finding of fact and decision, holding that the "costs of removal were chargeable to the contractor under Paragraph 5(b) and the amount charged—the costs of removal and reinstallation, plus 15 percent for inspection, supervision and overhead—were properly computed in accordance with Paragraph A–7." (Appeal File, Tab No. 15.)

8. Paragraph 5 of the General Provisions reads:

5. *INSPECTION*

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government except as otherwise provided in the contract: *Provided*, That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor or when reinspection or retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(e) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies hereunder. Records of all inspection work

by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

9. Trayer duly appealed the finding of the contracting officer to the Board. Neither party having requested a hearing, the matter was submitted for decision on the record.

Decision

When the contracting officer first notified Trayer that the sum of $3,489.91 was being deducted from the contract price to cover the cost of removing and reinstalling the transformer, he cited only Paragraph A–7 as the basis for his action (Finding of Fact No. 2, above). Trayer's protest that A–7 applies only if correction is required at the point of installation and could not apply here since correction was made at the factory, brought the response from the contracting officer (Finding of Fact No. 4, above) that reference to A–7 was for recovery of 15 percent for inspection, supervision and overhead. The contracting officer did not explain how there could be a computation of 15 percent for indirect costs when the Government had not incurred any direct costs for correction at the point of installation.

[1] When this matter was returned for handling under the disputes clause after being improperly referred to the General Accounting Office, the successor to the original contracting officer referred to Paragraph 5(b) of the inspection clause, as well as Paragraph A–7, as a basis for charging the direct and indirect costs of removal and reinstallation to the contractor (Finding of Fact No. 7, above). The inclusion of Paragraph 5(b) does nothing to cure the error of attemping to use A–7 as a basis for charging Trayer with the indirect costs. An examination of A–7 (Finding of Fact No. 3, above) discloses that the entire paragraph deals with the Government's rights in the event that it must make a correction of supplies or equipment at the point of installation or delivery, or if it must pay another contractor for such correction. The Board summarily finds that the facts of record in Trayer's case, where the transformer was returned to the factory for correction, do not fall within the purview of Paragraph A–7.

The Government's attempt to charge Trayer with any of the costs must therefore stand or fall on the provisions of Paragraph 5(b) of the inspection clause. Such paragraph provides that supplies which are required to be corrected shall be removed promptly after notice and if the contractor fails promptly to remove such supplies, the Government may replace or correct such supplies and charge to the contractor the cost occasioned the Government thereby (Finding of Fact No. 8, above).

The Board has held that where there is no compliance with such a notice requirement, the Government cannot charge a contractor with costs of corrective action. *Reynolds Metals Co.*, IBCA–484–3–65

(May 12, 1966), 66-1 BCA par. 5566. The only evidence of record with respect to notice is contained in the contracting officer's letter to Trayer on May 24, 1973, which reads:

> Thank you for your prompt attention to the problem of the above transformer failing shortly after being energized, as discussed in our May 23 telephone conversation.
>
> H. K. Porter Company has contacted our office in Bismarck, North Dakota, and advised that they will pick up the transformer and return it to their factory for repairs. (Appeal File, Tab No. 3.)

Paragraph 5(b) allows Government action for which the contractor may be charged if the contractor fails promptly to remove the equipment. The contracting officer's letter shows there was no failure on the part of Trayer to give prompt attention to the removal of the transformer. Only if Trayer had failed to act promptly after notice would there be any reason to invoke the provisions of Paragraph 5(b) with respect to Government costs caused by such failure.

Thirty years ago, the Court of Claims decided a case remarkably similar to the present one. In *Standard Transformer Company* v. *United States*, 108 Ct. Cl. 214 (1947), the Department of the Interior bought four transformers, all of which failed shortly after being placed in service. The contractor returned the transformers to its factory and corrected the defects. When the transformers were returned and placed back in service, all four operated satisfactorily. The Department was not content with having the defects corrected at the contractor's expense, but also attempted to charge the contractor, first with cost of labor involved in handling the transformers, and then with liquidated damages for delays in delivering the repaired transformers. The Court held that the Department was entitled to neither, holding as follows on p. 235:

> Article 4(a) of the contract (finding 4) provided in part that "In case any articles are found to be defective in material or workmanship, or otherwise not in conformity with the specification requirements, the Government shall have the right to reject such articles, or require their correction." None of the transformers was rejected but defendant called upon plaintiff to correct certain latent defects in certain material used in the transformers that developed when the transformers were put in use at the pumping plant, and plaintiff promptly corrected these defects at its own expense. In these circumstances plaintiff did not become liable to defendant for any excess costs or liquidated damages under Articles 4 of the contract or Article 23 of the specifications.
>
> Plaintiff is entitled to recover the sum of $3,350 deducted and withheld by defendant from the amount otherwise due plaintiff under the contract. Judgment will be accordingly entered. It is so ordered.

The inspection clause of the contract was set forth by the Court on p. 218:

> 4. Article 4 of the contract reads:
>
> *Inspection*—(a) All material and workmanship shall be subject to inspection and test at all times and places and, when practicable, during manufacture.

In case any articles are found to be defective in material or workmanship, or otherwise not in conformity with the specification requirements, the Government shall have the right to reject such articles, or require their correction. Rejected articles, and/or articles requiring correction, shall be removed by and at the expense of the contractor promptly after notice so to do. If the contractor fails to promptly remove such articles and to proceed promptly with the replacement and/or correction thereof, the Government may, by contract or otherwise, replace and/or correct such articles and charge to the contractor the excess cost occasioned the Government thereby, or the Government may terminate the right of the contractor to proceed as provided in Article 5 (or in the article entitled "Delays-Liquidated Damages", quoted in paragraph 5 of the Directions, if it is substituted for Article 5) of this contract, the contractor and surety being liable for any damage to the same extent as provided in said Article 5 (or in said substitute article) for terminations thereunder.

The inspection provisions of Article 4(a) of the Standard Transformer contract now appear in Paragraph 5(b) of the Trayer contract. A comparison of the two clauses shows that much of the language has survived more than 30 year's usage in Government contracts with no change at all, and the few changes that have been made are not substantive insofar as the present appeal is concerned.

The Board finds that the inspection clause employed in the Trayer contract is not sufficiently different from the inspection clause in Standard Transformer to require a different result. Accordingly, Trayer is entitled to recover the sum of $3,489.91 deducted and withheld by the Government from the amount otherwise due Trayer under the contract.

Conclusion

Trayer's appeal is sustained.

G. Herbert Packwood,
Administrative Judge.

I concur:

William F. McGraw,
Administrative Judge.

EFFECT OF OCTOBER 4, 1976 SOLICITOR'S OPINION M-36888*

OIL AND GAS LEASES: GENERALLY—OUTER CONTINENTAL SHELF LANDS ACT: OIL AND GAS LEASES

The interpretation of the Mineral Leasing Act of 1920 set forth in the Oct. 4, 1976 *Solicitor's Opinion* (M-36888) is compelled by the statute.

Terms of an oil and gas lease inconsistent with the statute are equally as invalid as a regulation which operates to create a rule out of harmony with the statute.

A lessee gains no rights through a lease which could not be bestowed lawfully, since regulations or lease terms inconsistent with the statute are invalid.

The involuntary invalidation of a lease term does not amount to *pro tanto* cancellation of the lease.

OIL AND GAS LEASES: GENERALLY—OIL AND GAS LEASES: ROYALTIES—OUTER CONTINENTAL SHELF LANDS ACT: OIL AND GAS LEASES

The Oct. 4, 1976 *Solicitor's Opinion* (M-36888), in effect, found that the Secretary, by permitting exemptions from royalty requirements for oil and gas used for production purposes or unavoidably lost, was alienating the royalty interest of the United States on certain leases without authority to do so.

Court cases indicate that it is in the Secretary's discretion to apply the corrected interpretation of the statutes in the collection of additional royalty retroactively or prospectively based on equitable considerations.

The Secretary is limited in the exercise of this authority only by the rule of estoppel where the application of the corrected interpretation of law threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel.

M-36888 (Supp. II)

March 9, 1977

To: JEROME C. MUYS, ESQUIRE, DEBEVOIS AND LIBERMAN, 700 SHOREHAM BLDG., 806 15TH ST., N.W., WASHINGTON, D.C. 20005

SUBJECT: EFFECT OF OCTOBER 4, 1976 SOLICITOR'S OPINION M-36888

OPINION BY ACTING DEPUTY SOLICITOR FERGUSON

OFFICE OF THE SOLICITOR

Dear Mr. Muys:

This letter is written in response to your letter of Jan. 12 in behalf of Chanslor-Western Oil and Development Company. Action on Chanslor-Western's appeal from the application of NTL-4 to Chanslor-Western's leases (Sac. 019381 (a), 019392, 019381(b)) has been delayed pending this reply. In the *Solicitor's Opinion* of Oct. 4, 1976, we concluded that in the absence of a specific statutory bar, such as in secs. 18 and 19 of the Mineral Leasing Act of 1920, royalty is due on all production, including vented and flared gas and oil or gas used for production purposes or unavoidably lost. We stated that inclusion of an exemption for this purpose, other than pursuant to secs. 18 and 19, in either a lease or Departmen-

*Not in Chronological Order.

tal regulation is contrary to law and is a nullity.

Chanslor-Western's leases Sac. 019381(a) and 019381(b) were issued pursuant to sec. 14 and Sac. 019392 was reissued pursuant to sec. 2(a) of the 1935 amendments to the Mineral Leasing Act. Neither sec. provided for the exemption of oil or gas used for production purposes or unavoidably lost from royalty requirements as in secs. 18 and 19 of the Act. You seek clarification of the Oct. 4 Solicitor's Opinion or "limitation of its application to Chanslor-Western's appeal so as to preserve Chanslor-Western's longstanding exemption from payments of royalties on oil which it uses for essential production purposes on the lease."

The intent expressed in the Oct. 4 Solicitor's Opinion is to apply the Solicitor's interpretation to all existing leases from the date of issuance of NTL–4, Nov. 18, 1974, for Mineral Leasing Act leases and from the date of issuance of the corresponding OCS Notice, June 28, 1974, for OCS Lands Act leases. Your position is that the Department cannot now change its interpretation of the Mineral Leasing Act because it is a longstanding contemporaneous interpretation of the statute by the agency charged with its interpretation and the property rights of the lessee are determined by those rules in effect when the lease is executed. (Citing *Union Oil Co. of California* v. *Morton*, 512 F. 2d 743, 748 (9th Cir. 1975), *Continental Oil Co.* v. *U.S.*, 184 F. 2d 802, 810 (9th Cir. 1950)).

First, we will respond to your argument based on the doctrine of contemporaneous construction. Stated simply, the doctrine of contemporaneous construction is that the interpretation of a statute by the agency charged with its administration which was contemporaneous with enactment and which is of longstanding is entitled to great, if not controlling, weight in construeing the statute. *Houghton* v. *Payne*, 194 U.S. 88 (1904). However, "* * * it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction." * * * (*Id.* at 99.) The rule of contemporaneous construction is not an absolute rule of interpretation and will give way to an inquiry as to the original correctness of such construction (*Id.* at 100). "* * * A custom of the department, however long continued by successive officers, must yield to the positive language of the statute." * * * (*Id.*)

The interpretation of the Mineral Leasing Act of 1920 set forth in the Oct. 4 Solicitor's Opinion, we think, is compelled by the statute. We do not think the particular language of the statute is susceptible of any other reasonable interpretation. We have indicated why we think so in the Opinion. In *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*,

297 U.S. 129, 134 (1936), the court stated:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law * * * but the power to adopt regulations and to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * *

See also, *McDade* v. *Morton*, 353 F.Supp. 1006, 1012 (D.D.C. 1973); *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315 (1924). Terms of an oil and gas lease inconsistent with the statute are equally invalid. *Union Oil Company of California* v. *Morton*, *supra*. In the *Union Oil* case the court outlined the outermost boundary of the Secretary's authority. "The Secretary can alienate interests in land belonging to the United States only within limits authorized by law." The Oct. 4 *Solicitor's Opinion*, in effect, found that the Secretary, by permitting exemptions from royalty requirements for oil or gas used for production purposes or unavoidably lost, was alienating the royalty interest of the United States on certain leases without authority to do so.

In a similar case, *Atlantic Richfield Company* v. *Hickel*, 432 F.2d 587 (10th Cir. 1970), an administrative determination made by the Acting Director of the Geological Survey resulting in a reduced royalty under a lease held by ARCO was determined by the Secretary to be contrary to law. ARCO was required to pay back royalty. The court sustained the Secretary's view that the original administrative determination was contrary to law and thereby outside the scope of the agents' authority. (at 592.) The court held that "the United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the United States be waived by unauthorized agents' acts. (at 591–592.)

The Secretary was held to be without authority to accept a lesser royalty rate than that required under the Mineral Leasing Act provisions. The acquiescence by the Government's agents and acceptance of a lesser royalty for thirteen years were held not to alter the obligation of the Secretary nor were those circumstances held to estop the government. *See also*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384–5 (1947); *Automobile Club of Michigan* v. *Commissioner of Internal Revenue*, 353 U.S. 180 (1957); *Utah Power and Light Co.* v. *Morton*, 243 U.S. 389, 410 (1917).

In another similar case, *McDade* v. *Morton*, *supra* at 1011, the Interior Department Solicitor found that the past practice of determining whether to lease land competitively or noncompetitively upon the basis of facts known at the time of filing of a lease offer was clearly erroneous and contrary to the ordinary reading of the statute. In upholding the *Solicitor's Opinion*, the court stated that an administra-

tive agency is not estopped "* * * by its former interpretation of a statute, however longstanding, from correcting that which it presently feels to be clearly erroneous." * * * (at 1012.) The doctrine of equitable estoppel was held not to be a bar to the Secretary's correction of a mistake of law. (at 1012.) Then the court quoted from *Pennsylvania Water and Power Co.* v. *Federal Power Commision*, 123 F. 2d 155, 162 (D.C. Cir. 1941), the following statement:

> * * * Save in respect of a subject-matter finally closed and settled under the former practice, the decision on which that practice is founded contains no element of estoppel or *res judicata*, as the doctrines thereof are applicable in judicial proceedings. (Italics supplied.)

The chief argument you make in Chanslor-Western's behalf is that the language quoted by the court in McDade exempts Chanslor-Western's leases from the applicability of NTL–4 and the Oct. 4 Solicitor's Opinion. You view the issuance of the lease as making the lease terms "a subject-matter finally closed and settled under the former practice."

The quoted language originated in the case of *Payne* v. *Houghton*, 22 App. D.C. 234, 249, aff'd, *Houghton* v. *Payne*, 194 U.S. 88 (1904). At issue in that case was the government's revocation of a certificate or license admitting certain publications as second class mail. The license was determined to have been issued contrary to law. The court upheld the government. The quoted language was in connection with the statement: "Were an attempt made now to reopen the question as to mail matter carried under the former permission, and collect additional postage, the question would be a very different one." It appears that the language in question went to the retroactive collection of postage on mail carried earlier under the certificate not to revocation of the certificate itself. Since the court did not consider or rule on the question of collection of past postage, the statement in question appears as dictum. In Chanslor-Western's case, the Department in effect, has declared invalid a lease term as contrary to law and this action is not inconsistent with the action taken by the government in *Payne* to revoke a certificate deemed contrary to law.

The specific question before the Department in this matter is not whether the regulations or lease terms are invalidated by the corrected interpretations (since they are invalidated by operation of law) but rather whether the Secretary is required to collect additional royalty that would have been due in the past under the corrected interpretation of the law. The decision in the *Atlantic Richfield* case upholds the Secretary's authority to collect back royalty based on correction of an administrative interpretation of the Mineral Leasing Act. Yet precedent also has been set for a corrected interpretation of the law under similar circumstances to be applied from date of notice as in *McDade. See also, Franco Western Oil Company, et al.*, 65 I.D. 427, 428

(1958); *Safarik* v. *Udall*, 304 F.2d 944 (D.C. Cir. 1962). These cases indicate that it is in the Secretary's discretion to apply the corrected interpretation retroactively or prospectively based on equitable considerations.

The Secretary is limited in the exercise of this authority only by the rule of estoppel where the application of the corrected interpretation of law threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. *United States* v. *Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973). The Secretary has determined that the payment of royalty under the corrected interpretation will date from the date of notice to the lessee (through NTL-4). We do not think this determination will work a serious injustice especially since other, more appropriate, relief may be obtained under the Mineral Leasing Act where justified. The Secretary is authorized pursuant to 30 U.S.C. § 209 (1970) to reduce the royalty whenever in his judgment the lease cannot successfully be operated under the lease terms.

You also argue on behalf of Chanslor-Western that "the property rights of the lessee are determined by those rules in effect when the lease was executed." (Citing *Union Oil Company*, *supra*.) Without going further into the reasons for this, it should be noted that the interpretation just quoted is peculiar to the OCS Lands Act. The leases we are discussing were issued under the Mineral Leasing Act of 1920. In any case, a lessee gains no rights through a lease which could not be bestowed lawfully, since regulations or lease terms inconsistent with the Statute are invalid. *Union Oil Company*, *supra* at 748. With this regard, each of Chanslor-Western's leases expressly incorporated the provisions of the Mineral Leasing Act of 1920. Regardless of whether the lease expressly or impliedly incorporated the Act, the ruling in *Continental Oil Company* v. *United States*, 184 F.2d 802 (9th Cir., 1950) applies:

> The rights of the parties are determined by the provisions of the leases, *read in the light of the provisions of the Mineral Leasing Act*, * * *. (at 807.) (Italics added)

Clearly, when the provisions of the lease are in conflict with the Act, the statute must prevail.

Your argument is apparently based on the view expressed in *Standard Oil Company of California* v. *Hickel*, 317 F.Supp. 1192 (1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971) that the Government's rights and obligations under a lease as the lessor of public lands are subject to the same rules of contract construction as are applicable to contracts between private parties. Thus, you argue that invalidation of Chanslor-Western's lease terms providing for certain exemptions from payment of royalty amounts to unauthorized administrative cancellation of leases, similar to a breach of contract. But *Standard Oil* dealth with the construction of contract provi-

sions which fall within the discretionary authority of the Secretary. At issue in this case are contract provisions which the Solicitor concludes the Secretary could not validly approve since they are contrary to the law establishing the authority under which the leases were issued. We would likely concur in your argument based on *American Trucking Assns., Inc.* v. *Frisco Transportation Co.*, 358 U.S. 133, 146 (1948), *Alabama Power Co.* v. *Federal Power Commission*, 482 F.2d 1208, 1212–16 (5th Cir. 1973) and *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), where an administrative agency exercised its discretionary authority to change the terms of certain issued licenses through adoption of a different, preferable policy, if that were the case here. But the cases you cite are distinguished from this particular case by the fact that in this case the statute is viewed by the Department as compelling the conclusion reached in the Oct. 4 *Solicitor's Opinion.* Hence, the involuntary invalidation of a lease term does not amount to *pro tanto* cancellation of the lease.

In conclusion, the Oct. 4, *Solicitor's Opinion* is properly applicable to all leases issued pursuant to the Mineral Leasing Act of 1920 and the OCS Lands Act. The Secretary's decision to require payment of royalty in accordance with that Opinion from the date of issuance of notices to the lessees and not to require back payment of royalty was based upon equitable considerations within the lawful exercise of his discretion.

We hope this letter has clarified a number of points made in the Oct. 4 *Solicitor's Opinion* which you questioned.

Sincerely yours,

FREDERICK N. FERGUSON,
Acting Deputy Solicitor.

JAMES W. CANON, ET AL.

1 SEC. 1

Decided *April 15, 1977*

1. Alaska Native Claims Settlement Act: Generally—Oil and Gas Leases: Lands Subject to—Withdrawals and Reservations: Generally

Lands withdrawn for the protection of Alaska Natives' selection rights are not available for oil and gas leasing under the Mineral Leasing Act. 43 U.S.C. § 1621 (i) (1970).

2. Alaska Native Claims Settlement Act: Generally—Applications and Entries: Valid Existing Rights—Oil and Gas Leases: Applications: Filing

A pending noncompetitive oil and gas lease offer is not a valid existing right protected by the savings clause in the Alaska Native Claims Settlement Act.

3. Applications and Entries: Valid Existing Rights—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Discretion to Lease

Neither the filing of an over-the-counter oil and gas lease offer, nor the holding of a drawing of simultaneously filed offers to determine the first qualified offeror, creates any right to a lease or any property rights in the offeror that diminish the Secretary's discretion whether or not

to issue a noncompetitive oil and gas lease on a given tract.

4. Oil and Gas Leases: Discretion to Lease—Oil and Gas Leases: Rentals

An oil and gas lease is not *issued* until it is signed by the authorized officer; the acceptance of first year's rental in advance as required by regulation does not create a lease contract. Until lease issuance, the Secretary retains his discretion to lease or not to lease a given tract.

OPINION BY SECRETARY OF THE INTERIOR ANDRUS

OFFICE OF THE SECRETARY

DECISION—OFFERS REJECTED

The Alaska State Office, Bureau of Land Management, has completed adjudication of decisions to issue conveyance of the subsurface of lands, described in federal register notices to be published, to Arctic Slope Regional Corporation under the provisions of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.* (1970). The notices of decisions to issue conveyance state our intent to convey under the provisions of sec. 14(e) and (f) of ANCSA, 43 U.S.C. § 1613 (e) and (f) (1970), and 43 CFR Subpart 2652, to Arctic Slope the subsurface estate of lands selected, and to which Arctic Slope is found to be entitled under sec. 12 of ANCSA, 43 U.S.C. § 1611 (1970), and 43 CFR 2652.3.

In conjunction with the publication of the notices of decisions to issue conveyance, I am issuing this decision rejecting the noncompetitive oil and gas lease offers filed for the lands to be conveyed. The oil and gas lease offerors involved are listed in the Appendix to this decision.

I take this action under the authority of sec. 17 of the Mineral Leasing Act of 1920, 30 U.S.C. § 226 (1970), and 200 Departmental Manual 1.9. I take this action in furtherance of the policy established by my predecessor in the decision *In Re Arctic Slope/Western, et al.*, ANCAB No. RLS 76–11 (A)-(MM) (Nov. 24, 1976). For the benefit of those not parties to that appeal, I reiterate the background to these cases, the policy being applied, and the basis for this policy.

I. BACKGROUND TO THE CASE

The lands in question are on the "North Slope" of the Brooks Range in northern Alaska. During and after World War II, all public lands in northern Alaska were withdrawn from all forms of entry and disposal. Public Land Order No. 82, 8 FR 1599 (Jan. 23, 1943). As the military demands for the land diminished and the private sector's requests for permission to explore the area for oil and gas increased, P.L.O. No. 82 was revoked and a system for opening the land to leasing under the Mineral Leasing Act established. P.L.O. No. 1621, 23 FR 2637 (Apr. 18, 1958), P.L.O. No. 3521, 30 FR 271 (Jan. 5, 1965).

These orders opened the land to the filing of noncompetitive oil and gas lease offers upon the completion

of protraction map-leasing diagrams and opening orders notifying the public that leasing blocks had been established and that offers would be received on those blocks. These openings commenced in Jan. 1965, beginning with the north-central portion of the North Slope, and continued through the Notice that offers could be filed for land in the western Arctic embraced in these offers. (31 FR 12575 (Sept. 23, 1966.))

The opening orders provided that offers filed before a certain date would be regarded as having been simultaneously filed. When more than one offer was filed for a tract, a drawing was held to establish the first qualified offeror if a lease were to issue. Those tracts for which no offers were filed during the period specified in the opening order then were subject to over-the-counter offer filings. Under this system, public land on the North Slope not otherwise withdrawn was available for the filing of noncompetitive lease offers either 1) by simultaneous filings under an opening order, or 2) by over-the-counter filings.

During this period various Native groups filed protests against lease issuance in the Fairbanks District and Land Office, BLM. In response to the protests, the Department issued a press release Nov. 28, 1966, manifesting its intention to hold the drawing noticed by the opening order of Sept. 23, 1966, but not to issue any leases on the first-drawn offers until the Native protests were resolved. On Nov. 30, 1966, the Department posted a public notice to the same effect. On Dec. 1, 1966, the Secretary signed a *Federal Register* notice confirming this policy. 31 FR 15494 (Dec. 8, 1966). The drawing at issue in some of the cases here was held, pursuant to this policy, on Dec. 20, 1966, and no leases have been issued.

Over-the-counter offers continued to be filed for lands on which no offers were received in the drawings. In mid-1968, Atlantic Richfield Co. announced its discovery of oil at Prudhoe Bay on lands leased by the State of Alaska. The announcement generated immense interest; in the next half year over 20,000 noncompetitive oil and gas lease offers were filed in Alaskan BLM offices, including offers which covered practically all potentially available land on the North Slope.

The Department responded by issuing protective withdrawals, including P.L.O. No. 4582, 34 FR 1025 (1969), which were designed to maintain the public land status pending legislation for the resolution of Alaska Natives' land claims. Subsequently, secs. 11(a)(1), (a)(2) and (b)(3) of ANCSA, 43 U.S.C. § 1610 (1970), and Secretarial withdrawals under the authority of sec. 11(a)(3) of ANCSA, 43 U.S.C. § 1610(a)(3) (1970), expressly prevented lease issuance.

In response to the intense interest of the offerors in maintaining their first qualified status in case the lands were not conveyed under ANCSA, the Department did not reject all such pending applications wholesale. Rather it suspended action on them until the land selection

rights granted the Natives by ANCSA were exercised, and it could be determined what land was still public land subject to leasing.

II. THE DEPARTMENT'S POLICY

It is the policy of the Department of the Interior to expedite conveyances under ANCSA by rejecting pending noncompetitive oil and gas lease offers which conflict, in whole or in part, with conveyances under ANCSA at the time the lands to be conveyed are definitely identified. This policy is reached upon consideration of the following.

[1] (a) It is the Department's view that sec. 22(i) of ANCSA, 43 U.S.C. § 1621(i) (1970), does not authorize the issuance of mineral leases under the Mineral Leasing Act on lands to be conveyed under ANCSA. This section states that the Department's authority to "grant leases" is not to be impaired on lands withdrawn for the protection of Native selection rights. In the statute itself, however, secs. 11(a)(1), 11(a)(2), and 16(a) of ANCSA, 43 U.S.C. §§ 1610(a)(1), (a)(2), and 1615(a) (1970), expressly withdraw lands from mineral leasing under the Mineral Leasing Act. I conclude that Congress did not intend to authorize leasing under the Mineral Leasing Act in sec. 22(i) of ANCSA, 43 U.S.C. § 1621(i) (1970). The legislative history of ANCSA corroborates this conclusion. H. Rept. 92–746, 92d Cong., 1st Sess. (1972) at 45–46. Congress felt that leasing under the Mineral Leasing Act would be inconsistent with the purposes of ANCSA, and did not intend to include the authority to issue leases under the Mineral Leasing Act in sec. 22(i) of ANCSA. With the decision to issue conveyance, the pending offers are within the rule that an application may not be held pending availability of the land when approval of the application is prevented by a valid selection of record. 43 CFR 2091.1(b).

(b) Even if ANCSA did not preclude lease issuance, this policy would be established in the exercise of the discretion in section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1970). I would not now exercise this discretion by amending the existing withdrawals from mineral leasing in order to lease in these cases. Issuance of leases on the pending offers would frustrate Congressional policy by denying Alaska Native corporations the full benefit of the resources in the lands which Congress intended to be conveyed to them. H. Rept. 92–523, 92d Cong., 1st Sess. (1971) at 5.

(c) Even if the Department is not barred from issuing mineral leases, issuance of leases on the pending offers at this juncture would nullify the years of policy decision and withdrawals preventing lease issuance in order to protect the rights of Alaska Natives.

(d) The oil and gas lease offerors have been granted protection commensurate with the nature of their interest as first qualified offerors by the Department's suspension

of their offers. In light of the discussion of the nature of the offerors' interest below, the Department has safeguarded the offerors' status as first qualified applicants during the intervening years of title uncertainty. The offerors are not due greater deference because the Department suspended, rather than rejected, their applications during the period of the withdrawals in aid of legislation, and after Congress resolved the Native protests by extinguishing aboriginal title and all claims of aboriginal title in ANCSA. The suspension policy has jointly served the interests of the Alaska Natives by allowing the Department to meet fully their rights under ANCSA, and the interests of those first-qualified applicants whose lease offers cover lands not selected. This statement is not intended, however, to imply that the Department will exercise or has exercised its discretion to lease lands not conveyed.

III. BASIS FOR THE POLICY—RIGHTS OF THE OFFERORS

The offerors in this case are all (except one) the first qualified offerors for noncompetitive oil and gas leases under the provisions of section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. § 226 (1970). Edward F. Coiley's offer F-5342 is apparently second qualified after W. J. Nicolini's offer F-4963 for Block 8, T. 8S., R. 3 W., U.M.

One group of offerors had its "first qualified" status determined in the Dec. 1966 drawing described above, under the provisions for simultaneously filed noncompetitive oil and gas lease offers set out in 43 CFR Subpart 3123 (1966), now 43 CFR Subpart 3112, and the relevant opening order. The second group of offerors is first qualified by virtue of first-filed over-the-counter noncompetitive oil and gas lease offers. Their rights are governed by sec. 17 of the Mineral Leasing Act of 1920, 30 U.S.C. § 226 (1970).

Sec. 17 provides that the Secretary "may" issue noncompetitive oil and gas leases on lands not within any known geological structure of a producing oil or gas field to the first qualified applicant therefor. In *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965), the Supreme Court stated, "Although [the Mineral Leasing] Act directed that if a lease was issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract." *See also Pease* v. *Udall*, 332 F.2d 62 (9th Cir. 1964); *Haley* v. *Seaton*, 281 F.2d 620, 623–26 (D.C. Cir. 1960).

[2] In *Schraier* v. *Hickel*, 419 F. 2d 663, 667 (D.C. Cir. 1969), the Circuit Court of Appeals applied *Tallman* and characterized a noncompetitive oil and gas lease offer as a "proposal" which "does not rise to the level of 'claim' or 'right' within the savings clause of the Statehood Act where there has been no such determination to lease." The savings clause of sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. note preceding § 21 (1970), makes the State's grant subject to

"any valid existing claim, location, or entry * * *. This is even more protective of outstanding interests than the savings clause of ANCSA. Sec. 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1970), makes all conveyances "subject to valid existing rights." We believe there is no distinction between the Statehood Act and ANCSA relevant in resolving the conflict between either of the statutory grants and pending noncompetitive oil and gas lease offers.

[3] In *Arnold* v. *Morton*, 529 F. 2d 1101, 1105 (9th Cir. 1976), the Circuit Court of Appeals reaffirmed the conclusion that a noncompetitive oil and gas lease offeror has no right to a lease, and no property interest in his offer. Although the Court in *Arnold* concluded that the Secretary had erroneously determined that the lands in question were not subject to leasing, the Court rejected the contention that it could order lease issuance.

The Secretary's discretion in noncompetitive oil and gas leasing, and the limited nature of a noncompetitive lease offer, have been confirmed in *Burglin* v. *Morton*, 527 F.2d 486 (9th Cir. 1976); *Duesing* v. *Udall*, 350 F.2d 748, 750–51 (D.C. Cir. 1965); *Rowe* v. *Kleppe*, Civil No. 75–1152 (D.D.C., July 29, 1976); *Burglin* v. *Secretary of the Interior*, Civil No. A75–232 (D. Alaska, Dec. 29, 1976).

This law applies to the simultaneously filed, first-drawn offers as well as the first-filed, over-the-counter offers. *Schraier* v. *Hickel*, *supra*, also dealt with offers filed in a simultaneous drawing. The Circuit Court of Appeals (*id.* at 667) stated:

> * * * Nor can it be successfully asserted that the Secretary exercises his discretion whether or not to lease when he gives notice for filing and processing applications. * * * Similarly the Secretary does not lose his ultimate authority because the Departmental officials assumed that appellant would be awarded a lease if he were found to qualify in all respects under pending regulation.

Nor was any deviation from these cases generated by the terms of the notice for the drawing in question. No contract was created by the requirement that first-year's rental be submitted with the offer, and that rental would be earned when the offer was first drawn. The Notice in question stated that if an offer was rejected, "the advance rental will be returned" to the offeror. *E.g.*, 30 FR 11697 (Sept. 11, 1965); 31 FR 4741 (Mar. 19, 1966). The change in policy from earlier drawings, *e.g.*, 30 FR 898 (Jan. 28, 1965), was designed to prevent the obstructive practice of withdrawal of first-drawn offers prior to lease execution. It was not designed to, nor did it in effect, make the drawing an acceptance of the offer, or constitute a waiver of the Secretary's discretion and a commitment to lease to the first-drawn offeror.

[4] The regulation governing noncompetitive lease *issuance* at the time of the drawing in question, 43 CFR 3123.5(b) (1966), provided, "The United States will indicate its acceptance of the lease offer, in

whole or in part, and the issuance of the lease by the signature of the appropriate officer thereof in the space provided." The United States executed no offer in this case. The Secretary may not ignore his own regulations. *McKay* v. *Wahlenmaier*, 226 F.2d 35, 43 (D.C. Cir. 1955). No lease contract was entered into in the drawing. After the drawing in question, the Secretary retained the authority to reject the offers in response to the Native protests and refund the first year's rentals, but did not do so in response to pressure from the lease applicants that they be allowed to retain their priority.

The expectation that leases would issue to the first qualified offeror in these cases as a matter of course, after the December 20, 1966 drawing, does not render *Schraier* and the other case law inapplicable. The Department's authority and discretion to lease or not to lease must be judged as of the time of lease execution, rather than the date the offer was filed or drawing notice was posted. *E.g.*, *Hannifin* v. *Morton*, 444 F.2d 200 (10th Cir. 1971); *Wann* v. *Ickes*, 92 F.2d 215, 217 (D.C. Cir. 1937).

Those applicants who hold over-the-counter lease offers cannot avail themselves of the argument that the provision of the drawing notice regarding first year's rental created a contract. The over-the-counter leasing regulations at that time clearly documented that an offer does not become a lease until executed by the appropriate officer, 43 CFR 3123.5 (b) (1966), and an offer may be withdrawn without prejudice prior to lease issuance, 43 CFR 3123.5 (a) (1966).

Neither set of applicants has greater rights on account of the delay entailed by the suspension. *McDade* v. *Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974). The noncompetitive oil and gas leasing regulations did not compel action on a lease offer within any particular time. 43 CFR 3123.5(b) (1966). The "land freeze" violated no rights of the offerors in this case. I reiterate the conclusion of *In Re Arctic Slope/Western*, *supra*, that formal withdrawal action under E.O. No. 10355, 17 FR 4831 (1952), was not required to suspend action on these offers. The Executive Order states, "[a]11 orders issued by the Secretary of the Interior *under authority of this order* shall be designated as public land orders and shall be submitted * * * for filing and for publication in the federal register." *Udall* v. *Tallman*, *supra*, does not imply or hold that the Secretary's discretion not to lease under sec. 226 can only be exercised by public land order; it is silent on the question.

In my opinion, the Secretary's discretion not to lease under sec. 17 of the Mineral Leasing Act may be exercised without formal withdrawal action when the public interest so dictates. The "land freeze" was a proper exercise of discretion under sec. 17. The claims of Indian and aboriginal title did not divest the Department of its authority to issue mineral leases; the Department had the same *authority* to issue mineral leases after the Native

protests were filed as before. The existence of the authority, however, does not mandate lease issuance, as *Udall* v. *Tallman*, *supra*, made clear. The policy decision not to issue leases and to maintain the status of the public lands involved here while the question of Native rights was considered was, to paraphrase *Burglin* v. *Morton*, *supra*, at 489, an *exercise* of discretion, not an abuse of discretion. *See Pease* v. *Udall*, *supra*.

IV. BASIS FOR THE POLICY—TO EXPEDITE CONVEYANCES

This decision will obviate the delay attendant on exhaustion of the appeal remedies in the Department. In accordance with the policy stated above, oil and gas leases will not be issued as a consequence of administrative appeals; the offers are hereby rejected. In addition, in the cases to which this decision applies, the oil and gas lease offerors assert an interest which is not a "property interest in land." *McTiernan* v. *Franklin*, 508 F. 2d 885, 888 (10th Cir. 1975); *Schraier* v. *Hickel*, *supra*; *Duesing* v. *Udall*, *supra* at 750–51; *Rowe* v. *Kleppe*, *supra*. An oil and gas lease offeror thus does not have standing under 43 CFR 4.902 to appeal to the Alaska Native Claims Appeal Board (ANCAB) a BLM decision to issue conveyance. This decision will avoid delay and expense to both the offerors and the Natives in the Department's appeal process, time and expense which the policy stated in this decision renders unnecessary.

This decision will avoid the offerors' attempts to invoke the jurisdiction of the Interior Board of Land Appeals by appealing the rejection of the oil and gas lease offers separately from the appeal of the decisions to issue conveyance. The Board of Land Appeals (IBLA) has such appeal authority in the regular oil and gas lease offer case, 43 CFR 4.1(3). Since Aug. 6, 1975, however, appeals in "matters relating to land selection arising under [ANCSA]" lie with ANCAB. 43 CFR 4.1(5), 40 FR 33172 (1975). This decision will obviate the confusion and delay of multiple appeals, determinations of jurisdiction under this regulation, and case transfers under 43 CFR 4.901(c).

The Department's administrative remedies afford administrative due process to those who hold or assert property interests. Bypassing these remedies will not violate any procedural due process rights of the offerors. As discussed above, oil and gas lease offerors, whether before ANCAB or IBLA, have no property interest which invokes the hearing requirements of due process, and which would require the application of the Department's hearing regulations, *e.g.*, 43 CFR 4.420–452. Compare *Burglin* v. *Morton*, *supra* at 488, with *Pence* v. *Kleppe*, 529 F.2d 135 (9th Cir. 1976). In addition, in this case I find no factual dispute which would alter the outcome of the cases, so that the appeals boards' discretionary authority to order hearings in cases containing factual disputes

will not be necessary. 43 CFR 4.415; 43 CFR 4.911(c).

This decision constitutes the final action of the Department of the Interior in these cases. The advance rentals which accompanied the applications will be refunded pursuant to the issuance of this decision. Therefore, pursuant to the authority granted the Secretary by section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1970), and 200 Departmental Manual 1.9, the noncompetitive oil and gas lease offers listed in the Appendix, p. 184 because they conflict in whole or in part with the lands described in the notices of decisions to issue conveyance to Arctic Slope Regional Corporation (F-19148-11, -17, -18, -19, -20, -21, -22, and -34, and F-033698 through F-033705, F-033707, F-033708, F-14922-A, and F-14922-A2), are hereby rejected.

CECIL D. ANDRUS,
Secretary of the Interior.

APPENDIX

OFFEROR	OFFER SERIAL NUMBER
Amerada Hess Corp.	F-4356
	F-4365
	F-4373
	F-4379
	F-4380
M. E. Buster Anderson	F-4857
	F-4856
Marvin J. Andresen, Guy M. Whitney, Richard E. Church	F-4765
	F-4770
Alan J. Antweil	F-876
	F-890
	F-1205
	F-1208
	F-1209
	F-1210
	F-1211
Mary Frances Antweil	F-2633
	F-2072
	F-2073
	F-4950
E. M. Arndt	F-5331
Iola Call	F-4854
Iola Call, LaRaine Riddick	F-4853
James W. Canon	F-7211
	F-7212
	F-7213
	F-7228
	F-7229
	F-7230
	F-7231
James W. Caylor	F-6954
Don Chandler	F-4663
Ethyl D. Clasby, Charles J. Clasby	F-9074
Edgar M. Clausen	F-9049
Anna M. Coiley	F-5348
	F-5350
Edward F. Coiley	F-5341
	F-5342
Lloyd A. Burgess	F-4660
Donald Burnett	F-4694
Donald Burnett, Richard Burnett	F-4868
W. Burnett	F-5008
	F-5009
	F-5010
	F-5011
	F-5012

OFFEROR	OFFER SERIAL NUMBER
W. Burnett	F–4846
	F–4847
W. Burnett,	F–1022
Donald Burnett,	
Wally Burnett	
C. Freericks,	F–6472
C. Burglin	F–6476
	F–6477
	F–6478
Future, Inc.	F–8977
	F–8984
	F–8986
	F–6305
	F–6306
	F–6307
	F–6308
	F–6309
	F–6310
	F–6311
	F–6312
	F–6313
	F–6314
	F–6315
	F–6316
	F–6318
	F–6319
	F–6320
	F–6321
	F–6322
Estate of Mary Ball	F–6025
Connelly, Wilbur T.	
Connelly, Administrator	F–6026
	F–6028
	F–6029
	F–6030
	F–5952
	F–5955
	F–5956
	F–6022

OFFEROR	OFFER SERIAL NUMBER
Estate of Mary Ball	
Connelly, Wilbur T.	
Connelly, Administrator	F–5951
	F–5954
	F–5957
Hans A. Fischer	F–5199
B. P. Fleming	F–5343
Troy A. Klingel	F–1664
Sophie D. Krize	F–5200
Charles W. Lafferty,	F–7511
Denny G. Breaid,	F–7512
Ray D. Kohler	
Lee Linck	F–1023
	F–1024
James J. McNamee	F–7092
	F–7093
	F–7095
Frances M. Martindale,	F–7183
Yolana Rocker,	
Stella Marshall	
Frances M. Martindale,	F–7184
Kenneth J. Gain	
Frances M. Martindale,	F–7185
Kenneth J. Gain,	
Ruth I. Niemeyer	
Mrs. Mildred C. Miller	F–4869
Kenneth Jay Gain	F–7179
	F–7180
	F–7181
G. S. Giovanelli	F–5330
J.H. Gronmark	F–5340
F. Bruce Haldeman	F–4852
Lowell Hanson	F–7084
c/o C. J. Newlin	F–7085
	F–7086
	F–7091
R. C. Hoefle	F–2297
Owen Jennings	F–1017
	F–1018

OFFEROR	OFFER SERIAL NUMBER
August A. Johnson	F–2144
August A. Johnson, Patricia Y. Novosel	F–4723
Dorothy T. Johnston	F–8962
William G. Kennedy, c/o Trans-Northern Resources, Inc.	F–3108
	F–3109
	F–3110
	F–3112
	F–3113
	F–3114
Sohio Petroleum Co.	F–362
Mobil Oil Corp.	F–298
	F–311
	F–312
W. J. Nicolini	F–4963
Adam Polyniaszek	F–7449
Julian C. Rice, Lloyd Hoppner	F–6352
John T. Rowlett, c/o Trans-Northern Resources, Inc.	F–2881
	F–2882
Walter Sczudlo, Dolores J. Sczudlo	F–7451
	F–7452
William D. Sexton, c/o First National Bank of Fairbanks	F–4859
	F–4860
	F–4861
D. L. Simasko	F–114
	F–117
Marian E. Simpanen	F–5337
Marion S. Weeks	F–6287
	F–6291
	F–6292
	F–6293
	F–6294
	F–6295
N. Merrill Wien	F–9061
Donald G. Stevens	F–123
	F–580
	F–581
	F–582
Betty Stewart	F–7096
Robert F. Stroecker	F–8969
W. G. Stroecker	F–6296
	F–6301
	F–6304
	F–8974
W. G. Stroecker, John Butrovich, Jr. Ten Oil	F–8942
	F–8992
	F–8993
	F–8997
	F–8998
Henry D. Tiffany, III	F–9013
	F–9015
Union Oil Co. of California	F–297
	F–299
	F–338
	F–335
William Van Alen	F–7207
	F–7208
	F–7209
James A Vanderweele	F–369
M. T. Van Dyke	F–5834
	F–5893
L. K. Virgin, Vernon Forbes, Wilbur Walker	F–5204
	F–5206
Sigurd Wold	F–6220
	F–6221
	F–6222
	F–6223
	F–6224
Estelle Wolf	F–2010
Patricia Y. Novosel, John H. Hummel	F–204
Walter P. Wigger	F–205
Dan Ramros	F–206
Mark Ringstad, Elmer Price	F–207
	F–211
Nils Braastad	F–208
Charles Greer	F–210
William N. Allen III	F–212
Kenneth L. Rankin	F–209
Mary Frances Antweil	F–2074
	F–2076

ESTATE OF PHOEBE SHANTA WILSON

6 IBIA 75

Decided *May 12, 1977*

Appeal from an order denying petition for rehearing.

REVERSED and MODIFIED.

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

The Indian Reorganization Act, generally, recognizes two classes of persons who may take testator's lands by devise, that is, any member of the tribe having jurisdiction over lands and legal heirs of the testator.

2. Indian Probate: Indian Reorganization Act of June 18, 1934: Nonapplicability—270.2

Certain provisions of the Indian Reorganization Act, including the section which dictates who may take testator's land by devise, do not apply to certain named Indian tribes in Oklahoma, including the Kiowa, Comanche, and Apache tribes.

APPEARANCES: Virginia Shanta Klinekole, pro se.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

Phoebe Shanta Wilson, a member of the Mescalero Apache Indian Tribe of New Mexico, died testate on July 8, 1975, possessed of a certain interest in trust property situated on the Kiowa-Comanche-Apache Indian Reservation in Oklahoma.

Decedent executed a will on June 18, 1974, the sole devisee being a niece, Virginia Shanta Klinekole, a member of the Mescalero Apache Tribe of New Mexico.

The decedent's sole heir-at-law is an adopted daughter, Rosalie Shanta.

[1] Pursuant to the Indian Reorganization Act generally, two classes of persons may take testator's land by devise. They are, any member of the tribe having jurisdiction over such lands and legal heirs of the testator. (*See* 25 U.S.C. § 464 (1970)).

Administrative Law Judge Richard B. Denu, found that 25 U.S.C. § 464 (1970) of the Indian Reorganization Act applied to this situation and concluded that the devisee under the will did not qualify to take. In keeping with the aforementioned provision of the Indian Reorganization Act, he consequently disapproved the will and found that the decedent died intestate as to all trust and restricted property on the Kiowa-Comanche-Apache Indian Reservation in Oklahoma and found and adjudged the decedent's sole heir to be Rosalie Shanta, adopted daughter and sole heir-at-law.

[2] However, the Indian Reorganization Act expressly excludes certain Oklahoma Indian Tribes including the Kiowa, Comanche, and Apache Tribes, from sec. 464 of the

Act, *inter alia*. The exclusory provision states:

> * * * sec. * * * 464 * * * of this title shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa * * *. (See 25 U.S.C. § 473 (1970.))

It is settled that the laws of the place where the land is located determine who should inherit. (*See* 25 U.S.C. § 348 (1970.))

Since sec. 464 of Title 25 does not apply to the Kiowa-Comanche-Apache Indian Reservation of Oklahoma, we see no reason why the devisee under the will should not inherit.

We find that section 464, *supra*, is inapplicable and that Virginia Shanta Klinekole, sole devisee under the will, is in fact and law eligible to take the aforesaid fractional share in the allotment on the Kiowa-Comanche-Apache Indian Reservation in Oklahoma.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, IT IS ORDERED that the ORDER DISAPPROVING WILL and DETERMINING HEIRS dated August 6, 1976, be and the same is hereby REVERSED and MODIFIED.

It is further ORDERED that the will of the decedent, Phoebe Shanta Wilson, EXECUTED June 18, 1974, be, and the same hereby is approved as to property exempt from the Indian Reorganization Act and her trust estate shall be distributed in accordance therewith.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Chief Administrative Judge.

WM. PHILIP HORTON,
Administrative Judge.

EFFECT OF FAILURE TO RECORD TIMELY UNDER SEC. 314(b) FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Recordation

A mining claim located after Oct. 21, 1976, for which a notice of recordation required to be filed by sec. 314(b) of the Federal Land Policy and Management Act of 1976, has not been filed within 90 days from the date of location is void, and the Department may not accept or give force to a notice of recordation filed after the 90 day period.

M-36889 *May 17, 1977*

OPINION BY ACTING DEPUTY SOLICITOR FERGUSON

OFFICE OF THE SOLICITOR

To: DIRECTOR, BUREAU OF LAND MANAGEMENT

FROM: SOLICITOR

SUBJECT: EFFECT OF FAILURE TO RECORD TIMELY UNDER SEC. 314(b), FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Question

The Bureau of Land Management has requested this office to determine whether, under sec. 314 of the Federal Land Policy and Management Act, the Secretary of the Interior has the authority to accept a notice of recordation of a mining claim located after Oct. 21, 1976, if the notice of recordation is filed more than 90 days after the date of location of the claim.

Conclusion

A mining claim located after Oct. 21, 1976, for which a notice of recordation required to be filed by sec. 314(b) of the Federal Land Policy and Management Act of 1976, has not been filed within 90 days from the date of location is void, and the Department may not accept or give force to a notice of recordation filed after the 90-day period.

Background

On Oct. 21, 1976, the Federal Land Policy and Management Act became law. Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (referred to as FLPMA). Sec. 314 of the FLPMA says, in part:

> (b) * * * The owner of an unpatented lode or placer mining claim or mill or tunnel site located after the date of approval of this Act *shall, within ninety days after the date of location* of such claim file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground.
>
> (c) *The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim* or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site. (Italics added).

Sec. 314(b)-(c), FLPMA. Prior to the enactment of the FLPMA, the Department of the Interior did not require a mining claimant, in general, to file a record of his claim with the Federal government. A state or a mining district usually required this information. *See* 30 U.S.C. § 28 (1970).

The Bureau of Land Management has informed us that several claimants filed their recordation notices more than 90 days after they located their claims. The Bureau requests our advice whether the late filing of a notice of recordation has any effect, or whether a person who fails to file within the 90-day period must make a new location of the claim, and subsequently record that location with the appropriate office in 90 days.

Discussion

The first question which must be asked is whether the FLPMA imposes a mandatory requirement on the locator to file a notice of recordation within 90 days from the date of location. If so, the second question which must be asked is what are the effects of a failure to record on time. A cardinal rule of statutory construction is that the interpretation of a statute should be consistent with Congress' intentions. *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). "The starting point in a search for legislative intent is of course the pertinent statutory language." *DePuy* v. *DuPuy*, 511 F.2d 641 (5th Cir. 1975).

Sec. 314(b) of the FLPMA says, "The owner of an unpatented lode or placer mining claim or mill or tunnel site located after the approval of the date of this Act *shall*, within ninety days from the date of location of such claim, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location * * *." [1] Unless the context requires otherwise the use of the word "shall" in a statute indicates the "language of command." *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1946); *Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 534 (1930). Examination of the legislative history shows that Congress intended "shall" to be used in its normal meaning sense.

In its section-by-section analysis of S. 507, the Senate Committee on Interior and Insular Affairs commented:

> One of the most persistent and significant roadblocks to effective planning and management of most Federal lands, including the national resource lands, is the status of hardrock mining and mining claims on those lands under the Mining Law of 1872, as amended (30 U.S.C. 22–47).
>
> * * * * *
>
> Subsection (a) would establish the recording system so necessary for Federal land planners and managers. It would require that all mining claims under the 1872 Mining Law, as amended, be recorded by the claimants with the Secretary within 2 years after the enactment of S. 507, as ordered reported, or within 30 days of the location of the claim, whichever is later. Any claim not recorded is to be conclusively presumed abandoned and will be void * * *.

S. Rept. No. 94–583, 94th Cong. 1st Sess. 64–65 (1975). Sec. 207 of H.R. 13777, the House version of S. 507, contained similar provisions to those in sec. 311 of the Senate bill. The section-by-section analysis of the report of the House Committee on Interior and Insular Affairs, commenting on this sec. says:

> (b) A copy of the location notice of mining claims and mill sites in the appropriate office of record must be filed with the Bureau of Land Management. The bill emphasizes current requirements of law to the effect that recorded documents

[1] Sec. 103(n) of the FLPMA states that "Bureau" means the Bureau of Land Management. The Department, on Jan. 27, 1977, 42 FR 5298, adopted regulations that specifically explain where the notice of location is to be filed, and refer to BLM office having jurisdiction of the land covered by the claim as stated in 43 CFR 1821.2–1 (1976). Prior to the adoption of these regulations, the proper office was also the one designated in 43 CFR 1821.2–1, since that section governs the place of filing for all papers to be submitted to the Bureau in absence of a regulation to the contrary.

must contain a description of the mining claim or mill site sufficient to permit its identification on the ground.

(c) Failure to comply with (a) and (b) above constitutes abandonment of the claim.

H.R. Rept. No. 94–1163, 94th Cong., 2d Sess. 11 (1976). Neither of these analyses contain any inference that the Secretary may accept late filings of mining claims; to the contrary, the comments of both the House and Senate show that a claim which is not recorded is to be considered void. The Conference Report, which resolved the differences between the House and Senate versions on this recordation requirement says:

(24) Both the Senate bill and House amendments provide for recordation of mining claims and for extinguishment of abandoned claims. The Conferees adopted the more specific House amendments with one perfecting amendment.

Conf. Rep. No. 94–1724, 94th Cong., 2d Sess. 62 (1976). The use of the word "extinguishment" in the Joint Committee's comment reinforces the mandatory aspect of the recordation requirement.

The legislative history of the Act gives no indication that "shall" was not intended to be given its normal meaning. The purpose of the recordation provision, prompt notice to the Federal Government of new claims, would also be frustrated if filing was not mandatory. I hold that the duty to file a notice of recordation within 90 days from the date of location is mandatory and cannot be waived. *Compare* sec. 314 (b) of FLPMA *with* 43 U.S.C. § 687(a)–(1) (1970), which requires applicants for trade and manufacturing sites to record their claims within 90 days, but which specifically permits late filings.

Since the requirement to file is mandatory, it is necessary to determine what consequences attach to the failure to file. Sec. 314(c) of FLPMA says, "The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute the abandonment of the mining claim." Although the determination whether real property, including a mining claim, has been abandoned normally depends on the intention of the owner, *e.g.*, *Lakin* v. *Sierra Buttes Gold Mining Co.*, 25 F. 337 (C.C.D. Cal. (1885); *Hurkander* v. *Carrol*, 76 F 474 (D. Alaska 1896), Congress here has explicitly provided that failure to record is to be "deemed" to be an abandonment. By using the word "deem," Congress established a substantive rule of law that a failure to record, in time is an abandonment without regard to the locator's intent. See *Bowers* v. *United States*, 226 F. 2d 424, 428–29 (5th Cir. 1955), *Kohn* v. *Myers*, 266 F. 2d 353, 357 (2d Cir. 1959). I hold that regardless of the intent of a locator, for the purposes of section 314 of FLPMA, a claim not recorded timely is abandoned. The consequence of abandonment is clear: an abandoned claim reverts to the status of the public domain and is void. *Farrell* v. *Lockhart*, 210 U.S. 142, 147 (1908), *Brown* v. *Gurney*, 201 U.S. 184, 193 (1906); *Hurk-*

rader v. *Carroll*, *supra*; *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (D.C. Cir.), *cert. den.*, 375 U.S. 822 (1963); Belk *v. Meagher*, 104 U.S. 279, 283–84 (1881). *See also* discussion of legislative history of FLPMA, *supra*. I hold that under section 314 (b), (c) of FLPMA, a mining claim is void if the locator does not file a notice of recordation in the proper Bureau of Land Management office within 90 days from the date of location.

Regulations

On Jan. 21, 1977, 42 FR 5289, the Department adopted regulations to assist mining claimants in complying with the requirements of sec. 314(b) of the FLPMA. I have reviewed these regulations and I conclude that they are consistent with the FLPMA. The regulations state, in part, that:

(1) The requirement to file a notice of recordation within the 90 day period required by the statute is mandatory (43 CFR 3833.2–1); and

(2) that a claim for which a notice of recordation is not timely filed is void (43 CFR 3833.4).

Summary

The holder of a mining claim located after Oct. 21, 1976, must file a notice of recordation with the proper BLM office within 90 days from the date of location. The FLPMA does not permit the Secretary to accept or give effect to notice of recordation that is not filed on time. If a claim is not recorded in the required period, the land reverts to the public domain and the mining claim is void.

FREDERICK N. FERGUSON,
Acting Deputy Solicitor.

D. E. PACK

30 IBLA 166

Decided *May 19, 1977*

Appeal from decision of the Utah State Office, Bureau of Land Management, dismissing protest against pending oil and gas lease offer U–34366 of John S. Runnells.

Reversed.

1. Oil and Gas Leases: Applications: Generally

The signature of the offeror on a simultaneous oil and gas lease offer entry card may be affixed by means of a rubber stamp if it is the intention of the offeror that it be his or her signature.

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents

Use of a rubber-stamped facsimile of an offeror's signature on a simultaneous oil and gas lease entry card invites inquiry into whether the card was stamped by the offeror or, instead, by his agent.

3. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: First Qualified Applicant

Where an agent of an offeror for a simultaneous oil and gas lease signs the entry card by affixing a rubber-stamped facsimile of the offeror's signature, the requirements of 43 CFR 3102.6–1 apply and separate statements of interest by both offeror and the agent must be filed, or the offer will be rejected.

4. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents—Oil and

Gas Leases: Applications: Drawings—Words and Phrases

"Agent." The word "agent," as used in 43 CFR 3102.6–1, requiring statements of authority and disclosure of interests in oil and gas leases by agents, includes all persons or companies having discretionary authority to act on the offeror's behalf concerning the offer or lease.

5. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: First Qualified Applicant—Oil and Gas Leases: Options

Where a person files an oil and gas lease offer through a leasing service under an arrangement whereby the leasing service advances the first year's rental, selects the land, and controls the address at which the offeror may be reached, but no enforceable agreement is entered into whereby the offeror is obligated to transfer any interest in any lease to be issued to the leasing service, the service is not a party in interest in the offer merely because it may have a hope or expectancy of acquiring an interest, and the offeror is not precluded from stating that he is the sole party in interest in the offer.

APPEARANCES: D. E. Pack, Long Beach, California, pro se; James W. McDade, Esq., McDade and Lee, Washington, D.C., for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

In a drawing of simultaneous oil and gas lease offers conducted by the Utah State Office, Bureau of Land Management (BLM), the offer of John S. Runnells (the offeror) was drawn first for parcel UT 1408 as listed in the Aug. 1976 notice of land subject to simultaneous filings of oil and gas leases. On Oct. 5, 1976, D. E. Pack (appellant) filed a Notice of Protest of the results of this drawing and against issuing the lease to the offeror. In a decision dated Nov. 11, 1976, the State Office dismissed appellant's protest because the allegations therein had been satisfactorily answered by the offeror. Appellant filed his appeal of this dismissal and the administrative case record was duly forwarded for review by this Board.

[1, 2] The problem in this case stems from the use on the offeror's drawing entry card of a rubber-stamped facsimile of his signature. The use of a rubber stamp does not invalidate a simultaneous entry card if it is the intention of the offeror that the facsimile be regarded as his or her signature. *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971); *Louis Alford*, 4 IBLA 277 (1972); *Robert C. Leary*, 27 IBLA 296 (1976); *Evelyn Chambers*, 27 IBLA 317, 83 I.D. 533 (1976); *William J. Sparks*, 27 IBLA 330, 83 I.D. 538 (1976); *Arthur S. Watkins*, 28 IBLA 79 (1976). However, unlike use of a handwritten signature, use of a rubber-stamped signature on an entry card does not carry the presumption either that the signature was personally executed by the person named thereby, or that this person formulated the offer on

his own.[1] *Leary*, *supra* at 301; *Chambers*, *supra* at 323; *Sparks*, *supra* at 337; *Watkins*, *supra* at 81. Use of a rubber-stamped facsimile thus invites inquiry into whether a person other than the offeror executed the facsimile signature by affixing it on the entry card and, if so, whether that person served as the offeror's agent concerning the offer or lease.

[3] The purpose of this inquiry is to determine whether the offeror is qualified to receive an oil and gas lease, since the BLM may issue these leases only to the first qualified offeror. 30 U.S.C. § 226 (1970); 43 CFR Subpart 3102. If the offer (entry card) is signed by an agent of the offeror rather than by the offeror himself, 43 CFR 3102.6–1 (a) (2) [2] requires the filing of separate statements of interest by both the offeror and his agent. The offer is properly rejected as unqualified where these separate statements are not filed by both the offeror and his or her agent. *Southern Union Production Company*, 22 IBLA 379 (1975); *Leary*, *supra; Chambers*, *supra; Sparks*, *supra; Watkins*, *supra*. Thus, we must inquire as to whether someone other than the offeror stamped the entry card, and if so, whether this person was the offeror's agent.

Pursuant to an inquiry by the BLM, the offeror stated as follows concerning his entry card:

> I am the sole party in interest in the above numbered offer to lease and lease, if issued.
>
> The application for lease # U34366 was prepared by Stewart Capital Corporation, 100 South Wacker Drive, Chicago, Illinois, 60606, and, with my permission, my signature was affixed with a rubber stamp. I employ Stewart Capital Corporation, a service organization, to perform this service for me.

This statement indicates that the offeror intended the rubber-stamped facsimile to be regarded as his signature, and so the *Arata* requirement is satisfied. However, it also indicates that the Stewart Capital Corporation (Stewart), rather than

[1] We do not imply that the BLM must make these presumptions in every case where a signature is handwritten. We observe to the contrary that it is within the discretion of the BLM to examine the circumstances surrounding a handwritten signature where appropriate in order to determine its validity.

[2] Sec. 3102.6–1(a)(2) states as follows:

"If the offer is signed by an attorney in fact or agent, it shall be accompanied by separate statements over the signatures of the attorney-in-fact or agent and the offeror stating whether or not there is any agreement or understanding between them or with any other person, either oral or written, by which the attorney in fact or agent or such other person has received or is to receive any interest in the lease when issued including royalty interest or interest in any operating agreement under the lease, giving full details of the agreement or understanding if it is a verbal one. The statement must be accompanied by a copy of any such written agreement or understanding. If such an agreement or understanding exists, the statement of the attorney-in-fact or agent should set forth the citizenship of the attorney-in-fact or agent or other person and whether his direct and indirect interests in oil and gas leases, applications, and offers including options for such leases or interests therein exceed 246,080 acres in any one State, of which no more than 200,000 acres may be held under option, or exceeds the permissible acreage in Alaska as set forth in § 3101.1–5. The statement by the principal (offeror) may be filed within 15 days after the filing of the offer. This requirement does not apply in cases in which the attorney-in-fact or agent is a member of an unincorporated association (including a partnership), or is an officer of a corporation and has an interest in the offer or the lease to be issued solely by reason of the fact that he is a member of the association or a stockholder in the corporation."

the offeror himself, affixed the facsimile signature on the entry card. We have held that 43 CFR 3102.6–1(a)(2) applies where an agent of the offeror signs the entry card by affixing a rubber-stamped facsimile of the offeror's signature. *Leary*, *supra* at 299; *Sparks*, *supra* at 339; *Watkins*, *supra* at 81. It is, therefore, necessary to examine the circumstances under which the signature was stamped on the entry card in order to determine whether Stewart was the offeror's agent because, if so, the offeror would have to meet the filing requirements of this regulation in order to receive the lease here.

[4] A person is an agent of an offeror if he has authority to act with discretion on the offeror's behalf rather than only to perform manual or mechanical tasks involving no discretion, such as signing an entry card as the offeror's amanuensis. *Chambers*, *supra* at 325–326. We have held more specifically that a person affixing a rubber-stamped signature of an offeror is his agent within the meaning of 43 CFR 3102.6–1(a)(2) if he formulated the offer on the offeror's behalf, that is, if the offeror did not know specifically which lands his offer concerned. *Leary*, *supra* at 301. The record establishes to our satisfaction that Stewart, by affixing the stamped signature on the offer card and by other actions on behalf of the offeror, was acting as the offeror's agent. The record includes a letter from the offeror's attorney to the BLM enclosing the service agreement which Stewart executes with those who employ its services as the offeror did. This agreement states that Stewart is retained by the prospective offeror "to provide its advisory services in connection with, and to file, approximately [an agreed number of] filings pursuant to Stewart's Federal Oil Land Acquisition Program as described in the brochure heretofore delivered to [the would-be offeror] by Stewart." A copy of this brochure describing this program, which is incorporated into the terms of the agreement between the offeror and Stewart, is included in the record file of *Nadine H. Sanford*, IBLA 77–143, and we have taken official notice of it. This brochure provides in part as follows:

The Role of Stewart Capital

Stewart Capital Corporation is a service organization providing the expertise required for non-professionals to file on Federal oil and gas leases. As a result of these services, Stewart Capital's clients may be awarded oil and gas leases.

Stewart Capital Corporation retains a staff of professional landmen, each with a lifetime of experience in evaluating oil and gas leases. Each month they obtain complete lists of all available Federal leases for their area from the Bureau of Land Management and provide Stewart with a professional selection of those properties that they feel to be of superior value. From this information and from more than 13 years of operating experience, *Stewart has developed a computerized analysis for determining which leases are economically desirable for our clients and which, therefore, should be filed upon.* Estimated lease value, number of anticipated applicants and acreage amount are some of the main factors entering into the computer calculation.

Stewart's services, under the program, provide for a client filing applications for a twelve month period. Each application must be accompanied by a check in the amount of $10 which is the Government's cost of processing the application and is nonrefundable. *Stewart prepares the various applications, noting parcel number, state, etc. and forwards them, with the checks, to the appropriate office of the Bureau of Land Management* so that they will be received no later than 10:00 AM (local time) on the fourth Monday of each month.

If a Stewart client application is drawn as priority #1, a lease will be issued upon payment of the first year's rental of fifty cents per acre. Such payment, which will range from $20 for the smallest parcel of 40 acres to $1,280 for the largest parcel of 2,560 acres, must be received in the proper office of the Bureau of Land Management within 15 days from the date of notice. Failure to properly submit rental will result in automatic disqualification. *Stewart obtains the list of winners in the various states and immediately mails, by registered letter, a cashiers check for the appropriate amount to the proper office.* Stewart also wires the office stating that the check was mailed, giving the amount, the parcel to which it applies, the participant's name and the number of the registered letter. The client is then billed by Stewart for reimbursement.

As the application form requires one address only, Stewart recommends clients use Stewart's Chicago office until the lease is issued to the winning client. The advantage is that our office is manned at all times—whereas clients could be away on vacation or business—and thus Stewart would be able to act within the time permitted on any Government request in order to safeguard the issuance of the lease. Any inquiries received from prospective purchasers are immediately passed to a landman, or whomsoever the client may designate.

Simply put, *Stewart Capital combines a professional selection of leases with the mechanical processing of applications required to obtain such leases.* Although Stewart maintains a record of leases awarded and advises its clients when future payments are due, it does not provide services in connection with the management of leases or the development, sale or other disposition of leases awarded to its clients. The professional services required in this area are otherwise available through independent landmen and others. [Italics supplied.]

It is apparent that Stewart had the authority to, and did, on the offeror's behalf, select the land on which the offer was made, apply the signature stamp, file his entry card, and pay the first year's rental for the lease. Thus, Stewart formulated the offer on behalf of the offeror and used its authority to exercise discretion in other ways concerning the offer and lease, and was not acting in a purely mechanical capacity as an amanuesis. We conclude that Stewart was the offeror's agent within the meaning of 43 CFR 3102.6–1(a)(2).

We hold that since Stewart was the offeror's agent, the provisions of this section apply, and require the filing of separate statements of interest by both the offeror and Stewart. The record indicates that no such statement has been submitted by Stewart. It is accordingly unnecessary to make findings concerning the adequacy and timeliness of the offeror's statement quoted above. Since the provisions of this section have not been met, the offeror is not qualified and his offer must be rejected.

[5] Appellant Pack also asserts that the offeror's offer is not quali-

fied because the address listed on his drawing entry card was not his "true" address, but was in fact, as the record indicates, the address of a branch office of Stewart. Appellant further alleges and attempts to show that the offeror's offer was disqualified under 43 CFR 3100.5–5 and 3102.7, in that Stewart has an undisclosed interest in the lease and the offeror improperly stated that he was the sole party in interest. It appears that Stewart offers its "subscribers" (clientele) an "'A' Program" whereby the client who is successful in obtaining a lease through Stewart's services may, at his sole election, opt to convey a 35 percent interest in the lease to Stewart at a pre-established price. Thus, under the terms of this option, there is a possibility that Stewart may acquire lease rights from its successful clients, but Stewart has no claim of interest in the lease offer of its clients which is enforceable in law or in equity.

These issues were extensively discussed in *John V. Steffens*, 74 I.D. 46 (1967).[3] In that case, a leasing service selected lands, filed offers, and advanced funds on behalf of its clientele for leases which the service was willing to purchase from any successful client. However, the service had no enforceable right to purchase these leases. In *Steffens*, it was held that the leasing service did not hold an "interest" in the offers which it filed on behalf of its client on account of the mere hope or expectancy that it might subsequently acquire an interest in the lease on assignment from its client, and that the client/offeror was therefore not precluded from stating that he was the sole party in interest in the offer. *Id.* at 53. Moreover, *Steffens* considered and rejected the assertion that the use of the leasing service's address by its clients was improper. Thus, appellant's arguments on these issues are without merit. A willingness to purchase if the lessor desires to sell does not constitute an "interest" in the leasehold.

Our conclusion that appellant's protest must be sustained as to his allegation that the signature stamp was applied by the offeror's agent "without attestation by the agent as to his authority to sign said card," does not require invalidation of the drawing. The record indicates that Scott A. Harris, P.O. Box 2143, Roswell, New Mexico 88201, was the offeror whose entry card was drawn immediately after Runnells'. We accordingly direct the BLM to issue the lease in question to him, provided of course that all else is regular.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

[3] Cited with approval in *Georgette B. Lee*, 3 IBLA 272 (1971); *R. M. Barton*, 4 IBLA 229 (1972), 5 IBLA 1 (1972), 7 IBLA 68 (1972), 9 IBLA 70 (1973); and *Harry L. Matthews*, 29 IBLA 240 (1977).

the Interior, 43 CFR 4.1, the decision appealed from is reversed.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.
(Concurring separately)

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

I am in agreement with the reversal of the Bureau's decision. My comments are briefly directed solely to the issues raised concerning the practices of the leasing service. My views concerning some of the practices of leasing services are set forth in a concurring opinion in *R. M. Barton*, 4 IBLA 229, 234 (1972). There have been no administrative practices changed since that time which would cure some of the seemingly unfair advantages which leasing services may have to acquire oil and gas leases in the simultaneous drawing system. I adhere to my recommendation that measures be taken aimed at preventing some of the abuses and unfair practices of these oil and gas services, and appropriate investigation be made to assure there is no violation of the regulations and the statutes.

JOAN B. THOMPSON,
Administrative Judge.

RIO BLANCO NATURAL GAS COMPANY

30 IBLA 191

Decided *May 19, 1977*

Appeal from decision of the Colorado State Office Bureau of Land Management, holding that oil and gas lease C–1490 terminated by cessation of production.

Reversed and remanded.

1. Oil and Gas Leases: Drilling—Oil and Gas Leases: Extensions—Oil and Gas Leases: Production—Oil and Gas Leases: Termination—Oil and Gas Leases: Unit and Cooperative Agreements

An oil and gas lease is extended by operation of law for 2 years beyond the expiration of its primary term when actual drilling operations were commenced on the lease (or for the lease under a unit plan) prior to the expiration of the primary term and such operations are being diligently prosecuted on the expiration date, even though the lease may also have production at that time.

APPEARANCES: Thomas W. Whittington, Esq., and Russell S. Jones, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Rio Blanco Natural Gas Company appeals from a decision of the Colorado State Office, Bureau of Land Management, declaring that oil and gas lease C–1490 terminated by cessation of production. That de-

cision was made on remand from an earlier appeal to this Board, *Rio Blanco Natural Gas Co.*, 16 IBLA 243 (1974).

The subject lease was committed to a unit agreement, but no production was obtained in the unit prior to the expiration of the primary term of the lease after Apr. 30, 1972. The lease was therefore not extended pursuant to the provisions of 30 U.S.C. § 226(j) (1970). The lease itself, however, had production from the Huber No. 28–1 Well which was independent of the unit. This production extended the lease beyond its primary term, but the initial decision of the State Office held that production had ceased and the lease terminated on Mar. 1, 1973. In its initial appeal, appellant asserted that the lease not only enjoyed an extension because of production, but also enjoyed a 2-year extension because of drilling operations in the unit on Apr. 30, 1972, pursuant to 30 U.S.C. § 226(e) (1970):

> Competitive leases issued under this section shall be for a primary term of five years and noncompetitive leases for a primary term of ten years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities. *Any lease* issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities. [Italics added.]

Appellant asserted that the No. 20–1 Federal Gardner Well was spudded in on Apr. 30, 1972, and that drilling was diligently pursued until June 8, 1972, when the well was plugged. The well was a unit well but not within the boundaries of C–1490. Appellant contended that the lease was therefore extended through Apr. 30, 1974.

Appellant submitted two letters it had received from the USGS office at Denver, Colorado. The first letter, dated Feb. 1, 1973, informed appellant that it had 60 days in which to begin drilling operations on lease C–1490, failing which, the lease would be terminated by operation of law. 43 CFR 3107.3–1.[1] The second letter, dated February 9, 1973, stated that appellant should disregard the first letter; it further stated that lease C–1490 had been extended for 2 years due to drilling operations within the unit on Apr. 30, 1972. 43 CFR 3107.2–3.[2] Because it appeared that the State Office had not taken cognizance of this infor-

[1] Sec. 3107.3–1, *Cessation of production,* provides:

"A lease which is in its extended term because of production shall not terminate upon cessation of production if, within 60 days thereafter, reworking or drilling operations on the leasehold are commenced and are thereafter conducted with reasonable diligence during the period of nonproduction."

[2] Sec. 3107.2–3, *Period of extension,* provides:

"*Any lease* on which actual drilling operations, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time, shall be extended for 2 years and so long thereafter as oil or gas is produced in paying quantities." (Italics added.)

mation and because it appeared that the information might have a significant effect on the disposition of this case, the Board remanded the case to the State Office for further consideration. The State Office resolved the issue as follows:

> Had drilling operations been in progress at midnight on Apr. 30, 1972 (the end of the primary term of the lease), the lease term would not have been extended. We have been unable to determine that it was the intent of section 17(e) to permit a lessee to opt for a drilling extension if production extending a lease should continue for less than 2 years from the end of the primary term of the lease.

[1] In *Alta Vista Resources, Inc.*, 10 IBLA 45 (1973), the Board interpreted a similar 2-year extension provision.[3] The Board stated that while Alta Vista was precluded because no drilling operations were in progress at the expiration of the primary term of the lease, the result would have been different had drilling operations been in progress at that time:

> We note that no drilling operations actually were in progress on any of the subject leases, or for their benefit under an approved unit plan of operation, before or on the terminal date of the leases, November 1, 1972. For this reason alone, the 2-year extension requested may not be granted, regardless of whether or not the leases were in their "primary term." An oil and gas lease is not entitled to a 2-year extension under 30 U.S.C. § 226–1(d) (1970), which grants such an extension when the lessee has commenced "actual drilling operations" before the end of its term and is diligently prosecuting such operations at the end of the term, when prior to the expiration date of the lease the only acts undertaken by the lessee are acts preliminary to the actual drilling and the actual drilling is not commenced until after the lease has terminated. *Michigan Oil Company*, 71 I.D. 263 (1964). *If, in fact, "actual drilling operations" had been commenced before the end of the primary term of an oil and gas lease and such operations are being diligently prosecuted at that time, the lease is extended for a period of two years from the end of the primary term by operation of law.* No application for such extension is necessary. [Italics added.]

Id. at 46–47. Unlike the lessee in *Alta Vista*, appellant herein alleged the occurrence of drilling operations at the end of the primary term of its lease.

Both 30 U.S.C. § 226(e) and 43 CFR 3107.2–3, *supra* n. 2, refer to "any lease." In our construction, such a significant word may not be given an insignificant effect. *Rockbridge* v. *Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971). By the statute, Congress established two means by which leases may be extended: (1) by production and (2) by drilling. Such extensions devolve upon a lease by operation of law, not upon appli-

[3] *Alta Vista* involved 30 U.S.C. § 226–1(d) (1970), which was enacted with the extension provision of subsection 226(e) on Sept. 2, 1960, 74 Stat. 781, 789:

"Any lease issued prior to Sept. 2, 1960, which has been maintained in accordance with applicable statutory requirements and regulations and which pertains to land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities."

Subsec. 226–1(d) was enacted to give leases issued prior to the Act the same 2-year extension as leases issued after the Act could receive under subsection 226(e). Report of the House Committee on Interior and Insular Affairs, H.R. Rep. 1401, 86th Cong., 2d Sess. 5–6. The two provisions thus should be construed similarly.

cation by a lessee nor by action of any official.[4] They are not set forth as alternatives to one another but stand as independent sentences. Under the terms of the statute, a drilling extension is not precluded by the production extension. Such a determination is not indicated in the legislative history, the purpose of the extension provision being to encourage drilling by continuing the lease.[5] Thus, where two such extensions are simultaneously operative, one for an indefinite term and the other for a fixed term, whichever extension is concluded first leaves the remaining extension in effect. Accordingly, we hold that a lease is automatically extended for 2 years when actual drilling operations were commenced on the lease (or for the lease under a unit plan) prior to the end of the primary term. If the drilling of the No. 20–1 Federal Gardner Well met these conditions, the lease was entitled to a 2-year extension.

Appellant alternatively contends that if its lease was subject to termination by cessation of production on Mar. 1, 1973, the lease was extended by diligent drilling operations on the RB–E–01 Well, another well within the unit, which operations were commenced within 60 days of Mar. 1, 1973:

> [T]he preparations for the nuclear detonation in the RB–E–01 Well which in fact were commenced (or recommenced) on Mar. 14, 1973, and are still being diligently prosecuted constitute reworking or drilling operations which were commenced within 60 days after cessation of production from the Huber No. 1 Well and thereby prevent termination of the Colorado 1490 lease. The Huber No. 1 Well was plugged and abandoned on Mar. 1, 1973. On Mar. 14, 1973, the drill rigs for the implacement of nuclear devices were moved on site and permission to detonate those devices was granted on Apr. 12, 1973. As shown on page seven of Exhibit E, A.E.C. personnel and other personnel during April began to arrive on site for the detonation phase and the actual detonation actually occurred on May 17, 1973. Clearly, preparations for the detonation began within the 60-day period following the plugging of the Huber Well and thereby constitute reworking or drilling operations within the provisions of Sec. 17(f) of the Mineral Leasing Act (30 U.S.C.A., Sec. 226(f)).

These specific assertions were raised for the first time in this appeal. It would therefore be appropriate for the State Office initially to consider these factual assertions with advice of Geological Survey. Such consideration would only be necessary,

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[4] The fact that this is an automatic extension which devolves upon a lease by operation of law distinguishes it from prior extension provisions which required an application by the lessee and which could be precluded by an extension by production. *See, e.g., Pan American Corp.*, A–28832 (June 27, 1962); *Seaboard Oil Company*, 64 I.D. 405 (1957); *General Petroleum Corporation*, 59 I.D. 383 (1947).

[5] The Senate Interior Committee stated as follows in S. Rep. No. 1549, 86th Cong., 2d Sess. 7:

"[A]llowance of an *added* 2-year term for existing and future oil and gas leases, if actual drilling is being diligently prosecuted at the end of the primary term, will provide impetus toward exploration for oil and gas and reward those who do so diligently. The added period, it is believed, will not result in an excessively long overall leasing period in view of the time required, under present conditions, to block up areas for exploration, obtain financing, and carry on scientific investigations." (Italics added,) 1962 U.S. Code Cong. and Ad. News 3238–39.

however, if the State Office determined that the lease was not extended because the drilling of the No. 20–1 Federal Gardner Well did not meet the conditions of 30 U.S.C. § 226(e) (1970). If the drilling of the well meets those conditions, *i.e.*, it was commenced prior to the expiration of the primary term of the lease and drilling operations were diligently prosecuted at that time, then no consideration need be given to appellant's alternative contention.[6]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for further action consistent herewith.

JOSEPH W. GOSS,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge

ANNE POINDEXTER LEWIS,
Administrative Judge.

[6] Appellant also asserted that diligent drilling operations for the nuclear test well were being conducted on March 1, 1973. This matter was on appeal before the Director, U.S. Geological Survey, at the time the instant appeal to the Board was filed. By decision dated July 31, 1975 (GS–69–O&G), the Director determined that actual drilling operations with respect to the nuclear test well did not commence until after Apr. 13, 1973, when permission for emplacement and detonation of nuclear explosives was given. This decision was appealed to the Board (IBLA Docket No. 76–176), but at request of the appellant therein, the appeal was dismissed by order dated Oct. 16, 1975.

PEABODY COAL COMPANY

7 IBMA 318

Decided *May 20, 1977*

Appeal by Peabody Coal Company from a decision by Administrative Law Judge Cook, dated Aug. 23, 1976, in Docket No. BARB 75–615–P, in which the Judge found a violation of 30 CFR 75.805 and assessed a civil penalty in the amount of $7,000.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Penalties: Procedure of Assessment

A technical defect in the assessment process does not affect the jurisdiction of an Administrative Law Judge and, in the absence of prejudice to a party, may be cured by an amendment to the petition.

2. Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation: Generally

A violation of 30 CFR 75.805 is established where it is shown that Miller plugs, connectors of the single-phase variety, are being employed on high-voltage electrical equipment.

3. Federal Coal Mine Health and Safety Act of 1969: Appeals: Penalties

Where the record shows that the Administrative Law Judge has taken into consideration all relevant mitigating factors supported by the evidence, and has fixed the amount of the penalty accordingly, in the absence of a showing of an abuse of discretion on his part, the Board on appeal will not further modify the penalty assessed.

APPEARANCES: William P. Wooden, Esq., Gregory J. Leisse, Esq., for appellant, Peabody Coal Company; Rob-

ert J. Phares, Esq., Acting Assistant Solicitor, David L. Baskin, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On May 4, 1974, a Mining Enforcement and Safety Administration (MESA) inspector issued a notice of violation, No. 3 JEM, against Peabody Coal Company (Peabody) which cited a violation of 30 CFR 75.805[1] and stated in part as follows:

> The cable couplers on the high voltage systems at the Ken No. 4 Mine did not comply with the law, in that, they were not the three-phase type or constructed so that the ground check continuity conductor would be broken first and the ground conductor broken last * * *.

Prior to the issuance of this notice, an accident had occurred which resulted in the electrocution of a federal coal mine inspector. This notice was terminated on May 29, 1974, as "all of the miller plug type connectors were removed from the high voltage systems." Notice of Termination 1 JEM, May 29, 1974.

On Aug. 14, 1974, Order of Assessment No. 1935–89 was issued, listing among some 25 alleged violations the violation of 30 CFR 75.805. Peabody requested a formal hearing with the Office of Hearings and Appeals on the alleged violations on August 28, 1974. On Sept. 17, 1974, Peabody received a letter dated Sept. 11, 1974, in which MESA advised that the alleged violation of 30 CFR 75.805 had been improperly assessed and so would be deleted from Order of Assessment No. 1935–89 and such order would be reissued properly. On the same day, Peabody forwarded a check to the Office of Assessment to pay in full Order of Assessment No. 1935–89. A new order of Assessment, No. 1935–91, which contained the alleged violation of 30 CFR 75.805, was issued on Sept. 19, 1974. Thereafter MESA returned Peabody's check and on Nov. 1, 1974, Peabody sent its check back to MESA, citing 30 CFR 100.5.[2] Upon failure to reach a conference agreement and pursuant to Peabody's request, MESA forwarded both orders to counsel for formal hearings.

On Jan. 22, 1974, a petition for assessment of a civil penalty was

[1] Section 75.805 of 30 CFR provides:

"Couplers that are used with medium-voltage or high-voltage power circuits shall be of the three-phase type with a full metallic shell, except that the Secretary may permit, under such guidelines as he may prescribe, no less effective couplers constructed of materials other than metal. Couplers shall be adequate for the voltage and current expected. All exposed metal on the metallic couplers shall be grounded to the ground conductor in the cable. The coupler shall be constructed so that the ground check continuity conductor shall be broken first and the ground conductors shall be broken last when the coupler is being uncoupled."

[2] Sec. 100.5 of 30 CFR provides in pertinent part:

"(a) Payment by the operator or miner of the assessed penalty will close the case."

filed on Order of Assessment No. 1935–91 for the alleged violation set forth in Exhibit "A" attached thereto, which cited both Notice of Termination 1 JEM, May 29, 1974 and 30 CFR 75.805.

Peabody filed a motion to dismiss contending that it had tendered full payment of Order of Assessment No. 1935–89 when it contained the alleged violation of 30 CFR 75.805. In denying this motion by order dated Dec. 5, 1975, the Judge found that Peabody's payment was not timely since prior thereto it had been notified not to make payment of Order No. 1935–89 as it had been voided.

By order dated Feb. 4, 1976, the Judge granted MESA's motion to amend its petition by substituting Notice of Violation 3 JEM, May 4, 1974, for Notice of Termination 1 JEM, May 29, 1974, which had erroneously appeared on Exhibit "A" as originally filed. In granting this motion, over Peabody's objection, the Judge found that Peabody had apparently been aware that MESA intended to base its petition upon Notice No. 3 JEM of May 4, 1974, and therefore would not be prejudiced by an amendment to the petition to reflect such allegation.

A hearing was held on Feb. 10, 11 and 12, 1976, and a decision issued on Aug. 23, 1976. At the outset, the Judge rejected Peabody's argument that the Office of Hearings and Appeals lacked jurisdiction and held that the petition as originally filed was amended properly. It was found that the Miller plugs as employed by Peabody could be categorized as devices within the purview of 30 CFR 75.805 and that they were in violation of that regulation. The Judge held that this violation was a very serious nature, while recognizing that there would have been no electrocution if the circuit had been deenergized pursuant to proper testing techniques (Dec. 19). In finding that Peabody did not demonstrate gross negligence the Judge considered the failure of MESA personnel to previously cite for other violations of 30 CFR 75.805 for use of these devices which were obvious and visible. The recommended penalty of $10,000 was reduced and a penalty of $7,000 was assessed, in light of the foregoing fact and because MESA permitted production to be resumed with the dangerous connection in question and prior to abatement (Dec. 21).

On appeal, Peabody contends that the Administrative Law Judge lacked subject matter jurisdiction of the proceeding as the service of a proper Order of Assessment is a condition precedent to the filing of a civil penalty proceeding and because the order herein listed a notice of termination rather than a notice of violation, it is fatally defective. Additionally, Peabody argues that it paid Order of Assessment No. 1935–89 and that this was the only order ever issued with respect to Notice of Violation 3 JEM, May 4, 1974, and so the case should be closed pursuant to 30 CFR 1005.5. Peabody also asserts that the Judge erred in finding that Miller plugs are couplers and must therefore be

in compliance with 30 CFR 75.805 as that regulation is void for vagueness. Finally, it is argued that, based on MESA's own acquiescence in appellant's use of Miller plugs, a finding of negligence is inappropriate and further that the decision fails to accord proper mitigating weight to the finding that the fatality would not have occurred under proper testing procedures and de-energization of the circuit. Peabody submits that the amount of the penalty should be reduced accordingly.

MESA contends that Order of Assessment No. 1935–91 referred to a violation which is all that 30 CFR Part 100 mandates, that Peabody was aware of the alleged violation being charged from the outset and that any deficiency was corrected prior to the hearing. With respect to the gravity of the violation, MESA asserts that had proper devices been in use de-energization would have occurred regardless of testing procedures used and there would have been no electrocution.

Issues on Appeal

A. Whether the Administrative Law Judge had subject matter jurisdiction of the civil penalty proceeding.

B. Whether the use of Miller plugs constituted a violation of 30 CFR 75.805 and, if so, whether Peabody's noncompliance was negligent.

C. Whether sufficient and proper consideration and weight were given to the use of improper testing procedures in determining the amount of the penalty assessed, and, if not, whether the amount of the penalty should be reduced.

Discussion

A.

[1] Prior to the institution of a civil penalty proceeding, under 30 CFR Part 100, an Order of Assessment must be served on an operator with the opportunity afforded to either pay the penalty, request a conference, or request a hearing. Peabody does not dispute that such an order, No. 1935–91, was served herein and that a hearing was requested with full knowledge of the violation charged. However, viewing the issue as jurisdictional, Peabody contends that its undisputed awareness of the underlying violation is irrelevant.

Such a technical defect in the assessment process in no way affects the subject matter jurisdiction of an Administrative Law Judge, and, in the absence of prejudice to Peabody, the Judge was correct in allowing MESA to amend its petition by substituting the notice of violation for the notice of termination cited therein.

In contending that it has paid the penalty assessed for Notice of Violation 3 JEM, May 4, 1974, Peabody is raising on appeal an argument thoroughly and properly disposed of below. On the basis of verified documents he requested, the Judge determined that Peabody tendered full payment of Order of Assessment No. 1935–89 having previously

been notified that such order was voided because of an incorrect penalty assessment for Notice of Violation 3 JEM, May 4, 1974. The Judge recognized, and the Board agrees, that there is nothing in the regulations which prohibits MESA from correcting an erroneous assessment, especially where the operator has in no way changed his position in reliance thereon.

B.

The regulation involved, 30 CFR 75.805, provides in pertinent part: "Couplers that are used with medium-voltage or high-voltage power circuits shall be of the three-phase type with a full metallic shell * * *."

As the term "coupler" is nowhere defined, the crux of this proceeding is whether a Miller plug is a coupler and therefore subject to the regulations. If such device is a coupler subject to the requirements of 30 CFR 75.805, its use in the circumstances of this case would clearly be a violation. As sole support for its contention that Miller plugs are not couplers, Peabody cites the testimony of one of its employees that he regarded Miller plugs as "connectors" not "couplers" (Tr. 329), a distinction without a difference in our opinion.

[2] The term "coupler," as used in the regulation, has a broad connotation and is not meant to define a particular device. It is intended to be read in terms of usage. The regulation explains how any device *so used* should be constructed. Any device employed in joining medium- or high-voltage cables or conductors must have the specified characteristics.

The record supports a finding that Miller plugs were employed by Peabody on transformers and high-voltage electrical equipment. These devices served as the connection from the high-voltage circuit to the transformer (Tr. 339). Based upon their usage, they must conform to 30 CFR 75.805 which the devices herein did not.

The evidence shows that the Miller plug had no metallic shell and that it was a connector of the single-phase variety (Dec. 16–17). Additionally, it was so constructed that if it were pulled it would not break the ground check continuity conductor first and the ground conductor last (Dec. 14). The Judge stated, "It is clear that the Miller plugs did not comply with 30 CFR 75.805" (Dec. 17). We agree that the record amply supports the finding that a violation occurred.

We find no merit in Peabody's assertion that 30 CFR 75.805 because of vagueness cannot be validly enforced. Furthermore, on this point, we are unable to grant relief. The Board has held that it lacks the power to declare a regulation void or invalid for any reason. *Eastern Associated Coal Corporation*, 5 IBMA 185, 82 I.D. 506, 1975–1976 OSHD par. 20,041 (1975); *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973).

To the extent that Peabody argues that Miller plugs are not in violation of 30 CFR 75.805 due to

MESA's alleged previous administrative acquiescence in the use of Miller plugs on high-voltage equipment, such conduct on the part of MESA is irrelevant. Once it is determined that a regulation, as properly construed, imposes an obligation, then possible negligent enforcement of such regulation can in no way change that obligation. Additionally, the Judge correctly found that Peabody itself was negligent in not being aware of the specific requirements of the law. In 1971, at another of the operator's mines, and following the electrocution of an employee, unapproved-type high-voltage couplers were replaced on a transformer by approved three-phase metallic couplers.

The conduct of the parties herein might however bear on the amount of a penalty to be assessed, and the Judge did properly modify the recommended penalty to reflect the fact that Peabody was not guilty of gross negligence, owing to MESA's previous conduct with respect to the use of Miller plugs.

C.

The gravity of the violation is one of the factors to be considered in assessing a civil penalty pursuant to the criteria in sec. 109(a)(1) of the Act. In contending that this violation is extremely serious MESA's main argument is that it led to a fatality. The Judge found the violation to be very serious, rather than extremely serious, due to the fact that MESA personnel chose not to issue an imminent danger order to prohibit operation of the transformer in question prior to abatement. This factor was also specifically cited in reducing the amount of the recommended penalty, as was the fact that MESA had previously observed this condition without issuing notices of violation (Dec. 21).

[3] The Judge also specified the testing procedures violated by the MESA inspector and found that, "under proper techniques, [the inspector] would not have been electrocuted if the circuit had been de-energized (Tr. 253)" (Dec. 19). Peabody contends that this fact should have been considered in further mitigation of the amount assessed. The Board's reading of the Judge's decision indicates that this finding was considered in determining the gravity of the violation, as was the finding that had a proper coupler been in use the circuit would have been de-energized automatically (Dec. 18–19). In view of these findings it cannot be said that the Judge erred in failing to single out the improper testing procedure as a factor for further mitigation.

The Board finds that the totality of circumstances leading to the fatality was fairly and thoroughly evaluated by the Judge in reaching his determination that the violation was of a very serious nature. The penalty assessed herein is amply supported by the record and, therefore, will not be disturbed on appeal.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS AFFIRMED, that a penalty of $7,000 is assessed for the violation described in Notice of Violation No. 3 JEM, May 4, 1974, and that Peabody Coal Company SHALL PAY this amount on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

SOUTHERN OHIO COAL COMPANY

7 IBMA 331

Decided *May 23, 1977*

Appeals by the Southern Ohio Coal Company and the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge George A. Koutras dated Oct. 29, 1976, in Docket No. M 76-349, in which Judge Koutras granted in part and denied in part Southern Ohio Coal Company's Petition for Modification of the application of 30 CFR 75.1710-1(a) to its Meigs No. 1, Meigs No. 2 and Raccoon No. 3 Mines, pursuant to sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally

Where, in a proceeding to modify the application of the mandatory safety standard requiring that self-propelled electric face equipment be equipped with canopies or cabs (30 CFR 75.1710-1), a coal mine operator proves that the state of relevant mining operational conditions varies from time to time and does not remain static, it is error for the Administrative Law Judge to grant relief on the basis of the state of such conditions at a particular point in time or at a particular operating location in the mine in disregard of the variability of those conditions.

2. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally

It is error to grant relief in mining sections with mining heights above 56 inches where the Petition for Modification prayed for relief only in sections where the mining height is 56 inches or less.

3. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Burden of Proof

Where an operator has established a prima facie case of diminution of safety, the issue of the availability of technology which would allow compliance with a mandatory safety standard without a diminution of safety is an affirmative defense available to the Mining Enforcement and Safety Administration, and it is not necessary for the operator to prove that no such technology exists in order to prevail.

4. Federal Coal Mine Health and Safety Act of 1969: Modification of

Application of Mandatory Safety Standards: Generally

It is error for the Judge to deny all relief that is requested where the evidence of record will permit the granting of some relief.

APPEARANCES: Alvin J. McKenna, Esq., and D. Michael Miller, Esq., Alexander, Ebinger, Holscheek, Fisher & McAlister, for appellant/petitioner, Southern Ohio Coal Company; Robert A. Cohen, Esq., Trial Attorney, and Robert J. Phares, Esq., Trial Attorney, for appellant/respondent, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEAL

Factual and Procedural Background

On Mar. 19, 1976, appellant/petitioner Southern Ohio Coal Company (hereinafter "SOCCO") filed with the Office of Hearings and Appeals a Petition for Modification under sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "Act.") [1] The Petition prayed for a modification of the application of the mandatory safety standard set out in 30 CFR 75.1710–1 with respect to all of the mining sections regardless of vertical clearance therein in its Meigs No. 1, Meigs No. 2 and Raccoon No. 3 Mines. That standard requires the installation of substantially constructed cabs or canopies on all self-propelled electric face equipment in accordance with a timetable coordinated with the measurement of mining heights in a particular mine.[2]

The apparent statutory basis for 30 CFR 75.1710–1 is sec. 317(j) of the Act. 30 U.S.C. § 877(j) (1970). During the hearing on the merits in June 1976, SOCCO indicated that it was contracting the scope of its prayer for relief so that it was seeking modification only in those sections with a vertical clearance of 56 inches or less and not for the "front" canopy on any roof bolter in any section.

[1] 30 U.S.C. §§ 801–960 (1970).

[2] The text of the pertinent part of 30 CFR 75.1710–1 is as follows:

"(a) Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after Jan. 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls. The requirements of this paragraph (a) shall be met as follows:

"(1) On and after Jan. 1, 1974, in coal mines having mining heights of 72 inches or more;

"(2) On and after July 1, 1974, in coal mines having mining heights of 60 inches or more, but less than 72 inches;

"(3) On and after Jan. 1, 1975, in coal mines having mining heights of 48 inches or more, but less than 60 inches;

"(4) On and after July 1, 1975, in coal mines having mining heights of 36 inches or more, but less than 48 inches;

"(5) (i) On and after Jan. 1, 1976, in coal mines having mining heights of 30 inches or more, but less than 36 inches,

"(ii) On and after July 1, 1977, in coal mines having mining heights of 24 inches or more, but less than 30 inches, and

"(6) On and after July 1, 1978, in coal mines having mining heights of less than 24 inches:"

On Mar. 22, 1976, the United Mine Workers of America (hereinafter "UMWA"), representative of the miners at the three mines involved, filed an an ewtro SOCCO's Petition requesting that the Petition be denied and alleging that the proposed modification would not at all times guarantee the same measure of protection afforded the miners as guaranteed by the regulation and that application of the regulation's standard would not result in a diminution of safety to the miners. That was the only official participation of the UMWA as a party in the case.

The Mining Enforcement and Safety Administration (hereinafter "MESA") filed an answer to SOCCO's petition on Mar. 29, 1976, in which it indicated that it currently had insufficient knowledge or information to admit or deny the allegations contained in SOCC's Petition, but that it would conduct a full investigation of the conditions at the mine relative to the petition and file a report of the results of that investigation by way of an amended answer.

On May 25, 1976, MESA filed its amended answer, incorporating as a part thereof a report to Assistant MESA Administrator John W. Crawford, regarding the results of the investigation anticipated in its original answer. The amended answer opined that the Petition should be denied "for the reasons outlined in Government Exhibit No. 1 [the said report]."

On June 8–11, the Administrative Law Judge (hereinafter "Judge") held a hearing on the Petition in Columbus, Ohio. During the hearing, SOCCO and MESA presented a substantial amount of evidence regarding the physical characteristics of various sections of the three mines as well as evidence regarding the machinery in use at the mine or on order. In the latter category were testimonial and documentary evidence of the equipment's engineering data, equipment operators' testimony regarding operational details, photographic and videotape representations of the equipment, and opinion testimony from a MESA technical expert, among other items of evidence.

Based on the evidence adduced, argument and posthearing briefs, the Judge issued a decision disposing of the Petition on Oct. 29, 1976.

The Judge's findings and conclusions in that decision pertinent to the appeal along with relevant comments were the following:

Petitioner SOCCO operates a mining complex in Meigs and Vinton counties, Ohio, in which three mines are now operating. Meigs No. 1 Mine is the first of these; it had 5 working sections of a planned 14 throughout the operative period. Meigs No. 2 Mine is the second; it had 11 sections of a planned 14 working at the time of the filing of the Petition and 12 working sections at the time of the June hearing. Raccoon No. 3 is the final mine in this group; it had 5 of 9 planned sections working throughout the period (Dec. 6–7).

All three mines have unusually good roofs from a support stand-

point. All have undulating bottom subject to water and to considerable mud (Dec. 7).

Both conventional and continuous mining take place in the various sections throughout all three mines. On a typical conventional mining section, there are seven pieces of electrical face equipment: a coal drill; a cutter; a loader; a roof bolter; a scoop; and two shuttle cars. On a continuous mining section, there are typically five pieces of such equipment: a continuous miner; a roof bolter; a scoop; and two shuttle cars (Dec. 7).

A number of miners and other mine personnel besides the operators of electrical face equipment typically work in these sections. Usually none of these people work with a cab or canopy over or around them (Dec. 7).

There are in total 180 pieces of equipment to which the cab and canopy regulations apply in these three mines. Nearly 90 percent of these pieces already have the required cabs or canopies installed (Dec. 7).

The Judge rejected SOCCO's alternative ground for the granting of relief, that is, that it had a plan which guaranteed no less than the same amount of safety as the standard the application of which the petition sought modification. The "proposed alternative method of protection" advanced by SOCCO was the existing roof control plan. The Judge rejected this as not guaranteeing the same measure of protection because although SOCCO arguably compromised some of MESA's evidence regarding roof and rock falls, SOCCO was unable for all incidents presented by MESA testimony to provide explanation in a way which was favorable to the "alternative method" part of SOCCO's case (Dec. 105–107).

As to the other grounds for SOCCO's petition, that is, an alleged diminution of safety, the Judge created in essence two broad categories of reasoning for granting or denying the petition. In one of these categories there are four subgroups. (It appears that in making his decision, the Judge considered a particular piece of equipment in a particular mining section at a particular time, in an approach which SOCCO and MESA have respectively described as "static" and "piecemeal.")

The major categories referred to are:

Visibility. There was testimony and other evidence to indicate that the installation of canopies on some pieces of equipment had led to severe safety problems resulting from lack of visibility. The equipment under this category and its location in the mines may be summarized as follows: (a) National Mines Service Lokar and Torkar shuttle cars—Meigs No. 1 on 007 section, Meigs No. 2 on 007 and 011 (Lokar only) sections; (b) Joy 14BU10 loading machine—Meigs No. 2 on 005 section and Raccoon No. 3, on 004 section; (c) Joy and Goodman cutting machines—Meigs No. 2 on 007 sec-

tion; (d) National Mines Service Marietta continuous miner—Raccoon No. 3 on 001 section; and (e) Schroder coal drilling machine—Raccoon No. 3 on 004 section (Dec. 84–88).

Formula. Based largely on the testimony of a MESA expert witness, the Judge devised a formula for determining whether a particular piece of equipment in a particular section of a mine could be operated with a canopy without the creation of additional hazards, including visibility problems, due to the cramped operator compartment and the vertical height of the area in which the equipment was expected to operate (Dec. 95). A number of factors were important to the formula. The most salient was mining height in a section. Early in the progress of the case, there was a substantial disagreement regarding the proper term to be used in describing height in a particular entry or section. It was agreed that the appropriate measurement was simply vertical clearance. This meant floor to lowest allowed roof support height, and not necessarily literal floor-to-roof, since a floor-to-roof measurement would be an artificial indication of vertical clearance, given the presence of roof control materials which reduce clearance. The case was tried under the presumption that the proper "mining height" for a particular entire section was the lowest height in the working portions of that section (Dec. 95). Both parties presented evidence of mining heights in all sections treated in the Judge's Decision, except that MESA presented no measurements for the 005 section of Raccoon No. 3 Mine (Dec. 89–91, 103). (SOCCO was also the only party to present evidence on the mining height in the 008 section of Meigs No. 2 Mine. This section was not open at the time of the filing of the petition but was open at the time of the June hearing.) The great bulk of the respective measurements were very close to one another, but others displayed considerable discrepancies, and in these latter cases, the Judge relied on MESA's figures. (These were raw figures which did not take into account a 3-inch deduction for roof support.) (Dec. 92.)

Another factor was machine frame height. Since MESA presented virtually no evidence on this element, the Judge accepted all of SOCCO's evidence presented thereon (Dec. 93–94). A third element is the required minimum clearance from canopy top to the bottom of allowable roof support materials. The consideration of this element resulted from the MESA expert's testimony that a certain clearance was necessary to prevent "roofing out" and similar dangerous occurrences in the normal operation of the equipment in bottom conditions like those in SOCCO's mines. The MESA expert testified to specific minimum clearances for all of the various pieces of equipment involved except for the Fletcher LTDO–17 roof bolter (Dec. 92–93, 95–103). The final element is height of canopy above machine height to allow for reasonable operator visi-

bility. The MESA expert testified that a 10-inch height was necessary on the Joy 10 SC shuttle cars, and though he failed to testify on this factor as to the other pieces of equipment, the Judge, based upon the expert's total testimony and the Judge's observations of the photographic and videotape evidence, concluded that the 10-inch clearance was a minimum for all pieces of equipment (Dec. 93).

Using these factors, the formula consists of the following:

If the machine height in inches plus the 10-inch canopy height plus the required clearance in inches above the canopy top is greater than the raw vertical clearance measurement (from MESA) in inches less 3 inches for allowable roof support, then that piece of equipment with canopy attached cannot safely and successfully operate in that section, and no canopy will be required on it. If the first figure is less than the second, then the equipment with canopy can safely and successfully operate, and thus a canopy is required (Dec. 95).

(A) Using the formula, the Judge granted modification to the following pieces of equipment: (1) National Mine Service Marietta Miner—Meigs No. 1, 001 section; (2) National Mine Service Shuttle Car—Meigs No. 1, 001 section, 005 section; (3) Joy 15 RU Cutter—Meigs No. 1, 005 section, Meigs No. 2, 001 section, Raccoon No. 3, 003 section; (4) Joy 14 BU10 Loader—Meigs No. 1, 005 section; (5) Schroder CDB 2000A–16 Drill—Meigs No. 1, 005 section; (6) Goodman 2500 Cutter—Meigs No. 1, 007 section, Meigs No. 2, 009 section, 015 section, 017 section; (7) S & S Scoop—Raccoon No. 3, 003 section (Dec. 95–103).

(B) Using the formula, the Judge denied modification on the following pieces of equipment:

(1) In Meigs No. 1, on the

003 section: Jeffrey 120L Miner, and S. & S Scoop;

004 section: National Mines Service Marietta Miner and Shuttle Car;

007 section: Joy 14BU10 Loader and Schroder CDB 2000A–16 Drill;

(2) In Meigs No. 2, on the

003 section: Joy 15 RU Cutter, Joy 14 BU10 Loader, S & S Scoop, Schroder CDB 2000A–16 Drill and National Mine Service Shuttle Car;

007 section: Goodman 968–2 Loader, Long Airdox TDF–24–D Drill, S & S Scoop;

009 section: Goodman 968–2 Loader, Long Airdox TDF–24–D Drill, Fletcher LTDO–17 Roof Bolter, S & S Scoop and National Mine Service Shuttle Car;

011 section: Joy 14 RU Cutter and Long Airdox TDF–14–F Drill;

015 section: Goodman Loader, Schroder CDB 2000A–16 Coal Drill, S & S Scoop, and National Mine Service Shuttle Car;

017 section: Goodman 968–2 Loader, Schroder CDB 2000A–16 Drill, S & S Scoop, National Mine Service Shuttle Car;

(3) In Raccoon No. 3, on the

001 section: Kersey Scoop;

002 section: Jersey 15 RU Cutter, Joy 14 BU10 Loader, Schroder CDB 2000A–16 Drill, Kersey Scoop, National Mine Service Shuttle Car;

003 section: Joy 14 BU10 Loader, Schroder CDB 2000A–16 Drill and National Mine Service Shuttle Car;

004 section: Joy 15 RU Cutter, S & S Scoop, and National Mine Service Shuttle Car.

(C) Joy 10 SC shuttle car. The Judge found that the Joy 10 SC Shuttle Car qualified for the granting of the petition in all sections with mining heights of 56 inches and under. This came as a result of applying the formula and of the MESA expert's direct testimony that this piece of equipment could not successfully operate in such heights (Dec. 93–94). In MESA's piece-by-piece, section-by-section cataloging of the equipment, only three Joy 10 SC shuttle cars appear. One of them, although it also came under the "Visibility" diminution category mentioned above, appeared in a section (Raccoon No. 3, section 001), which has a height above 56 inches. Of the other two, it is not clear whether one is a Joy 21 SC or a Joy 10 SC shuttle car, but in any event they both appear in sections (Meigs No. 2, 001 and 002 sections) which are above 56 inches. (*See* Discussion, Part II, B, *infra*.)

(D) The Fletcher LTD0–17 Roof Bolter. There was some amount of evidence which indicated that the problems with the canopy on this piece of equipment were not as severe as those concerning other equipment. Also the Judge felt there was insufficient evidence presented on which he could make a decision based on the formula. As a result, the Judge denied modification for each piece of this type of equipment (Dec. 104–105).

Arguably, the Judge denied the petition in all sections where the lowest mining heights as measured by both parties (or as measured by MESA in cases where the two measurements were significantly different) were above 56 inches. Reason and logic would demand such a result, but the Judge never specifically mentioned that denial. However, that result could be inferred from two actions in the decision. First, the Judge excluded six sections from the operation of his grant generally of the modification for the Joy 10 SC shuttle car. Second, in the Judge's section-by-section analysis of the mines for purposes of applying the formula the following sections were omitted: Meigs No. 2, section 001 (64 inches); section 002 (70½ inches); section 004 (60 inches); section 005 (62 inches); and section 006 (69½ inches). (All figures are MESA's raw measurements without the 3-inch allowance for roof support materials.) Curiously, however, the Judge did consider Meigs No. 1, 003 section and Raccoon No. 3, 001 section, which sections had mining heights after the 3-inch allowance of 57 and 58 inches, respectively (Dec. 96, 101). (A possible explanation is that SOCCO's measurements

in these sections were close to MESA's but low enough to get under the 56-inch limit. In other words, since the Judge said he would rely exclusively on MESA's measurements only where there were significant discrepancies with SOCCO's measurements, perhaps in these cases, he relied on SOCCO's though he cited MESA's. In any event, our treatment of the central issue herein renders this problem inconsequential. (*See* Discussion, Parts I and II, B, *infra.*)

Other less important findings and conclusions will be dealt with in the Discussion below.

On Nov. 16, 1976, MESA filed its Notice of Appeal, and on Nov. 17, SOCCO followed suit with its own Notice of Appeal. Briefs and reply briefs with supporting documents were regularly filed by both parties in the respective appeals. On Dec. 27, 1976, SOCCO filed a motion seeking the multiple relief of expedited treatment of the appeals, pursuant to 43 CFR 4.514(b) and oral argument or in the alternative temporary relief pursuant to 43 CFR 4.21(a). In a response filed on Jan. 4, 1977, MESA joined SOCCO in the latter's request to expedite and to have oral argument, but opposed the granting of temporary relief. In an order issued Jan. 10, 1977, the Board granted the request for expedited treatment and set oral argument, thus obviating the need to decide the dispute on the alternative prayer for temporary relief. An oral argument was held Jan. 26, 1977.

Contentions of the Parties

On its appeal, SOCCO attacks the Judge's Decision with the following nine major assertions of error:

As to that group of equipment and working sections described under the "Visibility" diminution of safety category above, SOCCO asserts that the Decision is in error in the following three ways:

1. The modification granted was limited to those sections where the equipment operator/witnesses worked and not to all sections of the mines with the same or worse relevant characteristics;

2. The modification was limited to the specific brand name of the particular pieces of equipment as to which the witnesses testified;

3. Assuming that the Judge's "static" approach is an appropriate one, the Judge failed to take into account evidence regarding equipment and sections beyond those specifically treated in the Decision.

As to that group of equipment and sections described under the "Formula" diminution of safety category above, the Decision was in error in the following three ways:

4. Modification was granted and denied on the basis of heights as the Judge found them to be several weeks before the hearing;

5. The Judge disregarded SOCCO's evidence of height measurements which, as to some sections, were more credible than MESA's, and as to others, was the only evidence submitted; and

6. The Judge limited the modification on particular pieces of equipment to those sections where he found them to be placed at a time several weeks before the hearing.

7. As to both groups of equipment and sections, the Decision is in error in limiting the modification to those sections in existence at the time MESA conducted its investigation.

8. The Fletcher LTDO–17 roof bolter could and should have been included in either of the two groups for which modification was granted. Since it was not, the Decision is in error in that respect.

9. Accepting the Judge's "static" approach to the problem, the Decision nevertheless is in error in not including three specific pieces of equipment in the "Summary of Findings and Conclusions" insofar as the Decision made all the preliminary findings necessary to their inclusion.

MESA's response to SOCCO's assignments of error centered on three main areas. The first of these essentially presents the proposition that SOCCO presented an insufficient amount of evidence about the mines generally for the Judge to grant modification in sections, present and future, and for equipment other than those in and for which he did grant modification. The second main area of response regards SOCCO's assertion that its measurements were generally more credible than MESA's. (This argument requires consideration of a great number of minor points but no major tenet of law. It is not dissimilar to a "substantial evidence" argument and thus does not lend itself well to generalization here. Its salient features will be treated more in depth in the Discussion.) The third main area of MESA's concentration in response is that which deals with the SOCCO argument regarding the Fletcher roof bolter. (This, too, is largely a "substantial evidence" issue and will similarly be treated in more depth below. One point, however, should be made, and that is that MESA asserted that SOCCO's argument in this regard is that since SOCCO has shown good faith in working with an equipment manufacturer toward acceptable redesign of the canopy, it should not be barred from its relief. MESA says this argument is invalid and that SOCCO in order to prevail must show affirmatively that present technology leading to safe redesign of the canopy does not exist.)

On its appeal, MESA attacked the Decision of the Judge as being erroneous in the following three respects:[3]

[3] There was a fourth major issue originally raised in MESA's brief. This concerned the asserted error of the Judge's using the incorrect mining height for the 003 section of Raccoon No. 3 for purposes of applying the "Formula." MESA's position was that since the Judge accepted their measurements generally and since their measurement was 51 inches, then that was the measurement to be used and not the 48-inch measurement the Judge did use. SOCCO's reply was one of incredulity, since the 3-inch difference in these two measurements resulted from the 3-inch allowance for roof support materials used by the Judge in his formula. SOCCO was incredulous because MESA made this argument with respect to only this section when the Judge used the 3-inch allowance on all sections. SOCCO's speculation that MESA had missed the roof support allowance on this section was

(Continued)

1. There was a total lack of evidence that SOCCO had established a diminution of safety with respect to two particular pieces of equipment on their respective sections;

2. In granting modification for seven particular pieces of equipment, the Judge erred because they were located in sections where the "coal seam height" was not consistently 56 inches and below; and

3. The Judge erred in ignoring MESA's testimony regarding "possible saves" made possible by the use of cabs and canopies and the availability of present technology in permitting the retrofitting of SOCCO's equipment with workable canopies.

In reply to MESA's brief, SOCCO essentially characterizes MESA's first assertion of error as nothing more than a "substantial evidence" argument and has responded accordingly.

As to MESA's second assignment of error, SOCCO asserts that its prayer was for relief on all of its sections whether or not the mining heights are *currently* 56 inches or below. According to SOCCO, there were *no* sections excluded by SOCCO's prayer that the standard be modified for sections within that height restriction, since at some time every section could legitimately have a mining height of 56 inches or below. (This counterargument is closely allied with SOCCO's major argument on its own appeal.)

Like its conclusion on the nature of MESA's first assigned error, SOCCO also characterizes the final MESA claim of error as being essentially a "substantial evidence" argument. SOCCO responds with its own version of the quality of MESA's evidence, of its own evidence and of the Judge's treatment thereof.

Finally, as a general objection to MESA's brief, SOCCO indicates that a "common thread" running through MESA's particular claims of error is an inferential adoption of what SOCCO calls the "static" approach to the case. This approach, claims SOCCO, is an inappropriate one, and all conclusions resulting from it are tainted by its error. (This, of course, is virtually identical to SOCCO's main argument in its appeal in chief.)

Issues on Appeal

1. Whether the Judge erred in denying his authority to approach a petition for modification of the application of the cabs and canopies regulation from the point of view of granting prospective relief based on the proved changeability of relevant mine characteristics.

2. Whether there is substantial evidence to support the Judge's finding that the operation of two particular shuttle cars with cano-

(Continued)
apparently correct, since MESA, shortly after the filing of SOCCO's reply brief, filed a "Motion to Withdraw Issue from Appeal" directed at this issue. Further, MESA's counsel at oral argument indicated that MESA had no problem with the 3-inch allowance from raw figures for purposes of determining actual vertical clearance. In light of the above discussion the Board will grant MESA's motion, as will be reflected in the Order below.

pies attached results in a diminution of safety.

3. Whether relief may be granted which goes beyond the prayer in the petition for modification.

4. Whether the Judge ignored MESA's evidence going to diminution of safety and to the availability of technology which allows the fitting of machines with canopies which do not diminish safety.

5. Whether the operator bears the burden of affirmatively proving as part of its prima facie case that technology permitting the fitting of machines with canopies which do not diminish safety does not exist.

6. Whether there is substantial evidence which supports the Judge's finding that the operator failed to prove a diminution of safety with respect to the operation of the Fletcher LTDO–17 roof bolter with rear canopy attached in all of the mine sections with mining heights of 56 inches or less.

7. Whether, using the "Formula" approach to determining diminution of safety, relief may be granted with respect to the Fletcher LTDO–17 roof bolter despite the fact that the record discloses no evidence of required roof clearance for this machine.

Preface

The statute which provides the basis for the regulation in question in this case is sec. 317(j) of the Act, 30 U.S.C. § 877(j) (1970). It reads as follows:

> (j) An authorized representative of the Secretary may require in any coal mine where the height of the coalbed permits that electric face equipment, including shuttle cars, be provided with substantially constructed canopies or cabs to protect the miners operating such equipment from roof falls and from rib and face rolls.

Before we deal with the substantive issues in this case, we feel it incumbent on the Board to point out a disturbing feature of this case though neither party has raised it directly. That disturbing feature results from the anomaly which arises upon a comparison of the above-quoted statutory provision and its implementing regulation. The salient parts of the statute for purposes of this discussion are that an *authorized representative* of the Secretary *may* require the installation of cabs and canopies on electrical face equipment *where the height of the coalbed permits*. This suggests to us that an inspector in a mine may make a determination about the requirement of cabs and canopies after thoughtful examination of the mine's characteristics, on a case-by-case basis using his own discretion. The regulation, on the other hand, *mandates* the installation of cabs and canopies in particular heights at particular times. In practical effect, the regulation appears to distort the objectives of the statute, usurping the inspector's authority and at the same time substituting for his discretion an administrative decision as to when cabs and canopies are required and, at that, basing that decision on only one factor possible of consideration in the inspector's determination, namely, mining height. Further-

more, involved in the administrative decision which is embodied in the regulation is a disregard for the apparent intent of the language in the statute which reads, "where the height of the coalbed permits." At present the regulation mandates cabs and canopies in mining heights of less than 24 inches for future implementation, presumably on the basis that the height of the coalbed permits such use.

Nevertheless, we have decided this case on the assumed validity of the regulation and on the usual standards required in a section 301 (c) Petition for Modification, as we are required to do. As will be more fully developed in the discussion below, we feel that the Judge's determination that the operator established a prima facie case of diminution of safety is fully supportable. (The record supports SOCCO's allegations of the following elements of diminution of safety: excessive operator fatigue; the dangerous practice of operating equipment from outside the operator's compartment; operators injuring their heads and other parts of their bodies when they lean out of the equipment to see; running into other miners who could not be seen; difficulties in stepping out of operators' compartments creating the danger of being trapped in case of fire; jarring of operators' heads against canopies lowered to provide clearance; and many others.) The problem which we foresee, however, is that excessive litigation will result from this decision. That problem is minor though compared to the fact that the regulation involved will not do justice to the apparent intent of the statute the chief aim of which is to protect miners in circumstances where protection is needed. We are using the device of this Preface to express our hope that rulemaking or some other administrative vehicle can be used to eliminate the dual spectre of unnecessary and costly litigation and the prospective ineffectiveness of this regulation.

Discussion

I.

The Proper Approach to the Cabs and Canopies Modification Petition

Although the parties have presented and ably argued a number of complex factual and legal issues, it is clear that the resolution of one of these issues will obviate the need to deal with some of the rest and will facilitate the resolution of most of the others. That central issue is whether the Judge erred in using what SOCCO called the "static" approach in determining whether the grant of modification was warranted. SOCCO complains that the Judge granted modification only to particular machines in particular sections based on testimony from the operators of those very machines in those very sections. The proper way to handle the Petition, SOCCO suggests, is to grant modification as it was requested, that is, in general for all machines in all sections as they meet criteria estab-

lished by the Judge from evidentiary presentations at the hearing.

There is little doubt that SOCCO is correct in characterizing the Judge's piece-by-piece approach as it has. To show that there is record basis for following the more general approach it recommends, SOCCO refers to the following record citations, among others:

(1) The Judge concluded that the critical and relevant measurement reference in determining whether canopy equipped electrical face equipment can be safely operated in petitioner's mines is the mining height. (SOCCO Brief, p. 23, Dec. 107.)

(2) Brands of machines other than those for which modification was granted, but with the same or worse relevant characteristics are present in the mine and may be used in any section since they are easily moved from section to section, but they have not been the subjects of modification. (SOCCO Brief, p. 25, Exhibit P–1, Tr. pp. 180–81 and Exhibit R–25.)

(3) In treating the petition, the Judge used heights as measured several weeks prior to the June hearing. (SOCCO Brief, p. 27, Dec. 95–103.)

(4) Vertical clearances in a particular section may vary from day to day. (SOCCO Brief, p. 28, numerous transcript citations, Dec. 92.)

(5) The mines are in a developmental stage, and several additional sections, it is expected, are to be added in each mine. (SOCCO Brief, p. 36, Tr. pp. 22–23.)

It appears at once that SOCCO meant to ask for the general approach and that the Judge, in adopting the "static" approach, was implying that he did not believe he had the authority to grant relief on any other basis than the "static" approach. Evidence of both of those propositions appears fairly early on in the June hearing when the following colloquy took place between Judge Koutras and counsel for SOCCO, Mr. McKenna (at Tr., pp. 57–60):

JUDGE KOUTRAS: What I would like to do is to develop your testimony up through the date that MESA completed it's [*sic*] investigation, and if you are going to get into new areas where they have not had an opportunity to investigate yet, then I would like you to indicate in the record where you are starting.

In other words, I don't want testimony here this mornnig centered around developing sections that were developed, you know, prior to the hearing that MESA has not had an opportunity to investigate.

* * * * * * *

MR. McKENNA:

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* * * Now I don't know that the Petitioner is anyway [*sic*] restricted from what he can present by the cutoff date set by MESA. * * *

The question is, does your mine need this relief when your coal seam is 56 inches or less, and what we are attempting to say is, "Yes." We need the relief and *we are giving the court some degree of background as to the conditions of the mine.*

JUDGE KOUTRAS: *Well, Mr. McKenna, do you expect me as part of my decision in this case either, denying or approving this Petition for Modification, to say to you, "Look summer of '77 if you hit a coal seam that's 56 inches, you don't need cabs or canopies, is that what you expect out of me?*

MR. McKENNA: *Yes, Your Honor.*

JUDGE KOUTRAS: *I'm not too sure whether I have the jurisdiction or the—if I can see that far in the future. Seems to me that I've got to decide a case on the basis of what the existing factual situations are, and that is something that is far off.*

MR. McKENNA: That, Your Honor, I think is what we are trying to indicate. We are having these problems, now, when the coal seams are this high. We anticipate, based on the bore-holes in these areas, that the coal seams can be there to attempt to demonstrate to the court that we are not wasting your time on something that is just going to exist for a couple of days; that this is something that is coming.

JUDGE KOUTRAS: Yes, but * * *, both the operator and MESA are a hundred and eighty degrees, apart on some basic questions [i]f you are telling me that you are going to continue to hit coal seams, or you anticipate hitting coal seams that are below 56 inches, and MESA says that's a lot of hogwash, we were in there in May and we measured the coal seams "mining heights 43 to 77 inches in one area, 51 to 96 inches in another area, and 51 to 87 inches in another mine."

* * * * *

I'm trying to show you what the other picture is that with all of that background, you want me to accept your proposition that next year, and the year after, you are going to hit 56 inch coal seams.

MR. McKENNA. Right now.

JUDGE KOUTRAS: *That's what I'm concerned about. What is happening now? What are the facts in the present situation? What are the present facts in these three mines and the situation that you are currently developing, and I would like to restrict the evidence to that.*

MR. McKENNA: I think we have had the testimony of the particular witnesses at the last hearing, that this thing can change from week to week. If we've got to run in, you know, every month and say, "Look Judge, we're down below 56 inches, now, is it okay? Or next month we're up above, we'll put them back on."

JUDGE KOUTRAS: It might just get to that. You never know.

MR. McKENNA: I think that is why we are attempting to demonstrate that there is a problem which exists at a certain point. *That point is present in the mine today, and we feel it is going to continue.* [Italics added.]

Given the approach the Judge used in deciding this case and the clear impact of the above language, it becomes reasonably certain that the Judge followed that "static" approach because he felt he lacked the authority to follow the approach that SOCCO urged upon him and us. Our task thus becomes conceptually simpler. We must decide whether or not the Judge could have followed the SOCCO approach. If he lacked the authority, then we will consider the parties' assignments of error which are based on the assumed validity of the Judge's approach. If he had the authority, we need consider only those of SOCCO's objections which are based on the assumed invalidity of the Judge's approach, those of MESA's objections which, though based on the assumed validity of the Judge's approach, would nevertheless have application even if the general approach is possible, and finally the question of whether the record is complete enough for us to grant relief without further fact-finding by the Judge.

[1] In reaching our decision on whether SOCCO's approach is possible, we note first that SOCCO's argument in support of its position is very attractive. It has always been a goal of the law to dispose of a dispute as completely as possible in one action. Thus, if a general

scheme of resolution can be articulated accurately and fairly in a decision, that result is much preferable to an approach that leaves a litigant with only part of a remedy plus the opportunity to receive relief for a major portion of his problem at some later time. This is the type of problem we have here. SOCCO regrets that the Judge granted relief for a particular section, for instance, which may have a mining height well above 56 inches by the time the order is put into effect. That result is possible because the record indicates that the Judge used mining height measurements which were several months old and that the measurements in any section were subject to change at any time. SOCCO's greater concern, however, is that the reverse may be true, that is, that the Judge would deny relief in a particular section because an old measurement indicated a mining height above 56 inches when by the time of the decision's effect, that section's mining height could be well below 56 inches.

On the other side of the question, MESA has not dissuaded us from being sympathetic with SOCCO's viewpoint. Indeed it appears that MESA does not fully understand SOCCO's argument. In discussing one of the complaints advanced by SOCCO as being representative of the error in the Judge's approach (the use of heights measured weeks before the hearing and months before the decision), MESA admits that it "is at a loss to understand SOCCO's point" (MESA Reply Brief, p. 5). Perceiving that SOCCO's point is "based on the premise that conditions in a mine including mining heights can vary from week to week," MESA submits that it cannot be blamed for such since it caused no delay in scheduling a hearing as soon as possible after MESA's investigation was completed. MESA's offers as a solution to SOCCO's problem in this regard a stipulation as to heights for each section and declares it unfortunate that such was not done (MESA Reply Brief, p. 5). SOCCO's point, of course, is that since the heights change, it is inadequate to fashion relief based on measurements taken at any time whether weeks or months before or even after the hearing. If that approach is taken the decision is liable to grant modifications for sections which do not warrant it at the time of issuance and deny it for others which do warrant it at the time of issuance. SOCCO could have stipulated to certain heights but that would have been inconsistent with its position.

The only other contentions made by MESA which are arguably relevant to this point appear at pages 1 and 2 of MESA's Reply Brief. There, noting that SOCCO was complaining about what MESA described as the Judge's "piecemeal" approach, MESA submitted that SOCCO had no one to blame but itself for the Judge's action since SOCCO elected to present its evidence in a piecemeal fashion.

MESA argued that there was not enough evidence of conditions throughout the mine for the Judge to grant modification for all machines in all sections, and there was no evidence that the conditions proved in some sections were also present throughout the mine. That MESA makes this argument in response to SOCCO's general contention as to the Judge's "static" approach is further indication that MESA does not really comprehend SOCCO's premise. This argument goes more to whether the Judge should have extended relief to certain sections about which there was insufficient proof than it does to whether the Judge has the authority to grant such relief as a matter of law presupposing the presence of a proper factual situation. In short, MESA has cited us to no authority that would undermine the position that in a proper case the Judge could grant relief as requested by SOCCO.

When the Board or an Administrative Law Judge grants a modification based on an operator's showing that a proposed alternate method will guarantee no less than the same measure of protection as the standard whose application is sought to be modified, implicit in that grant is the notion that it is conditioned on the existence or nonexistence of some set of future events. Typically, what is assumed is the implementation of the proposed alternate method and the maintenance of its constituent conditions.[4] If an implied condition subsequently occurs which would make impossible the carrying forward of the alternative method, then the grant of the modification no longer has effect. Although neither that question nor the one more squarely before the Board here has ever been directly presented before, we believe the foregoing analysis is accurate and that it is a short logical step from that analysis of the nature of the grant in those circumstances to holding that the Judge had authority to fashion relief based upon the existence of conditions subsequent in the situation, as here, where diminution of safety, rather than proposed alternate method, is the asserted grounds for granting the relief. In other words, if we can grant relief based on the future implementation of an alternate method and on a variety of other conditions, we can grant relief in a diminution case to SOCCO in a particular section based on whether the mining height, as it changes day to day, is above or below a particular measurement. To recap then, on SOCCO's side of the argument, we have two points: one is the desire in the application of the law to dispose of as much of a dispute as is possible in one action, and the second is the authority, implicit in our decisions in which modification was granted on the basis of a proposed alternate method, to grant relief de-

[4] *See, e.g., Harmar Coal Company*, 3 IBMA 32, 81 I.D. 103, 1973–1974 OSHD par. 17,370 (1974).

pendent upon the existence of certain future conditions. On the other side of the argument, MESA has cited no authority for the proposition that the Judge had no authority to grant relief as prayed by SOCCO. We hold that the Judge erred in failing to grant relief on the basis of the general scheme requested by SOCCO and in limiting the relief granted to the bounds of the "static" approach.

II.

MESA's Assignments of Error

Turning now to specific objections to the Judge's decision which have applicability regardless of which approach is used, we shall treat MESA's three assignments of error first.

A.

MESA's leadoff objection involves two specific pieces of equipment on which the Judge allowed modification based on the "Visibility" diminution of safety rationale discussed above. MESA contends that there was a total lack of evidence to justify the modification on that basis on the Joy 10 SC shuttle car in Raccoon No. 3, section 001 and the National Mine Service Lokar in Meigs No. 2, section 011. MESA's position is that given the Judge's inclination to base his findings on the evidence he finds most credible and probative, namely, the testimony of the equipment operators appearing before him, the Judge should not have granted modification for these pieces of equipment, because the operators of this equipment testified in favor of keeping the canopies. For instance, MESA points out that the Judge cited two statements by equipment operator Paul Hall as being the basis for the Judge's conclusion of diminished safety on the Joy 10 SC shuttle car and one such statement by operator Burnette Breeding as being the basis for a like conclusion regarding the National Mine Service shuttle car. The statement by Breeding was to the effect that "equipment has run into top disturbing and/or pulling down cable headers, roof bolts, and ventilation curtains." Hall made a statement to the identical effect, plus another to the effect that "operators are unable to communicate with other equipment operators or helpers because their cap lamps cannot be seen and operators have experienced difficulty in positioning equipment, resulting in coal spillage" (MESA Brief, pp. 5 and 7, Dec. 84). MESA's position is that these are the only statements which even arguably could be taken as being consistent with the Judge's findings on these pieces of equipment. MESA asserts that the overall tenor of both Mr. Hall's and Mr. Breeding's testimony, plus some specific examples of testimony which when considered with the above-mentioned adverse statements throw into doubt their value, are enough to wipe out the effect of these statements in the Judge's determination. The specific examples of testimony are these: Although

both Mr. Hall and Mr. Breeding admit that their machines occasionally strike the roof, both feel that this occurs only when SOCCO engages in poor production methods meaning the leaving of top coal (Hall, MESA Brief, p. 5, Tr. p. 63) or of "2 to 4 or 5 inches" of bottom coal (Breeding, MESA Brief, p. 7, Tr. pp. 465 and 466). Since the Judge considered no other evidence in making these determinations other than the equipment operators' testimony and since MESA has just wiped out the effect of the only arguably adverse pieces of evidence therein, the Judge's findings regarding these particular pieces of equipment are without record basis and thus must fall, according to MESA.

There is little doubt that the overall tenor of these operators' testimony is favorable to the retention of canopies, and if MESA is correct in *both* of its premises (that the Judge considered no evidence other than the operators' testimony *and* that MESA has demonstrated that the only "unfavorable" statements really were not), then it would certainly be difficult to disagree with MESA's conclusion. However, neither premise is beyond question.

At the outset, although MESA apparently infers from the Judge's statement that he felt "constrained to base my findings on the credible and probative evidence presented, namely, the testimony of those equipment operators who appeared and testified at the hearing" that he relied on those statements exclusively, a closer inspection of that statement in context leads to a different interpretation. For example, following the sentence in which the above-quoted language appears is another which indicates that the Judge has accorded "little weight" (he did not say "no weight") to MESA's hearsay "operator statements" and to SOCCO's questionnaires and grievances (Dec. 89). In context it appears that the Judge meant to say that he merely preferred the "live" testimony of the operators as a basis for his findings to the colder hearsay evidence submitted by both parties, but not that he relied on the "live" testimony to the exclusion of all other types (Dec. 87). Another sentence further along makes the Judge's approach to this issue even clearer. The Judge indicates that the problem with the "operator statements," questionnaires and grievance forms, while they provide information indicative of visibility, comfort and other operational problems, is that they are simply too general and conclusory to be of any significant probative value in terms of supporting a finding that safety has been diminished in all areas of the mines below 56 inches" (Dec. 87). This is not to say that particular portions of such evidence do not provide a basis for a finding on particular machines, and the Judge makes frequent use of some of these portions. (*See* next paragraph.)

Furthermore, there is no support for MESA's apparent position that by making the "feel constrained"

statement, the Judge meant to indicate that when he deliberated on the possible diminution in attaching a canopy to a particular piece of machinery, he considered only the testimony of that particular machine's usual operator to the exclusion of all equipment operators who testified about similar machines and similar sections. If MESA's apparent position is incorrect and the Judge's statement does not mean that only Mr. Hall's and Mr. Breeding's testimony may be used for findings about the two machines in question, there is a great deal of evidence taking the record as a whole to support the Judge's findings. (*See, e.g.*, Judge's findings, Dec. 82, 85, his references to MESA investigative reports, grievances and statements received by the mine safety committees, and MESA videotapes, Dec. 85, and his recounting of three accidents involving shuttle cars, Dec. 86).[5] We feel that, given the context of the statement which MESA cites as central to this first premise, MESA's interpretation of that statement is not correct; its first premise therefore falls, and we may look to other sources of evidence in the entire record to find "substantial evidence" to support the Judge's findings. That evidence is present, and MESA's assignment of error in this regard may be disregarded.

Even if MESA's first premise is correct, however, and the Judge, by his own direction, should have considered only Mr. Hall's and Mr. Breeding's testimony in determining whether "their" respective machines exhibited diminished safety when equipped with canopies, MESA's second premise, that the witnesses rehabilitated their only arguably adverse statements, is also questionable. We note that although MESA has provided examples of rehabilitative statements by both Mr. Hall and Mr. Breeding in regard to their possibly adverse statements regarding disturbing the roof and pulling down roof support materials, it has failed to provide such rehabilitating examples regarding Mr. Hall's statement about a dangerous lack of visibility for communication purposes and about coal spillages resulting from positioning difficulties (MESA Brief, p. 5). (Arguably that "adverse" statement alone is "substantial evidence" adequate to sustain the Judge's finding.)

Moreover, MESA's characterization of the assertedly saving statements as rehabilitative is also suspect. MESA contends that although the equipment operators testified that their machines occasionally

[5] In this regard, SOCCO points out that even if an operator of a particular piece of equipment testifies negatively to SOCCO's position on modification concerning his machine, it would be unrealistic to deny modification on the sole basis of his testimony if a number of other miners testify on the other side. No single miner will operate that machine exclusively, and if after considering all the evidence, the Judge decides that operating that type of machine results in a diminution of safety for a number of other operators of the same type of machine, it would be irresponsible to disregard their testimony when considering the diminution in another machine of the same type but usually operated by a miner who testifies in a contrary fashion to the rest of his fellows. This modification of SOCCO's main argument on its own appeal to suit the purposes of this issue is well-reasoned and persuasive.

struck the roof, they did so only when top (Hall) or bottom (Breeding) coal was left and that leaving such coal was a poor production method. Although the Judge did not make a finding as to poor mining practices on a section-by-section basis, he did indicate that the evidence did not support a finding that poor mining practices prevail throughout the mines (Dec. 83). There is little question that the Judge is correct about this. Although Mr. Hall's opinion was that SOCCO was engaged in poor mining practices, many witnesses testified that SOCCO was not so engaged.[6] (*See* Judge's treatment of this issue and summary of evidence, Dec. 83.) Furthermore, when Mr. Hall made his assertedly cleansing statement regarding poor mining practices, he apparently was testifying about conditions in mining heights above 56 inches. When asked about lower heights, Mr. Hall indicated that 56 inches was "pretty low" and that leaving top coal may not be a problem in such heights (Dec. 83, Deposition of May 28, p. 66, hearing transcript, p. 444). SOCCO points out that Mr. Breeding's entire testimony is thrown into doubt by the fact that he signed a statement for his union which indicated that he believed canopies should remain on equipment only in heights above 56 inches.[7] Finally, these statements insofar as they blame poor mining practices for the "roofing out" (that is, striking the top with the canopy during normal operation) problems do not stand to reason. To illustrate, if Mr. Hall's machine "roofed out" in a section where MESA measured the lowest mining height to be 61 inches (section 001, Raccoon No. 3, Dec. 90), but, he implies it would not "roof out" if 3 or 4 inches of top coal had been taken (or 2 to 5 inches of bottom coal in Mr. Breeding's case), would he contend that his machine would not "roof out" in a section where all the top coal was taken but which then had a mining height also of 61 inches? To say that leaving top coal leads to *more* incidents of "roofing out" than would otherwise be the case is one matter, but to imply that that is a necessary factor in *all* such incidents is simply not reasonable.

[6] The witnesses who testified on this issue included MESA Subdistrict Manager Keaton, who testified that he had never observed any poor mining practices in the two mines (Meigs No. 2 and Raccoon No. 3) which he had visited, and Inspectors Knight and Osborne who opined that there *were* such poor practices but who admitted, first, that in some circumstances leaving coal is not a poor practice and, second, that they had not found out if such circumstances existed where they observed the allegedly poor practices (Dec. 83).

[7] MESA urged at the oral argument that this piece of evidence be rejected as unreliable, because the "statement" was an answer to a questionnaire's multiple choice question which was phrased and designed in such a way as to make any answer materially valueless. While the question involved is not as blatantly sinister as MESA asserts, it is not designed to allow for maximum valuable response. Nevertheless, as SOCCO suggests, it is in line with the essentially negative comments about canopies discovered by the Judge. The necessity of deciding its value to the argument on appeal, however, is obviated, if not by the above discussion of other matters bearing on this premise in MESA's assignment of error, then by our decision as to the first necessary premise in that assignment of error.

In brief, because both of MESA's necessary premises fail, we hold that there is sufficient "substantial evidence" to support the Judge's findings as to the Joy 10 SC shuttle car in Raccoon No. 3, section 001 and to the National Mines Service Lokar in Meigs No. 2, section 011 and we shall affirm that portion of the Judge's decision which concluded that there was a diminution of safety with respect to these machines when operated in a section where the mining height is 56 inches or below.

B.

In its second objection MESA contends that there are seven pieces of equipment which by virtue of their placement in sections with mining heights above 56 inches are beyond the power of the Judge to grant relief because they are beyond the bounds of the relief requested. In particular, these machines are:

1. In Meigs No. 1 on the 007 section
   a. National Mines Service Lokar;
   b. National Mines Service Torkar; and
   c. Goodman 2500 cutting machine
2. In Meigs No. 2, on the 005 section
   a. Joy 14 BU10 loading machine
3. In Meigs No. 2, on the 009 section
   a. Goodman 2500 Cutter
4. In Raccoon No. 3, on the 001 section
   a. National Mine Service Miner;
   b. Joy 10 SC Shuttle Car

These particular pieces may be divided into two groups for purposes of answering MESA's objection. In the first group are the four machines in the 007 section of Meigs No. 1 and the 009 section of Meigs No. 2. Both of these sections appear to be within the scope of the relief for which SOCCO prayed even under the "static" approach to defining that scope. (If the 3-inch allowance for roof support material is deducted from MESA's raw floor-to-roof measurements for these two sections, the result is mining heights which are clearly within the 56-inch "limit." For that matter the raw figure for Meigs No. 1, 007 section, being 56 inches, is within the limit before the 3-inch deduction. As indicated in the "Background" section above, it was agreed that such a deduction should be made since vertical clearance could not otherwise reasonably be expressed. At the oral argument, counsel for MESA in response to a question from the bench had no objection to such a 3-inch deduction for purposes of determining mining height.)

[2] In the second group are the three remaining machines. It is clear that these pieces were in sections which were measured before the hearing to be above 56 inches. Without discussing the parties' arguments regarding the scope of relief requested by SOCCO, we can say the we have concluded that MESA would be entitled to a reversal of the Judge's decision with respect to these machines as he wrote his Decision. However, insofar as we have rejected the Judge's approach in favor of that which SOCCO has urged upon us, we cannot say that these sections will be *forever* beyond the scope of SOCCO's requested relief since we cannot say that the mining heights in these sections will be *forever*

above 56 inches. (This applies as well to the four machines in the two sections discussed in the last paragraph. Under their current conditions, those sections had mining heights under 56 inches, but the general approach that a section may be within or without the scope depending on the changing mining heights takes precedence over the reasoning we detailed in the preceding paragraph.) The ultimate disposition of the petition for modification with respect to these seven machines will be dealt with along with the rest of the equipment in the Order below.

C.

In MESA's final assignment of error, it contends that the Judge committed reversible error by failing to give sufficient weight to the testimony of two of its witnesses. As evidence of this asserted failing, MESA points to these words of the Judge:

> The principal issue presented in this case is whether the use of cabs and canopies has diminished safety. The best evidence of that question is the testimony of the miners who operate the equipment in the mines on a day-to-day basis. [Dec. 74–75.]

MESA accuses the Judge of apparently believing that "MESA's investigation of the petition along with its experience and expertise in the area of mine health and safety cannot be given the same weight as the testimony of the miners who work in the mines, since the miners are in the best position to determine their own safety" (MESA Brief, p. 14). This chiding of the Judge by MESA shows that MESA has misunderstood the Judge's inclinations on this issue. We note that the Judge did not indicate that the equipment operators' testimony was the *only* evidence he would consider, merely that it was the *best.* Further, it is clear that when the Judge referred to "miners' testimony," he did not mean the testimony of only the operators called by SOCCO but meant the testimony of all equipment operators including those called by MESA. Also we point out that whatever expertise and experience MESA can muster, the Judge is not bound to accept the testimony of its witnesses even if undisputed. The notion that MESA normally can present a great body of expertise and experience on *safety* is not inconsistent with equipment operators' offering the best source of information regarding the components of *diminution of safety* from the use of cabs and canopies on the mine equipment. Finally, if MESA's expertise and experience were infallible, there would be no need for an Administrative Law Judge or this Board to review their decisions. Reason and our own experience teach us that, however seldom, MESA may sometimes be wrong, and since this is true, MESA's evidence need not invariably be accepted as the final word on matters purportedly within its expertise.

Since the evidence necessary for a Judge to conclude that there is a

diminution need not be confined to expert testimony on safety, there is nothing innately erroneous about the Judge's preferring equipment operators' testimony nor in declaring it the "best." Moreover, the Judge detailed a number of reasons on page 75 of his Decision as to why he did not take MESA's "hard evidence" (including investigative reports, videotape interviews, photographs and testimony including that of its expert, Mr. Gaydos) at face value. Included among these reasons were that none of the investigating inspectors operated any of the subject machines under actual mining conditions and that MESA inspectors failed to interview mine helpers who were exposed to danger allegedly as a result of compliance with the standard as they worked around the machines.

Taking the argument from the general to the specific, MESA feels that the Judge accorded insufficient weight to a MESA witness' testimony regarding "possible saves" resulting from the use of canopies and to testimony from the MESA expert regarding available technology for the installation of cabs and canopies.

On the first point, MESA contends that since it showed 26 such "possible saves" from death or serious injury, the Judge should have found that regardless of SOCCO's evidence, there can be no reasonable conclusion that compliance with the standard results in a diminution in safety. We agree with MESA to the extent that if MESA had been able to show that there were 26 such incidents, SOCCO would have to present a great deal of evidence showing dangerous by-products of compliance, and that that evidence would have to be most convincing. However, contending that it has such evidence does not necessarily make it so. On pages 78–79 of his Decision, the Judge analyzes this evidence. He notes first that the evidence presented by MESA Inspector Osborne consists of MESA's Exhibit R–27 (a compilation of some of the contents of other MESA exhibit/investigative reports). The information in that exhibit is that MESA took statements from 98 equipment operators and discovered 18 critical operator incidents of "possible saves" in the past.[8] Of the 18, seven were incidents which involved the front canopy of roof bolters for which SOCCO was specifically *not* seeking modification. As to all of the reported incidents, the information contained in the exhibit is far too sketchy to provide a basis for coming to a conclusion regarding diminution of safety. Although the Judge did not conclude specifically that this information was that sketchy, there are two items in the Decision which imply that he regarded it as such. The first of these is his statement on page 87 that:

> [W]hile the information contained in these documents ["operator statements" which appear in MESA's reports of in-

[8] It is not entirely clear from the record why MESA uses the figure 26 when discussing possible saves. Regardless of the origin of that figure, the Judge's use of 18 "critical saves" statements seems entirely justified (Tr. 549–550).

vestigation, amongst other information] is indicative of * * * operational problems caused by the use of canopies in low mining heights, it is impossible to make specific findings related to specific equipment and sections of the mines because the statements are too general and conclusory. * * * In short, I consider such information to be of little probative value in terms of supporting a finding that safety has been diminished * * *.

Although Exhibit R–27 arguably is not a "report of investigation," the exhibit is merely a compilation of "operator statements" contained in such reports admitted as other exhibits (Tr. 546–548).

The second item that implies that the Judge regarded MESA's evidence on "possible saves" to be too sketchy to be probative of any proposition is the manner in which the Judge handled the analysis of the exhibit. Consistent with his approach to considering both parties' other exhibits, the Judge relied on live operator testimony of the assertions contained in the exhibit rather than the exhibit itself. (*See* Dec. 87, and discussion on pp. 367–69, *supra*, regarding the Judge's preference for live testimony for purposes of weight and consideration.) MESA presented four witnesses whose statements were included in MESA's summary in Exhibit R–27. The miners' statements at the hearing provided some interest when compared to the statements MESA attributed to them in the exhibit. For instance, Burnette Breeding testified that a *70 to 80-pound* rock slid off the *loader boom* and struck his canopy *post*. The exhibit described the incident as "a large rock fell on canopy which weighed about 200 pounds."

Glenn Arrowood testified that he was injured when a piece of slate came off the *loader boom* and landed on his foot breaking it. His shuttle car did *not* have a canopy and he was *outside* the operator's compartment when he was struck (although he testified that he would not have been forced to get out if a canopy had been attached). The mining height at the place of this incident was about *11 feet*. The exhibit described the incident in the following language: "a rock did come *into the deck* and broke his foot (no canopy was provided at that time)."

Paul Hall testified that he was slightly injured when a rock flew out of the miner conveyor, not off the roof, and struck him on the knee. He felt that if his machine had been equipped with a canopy he would not have been struck and injured. Mr. Hall also indicated that "several times," top coal "and probably some pieces of small slate have fallen on" the canopy, but he did not say whether these would have injured him absent the canopy. These incidents are recorded in the exhibit as "rocks have fallen on canopy, would have been hurt."

Finally, miner Jim Jewell testified to three separate incidents, but one involved the front canopy on a roof bolter (for which SOCCO did *not* seek modification) and thus does not concern us. The other two incidents involved the rear (tramming) canopy. In one incident,

"quite a few pieces [of roof material] fell on the back" from the top. (Mr. Jewell did not opine whether he would have been hurt if there had been no canopy on his machine, nor did he describe the offending materials beyond the above-quoted statement.) In the other incident, to avoid running in some ruts, Mr. Jewell trammed his roof bolter in a fashion which caused it to come so close to a row of breaker timbers that the bolter hit one, causing it to fall. The *falling timber* struck the canopy and, in Mr. Jewell's opinion, he "would have probably had [his] head mashed in" were it not for the presence of the canopy. The Judge indicated that Mr. Jewell's testimony "coincides with the reported incidents [in Exhibit R–27] of *rocks* falling on his canopy." However, the "reported incident" in the exhibit is only the front canopy incident, with which we are not concerned, and not the other two.

Given the dissimilarity between the reported incidents in the exhibit and the live testimony of four of the equipment operators who were involved in some of those incidents, even disregarding the Judge's reasonable characterization of the reports as too conclusory and general to be of much value, we feel it was not unreasonable for the Judge to accord little weight to this exhibit as a whole and particularly as to the reports of incidents in which these four miners are central figures. In these circumstances, we cannot say that the Judge erred when he made this characterization of the subject evidence: "MESA's evidence supports a finding that canopies *may* have saved *a* miner from serious injuries or death." (Dec. 79, italics supplied.) Thus, MESA's premise that it presented evidence establishing 26 such "saves" fails and, as a result, so does its argument. The Judge's ultimate conclusion regarding the impact of this evidence on the diminution issue is also supportable given his view of this evidence and his assessment of SOCCO's evidence. Having noted that MESA's evidence supported a finding that canopies *may* have prevented a single incident of serious injuries or death, the Judge summarizes the impact of SOCCO's evidence this way:

> On the other hand, petitioner's evidence supports a finding that in some instances the use of canopies in its mines *has* resulted in injuries to equipment operators and *has* resulted in a diminution of safety because of the mining heights in which the equipment operates and the visibility problems related to such operations in low areas of the mines. (Dec. 79 italics supplied.)[9]

In brief, MESA has not convinced us of any error in regard to the Judge's position on this issue.

[3] The second specific point MESA makes in regard to the Judge's asserted error in according

[9] SOCCO in its Reply Brief emphasizes this point. The "possible saves" were, obviously, merely possible, while SOCCO's case presented evidence of situations where accidents actually occurred. SOCCO also pointed out that there was no evidence linking these incidents with the pertinent roof height. With no evidence indicating that such accidents are less likely to occur in lower heights, this point seems of little consequence. It is, of course, not central to SOCCO's case, since we are finding no error on this issue in any event.

insufficient weight to MESA's evidence involves the testimony of its expert, Mr. Gaydos. MESA's premise is that modification may not be granted unless the operator has shown conclusively that there is no safe way of complying where MESA has shown ways in which the operator could safely comply. Commenting on the same theme in its Reply Brief, MESA describes SOCCO's burden in this regard as requiring that "they must [make] an affirmative showing that present technology [to allow compliance] does not exist * * *" (MESA Reply Brief, p. 7). The context of that comment implies that MESA believes that such an affirmative showing should be an element of SOCCO's case in chief. As authority for this position MESA cites *United States Steel Corporation* v. *OSHRC*, 537 F. 2d (3d. Cir. 1976). In that case, the employer United States Steel Corporation (USS) contested the validity of a citation issued to it by the Occupational Safety and Health Administration (OSHA). OSHA filed its complaint and the employer answered, defending on the grounds, amongst others, of the "greater hazard" defense (which MESA compares with the "diminished safety" grounds for granting modification under our Act). At the hearing, OSHA put on unrebutted evidence that there were two methods for complying with the standard allegedly violated which methods did not present dangers greater than those at which the standard was directed. As evidence of its claim of greater hazard, USS presented testimony which essentially advanced the notion that complying with the standard would expose more workers to some ill-defined danger. The Court said that for "USS's argument to have logical validity, a critical, factual predicate had to be established, to wit, that there was no safe and practical method of" doing the work necessary to compliance. It is on this last statement's peg that MESA hangs its appellate hat for this issue.

Taken by itself, the above-quoted statement appears to support MESA's argument. However, putting it into context also puts its validity as supportive of MESA's position into question. The first thing that strikes us is that the Court of Appeals is unlikely to require the proving of a negative, since courts generally shy away from the requirement of proving such propositions. Since in that case, OSHA put on unrebutted and (obviously) credible evidence that there were two ways to comply safely and practically it seems more likely that the Court was telling USS that it runs the risk of failing beyond its prima facie showing of the "greater hazard" defense, to rebut the existence of any possible safe and practical methods of compliance, if OSHA manages to establish the existence of one or more.

In our case, there was no evidence of available technology presented except the testimony of Mr. Gaydos (Dec. 77–78. MESA has not disputed the Judge's assertion on this

point.) Since the Judge rejected that evidence as proving that such technology existed, this case simply is factually distinguishable from the *United States Steel* case, since unrebutted evidence going to the availability of requisite technology was present there.[10] Thus, the only question to be resolved is whether the Judge was correct in finding that MESA did not prove the existence of the necessary technology. The measure of the Judge's correctness is whether substantial evidence supports his finding.

On page 77 of his Decision, the Judge indicates that he was "not convinced that there is available technology at the present time to equip petitioner's equipment with workable canopies for all mining heights at the present time." The Judge went further to note that "MESA has not established that present technology exists for equipping petitioner's equipment with workable canopies in low mining heights or that present equipment is available that will do the job." The support for these assertions appears on p. 77 of the Decision. There the Judge noted that although Mr. Gaydos testified as to certain possible modifications and concepts, they would entail major engineering and design changes with no assurances that they will, in fact, achieve the desired results under actual mining conditions. He also characterized Mr. Gaydos' testimony as conceding that the suggested concepts and designs can be approached only on a piecemeal basis as to each piece of equipment and that testing of the suggestions under actual mining conditions would be necessary before a determination of their feasibility and workability could be

[10] We are not convinced, moreover, that the Third Circuit case is strictly comparable even absent this factual distinction. Conceptually, USS had to make a prima facie showing (as an affirmative defense) of "greater hazard." This is a relatively light burden. After that showing the burden of going forward shifted to OSHA which had to rebut. OSHA's burden was relatively heavier, since it had to overcome a prima facie showing by USS. Although the only requirement of USS for keeping the case going or for shifting the burden was to establish the affirmative defense prima facie, practically speaking, if OSHA has enough evidence to overcome that showing, OSHA will prevail unless USS puts on more of a case than a mere prima facie showing. We believe this is the situation to which the Court was speaking when it said that the "critical factual predicate" of establishing that there was no safe and practical way of complying was essential for USS's defense to have logical validity. (Tacit in this pronouncement was that just as OSHA knew from the pleadings what defense USS would use, USS had every opportunity to be forewarned of the nature of OSHA's rebuttal by using discovery devices.)

In the present case, MESA is the party put in the position of making the affirmative defense, here the availability of technology such as would make the operation of SOCCO's equipment with attached canopies safe in the subject mining heights. (Logically, this must be viewed as an affirmative defense, because the alternative, that is to require SOCCO to prove as part of its prima facie case that *no* possible set of technological factors exists such as would result in safe operation of its machines with attached canopies, would be tantamount to requiring SOCCO to prove a facet of its case beyond a reasonable doubt. Since 43 CFR 4.587 requires that SOCCO prove its case only by a preponderance, this alternative must be rejected.) Thus, MESA is in the position like the *employer* in *United States Steel* not only of making its prima facie case in order to shift the burden, but also of going beyond that to make that showing strong enough to withstand any rebuttal by SOCCO. It is not crystal clear here whether the Judge determined that MESA did not prove its prima facie case or whether its showing was not strong enough to withstand SOCCO's rebuttal, but in any event, our only inquiry is if there was substantial evidence to support either determination.

made. Support for the Judge's assertion that there are no assurances that the proposals made by Mr. Gaydos would work under actual mining conditions may be found at p. 669 of the transcript of the June hearing where, included in his testimony, Mr. Gaydos emphatically answers in the affirmative to this question posed by counsel for SOCCO, Mr. McKenna: "Is it fair to say that you are giving out possible solutions which need to be tried out?" Support for the notion that the solution can be approached only on a piecemeal basis may be found in Mr. Gaydos' testimony appearing also on pages 669 and 672 of the same transcript. This is enough to establish the existence of substantial evidence so as to support the Judge's finding regarding MESA's attempt to show that there is available technology such as would allow the safe operation of SOCCO's equipment with canopies. However, as additional support, there are, amongst others, the following factors as suggested by the Judge and SOCCO: of the implemented design concepts observed by Mr. Gaydos in other mines, at least one is no longer in use (Tr. 670); Mr. Gaydos has been in one of SOCCO's mines but never in the other two and he has never operated any equipment (Dec. 75); Mr. Gaydos' qualifications to render an expert opinion were at least slightly undermined by his assertion that it is unnecessary for machine operators to observe the roof, while a number of witnesses, including MESA witnesses, emphasized the importance of being able to see the roof and while an official MESA instruction guide emphasizes the same importance (Tr. 675–76, Dec. 80–81).[11] Our conclusion on this point then is a twofold one: first, MESA's argument that a necessary element of SOCCO's case is that there is no available technology is rejected; second, although the operator must rebut MESA's showing of the availability of alternate technology, in this case there was substantial evidence to support the Judge's finding that MESA did not establish the existence of such technology.

III.

SOCCO's Assignments of Error

The above completes our treatment of MESA's assignments of error, and turning to SOCCO's arguments we note that of the nine assignments listed in the "Contentions" section above, there are six which clearly either go to the argument that the Judge's "static" approach was improper or assign error in other ways based on the assumption that such approach was *not* improper. We have obviated the necessity of dealing with these six individually by our decision, set out

[11] Additionally, MESA has claimed legitimacy for Mr. Gaydos' opinion resulting from his testimony that the modification and design concepts he proposed were being used successfully in other mines under similar conditions. Although we have discovered an abundance of evidence of such successful use in other mines, our search of the transcript has disclosed no reference to similar conditions, and MESA has provided no record citation for that assertion (MESA Brief, p. 15).

in Part I above, that SOCCO's position was correct in its general argument that the "static" approach was improper.

A.

The three remaining issues are numbered 3, 5 and 8 in the "Contentions" section above, and of these issue No. 5 can be easily resolved by reference to our ruling on the propriety of using the "static" approach. In its argument on issue No. 5, SOCCO has advanced its position that the Judge erred in accepting MESA's measurements of mining heights in certain sections over SOCCO's. Since we have accepted SOCCO's contention that the mining height in a particular section may change from day to day and have largely based our ruling on that contention, this dispute is no longer of any consequence, as will be reflected in our Order disposing of this appeal.

B.

Although SOCCO's position on issue No. 3 seems to be premised on an ultimate affirmance of the Judge's taking the "static" approach, it nevertheless requires treatment here, at least in part. On this issue, SOCCO claims that the Judge failed to treat seven pieces of equipment in his decision although there was evidence presented thereon. We have investigated this claim and have come to the conclusion that since the "static" approach is a premise to the discussion of the asserted error for six of these machines, we need not deal with them in light of our ruling regarding the Judge's approach. (Using the "static" approach, SOCCO was mistaken about all of the six; the Judge in his Decision dealt with all six, and did so properly under that approach.)

Regarding the other machine in SOCCO's claim, a scoop on the 007 section of Meigs No. 1, we disagree that there was evidence presented sufficient to establish the existence of a scoop on this particular section. The transcript citations SOCCO makes do not provide a link between the scoop and a particular section. Although the machine operator involved did testify that he worked on the 007 section of Meigs No. 1, the bulk of his testimony dealt with his operaton of a shuttle car (Tr. 127). When asked by the Judge, "Have you ever operated any other machinery, such as cutter, or loader, or coal drill, or roof bolter, or scoop?," this operator replied, "I've run the bolter just a little bit, and I've run the scoop" (Tr. 131). In light of the fact that the witness testified he had worked for SOCCO for over a year and for another coal company before that, this is too thin a thread, without more, on which to hang the conclusion that the witness was talking about a scoop on the 007 section of Meigs No. 1.[12] SOCCO's assignment of error on this issue is therefore rejected.

[12] The approach we will use in dealing with the proper relief in this case will, in any event, cover scoops generally, and if there is a scoop on that section in fact, it will be covered by a general grant of modification, assuming the other prerequisite conditions are present.

C.

In the issue numbered 8 in the "Contentions" section above, SOCCO proposed that the Judge erred in failing to grant relief with respect to the Fletcher LTDO–17 roof bolter. SOCCO advances the proposition that modification with respect to this machine should have been granted either on the "Visibility" grounds or on the "Formula" grounds. As to the former, SOCCO has presented a forceful argument in its brief (SOCCO Brief, p. 37), but we conclude that there was substantial evidence upon which the Judge could find that SOCCO had not made its requisite showing of diminution of safety. SOCCO attacks the Judge's diminution reasoning by noting that although the Judge "found" that two roof bolter operators had visibility problems in mining heights higher than 56 inches, he failed to grant modification based on those problems in heights of 56 inches or less. SOCCO's position is that if the problems exist in higher heights, they certainly exist at lower heights. SOCCO's argument in this regard certainly makes sense superficially, but the logical premise necessary for this argument to be accepted is missing. That premise is that the problems equate with diminution. In discussing this situation, the Judge wrote:

> While the testimony of [roof bolter operators] White and Richmond indicates that they have experienced some visibility problems with their canopy-equipped roof bolters, * * * the testimony reflects that those men work in a fairly high mining height * * *. (Dec. 104.)

In order for this statement to have any logical value when compared with the Judge's ultimate finding of no diminution, we must infer that, whatever the indications, the Judge did not feel that the operators' problems were great enough to produce a diminution and that since there was no testimony of diminution-type problems from operators working in a less than 56-inch height, he had no basis upon which to find diminution and thus grant the modification. (We also note that the only other roof bolter operator testified that he had no such problems and that he worked in heights within the 56-inch limit (Dec. 104; Tr. 302 and 306.) The Judge took his testimony into account, and we cannot say that his apparent conclusion that SOCCO's evidence did not overcome that testimony was unreasonable (Dec. 104)).

SOCCO's second point of attack is that the Judge had before him the testimony of MESA's expert Mr. Gaydos that redesign of the Fletcher roof bolter's rear canopy is "definitely in order." (SOCCO Brief, p. 37, Dec. 105, Tr. 628.) The argument is that if redesign is definitely in order, the failure to grant modification perpetuates the diminution of safety (SOCCO Brief, p. 37). Once again SOCCO has made a leap over a requisite to its argument's logical validity. The missing link is the evidence or con-

clusion that redesign's being definitely in order is the same as a diminution in safety. It has been SOCCO's position throughout this proceeding that it has been making a continuing effort at finding canopy designs which are safe and more operationally acceptable. SOCCO has also indicated that it will continue to work on such designs even for equipment on which the present installation of canopies does not result in diminished safety (SOCCO Brief, pp. 37–38). If SOCCO is going to work on such designs it must mean that redesign is "in order," but obviously the old design has not prompted a Judge to find a diminution of safety. In other words, redesign's being definitely in order does *not* equate with diminution in safety and SOCCO's argument under the "Visibility" rationale thus falls.

[4] SOCCO makes an interesting and novel argument in assigning error to the Judge's refusal to include the Fletcher roof bolter in his grant of modification based on the "Formula." The Judge's main reason for refusing to make the requisite findings is that "there is no information as to the required canopy clearance which would permit this piece of equipment to operate safely in the mines." (Dec. 104.) Conceding that the Judge is correct on this (Mr. Gaydos testified as to clearances for all pieces or types of equipment other than this one), SOCCO nevertheless responds that even assuming a clearance figure af zero, it is possible to fashion relief for this machine in certain mining heights until SOCCO can bring another modification petition with evidence of the proper clearance figure to cover the machine in higher heights as well. SOCCO's calculation for this is to take the 40-inch machine height and add the 10-inch canopy visibility factor, with no allowance for canopy-to-roof clearance, and grant modification in sections where the mining height minus 3 inches for allowable roof support is 50 inches or less. There can be little doubt that using this approach achieves the "Formula's" goal of granting modification in heights where canopy-equipped machines may not successfully operate.[13] In the absence of counterargument by MESA, we have been able to find no valid reason for why SOCCO's position on the "Formula" may not be accepted. This conclusion will be reflected in the Order below.

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[13] Although the Judge indicated that Mr. Gaydos' testimony regarding the manufacturer's specifications for this equipment produced some marked discrepancies when compared to SOCCO's evidence, he later noted that MESA has not rebutted SOCCO's evidence as to machine height. We therefore accept SOCCO's 40-inch measurement. MESA in responding to SOCCO's two arguments regarding the Fletcher roof bolter chose not to concentrate on this "Formula" argument and we thus have no counterargument to consider.

On a related issue, MESA at oral argument objected to the Judge's use in his "Formula" of a standard 10-inch canopy visibility factor, since Mr. Gaydos testified that such was reasonable only in relation to the Joy 10 SC shuttle car. We note that MESA failed to raise this in either of its briefs and we need not therefore treat it, but we have also found that the Judge had a reasonable basis upon which to use such a figure beyond Mr. Gaydos' testimony. (*See*, discussion, Dec. 93 and "Background," p. 11, *supra*.)

IV.

Framing the Relief

In cases of this nature where we find that the Judge generally has done a creditable job except in an error in his approach, we are usually inclined to resolve the appeal by remand for new findings and conclusions consistent with our announcements in the opinion. This is generally a good policy; however, here we are faced with a case warranting expedited appeal and thus are compelled to search the record to discover whether it is sufficient for us to make additional findings and conclusions so as to grant or deny relief without the necessity of a surely delaying remand. We have conducted that search and have discovered that the record is sufficient for us, following the Judge's approach with a few significant exceptions, to make those findings and conclusions in almost all cases.

We hasten to express our feeling that this case is unique and that in order for future petitioners to prevail they will have to show conditions similar to those shown by SOCCO here or otherwise supportive of a conclusion of diminished safety. As examples of the types of conditions to which we refer, we cite the following: at least two (and arguably the third, at least in a major degree) of the mines involved in this case have unusually good roof conditions (April Tr. 23–25; Dec. 8); all three mines have undulating bottoms (Dec. 92–93; April Tr. 23–25), and all the mines bottoms are subject to water, mud and irregular bedding (Dec. 92–93, 20; April Tr. 23–25).[14] (These last two factors are especially important in the validity of the "Formula" rationale *viz.*, clearances when tramming, and in the rebutting of the MESA argument that SOCCO was engaged in poor mining practices, respectively.) Of no minor importance in our consideration has been the substantial showing that SOCCO has made a continuing good faith effort to evaluate canopy designs and to redesign equipment and canopies for the purpose of implementing better and safer canopy designs (Dec. 77, 104–105. *See also* discussion in SOCCO Brief, pp. 11–12, and record citations contained therein.) As we compose the order which will tie up our consideration of this appeal, we will not explicitly make all of these conditions factual predicates upon whose continued existence our grant of modification will depend. However, the overall condition of the

[14] This list along with other factors mentioned in the same paragraph is not meant to be exhaustive. The Judge and we look at the record as a whole to make conclusions about the nature of the mines, and although it is not necessary that another operator must show that his mine *duplicates* the conditions in SOCCO's mines before he may prevail, he must show conditions which suggest the same type of overall situation. It must be remembered that it is not the conditions themselves which demand the grant of modification. The conditions as a whole either support or detract from the conclusion of diminished safety. One way of looking at this situation is to say that certain conditions make machine operator testimony regarding safety problems more credible and thus more supportive of the ultimate conclusion. Conditions alone without a substantive showing of diminution will not support the grant.

mines is especially important to our grant, and if conditions change to the extent that a conclusion that a diminution in part or throughout the mines can exist is significantly less likely, we mean our Order to imply that its grant will no longer apply.[15]

ORDER

WHEREFORE pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)),

IT IS HEREBY ORDERED, that MESA's motion to withdraw that issue raised in its brief which dealt with the Judge's use of a 48-inch mining height in the 003 section of Raccoon No. 3 Mine IS GRANTED.

IT IS FURTHER ORDERED, that the findings of fact and conclusions of law of the Administrative Law Judge in the above-captioned case ARE AFFIRMED, except as in this Order specified.

IT IS FURTHER ORDERED, that the Order of the Administrative Law Judge IS MODIFIED in the following particulars:

(1) In all sections of the subject mines where the mining height is, and as it remains, 56 inches or less, the Petition for Modification of Southern Ohio Coal Company is granted for all National Mines Service Torkar and Lokar shuttle cars, all Joy 14BU10 loading machines, all Joy 15 RU cutting machines, all Goodman 2500 cutting machines, all National Mines Service Marietta continuous miners, all Schroder coal drills, all Joy 10 SC shuttle cars, and all machines later introduced into the mines which machines are substantially similar by reason of function and engineering characteristics, dimensions and design to one or another of the machines listed in this subparagraph (1);

(2) As to the machines listed in this subparagraph (2), the said Petition is granted in all sections of the mines where the mining height is, and as it remains, at or lower than the height associated with a particular machine in this list:

(a) all Jeffrey 120L continuous miners—44 inches;

(b) all Lee-Norse HM 105 continuous miners—52 inches;

(c) all Goodman 968-2 loaders—47½ inches;

(d) all Long Airdox TDF-24 coal drills—45 inches;

(e) all Fletcher LTDO-17 roof bolters—50 inches;

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[15] Two conditions upon which we will explicitly make the grant dependent are SOCCO's continued good faith in seeking non-safety diminishing canopy designs and SOCCO's good faith in pursuing acceptable mining practices. Along the latter line, we do not contemplate that SOCCO will either fail to mine a particular roof or floor portion of the coal seam, for instance, or to make a reasonable placement of a loading point for the purpose of creating a mining height measurement which is artificially low.

We also note that it may not be necessary to talk in terms of conditions subsequent in any event. Since we have decided that a modification plan is a safety standard for purposes of the Act, the remedy of a petition for modification of the modification plan is available to the representative of miners in the event of changed conditions. *Affinity Mining Company v. MESA*, 6 IBMA 100, 107–108, 83 I.D. 108, 1975–1976 OSHD par. 20,651 (1976).

(f) all S & S scoops—48 inches;
(g) all Kersey scoops—50 inches;
(h) all machines later introduced

into the subject mines which machines are substantially similar by reason of function and engineering characteristics, dimensions, and design to one or another of the machines in Parts (a) to (g) of this subparagraph (2) in all sections with mining heights at or below that associated in this subparagraph (2) with the particular machine with which the newly introduced machine is substantially similar.

IT IS FURTHER ORDERED, that this Order shall remain in effect in the mines or constituent parts thereof only so long as the conditions as set out in Part IV of the Opinion to which this Order is attached remain in existence therein and that the Mining Enforcement and Safety Administration shall have resort to its normal enforcement remedies to compel compliance with 30 CFR 75.1710–1 in all situations beyond the scope of this Order granting modifications and in the mines or any parts thereof in the case of the future failure of the said conditions.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

ESTATE OF JAMES ANDREWS WHITE a/k/a JAMES P. ANDREWS

6 IBIA 79

Decided *May 24, 1977*

Appeal from Administrative Law Judge's order denying extension of time in which to file a petition for rehearing.

REVERSED.

1. Indian Probate: Pleading: Extension of Time—355.1

A timely request for an extension of time was submitted to the appropriate office on Oct. 15, 1976, as a result of the personal visit by appellant's representative to the Agency Superintendent that day, during which time Bureau assistance was provided in drafting such request.

2. Indian Probate: Pleading: Extension of Time—355.1

Where an extension request was sent to the wrong office for filing on account of incorrect advice from Department personnel who are responsible for knowing right procedures, the Department is estopped from denying such request on grounds that it was not filed at the proper place.

APPEARANCES: Stephen C. Rice, Esq., for appellant, Millie Andrews.

OPINION BY ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Millie Andrews, through her attorney, Stephen C. Rice, appeals from an order denying an extension of time in which to file a petition for

rehearing in the above-captioned estate.

James Andrews White, a/k/a James P. Andrews, deceased unallotted Nez Perce, died intestate on February 10, 1971, possessed of trust property in Washington and Idaho. An order determining heirs was entered by Administrative Law Judge Frances C. Elge on Aug. 18, 1976. In the Notice of Decision Judge Elge stated: "This decision becomes final 60 days from the date of this notice. Any person aggrieved by the decision of the Judge may, within the 60 days, but not thereafter, file with the Superintendent a written petition for rehearing * * *." The foregoing instruction is taken from 43 CFR 4.241(a).

Appellant maintained at the hearing that under Idaho statutes in effect at the time of decedent's death, she should be declared sole heir to decedent's Idaho property. In addition she asserted that certain instruments executed by three adoptive first cousins of decedent effectively conveyed their inherited interests to her. Both of the above positions were rejected in Judge Elge's order determining heirs. Appellant is, therefore, an aggrieved person within the meaning of Department rules.

On Oct. 15, 1976, the 58th day from the date of the order determining heirs, appellant's daughter, acting on her mother's behalf, sought assistance from the Superintendent of the Northern Idaho Indian Agency in applying for an extension of time in which to file a petition for rehearing in this estate.

Department regulations provide that a request for an extension of time "must be filed within the time allowed for the filing or serving of the document and must be filed in the same office in which the document in connection with which the extension is requested must be filed." 43 CFR 4.22(f)(2).

Based on the above rule, appellant's representative had gone to the correct place to submit a request for extension of time and was there in sufficient time to file a timely request. Nevertheless, the Superintendent advised appellant's representative to telephone the Administrative Law Judge's office in Portland, Oregon, for instructions.

It was related to appellant's representative by the Portland office that any request for an extension of time would have to be submitted in writing. Thereupon, a staff member of the Northern Idaho Indian Agency assisted in the preparation of a letter for appellant's signature addressed to the Administrative Law Judge in Portland, Oregon, requesting an extension of time. This letter, attached to appellant's brief as Exhibit 2, is dated Oct. 15, 1976, and is stamped received by the Administrative Law Judge's office in Portland as of Oct. 18, 1976, the final day for the filing of the document. As noted in Judge Elge's Oct. 29, 1976 Order Denying Extension of Time the foregoing written request was forwarded by Judge Snashall's office to her office where it was received on Oct. 20, 1976.

Judge Elge's Order Denying an Extension of Time states that ap-

pellant's written request dated Oct. 15, 1976, "was not filed in the office where the filing was required" (Order, p. 2). We think Judge Elge would not have pointed to such failure in denying the extension request had she known of the wrong advice given to appellant by Department personnel as described above. It is clear, as appellant's brief emphasizes, that appellant's representative

> [*D*]*id go* to the *office where filing is required* and therein did ask for and received help in drafting a written request for an extension of time. The written request dated Oct. 15, 1976, should have been *retained* and *filed* in the office of the Superintendent at the North Idaho Indian Agency * * *.

(Appellant's Brief, p. 4.)

[1, 2] Based on all of the above we believe the following two rulings are appropriate in this appeal: First, we hold that a timely request for an extension of time was submitted to the appropriate office on Oct. 15, 1976, as a result of the personal visit by appellant's representative to the Superintendent that day, during which time Bureau assistance was provided in drafting such request. Second, we hold that where an extension request was sent to the wrong office for filing on account of incorrect advice from Department personnel who are responsible for knowing right procedures, the Department is estopped from denying the request on grounds that it was not filed at the proper place.[1]

Appellant's brief refers to additional efforts to file a proper extension request on Oct. 18, 1976, the 60th and final day for its receipt. It is alleged, among other things, that appellant's representative hand-delivered a written request for an extension to the Northern Idaho Indian Agency but that when she arrived there at approximately 4:45 p.m., the office was closed. This second request was then filed on the morning of Oct. 19, 1976, 1 day late.

Because of our holding that the request for extension dated Oct. 15, 1976, should be granted, we need not decide whether the extenuating circumstances referred to by appellant as occurring on Oct. 18, 1976, further justify reversal of Judge Elge's order of Oct. 29, 1976.

The extent of the order which the Board herein renders is that appellant shall be allowed 30 days from the date of this decision to file a petition for rehearing with the Superintendent of the Northern Idaho Indian Agency. It remains the responsibility of appellant to set forth all grounds upon which such peti-

[1] Implicit in these two holdings is that authority exists to grant an extension of time in which to file a petition for rehearing. We read existing regulations as permitting such action by Administrative Law Judges responsible for Indian probate in contrast to older practices of the Department by which only the Secretary could permit such extensions "for good cause shown." *See Estate of Jack Fighter,* 71 I.D. 203 (1964). By no means, however, should parties presume that simply because a request for an extension of time in which to file a petition for rehearing has been timely filed, that it will automatically be granted. Such decision rests on the sound discretion of the Administrative Law Judge.

tion is based, including, if applicable, a description of any newly discovered evidence in support thereof in accordance with procedures prescribed at 43 CFR 4.241 (a). The Administrative Law Judge to whom this case is assigned retains full authority to dispose of the petition as he deems proper, as provided at 43 CFR 4.241(b) and (c).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Extension of Time entered by Administrative Law Judge Frances C. Elge on Oct. 29, 1976, be, and the same is hereby REVERSED. It is FURTHER ORDERED that Millie Andrews, appellant herein, shall be allowed 30 days from the date of this decision to file a petition for rehearing with the Superintendent of the Northern Idaho Indian Agency who shall, as provided at 43 CFR 4.241(a), promptly forward it to the Administrative Law Judge's office in Billings, Montana.

This decision is final for the Department.

WM. PHILIP HORTON,
Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Chief Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

IN SITU GASIFICATION OF COAL

Coal Leases and Permits: Generally—Mineral Leasing Act: Generally—Mineral Leasing Act: Methods of Development

The Mineral Leasing Act of 1920, *as amended and supplemented,* most recently by the Coal Leasing Amendments Act of 1975, allows the Secretary to authorize development of coal leases by methods which were not utilized by the industry at the time of passage of the 1920 Act. The broad grants of authority to the Secretary in the 1920 Act allow technological developments in the coal mining industry.

Coal Leases and Permits: Generally—Coal Leases and Permits: Leases

The grant of the privilege to mine and dispose of all coal includes in situ methods of development.

Coal Leases and Permits: Royalties

Royalty provisions, which do not specifically mention in situ development, are applicable to such development. The Secretary, through the Geological Survey, is empowered to promulgate by regulation a conversion ratio of in situ extraction to coal expended in order to determine the royalty due.

M-36890 *May 24, 1977*

May 10, 1977

TO: REGIONAL SOLICITOR, DENVER

FROM: ACTING DEPUTY SOLICITOR

SUBJECT: IN SITU GASIFICATION OF COAL

The United States Geological Survey has been advised that the holder of coal lease C-0120073,

Kemmerer Coal Company, intends to assign its lease to Christ's Energy Resources (CER) for the purpose of conducting in situ gasification of the coal. The various issues which suggest themselves are: (1) whether the Mineral Leasing Act of 1920, 41 Stat. 437, *as amended* (30 U.S.C. §§ 181–287 (1970)), authorizes the Secretary of the Interior to allow exploitation of a coal lease by in situ combustion methods; (2) whether the terms of the present lease allow for such methods; (3) whether such methods if legally permissible, fall within the Scope of the Department's coal mining operating regulations; and (4) what is the method of determining royalties due the government under the lease.

Background Information.

As of Jan. 1, 1972, the United States had estimated remaining coal reserves of 3,224 billion tons. Of this amount 1,581 billion tons has been identified on the basis of mapping and exploration with the remaining 1,643 billion tons hypothesized from geological data. On the basis of depth, 50.5% of the nation's coal reserves have an overburden of 2000–6000 feet. USGS, *United States Mineral Resources;* Geological Survey Professional Paper 820 (1973) at 135–140. Hypothetical resources, comprising approximately 51% of the nation's reserves, lie for the most part at depths exceeding 1000 feet. Although large, such hypothetical reserves are, for the most part, relatively inaccessible for mining at present. *Id.* at 139.

A Bureau of Mines Technical Progress Report points out potential advantages of in situ combustion of coal (burning the coal in place and using the energy): (1) the amount of underground mining, with attendant personnel and equipment, can be reduced; (2) the method can be used to develop coal deposits which presently are not economical with conventional techniques (*e.g.*, low Btu coal, thin seams, great depth); (3) the method can be used as secondary recovery of previously mined deposits; (4) the various in situ methods (combustion, liquefaction and gasification) can complement one another. Bureau of Mines, TPR 84, *In Situ Combustion of Coal For Energy* (Nov. 1974) at 2. The Bureau of Mines has been experimenting with in situ gasification at Gorges, Alabama and Hanna, Wyoming.

The facts outlined in CER's Field Test Plan have been denominated "Proprietary Information" by CER. For the present discussion, the following general facts are sufficient. CER intends to operate an in situ gasification project, as assignee of Kemmerer Coal Company, lessee of the coal. The coal involved is a twenty-five feet thick seam lying under 130 feet of overburden. This coal is classified as high volatile sub-bituminous with a Btu content ranging from 8,500 to 11,500. The test plan anticipates utilization of approximately one-third of the energy content of the seam involved. Subsequent recovery would apparently be precluded because of the methods involved to extinguish the fire in the seam. Those methods

combine water flooding and cement injection. In addition the heat would have a tendency to physically and chemically alter any remaining coal.

The Mineral Leasing Act Allows for In Situ Methods of Mining.

The Mineral Leasing Act of 1920 *as amended*, authorizes the Secretary to allow the development of a coal lease by means of in situ combustion. This is a conclusion based upon review of the relevant legislative history of the latest amendment to that Act, the Coal Leasing Amendments Act of 1975, 90 Stat. 1083.

Sec. 3 of the Coal Leasing Amendments Act of 1975 amends sec. 2(a) of the Mineral Leasing Act of 1920 (30 U.S.C. § 201(a) (1976)).

In discussing the Secretary's responsibilities, the new sec. 3(C) states, in pertinent part:

> Prior to the issuance of a lease, the Secretary shall evaluate and compare the effects of recovering coal by deep mining, by surface mining, and by *any other method* to determine which method or methods or sequence of methods achieves the maximum economic recovery of the coal within the proposed leasing tract. (Italics supplied.)

The sectional analysis in the House Report, H. Rep. No. 94-681, 94th Cong. 1st Sess. (1975), merely paraphrases this language. H. Rep. 94-681 at 22.

Senator Metcalf discussed this provision during Senate debate.

> Coal recovery by underground mining methods and by strip mining methods involves quite different impacts upon the environment, upon surrounding communities, and upon land use patterns in affected areas, and considering the new recovery methods such as in-situ gasification now being actively researched—notably by the Bureau of Mines—S. 391 would require the Secretary to evaluate and compare the effects on coal recovery by both traditional and novel mining techniques, before issuing a lease.
>
> The Secretary would also be required to study the possible sequences of such methods which would yield the maximum recovery of the resource. This latter requirement is of great moment because many of the thick-seam thin-overburden deposits of coal in the west are equally susceptible to surface mining and underground mining. The failure to consider the possible repercussions of one method upon the other could mean the virtual abandonment of immense amounts of the deepest coal reserves if rendered economically unattractive or overly hazardous to mine.
>
> This requirement for a study of mining methods by the Secretary makes plain horsesense. Cong. Rec. S. 9983 (June 21, 1976)

Hence in situ development can be inferred to be within the category of "any other method" mentioned in the Act itself.

Congress has allowed wide latitude to the Secretary over the method in which lessees will exploit their leases. In light of the comments in the legislative history, it is apparent that in situ methods of coal mining may be authorized by the Secretary under the statute.

While it is to be conceded that subsequent to the passage of the Coal Leasing Amendments Act of 1975 in situ methods are acceptable, the resolution of that question for leases issued prior to Aug. 4, 1976 requires separate analysis. Sec. 13 of the Coal Leasing Amendments Act, *amending* sec. 3 of the Mineral Leasing Act (30 U.S.C. § 203 (1970)), indicates that the provisions of the Coal Leasing Amend-

ments Act can be made applicable to existing leases only through modification of the lease terms upon application of the lessee to modify acreage limitations or at the time the lease is subject to renegotiation. Since the lease in question was issued in 1968, the legality of in situ methods under the Mineral Leasing Act of 1920 as it existed at that time must be shown.

Legislation, such as the Coal Leasing Amendments Act, which gives specific authority to an agency is not necessarily to be construed to evince lack of prior authority. *Lichter* v. *United States*, 343 U.S. 742 (1948). This is especially true here, where Congress did not create a new method of mining coal but rather said that the effects of this method of lease development must be evaluated by the Secretary. Congress apparently thought that such methods were already permissible. Such Congressional interpretation of existing law, while not conclusive as to the intent of a previous Congress, is entitled to some weight. *Federal Housing Administration* v. *Darlington, Inc.*, 358 U.S. 937 (1958).

As originally enacted, the Mineral Leasing Act of 1920 was silent on the subject of permitted methods of mining. Sec. 30 of the Act (30 U.S.C. § 187 (1970)) prescribes the conditions which Congress intended be placed in each lease. There are no proscribed mining methods. Under sec. 30, the Secretary is empowered to include "such other provisions * * * for the protection of the interests of the United States." This grant is broad enough to enable the Secretary to respond to new developments of technology. The Secretary is further authorized, in sec. 32 (30 U.S.C. § 189 (1970)), to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter. * * *" Again, this is a broad grant which enables the Secretary to respond to changes in the mining industry.

Broad regulatory statutes are to be construed so as to include new technological developments. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). In *Southwestern*, the Court upheld the Federal Communications Commission regulation of community antenna television (CATV); in *Midwest Video*, the Court upheld FCC regulation of cable television. Neither technology was in existence at the time of passage of the Communications Act of 1934, 48 Stat. 1064, 47 U.S. C. § 151 *et seq.* (1970). In this general vein, the Supreme Court has declared itself loath "in the absence of compelling evidence that such was Congress' intention * * * [to] prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968); *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311 (1953). Since in situ methods are neither inconsistent with the purpose of the Mineral Leasing Act nor has Congress proscribed specific methods for developing a lease, it seems likely that a decision by the

Department to allow in situ development would be sustained by the courts, if such action were challenged.

There is evidence that the Department of Interior has considered allowing in situ methods of recovery under certain circumstances. The Final Environmental Impact Statement, Proposed Coal Leasing Program, specifically mentions and discusses in situ methods in its discussion of potential extractive techniques. EIS, 1–57, 60. Further, while an opinion on the legality of in situ development was not prepared, the regulations concerning diligent development, 43 CFR 3520.2–5, 41 FR 56645 (Dec. 29, 1976), allow for an extension of the ten year diligent development period where such extension is needed to "complete development of advanced technology, *e.g.*, in situ, gasification or liquefaction processes." Finally, in the response to comments associated with the promulgation of regulations defining commercial quantities for prospecting permits, 43 U.S.C. Part 3520 (1970), 41 FR 18845 (May 7, 1976), the Department responded to a request for clarification as to applicability to in situ operations by stating:

> This section refers to the cost of operating or developing a "mine." Several comments requested that additional language be added to insure that "mine" encompassed in situ development. The Department intends and believes that the term "mine" is sufficiently broad to take into account all types of coal development, including in situ development. 41 FR 18845 (May 7, 1976).

I am of the opinion that the Mineral Leasing Act of 1920, *as amended*, grants the Secretary sufficient authority to permit in situ mining techniques under the terms of a coal lease issued prior to Aug. 14, 1976.

The Terms and Conditions of Kemmerer Coal's Lease Allow In Situ Development.

Since the Secretary has the authority under the Mineral Leasing Act to permit in situ development of a coal lease, it remains to be answered whether the lease terms under consideration allow for such techniques.

The pertinent language of the lease in this regard is in sec. 1 thereof:

> **The lessor * * * does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all coal * * * together with the right to construct all such works, buildings, plants, structures, and applicances as may be necessary and convenient for the mining and preparation of the coal for market, the manufacture of coke or other products of coal * * ***

In situ combustion, gasification and liquefaction can be properly considered as part of the lessee's "privilege to mine and dispose of all coal." Webster's *Third New International Dictionary* states that a mine is "a pit or excavation in the earth from which mineral substances are taken by digging or by some other method of extraction." The verb 'to mine' means "to get (as ore, metal, or other natural constituent) from the earth." The Bureau of Mines' *dictionary of mining, mineral and related terms* (1968) contains similar definitions of a 'mine' and 'to mine'. A mine is "an opening or excavation in the earth for the purpose of extracting min-

erals * * *" These definitions are in harmony with the statement relat- to the commercial quantity regulations, *supra*, as to the breadth of the term "mine."

The type of activity involved with in situ development clearly falls within these definitions.

Assuming, *arguendo*, that in situ extraction did not constitute mining of the coal, it would fall within the grant of "preparation for market" or the manufacture of "other products of coal." Both liquefied and gasified coal are "other products" of coal. In addition, in situ combustion, liquefaction and gasification are methods of preparing coal, at the site, and converting it for marketing for energy use.

The lease terms which grant the right to exploit the leased coal deposit are inclusive of in situ methods.

General principles of mining law support the conclusion that the lease involved allows for in situ development. The lessee's rights under a mineral lease which grants the right to mine include the exclusive possession of the deposits and the right to remove and reduce ore to ownership. *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 369 (1925); *London Extension Mining Co. v. Ellis*, 134 F. 2d 405 (10th Cir. 1943).

Furthermore, a lessee's implied obligations under the lease are to be interpreted in light of technological methods that are presently economically feasible. *Williams* v. *Humble Oil & Refining Co.*, 290 F. Supp. 408, 416, 417 (D.C. La. 1968), *aff'd*, 432 F. 2d 165, *cause remanded*, 432 F. 2d 165, *rehearing denied*, 435 F. 2d 772, *cert. denied*, *Humble Oil & Refining Co.* v. *Price*, 402 U.S. 934, on remand 53 F.R.D. 694. Hence, the lessee's covenants to develop, etc., are modified as new technology appears. The mining law allows lessees to employ new technology.

I am of the opinion that under Kemmerer's lease an in situ method falls within the grant to mine and dispose of the coal upon the leasehold.

Does the Proposed Test Plan Satisfy Applicable Requirements for Resource Conservation.

The proposed test plan as explained by CER raises two areas of concern: (1) the test, as proposed, will utilize one-third of the energy content of the coal seam within the test areas, and (2) the method of extinguishing the in situ combustion will be by flooding and concrete injection. These are areas of concern because of the Secretary's responsibility for resource husbandry and conservation. Sec. 30 of the Mineral Leasing Act of 1920 gives the Secretary power to condition leases to achieve "the prevention of undue waste" (30 U.S.C. § 187 (1970)). Sec. 32 of the Mineral Leasing Act gives the Secretary authority to promulgate rules and regulations to accomplish the purposes of the Mineral Leasing Act, (30 U.S.C. §189 (1970)), which include, *inter alia*, the prevention of undue waste.

The Coal Leasing Amendments Act of 1975 added new requirements of resource conservation. Sec. 2(a)(3)(C) of the Mineral Leasing

Act, *as amended*, now states, in pertinent part:

> Prior to the issuance of a lease, the Secretary shall evaluate and compare the effects of recovering coal by deep mining, by surface mining, and by any other method to *determine which method or methods or sequence of methods achieves the maximum economic recovery of the coal within the proposed leasing tract.* This evaluation and comparison by the Secretary shall be in writing but shall not prohibit the issuance of a lease; however, *no mining operating plan shall be approved which is not found to achieve the maximum economic recovery of the coal within the tract.* (Italics added.)

This standard of maximum economic recovery is to be applied by the Secretary upon the issuance of a lease subsequent to the passage of the Act (Aug. 4, 1976) and upon review of any mining plan submitted in connection with such leases. The standard is to be applied to new leases and, by the terms of sec. 13(b) of the Act, to existing leases upon modificaton of acreage limitations. In a memorandum dated Jan. 19, 1977, to the Deputy Under Secretary from the Assistant Solicitor—Minerals, the opinion was stated that the requirement of maximum economic recovery was not applicable to existing leases, but that the Secretary had the authority, under secs. 30 and 32 of the Mineral Leasing Act of 1920, to make it a requirement if he chose. The Secretary has not yet done so, and has not promulgated rules and regulations defining the maximum economic recovery standard.

Even if existing leases are not held to a standard of "maximum economic recovery," however that term is eventually defined, the Supervisor still has the responsibility to review any mining plan for undue waste. Sec. 211.4(b)(c) of 30 CFR (1976) [1] states:

> (b) Coal mining operations shall be conducted so as to ensure the extraction of the coal resource to the maximum extent possible, taking into account existing technology, commercially available equipment, the cost of production, and the quality and quantity of coal resource, so that future environmental disturbance through the resumption of mining will be minimized.
>
> (c) The operator shall take all actions necessary to minimize waste and drainage to any remaining coal-bearing formations and other resources.

This language was not changed by the other amendments to 30 CFR Part 211 which were published in 42 FR 4441 (Jan. 25, 1977) and is clearly the standard the Mining Supervisor should apply in reviewing any mining plan submitted by CER or any other lessee.

The regulations quoted above expressly allow and the requirements of sec. 3(c) of the Coal Leasing Amendment Act of 1975 implicitly permit an evaluation of existing technology. Thus certain inefficiencies associated with new technology, such as in situ methods, might be countenanced which might not otherwise be allowed for a mine using proved technology. The Mining Supervisor, however, must make such a determination on a case by case evaluation using the criteria set forth in 30 CFR 211.4(b) and (c).

Surface mining methods can recover up to 90 percent of the coal resource. Underground mining techniques can recover up to 50 percent

[1] The regulation is applicable to Kemmerer's lease under the lease's preamble clause which incorporates prospective regulations issued pursuant to the Mineral Leasing Act.

of coal resource. The CER plan can be expected to recover only one-third of the coal resource in the seam chosen for the test. This raises the question whether the approval of this plan by the Secretary would violate his duty to prevent waste of the mineral resource. The Secretary may wish to encourage development because it enables development of coal which is not ordinarily recoverable by other methods. Although the regulatory standard applicable to the lease in question appears to be sufficiently broad to allow the Secretary to approve in situ development even where the total recovery is relatively low, the Department may wish to develop a resource conservation standard that applies to in situ methods only. I do not give any opinion at this time, however, about the appropriateness of this proposed development plan under 30 CFR 211.4.

Need for a Mining Plan For In Situ Projects.

Cimarron Associates, in its application on behalf of CER, states that it considers the proposed plan to constitute "casual use" under 30 CFR 211.10(a) and therefore not one which would require the submission of a mining plan. I am of the opinion that the test is more than mere "casual use" and that it requires filing a mining plan. The definition of casual use in section 211.10(a) is "activities which do not cause significant surface disturbance or damage to lands, resources * * *." In situ combustion is a major operation of considerable significance to coal development and a method which will alter the nature of remaining coal deposits. Furthermore, the casual use provision is designed to relieve a coal operator from the burden of filing a mining plan prior to every incidental activity undertaken. It is not to be construed to relieve him of that obligation in connection with the actual mining, exploitation or utilization of the leased coal.

The Coal Mining Operating Regulations, 30 CFR Part 211, as presently written appear to be sufficient to govern activities associated with in situ development. The one possible exception to this is the definition of "mine" found at 30 CFR 211.2(v). As presently defined a mine is "an underground or surface excavation" as well as the support facilities appurtenant to the excavation. An amendment embodying a slightly more expansive definition of mine should be considered. The remainder of 30 CFR Part 211 speaks in terms of responsibilities tied to a mining plan. Both the definition of the term "mining plan" and the way it is employed in 30 CFR Part 211 seems broad enough to cover in situ development.

Sec. 211.2(w) defines a mining plan as "a detailed plan for development of the coal resource submitted to the Mining Supervisor for approval prior to commencement of any mining operation, showing the proposed location, method, and extent of mining and all related activities necessary and incidental to such operation, including steps to be taken to reclaim disturbed areas, to mitigate adverse impacts, and to otherwise meet the performance

standards and requirements set forth in this Part."

The definition of a mining plan, as well as the purpose of the operating regulations under 30 CFR Part 211, encompass the development of a coal lease by in situ methods. I am of the opinion that such a mining plan is required for CER's proposed project.

Determination of Royalties.

The Coal Leasing Amendments Act of 1975, sec. 6 (*amending* sec. 7 of the Mineral Leasing Act, 30 U.S.C. § 207 (1970)) sets forth the provisions on royalty determination. It states:

> A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation * * *

The statute is not tied to any one method of determining the value of the coal exploited by the lessee. It is flexible enough to allow for production royalties in cases where the coal is extracted, or for Btu, coal consumed or some other royalty base in the case of in situ methods.

The regulations as presently promulgated, 30 CFR 211.63 and 211.64 (these regulations have not been amended subsequent to the passage of the Coal Leasing Amendments Act of 1975 and are applicable to Kemmerer's lease are not adaptable to determination of royalties in the case of in situ development. They are focused on the production of coal by extraction.

Sec. 2(c) of the lease, "Royalty," as presently written sets rates for underground and stripmining or augur methods. While the existing regulations could, if necessary, be interpreted to apply to in situ methods, revised regulations should be promulgated establishing a method of determining royalties based on the coal consumed or otherwise utilized prior to permitting in situ methods under the existing lease. Such regulations would establish the conversion ratio of energy extracted to coal consumed. Future leases should incorporate the conversion ratio established by the Geological Survey as a lease term.

Conclusion.

I am of the opinion that the Secretary has authority to permit in situ methods of coal production under the Mineral Leasing Act of 1920, both as originally enacted and as amended by the Coal Leasing Amendments Act of 1975. The lease of coal to Kemmerer Coal Company also permits the exploitation of coal by in situ methods, subject to the Mining Supervisor's approval of a mining plan which is in accord with applicable regulations.

Each mining plan should be reviewed to assure that the methods proposed will not result in undue waste of the mineral resource. Prior to any in situ development regulations must be promulgated to establish the means of determining royalties due.

No opinion is expressed as to the ability of this particular proposed plan to meet environmental standards established by the Federal Clean Air Act, 81 Stat. 488, 42 U.S.C. § 1857 (1970), or the 1972 Federal Water Pollution Control Act Amendments, 86 Stat. 816, 33 U.S.C. § 1157 (1970).

FREDERICK N. FERGUSON,
Acting Deputy Solicitor.

ESTATE OF THROWS FIRST*

Decided *February 4, 1977*

6 IBIA 28

Petition to reopen.

DENIED.

1. Indian Probate: Reopening: Generally—375.0

Where no cogent reasons are alleged and the petition for reopening is submitted after the statutory period for filing, a reopening will not be allowed.

APPEARANCES: Mary Goggles Antelope, pro se.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before the Board on a petition to reopen filed by the petitioner, Mary Goggles Antelope, with Administrative Law Judge Garry V. Fisher.

The estate having been closed since Aug. 8, 1940, the petition was referred by Judge Fisher for disposition pursuant to 43 CFR 4.242 (h).

The petitioner in support of her contentions in effect states that Throws First's estate was probated without listing her as an heir. She asserts that she should have been included as an heir, being a daughter of a predeceased daughter of the decedent.

She further asserts that her mother was Hallowing Woman, a/k/a Haloween Goggles and Theresa Throws First Goggles, born 1886, married to John B. Goggles, 1901. Petitioner declares she was born in 1903.

In support of her petition there were submitted copies of the following:

1) Marriage certificate showing a ceremonial marriage having taken place between John Baptist Goggles and Theresa Throwing First on Aug. 20, 1903.

2) Certificate of Baptism certifying baptism on Aug. 20, 1903, of Mary Goggles Antelope born June 7, 1903, to John B. Goggles and Theresa Throwing First.

3) Delayed Birth Certificate sworn to by the petitioner on Aug. 1, 1960, wherein the petitioner declares her name at birth, June 7, 1903, to be Mary Goggles and her parents to be John B. Goggles, age 19, and Halloween (Hollowing Woman) Throws First, age 17.

4) Census rolls record of Catherine Throws First, from 1892 through 1902. The rolls reflect Catherine to have been 16 in 1892 and single, her maiden name being Catherine Reed; that she married Throws First in or about 1898 at age 22. The roll for 1899 shows Throws First and Catherine Throws First to have a daughter, age 14. The roll for 1900 shows a daughter, Hollowing Woman, age 3. The roll for 1901 and 1902 shows Hollowing Woman, Halloween, to be 4 and 5, respectively.

*Not in Chronological Order.

A docketing notice was issued by the Board on Oct. 20, 1976, and opportunity afforded the petitioner and other interested parties to submit within 30 days briefs or statements in opposition to or support of the petition. No additional information was submitted in support of said petition.

[1] Where no cogent reasons are alleged and the petition for reopening is submitted after the statutory period for filing, a reopening will not be allowed.

We are not persuaded by petitioner's allegations and find no cogent reasons for granting reopening.

The petitioner alleges she is the granddaughter of decedent; that she was born June 7, 1903 to John Baptist Goggle and Hallowing Woman, a/k/a Haloween Goggles, and Theresa Throws First.

The census rolls show one Catherine Reed, age 22 to have married Throws First in or about 1898. This is corroborated by the records supplied by the Superintendent, Wind River Indian Agency, and testimony of Gregory Blackburn, a disinterested witness who knew decedent all of his life.

Although the petitioner asserts that Hollowing Woman, Haloween Goggles and Theresa Throws First were one and the same person, she supplies no supportive evidence of same.

Moreover, assuming Hallowing Woman, Haloween Goggles and Theresa Throws First were one and the same, we are faced with an apparent impossibility, *i.e.*, the undisputed fact that Hallowing Woman, a/k/a Haloween Goggles and Theresa Throws First, at the age of 6, gave birth to the petitioner, Mary Goggles Antelope. We give no weight to the delayed birth certificate for obvious reasons.

In view of the foregoing reasons, the petition to reopen must be denied.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition to reopen be, and same is hereby DENIED.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Chief Administrative Judge.

UNITED MINE WORKERS OF AMERICA
(LOCAL UNION NO. 1993)
v.
CONSOLIDATION COAL COMPANY

8 IBMA 1

Decided *June 3, 1977*

Appeal by Local Union No. 1993, United Mine Workers of America from an initial decision issued by Administrative Law Judge Steffey on Feb. 2, 1977, in Docket No. PITT 77-7, in which was incorporated a previous order granting partial summary decision and dismissal of an Application for Compensation filed under sec. 110 (a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation: Generally

A claim for compensation under sec. 110 (a) for miners idled by a withdrawal order issued under sec. 104(a) of the Act is sustainable only as to those miners specifically withdrawn from the mine or an area of the mine by the terms of the withdrawal order as issued.

2. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation: Generally

A claim for compensation under sec. 110(a) at the rate allowable for withdrawal orders issued for an unwarrantable failure to comply with a mandatory standard is not sustainable where such claim is predicated upon an imminent danger withdrawal order issued under sec. 104(a) of the Act.

APPEARANCES: Robert L. Jennings, Jr., Esq., for appellant, Local Union No. 1993, United Mine Workers of America; Thomas A. Koza, Esq., and Anthony J. Polito, Esq., for appellee Consolidation Coal Company.

OPINION BY ADMINISTRATIVE LAW JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On Oct. 29, 1976, Local Union No. 1993, United Mine Workers of America (Local No. 1993) filed its Application for Compensation on behalf of all miners employed at the Renton Mine of Consolidation Coal Company (Consolidation) who allegedly were idled as the result of certain closure orders issued by the Mining Enforcement and Safety Administration (MESA) in Sept. 1976. The Application for Compensation was filed pursuant to sec. 110(a) of the Federal Coal Mine Health and Safety Act of 1969 (the Act).[1]

On Sept. 8, 1976, a MESA inspector determined that an imminent danger existed in the 3 east section of the Renton Mine and issued Withdrawal Order No. 1 FJM under sec. 104(a) of the Act, requiring that all persons be withdrawn from and prohibited from entering "The entire 3 east section" of the mine.[2] As a result of an accumula-

[1] Sec. 110(a) provides in pertinent part:

"If a coal mine or area of a coal mine is closed by an order issued under sec. 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal mine or area of a coal mine is closed by an order issued under sec. 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. * * *"

[2] The issuance of an imminent danger withdrawal order is provided for as follows:

"Sec. 104(a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and

tion of methane gas in the 3 east section an imminent danger was found to exist and Modification Order No. 2 FJM JVC was issued on Sept. 15, 1976, withdrawing all persons from the 1, 2 and 3 east sections. This modification order, which affected only the 1 and 2 east sections since the 3 east section had already been closed, was terminated later that same day. All conditions were corrected and the original order, No. 1 FJM of Sept. 8, 1976, was terminated on Sept. 28, 1976.

In its application, Local 1993 sought 1 week of compensation under the unwarrantable failure provisions of sec. 110(a) for all the miners employed at the Renton Mine when the sec. 104(a) order of Sept. 15, 1976, was issued, rather than compensation for only the miners who were specifically withdrawn by the order. The basis for the claim of 1 week's compensation was the contention of Local 1993 that the idlement was a direct result of Consolidation's unwarrantable failure to comply with mandatory standards. Local 1993 claimed that all 100 miners working on each of the three shifts were idled even though only from 16 to 24 miners were specifically withdrawn by the terms of the sec. 104(a) order.

In its Answer, Consolidation moved for an order dismissing portions of the Application and for partial summary decision.

On Jan. 14, 1977, the Judge granted Consolidation's motion to dismiss, holding that only those miners specifically withdrawn from a mine by a withdrawal order are "idled by such order" within the meaning of sec. 110(a) of the Act. The Judge dismissed those paragraphs of the Application which sought compensation for 1 week for all miners who allegedly were idled as a direct result of Consolidation's unwarrantable failure to comply with the Act. It was held, on the basis of previous decisions of the Board,[3] that the term "unwarrantable failure" as used in the third sentence of sec. 110(a) relates only to an "unwarrantable failure" found by an inspector to exist at the time of the issuance of an unwarrantable failure withdrawal order under sec. 104(c). These issues comprise the two issues presented for review.[4]

thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this sec., to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists."

[3] The Judge cited *UMWA* v. *Clinchfield Coal Co.*, 1 IBMA 33, 1971–1973 OSHD par. 15,367a (1971); *UMWA* v. *CF&I Steel Corp.*, 3 IBMA 187, 81 I.D. 308, 1973–1974 OSHD par. 17,962 (1974), *aff'd sub nom. CF&I Steel Corp.* v. *Morton*, 516 F. 2d 868 (10th Cir. 1975); and *Billy F. Hatfield* v. *Southern Ohio Coal Co.*, 4 IBMA 259, 269, 82 I.D. 289, 1974–1975 OSHD par. 19,758 (1975), *pending sub nom. District 6, UMWA* v. *Interior Board of Mine Operations Appeals*, No. 75–1704 (D.C. Cir. filed July 21, 1975).

[4] On Feb. 1, 1977, Local 1993 filed a motion seeking permission to withdraw those paragraphs of its application not encompassed in the Judge's Order of Jan. 14, 1977, as those paragraphs made no allegation not already contained in the paragraphs dismissed. By Orders dated Feb. 2 and 16, 1977, permission to withdraw these paragraphs was granted and the Judge ruled that the proceedings before him were concluded.

On appeal Local No. 1993 contends that miners not expressly required to be withdrawn from a mine by a sec. 104(a) order are nonetheless "idled due to such order" within the meaning of sec. 110(a) when they believe themselves to be exposed to that same imminent danger and voluntarily withdraw themselves from the mine or a portion of a mine. The miners herein are alleged to have determined that the accumulation of methane gas found by the inspector posed an explosion hazard throughout the mine. Additionally, Local No. 1993 urges the Board to overturn our decisions in *Billy F. Hatfield*, *supra*, and *Clinchfield Coal*, *supra*, and find that miners idled by a sec. 104(a) withdrawal order are entitled to up to 1 week of compensation under sec. 110(a) when the imminent danger necessitating withdrawal arises from an unwarrantable failure to comply.

Consolidation's position on appeal is that the Judge was correct in holding that the miners who voluntarily refused to enter the mine to work were not idled by the imminent danger withdrawal order within the meaning of sec. 110(a). With respect to the second issue on appeal, Consolidation contends that Local 1993 fails to set forth any persuasive reason why the Board's holdings in *Billy F. Hatfield*, *supra*, and *Clinchfield Coal*, *supra*, should be reversed or modified. Consolidation argues that these cases prohibit the introduction of evidence pertaining to the existence of an unwarrantable failure under sec. 104(c) in any proceeding brought pursuant to sec. 110(a) which is based upon an imminent danger withdrawal order issued under sec. 104(a) of the Act. It believes this position to be amply supported by relevant legislative history and the express wording of secs. 110(a) and 104(a).

Issues on Appeal

A. Whether the Judge erred in deciding that only those miners specifically withdrawn from a coal mine by an imminent danger withdrawal order, and not those miners assigned to work in other areas of the mine who voluntarily refuse to enter the mine to work, are "idled by such order" within the meaning of sec. 110(a) of the Act.

B. Whether the Judge erred in deciding that the claim for compensation of Local 1993 under sec. 110(a) at the rate allowable for withdrawal orders issued for an unwarrantable failure to comply with a mandatory health or safety standard is not sustainable where such claim is based upon an imminent danger withdrawal order issued under sec. 104(a) of the Act.

Discussion

A.

At issue here is whether sec. 110(a) requires compensation for miners who voluntarily decline to enter a mine until the condition giving rise to an imminent danger

closure order is abated, even though those miners were not specifically withdrawn by the subject order. Local 1993 is urging that the phrase "idled by such order" in sec. 110(a) should be afforded a broad and liberal construction in order to allow such compensation.

In rejecting this contention, Judge Steffey highlighted the fact that miners may seek review of an inspector's order under sec. 105 if they believe that the entire mine presents an imminent danger even though the inspector's order has designated only certain sections as dangerous.[5] He held that a proceeding under sec. 110(a) is not an appropriate vehicle by which to challenge the correctness of the order which is the basis of a claim for compensation. We agree.

The Board believes that sec. 103(g) also provides a remedy for miners who feel that they are exposed to an imminent danger in that it allows them to call for an immediate inspection by MESA to so determine.[6] The fact that Congress inserted this provision indicates to us an intention that miners were not to be permitted to independently determine that an imminent danger is present.

In addition to these remedies afforded miners by the Act, the express language of sec. 104(a) makes it clear that the inspector, and not an individual miner, is required to determine the area throughout which an imminent danger exists. Sec. 104(a) requires an inspector to determine the area of a mine which is affected by an imminent danger and sec. 110(a) also refers to a "coal mine or area of a coal mine." This wording indicates to us that Congress intended that miners be compensated only if an inspector's withdrawal order specifically excludes them from an affected area as described by the inspector or where miners are idled as a direct and necessary result of such order.

In view of the wording of these sections, for this Board to afford sec. 110(a) the expansive interpretation urged by Local 1993 would necessitate indulging in a most creative form of statutory construction.

[5] Sec. 105 provides in pertinent part:

"(a)(1) An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. * * * The applicant shall send a copy of such application to the representative of miners in the affected mine, or the operator, as appropriate. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof or to the time fixed in such notice. * * *"

[6] Sec. 103(g) provides in part:

"Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. * * * Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title."

Furthermore, we do not believe that compensation proceedings under the Act are intended to be a punitive component of the overall enforcement scheme as contended by Local 1993. Rather these provisions are directed at providing miners with partial recompense for their idlement occasioned by the sudden issuance of withdrawal orders. *See Island Creek Coal Company*, 5 IBMA 276, 283, 82 I.D. 598, 1975–1976 OSHD par. 20,225 (1975); *Rushton Mining Company*, *infra* at 721–22.

B.

It is undisputed that the Application involved herein is based upon a closure order and subsequent modification orders which were predicated upon MESA's finding of an imminent danger. Local 1993, however, is attempting to take advantage of the greater compensation benefits allowable when a closure order is issued on account of an unwarrantable failure of the operator to comply with mandatory standards.

The Board has previously addressed this contention and in both *Clinchfield*, *supra*, and *Billy F. Hatfield*, *supra*, we have held that under section 110(a), miners are entitled to compensation under the terms of the closure order as issued. The Judge relied on these decisions, which we are now urged to overturn, in rejecting Local 1993's contention.

We believe, as did the Judge, that our previous rationale remains valid and it is undisputed that these decisions are dispositive of the issue Local 1993 raises herein. The Court of Appeals for the Third Circuit has similarly recognized that the greater compensation benefits of sec. 110(a) are applicable only when the MESA inspector has found an unwarrantable failure to comply by the operator. *Rushton Mining Co.* v. *Morton*, 520 F. 2d 716, 719 (3d Cir. 1975).

The Board is not persuaded by Local 1993's own interpretation of relevant legislative history which we have previously reviewed and analyzed. *See Billy F. Hatfield*, *supra*, at 267–269. The Judge also thoroughly examined these Congressional reports and concluded that Congress intended that the compensation benefits in the third sentence of sec. 110(a) be predicated up the issuance of a sec. 104(c) withdrawal order.

We will, therefore, adhere to our previous holdings until a contrary determination is made by the courts.[7]

Furthermore, it has been held that the validity of a sec. 104(a) Order of Withdrawal is not in issue in a compensation proceeding under section 110(a). *United Mine Workers of America (District 14, Local*

[7] Our decision in *Billy F. Hatfield, supra,* is currently pending on appeal in the Circuit Court for the District of Columbia wherein the question presented here is at issue. *See* fn. 3, *supra.*

Union 9856) v. *CF&I Steel Corporation, supra.*

Local 1993 claims it is not dissatisfied with the terms of the withdrawal orders involved herein and asserts that its position is a matter of statutory construction. However, its interpretation of sec. 110(a) is tantamount to an attempt to challenge and modify the terms of the subject closure orders, which challenge should have been sought pursuant to section 105. Such a review of the orders herein was not sought within the 30-day time limit prescribed by sec. 105(a), and Local 1993's present request for leave to amend its application for the purpose of seeking alteration of the sec. 104(a) order is not timely, and therefore is denied. Local 1993 could have pursued the remedy provided by sec. 105 and filed an Application for Compensation simultaneously.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED, and that the request for leave to amend Local 1993's Application for Compensation IS DENIED.

HOWARD J. SCHELLENBERG, JR.
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

APPEAL OF H. M. BYARS CONSTRUCTION CO. AND NEVADA PAVING, INC., JOINT VENTURE

IBCA-1098-2-76

Decided *June 7, 1977*

Contract No. H50C14207884, Specification No. Plir-Cons 1-1250-2-42, Bureau of Indian Affairs.

Sustained in Part.

1. Contracts: Construction and Operation: Notices

The 20-day notice provision of the changes clause is found inapplicable when the Board finds numerous survey errors were the principal cause of most of the costs claimed and that such errors came within the defective specification exception to the notice requirement of the changes clause.

2. Contracts: Performance or Default: Compensable Delays

When the Government is obligated to provide the requisite surveying and staking services on a project the contractor is entitled to compensation for delays caused directly by the Government's failure to have sufficient surveying and staking performed or caused directly by erroneous surveying and staking.

APPEARANCES: Mr. Charles M. McGee, Sanford, Sanford & McGee, Attorneys at Law, Reno, Nevada, for the appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE VASILOFF

INTERIOR BOARD OF CONTRACT APPEALS

Findings of Fact

The contract, awarded on June 30, 1972, to H. M. Byars Construction

Co. and Nevada Paving, Inc., a joint venture, is in the amount of $595,917.07. Work required to be performed under the contract was for the appellant to furnish all labor, materials, equipment, and services for grading, draining, and surfacing of 7.481 miles of Route 2 and hot bituminous concrete overlay of .778 mile of Route 201, and grading, draining and surfacing of .501 mile of Route 201 on the Pyramid Lake Indian Reservation, Washoe County, Nevada. Standard Form 23–A (Oct. 1969 Edition) was made part of the contract. Work was to commence within 10 calendar days after the date of receipt of notice to proceed and was to be completed within 200 calendar days from the date of receipt of such notice. Notice was received by appellant on July 22, 1972 (Appeal File Exh. 2). By letter dated Aug. 2, 1972, appellant was notified that the contract time would commence July 23, 1972, and would expire on February 7, 1973. (Appeal File Exh. 3.)

After the work commenced 3 change orders and a stop work order were issued by the contracting officer. Change order 1 issued on Dec. 4, 1972, increased the contract amount by $1,880.06 but did not change the contract completion date (Appeal File Exh. 5). Change order 2 issued Dec. 6, 1972, increased the contract amount by $1,240.60 but, again, did not change the completion time of the contract (Appeal File Exh. 6). On Dec. 20, 1974, the contracting officer issued a stop work order effective Dec. 19, 1972, because of weather limitations (Appeal File Exh. 7). As of Dec. 19, 1972, appellant had completed all items of work except the chip seal coat. On May 18, 1973, the contracting officer issued an order to resume work (Appeal File Exh. 8). The project work was substantially complete on May 25, 1973 (Appeal File Exh. 9–3). Change order 3, issued on June 28, 1973, decreased the contract amount by $273.44 with no change in the completion date of Feb. 7, 1973, and reduced the contract to $598,764.36 (Appeal File Exh. 10). Because of the issuance of the suspension of work order the contracting officer in his final decision extended the completion time of the contract 149 days to July 6, 1973. At the time of the final decision appellant had received a total of $656,994.54 in payments on the contract (Appeal File Exh. 11–2).

Clauses 3 (changes) and 23 (suspension of work) of Standard Form 23–A provide as follows:

"3. CHANGES

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any changes in the work within the general scope of the contract, including but not limited to changes:

"(i) In the specification (including drawings and designs):

"(ii) In the method or manner of performance of the work;

"(iii) In the Government-furnished facilities, equipment, materials, services, or site; or

"(iv) Directing acceleration in the performance of the work;

"(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction,

instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

"(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereinafter.

"(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: *Provided, however*, That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: *And provided further*, That in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

"(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

"(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

"23. SUSPENSION OF WORK

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

"(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

"(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract."

Sec. 105.08 of the General Provisions provides:

"105.08 Construction Stakes, Lines, and Grades

The contracting officer will set such initial construction stakes establishing lines, slopes, and continuous profile-grade in road work, and reference lines

and bench marks for bridge work, culvert work, protective and accessory structures and appurtenances as he may deem necessary, and will furnish the contractor with all the necessary information relating to lines, slopes, and grades. These stakes and marks will constitute the field control by and in accordance with which the contractor shall establish other necessary controls and perform the work.

"The contractor will be held responsible for the preservation of all stakes and marks; and if any of the construction stakes or marks have been carelessly or willfully destroyed or disturbed by the contractor, the cost to the Government of replacing them may be charged against him and may be deducted from the contract price.

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

The required surveying and staking was performed for the Government by another contractor under a separate contract.

This appeal arises out of survey errors conceded by the Government (Tr. 176). Appellant has appealed 16 separate items. All of these items arose during the period of July 18, 1972, to Nov. 2, 1972. The first written notice given by the appellant to the Government was on July 13, 1973 (Appeal File Exh. 12). However, although not a part of the record, the contracting officer has stated in his final decision that appellant hand delivered a written notice of the claim items to the contracting officer's authorized representative on Feb. 28, 1973 (Appeal File Exh. 12, 14).

[1] In denying the 16 items the contracting officer relied, along with other grounds, upon the failure to provide the 20-day written notice required in clause 3 (changes) and clause 23 (suspension of work) quoted above. The Government counsel during the hearing and in his brief also relies upon this defense. The contracting officer in a 62-page final decision did not show he had any difficulty in discussing the merits of the claim items. Indeed, out of a total of 20 claim items the contracting officer allowed 3 and denied 17. Appellant withdrew 1 item (Item 4c), during the hearing, leaving 16 items before the Board (Tr. 270, 271). In any event within clause 3 is an exception for defective specifications which makes the 20-day notice provision inapplicable to the costs involved in this appeal. Appellant had a right to rely upon the survey services provided by the Government and if there were significant and pervasive errors in the surveys the specifications were defective. See *Morrison-Knudsen Co., Inc.* v. *The United States*, 184 Ct. Cl. 661 (1968); *Jos. D. Bonness, Inc., et al.*, ASBCA No. 18828 (Dec. 27, 1973), 74–1 BCA par. 10,419; *Desonia Construction Company*, ENG BCA Nos. 3231,

3250, 3256, 3257 (Nov. 17, 1972), 73-1 BCA par. 9797.

The 16 items will be described using the same identifying designation as the parties.

Item 1(a)

On Aug. 3, 1972, appellant discovered the left slope stake was 10 feet closer to the center line of the road than it should have been at station 65+00. After the cut had been constructed to a depth of 30 feet below the incorrect slope stake, the error was discovered. To correct this error it necessitated the repioneering of the slope 100 feet in each direction from station 65+00. The Government compensated appellant for the additional 433 cubic yards excavated pursuant to the unit price for unclassified excavation. Appellant concedes it received payment for the additional excavation of 433 cubic yards (Tr. 17, 24). Appellant seeks payment of $211.97 for the cost of equipment and labor without profit to rectify the mistake (Appeal File Exh. 12–3, 12–7; Tr. 18). Another reason for denying this item given by the contracting officer was the lack of timely notice pursuant to clause 3 (changes) of Standard Form 23–A.

Item 1(c)

Between stations 44+00 and 49+00 on Aug. 30, 1972, appellant found that the red head stakes were in error. The tops of the red head stakes were to be the grade level (Tr. 48). When a contractor has completed the subbase he requests the Government to put in the red head stakes (Tr. 48). As a result of the error appellant had to regrade and finish the grade level three times, and seeks $309.93 for the cost of equipment and labor with no profit to correct the error (Appeal File Exh. 12–4, 12–9; Tr. 49). The contracting officer in denying the claim cites a letter from the company which performed the survey work on the project dated Mar. 27, 1973. The survey company states in the letter that appellant had left the subgrade too high (Appeal File Exh. 20). In his testimony the contracting officer's authorized representative admitted there were survey and stake errors for this item (Tr. 176). In his final decision the contracting officer admitted there is no unit price applicable for this corrective work. Pursuant to the provisions of Section 105.08 of the General Provisions the reimbursement would be governed by clause 3 (changes) of Standard Form 23–A, but, concluded the contracting officer, since appellant did not provide timely notice pursuant to clause 3 the claim is denied.

Item 1(d)

The slope stakes at station 368+00 and 368+50 were discovered on Aug. 31, 1972, to be incorrectly marked. The cut slope marked on the stakes was 4 to 1 but should have been marked 2 to 1. Appellant seeks $211.57 for equipment and labor without profit for correcting the mistake (Appeal File Exh. 12–4, 12–10; Tr. 71, 74–76).

Appellant was actually paid for a 2 to 1 slope by the Government based on the design slope notes although the slope stakes on the site were incorrectly marked 4 to 1. Less excavation is necessary to construct the 4 to 1 slope than the 2 to 1 slope. Because of the incorrectly marked slope stakes appellant unnecessarily excavated 14.7 cubic yards of unclassified excavation and the contracting officer awarded $15.14 (14.7 cubic yards × $1.03 unit price) as increased payment (Appeal File Exh. 22–3; Gov't. Exh. A; Tr. 78–80).

Item 1(e)

After 2 hours of work between stations 360+00 and 375+00 on Sept. 5, 1972, appellant discovered that the super elevations written on the stakes were incorrect (Tr. 89, 94, 96, 103, 104, 105). A super elevation is an elevation indicating the degree the road is to be banked around a curve to handle the traffic (Tr. 88). As a result of the error appellant moved his equipment to another portion of the project to work while the correct super elevation was determined. For moving the equipment to another site and back, appellant seeks $370.81 with no profit (Appeal File Exh. 12–4, 12–11; Tr. 90). The contracting officer found that this unscheduled cost of movement of equipment did not have a unit price in the contract so any reimbursement would be governed by clause 3 (changes) of Standard Form 23–A pursuant to the provisions of Sec. 105.08 of the General Provisions. Due to lack of timely notice the claim was denied in the final decision of the contracting officer.

Item 1(f)

On Sept. 14, 1972, appellant discovered that the red head (finishing grade) stakes were .3 of a foot too low between stations 6+50 and 9+50. As the blademan was cutting down to the red head stakes for a couple of hours he left large windrows for 300 feet (Tr. 110–112, 115). After acknowledging the error the contracting officer's authorized representative instructed the appellant to disregard the red head stakes and finish the grade by "eye balling it" (Tr. 112). Appellant seeks $93.08 for the corrective work for equipment and labor with no profit (Appeal File 12–5, 12–12; Tr. 113). The contracting officer in his final decision stated that the Government's direction to "eye ball" the grade saved the appellant time and money since no time was lost looking for red head stakes. In addition, since there is no unit price for the appellant's work claim, clause 3 (changes) of Standard Form 23–A is applicable pursuant to Sec. 105.08 of the General Provision. Again, held the contracting officer, since appellant failed to comply with the notice requirements the claim is denied.

Item 1(g)

The next survey error was discovered by appellant on Sept. 21, 1972,

at station 242+00. After hauling rock material to complete the roadway embankment, appellant realized the slope stakes were 1 foot too high. The extra material had to be removed and hauled away. The contracting officer found this claim justified and allowed a payment of $201.06 (195.2 cubic yards × $1.03 unit price for unclassified excavation). Appellant seeks a total of $411.99 for the cost of equipment and labor without any profit (Appeal File Exh. 12–5, 12–13; Tr. 119, 120). Since the Government allowed $201.06, this leaves a balance sought by appellant of $210.93. The construction supervisor for appellant testified that the material was unclassified excavation if it is moved once but if moved twice it is no longer unclassified excavation (Tr. 120, 121).

Item 1(h)

On Sept. 22, 1972, appellant was hauling fine material from station 200+00 to 240+00 to slope stake grade in preparation for the finish grade. The slope stake grades were .17 to .23 of a foot too low. As a result the red head stakes, when put in, were raised .2 of a foot for 4,000 feet (Tr. 130–132). With the red head stakes in the ground appellant had to raise the subgrade and had to work around the red heads in the work area with its equipment (Tr. 132). Appellant was paid the unit prices for the additional material it brought in as subgrade either as unclassified excavation or borrow (Tr. 133). What appellant seeks is $1,068.34 for men and equipment with no profit for working around the red head stakes to correct the error (Appeal File Exh. 12–5, 12–14; Tr. 133). The contracting officer also found that since there is no unit price for subgrade finishing, clause 3 (changes) of Standard Form 23–A is applicable pursuant to Sec. 105.08 of the General Provisions. Failure to give timely notice precludes consideration of the claim held the contracting officer.

Item 1(i)

Appellant claims $525.20 which includes no profit for delay on this item which occurred on Oct. 18, 1972, between station 0+00 and 10+00 (Appeal File Exh. 12–6, 12–15). While appellant was attempting to finish the aggregate base course to red head grade he realized there was a .3 foot error. Because of this error appellant claimed 8 hours of delay because there was no other place on the job to work due to inadequate staking on the project site (Tr. 143–146, 148–150, 155). The contracting officer's authorized representative admitted he does not disagree with appellant on this item except on the length of the delay. He testified the delay was not more than 2½ hours (Tr. 159–161). Although appellant alleges it took 8 hours to rectify the mistake in the complaint its construction superintendent testified it would take up to 6 hours to correct the mistake (Tr. 155). In the final decision the contracting officer

stated appellant could have worked on the project at another location but cited no evidence for this holding. Neither did the Government introduce any evidence during the hearing to support this statement. Since there is no unit price established in the contract for this delay claim the contracting officer also held clause 3 (changes) of Standard Form 23–A pursuant to Section 105.08 of the General Provisions was applicable. And since there was a failure of timely notice the claim was disallowed.

Item 1(j)

For failure to have two survey crews on the project on Oct. 20, 1972, appellant seeks $250.90 for delay but no profit (Appeal File 12–6, 12–16). The Government had promised to have two survey crews on the job and the contracting officer admits in his final decision only one crew was present (Tr. 168). Appellant alleges that since it was constantly on the heels of the survey crew it requested a second crew to speed up the staking so appellant could proceed without constant delays (Tr. 169). In answer to the Board's question of whether appellant was ever delayed for lack of stakes, the authorized representative for the contracting officer testified: "Well, blue topping yes. On the subgrade and also the A–B I guess he was on top of surveyors all the time, most of the time." (Tr. 173.) The contracting officer stated in his final decision appellant could have worked on furrow ditches or the obliteration of the old roadway. Appellant's construction superintendent stated furrow ditches could not be put in until the end of the job because it was not established yet where they were to be located. And in regard to obliteration of the old roadway he testified that since appellant was still using this to transport equipment this could not be done until the end (Tr. 149, 150).

Since these were delays due to lack of survey stakes the contracting officer held that clause 3 (changes) of Standard Form 23–A was applicable pursuant to Section 105.08 of the General Provisions and due to the lack of timely notice the claim is denied.

Item 1(k)

On Nov. 2, 1972, the survey crew was late and did not arrive until 10 a.m., which is admitted by the contracting officer. As a result appellant seeks $301.24, which includes no profit, for the delay since appellant's work force could not commence work until 2 p.m. (Appeal File Exh. 12–6, 12–17). The item was denied by the contracting officer due to lack of timely notice under clause 3 (changes) of Standard Form 23–A which is applicable under Sec. 105.08 of the General Provisions. In addition, the contracting officer stated in his final decision that even if the survey crew had arrived on time there would still have been a 3 to 3½ hour delay in order for the stakes to be set in the ground.

Item 4

This item 4 concerns five specific instances wherein appellant alleges unanticipated costs due to errors of survey stakes.

Item 4(a)

On July 19, 1972, appellant was working on the site when it discovered that the slope stakes were 1 foot off for the entire project. The actual ground elevation was 1 foot lower than indicated on the design (Tr. 188, 190, 203). Appellant seeks $633.70 for duplicating work after the grade change was made to correct the error. This claim was originally in the amount of $747.72 but at the hearing counsel for the appellant amended his claim to $633.70 when he realized that it included an amount for brush clearing a second time (Tr. 215). This amount is for the labor and equipment charges with no profit (Tr. 215). The 1 foot error is conceded by the contracting officer.

Appellant had commenced to build slopes and grade and then after the 1 foot error was discovered the completed work had to be lowered 1 foot (Tr. 202, 204).

In his final decision the contracting officer states that the notice to proceed was issued to appellant on July 19, 1972 and was acknowledged as received on July 22, 1972. The work that had to be duplicated was first done on July 18 and 19, 1972, and since the appellant had commenced work before receiving the notice to proceed and the error was also discovered before the notice to proceed was received the claim is denied. Government counsel during the hearing also relied upon this ground.

On July 13, 1972, a pre-construction conference was held. Appellant was given approval by the Government representatives, including the contracting officer's authorized representative who was present, to proceed with the work at once (Tr. 195, 196, 201). Appellant actually began operations on July 14, 1972, and began to move equipment onto the work site on July 17, 1972 (Tr. 193, 201, 202). During these days the Government's authorized representative for the contracting officer and the Government's inspector were on the work site (Tr. 201, 219). The record does not disclose that the Government objected to appellant's beginning work before the actual notice to proceed was received (Tr. 220).

Item 4(b)

Item 4(b) consists of two separate parts. The first part consists of a change in the balance points. This is related to item 4(a), the 1 foot error in elevation for the entire project. The original balance points were based on the erroneous elevation and appellant prepared its bid on this basis (Tr. 228). The balance points indicate how far the excavated material from the cut is to be hauled and placed in the fill (Tr. 251). After the 1 foot error in elevation was discovered the balance points throughout the entire proj-

ect were changed on July 26, 1972. The contracting officer adopts a perplexing position in his final decision. He states that the balance points are provided by the Government only as a guide to the contractor and then also states that the appellant "* * * elected to locate the balance points on the project with full knowledge of the elevation error, and the probable grade change to compensate for the elevation error which would probably cause minor changes in the balance point locations." The Board notes that the balance points were changed on sheets 9 through 13 of the construction plans by the Government. Appellant did not receive the new balance points from the Government until after the middle of August 1972 (Tr. 241, 248). Appellant seeks to recover $202 for its labor and equipment with no profit for the effort expended in attempting to establish new balance points on the job (Appeal File Exh. 12–25, 12–29; Tr. 229).

The second part of item 4(b) is in the amount of $1,256.39 for labor and equipment with no profit (Appeal File Exh. 12–25, 12–29). At station 65+00 the design required a ½ to 1 foot slope, or ½ foot horizontal and 1 foot vertical. Unfortunately this area consisted of sand and the ½ to 1 foot slope would not stand in place (Tr. 231, 250). To correct this design error the Government directed appellant to cut the slope back and construct a "bench" of 15 feet until solid rock was reached so the slope would be stabilized (Tr. 232). With the design change appellant actually excavated an additional 7,810 cubic yards and was paid the unit price for unclassified excavation (Tr. 235). The amount sought for the change in the slope is for the repioneering appellant had to do in order to get its equipment in place to accomplish the change in design.

The position of the contracting officer is that the repioneering is included in the payment for the 7,810 cubic yards of additional excavation pursuant to the unit price for unclassified excavation. Also for failure to give timely notice pursuant to clause 3 (changes) of Standard Form 23–A the claim is denied.

Item 4(d)

During the hearing appellant reduced item 4(d) from $607.32 to $397.15 (Tr. 274). On August 21, 1972, appellant was delayed because of a lack of pipe location stakes and seeks the $397.15 for equipment and labor with no profit (Appeal File Exh. 12–26, 12–31; Tr. 276, 277). The claim was denied by the contracting officer due to failure of the appellant to give timely notice pursuant to clause 3 (changes) of Standard Form 23–A. A failure to supply the stakes was a change in Government furnished services stated the contracting officer. The Government presented no evidence during the hearing on this item (Tr. 283).

Item 4(e)

Due to a lack of slope staking appellant moved two scrapers off the construction site on Aug. 25, 1972, to mitigate any possible damages. The scrapers were moved to another job. This left three scrapers on the construction site. Appellant had planned to use five scrapers on this portion of the work in combination with one push cat (Tr. 285, 290). Five scrapers would keep one push cat fully utilized. Since only three scrapers were left on the job appellant claims the push cat was not being fully used and thus sat idle 40 percent of the time (Tr. 285, 286). Appellant, due to the delay in slope staking, actually performed the work in Sept. 1972 (Tr. 285). The work was originally scheduled by appellant to be performed in early Aug. (Tr. 285, 290, 291). Due to failure to have the project sufficiently staked appellant did not have any place else to work with the equipment (Tr. 293). The contracting officer held that the slope staking was completed Aug. 29, 1972, however, due to corrections in the staking it was actually completed on Sept. 18, 1972. Appellant seeks to recover $1,600 for 40 percent of its cost of the push cat due to its nonuse, this includes no profit (Appeal File Exh. 13–8; Tr. 286).

Lack of timely notice pursuant to clause 3 (changes) or clause 23 (suspension of work) of Standard Form 23–A was cited by the contracting officer in denying this item. Also stated by the contracting officer in denying this item was that item 3, which was settled, included this claim. The Government presented no evidence on this item (Tr. 299).

Item 4(f)

Originally in the amount of $9,000 item 4(f) was reduced to $7,515 during the hearing by the appellant (Tr. 299, 301, 307–313). For the period of August 7–25, 1972, appellant could not fully utilize three scrapers on the job due to lack of stakes (Tr. 314, 315). These scrapers were rented for this project and appellant seeks to recover the proportionate cost of the rental charges only for the period of time the scrapers were not operated (Tr. 308, Appellant Exh. 6, 7). This item does not include profit. The Government offered no evidence on this item (Tr. 320).

Item 5

Between stations 275 and 315 appellant was required to construct a ½ foot to 1 foot slope. Due to sandy soil it would not hold. To correct this design error the Government instructed appellant to build a 1 to 1 foot slope. In doing the corrective work appellant had to drill into and blast the solid rock which was below the sand. Appellant had to expend a "couple of weeks" to remove the sand so the rock would be exposed. Until the rock was all exposed appellant did not realize the amount of the drilling and blasting necessary. Several thousand cubic yards had to be removed before the drilling and blasting could take place (Tr. 321–325). Appellant had anticipated this area to have been

staked around the first of August, at which time the rock would have been discovered (Tr. 326). However, the staking was totally complete only on Sept. 18, 1972. Ordinarily this would appear to be a claim for a differing site condition. However, appellant is claiming reimbursement only for the overtime payments to its drilling and blasting crew because of the delayed staking (Tr. 327). Appellant originally claimed $3,980 but during the hearing the amount was reduced to $2,990.62 (Tr. 332–338). The overtime period was for Sept. 18 to Oct. 22, 1972 (Tr. 333). Profit on this item is not sought by appellant. No evidence was presented by the Government on this item (Tr. 346).

Decision

Before proceeding further the Board notes the appellant completed the job within the time period allowed by the contracting officer. In all of the items for which appellant seeks recovery no amount is sought for profit, it only seeks to recover its out of pocket costs. The record fully discloses that the survey contractor engaged by the Government to provide the requisite surveying and staking on this project was less than adequate. Considering the fact that when the survey work was performed it was frequently erroneous and also the fact of the survey work not being completed on schedule, it is commendable that appellant has completed the work under this contract within the allotted time. The Board notes there is no dispute on the survey and staking errors. During the hearing the Government offered no affirmative evidence to rebut the evidence presented by appellant on quantum, except for item 1(i).

Item 1 (a)

It is not denied that the left slope stake was 10 feet closer to the center line of the road than it should have been. It would appear that Sec. 105.08 of the General Provisions would govern this situation and provide payment only pursuant to the unit prices for unclassified excavation for which appellant has received compensation. However, the very provisions of Sec. 105.08 direct payment pursuant to clause 3 (changes) of Standard Form 23–A if the corrective work differs substantially from the original work. In order to perform the corrective work appellant had to repioneer the slope 100 feet in each direction. The Board finds that the repioneering necessitated by the Government's stake error differs substantially from the original work and thus clause 3 (changes) governs. See *Kinemax Corporation*, IBCA–444–5–64 (Jan. 19, 1967), 74 I.D. 28, 67–1 BCA par. 6085; *The Brezina Construction Company, Inc.*, IBCA–757–1–69 (Nov. 20, 1970), 70–2 BCA par. 8574.

Item 1(a) is sustained.

Item 1(c)

In his final decision the contracting officer relied upon a self-serving letter from the survey company.

The authorized representative for the contracting officer testified that there were survey and stake errors on this item. There is no unit price for the corrective work necessitated by the errors.

Item 1(c) is sustained.

Item 1(d)

Appellant constructed a 4 to 1 back slope pursuant to the stakes incorrectly marked 4 to 1. The correct marking should have been 2 to 1. The Government had actually paid appellant for work based on a 2 to 1 back slope, which required more excavation than the 4 to 1 slope. For unnecessary excavation of 14.7 cubic yards appellant received the unit price for this amount.

The Board believes this error is governed by the provisions of Sec. 105.08 of the General Provisions. The corrective work necessary is not substantially different from that described on the plans.

Item 1(d) is denied.

Item 1(e)

This item 1(e) was denied for lack of timely notice. The contracting officer in his final decision admitted there is no unit price for the work involved in this item. Since the Board has stated above that the notice provision is not applicable to this appeal, item 1(e) is sustained.

Item 1(f)

[2] The Government does not deny that its error caused appellant to leave windrows for 300 feet in the roadway. The fact that appellant was directed to correct the error by "eye balling it," thus saving appellant time and money by not having to look for red head stakes was used by the contracting officer in denying this item.

Appellant is entitled to have the work site properly surveyed and staked. Appellant is also entitled to recover where, as here, the Government's error caused it additional expense. The contracting officer admits there is no unit price for this corrective work.

Item 1(f) is sustained.

Item 1(g)

The Government has conceded entitlement on item 1(g). But maintains the Government, payment based on the unit price for unclassified excavation for the amount of extra material that had to be hauled away is the correct amount of compensation for this error in grade. Appellant's construction supervisor admitted that the material is unclassified excavation if moved once, but loses its characteristic if moved twice. The Board is not convinced that the hauling away of the extra material is work substantially different from that described in the plans.

Item 1(g) is denied.

Item 1(h)

In his final decision the contracting officer admitted there is no unit price for the corrective work required by the Government's error. Appellant had to do the corrective work, raising the subgrade, with its

men and equipment working around the red head stakes which were put into the ground by the Government. The normal course of work is to build the subgrade to the specified grade and then request the Government to set the red head stakes so the finishing grade may be completed. Appellant had to raise the subgrade working around the red head stakes.

Item 1(h) is sustained.

Item 1(i)

The only dispute on item 1(i) is whether there was an 8, 6 or 2½ hour delay. The Government's authorized representative for the contracting officer testified the delay was 2½ hours. Appellant's construction superintendent testified the delay would take up to 6 hours to correct the mistake. Due to lack of stakes appellant had no other place to work. The contracting officer, citing no evidence, stated in the final decision that appellant could have worked some place else on the project. Government counsel offered no evidence where appellant could have worked. The corrective work did not have a unit price admitted the contracting officer. Item 1(i) is in the total amount of $525.20 based on 8 hours or $65.65 per hour. The Board believes the delay was 6 hours or $393.90. Item 1(i) is sustained in the amount of $393.90.

Item 1(j)

Item 1(j), held the contracting officer, was not caused by survey errors, but rather a lack of survey stakes. Due to lack of timely notice the item was denied. The Board has held above that the notice provision is not applicable.

Item 1(j) is sustained.

Item 1(k)

That the survey crew was late on the job site is not denied by the contracting officer. The survey crew arrived at 10 a.m., and worked until 2 p.m., before enough survey work was completed and appellant could commence operations. The record is clear from testimony from the Government's own witness that the survey crew was never far enough ahead that appellant could plan its work with any degree of flexibility. The survey work and staking should have been completed far enough in advance to obviate any delays in the appellant's work. Under the rationale advanced by the contracting officer in denying the claim, the appellant would have a 3½ hour delay each day, if both appellant and the survey crew commenced work at 7 a.m. What the contracting officer appears to have failed to consider is that the survey work should be far enough advanced that there would never be any reason for delays due to lack of staking. Needless to add, appellant is also entitled to correct surveying and staking on a job when the contract provides the Government shall provide such services. From the review of the record on this job appellant was constantly confronted with the frustration of attempting to utilize the grossly inadequate

survey services supplied on this contract by the Government.

Item 1(k) is sustained.

Item 4(a)

That the work was actually performed July 18 and 19, 1972, is not denied by the contracting officer. That the Government agreed and permitted appellant to commence operations before actually receiving written notice to proceed is clear from the record. Indeed, Government personnel saw appellant on the job site on July 18, 1972, and did not object to appellant's operation. The error in elevation was discovered by appellant and the grade change was then corrected by the Government. Whether appellant commenced work on July 18 or July 22, 1972, the error would not have been discovered until actual cut and fill operations had commenced.

Item 4(a) is sustained.

Item 4(b)

The first porttion of this item 4 (b) is related to the previous item, 4(a), the error in elevation also threw the balance points off. In bidding on this contract appellant had a right to rely upon the balance points established by the Government. There is no denial that a 1 foot error in elevation for the entire project would affect the balance points. The notice to proceed is dated July 19, 1972. The new balance points were not furnished to the appellant until the middle of Aug. 1972.

The first portion of item 4(b) is sustained.

The second portion of item 4(b) is not an error in surveying, but actually a change in the design of the work at station 65+00, and thus covered by clause 3 (changes) of Standard Form 23–A. Appellant seeks only its cost to repioneer the slopes for its equipment to get into position to accomplish the design change directed by the Government. The contracting officer errs in treating this design change as a survey error and thus governed by Section 105.08 of the General Provisions.

The second portion of item 4(b) is sustained.

Item 4(d)

The contracting officer in his final decision based his denial of item 4(d), lack of pipe location stakes, on a failure of timely notice. The Board has held above that the notice provision is not applicable. There was a lack of pipe location stakes, causing a delay.

Item 4(d) is sustained.

Item 4(e)

The Government in the final decision takes the position that settlement of item 3 also included item 4(e). Item 3 concerned a dispute about payment of extra material as either borrow or as unclassified excavation, the latter having a higher unit price than the other. The Board cannot accept the contracting officer's conclusion that item 4(e) which hinges on lack of staking is included in item 3. The

staking was not completed until Sept. 18, 1972. The Government presented no evidence on this item to rebut the appellant's testimony.

Item 4(e) is sustained.

Item 4(f)

There is no denial of a lack of staking for the period covered by this item 4(f). Appellant could not utilize the 3 scrapers fully on the work site although it was obligated to pay the rental charges on the equipment. No attempt was made by the Government to offer evidence to show that the equipment could have been utilized on another part of the project.

Item 4(f) is sustained.

Item 5

Since the Government offered no evidence on item 5 the Board is faced with uncontradicted testimony of the appellant's witnesses. However, due to the contracting officer's circuitous argument in his final decision, the Board considers a few comments may be appropriate. It is noted appellant claims overtime for the period Sept. 18, 1972, to Oct. 22, 1972, for its drilling and blasting crew. The staking was completed on Sept. 18, 1972.

In his final decision the contracting officer discusses what drilling and blasting work was accomplished on the construction site for the period before Sept. 18, 1972, the date the staking was completed. The amount of drilling and blasting accomplished or not accomplished by appellant before Sept. 18, 1972, at other stations on this job is not relevant to the issue in item 5. Appellant is not requesting payment for drilling and blasting for any period before Sept. 18, 1972. Appellant has established that the Government was responsible for the design error between stations 275 and 315. The ½ to 1 foot slope in sandy soil would not hold. Appellant was directed to construct a 1 to 1 foot slope, but this necessitated appellant to remove vast quantities of sand and only then was rock discovered, which had to be drilled and blasted. If the staking had not been delayed, this design error could have been discovered earlier and perhaps any overtime for drilling and blasting required by the Government's delay in staking could have been avoided.

Item 5 is sustained.

Summary

Item 1(a) is sustained in the amount of	$211.97
Item 1(c) is sustained in the amount of	309.93
Item 1(d) is denied	
Item 1(e) is sustained in the amount of	370.81
Item 1(f) is sustained in the amount of	93.08
Item 1(g) is denied	
Item 1(h) is sustained in the amount of	1,068.34
Item 1(i) is sustained in the amount of	393.90

Summary—Continued

Item 1(j) is sustained in the amount of	250.90
Item 1(k) is sustained in the amount of	301.24
Item 4(a) is sustained in the amount of	633.70
Item 4(b) is sustained in the amount of	1,458.39
Item 4(c) is withdrawn	
Item 4(d) is sustained in the amount of	397.15
Item 4(e) is sustained in the amount of	1,600.00
Item 4(f) is sustained in the amount of	7,515.00
Item 5 is sustained in the amount of	2,990.62
Total	$17,595.03

KARL S. VASILOFF,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

MABLE M. FARLOW

30 IBLA 320

Decided *June 7, 1977*

Appeal from decision of the Oregon State Office, Bureau of Land Management, rejecting color of title application OR-12944.

Set aside and hearing ordered.

1. Boundaries—Patents of Public Lands: Generally—Public Lands: Riparian Rights—Surveys of Public Lands: Generally

In determining what land is conveyed under patents or grants of public land bordering a meandered watercourse, the general rule is that the waterline itself, not the meander line, constitutes the boundary. There is an exception where the meander line may constitute the boundary between lands omitted from the survey and the watercourse if fraud or gross error is shown in the survey. This exception is only applicable to limit the boundary of the surveyed lots on the side of the watercourse where the omitted land is shown. It does not apply to a lot on the opposite side of the watercourse from the omitted land so as to pass title to the omitted land with title to the lot on the opposite side. The waterline would remain the actual boundary of that lot.

2. Color or Claim of Title: Generally

A claim or color of title must be based on a document or documents, from a source other than the United States, which on their face purport to convey title to the land applied for, but which is not good title. The mere mistaken belief that the land applied for was included in the description set forth in the claimant's deed is insufficient to establish a claim or color of title.

3. Boundaries—Conveyances: Generally—Evidence: Generally—Color or Claim of Title: Description of Land

Extrinsic evidence may be used to make definite the description in a private deed which contains a latent ambiguity, either to determine actual or color of title. Therefore, a color of title claimant may introduced extrinsic evidence to establish whether the deeds in her chain of title were based upon plats, records and other documents which can be read together with the deeds as creating a color of title beyond the actual title shown on an official federal survey plat.

4. Color or Claim of Title: Good Faith

The requirement of good faith contained in the Color of Title Act necessitates establishing the 20-year period of possession under claim or color of title prior to the time the claimant learned of the defect in her purported title. If this re-

quires counting years during which the claimant's predecessors in interest held the land, their good faith must also be established.

5. Color or Claim of Title: Generally—Rules of Practice: Appeals: Hearings

The obligation for proving a valid color of title claim is upon the claimant. Where a claimant has alleged facts which, if proved, may establish her color of title, the Board of Land Appeals may order a fact-finding hearing pursuant to 43 CFR 4.415.

APPEARANCES: Dennis C. Karnopp, Esq., and C. Montee Kennedy, Esq., of Panner, Johnson, Marceau & Karnopp, Bend, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Mable M. Farlow appeals from the Apr. 14, 1975, decision of the Oregon State Office, Bureau of Land Management (BLM), rejecting her application OR-12944 under the Color of Title Act, Dec. 22, 1928 (45 Stat. 1069), *as amended*, 43 U.S.C. § 1068 *et seq.* (1970). Appellant filed her application on June 27, 1974, for certain land land west of the Deschutes River in sec. 12, T. 6 S., R. 13 E., W.M., Wasco County, Oregon. The State Office rejected the application because appellant's chain of title lacked a deed or other written instrument describing land west of the Deschutes River.

Appellant's chain of title begins with a patent issued in 1904 by the United States for land described as "Lots numbered three, four and five" in section 12, "according to the 'Official Plat of the Survey.'" The "Official Plat of the Survey," approved in 1883, places these lots between the east township boundary and the Deschutes River. As shown on that plat, lot 5 contains all the land in the S ½ SE ¼ of sec. 12 and east of the river, amounting to 30.96 acres. The land in the S ½ SE ¼ which is west of the river is designated lot 6. Lot 6 has never been patented.

There have been numerous conveyances of the patented parcel since 1904. Warranty deeds for six conveyances during 1927–1943 all describe the conveyed land as lots 3, 4 and 5. In 1946, appellant and her husband (now deceased) purchased for $50 land described as: "Lot Five (5), * * * containing 30 acres more or less. All mineral (perlite) rights retained on any part or parcel of above land which lays on East side of the Deschutes River."

This case arose because the 1882 survey, on which the 1883 official survey plat was based, erroneously meandered the Deschutes River as flowing through the approximate center of the S ½ SE¼ of sec. 12. By lot 5, the river actually curves and flows closer to the east township boundary. A 1972–73 dependent resurvey established new meanders of the river and subdivided the omitted lands in sec. 12 which are west of the river. The approved plat of this subdivisional survey shows two lots in the S ½ SE ¼ west of the river: lot 7, in the SW ¼ SE ¼, and lot 8, in the SE¼SE¼ bounding the river. The position of pa-

tented lot 5 is also shown in the SE¼SE¼ but east of the river and is much smaller than shown on the 1883 survey plat.

Appellant has applied for the land, shown in the resurvey as within lot 8, which is east of the 1883 meander line of the Deschutes River, but actually west of the river. The State Office, in rejecting her application, stated that no conveyance in appellant's chain of title described land west of the river. According to the State Office, the term "lot 5" only describes land east of the river.

Appellant contends generally that her chain of title gives color of title to the land west of the river because all of the public records show lot 5 as including land on both sides of the river with the exception of the erroneous 1883 survey plat. She also contends that the meander line shown on the 1883 survey plat is the boundary of lot 5. This would include land west of the river.

[1] If appellant is contending alternatively that she has actual title to the land west of the river up to the meander line as shown on the erroneous 1883 survey plat, we must reject this argument. The general rule is that survey meanders of rivers are run for the purpose of defining the sinuosities of the banks of the watercourse and to determine acreage, but they are not boundaries of the tract. The watercourse, not the meander line as actually run on the land, is the boundary of federal conveyances. *E.g.*, *United States* v. *Lane*, 260 U.S. 662 (1923); *Railroad Company* v. *Schurmeir*, 74 U.S. 272, 286–87 (1868). An exception to this rule has been created where fraud or gross error is shown in the survey or where facts and circumstances disclose an intention to limit a grant or conveyance to the meander line. In such situations, the meander line, not the watercourse, is considered to be the boundary of the federal conveyance. *E.g.*, *Jeems Bayou Fishing & Hunting Club* v. *United States*, 260 U.S. 561 (1923); *Lee Wilson & Co.* v. *United States*, 245 U.S. 24, 29 (1917); *Ritter* v. *Morton*, 513 F. 2d 942, 947 (9th Cir.), *cert. denied*, *Ritter* v. *Kleppe*, 423 U.S. 947 (1975); *Utah Power and Light Co.*, 6 IBLA 79, 86–87, 79 I.D. 397, 400 (1972).

The above cases applying the exception to the watercourse boundary rule, however, all refer to situations where there is omitted land between the meander line on one side of the watercourse and the watercourse. Thus, that rule would be applicable to the original lot 6 which is shown on the 1883 survey plat as being bounded on its east side by the river. The omitted lands between the meander line boundary of lot 6 and the river may be surveyed as public lands. This was done by the 1973 resurvey. We know of no case holding that the meander line of an erroneous survey may be considered the boundary of a lot shown as being on one side of the watercourse so as to include land on the other side of the watercouse. In other words, where there has been an error in a survey such as in this case, the general rule that the water-

course is the boundary of lots shown as bounded by the watercourse on the erroneous survey plat is applicable to the side of the watercourse where there have not been omitted lands. However, the exception is applicable to the lots on the other side of the watercourse where there are omitted lands. The public land survey system uses fractional subdivisions designated by individual lot numbers to describe land on each side of a meandered river. It is basic in that system that a given lot is only on one side of the meandered watercourse. *See MANUAL OF SURVEYING INSTRUCTIONS*, General Land Office, pp. 74–75, Plate III (1902); *MANUAL OF SURVEYING INSTRUCTIONS*, U.S. Department of the Interior, pp. 83, 86 (1973). Therefore, conveyance of a lot described according to the official survey plat and shown on that plat as bounded by a river does not give actual title to land on the other side of the river. *See William F. Trachte*, A–29260 (June 7, 1963). The land west of the river is public land subject to a color of title application.

[2] The crucial issue in this case is whether the conveyances in appellant's chain of title may be deemed to give color of title to land west of the river within the meaning of the Color of Title Act. The BLM State Office correctly stated in its decision the principle that a claim or color of title must be based on a document or documents, from a source other than the United States, which purport to convey title to the land applied for, but which is not good title. *Cloyd and Velma Mitchell*, 22 IBLA 299, 303 (1975); *William P. Surman, Mary Van Anderson Surman*, 18 IBLA 141, 143 (1974). The mistaken belief that the land applied for was included in the description set forth in the claimant's deed is insufficient to establish a claim or color title. *Cloyd and Velma Mitchell*, *supra* at 302; *William P. Surman, Mary Van Anderson Surman*, *supra* at 144; *Marcus Rudnick and Marcia Rudnick*, 8 IBLA 65 (1972); *Storm Brothers*, A–29023 (Oct. 8, 1962).

[3] We have indicated why the description in appellant's deeds cannot give actual title to the land. Without more, those descriptions also would not be considered as giving color of title to the land where reference would be made to the original United States plat of survey showing lot 5 to be on one side of the river. However, appellant urges, in effect, that the descriptions in the chain of title are not based upon the 1883 survey plat but on other plats, public records, title company records and opinions reflecting a different lot 5 which embraces land on both sides of the river. She contends that evidence outside the deed should be considered to ascertain the identity of the property described as lot 5.

In support of this position, she submits the following documents to the Board: (1) an affidavit of Clarence N. Hunt, who purchased lots 3, 4 and 5 in 1943 and sold lot 5 to appellant, stating that

he always believed lot 5 was located on both sides of the river and relied on other documents for such a belief; (2) a 1916 right-of-way and track map of the Deschutes Railroad Company, corrected to Dec. 31, 1933, showing lot 5 on both sides of the river; (3) an updated but post-1965 Wasco County assessor's map showing lot 5 on both sides of the river; (4) a second assessor's map, noted "retraced June 5, 1975," still showing lot 5 on both sides of the river; (5) copies of the Wasco County tax rolls from 1947 through 1964 indicating lot 5 consists of 29.76 acres; and (6) an affidavit of Pat McLoughlin, manager and general partner of Wasco Title Oregon, Ltd., a title insurance company, stating that for at least 50 years maps of the Wasco County assessor's office, "and other public records," have shown lot 5 on both sides of the river. These documents go far to lend support to appellant's contentions that she and her predecessors considered the conveyances of lot 5 to embrace land west of the river as well as east of the river because there was reliance on records other than the 1883 survey plat.

It is true, as appellant contends, that to ascertain the exact location of property described in deeds, especially where only lot numbers are given, it may be necessary to look to other records, such as survey or other plats. Thus, we have looked to the 1883 United States survey plat here to ascertain the true legal boundary of lot 5. The issue thus becomes whether we can look to other evidence of plats, records, etc., to establish a color of title to land different from what the official United States survey would show as actual title.

Prior departmental decisions which held that a description in a deed could not give color of title to land beyond the actual boundaries created by the United States survey were not concerned with the type of evidence presented in this case. *See, e.g., Cloyd and Velma Mitchell, supra; William P. Surman, Mary Van Anderson Surman, supra; Marcus Rudnick and Marcia Rudnick, supra; Storm Brothers, supra.* Those cases, therefore, are not precedents precluding a consideration of evidence which goes to an understanding of the descriptive words used in a deed. Rather, they are concerned with an unsupported mistaken belief that a description included the subject land.

It is a general principle of evidence and property law that extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity, either to determine actual title or color of title. *Richardson* v. *Duggar*, 86 N.M. 494, 525 P.2d 854 (1974); *Redfearn* v. *Kuhia*, 50 Ha. 77, 431 P.2d 945 (1967); 3 Am. Jur. 2d *Adverse Possession*, § 108 (1965); 23 Am. Jr. 2d *Deeds*, § 222 (1965); 3 *Jones on Evidence*, § 16.50 (6th ed. 1972). Where a latent ambiguity exists in the chain of title, such evidence may be submitted with a color of title application to make definite the description by establishing what the parties to a conveyance meant by the language set forth in

the conveying documents. *See Hugh Manning*, A-28383 (Aug. 18, 1960). In the circumstances here there is an ambiguity as to whether the deeds of conveyance were intended to convey only the lots as shown on the 1883 United States survey plat or whether they were intended to convey the lots as shown on some other plats and records. We conclude that evidence to resolve that ambiguity should be considered to determine whether the deeds were based upon such other plats and records which should be read together with the deeds as creating a color of title to land west of the river.

[4] For a class 1 claim under the Color of Title Act, a claimant must have held the land in "good faith" under color of title for 20 years and have cultivated a portion of the land or have improvements on the land. 43 U.S.C. § 1068 (1970); 43 CFR 2540.0-5(b). There is not good faith within the meaning of the Act where the claimant knew at the time he acquired the land that title was in the United States. *Day* v. *Hickel*, 481 F.2d 473, 476 (9th Cir. 1973). Good faith also requires that the 20-year period of possession under claim or color of title must be established prior to the time the claimant learned of the defect in his purported title. If this necessitates counting years during which the claimant's predecessors in interest possessed the land, their good faith must also be established. *Lester J. Hamel*, 74 I.D. 125, 129 (1967); *Nora B. K. Howerton*, 71 I.D. 429, 434 (1964). If any predecessor knew of the defect, the 20 years must be established after he divested himself of the land. *See Byran N. Johnson*, 15 IBLA 19, 22 (1974).

Appellant and her husband learned of their defective title in 1961 during a lawsuit brought by their grantor to cancel the 1946 deed. Also in 1961, appellant's husband applied for a grazing lease on the lands from the United States. Therefore, appellant's 20-year period of good faith possession must pre-date 1961 and must include the conveyances of Mar. 25, 1939 and June 30, 1943. Those conveyances were for the three lots. It was not until 1946 that lot 5 was severed from the entire parcel. From the charts, plats and maps in the record it appears that the error in the placement of the river by the 1883 survey did not so greatly affect the total acreage of the three lots, which were all on the east side of the river. In comparison, the change in the river's location now shows the area shown on the 1883 plat as lots 3 and 4 to be much larger, with only lot 5 suffering a loss of acreage. We mention this because much has been made of the acreage discrepancy for lot 5 as shown in the conveyances and as actually exists as bounded on the west by the river. The question of good faith in the grantors and grantees in believing title included land west of the river will go to the conveyances of the three lots prior to 1946, as well as to the 1946 conveyance of lot 5.

[5] The obligation for proving a valid color of title claim is upon

the claimant. 43 U.S.C. § 1068 (1970); *see William F. Trachte, supra.* Appellant has alleged facts which, if proved, may establish her color of title. We believe appellant should be afforded an opportunity to substantiate her claim further. This can best be done at a hearing where testimony, as well as documentary evidence, may be presented and explained and where BLM may present its own evidence, if it desires, and cross-examine appellant's witnesses. Therefore, we order a fact-finding hearing to be held before an Administrative Law Judge pursuant to 43 CFR 4.415. *See Sun Studs, Inc.*, 27 IBLA 278, 294, 83 I.D. 518, 525–26 (1976). The issues at the hearing may include all matters relevant to showing entitlement under the Color of Title Act and include: whether there is sufficient color of title to land west of the river from other records, plats, etc., as well as the deeds, as we have discussed above; if so, what land; whether appellant and her predecessors were in good faith in claiming land west of the river; and compliance with other requirements of the Act.

The ordering of the hearing does not prevent BLM and appellant from making any stipulated agreement which might obviate the necessity for a full hearing. In such an event, they may make appropriate motions for dismissal to the Administrative Law Judge assigned to hear the case for referral to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division for appropriate action.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

UNITED STATES
v.
PITTSBURGH PACIFIC COMPANY

30 IBLA 388

Decided *June 15, 1977*

Appeal from so much of decision of Administrative Law Judge as dismissed contest brought by Montana State Office, Bureau of Land Management, against 12 lode claims located within the Black Hills National Forest under mineral patent application MONTANA 032330 (S.D.).

Set aside and remanded.

1. Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Patent—Rules of Practice: Appeals: Burden of Proof

A mining claimant must prove a discovery under the prudent man test, including that the mineral can be extracted, removed and marketed at a profit.

2. Administrative Procedure: Substantial Evidence—Evidence: Sufficiency—Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Environment

In a contest of a patent application for a lode mining claim, the Board of Land Appeals may remand the case for further hearing to complete the record regarding the (1) availability and expense of necessary financing, land and water, (2) the expense of labor, and (3) the expense of compliance with environmental protection laws.

3. Environmental Policy Act—Mining Claims: Environment—National Environmental Policy Act of 1969: Environmental Statements

When parties are to offer evidence as to costs, to a mining claimant, of measures required by statute or regulation to mitigate environmental impact from development of a mine, it would be helpful for a Government contestant to assist an intervening state government and the claimant in computation of such costs; however, under 42 U.S.C. § 4332 (1970), an environmental impact statement is not required prior to the nondiscretionary federal action of issuance of a mineral patent.

APPEARANCES: John C. Banks and Jack E. Hanthorn, Esqs., U.S. Department of Agriculture, Denver, Colorado, for appellant, United States; Horace R. Jackson, Esq., Lynn, Jackson, Shultz, Ireland and Lebrun, Rapid City, South Dakota, for appellee, Pittsburgh Pacific Company; Attorney General William J. Janklow and Assistant Attorney General Lawrence W. Kyte, Pierre, South Dakota, for amicus curiae State of South Dakota; Richard W. Bliss, Esq., for amicus curiae American Mining Congress.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

The United States appeals from so much of a decision of Administrative Law Judge John R. Rampton, Jr., as dismissed a contest proceeding against a mineral patent application filed by appellee Pittsburgh Pacific Company for twelve 20-acre lode mining claims [1] located within the Black Hills National Forest, Lawrence County, South Dakota. The claims are contiguous and stretch in a northsouth direction for somewhat over a mile. Upon request of the Forest Service, U.S. Department of Agriculture, the Bureau of Land Management filed a contest complaint against appellee's patent application, contending there had been no discovery of valuable mineral deposits and asking that the claims be held invalid. By order, the Board granted petitions of State of South Dakota [2] and American Mining Congress to file briefs as amici curiae.

The United States contends generally that Pittsburgh has not proved the discovery of valuable deposits, and supports its argument with allegations of error in the geological and economic analysis performed. Additionally, the State of South Dakota argues, *inter alia*, that adequate consideration has not been given to cost of compliance with environmental quality statutes and regulations.

Pittsburgh claims discovery of some 160 million tons of relatively low grade iron ore, including specular hematite and martite. Pitts-

[1] The claims involved on appeal are Pitt Pac Nos. 1 through 9 and Spec. Nos. 1 through 3. Two other lode claims, Spec. Fraction and Magnetite Fraction, were declared void by the Administrative Law Judge, and no appeal was taken as to those claims.

[2] Pittsburgh and South Dakota reply briefs were filed Sept. 2, 1975.

burgh intends to mine 96 million tons under a plan of operation which includes the annual removal of 7,200,000 long tons of ore; the crushing of the best 4,900,000 long tons; the cobbing (preliminary separation) of that ore; the reduction roasting of the best 2,300,000 long tons until all of the iron is magnetized and more readily ground and separated; grinding and magnetic separation, with gangue rock washed away; and the compression, into hard pellets, of 1,000,000 long tons of ore. The process of reduction roasting followed by fine grinding and magnetic separation of iron has not been used except on an experimental basis in a laboratory or pilot project. Each year 10,000 rail cars of such pellets, containing 62.68 percent natural iron, would be loaded and shipped. Pittsburgh states that unless patents are issued, the necessary financing cannot be obtained.[3] Assuming a 20-year payout on investment, and pellet prices as of Feb. 1975,[4] the proposed operation would involve well over ½ billion dollars in gross revenue.

For reasons set forth hereafter, the decision of the Administrative Law Judge must be set aside and the case remanded. The decision, however, is well reasoned, and except as modified herein, the findings and conclusions are accepted.

[1] Pittsburgh is entitled to a patent for a particular claim if a "valuable mineral deposit" has been discovered on that claim. 30 U.S.C. §§ 22, 29 (1970). The test for determining whether or not deposits are "valuable" was set forth in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This test has been cited with approval by the Supreme Court. *E.g.*, *Best* v. *Humboldt Placer Mining Company*, 371 U.S. 334, 335–36 (1963). To satisfy this prudent man test, Pittsburgh must show marketability under *United States* v. *Coleman*, 390 U.S. 599, 600 (1968), *i.e.*, that "the mineral can be extracted, removed, and marketed at a profit." *United States* v. *Kottinger*, 14 IBLA 10 (1973).

The Government concedes that Pittsburgh is acting in good faith in claiming the lands for the purpose of mining ore in paying quantities. The test, however, is objective rather than subjective. The United States grants title to mining claims in the national interest after finding there is a reasonable prospect that a successful mine will be developed.

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[3] The Board recognizes that many very sizable mining ventures have been fully operated without patent.

[4] Pittsburgh alleges on appeal that the price of taconite pellets, at 62.68 percent natural iron, has increased at the lower lake ports from $15.795 per gross ton in Oct. 1969 (when Pittsburgh prepared its cost/profit analysis) to $28.331 in February 1975, an increase of 79.4 percent. While the Board notes the rate of inflation, including the high increase in cost of energy, such new evidence is discussed *infra*.

[2] While Pittsburgh has submitted considerable evidence which indicates that a discovery has been obtained, there remain factors — some of which may be beyond the control of Pittsburgh — which could stand in the way of a profitable mining operation. After evaluating the evidence, we conclude that substantial questions exist with respect to adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws.

Water Supply

No significant dispute exists over the amount of water needed for the mining and beneficiating process. It is agreed some 20,000 to 25,000 gallons per minute (gpm) of water will be used, with a recycle rate of approximately 95 percent, thus requiring 1,000 to 1,250 gpm of new water during operation. As possible sources, Pittsburgh has cited Box Elder Creek and nearby flooded abandoned mines, natural springs, and wells. It will be necessary for Pittsburgh to construct ponds of substantial acreage and depth for water storage, to supply water during relatively dry spells.

The United States argues that Pittsburgh has failed to prove that sufficient water would be available at the claims in South Dakota. Noting problems of obtaining ownership of water from private sources and permits for water from public sources, the Government characterizes Pittsburgh as "seem[ing] to have assumed that, with so much water around, it could secure enough for its use." Further, the Government argues that, even assuming *arguendo* the water is available, Pittsburgh has not adequately accounted for water-related costs involving acquisition of the water, additional land for storage and tailings reservoirs, construction of such reservoirs, possible pipeline easements, and pumping costs. *See United States* v. *Osborne* (*Supp. on Judicial Remand*), 28 IBLA 13 (1976); *United States* v. *Kosanke Sand Corporation* (*On Reconsideration*), 12 IBLA 282, 308–09, 80 I.D. 538, 551 (1973). In *Osborne* at 35, the Board indicated that a prudent man would be assured that an element essential to his mining operation was available, before he would make further expenditures:

> Since water is essential, and its lack makes aggregate production "very costly," it would seem that prudence would demand that the claimants satisfy themselves as to its availability in sufficient quantity before they "[w]ould be justified in the further expenditure of their labor and means, with a reasonable prospect of developing a paying mine." *Castle* v. *Womble*, 19 L.D. 455, 457 (1894); *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905); *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *United States* v. *Coleman*, 390 U.S. 599 (1968). Yet these claimants apparently are content to simply presume the availability of water on the claim in the desert to the approximate volume of 400 gallons per minute. No evidence was adduced to show how water would be obtained if none were found on the claim, or what effect this might have had on their

ability to market aggregate at a profit prior to July 23, 1955.

Referring to cost figures presented at the hearing, Pittsburgh states that the "per ton production costing on plant construction would include (and does in most reported figures) cost of land and water." On the question of availability of water, Pittsburgh has submitted on appeal reports from professional ground water geologists who conclude that the company's stated need for 1,000 gpm, or 1,300 acre-feet of water per year, can be met entirely from the flow in Box Elder Creek, assuming that a 3-year water storage facility for approximately 4,000 acre-feet is constructed to insure that water will be available. The reports do not deal explicitly with the question of how much of this flow would be available to Pittsburgh for appropriation,[5] nor are there estimates of costs of transportation of water from the stream to the plant. Such evidence may not be considered by the Board except to determine whether the hearing should be reopened. *United States* v. *McKenzie*, 20 IBLA 38, 44 (1975).

The evidence adduced at the hearing does not fully establish that sufficient water is reasonably available. Pittsburgh stated its volume of water requirement, noted several possible sources for that much water, and argued that there would thus be sufficient water. There was, however, no detailed showing that the rights could be acquired, nor was there any specification of cost of such supply, beyond the general statement of construction costs. On remand, the parties will have the opportunity to show more clearly whether the requisite water supply can be obtained and delivered at a feasible cost.

Additional Land

Pittsburgh will require approximately 600 to 900 acres of land outside the mining claims upon which to construct its plants, tailings pond, and water storage reservoir (Tr. 899). A small portion of this land may be available to appellants as millsites. 43 CFR Subpart 3864. The Government alleges that Pittsburgh has not shown it will be able to obtain the necessary land. Pittsburgh contends that there "is substantial land in private ownership adjacent to and in the near vicinity of the involved claims * * * [which] can be acquired in the normal course of business when the time comes." Additionally, Pittsburgh notes that it is possible to purchase lands in other areas and exchange them with the Forest Service for adjacent land within Black Hills National Forest.

Pittsburgh presented oral evidence that sufficient lands in private ownership exist near the claims. The Board takes official notice of the more current status plats[6] for the areas surrounding

[5] In its response brief to the amicus brief of the State of South Dakota, the United States suggests that a permit must be obtained from the South Dakota Water Resources Commission.

[6] The plats are: (1) MT Plat, T. 3 N., R. 5 E.; (2) MTP Suppl. Sec. 18, 21, 22, T. 3 N., R. 5 E.; (3) MT Plat, T. 3 N., R. 4 E.; Black Hills Meridian, Lawrence County, South Dakota. The maps were current as of June 16, 1976, and were supplied by the Montana State Office, Bureau of Land Management.

the mining claims. 43 CFR 4.24b. After studying these plats, a question remains as to whether Pittsburgh will be able to obtain the required acreage of appropriate location without obtaining national forest lands. While there may be private tracts which are geographically and economically feasible, this is not clear from the record.

Apparently, the only other feasible land is in the National Forest, managed by the Forest Service. Since this contest was initiated at the request of the Forest Service, it is not clear whether the Service would be amenable to the necessary exchange.

A reasonably prudent man would take steps to assure that essential land is available to the project. *See Osborne, supra.* On remand, Pittsburgh will have an opportunity to show that it can acquire the requisite suitable acreage for the anticipated construction, in a feasible configuration and at a price harmonious with a profitable mining operation.

Financing

Pittsburgh estimated that as of October 1969, some $28,000,000 would he required to finance the project. The Government argues that Pittsburgh had shown no source of financing. Pittsburgh states that "normally financing is done or at least underwritten by the users of the product, the steel mills and companies desiring to insure a source of supply."[7] At the hearing, John D. Boentje, Pittsburgh's President, testified that:

> [O]f the pellet projects that have been initiated in this country there is probably only one that does not have a steel company as a sole owner or a partnership of an iron ore company and a steel company or a partnership of several steel companies possibly with an iron ore company.[8]

He also averred that he would not, on the basis of the projections made for this operation, hesitate to approach the steel companies to invite their financial participation.[9]

Fred DeVaney, an expert witness brought in by the Company, noted that "[m]uch of the money that has gone into these taconite plants has come from insurance companies, and much has come from the steel companies that need the pellets."[10] DeVaney also gave a step-by-step account of the process typically undertaken by an iron ore mining company in securing financing for a project from the various steel companies,[11] but he explained further that:

> One of the first things they ask you is do you have title to your land or do you have options on it. And I mean, *if you don't have an option or title to it, they are not very much interested in putting any money in it until they know where you are at.* [Italics added.] So that is why you carry things so far until we get financing on it.[12]

The Department, of course, is most anxious that it not patent the land only to have the project fail for lack of financing. The upwards

[7] Brief for contestee, Jan. 17, 1973 at 92–93.

[8] Tr. 439.
[9] Tr. 440.
[10] Tr. 709–10.
[11] Tr. 709–13.
[12] Tr. 711.

of $28,000,000 in financing is as essential to appellant's project as is the required water and land. If it could be shown by further evidence that a responsible financial source would probably furnish the funds needed, conditioned upon patents being issued by the United States, this would help to assuage Departmental questions as to the likelihood of full development of the deposit. The Board does not believe a prudent miner would continue making his own substantial investments until he has a reasonable expectation of success in developing a valuable mine and of the availability of additional funds, if necessary, at feasible interest cost. *See Osborne, supra.*[13] On remand, the parties will have the opportunity to present evidence as to potential availability of financing and other matters as discusssed herein.

Labor Costs

To determine the estimated cost of labor, the parties have introduced the cost experience of Pittsburgh and comparable companies.

Pittsburgh's case *re* labor costs was made out by Pavel Zima, an engineer with the company, primarily by means of the economics section of the Mineral Evaluation Report, Exhibit M–4.[14] This report shows operation-by-operation estimates of labor needs and costs, and labor expense is allocated to each processing step. Zima's labor estimates at each step are merely stated, however, and are not explained, describing the operation involved and detailing why the given number of men at a given wage cost is needed.

Government witness Dr. Alfred Petrick stated as his opinion that 252 persons, rather than 177, as estimated by Zima, would be necessary for the total operation, and that the increase in costs occasioned by the 75 extra persons would then be approximately $948,000 annually.[15] A major factor in Petrick's analysis of Pittsburgh's total labor needs was a comparison of labor use experience in several other plants. At p. 997 of the hearing transcript, he stated:

> Of course, we are dealing with different outputs and have to make some allowances, but looking at seven or eight or nine plants' totals, and looking at the maintenance force as a percentage of the total, I don't feel that I would be out of line adding this number of men to the maintenance crew at this operation and the total is in the same area so far as total employment of these other plants.

Petrick did not specify the individual operations to which he believed the members of the increased labor force would be allocated. Neither did he give a detailed breakdown of the comparison process he employed in analyzing the relevance of the labor experience of the seven to nine other plants. Though Pittsburgh did cross-examine Petrick on his labor estimates, it made no attempt to offer

[13] The Board does not mean to indicate that for mining claims involving operations of substantially lesser scope, similar evidence of financing would ordinarily be necessary.

[14] See also the hearing transcript at 771–72, 777–79, 808.

[15] See the hearing transcript at 934, 946–49, 995–1000.

additional evidence on this question.

The following evidence provides an additional basis for comparison with Pittsburgh's anticipated labor costs: a 1962 news summary (Exhibit M–48) noting that the Kirkland Lake plant in Canada would produce 1 million tons per year (tpy) of 66 percent iron pellets from ore of an undisclosed concentration by employing 400 persons; a 1963 brochure (Exhibit M–37) describing the Groveland Mine in Michigan, where 180 employees produced 1.25 million tpy of similar pellets out of ore averaging 33 percent iron, and where ore of concentration less than 25 percent was not processed; a 1964 memo (Exhibit M–39) from Pittsburgh's President *re* Eveleth Taconite Company's plans for a mine employing 350 to 375 persons to produce 1.63 million tpy of similar pellets from ore of undisclosed concentration; a 1969 brochure (Exhibit M–36) and a 1970 article[16] on the Jackson County Iron Company in Wisconsin, stating that 750,000 tpy of similar pellets were produced from ore of a 22 to 23 percent iron content through the efforts of 230 workers and managers; an article (Exhibit M–44) projecting that a plant could use a reduction roasting process to produce at a profit 1.2 million tpy of 64 percent pellets from 40 percent ore at a labor cost of $900,000 per year; and a 2-page study attached to Exhibit M–44 forecasting labor costs of $1,127,848 per year for a reduction roasting plant producing 2 million tpy of 64 percent pellets from 45 percent ore. Only the latter two projected operations involve reduction roasting.

Questions remain regarding Pittsburgh's estimate that it will be able to produce 1 million tpy of 63 percent pellets out of ore averaging 17 percent iron content, with a processing cut-off at 12 percent concentration, while employing only 177 persons. At the Groveland Mine, noted above, 25 percent greater production than Pittsburgh contemplates is achieved with approximately the same number of employees, but the ore bears slightly more than twice as much iron, and no reduction roasting process is necessary. Because of the lower iron concentration in its ore, Pittsburgh may have greater labor expenses involved in drilling, blasting, mining, and transporting the larger volumes of ore, putting it through at least the primary stages of beneficiation, and disposing of waste material. In the Jackson County Iron Company example, we see 25 percent less output than Pittsburgh intends, but at a 30 percent higher employment level. Assuming *arguendo* that the ore concentration is as low for the Kirkland Lake and Eveleth Taconite projects as it would be for Pittsburgh's, we note that Kirkland Lake uses 400 persons to produce the same tonnage per year as Pittsburgh forecasts, and that Eveleth was expecting an output only 63 percent higher than Pittsburgh's

[16] Attached to Pittsburgh's response to the amicus brief of the American Mining Congress.

but at a utilization of 100 percent more employees.

While the evidence discussed above would on its face indicate that Pittsburgh's labor expense estimates are too low, we do not feel that there is sufficient evidence in the record for us to determine the matter. Petrick only barely detailed in his testimony the evidence upon which he based his opinion that the labor cost projection must be raised. We recognize that there can be differences in mining and engineering factors between various mines and plants producing the same iron pellets, and that these differences can have a substantial influence on labor costs, *e.g.*, the relative softness of the South Dakota ore compared with the ore of the Mesabi Range mines, or the possibility of higher percentage recovery of iron because of reduction roasting. Additional evidence is necessary to assess the accuracy of Pittsburgh's labor expense projections.

Cost of Compliance with Environmental Quality Statutes and Regulations

At the hearing, environmental costs were considered only to a limited degree. In Pittsburgh's testimony and in the economics section of Pittsburgh's Exhibit M–4, it was succinctly given that environmental protection costs were comprehended by the anticipated general construction costs listed in the report, plus 1 cent for miscellaneous environmental control for each ton shipped. Construction was to be undertaken as a matter of course in a manner which would assure environmental quality maintenance.

Neither did the government establish the environmental protection measures which would be required and the cost thereof. However, it is noted that considerable environmental legislation and regulations have been promulgated since the evidence herein was first formulated.

As amicus curiae, South Dakota has posed questions concerning water quality, air pollution, reclamation and other problems. The cost of compliance with governmental and other environmental requirements are of course significant in determining whether there has been a discovery. *Kosanke*, *supra* at 12 IBLA 298–99, 80 I.D. 546–47.

As stated, there would be a removal of some 7.2 million tons of material per year, ultimately affecting an area of about 240 acres now within a national forest. In addition, Pittsburgh would need to construct ponds and buildings over some 600 to 900 acres on other lands in the area. Some 4.9 million tons will annually move into the beneficiation process, and this may create the need for environmental controls as to dust and disposal of waste water and soil. All told, some 6.2 million tons of waste earth will have to be disposed of. Though Pittsburgh had proposed to use natural gas, the roasting of 2.3 million tons per year could create air pollution problems. A railroad spur will have to be constructed, presumably through the National Forest. Adjacent to the claims are two

creeks which South Dakota states it has classified as cold water fisheries.

The State is therefore admitted as a party to the contest, in order that the State, together with the other parties, may offer new evidence [17] as to environmental requirements, the cost of compliance, and other pertinent factors.

Environmental Impact Statement

[3] The State of South Dakota submits that an Environmental Impact Statement (EIS), 42 U.S.C. § 4332 (Supp. V, 1975), would serve a useful purpose in the Department's deliberations. The principal State arguments may be summarized:

1. The action of issuance of patents is a major federal action significantly affecting the human environment under § 4332 in part because Pittsburgh admits the essential financing of the project cannot be obtained unless the patents are issued.

2. Preparation of a federal impact statement is not "impossible" under § 4332, regardless of whether a patent is required to issue. Rather, the Act requires compliance to the fullest extent possible.

3. One of [the EIS] purposes is to require the giving of attention to an environmental problem regardless of whether the agency has authority to do anything about it. *The Scenic Rivers Association of Oklahoma* v. *Lynn*, 520 F. 2d 240, 245 (10th Cir. 1975), *rev'd on other grounds, sub nom. Flint Ridge Development Company* v. *Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976).

4. The EIS would be helpful in providing information to the Secretary of the Interior for utilization in submitting his report for Congress under 30 U.S.C. § 21a (1970), to other executive offices, to the Congress itself, to the State and to others generally. [See *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).]

5. The National Environmental Policy Act (NEPA) requires the Federal Government to make available its expertise to assist the States in discharging their responsibiilty to determine potential adverse impacts and to take necessary steps to mitigate. 42 U.S.C. § 4332(2)(G) (Supp. V, 1975).

6. The Administrative Law Judge must consider the costs of compliance with state and federal environmental statutes and regulations. *United States* v. *Kosanke Sand Corporation (On Reconsideration)*, *supra*. An EIS would permit environmentally informed decision making, by indicating comprehensively and in detail whatever adverse environmental impacts must be mitigated. It would provide a basis for the parties to argue the costs thereof. Under *Kosanke*, in fulfilling the requirements of § 4332 "to the fullest extent possible," the Department should at the least prepare a statement within the scope of these environmental costs.

7. NEPA mandates that any EIS will be prepared at the earliest possible moment in order to be of maximum assistance to all. *See Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972); *Harlem Valley Transportation Association* v. *Stafford*, 360 F. Supp. 1057 (S.D. N.Y. 1973).

Whether there is a requirement for an environmental impact statement depends upon whether, within the intent of the statute, the nondiscretionary act of issuance of a mining claim patent is a major federal action significantly affecting the human environment. An EIS would encompass much more than computation of the direct environmental costs which are required to

[17] See *infra*.

be borne by Pittsburgh. While evidence as to such costs may be offered in connection with the hearing on remand, such evidence could be developed without the preparation of an EIS. *Kosanke, supra.*

Although Pittsburgh located its claim and performed exploration work before NEPA was enacted, no mining has commenced. It could be argued there has not been an irreversible and irretrievable physical commitment of resources. 42 U.S.C. § 4332, part (2)(C)(v) (Supp. V, 1975); *Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323, 1331, 1333, 1335, 1337 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972). If Pittsburgh were to commence its mining before patenting, the Forest Service would probably prepare a statement before approving a mining plan of such magnitude within the National Forest. 36 CFR Part 252; *Friends of the Earth, Inc.* v. *Butz*, 406 F. Supp. 742, 747–48 (D. Mont. 1975), *appeal docketed*, 9th Cir., No. 75–3477 (Oct. 24, 1975). Forest Service regulation 36 CFR 252.4(f) provides:

> Upon completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required. Not every plan of operations, supplemental plan or modification will involve the preparation of an environmental statement. Environmental impacts will vary substantially depending on whether the nature of operations is prospecting, exploration, development, or processing, and on the scope of operations (such as a size of operations, con[s]truction required, length of operations and equipment required), resulting in varying degrees of disturbance to vegetative resources, soil, water, air, or wildlife. *The Forest Service will prepare any environmental statements that may be required.* [Italics added.]

As to whether an impact statement is required before prospecting in a national forest, the District Court in *Friends of the Earth* ruled:

> The defendants argue that an EIS is not yet required, since the Forest Service's approval merely went to defendant [Johns Manville Sales Corporation's] plan of proposed prospecting operations. Defendants point to the 1872 mining law (30 U.S.C. §§ 22 *et seq.*), and the Organic Act of June 4, 1897 (16 U.S.C. § 748), for the proposition that defendant JMSC has a statutory right to go upon national forest lands for the purposes of mineral exploration, development and production. Regardless of what right JMSC may have, the defendants still must comply with NEPA.
>
> * * * * * *
>
> JMSC's operations realistically involve only a small project which will not significantly affect the quality of human environment. But, as JMSC indicates and as the Court completely agrees, if JMSC later desires to proceed with the mining operation, an environmental impact statement will be required before any mining activity commences.

South Dakota also cites *Gifford-Hill* v. *F.T.C.*, 389 F. Supp. 167 (D. D.C. 1974), for the proposition that an EIS is required with respect to significant actions taken by private persons where federal permission [18] is required.

In the event that Pittsburgh should apply to the Forest Service for a discretionary exchange of lands in order to gain additional

[18] The examples cited by the Court all involve discretionary Federal actions.

acreage, as discussed *supra*, presumably an EIS would be required. *National Forest Preservation Group* v. *Butz*, 485 F.2d 408, 411–12 (9th Cir. 1973).

If it can be proved that Pittsburgh has made a discovery on a particular claim, then, all else being regular, Interior would have no discretion as to whether patent should issue. *Cameron* v. *United States*, 252 U.S. 450 (1920); *United States* v. *O'Leary*, 63 I.D. 341 (1956). In 1973 *United States* v. *Kosanke Sand Corporation*, *supra*, set out the Departmental position that EIS statements are not generally required in connection with such nondiscretionary patenting of mining claims. The statute pertaining to impact statements was amended in 1975, without pertinent change. 42 U.S.C. § 4332 (Supp. V, 1975).

The tenth Circuit in its 1975 decision, *Scenic Rivers Association of Oklahoma*, *supra*, upheld a 1974 District Court decision that an impact statement was necessary in an interstate commerce matter, despite the fact that a nondiscretionary federal action and private rights were involved. In 1976, on certiorari *sub nom. Flint Ridge*, *supra*, the Solicitor General argued forcefully that no statement was required in connection with a nondiscretionary action:

> Indeed, because compliance with the Disclosure Act is prerequisite only to the sale or lease of lots in interstate commerce (15 U.S.C. 1703(a)(1)), and not to the funding of developments, actions significantly affecting the environment can occur well before the developer is required to file his statement of record and property report.
>
> We submit that, in light of the foregoing, NEPA is inapplicable to the effectiveness of developers' filings with OILSR under the Disclosure Act. As Senator Jackson, the principal sponsor of NEPA, stated on the Senate floor, NEPA's procedural requirements simply direct "all agencies to assure consideration of the environmental impact of their actions in decisionmaking" (115 Cong. Rec. 40416 (1969)). Thus, Section 102(2)(A) of NEPA requires federal agencies to utilize a systematic interdisciplinary approach insuring integrated use of relevant science and design arts "*in planning* and *in decisionmaking* which may have an impact on man's environment" (italics added). Section 102(2)(B) directs such agencies to develop methods and procedures to ensure that environmental values "may be given appropriate consideration *in decisionmaking* along with economic and technical *considerations*" (italics added). And Section 102(2)(C) requires federal agencies to include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."
>
> Each of these requirements in Section 102 is aimed at federal agencies that have planning responsibilities or decisionmaking powers—agencies that can take account of the environmental consequences of their proposed actions and be guided accordingly.

Brief for Petitioner at 16–17, *Flint Ridge*, *supra*.

The Supreme Court reversed on other grounds and did not resolve the issue herein concerned. The Court stated at 426 U.S. 786:

> First, [petitioners] claim, allowing a disclosure statement to become effective is not major federal action significantly affecting the quality of human environ-

ment within the meaning of NEPA. In petitioners' view, NEPA is concerned only with introducing environmental considerations into the decision making processes of agencies that have the ability to react to environmental consequences when taking action. If the agency cannot so act, its action is not "major" and does not fall within the statutory language. Thus, petitioners urge, NEPA should not be read to impose a duty on HUD to prepare an environmental impact statement in this case since the agency, by statute, has no power to take environmental consequences into account in deciding whether to allow a disclosure statement to become effective. To this respondents counter, as did the Court of Appeals, that NEPA's goals are not so narrow and that even if the agency taking action is itself powerless to protect the environment, preparation and circulation of an impact statement serves the valuable function of bringing the environmental consequences of federal actions to the attention of those who are empowered to do something about them—other federal agencies, Congress, state agencies, or even private parties.

Petitioner's second argument is that even if HUD's action in allowing a disclosure statement to become effective constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA, HUD is nonetheless exempt from the duty of preparing an environmental impact statement because compliance with that duty is not possible if HUD is also to comply with the Disclosure Act's requirement that statements of record become effective within 30 days of filing, unless incomplete or inaccurate on their face. In response to this claim, respondents contend that the Secretary has an inherent power to suspend the effective date of a statement of record past the 30-day deadline in order to prepare an impact statement. Because we reject this argument of respondents and find that preparation of an impact statement is inconsistent with the Secretary's mandatory duties under the Disclosure Act, we need not resolve petitioners' first contention. [19]

The Supreme Court has thus left undetermined whether a NEPA statement is required to be prepared by Government agencies in connection with nondiscretionary actions. If the Justice Department analysis of the statute, as

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[19] In *Flint Ridge*, the Court further stated at 426 U.S. 787:

"NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all the other requirements of § 102—'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees, who wrote the 'fullest extent possible' language into NEPA:

'The purpose of the new language is to make it clear that each agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible * * *. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directive set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.' 115 Cong. Rec. 39703 (1969) (House conferees) (italics added).

See *id.*, at 40418 (Senate conferees). See also 40 CFR 1500.4(a) (1975).

"Section 102 recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.' And so the question we must resolve is whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with her duties under the Disclosure Act."

quoted *supra*, were to be changed, it would have a far reaching effect throughout the Federal Government. With respect to the nondiscretionary issuance of patents, therefore, the Department is constrained to follow the Justice interpretation,[20] which interpretation is in accord with *United States* v. *Kosanke Sand Corporation*, *supra*.

Further, because the Forest Service has management responsibility for the national forest lands herein concerned, it would appear that the Forest Service would be the appropriate agency to prepare any statement.[21] No authority has been cited under which the Department could order a full EIS to be prepared by the Forest Service, where the statement is not required by law.

The Board recognizes, however, that a project which would take 240 to 1,140 acres from a national forest, mine over 7 million long tons of ore annually, and each year ship 10,000 railroad cars of finished pellets, is not a typical group of mining claims. The State has requested assistance in computation of the cost to Pittsburgh of measures to be required to alleviate the environmental impact of the project. It would be helpful for the Forest Service, as contestant, to assist the State and appellant in the computation of the evidence of environmental costs at issue in the contest.[22]

New Evidence

Any formal request to consider new evidence as to ore values, energy availability and costs, environmental matters, or other items of expense should be presented to the Administrative Law Judge for his ruling, prior to the rehearing, in connection with the stipulation at Tr. 865 and the problems discussed in *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 233, 251–54 (1969).

On remand,[23] the Administrative Law Judge will have discretion to entertain any other issues which he deems proper, in order to formulate the required findings and conclusions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the matter is remanded.

JOSEPH W. GOSS,
Administrative Judge.

WE CONCUR:

ANNE POINDEXTER LEWIS,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

[20] *See Harrison* v. *Vose*, 18 U.S. (9 How.) 181 (1850).

[21] 36 CFR 252.4(f); 40 CFR 1500.7(b). For an oil and gas lease in a national forest, where the Government retains ownership of the property and Interior supervises the lease, the Board has ruled that Interior is the lead agency for preparation of the statement. *W. T. Stalls*, 18 IBLA 34, 35–36 (1974).

[22] See 42 U.S.C. § 4332, part (2) and (G) (Supp. V, 1975); Forest Service and Bureau of Land Management Memorandum of Understanding, part A, 11 (April 1, 1957); 43 CFR 4.452–4 and 4.452–5. *Cf.* 36 CFR 252.4(f), *supra*

[23] Other points of law and fact have been argued on appeal, but because of the decision to remand, such matters need not be discussed at this time.

APPEAL OF HARTFORD ACCIDENT AND INDEMNITY CO.

IBCA 1139-1-77

Decided *June 23, 1977*

Contract No. H50C14209320, Bureau of Indian Affairs.

Motion to Dismiss Denied.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Notice—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Motions

The Government's motion to dismiss an appeal because of the failure of the contractor to give the 20-day written notice required by the Changes clause is denied, where the Board finds that there was timely notice with respect to some of the costs on which the claim is based and that the hearing to be held may show that some or all of the remaining costs fall within other recognized exceptions to the strict application of the 20-day cost-limitation provision.

APPEARANCES: Mr. William F. Haug, Attorney at Law, Jennings, Strouss & Salmon, Phoenix, Ariz., for the appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Ariz., for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal [1] on the ground that the contractor failed to give written notice to the Government of the claim within 20 days of the incurrence of the costs on which the claim is based as required by Clause 3, "Changes" [2] of the contract.[3]

In the decision [4] from which the instant appeal was taken, the contracting officer found as follows:

> 4. Written notice of a claim was first filed by the surety on Aug. 4, 1976. Clause No. 3 of the General Provisions provides that no claim for any change shall be allowed for any costs incurred more than 20 days before the contractor gives written notice; thus the date from which costs may be computed is July 15, 1976. The last reported day that contract work was performed was June 14, 1976. Accordingly, no allowable costs were incurred by the contractor subsequent to July 15, 1976.
>
> 5. From the above, I find that no proper basis of claim for additional costs exists. Therefore, the contractor's claim is hereby denied.

The Changes clause to which the contracting officer refers and on which he relied for denial of the claim reads as follows:

> 3. CHANGES
>
> (a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

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[1] The appeal is being prosecuted by the appellant as the completing surety. Following default under the Contract awarded to Fred E. Divers, Jr., d/b/a Divers Painting, the surety engaged George Ardizzone, d/b/a Three Guys Painting to complete the contract work. *See* Completion Agreement dated Sept. 30, 1975, between the Surety Company and George Ardizzone and the Take-Over Agreement dated Oct. 17, 1975, between the Surety and the Government (Appeal File, Items 4 and 5). All references to items are to those contained in the Appeal File.

[2] General Provisions, Standard Form 23-A (October 1969 Edition).

[3] The contract called for the repairing and painting of the spillway and main canal gates at Headgate Rock Dam, Colorado River Agency in Yuma County, Parker, Arizona.

[4] Item 18, Findings of Fact and Decision dated Nov. 11, 1976.

(i) In the specifications (including drawings and designs);

(ii) In the method or manner of performance of the work;

(iii) In the Government-furnished facilities, equipment, materials, services, or site; or

(iv) Directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this par. (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: *Provided, however*, That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: *And provided further*, That in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

The claim denied by the contracting officer is, according to the appellant, the result of the Government having imposed a safety requirement nowhere to be found in the contract documents. The Complaint states at p. 2:

[T]he United States of America, acting through its authorized employees, unreasonably interfered with Contractor's method of performing the work in requiring two of Contractor's employees to be on the jobsite whenever one employee was working on the spillway gates below the deck. There is nothing in the contract documents, plans, specifications or the United States Department of the Interior, Bureau of Reclamation's Safety and Health Regulations for Construction[5] that requires the method of per-

[5] The Government vigorously denies that the absence from the contract and other contractual documents of any specific safety requirement covering the point in issue is dispositive of the question presented, stating: "* * * While neither the contract nor the Bureau's 'Safety and Health Regulations for Construction' specifically address the job situation presented here, it cannot be disputed that an employer is required under sec. 5(a)(1) of OSHA Act (29 U.S.C. § 654(a)(1)) to furnish a place of employment free from recognized hazards. In the case of *National Realty and Construction Co.* v. *Secretary of Labor*, 489 F. 2d 1257 (1973), it was held that Congress, in passing such a general obligation, intended to impose on employers an achievable duty. In other words, the measures had to be both feasible and have utility. That situation couldn't be more applicable in the present case. * * *" (Government's Reply to Appellant's Response to Motion to Dismiss, pp. 1, 2).

formance demanded by the United States of America.

In support of its opposition to the Government's motion to dismiss, the appellant has submitted an affidavit from Mr. George Ardizzone who had completed the contract work for the appellant surety company under the trade name of "Three Guys Painting" (n. 1, *supra*). In the affidavit Mr. Ardizzone states: (i) that it was not until after work commenced that he was advised by the project inspectors, as well as the project superintendent, that the contract documents and, more particularly, the Safety and Health Regulations for Construction did not permit him to allow one employee to be working below the deck without another employee being present to watch him; (ii) that while he objected to the requirement as not being necessary for safety purposes, he did not question the representations made to him that having two men on the project was a requirement of the contract; (iii) that after performance of the work concluded he had occasion to review the more than 400 pages involved in the Safety and Health Regulations for Construction but was unable to locate any such requirement; (iv) that the Government representatives were requested to but failed to show him a provision in the contract setting forth the requirement; and (v) that it was not until after he completed the contract work and shortly before the appellant filed the claim encompassed by the instant appeal that he became aware that the safety requirement imposed by the Government was not set forth in the contract documents and therefore constituted a change.[6]

Commenting upon the notice provisions of the Changes clause included in construction contracts since 1968, the Government states:[7]

> * * * The "Changes" clause used in construction contracts is discretionary in allowing a contracting officer to receive and consider any constructive change claim the contractor may assert prior to final payment. However, that same clause is mandatory in the prohibiting of any costs incurred more than 20 days prior to notification to the Government of the construction [*sic*] change. It cannot be waived. [8] * * *

The appellant does not contest the contracting officer's finding that all of the costs on which the claim is based were incurred more than 20 days before the contractor gave written notice to the contracting officer as called for by the "Changes" clause quoted above. The notice of

[6] Although the Government filed a document in response after the affidavit was received (n. 5, *supra*), it did not undertake to contest Mr. Ardizzone's assertions (i) that the project inspectors, as well as the project superintendent, had represented to him that the prohibition against having one employee working below the deck unless another employee was present to watch him was contained in the contract documents and, more particularly, in the Bureau of Reclamation's Safety and Health Regulations for Construction and (ii) that following the completion of contract performance the Government representatives concerned were requested to but failed to show Mr. Ardizzone any provision in the contractual documents setting forth the requirement.

[7] Answer and Motion to Dismiss, p. 2.

[8] Citing, *inter alia*, *Baltimore Contractors, Inc.*, GSBCA Nos. 3489, 3490 (Feb. 15, 1973), 73-1 BCA par. 9928, and *Preferred Contractors, Inc.*, ASBCA Nos. 15569, 15615 (Jan. 19, 1972), 72-1 BCA par. 9283.

appeal [9] characterizes the contracting officer's decision as erroneous, however, because that officer had failed to find that the Government had been prejudiced by the delayed submission. In response to the motion to dismiss the appellant asks us to consider the case of *ICA Southeast, Inc.*, AGBCA No. 331 (Mar. 2, 1973), 73-1 BCA par. 9969.[10] Later, referring to a position taken by the Department counsel in these proceedings,[11] the appellant asserts that the Government's Reply misstates the facts, after which it observes:

> The Government's initial position is based upon the twenty (20) day notice provision. The Contracting Officer did not seek to respond to the merits of Petitioner's claim for fear that the twenty (20) day provision would be waived. It is the position of the Petitioner at this time that the Government's Reply waived the twenty (20) day notice provision.
>
> The record should disclose that the Government did not permit Ardizzone to paint at the same time the sandblasting operation was going on. The Government contends that the extra help did, in fact, work as pot-tenders. This is totally erroneous. The only time pot-tenders were required was during the sandblasting operation. Petitioner's claim relates to the painting operation where it was not necessary to have anyone assisting the sprayer below. These facts, however, can be more appropriately brought out by a hearing on the merits of Petitioner's claim. [12]

The record before us discloses that at the Pre-construction Conference on Oct. 21, 1975, the Bureau of Reclamation's safety policy

[9] Item 20, pp. 1, 2 ("* * * Contracting Officer failed to find that the Government had been prejudiced by the late submission of the claim and, in fact, the evidence submitted to the Contracting Officer and in the Contracting Officer's possession discloses that there was no prejudice to the Government by reason of the late submission and that the Government was aware at all times of its interference with the Contractor's performance of the contract.").

[10] "* * * There the Board held that the notice provision of the 'Changes Clause' was not applicable when the Government gave no notice to the contractor of the change. Whenever the Government directs the contractor to do something that constitutes a change under the contract, the Government is under a duty to give notice of the change to the contractor." (Response to Motion to Dismiss, p. 2.)

[11] The Department counsel had stated,

> "* * * Faced with reality of the strict compliance requirement to the 20-day provision, counsel is now trying to say that there was a notice requirement of a change, namely the requirement of having a man topside when somebody was working below. He asserts that the contractor was led to believe that the contract required such deployment of personnel and thus was not in a position to give notice to the government of a claim. * * * It would be impractical for the contractor to attempt a one-man operation. Somebody had to be on topside to operate the compressor and the sand pot, or to do other duties necessary to keep the sandblaster or painter functional. In fact, the contractor's Safety Program which was submitted Oct. 31, 1975, refers to having a pot-tender on the job and having control of the sandblasting system. The program was approved and it certainly would not have been had there been any indication of a one-man operation being intended. At the Pre-construction Conference the contractor stated an intent to have three men plus himself on the job. The contractor attempted to change his workforce from that stated in the conference and implied in his safety program. To say the Government initiated or directed a change is without foundation. In fact, an examination of the payrolls shows that the so-called 'extra' help wasn't that at all. They are listed as, and did in fact work as, pot-tenders and were necessary to the functional operation of the system employed by the contractor. They were performing productive work and were not just standbys costing the contractor money" (Government's Reply to Appellant's Response to Motion to Dismiss, pp. 1, 2).

[12] Petitioner's Response to Government's Reply to Petitioner's Response to Motion to Dismiss, pp. 1, 2.

was discussed;[13] that Mr. Ardizzone referred to an anticipated work force of three men other than himself;[14] that in the safety program submitted by the contractor under date of Nov. 3, 1975, reference is made to the employment of a pot tender;[15] that at the Joint Safety Policy Meeting on Dec. 19, 1975, a representative of the Bureau of Reclamation stated "two contractor employees shall be on the job site whenever an employee is working below deck;"[16] and that the contractor advised the Government of his intention to file a claim at least as early as Apr. 24, 1976. In the Field Inspector's Daily Report for that date,[17] the following remarks appear:

CONTRACTOR WILL FILE CLAIM, IN REGARDS TO THE SAFETY REQUIREMENT, OF, WHEN ONE (1) MAN IS BELOW THE BRIDGE, ONE (1) MAN, WILL REMAIN ON DECK, AS SAFETY TENDER.

CLAIM WILL CITE, "EXCESSIVE LABOR COST, DUE TO ADDITIONAL MAN ON SITE," ALSO "NOT COVERED IN SPECIFICATIONS, WHEN BID."

Discussion

In 1967, the principal equitable adjustment provisions in Government construction contracts utilizing Standard Form 23–A were revised.[18] The radical revisions, however, were in the "Changes"[19] clause which for the first time included provisions covering constructive changes and which provided that except for claims based on defective specifications no claim involving a constructive change should be allowed for any costs incurred more than 20 days[20] before the contractor gave the contracting officer written notice thereof. The mandatory nature of the 20-day notice requirement was not only reflected in the language of the clause itself but was underscored by the fact that accompanying the revised clause and published at the same time was an Appendix in which it was stated: "* * * The 20-day limitation is not 'waiverable,' and costs

[13] Item 6, Report of Meeting, p. 1 ("* * * Mr. Larry Thomas commented upon the importance of safety and gave a brief description of the development of the Bureau of Reclamation's safety policy. He explained that Reclamation enforced Part 1926 of OSHA, Safety and Health Regulations for Construction, as well as a Bureau of Reclamation supplement thereto which amplified areas which we believe OSHA had treated inadequately. Copies of the Bureau of Reclamation's Safety and Health Regulations for Construction were furnished to Mr. Ardizzone.").

[14] "Mr. Borge emphasized that this contract was under the Arizona Plan and Mr. Ardizzone advised that he was familiar with the workings of Hometown Plans having performed work under the San Diego Plan. He also explained that he would have a work force of about three men other than himself, one of whom was an American Indian. This would probably put him in compliance with the Arizona Plan * * * " (Note 13, *supra*, p. 4).

[15] Item 7, letter dated Nov. 3, 1975, pp. 1, 2 ("Regarding the above-mentioned project, it is the intention of Three Guys Painting to comply with all safety rules and regulations while performing on this project * * * Sandblasting Equipment as Remote Controls which Allow Workmen Sandblasting to Shut Down the System, A pot-tender will also have control of the complete system.").

[16] Item 9, Minutes of Joint Safety Policy Meeting, p. 2.

[17] Item 23, Field Inspector's Daily Report, Sat., Apr. 24, 1976.

[18] 32 FR 16,268–16,270 (November 29, 1967).

[19] FPR 1–7.602–3.

[20] A comparable 20-day cost limitation provision is included in the Suspension of Work Clause presently included in Government Construction Contracts (Standard Form 23–A, Oct. 1969 Edition). A similar provision had been included in an earlier version of a Suspension of Work Clause since 1960 (25 FR 648).

may not be recovered contrary to this limitation." [21]

For the first several years after the present Changes clause was prescribed for use in 1968, the boards of contract appeals almost uniformly interpreted the 20-day notice provision strictly. See, for example, *Merando, Inc.*, GSBCA No. 3300 (May 27, 1971), 71–1 BCA par. 8892; *Fred McGilvray, Inc.*, ASBCA Nos. 15741, 15778 (Sept. 23, 1971), 71–2 BCA par. 9113; *Preferred Contractors, Inc.*, ASBCA Nos. 15569, 15615 (Jan. 19, 1972), 72–1 BCA par. 9283; *Merando, Inc.*, GSBCA No. 3513 (May 18, 1972), 72–2 BCA par. 9483; *Edgar M. Williams, General Contractor*, ASBCA Nos. 16058, *et al.* (Oct. 16, 1972), 72–2 BCA par. 9734; and *Baltimore Contractors, Inc.*, GSBCA Nos. 3489, 3490 (Feb. 15, 1973), 73–1 BCA par. 9928. In interpreting the 20-day cost limitation provision of the "Changes" clause strictly, the boards appear to have relied to some extent upon the strict manner in which comparable notice requirements in an earlier version of the suspension of work clause (note 20, *supra*) had been interpreted in such cases as *Structural Restoration Co.*, ASBCA Nos. 8747, 8756 (July 16, 1965), 65–2 BCA par. 4975 [22] and *National Construction Co.*, POD BCA No. 182 (May 8, 1969), 69–1 BCA par. 7649.

Even during such period, however, the boards recognized that there were limited and well-defined areas in which the 20-day cost limitation provision should not be applied literally. In *Ionics, Inc.*, ASBCA No. 16094 (Aug. 11, 1971), 71–2 BCA par. 9030,[23] for instance, the Armed Services Board refused to apply the 20-day notice [24] provision literally where it found that the contractor's failure to submit a timely claim for a constructive change had been predominantly induced by representations made by the Government to the appellant.

In 1972, the Court of Claims rendered its decision in *Hoel-Steffen Construction Company* v. *United States*, 197 Ct. Cl. 561. In reversing, in part, a decision of this Board [25] denying a contractor's claim under

[21] 32 FR 16,269. For a background discussion of the changes, *see* O. S. Hiestand, Jr., "A New Era in Government Construction Contracts," 28 Fed. B.J. 165 (1968); 5 Y.P.A. 473.

[22] Addressing itself to the 20-day cost limitation provision included in the contract before it, the Board stated:

"[T]he 20-day limitation in the suspension of work clause * * * does not refer to the period during which the suspension of work occurred but refers to the time when the costs claimed were incurred. * * *

"* * * It makes no difference that the Government has made no claim nor offered any evidence to show that it was in any way prejudiced by any failure on the part of the appellant to give notice sooner than it was actually given" (65–2 BCA par. 4975, at 23,477).

[23] In *Merando, Inc.*, GSBCA No. 3513, text *supra*, the Board stated: "An exception to the rule of strict interpretation of the notice requirement exists when the Government was instrumental in causing the failure of timely filing. *Ionics, Inc.*, ASBCA 16094, 71–2 BCA par. 9030 * * *" (72–2 BCA par. 9483, at 44,175).

[24] Claims involving defective specifications are specifically excepted from the coverage of the 20-day cost limitation provision by the express terms of par. (d) of the "Change" Clause (text, *supra*). *See Kelly Electric, Inc.*, DOT CAB 71–34 (Sept. 22, 1971), 71–2 BCA par. 9097; *Joseph D. Bonness, Inc., et al.*, ASBCA No. 18828 (Dec. 27, 1973), 74–1 BCA par. 10,419; *Desonia Construction Co., Inc.*, ENG BCA Nos. 3231, *et al.* (Nov. 17, 1972), 73–1 BCA par. 9797.

[25] *See* 75 I.D. 41, 68–1 BCA par. 6922.

the Suspension of Work clause there involved,[26] the Court found that, insofar as the 20-day cost limitation provision was controlling on the question presented, the notice requirement had been satisfied. Eschewing any finding as to what would have been the result if only oral complaints indicating a possible claim had been made to the Government within the specified period, the Court found that to the extent a written component was required to comply with the 20-day cost limitation provision, the requirement had been satisfied. This finding was based (i) on two letters written within 20-days of the incurrence of the costs claimed in which the contractor had requested a time extension or made reference to other contractors interfering with the progress of its work but in which no reference had been made to the suspension clause or other equitable adjustment provision and (ii) on the issuance of a Change Order in which the Government acknowledged that progress on the work had been slowed by another contractor and stated that such matter would be considered when the extent of the delay due to such causes had been documented by the contractor.

More significant perhaps than the issues actually decided in *Hoel-Steffen* were the remarks made by the Court after its holding had been reached. The Court stated:

> To adopt the Board's severe and narrow application of the notice requirements, or the defendant's support of that ruling, would be out of tune with the language and purpose of the notice provisions, as well as with this court's wholesome concern that notice provisions in contract-adjustment clauses not be applied too technically and illiberally where the Government is quite aware of the operative facts. * * *

(197 Ct. Cl. 573).

In the wake of *Hoel-Steffen* there has been a great increase in the number of board decisions in which 20-day cost limitation provision has not been applied strictly. For the most part such decisions have

[26] "Price Adjustment For Suspension, Delay, or Interruption of the Work For Convenience of The Government.

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

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

This clause was added to the Federal Procurement Regulations in Jan. 1960 (25 FR 648).

cited or quoted from the *Hoel-Steffen* decision in finding that strict compliance with the 20-day notice provision was unnecesary where the record shows that the Government was quite aware of the operative facts. See, for example, *Davis Decorating Service*, ASBCA No. 17342 (June 13, 1973), 73–2 BCA par. 10,107 at 47,475 ("* * * We have many times stated that where the responsible Government officials are aware or should be aware of the facts giving rise to a claim, then strict compliance with the written notice requirements is not required. * * *");[27] *Russell Construction Company*, AGBCA No. 379 (Nov. 11, 1974), 74–2 BCA par. 10,911; *J. L. Pitts Construction Company*, AGBCA No. 311 (Oct. 24, 1975), 75–2 BCA par. 11,535; *R. R. Tyler*, AGBCA No. 381 (Nov. 23, 1976), 77–1 BCA par. 12,227; and *Smith & Pittman Construction Company*, AGBCA No. 76–131 (Mar. 2, 1977), 77–1 BCA par. 12,381.

[27] The Armed Services Board has also held, however, that even though the Government knew that extra work was being performed, it still was prejudiced where the contractor delayed in submitting certain of its claims and that that delay deprived the Government of the opportunity to consider viable alternatives to the method employed by the contractor which resulted in the additional costs claimed. *See M. M. Sundt Construction Co.*, ASBCA No. 17475 (Apr. 30, 1974), 74–1 BCA par. 10,627 at 50,425 ("It may be, however, that although the party against whom the claim is made has knowledge of the extra work, the failure to make a claim does in fact result in prejudice * * *").

See also, Fraenkische Parkettverlegungr, ASBCA No. 18453 (June 30, 1975), 75–2 BCA par. 11,388, at 54,223 ("* * * Appellant's long delay in pressing its claim distinguishes this case from those in which the contractor promptly, although informally, put the Government on notice of its position * * *").

In *R. R. Tyler*, *supra*, the Agriculture Board considered at some length the nature of the notice provisions included in the "Changes" clause presently prescribed for use in Government construction contracts, as well as the effect to be given to the Appendix which had accompanied the publication of the revised "Changes" clause in the *Federal Register*. Addressing the question of whether the Government must show prejudice where no apprisal notice of any kind has been given, the Board stated:

> * * * At the outset, we recognize that there are two separate notice requirements in clause 3, as revised in 1968.
>
> Written notice is required under paragraph (B) of the date, circumstances and source of any written or oral order regarded by the contractor as a change order, other than a designated change order under paragraph (A). Paragraph (D) in effect requires such notification, which is characterized as an 'appraisal [*sic*] notice' in the Appendix issued in explanation of the revision * * * (32 F.R. 16269–16270) * * * This 20-day requirement is not applicable in the case of defective specifications, nor is it directed at the presentation of the monetary claim under paragraph (E) but only at the apprisal notification. Paragraph (E) required written notice of the general nature and monetary extent of any claim the contractor intends to assert under clause 3 within 30 days after receipt of a written change order under paragraph (A) or after notice of a constructive change has been given under paragraph (B).
>
> * * * * * * *
>
> Appellant's counsel contends * * * that the interpretation of Clause 3(D) should be liberalized even further, in that even if there has been no apprisal notice of any kind, the 20-day limitation should

nevertheless not be applicable where the Government has been unable to show any prejudice resulting from the absence of such notice. * * *

* * * * * * *

In any event, Section 2(a)(4)(iii) of the Appendix to the 1968 revisions of Standard Form 23–A provides that the "20-day limitation is not waiverable." We believe that to require the Government to prove that it was not prejudiced in the absence of any apprisal notice at all, either actual or constructive, would render both the apprisal notice provision of the contract and the nonwaiverable language of the Appendix totally without meaning. * * * Therefore, while the element of prejudice is for consideration in connection with the notice required by paragraph (E) of clause 3 and by clause 4, it does not affect the requirement that the Government must have had some form of apprisal notice, [28] whether written, oral or constructive, within the time specified in paragraph (D).

* * * Although the Contracting Officer contended that he was not aware of any objections by the contractor to having to perform in the manner or under the circumstances alleged in each of the claim items, the knowledge of the Contracting Officer's Representative and the inspectors who daily administered the contract on the site, and with whom the contractor dealt in the performance of his work, must be imputed to the Contracting Officer. Davis Decorating Service, supra.

(77–1 BCA par. 12,227 at 58,863–58,865).

In the recent case of *Mil-Pak Company, Inc.*, ASBCA No. 19733 (Jan. 26, 1976), 76–1 BCA par. 11,725,[29] the Armed Services Board recognized another exception to the 20-day cost limitation provision of the current "Changes" clause. In that case the Board found that in the circumstances there present [30] a written notice to the contracting officer would have been useless.

Since the Court of Claims 1972 decision in *Hoel-Steffen, supra*, this Board has had occasion to consider the 20-day cost limitation provision in the "Changes" or "Suspension of

[28] In *Smith & Pittman Construction Co.*, text, *supra*, the Board stated: "* * * In the absence of apprisal notice of any kind, the 20-day limitation in clause 3(d) as to claims for costs incurred in connection with an alleged constructive change order is applicable. *R. R. Tyler, supra*" (77–1 BCA par. 12,381, at 59,929).

[29] "* * * The contracting officer had made it clear at the preconstruction conference that performance of work in the main store, while business was being conducted therein, could not and would not be allowed. Therefore, a written notice to the contracting officer pursuant to the Changes clause would have been useless, and the lack of such notice did not prejudice the Government * * *" (76–1 BCA par. 11,725 at 55,874).

[30] In reaffirming the decision on reconsideration (76–1 BCA par. 11,836), the Board again gave primary emphasis to the fact that a timely written notice to the contracting officer would have been useless (n. 29, *supra*). After citing its opinion in *R. C. Hedreen Company*, ASBCA No. 19439 (Mar. 10, 1976), 76–1 BCA par. 11,816, the Board expressed the view, however, that a valid changes claim, filed before final payment, should not be barred by a failure to give the specified notice when it is reasonably certain that the Government would not have acted differently if such notice had been given.

In *Andy International, Inc.*, ASBCA No. 20397 (July 30, 1976), 76–2 BCA par. 12,046, the Board referred to its decisions in *Mil-Pak*, on reconsideration, and in *R. C. Hedreen, supra*, in the course of discussing what was perceived to be a trend toward making the rule the same for both "mandatory" and "discretionary" notice provisions. While there may indeed be such a trend, it appears that *Hedreen* may have involved defective specifications in which case the defective specification exception to the 20-day notice requirement would apply (n. 24, *supra*). The finding in *Mil-Pak* (n. 29, *supra*) that the Government had not been prejudiced by the lack of timely notice does not appear to have been necessary to the decision. The principle had already been established that the 20-day notice provision would not be applied strictly where actions taken by the Government had induced or contributed to the delay in giving notice *Ionics, Inc.*, text *supra; J. A. LaPorte*, text, *infra* and n. 31, *infra*.

Work" clauses on relatively few occasions. In two of such cases it was not considered necessary to decide the notice question because the claims presented were found not to be meritorious in any event. *See Iverren Construction Company (a/k/a ICONCO.)*, IBCA–981–1–73 (Dec. 30, 1975), 82 I.D. 646, 76–1 BCA par. 11,644, *affirmed on reconsideration*, 83 I.D. 179, 76–1 BCA par. 11,844 (Acceleration Claim) and *Electrical Enterprises, Inc.*, IBCA–971–8–72 (Mar. 19, 1974), 81 I.D. 114, 74–1 BCA par. 10,528 (Suspension of Work Claim). In *J. A. LaPorte, Inc.*, IBCA–1014–12–73 (Sept. 29, 1975), 82 I.D. 459, 75–2 BCA par. 11,486, the Board found that the 20-day notice provision of the "Changes" clause did not preclude consideration of a claim on the merits where there was no one action of the Government which could be pointed to as the identifiable event upon which the claim was grounded and from which the contractor's delay in presenting the claim could be measured.[31] In a very recent case, *H. M. Byars Construction Co. and Nevada Paving, Inc., A Joint Venture*, IBCA–1098–2–76 (June 7, 1977), 84 I.D. 260, BCA par. 12,568, we found the specifications to be defective and therefore the 20-day notice provision of the Changes clause not a bar to consideration of the contractor's claims on their merits (n. 24, *supra*).

[31] Mentioned as a factor contributing to the decision reached were indications that "the Government's actions contributed to and may even have been the principal cause of the delay in giving notice of the claim (footnote omitted)" (82 I.D. 483, 75–2 BCA at 54,780).

The Government has cited the case of *Baltimore Contractors* and the case of *Preferred Contractors* (n. 8, *supra*), in support of its position that the 20-day notice provision of the "Changes" clause should be adhered to strictly. While the decision in *Baltimore Contractors* supports the Government's position, there is nothing in the opinion to indicate that the Government—as contrasted with the prime contractor—was aware of the operative facts upon which the claim disallowed was based until after all the costs involved had been incurred (*i.e.*, there is nothing to indicate that an apprisal notice of any kind was given during the crucial period). In the earlier case of *Merando, Inc.* (n. 23, *supra*), however, the General Services Board had recognized that an exception should be made to the rule of strict interpretation of the notice requirement where the Government had been instrumental in causing the failure to file a timely claim.

As to the Government's reliance upon *Preferred Contractors*, *supra*, we note that the case was decided prior to the decision of the Court of Claims in *Hoel-Steffen*, *supra*, and the Armed Services Board's decision in *Davis Decorating Service*, *supra*, which represented a major departure from the earlier decisions of that Board (including its decision in *Preferred Contractors*), with respect to the 20-day notice requirement of the 1968 version of the Changes clause.

Lastly, we note that in both *Preferred Contractors* and *Baltimore Contractors*, the decisions were rendered following hearings at which the parties were afforded the opportunity to offer evidence in support of their respective positions.

The appellant's contention that the Government is required to give the contractor notice of a constructive change is entirely without merit. With respect to such changes, Paragraph (b) of the clause provides for the contractor to give the contracting officer "written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order." [32] While appellant's counsel advances the contention that Government counsel has waived reliance upon the 20-day notice provision by undertaking to argue the merits of the case in the Government's Reply (notes 11 and 12, *supra*, and accompanying text), no authorities are cited in support of the position and we are aware of none. The argument that the Government is required to show prejudice as a result of a delay in giving notice of a claim merits serious consideration. There is no doubt that such a showing is required with respect to the 30-day notice requirement.[33] In the preceding portion of this opinion we have cited and quoted from cases which hold that the Government need not show prejudice where the contractor has failed to give any kind of apprisal notice within 20 days of the incurrence of the costs on which the claim is based. *R. R. Tyler*, *supra*; *Smith & Pittman Construction Co.* (n. 28, *supra*).

Decision

The affidavit of George Ardizzone [34] appears to have been prepared without reference to the fact that on Apr. 24, 1976, he had informed the field inspector of his intention to file a claim in regard to the safety requirement imposed by the Government. According to the field inspector's report for that date, the claim when submitted would cite excessive labor costs due to an additional man on the site which was not covered in the specifications when bid.[35] The claim submitted to the construction engineer in Aug. of 1976 (Items 15 and 17), was presented on this basis.

While the field inspector has no authority to make changes to the contract, he was the representative of the Government on the job. In his capacity of inspector, he prepared daily written reports covering (i) the work being performed (ii) safety conditions (iii) communications with the contractor and (iv) instructions received from his

[32] The reliance appellant's counsel places upon the case of *ICA Southeast, Inc.* (n. 10, *supra* and accompanying text) is misplaced. The decision in that case turned on a special clause included in the contract. The instant contract contains no such special clause; nor does it contain any counterpart thereof.

[33] See *R. R. Tyler*, text, *supra* at 58,864–58,865; *M. M. Sundt Construction Co.*, n. 27, *supra*, at 50,424 ("* * * Even if the 30-day notice requirement was applicable there must be a showing of prejudice before it will bar consideration of an untimely claim. * * *"). The Government's burden of showing prejudice must be carried by the submission of evidence. It is not satisfied by simply making allegations. *Power Line Erectors, Inc.*, IBCA No. 637–5–67 (Dec. 18, 1968), 69–1 BCA par. 7417.

[34] Text accompanying note 6, *supra*.

[35] Note 17 and accompanying text.

supervisor. The reports themselves (Item 23) [36] do not show to whom they were distributed but we presume that, whatever distribution was made, it included the construction engineer and may have included the contracting officer as well.

We find that, as of Apr. 24, 1976,[37] the Government officials charged with immediate responsibility for administering the contract were aware of the operative facts pertaining to the claim involved in this appeal; that such knowledge was imputable to the contracting officer; that if a written component of the 20-day notice requirement of the "Changes" clause is necessary, it was supplied by the Field Inspector's Daily Report for that date; and that, consequently, claimed costs incurred by the contractor on and after Apr. 4, 1976, are for consideration on the merits. *Hoel-Steffen Construction Co.* v. *United States*, *supra; Davis Decorating Service*, *supra; R. R. Tyler*, *supra;* and *Smith & Pittman Construction Co.*, *supra.*

Remaining for consideration is the question of what basis, if any, exists for waiving strict compliance with the 20-day notice requirement of the "Changes" clause with respect to claimed costs incurred prior to Apr. 4, 1976. This question cannot be answered definitively on the basis of the present record. There may be some benefit to the parties, however, in discussing questions raised by the record as presently constituted.

As has been previously noted, the Government appears to concede that none of the contractual documents including the Bureau of Reclamation's Safety and Health Regulations for Construction prescribed the safety measure directed by the Government and forming the basis of the instant appeal.[38]

While the Government's position is not entirely clear, it appears to be contending that the contractor could properly be directed to comply with the safety requirement in issue as part of the contractual obligation it had assumed, because the Occupational Safety and Health Act requires an employer to furnish a place of employment free from recognized hazards (n. 5, *supra*).

A contracting agency may require a contractor to meet standards higher than those imposed by the Occupational Safety and Health Administration by expressly including the higher standard in the contract terms.[39] The explanation given of the Bureau of Reclamation's safety policy at the precon-

[36] As a contemporaneous written record of job activities, the field inspector's daily reports are entitled to a great deal of weight as evidence. *See Kean Construction Co., Inc.*, IBCA–501–6–65 (Apr. 4, 1967), 74 I.D. 106, 109–110, 67–1 BCA par. 6255, at 28,964; *R. R. Tyler*, text, *supra*, 77–1 BCA par. 12,227 at 58,865–866 ("The contemporaneous records of the Government, which are a part of the official record in this appeal, carry far more evidentiary weight that the unsupported allegations of the contractor and his superintendent * * *").

[37] Text accompanying note 17, *supra.*

[38] Notes 5 and 16, *supra,* and accompanying text.

[39] *Paul E. McCollum, Sr.*, IBCA–1080–10–75 (Feb. 24, 1976), 83 I.D. 43, 76–1 BCA par. 11,746; *Wright-Dick-Boeing, A Joint Venture*, ENG BCA No. 3576 (Feb. 10, 1977), 77–1 BCA par. 12,437.

struction conference reflects this view of the contracting agency's prerogatives in the area of safety (n. 13, *supra*). In the absence of the Government showing some basis in the contractual documents for the imposition of the safety requirement in issue, a question arises as to whether the specifications can be said to be defective. If, based upon an augmented record, the Board were to so find, there would be no basis for invoking the 20-day cost limitation provision with respect to any of the costs claimed (n. 24, *supra*).

The record before us also indicates that the Government officials with whom Mr. Ardizzone spoke may have been confused as to the source of their authority to direct the contractor to have one man topside whenever a man was working below the deck. In the affidavit previously mentioned, Mr. Ardizzone states that the project inspectors, as well as the project superintendent, referred to the contract documents and particularly the Bureau of Reclamation's Safety and Health Regulations as the authority under which they were proceeding. This statement has not been denied by the Government.[40]

Elsewhere in his affidavit, Mr. Ardizzone states that he did not question the Government's representations that having two men on the project was a requirement of the contract until after the contract work had been completed. While there is no reason to suppose that the representations attributed to the Government officials in question were not made in good faith, a question arises as to whether they could have predominantly induced[41] the late filing of the claim. If, based upon the evidence adduced at the hearing, we were to so find, the 20-day cost limitation provision would not be a bar to consideration of the claim on the merits.

Except for our findings with respect to the apprisal notice of Apr. 24, 1976, our comments have been based upon inferences drawn from the record as presently constituted. The evidence to be introduced at the hearing to be held may prove some or all of such inferences to be wholly unwarranted. The evidence of record following a hearing may fail to show (i) that the specifications were defective or (ii) that actions by Government representatives induced or materially contributed to the delay by the contractor in giving notice of the claim. In that eventuality and in the absence of a showing of an apprisal notice of a claim at any time prior to Apr. 24, 1976, we could then be confronted with the question of whether the failure of the Government to show prejudice as a result of the delayed notice of claim has the effect of vitiating the mandatory 20-day cost limitation provision. In such event the parties would be expected to fully brief the question of what meaning could be

[40] N. 6, *supra*, and accompanying text.

[41] *Ionics, Inc.*, text accompanying n. 23, *supra*.

ascribed to the absolute nature of the language employed in paragraph (d) of the "Changes" clause and the non-waivability language of the Appendix which accompanied the publication of such clause, if a finding of prejudice is a prerequisite to applying the 20-day cost limitation provision.

Thus far the Government has not requested that the claim be dismissed because of the failure of the appellant to give the notice pertaining to the claim required by Paragraph (e) of the "Changes" clause. If such a question were to be raised, the Government would be required to assume the burden of showing prejudice resulting from the delay in giving that notice (n. 33, *supra*). Considering the detailed nature of the records available to the Government covering the entire period of contract performance and the position taken by the Government in these proceedings with respect to the merits of the claim presented (n. 11, *supra*), it is at least very doubtful that such a burden could be sustained with respect to this discretionary notice provision.

Conclusion

The Government's motion to dismiss is denied.

WILLIAM F. MCGRAW,
Administrative Judge,
Chairman.

I CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

UNITED STATES
v.
UNION CARBIDE CORPORATION

31 IBLA 72

Decided *June 24, 1977*

Appeal from a decision of Chief Administrative Law Judge L. K. Luoma holding that the mineral deposit embraced within the limits of the EZ No. 225 placer mining claim and the J.C. 75 and J.C. 76 lode mining claims is locatable under the Mining Act of 1872, as amended, A–7345.

Affirmed as modified.

1. Mineral Leasing Act: Applicability—Sodium Leases and Permits: Generally

A silicate will be considered to be a sodium silicate and subject to disposal under the Mineral Leasing Act either where the sodium within the deposit is commercially valuable or where the sodium is essential to the existence of the mineral.

Robert E. Simpson, A–4167 (June 22, 1970), overruled to extent inconsistent, Wolf Joint Ventures, 75 I.D. 137 (1968), distinguished.

APPEARANCES: Fritz L. Goreham, Esq., Office of the Field Solicitor, United States Department of the Interior, Phoenix, Arizona, for the appellant; Howard Twitty, Esq., of Twitty, Sievwright & Mills, Phoenix, Arizona, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The United States has appealed from a decision of Chief Admin-

istrative Law Judge L. K. Luoma, *United States* v. *Union Carbide Corporation*, Arizona 7345, dated June 14, 1974, holding a deposit of zeolite embraced within the limits of the EZ No. 225 placer mining claim and the J.C. 75 and J.C. 76 lode mining claims locatable under the Mining Act of 1872, *as amended*, 30 U.S.C. § 22 *et seq.* (1970).

The sole issue on appeal is whether the deposit of zeolite-bearing ore found within the claim is locatable under the general mining laws, 30 U.S.C. § 22 *et seq.* (1970), as Judge Luoma found, or is subject to leasing under the provisions of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970), as the Geological Survey contends. We find ourselves in substantial agreement with Judge Luoma and hereby adopt his decision with certain modifications noted below. A copy of his decision p. 314 is appended hereto.

Our major difficulty with the Judge's decision is his treatment of the Bureau of Land Management decision in *Robert E. Simpson*, A-4167, June 22, 1970. In *Simpson*, the Office of Appeals and Hearings, BLM, vacated a decision of the Arizona Land Office rejecting Simpson's sodium prospecting permit application for zeolite minerals in certain lands. The Land Office had rejected the application because the lands requested were embraced within various mining claims located for zeolite. The Office of Appeals and Hearings, BLM, recognizing that the rejection was implicity premised on the locatability of the zeolite, examined this question on appeal.

Starting from the premise that "silicates of sodium are subject to disposition only in the form and manner provided in the Mineral Leasing Act and are not subject to location under the mining laws," *Simpson* drew an analogy between zeolite and dawsonite which had been held, in *Wolf Joint Ventures*, 75 I.D. 137 (1968), to be subject to mineral leasing. Thus, it concluded that "deposits of sodium silicates classed as sodium zeolites" were not subject to location.

Judge Luoma held that the zeolites found within the claims, *i.e.*, chabazite and erionite, were calcium sodium aluminosilicates, not sodium zeolites, and that the deposit did not contain a significant presence of sodium. Therefore, he held the deposit locatable under the general mining laws.

We think this case points very clearly to the peril of using terminological categorization as a facet of adjudication. The appellant seems to be directing its effort to naming the mineral substances as sodium zeolite; the appellee seems to be devoted to calling the substance a calcium sodium aluminosilicate. The mineral deposit, however, remains structurally the same no matter how it is designated. The ultimate question is whether this mineral on the claims in issue is a type of deposit containing sodium that Congress intended should be removed from the workings of the general mining laws, and made sub-

ject to disposition only under the mineral leasing statutes.

[1] It should first be noted that all substances that contain traces of sodium or other leasable minerals are not necessarily subject to the Mineral Leasing Act of 1920. Thus, in *Burnham Chemical Co.* v. *United States Borax Co.*, 54 I.D. 183, 189 (1933), the Department clearly considered the mineral "ulexite" to be locatable as a calcium borate. Ulexite's chemical formula shows the presence of sodium, $NaCaB_5O_9$–$8H_2O$.[1]

The relevant statute speaks of "chlorides, sulphates, carbonates, borates, silicates or nitrates of sodium * * *," 30 U.S.C. § 261 (1970). For the purposes of this appeal we are concerned with the meaning of the term "silicates * * * of sodium" as used in the Act. The term "silicate minerals" is defined as "minerals with crystal structure containing SiO_4 tetrahedron arranged as (1) isolated units, (2) single or double chains, (3) sheets, or (4) 3-dimensional networks." Paul W. Thrush, ed., *A Dictionary of Mining, Mineral and Related Terms* at 1011 (1968). Zeolites are a class of hydrated silicates of aluminum and either calcium or sodium or both. *Id.* at 1252. Zeolites are clearly silicates. But the question is whether the casual or fortuitous presence of sodium within the molecular structure causes the zeolites in the instant case to be classified as "silicates of sodium." We think it does not.

We believe that a zeolite could properly be classified as a silicate of sodium, as contemplated by the Mineral Leasing Act, *supra*, if either of two contingencies occur. First, the sodium must be present in sufficient quantity so as to be commercially valuable. An analogy can be drawn with the situation that may occur with granite deposits. Theoretically, an uncommon variety of granite would be locatable under the Building Stone Act of Aug. 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970). Various amounts of potassium naturally occur within granite deposits. Potash, loosely defined as a carbonate of potassium, is subject to the Mineral Leasing Act of Feb. 7, 1927, 30 U.S.C. § 281 *et seq.* (1970). The Geological Survey has taken the position that if an uncommon variety deposit of granite contains potash in sufficient quantity to be commercially recoverable, that deposit is disposable only under the provisions of the Mineral Leasing Act. (*See e.g.*, Tr.

[1] One issue in *Burnham Chemical Co.* v. *United States Borax Co.*, 54 I.D. 183 (1933) was whether under sec. 23 of the Mineral Leasing Act of 1920, the sodium borate discovered within the limits of the claims was "dissolved in and soluble in water, and accumulated by concentration." The decision found that the deposits were "not within the provisions of Sec. 23 of the Leasing Act at the time such deposits were found." *Id.* at 189. Subsequent thereto, in *United States* v. *United States Borax Co.*, 58 I.D. 426 (1943), the Department reversed *Burnham Chemical Co., supra*, finding that the sodium borate was accumulated by concentration and thus leasable. The question then was whether the lands were known to be valuable for sodium borate on Sept. 2, 1927, the date of the discovery of the deposit of colemanite and ulexite. Thus, the decision in *United States* v. *United States Borax Co.* did not reverse the implicit finding that ulexite was locatable.

101.) The logical and necessary corollary to this position is that if a deposit of such granite contains certain amounts of potash but at too low a level to permit economic recovery, that deposit is subject to location pursuant to the Building Stone Act, *supra*. This, in our opinion, is one proper criterion by which to determine that a deposit is leasable under the Mineral Act *as amended*. Both sides admit that the sodium present in the deposits in the instant case is not commercially valuable.[2]

Secondly, the molecular structure of the mineral must be ascertained in order to determine whether the mineral is locatable under the general mining laws, or is disposable only by lease under the Mineral Leasing Acts. If the presence of sodium or any other material listed in the Mineral Leasing Acts is essential to the existence of the mineral, that mineral is leasable and not locatable. Thus, as the decision in *Wolf Joint Ventures*, *supra*, found, dawsonite, while admittedly a double salt with aluminum present, requires sodium carbonate for its molecular structure. Regardless of whether the sodium was commercially recoverable, dawsonite would be subject to the provisions of the Mineral Leasing Act. The structure of zeolite on the other hand has no molecular requirement for sodium, but merely for a cation. The molecular structure of zeolite does not vary essentially, dependent upon which cation is present. It is structurally immaterial whether the cation be calcium, sodium, potassium, or magnesium. Therefore, it cannot be said that the presence of sodium is essential to the existence of a zeolite deposit. The decision in *Wolf Joint Ventures*, *supra*, does not impel a contrary result.

We note that the decision of Judge Luoma found, pursuant to the test established in *Simpson*, that the deposit did not possess a *significant presence* of sodium. In a very real sense we are attempting to formulate a test which might determine this question. We do not believe, as the Government contends, that the fact that sodium has a higher unit cell occurrence than calcium or magnesium has any intrinsic bearing on whether the presence of sodium is significant. Rather, we believe that the two-fold test we have outlined deals with this question more concretely than the analysis undertaken in *Simpson*, *supra*.

Inasmuch as the zeolite deposit at issue meets neither of these tests, it must be held to be locatable under the general mining laws. Furthermore, we believe that, analyzed in the light of this decision, the decision in *Robert E. Simpson*, *supra*, cannot be maintained, and it is hereby overruled to the extent it is inconsistent with the views expressed herein.

[2] We think that the legislative history of the Potassium Act of 1927, Act of Feb. 7, 1927, 44 Stat. 1057, 30 U.S.C. § 282 *et seq.* (1970), supports appellee's assertions that leucite and alunite were seen as within the ambit of that Act because of their potential value as a source of potash and not simply because the minerals contained some potassium. *See e.g.*, Hearings before the House Committee on the Public Lands on H.R. 9029, 68th Cong., 2d Sess., 31–32, 38–39 (1925).

Judge Ritvo, in dissent hereto, argues that: "the question should be whether the sodium is essential to the existence of the zeolite deposit, not whether there can be other zeolite deposits with another cation." *Infra* at 329.

He then states: "while it [sodium] is there it is essential to the stability of the zeolite."

In our opinion, Judge Ritvo mistakes the concept of "present" with the concept of "essential." The fact that something is *present* does not make it *essential.* The evidence clearly points out that the deposit of zeolite is chiefly a calcium-type, rather than a sodium. The sodium cation is present in the mineral, but it is not essential to its structure. In the instant case, the majority of the cations are provided by calcium.

The dissent's discussion of the failure to join George Hunker, who in Sept. 1972 filed a prospecting permit application covering the lands embraced by the mining claims herein, confuses two disparate concepts: the existence of an interest that would be sufficient to support intervention in an appeal by a party and the existence of an interest that is of such a nature as to be legally termed "indispensable" to a resolution of the case.

In the instant case it is important to note that the party who is argued to be "indispensable" would not be a party defendant, but rather would be a party plaintiff. Surely the respondent herein cannot be required to join a party inimical to its interests, particularly where, as here, the appellant and not the respondent was the moving force behind the contest proceeding.

Moreover, even should the Government prevail on the merits of a case such as this, Hunker would not necessarily receive any benefits. At best, all that Hunker would be possessed of would be a preference right of priority to be considered when and if the Department decided that issuance of sodium prospecting permits for the land in issue was in the Government's interest. As Judge Ritvo noted in a previous case involving a phosphate prospecting permit application, "* * * the filing of a phosphate prospecting permit application creates no vested rights in the applicant * * *." *William F. Martin*, 24 IBLA 271 (1976).

The applicable regulation, 43 CFR 3510.0–3, provides that "the Secretary is authorized to issue permits to prospect *unclaimed* and *undeveloped* land areas subject to the provisions of the Mineral Leasing Act, as amended * * *." The Department has consistently held that "* * * prospecting permits are to be issued only where the existence or workability of the phosphate bed underlying the land has not [yet] been determined." *William F. Martin*, *supra; Atlas Corp.*, 74 I.D. 76 (1967). There seems little question that regardless of whether the deposit of zeolites is deemed locatable or leasable its workability has been demonstrated and thus, if leasable, the lands could only be leased by competitive bidding.

We stress that our decision in this case relates only to the claims in issue where the zeolites have not been shown to have a significant amount of sodium. Zeolites having a different composition from those at issue here are not passed upon.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified, and the contest complaint is dismissed.

DOUGLAS E. HENRIQUES,
Administrative Judge.

I CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

June 14, 1974

DECISION

UNITED STATES OF AMERICA,
Contestant

v.

UNION CARBIDE CORPORATION,
Contestee

Arizona 7345

Involving the EZ No. 225 placer mining claim and the J.C. 75 and J.C. 76 lode claims situated in Sec. 13, T. 11 S., R. 28 E., GSR Mer., Graham County, Arizona.

Complaint Dismissed

The Bureau of Land Management, United States Department of the Interior, filed a complaint against the above-named placer mining claim on Nov. 7, 1972. The complaint charged:

"The EZ No. 225 placer mining claim is invalid because the minerals sought to be located are not locatable under the general mining law."

Contestee filed a timely answer denying the charge.

A prehearing conference was held on Jan. 30, 1973, at Phoenix, Arizona. Contestant was represented by Fritz L. Goreham, Esq., Office of the Solicitor, Department of the Interior, Phoenix, Arizona. Contestee was represented by Howard A. Twitty, Esq., Twitty, Sievwright & Mills, Phoenix, Arizona.

By agreement of the parties, the complaint was amended to include the lode claims, J.C. 75 and J.C. 76. Mr. Twitty stated that the lode claims embraced the same ground as the placer location and that the only reason the lode locations were made was to prevent others from top locating over the placer. The parties agreed that the mineral deposit [if locatable] was properly located as a placer and that no lode versus placer issue would be raised. The parties also agreed:

1. That neither party would challenge the other party's manner of cutting samples, where they came from and handling of the analyses.

2. That prior to hearing they would exchange papers showing each party's analysis of the mineral or minerals involved.

3. That prior to hearing they would make every effort to agree on the chemical compound or formula of the mineral or minerals involved and reduce it to writing which could be received in evidence by stipulation.

4. That prior to hearing they would make every effort to reach agreement on the specific issue or issues involved.

5. That there was no issue on the prudent-man rule of discovery and marketability.

The hearing was held on July 17, 1973, in Denver, Colorado. Contestant was represented by Mr. Goreham. Mr. Twitty and Patrick J. Morgan, Esq., of the Union Carbide Corporation, New York, New York, represented Contestee.

The basic issue herein is whether the deposit of zeolite-bearing ore found on the EZ No. 225 claim is locatable under

the general mining laws, 30 U.S.C. § 22 *et seq.* (1970), or subject to leasing under the provisions of the Mineral Leasing Act of Feb. 25, 1920, *as amended.* 30 U.S.C. § 181 *et seq.* (1970).

The EZ No. 225 claim, covering lands in Graham County near Bowie, Arizona, was located for zeolite on Apr. 15, 1961, by T. H. Eyde, as agent for Union Carbide Corporation (Ex. 6). As a protective measure, the lands embraced by the EZ No. 225 claim were also located as two lode claims, the J.C. 75 and J.C. 76, on Sept. 14, 1972 (Ex. 7 and 8).

General Background of Zeolites

Zeolites belong to a group of naturally occurring minerals called framework silicates. There are several groups of framework silicates: the feldspars, the feldspathoids and the zeolites. Zeolites were first recognized as a new group of minerals by a Swedish Mineralogist in 1756. There are more than 40 naturally occurring zeolites. All the zeolites are crystalline hydrated aluminosilicates of alkali (*e.g.*, sodium and potassium) and alkaline earth (*e.g.*, calcium and magnesium) elements (Ex. G, p. 1; Ex. 5, p. 8, Tr. 19–20). The two principal zeolites found in the ore deposit on the EZ No. 225 claim are chabazite and erionite (Tr. 17; Ex. 5, p. 24).

Zeolites have three components: a crystalline aluminosilicate framework structure, cations and water molecules (Tr. 30). The framework structure is based on an infinitely extending three-dimensional network of AlO_4 and SiO_4 tetrahedra linked to each other by the sharing of all the oxygens (Ex. 5, p. 3). The structure encloses interconnected cavities occupied by the cations and water molecules (Ex. G, p. 1).

The tetrahedra of four oxygen ions surrounding a silicon or aluminum ion act as the building blocks of the zeolite framework. A silicon ion has four positive charges which neutralize one of the two negative charges on each oxygen. The remaining negative charge on each oxygen combines with another silicon or aluminum ion. The aluminum ion has only three positive charges. (Ex. 5, p. 5). The deficiency must be made up by an additional positive charge of alkali metals, such as sodium or potassium with one positive charge (M+) for each atom, or alkaline earths, such as calcium or magnesium with two positive charges (M++) for each atom (Ex. 5, p. 6). Such positive charges, known as cations, in most cases may be completely interchanged for other cations without destroying the crystalline framework structure. Such an interchange of cations is called cation exchange (Ex. G, p. 6).

Water molecules, along with the exchangeable cations, occupy channels and interconnected voids within the crystalline framework structure of the zeolites (Ex. 5, p. 11). The water may be reversibly removed without significant structural distortion (Ex. G, p. 7; Tr. 34, 132). The dehydration of zeolites is necessary to free the cavities and channels of the zeolites for their commercial use as molecular sieves and as adsorbents (Ex. G, p. 8; Ex. 5, p. 1–4).

Zeolites exhibit molecular sieve properties based on the size of the apertures that connect the voids (Ex. G, p. 8). Zeolites form microporous molecular sieves whose apertures or pores are less than 10A in diameter[1] (Ex. 5, p. 1).

The term molecular sieve may refer to microporous solids which can separate molecules based on differences in size and shape. The molecular sieve action can be total; certain large molecules may be totally prevented while diffusion of smaller molecules may occur, or there may be a partial sieve action where different size molecules may diffuse or penetrate the solid at varying rates under various conditions (Ex. 5, p. 3).

Such properties make zeolites very useful in the removal of water and substances such as sulfur dioxide and hydro-

[1] 1 A is one angstrom. An angstrom is a unit of linear measurement. One inch equals 254,000,000 A (Ex. 5, p. 1).

gen sulfide from gas streams (Ex. 5, p. 21) and in selective adsorption of other materials (Tr. 108).

Applicable Law

The general mining laws, 30 U.S.C. § 22 *et seq.* (1970), provided for the location of valuable mineral deposits on lands belonging to the United States. However, the Mineral Leasing Act of Feb. 25, 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970), removed deposits of certain listed minerals from acquisition under the general mining laws and made them subject only to lease. Sodium was one of those minerals.

The provisions of the Mineral Leasing Act applicable to deposits of sodium are as follows:

30 U.S.C. § 181 (1970) reads in pertinent part:

"Deposits of * * * sodium * * * shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States, or associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, * * *"

30 U.S.C. § 193 (1970) provides in pertinent part:

"The deposits of * * * sodium * * * herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this chapter, except as to valid claims existent on Feb. 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

30 U.S.C. § 261 (1970) provides in pertinent part:

"The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, in lands belonging to the United States for a period of not exceeding two years: * * *"

30 U.S.C. § 262 (1970) provides in pertinent part:

"Upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 261 of this title have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit * * *."

The law relating to the question of whether a body of ore may be considered a deposit of sodium within the meaning of the Mineral Leasing Act is limited to a few decisions of the Department of the Interior. Such a question arose in *Wolf Joint Venture, et al.*, 75 I.D. 137 (1968). Therein, certain sodium preference-right lease applicants were afforded the opportunity to request a hearing at which evidence was to be presented about certain enumerated questions relating to the nature of the occurrence of the minerals in certain deposits, the extent of such deposits and the feasibility of the development of the various minerals in the deposits. *Id.* at 139–140. The principal mineral of question in *Wolf Joint Ventures* was dawsonite, which is a double salt—a sodium aluminum carbonate. About the locatability or leasability of dawsonite, the Solicitor stated:

"Notwithstanding the presence of aluminum as a constituent element of the mineral, dawsonite is among the sodium substances enumerated in section 23 of the Act. As such, dawsonite, as well as all of the other enumerated substances of sodium, is subject to disposition only under the provisions of the Mineral Leasing Act. (Footnote cited, *E.g.* analcite ($NaAlSi_2O_6.H_2O$)) *United States* v. *U.S. Borax Co.*, 58 I.D. 426, 432 (1943)."

In *Robert E. Simpson*, A–4167 (June 22, 1970), the Office of Appeals and Hearings considered an appeal from a decision of the Arizona Land Office which rejected Simpson's sodium prospecting permit application for zeolite minerals in certain lands in sections 18, 19, 20, 28, 30 and 33, T. 11 S., R. 29 E., G.S.R.M., Graham County, Arizona, because the applied for

lands were already appropriated under the general mining law. The Land Office decision was reversed and the Office of Appeals and Hearings stated:

"* * * we have concluded that the sodium zeolites are silicates of sodium subject to disposition only under the Mineral Leasing Act of 1920, as amended, and are not subject to location and acquisition under the mining laws of the United States.

* * * * * * *

"* * * we conclude that deposits of sodium silicates classed as sodium zeolites are subject to disposition only under the sodium provisions of the Mineral Leasing Act of 1920, and that such deposits are not subject to location and disposition under the mining laws of the United States. It is our opinion that with respect to a particular zeolite, the cation of the framework must be sodium or contain a significant presence of sodium in order for the zeolite to be described as a sodium zeolite or a sodium silicate compound.

* * * * * * *

"In our opinion, both herschelite, which has a nearly pure sodium cation (91 percent), and the intermediate chabazite, which contains a significant presence of sodium in the cation charge, would be subject to the sodium provisions of the Mineral Leasing Act. So long as an occurrence of a particular zeolite may be properly identified, in the mineralogical sense, as an intermediate sodium-calcium zeolite, it would be a silicate of sodium enumerated in section 23 of the Mineral Leasing Act."

The Conservation Division, Geological Survey, by memorandum dated Mar. 10, 1971, concurred with the technical statements and findings in *Simpson* and the Solicitor expressly approved of the conclusions therein. *Disposition of Sodium zeolite Under the Mineral Leasing Act of 1920*, M–36823, May 7, 1971.

In an early Departmental decision, *Burnham Chemical Co.* v. *U.S. Borax Co. and Western Borax Co.*, 54 I.D. 183 (1933), the Assistant Secretary dismissed as untenable an argument that kernite was not a leasable mineral because the commercial products made from kernite, namely borax and boric acid, were valuable for their boron content and not for the sodium therein. The Assistant Secretary stated:

"The act [Mineral Leasing Act] specifies among the salts named "sodium borate," and relates to the deposit found in the ground, and it is immaterial what constituents thereof are the most useful after it has been made into a commercial commodity. If that argument were valid it would, of course, follow that no sodium borate from which borax is made would be within the purview of the Leasing Act, either as it originally stood or as amended." *Id.* at 186.

Evidence

Contestant's analyses of its samples from the EZ No. 225 placer claim are contained in a report (Ex. G) prepared by Dr. Richard A. Sheppard.[2] A comparable report (Ex. 5) on the samples taken by Union Carbide Corporation was compiled by Dr. Donald W. Breck.[3]

[2] Dr. Sheppard is a geologist for the Geological Division of the United States Geological Survey in Denver, Colorado. He was graduated from Franklin & Marshall College in 1956 with a B.S. in geology. Four years later he received a Ph.D. in geology from Johns Hopkins University and since that time has been employed by the Geological Survey. From Dec. 1962 until the present he has been the project chief for the zeolite project in southeastern California. He has authored or co-authored numerous publications dealing with zeolites (Ex. A).

[3] Dr. Breck is currently Senior Research Fellow for the Union Carbide Corporation in Tarrytown, New York. He received a B.S. and a M.S. in chemistry in 1942 and 1948, respectively, from the University of New Hampshire. He has been employed by Union Carbide Corporation since graduating from Massachusetts Institute of Technology in 1951 with a Ph.D. in inorganic chemistry. His entire tenure with Union Carbide has been spent working with zeolites. He has research experience in inorganic fluorine chemistry, inorganic silicate chemistry, mineralogy and physical chemistry. He has authored a book on zeolites entitled *Zeolite Molecular Sieves: Structure, Chemistry and Use*, Wiley, New York, 1973. He has also authored or co-authored an extensive number of publications dealing with the physical properties of zeolites. He has received over 20 patents for synthetic zeolites and processes involving zeolites. (Ex. 1).

Dr. Sheppard's report consists of three parts: a general statement about zeolites outlining their properties, structure, chemistry and occurrence; a general statement about the two principal zeolites on the claim, chabazite and erionite; and the mineralogy and chemistry of the ore and ore minerals from the claim (Tr. 16–17). Dr. Sheppard was not involved in the sampling nor in the testing of the samples. He merely assembled the raw data and prepared the report (Tr. 17).

Dr. Sheppard reported that the deposit on the claim consisted chiefly of zeolites. By X-ray diffraction the percentages were determined to be about 70 to 80% chabazite, 10 to 20% erionite, 5% clinoptilolite and about 5% other materials (Tr. 18). He believed that zeolites could be divided on the basis of their predominant cations. He considered a sodium zeolite to be one in which the sodium cation was predominant. Based on the analyses, he felt sodium was the predominant cation in the ore from the EZ No. 225 claim and that the zeolites should be considered sodium zeolites, which in turn generally could be considered sodium silicates (Tr. 21, 26).

Dr. Sheppard stated that Table 6 (Ex. G, p. 35) showed that sodium made up about 55% of the cations for chabazite (Tr. 22). The figures in Table 6 represent atoms per unit cell calculated on the basis of 72 oxygen atoms. Chabazite was separated from the bulk ore and the separation was considered to be about 99% pure. The erionite separation was only about 55% to 80% pure (Tr. 22). The following testimony was elicited from Dr. Sheppard concerning the calculations for Table 6:

Q. When you calculated the atom weights for this Table 6, you were assuming these samples were pure samples, were you not?

A. I treated them as if they were nonomineralic, as if they consisted of only one mineral.

Q. They were pure?

A. Right.

Q. Now, on your Table 6, if, by ion exchange the calcium in the chabazite was replaced with, I mean the sodium in the chabazite in your Sample 1 was replaced with calcium, how many ions of, or atoms of calcium would be required?

A. Say half.

Q. Half of 3.61?

A. Right.

(Tr. 47–48)

He explained that while sodium makes up about 55% of the sum of the magnesium, calcium, sodium and potassium cations (Tr. 23), such percentage represents the exchangeable cations by atoms, not by weight (Tr. 57).

A significant difference in the reports was pointed out by Dr. Sheppard in comparing his Table 3 (Ex. G, p. 25) with Dr. Breck's Tables 7 and 8 (Ex. 5, p. 24) (Tr. 26–27). The tables express the weight percentage of zeolite in the bulk ore. Table 3 and Table 8 show the results of X-ray powder diffraction analyses. Contestant's analysis shows the three sample average to be 75% chabazite, 15% erionite, 5% clinoptilolite, and an average total of 95% zeolites. Union Carbide's three sample average is about 60% chabazite, about 28% erionite, no significant amount of clinoptilolite, and an average total of 87.3% zeolites. The other 12.7% is apparently gangue material (Tr. 109). Table 7 (Ex. 5, p. 24) represents an analysis of the bulk ore samples by oxygen adsorption. No comparable test was performed by Contestant, nor was Dr. Sheppard familiar with the oxygen adsorption test (Tr. 42–43).

The oxygen adsorption test showed the average percentage of zeolites in the ore to be the same as that shown by Contestee's X-ray diffraction analysis. 87.3%. Clinoptilolite did not show up because the pore size of clinoptilolite following dehydration is too small to adsorb oxygen (Tr. 110). According to Dr. Breck, clinoptilolite is a very minor component of the deposit (Tr. 113).

Dr. Sheppard indicated that the fact that Contestee's analyses showed an

average of about 60% chabazite, while Contestant's average was 75% chabazite, could be significant in that Contestant's analyses showed chabazite to contain more sodium than does erionite (Tr. 28–29).

In reference to Table 1 (Ex. G, p. 22) which contains the figures for the weight percentage chemical analysis of ore from the claim, Dr. Sheppard stated that the sum of the sodium and potassium oxides and the sum of the calcium and magnesium oxides were just about equal, being about four percent (Tr. 41). However, in two of the three samples the weight percentage of the alkaline earth oxides did exceed the weight percentage of alkali oxides (Tr. 42). In fact the table discloses that for each sample the weight percent of CaO is greater than that of Na_2O.

While chabazite was successfully separated from the ore in the laboratory, Dr. Sheppard knew of no commercial operation by which chabazite and erionite are being or could be separated (Tr. 53). Dr. Russell G. Wayland[4] disagreed with Dr. Sheppard, he believed there were existent processes by which chabazite could be commercially separated (Tr. 93).

When asked to define a sodium deposit, Dr. Sheppard responded:

"THE WITNESS: Sodium, being a metal as far as I know, sodium itself doesn't occur in nature, so there are no deposits of sodium. The sodium is a very reactive element and it combines with other things like chabazites and sulphites and enters into the silicates and so forth, but if you would say a deposit of sodium mineral, I mean sodium itself doesn't occur as sodium in nature."

(Tr. 58)

And on whether the deposit on the claim herein could be characterized as a sodium deposit:

"THE WITNESS: Again, it is a deposit of a sodium bearing Zeolite.

"JUDGE LUOMA: Do you have expertise or knowledge of commercial uses of sodium?

"THE WITNESS: No, I don't.

"JUDGE LUOMA: You don't know then whether a sodium as you found it to be present in the Zeolite would be in and of itself commercially usable?

"THE WITNESS: I don't know that."

(Tr. 59)

Dr. Russell G. Wayland, Chief, Conservation Division, United States Geological Survey (see above), concurred in the conclusions reached by Dr. Sheppard in his report (Tr. 63). Dr. Wayland felt the deposit was a sodium silicate deposit within the meaning of the Mineral Leasing Act and, therefore, leasable. When asked whether sodium was a dominant or essential cation in the deposit, he stated:

"A. Whether it is dominant is not a controlling point, that it is essential is a controlling point and it is an essential constituent. Without it, these would not be leasable and without it these particular deposits would not be Zeolite, they would not be sodium silicate, but they are in my view and also in the view of Dr. Sheppard."

(Tr. 63)

Also, as to the function of sodium in the deposit, he explained:

"THE WITNESS: It is an essential constituent of these [sic] Zeolite. Without its presence there these minerals would not have the properties that they do to go beyond immediately foreseen properties. And the other function is that it is present and the Government owns the deposit."

[4] Dr. Wayland is the Chief, Conservation Division, United States Geological Survey. Dr. Wayland received a B.S. in mining engineering in 1934 from the University of Washington. In 1936 he was graduated from the University of Minnesota with a M.S. in economic geology. The following year he received an A.M. from Harvard University in economic geology. He then returned to the University of Minnesota and was graduated in 1939 with a Ph. D. in geology. He is a member of a number of professional geological organizations and is a certified professional geologist. He has published numerous articles and reports on a wide range of geological topics (Ex. C).

"JUDGE LUOMA: The fact that the calcium itself is present is important to you?

"THE WITNESS: Not very.

"JUDGE LUOMA: Was that your testimony?

"THE WITNESS: No. The sodium is present, it is required to be there in these crystalline structures, as Dr. Sheppard brought out, and I am sure Dr. Breck will in his report, say the same thing. So without the sodium in these particular minerals you don't have these minerals."

(Tr. 94)

Dr. Breck had a different response on whether sodium was essential:

"A. Well, it is certainly not an essential component. There are chabazites that occur that are primarily all calcium and there are, of course, there are some Zeolite minerals that have as many as four cations, so sodium per se is not an essential component either to the formation or to the Zeolite afterwards. We, for example, synthetically manufacture three sodium based Zeolites. In one instance, in fact two instances, we go through deliberately an ion exchange procedure to remove the sodium because we don't want it for the end adsorption unit and in that text the sodium is neither essential nor desirable.

(Tr. 117)

Dr. Wayland was questioned extensively about the effect of the Minutes of the Sodium Board dated December 30, 1960, which attempted to establish standards for the classification of sodium lands (Tr. 69–80). The minutes were not approved by the Director of the Geological Survey until July 24, 1961 (Ex. F). Concerning such approval, Dr. Wayland testified:

"A. They are standards which we will apply, they are guidelines to us. We use them. We would use those for broad classifications as opposed to case load questions. We might use them, we are a professional organization and we rely on the judgment of our geologists, our District geologists, our Regional geologists and where we have a question we go all the way to the Director. When we are putting out something which is rather systematically and well documented, we go all the way to the Director for his blessing. We don't feel necessarily that we have to, but we think it is the best thing because if we are going to have something which has been rather thoroughly worked up, we feel he should know about it and it becomes a document which we will show anybody who asks or exhibits an interest.

Q. Then the Director's approval does not—is not the thing that makes them official?

A. It helps a lot.

Q. Well, what is the effect of the Director's approval?

A. It proves he saw it and he had no problem with it.

Q. Other than that, his approval doesn't mean anything?

A. There is nothing in the law or regulations that require he has to approve those standards in that form before we put them into practice. * * *"

(Tr. 74–75)

Dr. Wayland's testimony is in apparent conflict with a letter dated June 26, 1973, signed by him in which he stated on p. 2 at 5(e) (Ex. 12):

"Prior to final approval of the minutes, they are used for information purposes only and are not used as classification standards."

In addition, Exhibit F, which is a copy of the approved Minutes of the Sodium Board, has a cover memorandum from the Chief, Conservation Division, to the Director, Geological Survey, which states:

"Your approval of this memorandum will constitute our authority for applying these new standards to land classification."

As to the quantity of sodium necessary in order for him to consider the mineral leasable, Dr. Wayland testified:

"THE WITNESS: I would not draw the line at 49.9 alkali as opposed to alkaline earth. I would draw the line somewhere down much closer to 20 percent. The mineralogist will consider that he

has essentially an end member if he is within 20 percent of one end of it, but what we are talking about here are intermediates in the series and I feel that we have properties that are, due to the presence of sodium as well as calcium, in the intermediate of this isomorphus series and therefore, we are dealing clearly with the mixtures that is described in these papers, technical papers here." (Tr. 96–97)

The testimony presented by Contestee will be discussed next. Dr. Donald W. Breck, Senior Research Fellow for the Union Carbide Corporation (see above), testified that the material processed from the claim herein is designated by Union Carbide as AW 500 (Tr. 109). During the processing of AW 500 there is no attempt made to separate chabazite and erionite nor to remove the gangue material. Dr. Breck knew of no commercial process by which those zeolites could be separated (Tr. 109). Contestee uses the ore from the claim commercially without beneficiation because it makes no difference whether it is chabazite or erionite for Contestee's purposes (Tr. 111).

During ion exchange or dehydration, there is little or no effect on the aluminosilicate structural framework of chabazite or erionite (Tr. 111).

In referring to Contestant's electron micrographs of the samples from the claim (Ex. G, Fig. 3–6, 27–30), Dr. Breck stated that they did not provide any helpful information for Contestee's purposes and he felt they were totally irrelevant in terms of Contestee's product use (Tr. 112). He felt the same about Contestant's spectrographic analysis (Tr. 113).

Dr. Breck explained the reason why Union Carbide had not made a separation of chabazite and erionite and done separate analyses on each, by stating:

"A. Because I didn't consider that relevant either. We mine the ore and we processed it as it is and we sell a particular product. We carry through no separation so we are therefore not interested in the chemical makeup of even one component." (Tr. 113)

While Dr. Sheppard felt that sodium was the predominant cation in the ore deposit, based on the results in Table 6, Ex. G, p. 35, which express the unit cell composition of chabazite and erionite based on 72 oxygen atoms, Dr. Breck disagreed. Dr. Breck testified:

"* * * If you start out with, let's say in this particular case, four sodium ions and we replace only one calcium ion comes in it automatically has to kick out two sodiums. That means you have left two sodium and one calcium, so we are now at the point where we have twice as many sodium as calcium.

JUDGE LUOMA: Same job is being done though?

THE WITNESS: The same job is being done, right. In fact, I won't go into this, in many cases it is preferable to have a calcium form. However, in our processing of the ore, as yet we have not gone into that because it is not necessary, but further refinement in the product might require it.

JUDGE LUOMA: Well, in layman's language then, is the end result that even though by one method it may appear to be predominantly sodium in effect it may in another way of measuring it, [be] predominantly calcium because of the two to one relationship?

THE WITNESS: That's true.

JUDGE LUOMA: Is that a correct statement?

THE WITNESS: That's true in the way I determined this on the mole basis. If you count the Na_2O and the CaO the divalent ions are in the majority. But if you count numbers of individual ions then because of this two to one relationship you can have or do have more sodium than calcium, but the calcium is performing a dual role for your purposes. It is performing a dual role."

(Tr. 122–123)

Dr. Breck felt the unit cell analysis was irrelevant and that there was a built-in bias in such analysis. He stated:

"* * * you are counting individual atoms and in this case you are forgetting

that one calcium is equivalent to two sodium or two potassium because they fulfill the structural function of two of the other ions.

* * * * * * *

A. Yes, there is a built-in bias. You have expressed these compositions in several other ways. Really, if you want to look at something ludicrous take the compound SiO_2 for quartz. It is 50 percent by weight silicone atoms on a number basis, but not if you got to go to a volume basis it is over 90 percent oxygen so it depends on what you pick as your basis."

(Tr. 116)

Dr. Breck believed that of the three means used to calculate sodium-calcium content, weight percent analysis, mole analysis, and unit cell analysis, weight percent analysis made the most sense for the purpose of the contest as he understood it (Tr. 116).

Dr. Breck did not consider the ore deposit on the claim to be a sodium deposit. In his opinion a deposit containing sodium as a usable chemical component that could be commercially extracted would have to contain much more sodium than the deposit herein (Tr. 119).

When asked whether the sodium found on the claim could be extracted and used in industry, he responded:

"THE WITNESS: It is present in too small a quantity and there is no process that I can envisage whatsoever foreseen that would be economically operable to extract that small amount of sodium, as compared, for example to the occurrence of sodium in other more usable raw material forms."

(Tr. 119–120)

Dr. Breck stated that he absolutely would not agree that the deposit could be classified as a sodium silicate (Tr. 123). He would classify the deposit on the EZ No. 225 claim as a calcium sodium aluminosilicate. He made such classification with the realization that his analyses showed the calcium content to be only slightly greater than the sodium content. In his opinion the deposit is better classified as a calcium sodium aluminosilicate than as a sodium calcium aluminosilicate. In that regard he would disagree with the conclusions of Contestant's witnesses. However, he would not disagree with the analytical data presented by Contestant (Tr. 124–25). Dr. Sheppard stated that it depends upon what basis one uses in analyzing the deposit, but he admitted that on a mole basis one would have to term the deposit a calcium sodium aluminosilicate (Tr. 164). Contestant introduced as evidence (Exhibit P) an excerpt from the *Handbook of Geochemistry* edited by Wedepohl and published in 1970 (Tr. 162). The excerpt was a table which listed minerals containing sodium as a "major component." Under the heading "silicates" were listed chabazite and erionite. There was no indication of what type of analysis had been used to arrive at the conclusion that sodium was a major component of such minerals (Tr. 163).

Robert Langerhans, Assistant General Manager of the Molecular Sieve Department, Linde Division, Union Carbide Corporation, testifying as to the uses of AW 500, the only product produced from the deposit on the EZ No. 225 claim, stated:

"A. Well, the present commercial uses that we find is they are used in acid gas drying, in applications such as removal of water from recycled hydrogen, water from air, generated nitrogen, natural gas like fuel gas, chloroform, carbon tetrachloride, acid gas components, hydrochloric acid, NO_2 CO_2, there are other applications where you can simply dry organic compounds if you want to get them very very dry and pass the compound over AW–500 and it will do a nice drying job. There are further applications for ion exchange in the removal of radioactive cesium. This is from AEC waste."

(Tr. 126)

The sales of AW 500 for the years 1970, 1971 and 1972 were 95,000 pounds, 105,000 pounds, and 65,000 pounds, respectively (Tr. 127). The price charged per pounds for the material is dependent upon the

quantity purchased, the greater the amount, the cheaper the unit price. The price ranges from $1.69 per pound to $1.14 per pound (Tr. 133).

During the manufacturing process no attempt is made to remove gangue material from the ore (Tr. 130). Langerhans knew of no commercial process by which chabazite and erionite could be separated (Tr. 131).

Andrew J. Regis,[5] Senior Research Engineer for Norton & Company (see above), testified for Contestee. Regis was the co-author of two articles on zeolites whose abstracts were introduced as evidence at the hearing (Ex. 18). He stated that he was familiar with Union Carbide's claims in the Bowie area and that he knew the approximate location of the EZ No. 225 claim (Tr. 135).

The formulas used to express the chemical composition of the zeolites in Exhibit 18 were "written in the oxide form, weight percentage converted to oxide, mole ratio." (Tr. 139) Regis stated that that was the only way to write a chemical formula for material based on a chemical analysis because it gives a representation of the true chemical make-up of the material as a bulk composition material (Tr. 139). He testified that the unit cell formula may only be used for a very pure, very homogenous material and that it does not show the true percentage of the oxide in the ore (Tr. 139–140).

Norton & Company has claims located to the south of the EZ 225 claim and based on his work on such claims and in the general area. Regis would expect the ore to become more calcium enriched as one went north. Based on the chemical analyses of the samples from EZ 225 claim, he would characterize the deposit as a calcium sodium aluminosilicate or a calcium sodium chabazite (Tr. 141). He said that the classification of zeolites as silicates of sodium would be completely erroneous (Tr. 142).

[5] Andrew J. Regis is an X-ray crystallographer and Senior Research Engineer for Norton & Company, Worcester, Massachusetts (Tr. 135). His work involves responsibility for investigations of the distribution, purity, origin and economic potentials of natural zeolite deposits in the western United States. He graduated from the University of Utah in 1957 with a B.S. in mineralogy and the following year received a M.S. in mineralogy from the same institution. His list of publications dealing with zeolites is extensive (Ex. 4).

FINDINGS AND CONCLUSIONS

It is undisputed that sodium is present in the ore deposit on the EZ No. 225 placer claim. There is no basic disagreement about the amount of sodium in the deposit except in its relative proportion to the amount of calcium present therein and in the method of expressing such amounts.

Contestant claims that the deposit consists of sodium zeolites which generally can be described as sodium silicates. Contestee asserts that silicate is an incorrect characterization for zeolite minerals. Contestee believes that zeolites should be termed aluminosilicates and that the deposit on the claim is best described as calcium sodium aluminosilicate.

I find that the deposit on the EZ No. 225 claim is a deposit of zeolite minerals. I find that calcium is the predominant cation. The most proper characterization of the deposit is that it is a calcium sodium aluminosilicate. In a very general sense the deposit could be considered a silicate deposit.

Does such a deposit qualify as a silicate of sodium so as to fall within the ambit of the sodium provisions of the Mineral Leasing Act? The language in *Robert E. Simpson*, A–4167 (June 22, 1970), indicates that with respect to a particular zeolite the dominant cation must be sodium or there must be a "significant presence" of sodium in order for the zeolite to be considered a sodium zeolite or sodium silicate compound.

Herein, I have found that the predominant cation in the zeolite-bearing ore deposit on the EZ No. 225 claim is calcium.

However, the question still remains: Does the deposit contain a significant[6] presence of sodium?

I find that there is not a significant presence of sodium in the deposit on the claim nor is the sodium essential to the ore. There are three essential components of zeolite minerals: the aluminosilicate framework, water molecules, and cations. The fact that the cations may be calcium, sodium, magnesium or potassium apparently has little bearing on the physical properties of the ore, although Contestee pointed out that calcium, as a bivalent cation was, in fact, preferable to the univalent sodium for the purposes for which the zeolite ore is used. Also ion exchange has little effect on the framework structure of chabazite and erionite. By such exchange it is possible that all the sodium ions could be exchanged for other cations. Therefore, the sodium ions are not essential to the deposit nor is their presence significant.

There is no single element of chabazite or erionite that makes them valuable minerals. It is not calcium, sodium, magnesium, potassium, aluminum, silicon, hydrogen or oxygen. Sodium could not be extracted and removed from the deposit and marketed at a profit, nor could any of the other individual components of these zeolite minerals. I find that the deposit on the EZ No. 225 placer claim is not valuable for the sodium found therein. The value of the deposit on such claim is derived from the physical characteristics exhibited by the unique combination of elements forming these zeolite minerals. Such characteristics make this zeolite ore commercially valuable for use as adsorbents and molecular sieves.

Therefore, the ore deposit on the EZ No. 225 placer claim is not a deposit of sodium or a silicate of sodium within the meaning of the Mineral Leasing Act, and is locatable under the general mining laws. Having so concluded it is not necessary to deal with the peripheral question presented as to the effective date of leasability of these zeolite minerals.

[6] Significant is defined in *Webster's New International Dictionary*, 3d Edition, 1966 as: having a meaning; suggesting or containing some concealed, disguised or special meaning; having or likely to have influence or effect.

ORDER

The complaint is dismissed.

L. K. LUOMA,
Chief Administrative Law Judge.

Enclosure: Information pertaining to appeal procedure
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ADMINISTRATIVE JUDGE RITVO DISSENTING:

I must respectfully dissent from the conclusion reached by the majority for reasons of substance and procedure. On the merits I would find that the zeolite deposit is disposable only under the provisions of the Mineral Leasing Act and on procedural grounds I would find the failure to make a prospecting permit applicant a party to the contest was incorrect and may require a substantial repetition of the proceedings to this point.

Examining first the procedural problem, I note that the case origi-

nated with an application, A–4167, filed by Robert E. Simpson, for a sodium prospecting permit application for among others, the land covered by other of Union Carbide's mining claims. In a decision dated Sept. 5, 1969, the Arizona Land Office rejected his application because the lands were already appropriated under the mineral land laws by Union Carbide. On appeal to the Director, this decision was vacated and remanded. *Robert E. Simpson*, A–4167 (June 22, 1970). The decision instructed:

> Accordingly, in view of the conclusions we have reached herein, the land office decision of September 5, 1969, is hereby vacated, and the case is remanded to the land office, through the Arizona State Director, for further appropriate action not inconsistent with this decision: (1) to determine whether the lands applied for are properly subject to the sodium prospecting provisions of section 23 of the Mineral Leasing Act or are subject to competitive leasing as authorized by section 24 and the regulations promulgated thereunder; (2) to determine whether any mining claims have been located on lands subject to this appeal involving an asserted discovery of sodium zeolites; (3) if a discovery of zeolites is asserted, to initiate a mining contest for the purpose of challenging the validity of the said mining claims; (4) to determine whether the appellant herein is entitled to the issuance of a sodium prospecting permit for the lands included in his application; and (5) to resolve any other question which may arise in this matter and requires such resolution.

Thereafter, a contest proceeding was initiated, not against the lands involved in *Simpson* but against another Union Carbide placer claim on the ground that the minerals for which the claim had been located not locatable under the mining laws. The contest complaint states that the land is also included in sodium prospecting permit application A–7300 filed Sept. 25, 1972, by George H. Hunker, Jr. Although the validity of Hunker's prospecting permit application, under which he intends to explore for the same deposits as Union Carbide claims, is intertwined in the issue raised by the contest, for if the minerals were found locatable, then Hunker's permit application would in all likelihood have to be rejected, Hunker was not made a party to the contest.

In other situations involving a conflict between a mineral claimant and a mineral leasing act permit applicant or lessee, the Department has explicitly directed that both the permit applicant or lessee and the mineral claimant be made parties to the contest proceeding. *Burnham Chemical Co.* v. *United States Borax Co.*, 54 I.D. 183, 184, 185 (1933); *reversed in part*, *U.S.* v. *United States Borax Co.*, 58 I.D. 426 (1943)[1]; *Union Oil Co. of California*, 65 I.D. 245, 253 (1958), *aff'd.*, *Union Oil Company of California* v. *Udall*, 289 F. 2d 790 (D.C. Cir. 1961).

A determination in this contest that the zeolite deposit is locatable and not leasable will not be binding upon Hunker and presumably he will, if he so desires, be free to litigate the matter when his permit ap-

[1] For a summation of later proceedings see *Burnham Chemical Co.*, 59 I.D. 365, 366 (1947).

plication is rejected as a result of this contest.

Whether Hunker would be assured of a permit or not, if the deposit were held leasable, is immaterial. The point is that if his permit application is denied on the ground that the deposit is locatable it is likely that the proceedings to date may be repeated.

It would have been preferable to have had Hunker made a party to the contest at the outset. That not having been done, an alternative is not to issue a decision on the merits at this time.

I would at least postpone a decision adverse to Hunker until he has been given permission to intervene, if he so desires, and to decide for himself whether he believes the record is complete from his point of view. Despite the majority's apprehension, there are no mechanical difficulties to having Hunker appear in the proceedings.

To understand the problems raised by this appeal on the merits we must first consider the nature of the mineral in dispute. The Administrative Law Judge described it as follows:

> Zeolites belong to a group of naturally occurring minerals called framework silicates. There are several groups of framework silicates: the feldspars, the feldspathoids and the zeolites. Zeolites were first recognized as a new group of minerals by a Swedish mineralogist in 1756. There are more than 40 naturally occurring zeolites. All the zeolites are crystalline hydrated aluminosilicates of alkali (*e.g.*, sodium and potassium) and alkaline earth (*e.g.*, calcium and magnesium) elements (Ex. G, p. 1; Ex. 5, p. 8; Tr. 19–20). The two principal zeolites found in the ore deposit on the EZ No. 225 claim are chabazite and erionite (Tr. 17; Ex. 5, p. 24).
>
> Zeolites have three components: a crystalline aluminosilicate framework structure, cations and water molecules (Tr. 30). The framework structure is based on an infinitely extending three-dimentional network of AlO_4 and SiO_4 tetrahedra linked to each other by the sharing of all the oxygens (Ex. 5, p. 3). The structure encloses interconnected cavities occupied by the cations and water molecules (Ex. G, p. 1).
>
> The tetrahedra of four oxygen ions surrounding a silicon or aluminum ion act as the building blocks of the zeolite framework. A silicon ion has four positive charges which neutralize one of the two negative charges on each oxygen. The remaining negative charge on each oxygen combines with another silicon or aluminum ion. The aluminum ion has only three positive charges (Ex. 5, p. 5). The deficiency must be made up by an additional positive charge of alkali metals, such as sodium or potassium with one positive charge (M+) for each atom, or alkaline earths, such as calcium or magnesium with two positive charges (M++) for each atom (Ex. 5, p. 6). Such positive charges, known as cations, in most cases may be completely interchanged for other cations without destroying the crystalline framework structure. Such an interchange of cations is called cation exchange (Ex. G, p. 6).
>
> Water molecules, along with the exchangeable cations, occupy channels and interconnected voids within the crystalline framework structure of the zeolites (Ex. 5, p. 11). The water may be reversibly removed without significant structural distortion (Ex. G, p. 7; Tr. 34, 132). The dehydration of zeolites is necessary to free the cavities and channels of the zeolites for their commercial use as molecular sieves and as adsorbents (Ex. G, p. 8; Ex. 5, p. 1–4).
>
> Zeolites exhibit molecular sieve properties based on the size of the apertures that connect the voids (Ex. G, p. 8). Zeo-

lites form microporous molecular sieves whose apertures or pores are less than 10 A in diameter[2] (Ex. 5, p. 1).

The term molecular sieve may refer to microporous solids which can separate molecules based on differences in size and shape. The molecular sieve action can be total; certain large molecules may be totally prevented while diffusion of smaller molecules may occur, or there may be a partial sieve action where different size molecules may diffuse or penetrate the solid at varying rates under various conditions (Ex. 5, p. 3).

Such properties make zeolites very useful in the removal of water and substances such as sulfur dioxide and hydrogen sulfide from gas streams (Ex. 5, p. 21) and in selective adsorption of other materials (Tr. 108).

I would first note that while the majority affirms the result reached by the decision below, it rejects the rationale of that decision and bases its conclusion on different criteria. The decision below accepted in large part the test set out by the BLM in *Simpson*, *supra*, and approved by the Solicitor, but held that under that test the zeolite deposits were a locatable and not a leasable deposit. The majority rejects that test, offers a different two-part one, and then concludes that under one of its criteria, the deposit is locatable. It does not discuss whether it would reach the same conclusion if it applied the same test as did the BLM and the Administrative Law Judge.

In my opinion, on the one hand the second part of the new, two-part test propounded by the majority is not persuasive, and on the other, the Administrative Law Judge's application of the BLM test, which in my view is sound, is incorrect.

First as to the majority's standard. The majority offers as the first of its two criteria for classifying a zeolite as a silicate of sodium the requirement that the sodium be present in sufficient quantity to be commercially valuable. I agree that a zeolite deposit containing sodium which is commercially valuable is disposable only under the Mineral Leasing Act. This would also be the result under the BLM test.

The second criterion is more troublesome. It would deem leasable a deposit of a silicate of sodium (or any other leasable mineral) only if the sodium is essential to the molecular structure of the mineral. In applying the test to this zeolite deposit, it points out that the sodium in the molecules of these zeolites can be replaced by another cation, such as calcium. From this it concludes that the molecular structure is not dependent upon which cation is present and therefore that the presence of sodium is not essential to the existence of the zeolite deposits. Thus it finds the zeolite deposit not to be leasable.

This criterion has its origin in a Geological Survey definition of "sodium" for the purpose of the Mineral Leasing Act. The Geological Survey defines a sodium mineral as "any valuable mineral that contains the element sodium as an *essential* element of the mineral's crystal

[2] 1 A is one angstrom. An angstrom is a unit of linear measurement. One inch equals 254,000,000 A (Ex. 5, p. 1).

structure" (Ex. J. at 3). (Italics supplied.) More specifically, a sodium zeolite is defined as "a crystalline hydrated sodium aluminosilicate with a framework structure that encloses cavities occupied by a significant amount of sodium and other alkali and alkaline earth minerals." *Id.* at 14.

The majority accepts the first definition in an abbreviated form by stating that the sodium cation, being replaceable by another, such as calcium, is not essential to the molecular structure of the deposit. Whether and how molecular structure differs from crystal structure is not explored. It then concludes since sodium is not essential to the existence of a zeolite deposit, this zeolite deposit is not a sodium deposit within the meaning of the Mineral Leasing Act, *as amended* (30 U.S.C. §§ 261, 262 (1970)).

In *Wolf Joint Venture*, 75 I.D. 137, 138–139, ftn. 4, the Solicitor, in discussing a related question, referred to analcite

$$(NaAlSi_2O_6.H_2O)$$

a zeolite, as an example of a leasable not a locatable mineral. That decision stated:

> Before proceeding to what specific questions must be considered by the hearing examiner, a threshold question is presented as to dawsonite
>
> $$[Na_3Al(CO_3)_3,2Al(OH)_3]$$
>
> That question is whether dawsonite, since it contains aluminum, is a locatable rather than a leasable mineral. The sodium provisions of the Mineral Leasing Act, *supra*, clearly establish that dawsonite, whatever may be its availability for leasing in the circumstances presented by these applications, is not open to location and disposition under the mining laws of 1872.
>
> Under the sodium provisions a permittee is entitled to a lease upon showing to the satisfaction of the Secretary of the Interior, *inter alia*, that valuable deposits of one of the enumerated sodium substances, including carbonates of sodium, have been discovered. Dawsonite is a double salt—a sodium aluminum carbonate, but it is nevertheless a sodium carbonate.[3] Notwithstanding the presence of aluminum as a constituent element of the mineral, dawsonite is among the sodium substances enumerated in section 23 of the Act. As such, dawsonite, as well as all of the other enumerated substances of sodium, is subject to disposition only under the provisions of the Mineral Leasing Act,[4] *United States* v. *U.S. Borax Co.*, 58 I.D. 426, 432 (1943).

Thus, if we look to past departmental action I can only conclude that the Department has held deposits such as this one to be leasable.[5]

I cannot accept the conclusion that the possibility of a cation ex-

---

[3] The Act speaks broadly of carbonates of sodium. There is no limitation that the form or mode of occurrence be simple salts of sodium. To the contrary, in a hearing on the Potassium Act of 1927, *as amended*, 30 U.S.C. secs. 282 *et seq.* (1964), the Director of Geological Survey gave examples of double salts and complex silicates of potassium as leasable minerals: alunite, a potassium aluminum sulphate, $KAl_3(OH)_6(SO_4)_2$; and leucite, a potassium aluminum silicate ($KAlSi_2O_6$). *Hearings before the House Committee on the Public Lands on H.R. 9029*, 68th Cong., 2d Sess., 39 (1925); see Wayland, *Is the Mineral Locatable or Leasable?* Mining Congress Journal, pp. 36–40, July (1967). (Italics supplied.)

[4] *E.g.*, analcite ($NaAlSi_2O_6.H_2O$).

[5] The majority refers to "ulexite" as a deposit containing sodium which was held to be locatable. Whatever the chemical composition of ulexite may be it was found locatable because it was a "calcium borate," not a sodium borate. *United States* v. *U.S. Borax Co.*, 58 I.D. 426, 428 (1943).

change is to be the criterion on which the resolution of this novel problem depends. We must begin with a realization that the Congress had little, if any, thought of how the technical terms of the sodium provisions of the Mineral Leasing Act, *supra*, could be applied to so odd a mineral as a zeolite. The majority offers a highly technical characteristic of zeolite as the deciding criterion. There is, of course, no support for this test in the legislative history of the sodium or other portions of the Mineral Leasing Act.

It seems to me that the question should be whether the sodium is essential to the existence of this zeolite deposit, not whether there can be other zeolite deposits with another cation. As Dr. Wayland testified when asked whether sodium was the dominant or an essential cation in the deposit: "Whether it is dominant is not a controlling point, that it is essential is a controlling point and it is an essential constituent" (Tr. 63). The sodium is not scattered through the chabazite or erionite or clinoptilolite as are pebbles in a sand and gravel deposit, or, like wheat and chaff, to be sifted out by tossing it in the air a few times. It is bound to the framework constituents by its neutralization of the excess negative electrical charge, or ion, of the framework. Wherever the zeolite goes, the sodium goeth also. While it is there it is essential to the stability of the zeolite. Although it may be replaced chemically by another cation, it is essential to the crystal structure of the zeolite so long as it is there. It may not be part of the framework structure of the crystal, as Union Carbide contends, but the framework structure is not the same as the crystal structure.

The sodium cations are chemically, that is, electrically, bonded to the other components of the double salt constituting these zeolites and, except in the more philosophical than scientific meaning of my colleagues, are essential to the crystal structure of these zeolites and to its stability.[6]

We must also stress again that Union Carbide markets the zeolite without attempting to replace the sodium cations with any others. Thus, they are essential to the product Union Carbide sells.

Further the oft-repeated assertions that the presence or absence of the sodium cation, so long as it is replaced by an equivalent, is immaterial to the zeolite is not necessarily so.

The framework of the zeolite is not totally rigid and the size of the apertures can be reduced by lowering the temperature. Cations are located near the apertures and partially block them. Aperture size can be increased by reducing the number or size of the cations through ion exchange (Ex. E and G, p. 8).

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[6] The majority refers to *casual presence* of sodium in the molecular structure. Casual is defined as "1. Happening or coming to pass without design and without being foreseen or expected; coming by chance. 2. Coming without regularity, occasional, incidental." *Webster's New International Dictionary* (2d ed.). I suggest the relationship of sodium to these zeolites is far from casual.

> The size and charge of the cation has an important effect on the properties of the zeolite, such as adsorption and ion exchange. *Id.* p. 19, *See also* pp. 5, 6 and 14.

As Dr. D. W. Breck, one of Union Carbide's expert witnesses stated: "In many zeolites cation exchange and/or dehydration may produce substantial structural changes on the framework and consequently alter physical properties. * * *" (Ex. 5, p. 4.) "The size and charge of the cation has an important effect on the properties of the zeolite, such as adsorption and ion exchange." *Id.* p. 19.

While Dr. Breck's statement continues with a discussion of the advantages of the calcium cation over the sodium cation for certain uses, his discussion is predicated upon the proposition that not all cations are equal — that the presence or absence of a particular cation can make a difference in the performance and characteristics of a particular zeolite.

Since the majority would not hold a deposit of a silicate of sodium locatable, and thus not leasable, merely because the sodium was not able to be extracted for use as sodium, or, if it could, it was not to be so extracted and used, we must find another test for such sodium deposits. The *Simpson*, case, *supra*, devised such a test, which as we have seen, was approved by the Associate Solicitor.

Simpson held that:

> [W]ith respect to a particular zeolite, the cation of the framework must be sodium or contain a significant presence of sodium in order for the zeolite to be described as a sodium zeolite or a sodium silicate compound.
>
> * * * * * * *
>
> In our opinion, both herschelite, which has a nearly pure sodium cation (91 percent), and the intermediate chabazite, which contains a significant presence of sodium in the cation charge, would be subject to the sodium provisions of the Mineral Leasing Act. So long as an occurrence of a particular zeolite may be properly identified, in the mineralogical sense, as an intermediate sodium-calcium zeolite, it would be a silicate of sodium enumerated in section 23 of the Mineral Leasing Act.
>
> The Conservation Division, Geological Survey, * * * by memorandum dated March 10, 1971, concurred with the technical statements and findings in *Simpson* and the Solicitor expressly approved of the conclusions therein. *Disposition of Sodium Zeolite Under the Mineral Leasing Act of 1920*, M–36823, May 7, 1971.

The Administrative Law Judge summarized the technical evidence and the several tests which may be used to measure the relative percentage of sodium and calcium in the chabazite and erionite, and clinoptilolite separately or in the ore. While the proportions differ slightly depending on which method of measurement is used, the results of each method are not disputed. The alkaline earth oxides (magnesium and calcium) and the alkali oxides (potassium and sodium) each constitute approximately half of the cations. Administrative Law Judge, p. 15, Tr. 114, 123, 125.

Thus even if we were to conclude as did the Administrative Law Judge, that calcium, and not sodium, is the predominant cation, we would still be left with the problem

of whether there is a significant presence of sodium in the ore.

Before we consider this issue, we believe it important to point out, as did the Administrative Law Judge, that it has long been settled that the use to which ore is put does not determine whether it is leasable, that is, an ore otherwise leasable remains only leasable even if the commercial product is valuable for a constituent other than sodium.

As the Administrative Law Judge stated:

> In an early Departmental decision, *Burnham Chemical Co.* v. *U.S. Borax Co. and Western Borax Co.*, 54 I.D. 183 (1933), the Assistant Secretary dismissed as untenable an argument that kernite was not a leasable mineral because the commercial products made from kernite, namely borax and boric acid, were valuable for their boron content and not for the sodium therein. The Assistant Secretary stated:
>
> * * * The act [Mineral Leasing Act] specifies among the salts named "sodium borate," and relates to the deposit found in the ground, and it is immaterial what constituents thereof are the most useful after it has been made into a commercial commodity. If that argument were valid it would, of course, follow that no sodium borate from which borax is made would be within the purview of the Leasing Act, either as it originally stood or as amended. *Id.* at 186.

It is this concept which has led the majority to devise its own test in order to avoid at least in this instance the necessity of determining at what point, if any, the amount of sodium in an ore becomes so minor that the deposit is not leasable.

The Administrative Law Judge, however, in my opinion, overlooked this rule in finding the sodium "insignificant." To reach his conclusion he stressed that the sodium in the zeolite is not recoverable and that the sodium ions are interchangeable with other cations. We have indicated earlier our disagreement with the significance the Administrative Law Judge gave to interchangeability. Here we point out that the deposit as it lies in the ground contains sodium and that it is the deposit as found and utilized that is to be examined to see whether it is leasable. In other words whether sodium can be, or if it can, whether it is intended to be extracted from the deposit is immaterial. The only issue is whether the ore contains sodium in one of the forms stated by the Mineral Leasing Act to be leasable.

Having posited the issue in this guise, we recognize at once that the test cannot be so completely simple. No one contends that the merest trace of a silicate of sodium is sufficient to render a deposit only leasable. For example, Dr. Wayland, Chief, Conservation Division of the Geological Survey, stated that he would classify as leasable an ore that contained 20 percent of its cations in the form of a leasable form of sodium (Tr. 96–97). In terms of this deposit I take that to mean 20 percent of 8 percent (the total alkali and alkaline earth in the deposit) or 1.6 percent of the deposit. Here the potassium and sodium oxides furnish about 50 percent of the cat-

ions or 4 percent of the ore, with the sodium constituting about 3 percent of that amount. This amount is well above the minimum suggested by Dr. Wayland.

However, we need not decide what the possible minimum percentage of sodium or other leasable minerals may be in other deposits. The silicate of sodium in this deposit is essential to the functioning of this deposit for use as a molecular sieve or in an ion exchange process. Whether the same amount of a silicate of sodium in a deposit of common rock, where the sodium plays no role in the use to which the rock is put, would make that deposit leasable is doubtful, but that issue is not before us.

Where the amount of a silicate of sodium in a deposit is significant and contributes to the characteristics for which the deposit is valued, then the deposit is one that is subject to disposition only under the Mineral Leasing Act. Since this deposit meets that test, I would find it leasable only and not locatable. Accordingly, I would reverse the holding of the Administrative Law Judge and hold the claims invalid.

Finally, I am not persuaded by the appellant's contention that the deposit is locatable because the claim was located prior to the date on which the Geological Survey administratively determined that zeolites would be subject to the Mineral Leasing Act. Whether a deposit is leasable or locatable depends upon the facts existing on the day the claim is located. Here all the relevant facts, both chemical and industrial were known then. It was only the application of the facts to the law that was made later. The Secretary is under no obligation to clarify in advance which deposits are leasable and which are locatable. He may decide each situation when it is presented to him without being forclosed because he has not done so earlier.

Therefore, I would reverse the decision of the Administrative Law Judge and find the mining claim invalid.

MARTIN RITVO,
Administrative Law Judge.

OLD BEN COAL COMPANY

8 IBMA 19

Decided June 28, 1977

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge John R. Rampton, Jr., Docket No. VINC 74-42, dated May 1, 1975, granting an application for review filed by Old Ben Coal Company and vacating an order of withdrawal issued pursuant to Section 104(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Imminent Danger: Extent of Withdrawal

In the review of a withdrawal order issued under sec. 104(a), the inconsistency between an inspector's finding of imminent danger and his failure to withdraw men from one of the areas logically affected thereby, should not be relied on directly to find that no imminent danger existed but it is not improper to rely on that inconsistency indirectly in determining the inspector's credibility at the hearing.

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In the absence of a clear and convincing showing of prejudicial error, a Judge's findings as to witnesses' credibility will not be disturbed on appeal.

2. Federal Coal Mine Health and Safety Act of 1969: Evidence: Credibility of Witnesses

APPEARANCES: Robert A. Meyer, Esq., for appellant, Old Ben Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor and Frederick W. Moncrief, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On Sept. 26, 1973, Mining Enforcement and Safety Administration (MESA) Inspector Narnie E. Nangle issued a withdrawal order pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969,[1] to Old Ben Coal Company (Old Ben) in respect of the latter's No. 21 Mine. Said order described the conditions creating the alleged imminent danger as follows:

> Loose coal and float coal dust was allowed to accumulate in excessive quantity along the floor of the 3 east south belt conveyor entry. This loose coal and float coal dust began 150 feet outby survey tag 7850 and continued inby to the tail roller of the No. 3 section, a distance of approximately 4500 feet. At 4 locations the bottom belt rollers were missing and the bottom belt was running in the loose coal and coal dust. The accumulation of loose coal and coal dust ranged in depth from 4 inches to 18 inches and float coal dust was present in the interconnecting crosscuts. The floor of this belt entry was dry and black in color. Six crosscuts outby the 45 south entry a pile of dry, loose, float coal dust was observed that was approximately 5 feet in height and 6 feet in length.

The order described the area from which miners were required to be withdrawn as follows: "The 3 east south belt entry, from 150 feet outby survey tag 7850 to the tail roller of the No. 3 section." Thus the order effectively withdrew miners from and prevented miners from entering the area along the belt but did not withdraw miners from the face inby the belt where miners were conducting roof bolting, maintenance and similar operations. (At the hearing from which this appeal was taken, all witnesses testified that they considered the face area to be a source of ignition of the allegedly dangerous accumulations of loose coal and float coal dust in the area of the mine from which the miners *were* withdrawn.)

On Sept. 28, 1973, MESA terminated this order, abatement having been accomplished, and on October 23, 1973, Old Ben filed an application for the review of the order. A hearing was held on Sept. 12, 1974,

[1] 30 U.S.C. §§ 801–960 (1970).

before Administrative Law Judge Rampton (Judge). At the conclusion of the hearing, the Judge announced on the record that he was inclined to grant the Application and invited Old Ben to submit proposed findings of fact and conclusions of law and MESA to submit appropriate objections thereto. During a colloquy with MESA counsel, the Judge stated that the inconsistency between finding an imminent danger situation and allowing men to remain in an area inby, under the factual situation in this case, "tips the scales" in favor of finding for the applicant that there was not an imminently dangerous accumulation of loose coal or float coal dust (Tr. 84). On May 1, 1975, the Judge issued his decision and found that MESA had failed to prove the existence of an imminent danger.

On May 27, 1975, MESA filed a notice of appeal from that decision, and subsequently timely filed a brief in support thereof. By letter to the Board dated Aug. 19, 1975, Old Ben noted that MESA had raised no issues not treated by the Judge and elected therefore to stand on the record.

Contentions of the Parties

MESA's brief essentially claims that the Judge's decision was based on insufficient evidence. MESA offers interpretations of the testimony alternative to the Judge's and attacks some of the Judge's rulings as having no basis in the record. MESA particularly takes issue with the bases for the Judge's credibility findings and with his reliance in the ultimate decision on the inconsistency between an inspector's finding of imminent danger and allowing men to continue to work inby the withdrawal area. MESA perceives the Judge's vacation of the order to result from his feeling that such an inconsistency negated the existence of an imminent danger (MESA Br., p. 10). As mentioned above, Old Ben's only response to this brief was a letter asserting its reliance on the record as a basis for affirmance since MESA brought up no new matters on appeal.

Issue Presented

Whether the Judge improperly relied upon the inconsistency between an inspector's finding of imminent danger and his failure to withdraw miners from an area logically affected thereby in determining that an imminent danger did not exist.

Discussion

The main thrust of MESA's argument is directed to the Judge's reliance on the inconsistency between an inspector's finding imminent danger and failure to withdraw men from an area logically affected thereby, especially since that area was a significant source of a prime element of the danger. To attack the Judge on this point, MESA points to the Judge's remarks at the hearing. Having considered the entire record in this proceeding, we characterize the Judge's oral decision as being nothing more than an attempt to expedite the ultimate disposition of the case since

he had a feeling after sitting through the hearing as to which side should prevail (Tr. 82). To be sure that a mere feeling would not control the decision in the case, the Judge made it abundantly clear that he was open to be persuaded against his initial inclination (Tr. 85). This approach of expedition has much to recommend it, and we are loath to overturn a Judge's decision because of remarks made at the hearing apparently resulting from prodding by MESA counsel, especially where it is clear from the Decision that subsequently the Judge fully considered and evaluated all of the evidence of record and arguments of the parties.

[1] MESA appears to feel that since there is no precedent regarding the invalidity of an order because of an extent-of-withdrawal problem, then the Judge's reliance on the inconsistency is misplaced (Tr. 83–84; MESA Br., p. 10). We agree that it would be improper to rely on that inconsistency directly in determining that no imminent danger existed. However, that does not end our inquiry in this case, because MESA's characterization of the Judge's reliance is an incorrect one. It is clear from the Judge's decision that he relied on the inconsistency not as going directly to the issue of the existence of imminent danger but as going to the question of the inspector's credibility. The Judge's finding here, that the inspector was less credible than an Old Ben witness whose testimony conflicted with that of the inspector regarding a number of central questions, is crucial. (We also note that there were a number of other factors upon which the Judge relied in making his credibility findings and that there were factors other than credibility upon which he relied in making his ultimate findings of fact. The credibility factors included the use by an Old Ben witness of simultaneously recorded notes where the inspector relied on memory, and the implausible description in the order of a float coal dust pile 5 feet in height and 6 feet in width in a high velocity intake air entry. The central factor other than credibility upon which the Judge determined that there was no imminent danger was the inspector's testimony that his concern was that the subject accumulations would contribute to an explosion ignited elsewhere, not that such accumulations would participate in the ignition themselves, and that the inspector had no reason to believe that an explosion anywhere in the mine was likely to occur (Dec. 6)). As a result, although we agree with MESA that it would be improper for the Judge to rely on the inconsistency as MESA has asserted he did, we conclude that it was not improper to rely on the inconsistency as he actually did, that is, as going to the inspector's credibility.

[2] Directing our inquiry then to the question of credibility findings generally, we will follow the rule that a Judge's credibility findings are entitled to extraordinary weight, and we will not presume to overturn such findings in the ab-

sence of a clear and convincing showing of prejudicial error. MESA has suggested a number of interpretations of the factors going to credibility which are viable alternatives to the Judge's interpretations. However, MESA has not persuaded us in a clear and convincing manner that the Judge's interpretations and his ultimate credibility finding were unreasonable, to say nothing of being prejudicial error.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the instant decision of the Administrative Law Judge herein IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

GLENN MUNSEY
v.
SMITTY BAKER COAL COMPANY, INC.
RALPH BAKER, SMITTY BAKER AND
P & P COAL COMPANY

8 IBMA 43

Decided *June 30, 1977*

Proceedings on remand from United States Court of Appeals for the District of Columbia Circuit with respect to an application by Glenn Munsey for review of an alleged discriminatory discharge and refusals to rehire under sec. 110(b) of the Federal Coal Mine Health and Safety Act of 1969.

Recommended decision adopted in part.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Good Faith

Any miner seeking relief from an allegedly discriminatory discharge or refusal to rehire in retaliation for a safety complaint to the Secretary or his authorized representative and a refusal to work must show as part of his prima facie case that his complaint was based upon a good faith belief that there was a dangerous condition or practice.

APPEARANCES: Steven B. Jacobson, Esq., for appellant, Glenn Munsey; J. Edward Ingram, Esq., for respondents Smitty Baker Coal Company, Inc., Ralph Baker and Smitty Baker; Glen M. Williams, Esq., for respondent P & P Coal Company; Jonathan Strong, Esq., Trial Attorney, and Robert J. Phares, Esq., Acting Assistant Solicitor, for intervenor Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Glenn Munsey is a coal miner and was employed at one time by the Smitty Baker Coal Company (Smitty Baker Coal). Munsey's employment with Smitty Baker Coal terminated on the morning of

Apr. 15, 1971. Munsey then applied for review pursuant to sec. 110(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 820(b) (1970), claiming in substance that he had been the victim of a discriminatory discharge and refusal to rehire on Apr. 15, 1971, in retaliation for allegedly protected activities.[1] These activities were a complaint to a section foreman with respect to an allegedly unsafe roof condition and a refusal to work.

Subsequently, a hearing was held by Administrative Law Judge Fauver at which time evidence was presented with respect to the termination of employment on the morning of Apr. 15 and two subsequent refusals to rehire which took place on the afternoon of Apr. 15 and on Apr. 29, 1971. Judge Fauver found that Smitty Baker Coal had violated sec. 110(b) on all three occasions, and accordingly granted relief.[2]

Smitty Baker Coal then appealed to the Board. The Board reversed, holding mainly that Munsey was not entitled to relief because he had voluntarily quit and the only safety complaint of which Smitty Baker Coal was aware had been made to someone other than the Secretary or his authorized representative, 30 U.S.C. § 820(b)(1)(A) (1970). 1 IBMA 144, 79 I.D. 501, 1971–1973 OSHD par. 15,355 (1972).

In turn, Munsey petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's decision. *Munsey* v. *Morton*, 507 F. 2d 1202 (D.C. Cir. 1974). 30 U.S.C. § 816 (1970). Citing its decision in *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F. 2d 772 (D.C. Cir. 1974), *cert. denied sub nom. Kentucky Carbon Coal Corp.* v. *Interior Board of Mine Operations Appeals*, 420 U.S. 938 (1975), the Court of Appeals vacated that decision, holding that a safety complaint to a section foreman made with intent to notify the Secretary or his authorized representative of such a complaint may be protected activity depending upon the practicalities of the situation in which government, management, and miners operate and the procedure implementing the Act in effect at the subject mine. Responding to a statement by the Board that a "voluntary quit" was not protected through sec. 110(b), the court, relying once again on *Phillips*, *supra*, said that "* * * a miner may have the right to refuse to work under conditions believed in good faith to be dangerous," 507 F. 2d at 1209, n. 58. The court remanded for further

[1] Munsey was joined in his application by Ernest and Arnold Scott. They subsequently withdrew from the case, filing affidavits stating that they had only participated initially because they were advised that they had to do so by officials of the United Mine Workers of America.

[2] Respondents have belatedly objected to consideration of the Apr. 29, 1971, refusal to rehire as a separate violation of section 110(b) on the ground that Munsey failed to complain as to that alleged violation within the 30-day period specified by the statute. The court ordered the Board to consider the events of Apr. 29, 1971, and the Board is obligated to comply.

proceedings in conformance with its opinion, proceedings which necessarily involved further factfinding.

Following the court's decision, Munsey sought to widen the scope of the controversy by moving the Board to add three respondents, namely, Ralph Baker, Smitty Baker, and P & P Coal Company (P & P). In the absence of timely objection, Munsey's motion was granted without prejudice to presentation of any defenses on the merits by these respondents.[3]

Inasmuch as the court directed its instructions specifically to the Board and in light of the presence of additional parties, as well as the necessity for further factfinding, the Board decided that it should retain jurisdiction and refer the case to the Hearings Division for a new hearing under special instructions in order to facilitate compliance with the court order and accord the new parties their full rights to due process of law. 43 CFR 4.29. The Chief Administrative Law Judge designated Administrative Law Judge Stewart to undertake the assignment.

Judge Stewart held a full evidentiary hearing and then issued a lengthy recommended decision. In summary he recommended that the Board conclude the following: (1) that the termination of employment on the morning of Apr. 15, 1971, did not involve a violation of sec. 110 (b) because Munsey did not intend at that time to notify the Secretary of a safety violation and his complaint to Smitty Baker Coal supervisory personnel was not equatable to notification to the Secretary; (2) that the refusal to rehire on the afternoon of Apr. 15, 1971, was not a violation of sec. 110(b) because Smitty Baker Coal affirmatively established by a preponderance of the evidence that it had a legitimate, nondiscriminatory motivation; and (3) that the refusal to rehire on Apr. 29, 1971, was a violation of sec. 110(b) because it was motivated by a desire to retaliate against Munsey for complaining to a union safety coordinator on the afternoon of Apr. 15, a complaint which did constitute and was intended by Munsey to be notification to the Secretary.

Exceptions and cross exceptions together with supporting briefs have been filed challenging critical recommended findings of fact and conclusions of law.[4] We are now summarily rejecting all exceptions to the recommended findings of fact. Judge Stewart meticulously documented his findings, painstakingly weighed conflicting evidence, and made careful credibility determinations. The Board has been shown no adequate reason to overturn Judge Stewart's findings of fact. However, based on those findings, we accept Judge Stewart's recommended conclusions of no violation on Apr. 15, 1971, with

[3] P & P objected to Munsey's motion belatedly, 43 CFR 4.510, and generally denied liability.

[4] Munsey's exceptions were apparently mailed on Dec. 12, 1976, and were filed nearly two weeks late on Dec. 16, 1976. Respondents have filed no objections as to service or late-filing.

one modification, and we reject his recommended conclusion as to the refusal to rehire on Apr. 29, 1971. Both the modification to his conclusions as to the events of Apr. 15 and the rejection of his conclusions as to the events of Apr. 29 stem from his finding that Munsey complained frivolously and in bad faith. We hold that a miner who abuses the protection of sec. 110(b) by initiating bad faith and frivolous complaints to the Secretary or his authorized representative was never intended by Congress to be covered by that section. Judge Stewart's finding that Munsey had initiated such a complaint independently buttresses his conclusion of no violation on the morning of Apr. 15 and compels the Board to conclude that Munsey failed to establish an essential element of his prima facie case as to the Apr. 15 and Apr. 29 refusals to rehire, namely, good faith.[5]

Inasmuch as the Board's decision today turns on the question of good faith and in light of the exceptions filed by Munsey as to Judge Stewart's findings on that question, the Board deems it appropriate to go into the matter of Munsey's bad faith in some detail.[6]

The court in *Phillips*, *supra*, recognized that the Act protects a miner from retaliatory action when his complaint is "not frivolous." 500 F.2d at 778. In *Munsey*, *supra*, the court reiterated that when a miner believes in good faith that a dangerous condition exists, he may have the right to refuse to work under such conditions. 507 F. 2d at 1209, n. 58. The Board agrees that section 110(b) mandates this threshold requirement with respect to the nature of the complaint it is designed to protect.

In determining the good faith of a miner in lodging a complaint the Judge should take into account the credibility of the complainant in describing his own state of mind. The surrounding facts and circum-

[5] Concluding, as the Board does, that there was no violation of sec. 110(b), it is not ordering the assessment of civil penalty recommended by Judge Stewart upon a petition by the Mining Enforcement and Safety Administration for leave to "intervene" granted in the absence of opposition. In reaching the merits, the Board implies no views as to the appropriateness of the intervention procedure under 43 CFR 4.513 as a means of filing a sec. 109 enforcement proceeding in this case.

[6] Munsey has excepted to any consideration of the good faith issue on the basis of an observation by the Court of Appeals as to the record as it then appeared, 507 F.2d 1209, n. 58. The court said: "* * * The evidence is clear that petitioner feared another rock fall from the roof * * *." *Id.*

This exception is without merit for a number of reasons. First, upon remand, Munsey himself insisted upon the joining of additional parties respondent. Additional parties are entitled to a full evidentiary hearing and are not in any way bound by findings and conclusions based on a hearing where they were not represented. This is especially so in regard to P & P which, as noted above, generally denied liability.

Moreover, when this case was initially before the Board, Judge Fauver's findings bearing on good faith were not reviewed and were not final for the Secretary. We now reject his findings in preference to those of Judge Stewart as augmented by us today. We do so both because the previous findings are conclusory and do not reflect adequate consideration of conflicting evidence, and because they are contrary to the record, as Judge Stewart has persuasively shown.

stances should then be considered as relevant to a complainant's actual state of mind. The miner's knowledge of these facts and circumstances is of course a relevant inquiry. In gauging good faith, the Judge may also take into account the lack of reasonableness of a miner's complaint but may not deny relief *solely* because a complaint was unreasonable.[7] In some situations management's attempts to resolve a safety dispute should be examined in order to determine whether the complaint was lodged with the Secretary in good faith.

It is clear that the Judge considered all relevant evidence in finding that Munsey was not acting in good faith when he initiated the report to the Secretary. Initially, the Judge found that the roof in the area where Munsey was working on April 15, 1971, had been tested by management up until the time of the rock fall and was found to be sound. Miners were working under the roof support timbers when the rock fell in front of them from the roof inby these timbers. There was no danger of a rock fall from the roof above the miners as they were working under the support timbers which functioned perfectly. As mining operations progressed inby into the area where the rock had fallen, those at the face would remain in a safe position as this area would either also be timbered or, if necessary, avoided by mining around it. It turned out that the roof there was stable and was safely supported with timbers and that mining operations continued normally through the area. The area was well-timbered before the fall and the Judge found that there was no way, including roof bolting, to have prevented the rock fall.

Following the rock fall, work was halted while two section foremen, a foreman trainee, and a member of the union mine safety committee each examined the roof area. They all determined in the presence of Munsey that the area was safe and that the work could be continued. When dust was observed falling from the roof, work was again halted, and the same experienced miners again examined the area and concluded in Munsey's presence that no loose rock was present and that the roof was safe.

When Munsey then refused to continue working, another miner volunteered to take his place setting jacks at the face, and the section foreman offered Munsey alternate work away from the face area. The mine superintendent also examined the roof and also found it safe and he too offered to let Munsey return to work away from the face area, explaining to him that there were other miners who would set jacks in his place.

The Judge recognized that when Munsey raised this safety issue management made every reasonable effort to satisfy the complaint. Additionally, there was no evidence

[7] The Board disavows any implication in Judge Stewart's opinion to the contrary when he cited *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368, 386–7 (1974). The Judge did however properly find bad faith.

of an antagonistic relationship between Munsey and management. The condition of the roof was found to be safe by everyone with expertise who inspected the face area including the continuous miner operator, two foremen, the mine superintendent, two members of the mine safety committee, and, later, MESA. Although the actual condition of the roof is not controlling, the foregoing facts, when coupled with Munsey's lack of credibility as perceived by the Judge, support the conclusion that Munsey's report was frivolous. *See Shapiro* v. *Bishop Coal Co.*, 6 IBMA 28, 51, 83 I.D. 59, 1975–1976 OSHD par. 20,469 (1976), *aff'd per curiam sub nom. Bishop Coal Co.* v. *Kleppe*, —— F. 2d —— No. 76–1368 (4th Cir. Jan. 17, 1977).

The Judge suggested, based upon the fact that Munsey's complaint to the union safety coordinator was entirely lacking in substance, that he may have had an ulterior motive in making this report, perhaps to protect himself from the consequences of his unjustifiable refusals to return to work. The Board agrees that under the circumstances in the present case, that inference is reasonable. Additionally, the Judge found that Munsey's refusal to accept the offers to work in other areas of the mine indicated that he simply did not want to work on Apr. 15, 1971. The refusals of Munsey to accept alternate work is also supportive of the Judge's inference.

The totality of circumstances, and inferences reasonably drawn from ascertainable facts, coupled with Munsey's lack of credibility support the Judge's finding that his complaint was self-serving, frivolous, and not based upon a good faith belief that the roof was unsafe. Having determined that Munsey did not have such a good faith belief, there is no justification under section 110 (b) to make any further inquiry. The basic nature of Munsey's complaint in no way changed because MESA inspected the mine on Apr. 16, 1971, and found other violations present. Never having had a good faith belief that there was a dangerous roof condition, Munsey did not have the protection of sec. 110 (b) when Smitty Baker Coal refused to rehire him on Apr. 29, 1971. We do not believe that the statute was intended to allow a miner who acted in bad faith to demand relief from an adverse reaction by an operator against an unprotected activity based on later, purely coincidental events. The primary purpose of the Act, protecting the health and safety of miners, is certainly not served by reaching a contrary conclusion. Denying the protection of the Act to a miner who lodges bad faith, frivolous complaints will not inhibit other miners in their reporting of conditions which they believe in good faith to be dangerous.

Because Munsey has failed to meet his prima facie burden consistent with the requirement of section 110(b), the Board denies his claim

for relief based upon the alleged discriminatory conduct on Apr. 15 and Apr. 29, 1971.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the recommended decision of the Judge in the above-captioned case IS ADOPTED insofar as it is consistent with the foregoing opinion and that all exceptions not dealt with specifically above ARE DENIED.

IT IS FURTHER ORDERED that the request for an assessment of civil penalty and the Application for Review based upon alleged violations on Apr. 15 and Apr. 29, 1971, ARE DENIED.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

PERMIAN MUD SERVICE, INC.

31 IBLA 150

Decided *June 30, 1977*

Appeal from decision of New Mexico State Office, Bureau of Land Management, rejecting sodium prospecting permit application NM-24573.

Affirmed.

1. Applications and Entries: Vested Rights—Mineral Lands: Determination of Character of—Mineral Lands: Leases—Public Lands: Leases and Permits—Sodium Leases and Permits: Leases—Sodium Leases and Permits: Permits

Under 30 U.S.C. § 262 (1970), a valuable deposit of sodium must be leased competitively even though the Geological Survey determination that lands are so known may have been made subsequent to appellant's filing of its application.

2. Act of Jan. 31, 1901—Mineral Lands: Leases—Mineral Lands: Prospecting Permits—Mining Claims: Lands Subject to—Mining Claims: Locatability of Mineral: Leasable Compounds—Mineral Leasing Act: Applicability—Mineral Leasing Act: Lands Subject to—Sodium Leases and Permits: Leases—Sodium Leases and Permits: Permits

Under 30 U.S.C. §§ 162 and 262 (1970), valuable deposits of sodium compounds are not open to location and disposition under the mining laws, but may be disposed of only under the Mineral Leasing Act, except for certain claims under 43 CFR 3501.1-1(b), existent at passage of Mineral Leasing Act of 1920 which have since been maintained in accordance with statute and regulation. *Max Barash*, 63 I.D. 51 (1956), was overruled in part by Solicitor's Opinion M-36686, 74 I.D. 285 (1967).

APPEARANCES: James E. Templeman, Esq., Sanders, Templeman and Crutchfield, Lovington, New Mexico. for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Permian Mud Service, Inc., appeals from a Feb. 6, 1976, decision

of the New Mexico State Office, Bureau of Land Management (BLM), rejecting its application NM 24573 for a sodium prospecting permit.

The question involves sodium chloride only. Permian's application was filed on Jan. 20, 1975, and after several amendments was given a priority date of February 19, 1975. In its statement of reasons, Permian avers that in Aug. 1973, it had entered the subject federal lands under the mistaken belief that they were owned by the State of New Mexico, and since shortly after that entry, "[b]rine in marketable quality and quantity has been produced" from the Tracy No. II hole on the lands.[1] This hole existed prior to appellant's entry, and was considered dry. Upon discovering that Tracy No. II was actually located upon federal lands, appellant in Oct. 1973 canceled its application with the New Mexico Oil Conservation Commission and in Mar. 1974 submitted an application for a federal permit. For various reasons of procedure which are not disputed, its filings prior to Jan. 20, 1975, were deemed insufficient.

On Feb. 6, 1976, the State Office issued its decision rejecting the 1975 application because:

> The lands described in this application are known to contain a valuable deposit of sodium chloride several hundred feet thick and may be leased only by competitive bidding as provided by 43 CFR Subpart 3520.

The record does not indicate the date upon which Geological Survey determined that the subject lands were known to contain a valuable deposit of sodium chloride. Permian urges that this may have occurred after it filed its permit application, but offers no evidence. The record contains a Geological Survey letter dated Dec. 22, 1975, stating that the land contains a valuable deposit of sodium chloride several hundred feet thick and that sodium chloride brine is presently being produced.

As to the prospecting permit, Permian offers an analogy to federal oil and gas leasing, summarizing *Max Barash*, 63 I.D. 51 (1956), in its Statement of Reasons at 3:

> Federal oil and gas lands are not subject to competitive bidding until it is determined that oil fields under such lands are embraced within known geological structures of producing oil and gas fields. If that determination is made after a proper offer for a non competitive lease a subsequent determination that the land does contain valuable minerals will not affect the applicant's right to a non competitive lease.

[1] Under 30 U.S.C. § 262 (1970), valuable sodium deposits are subject to competitive bidding. Appellant admits that valuable brine has been produced from the sodium chloride deposit since approximately 1973, and that the rules for known valuable deposits of sodium are analogous to those for known valuable deposits of oil and gas. In the case cited by Permian, *Max Barash*, *supra*, the Solicitor stated that

[1] The brine, according to Permian, "would be used to take the place of drilling mud since it causes less friction to a drilling bit than mud and is considerably cheaper than mud." Statement of Reasons at 1.

"* * * the Department may properly reject a noncompetitive offer to lease for oil and gas because it covers land within the known geologic structure of a producing oil or gas field so long as the determining facts are ascertained prior to the date of the offer." 63 I.D. at 60–61. Permian emphasizes the latter part of this holding.

While *Barash* [2] followed then departmental precedent, in 1967 the Department's position was reexamined in *Solicitor's Opinion* M–36686, 74 I.D. 285, and overruled in part. In *McDade* v. *Morton*, 353 F. Supp. 1006 (D. D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974), the District Court at 1009–10 discussed the change in departmental interpretation and regulations:

> It is clear from the express language of Section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226, that public lands of the United States "which are known or believed to contain oil or gas deposits may be leased" * * * by the Secretary of the Interior and that, "if the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease * * * shall be entitled to a lease of such lands without competitive bidding." * * * The Courts have long construed these provisions as giving the Secretary broad discretion in the issuance of oil and gas leases, the only limitation upon his discretion (as to land which is not within any known geologic structure of a producing oil or gas field) being that, *if* the land is leased, it *must* be leased to the first person making application therefor who is qualified under the statute and applicable regulations to receive a lease. * * * Given this broad discretion of the Secretary and the explicit statutory limitation, the courts have consistently held that no right to receive an oil and gas lease is obtained by the filing of a lease offer, even though the offeror be the "first qualified applicant," and that the Secretary may determine at any time prior to the acceptance of a lease offer not to lease particular land even if offers for such land were filed long before the determination not to lease or were filed in response to a direct invitation to file. * * *

The court also held that under the Department's regulations the Secretary had authority to require competitive oil leasing when the lands described in the noncompetitive offer are transferred from the category of nongeologic structure to known geologic structure (KGS) of a producing oil and gas field after the noncompetitive offer is filed:

> The express wording of the Mineral Leasing Act, 30 U.S.C. § 226 (a), (b) and (c), makes it clear that the Secretary of the Interior may not, without competitive bidding, lease lands which are within a known geologic structure. The question presented here is what is the scope of the Secretary's authority where, after a lease offer has been filed but before acceptance, and upon receipt of new or additional information, the land described in the offer is transferred from the category of non-geologic structure to that of a known geo-

[2] For subsequent history of *Barash*, see *Barash* v. *McKay*, 256 F.2d 714 (1958) judgment for plaintiff; *Max Barash*, 66 I.D. 11 (1959). *See also Udall* v. *King*, 308 F.2d 650 (D.C. Cir. 1962); *John P. Dever*, 67 I.D. 367 (1960).

logic structure of a producing oil and gas field.

Though the Mineral Leasing Act is silent on this precise question, Department of the Interior regulations exist directly on point. Under present regulations, in effect since 1967, Plaintiff clearly is not entitled to the leases he seeks. The regulations, in pertinent part, state:

"* * * When land is within the known geologic structure of a producing oil or gas field prior to the actual issuance of a lease, it may be leased only by competitive bidding * * *. [43 CFR 3101.1–1, formerly 43 CFR 3122.1, 32 FR 13324 (1967).]

"If, after the filing of an offer for a noncompetitive lease and before the issuance of a lease pursuant to that offer, the land embraced in the offer becomes within a known geological structure of a producing oil or gas field, the offer will be rejected and will afford the offeror no priority. [43 CFR 3110.1–8, formerly 43 CFR 3123.3(c), 32 FR 13324 (1967).]"

* * * * * * *

Inasmuch as Plaintiff is clearly not entitled to the relief he seeks under the current Department regulations cited above, the only question that remains is whether the regulations are a lawful administrative interpretation and implementation of the Mineral Leasing Act.

To answer this question, an understanding of the history of Sec. 17 of the statute and pertinent regulations is necessary.

Shortly after passage of the Mineral Leasing Act in February of 1920, the antecedent of the regulations in issue here, and the express policy of the Department of the Interior was that no prospecting permit * * * could be granted "within the known geologic structure of a producing field even though such a status as to the deposits may have arisen only during the pendency of the application for a permit. * * *" Case of Wilmer Jeannette, 47 I.D. 582 (1920).

In Apr. of 1921, under a new administration, Secretary of the Interior Albert B. Fall revoked the then existing regulation, reasoning that the regulation was not based under a mandatory provision of the statute and upon the premise that the rights of an oil and gas applicant were similar to those of a homestead entryman. [Instructions, 48 L.D. 98, 99 (1921)].

* * * * * * *

In Sept. of 1967, Solicitor Frank J. B[a]rry issued an opinion (74 I.D. 285) in which he concluded that the past practice of determining whether to lease land competitively or noncompetitively upon the basis of facts known at the time of the filing of a lease offer was clearly erroneous and contrary to the ordinary reading of the statute. Following this opinion the regulations were amended as hereinbefore cited.

* * * * * * *

Applying this principle of law to the facts herein, the Court finds that not only were the 1967 regulations authorized under the Mineral Leasing Act but they clearly embody what the Court finds to be the correct interpretation of the literal, mandatory language of the statute, i.e. that lands within a known geologic structure of a producing oil or gas field *"shall* be leased * * * by *competitive* bidding." [30 U.S.C. § 226(b)]. (Italics added).

As was stated by the Court of Appeals for this Circuit in District of Columbia National Bank v. District of Columbia, 121 U.S. App. D.C. 196, 198, 348 F. 2d 808, 810 (1965):

"* * * The plain meaning of the words is generally the most persuasive evidence of the intent of the legislature. The plain meaning doctrine must be given application, however hard or unexpected the particular effect, where unambiguous lan-

guage calls for a logical and sensible result. * * *"

The unambiguous language of the Mineral Leasing Act states that leases for land within a known geologic structure of an oil or gas field *shall* be leased by *competitive* bidding. The logical and sensible regulatory result under such wording is to preclude any type of leasing other than by means of competitive bidding *whenever* it becomes apparent that the applied for leases involve lands within a known geologic structure. To hold otherwise would fly in the face of the "plain meaning" of the statute's words.

353 F. Supp. 1010–13.

In said 43 CFR 3110.1–8, the Departmental oil and gas regulations considered in *McDade*, *supra*, specifically provided for postfiling KGS determinations, but neither the regulations controlling sodium permits and leases, nor the conditions stated on the sodium prospecting permit application, are explicit on this point.[3] This, however, does not render an analogy to oil and gas leasing invalid. The Court in *McDade* at 1012 concluded that the oil regulation clearly embodies the correct interpretation of the statute as to the meaning of "shall be leased * * * by competitive bidding." Despite the lack of a regulation comparable to section 3110.1–8, the Board concludes that the State Office properly interpreted section 262 in rejecting Permian's application. *C. A. Spicer*, A–24421 (Mar. 28, 1947). Appellant has no vested right to a lease without competitve bidding.[4] *David Miller*, 15 IBLA 270, 272 (1974). The lands must be leased competitively because they are known to contain valuable deposits of sodium chloride, even though the determination that the lands are so known may have been made by the Geological Survey subsequent to Permian filing its application.

While it could at first seem unfair for the Department to change its classification of the lands after Permian's filing of a noncompetitive offer, the Department has the responsibility to see that the United States receives a fair price. The United States is not forced to strike a bargain denying itself fair value, any more than a private owner would be.

[2] Permian also contends that: 30 U.S.C.A. Sec. 162 requires that it be permitted to mine the sodium chloride in

[3] The regulations controlling sodium prospecting permits and leases are at 43 CFR Group 3500. Prospecting permits are covered in 43 CFR Part 3510, competitive leases in 43 CFR Part 3520.

[4] The determination on issuance of a sodium prospecting permit for a particular tract of land is committed to the Secretary's discretion, and he may properly reject an application for such a permit when he finds for sufficient reasons that it is not in the public interest to allow the permit. *Joseph I. O'Neill, Jr.*, A–30488 (Supp) (Dec. 7, 1966), petition for review dismissed under stipulation, Civil No. 3556–SD–K, S.D. Cal., Nov. 22, 1971; *see Gene R. Blaney*, A–30894 (June 11, 1968). As originally written, the Mineral Leasing Act of 1920, *supra*, did not grant the Secretary such discretion, and directed him to issue a permit to any qualified applicant. The mandatory words directing the Secretary to issue permits were deleted by the 1928 amendments, *supra*, and the Secretary has since been held to possess discretionary authority in the issuance of permits. *Burnham Chemical Company* v. *Krug*, 81 F. Supp 911 (D.D.C. 1949), *aff'd.*, 181 F.2d 288 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 826 (1950).

the instant case in acordance with federal law relating to placer-mining claims. This section provides that all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable [therefor] are subject to location and purchase under the provisions of the law relating to placer-mining claims, for example, 30 U.S.C.A. Sections 29, 35 and 36. There is no question that the lands in the instant case contain deposits of salt and are [chiefly] valuable [therefor].

Statement of Reasons at 4.

This argument of Permian is not properly before the Board; there is no evidence of any placer location and no appeal from any action regarding a placer claim. Moreover, in *Solicitor's Opinion*, 49 L.D. 502 (1923), the Solicitor considered the identical question raised by Permian. Reading the Act of Jan. 31, 1901, 30 U.S.C. § 162 (1970), *in pari materia* with the Mineral Leasing Act of Feb. 25, 1920,[5] he concluded that:

Sec. 37 [of the 1920 Act] directed that the mineral deposits named in the act (including sodium chloride, or salt) shall be disposed of only pursuant to the terms of the act. It therefore repealed all previous acts relating to the disposition of those minerals. However, it excepted valid claims existent at the date of the passage of the act. * * * [6, 7]

This conclusion was affirmed in *Solicitor's Opinion*, M–36823 (May 7, 1971). As to sodium, see 43 CFR 3520.1–2. The Department has held that valuable deposits of sodium compounds which are enumerated in the Mineral Leasing Act[8] are not open to location and disposition under the mining laws, but may be disposed of under the provisions of the Mineral Leasing Act only. *E.g.*, *Wolf Joint Venture*, 75 I.D. 137, 139 (1968). In an analogous case involving oil shale, the United States Supreme Court has said:

The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. But § 37 (U.S.C. Title 30, § 193) contains a saving clause protecting "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated," and declaring that they "may be perfected under such laws, including discovery." [9]

Wilbur v. *Krushnic*, 280 U.S. 306, 314–15 (1930).

Thus, we conclude that the provisions of 30 U.S.C. § 162 (1970) are not applicable to Permian's 1973 entry and location on the sodium chloride bearing lands in issue.[10] The vitality of 30 U.S.C. § 162 (1970) today is based upon the sav-

[5] The Mineral Leasing Act of 1920, *as amended*, is codified at 30 U.S.C. § 181, *et seq.* (1970).

[6] 30 U.S.C. § 193 (1970).

[7] Secs. 23 and 24 of the 1920 Act, 41 Stat. 447, specifically excepted sodium lands in San Bernardino County, California. This exception was repealed by omission from the 1928 amendments to the Mineral Leasing Act, Act of Dec. 11, 1928, 45 Stat. 1019.

[8] 30 U.S.C. § 261 (1970).

[9] See 30 U.S.C. § 193 (1970), n. 4, *supra*.

[10] There is nothing in the record to indicate that the Department has yet initiated action to determine the extent of trespass damages.

ings clause *supra*, and is generally [11] limited to any valid claims existent at the date of passage of the Mineral Leasing Act of 1920, *supra*, which have since been maintained in accordance with statute and regulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

[11] See 43 CFR 3501.1–1(b).

APPEALS OF THE STATE OF ALASKA AND SELDOVIA NATIVE ASSOCIATION, INC.*

2 ANCAB 1

Decided *June 9, 1977*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management #A-050903 rescinding in part tentative approval and rejecting in part the application of the State of Alaska for certain lands under sec. 6(b) of the Alaska Statehood Act, July 7, 1958, 72 Stat. 339, amended, 48 U.S.C. Chap. 2 (1970). Appeal from the Decisions of the Alaska State Office, Bureau of Land Management #AA-6701-B, AA-6701-D, dated Oct. 9, 1975, approving for interim conveyance or patent certain lands selected by Seldovia Native Association, Inc., under secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. secs. 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decisions of the Bureau of Land Management reversed in part, affirmed in part, June 9, 1977.

1. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Easements: Review

For the purpose of determining whether or not the Secretary of the Interior retains jurisdiction to review easement interests reserved to the Federal government, interim conveyance and patent are documents of equal significance in the granting of title under ANSCA.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Conveyances: Generally

When an interim conveyance has been issued pursuant to ANCSA, the Secretary of the Interior and ANCAB lose all authority and jurisdiction over those interests in the land which have been conveyed, and the Secretary is without jurisdiction to reserve any easements not originally contained in the conveyance or to deprive the grantee of the interim conveyance of any interests conveyed therein.

3. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Easements: Review

The Secretary retains jurisdiction pursuant to 43 CFR 2650.4-7(c)(1) and S.O. 2982, to review easement interests reserved to the Federal government in an interim conveyance; and in the absence of regulations establishing a procedure for such review, the Board is not precluded from exercising the Secretary's authority to review easement reservations when such review is requested through appeal to the Board.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision—Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyance—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Waiver

Where Departmental regulations provide for the elapse of a 30-day appeal period before a decision to convey becomes

*Not in Chronological Order.

final, waiver by one of a number of parties who might appear does not render BLM's decision final so as to permit conveyance before elapse of the 30-day appeal period.

5. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Waiver

Proper filing of a Notice of Appeal during the 30-day appeal period will be treated as a revocation of a prior waiver of appeal rights.

6. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Parties

Under regulations contained in 43 CFR 4.902, a Regional Corporation has a right of appeal.

7. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Summary Dismissal—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The Board, in its discretion, will not summarily dismiss an appeal for failure to file a Statement of Standing merely because a Statement of Standing was not separately filed or separately labeled, where the timely filed Statement of Reasons clearly discloses the claim of property interests required for standing to appeal by 43 CFR 4.902.

8. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where the State clearly has standing to appeal a decision, and its appeal is consolidated by the Board for adjudication with another appeal in which the State's standing to appeal is challenged, the State's standing to appeal in the consolidated matter will not be prejudiced.

9. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Parties

Where a person is designated a necessary party by Order of the Board and is given actual notice of administrative proceedings which may affect a claimed property interest, and such person fails to appeal and assert any claim, such person may be dismissed as a party and the Board may adjudicate the property interest of other parties without regard to any interest which may be claimed by the party who fails to appear.

10. Alaska Native Claims Settlement Act: Aboriginal Claims

Until Congress acted to extinguish rights of Alaskan Natives to use and occupancy of aboriginal lands, such rights remained as an encumbrance on the fee, and title to land claimed by Alaska Natives, to which use and occupancy might be proved, was void when given.

11. Alaska Native Claims Settlement Act: Land Selections: Village Selections—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

ANCSA provides in secs. 11(a)(2) and 12(a)(1) that each village may select up to 69,120 acres of its total entitlement from TA'd lands surrounding the village. Such State TA's, already encumbered by aboriginal title to lands on which use and occupancy could be proved, were now subject to a statutory prior right of selection by Village Corporations; a Native right of selection, based not on aboriginal title, but on Congressional grant in ANCSA.

12. Alaska Native Claims Settlement Act: Aboriginal Claims—Alaska Native Claims Settlement Act: Land

Selections: State Interests: Statehood Act Selections: Tentative Approvals

The retroactive extinguishment of aboriginal title, and the resulting validation of State title, mandated by sec. 4(a) of ANCSA, applies to those lands tentatively approved to the State which are located outside Native village withdrawal areas.

13. Alaska Native Claims Settlement Act: Aboriginal Claims—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

Extinguishment of aboriginal title did not vest the State's title to those TA'd lands located within sec. 11(a)(2) withdrawal areas, for Congress clearly conferred on Native Village Corporations a superior right to select up to 69,120 acres of such lands.

14. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

The State's interest in TA'd lands located within sec. 11(a)(2) withdrawal areas did not vest prior to ANCSA, and did not vest subsequent to ANCSA as to lands properly selected by Village Corporations within the three-year period mandated by sec. 12(a).

15. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

The State's interest vests in those TA'd lands within sec. 11(a)(2) withdrawals not selected by Village Corporations within statutory deadlines, for, upon completion of Native selections, the last encumbrance on the State's title is removed.

16. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

In withdrawing sec. 11(a)(2) lands tentatively approved to the State, Congress rejected the State's contention that tentative approval vested equitable title in the State, and in consequence rejected the title the State had relied upon to dispose of TA'd lands to third parties.

17. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests

Where the State had not acquired equitable title to tentatively approved land selections within village withdrawal areas prior to ANCSA, a grantee of the State could not acquire a greater interest than its grantor and could not, prior to ANCSA, acquire equitable title sufficient to deprive Congress of power to dispose of the land in settlement of Native claims. Accordingly, any protection or priority afforded to third-party interests in the disputed lands must be statutory, conferred by ANCSA.

18. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: Entrymen

ANCSA protects, as "valid existing rights," those rights, whether derived from the State or Federal government, which do not lead to a grant of fee title and which were created prior to enactment of ANCSA. Rights leading to a fee, which had vested prior to enactment,

would not be subject to Congressional disposal and would be excluded from withdrawals for Native selection. Rights of entrymen leading to a grant in fee under Federal public lands laws, which had not vested prior to ANCSA, are treated by ANCSA as if vesting had occurred and are not categorized as "valid existing rights."

19. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

"Valid existing rights" protected by ANCSA include not only interests created by the Federal government, but may also include interests created by the State of Alaska so long as the latter are not interests leading to acquistion of fee title.

20. Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyance—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: Conveyances

The interests described in sec. 14(g) of ANCSA are of a temporary or limited nature, in contrast to those interests derived from laws leading to a grant of fee title such as the entries protected by sec. 22(b). Inclusion in Native conveyances of lands subjects to such interests, under administrative arrangements outlined in sec. 14(g) is appropriate, because such temporary or limited interests are not incompatible with Native ownership of the fee.

21. Alaska Native Claims Settlement Act: Definitions: Generally—Alaska Native Claims Settlement Act: Withdrawals: Generally

Lands on which the United States has issued patent either to the State or to a private individual are not within the definition of "public lands" in sec. 3(e) of ANCSA, were not withdrawn by sec. 11 of ANCSA, and therefore are not available for selection under ANCSA.

22. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

For the purpose of determining jurisdiction, a patent issued by the State of Alaska on TA'd lands within a sec. 11 (a)(2) withdrawal, will be accorded the same dignity as a Federal patent: *i.e.*, the effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction in the Department of the Interior over the lands conveyed. Therefore, the Board finds it lacks jurisdiction to decide the status of patents issued by the State of Alaska prior to ANCSA to third parties on TA'd lands, as the proper form for such an adjudication is in a judicial proceeding.

23. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests

Open-to-entry leases issued by the State of Alaska pursuant to A.S. 38.05.077 are protected as valid existing rights by the specific terms of sec. 14(g) of ANCSA because they are leases issued under sec. 6(g) of the Alaska Statehood Act.

24. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests

Where open-to-entry leases contain no provisions to purchase the leased land, but provide only for renewal upon expiration of a five-year term, the right of purchase asserted under A.S. 38.05.077 is not granted by the lease within the terms of sec. 14(g) of ANCSA, but appears to be an associated preference right granted in connection with the leasing program to individuals holding such leases.

25. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests

Where the asserted rights to purchase lands held under an open-to-entry lease can be exercised under State statutes only if the lease is relinquished, relinquishment of the lease and subsequent issuance of patent to the land would constitute a new interest created subsequent to ANCSA, contrary to sec. 11(a)(2) which specifically withdraws lands TA'd to the State "from the creation of third-party interests under the Alaska Statehood Act."

26. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests

The State may not extend a preference right to purchase lands under an open-to-entry lease program to which a Native Corporation will hold title; although a Native Corporation, succeeding under sec. 14(g) to the interest of the State as lessor, may wish to sell the leased land to the lessee, the Board finds no mechanism in ANCSA for the enforcement of such a right in the lessee against a Native patentee.

27. Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyances—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: Conveyances

Leases issued for the surface or minerals covered by a Native selection constitute a valid existing right protected by sec. 14(g) of ANCSA and any conveyance to a Native Corporation of lands on which such a lease has issued must be subject to the lease hold interest.

28. Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyances—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: Conveyances

State-issued permits and contracts for resource uses issued to third parties before Dec. 18, 1971 are protected as valid existing rights under sec. 14(g) of ANCSA, and any conveyance to a Native Corporation of lands on which such permits or contracts have been issued must be subject to such interests.

29. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests

When an interest in land selected by and tentatively approved to the State of Alaska was transferred from one State agency to another, the complete interest remained

subject to the withdrawal and selection provisions of secs. 11(a) and 12 of ANCSA; thus transfer by the State of a permit to extract natural resources from the State Division of Lands to the State Division of Aviation does not place the State in the position of a protected third party under ANCSA.

30. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Since ANCSA recognizes and protects State-created interests as valid existing rights, as well as interests recognized or created under Federal law, and thus involves interests which would not be of record in the BLM land office, BLM's administrative responsibility to identify, adjudicate and protect "valid existing rights" under ANCSA, are broader than under general Federal public land laws.

31. Alaska Native Claims Settlement Act: Administrative Procedure: Decision—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

While decisions of the Bureau of Land Management and documents conveying title to Native corporations pursuant to ANCSA properly contain a general provision protecting "valid existing rights" in accordance with the provisions of sec. 14(g) of ANCSA and the regulations in 43 CFR Part 2650, such documents must additionally describe valid existing rights according to the nature of the right and approximate location on the land, and may incorporate by reference other BLM files and files of the Alaska Division of Lands only as a supplemental source of information.

32. Alaska Native Claims Settlement Act: Administrative Procedure: Decision—Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyances—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Under ANCSA and the regulations in 43 CFR Part 2650, the Bureau of Land Management has the duty to ascertain whether a less-than-fee interest was issued to a third party, and must recite in the decision approving lands for conveyance to a Native Corporation that the conveyance is "subject to" such an interest.

33. Alaska Native Claims Settlement Act: Administrative Procedure: Decision—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Where the claimed "valid existing rights" were created by the State on lands tentatively approved to the State under the Statehood Act, the adjudication of the State's selection must be consolidated with the adjudication of the Native land selection, and valid existing rights in the land must be determined in a single decision.

34. Alaska Native Claims Settlement Act: Administrative Procedure: Decision—Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyances—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Both the decision to convey lands, and the interim conveyance, must specifically identify those interests protected under ANCSA as valid existing rights. Where the title conveyed will be "subject to" a less-than-fee interest, the nature of the interest must be identified and the lands affected must be described, at least by section and, where possible, according to the smallest legal subdivision.

35. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Although the validity of S.O. 2982 is being challenged on numerous grounds in pending litigation, the Board currently is bound by S.O. 2982, and insofar as it purports to limit and restrict the Board's jurisdictional authority, the Board's jurisdiction is so affected.

36. Alaska Native Claims Settlement Act: Land Selections: Easements: Description

Description of easements solely by reference to a BLM or State Division of Lands case file number is not sufficient to meet the requirements of sec. 17(b) of ANCSA, regulations promulgated thereunder, and Secretarial Order No. 2982.

37. Alaska Native Claims Settlement Act: Administrative Procedure: Decision—Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyances—Alaska Native Claims Settlement Act: Land Selections: Easements: Description

Decisions to convey and interim conveyances should, as a minimum, state the use for which each easement is reserved, state the width of each easement, state at least the sections through which an easement passes or, if a site easement, the section or sections in which the easement is located; alternatively, the easement could be located by incorporating in the conveyance document a map depicting the easement.

38. Alaska Native Claims Settlement Act: Administrative Procedure: Decision—Alaska Native Claims Settlement Act: Land Selections: Easements: Generally

Where the Bureau of Land Management has developed new procedures for the reservation and identification of easements subsequent to issuance of a Decision to Convey, the Board will remand the Decision to Convey to the Bureau of Land Management for the limited purpose of identifying the easements reserved in the Decision to Convey under appeal according to the uniform easement identification system currently being followed.

APPEARANCES: Jeffrey B. Lowenfels, Esq., for the State of Alaska; A. Robert Hahn, Jr., Esq. for Seldovia Native Association; James Vollintine, Esq., John R. Snodgrass., Esq., and James D. Linxwiler, Esq., for Cook Inlet Region, Inc.; John W. Burke, Esq., for the State Director, Bureau of Land Management; Theo L. Carson, Jr., Esq., for the Kenai Peninsula Borough; Charles Cranston, Esq., for M. Walter Johnson, George S. Rhyneer, LaVonne Rhyneer, Susan H. Johnson, Agnes Ann Coyle; Charles R. Tunley, Esq., for Theodore A. Richards, Morgan B. and Jeanie W. Sherwood.

The following parties appeared pro se: Phillip O. Nice, Mrs. Geraldine Lenore Faller, Mrs. Vivian MacInnes, Henry F. Kroll, II, David Vanderbrink, Mrs. Charlotte L. Calhoun, Mrs. G. Lucille Billings, Mrs. Susan Campbell, Daniel B. Winn, Michael, Diana, Shannon and Morgan McBride, Elizabeth M. Cummings, Thomas W. Larsen, William Findlay Abbott, Mrs. Judith Miller, Allen B. Billings, Eunice M. Berglund, Edmund T. Pawelek, Michael and Susan F. Campbell, and Elmer Sundsby.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, *as amended*, 40 FR 14734 (Apr. 7, 1976), and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decision.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is the officer of the United States Department of the Interior who is authorized to make decisions on land selection applications involving Native Corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

FACTUAL BACKGROUND

The lands in dispute in this consolidated appeal were selected in a series of applications by the State of Alaska (hereinafter State) for general purposes grants under sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, *amended*, 48 U.S.C. Chap. 2 (1970) (hereinafter "the Statehood Act") during the period from Dec. 29, 1959 through Jan. 1, 1961. All lands in the amended and consolidated State selection #A–050903 are located within T. 7 S., R. 12 W., Seward Meridian. Portions of the selection were tentatively approved in Decisions dated Oct. 4, 1960, Aug. 5, 1964 and Nov. 15, 1966. These tentatively approved selections totaled approximately 11,190 acres. Upon receipt of tentative approval, the State created numerous third-party interests in the disputed lands through issuance of patents, issuance of certificates of water appropriation, issuance of leases under the open-to-entry leasing program, timber sales, and issuance of permits for gravel extraction and other purposes. Lands to which the State received tentative approval were as follows:

U.S. Survey No. 3973, lot 4;
U.S. Survey No. 4734, lot 2 and 3;
U.S. Survey No. 4735;
U.S. Survey No. 4737, lots 1, 2 and 3;
U.S. Survey No. 4738.

T. 7 S., R. 12 W., Seward Meridian (unsurveyed)

Section 1: all, excluding Ismailof Island;
Sections 10–13: all;
Section 20: all, including Native allotment application AA–7602;
Sections 21–28: all;
Section 29: all, including Native allotment application AA–7602;
Sections 30–36: all.

On May 2 and May 16, 1974, Seldovia Native Association, Inc. (hereinafter Seldovia), filed selection applications #AA–6701–B and #AA–6701–D under the provisions of sec. 22(a) of the Alaska Native Claims Settlement Act for the surface estate of certain lands in T. 7 S., R. 12 W., Seward Meridian as well as T. 6 S., Rs. 12 and 14 W.; T. 8 S., Rs. 12 and 15 W.; T. 9 S.,

Rs. 13 to 15 W., and T. 10 S., R. 14 W.

On Oct. 6, 1975, the State Director, Bureau of Land Management in Decision #A–050903 rescinded the tentative approval previously given to the State's selection and rejected the State's application for the approximate 11,190 acres selected with the exception of a few parcels.

The Decision recites that the State of Alaska has the right of appeal to the Alaska Native Claims Appeal Board and that if an appeal is made the adverse parties to be served are Seldovia Native Association, Inc., and Cook Inlet Region, Inc.

The Bureau of Land Management in a Decision dated Oct. 9, 1975 on village selections #AA–6701–B and #AA–6701–D approved for interim conveyance or patent under sec. 14(a) of ANCSA the surface estate in approximately 51,855 acres from the lands selected by Seldovia. The State Director found that these lands "are unoccupied and do not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.

On Oct. 10, 1975, the day after issuance of BLM's Decision on Seldovia Native Association's selections #AA–6701–B and #AA–6701–D, Fred Elvsaas, President of the Seldovia Native Association, stated in a letter to the State Director, BLM: "In order to obtain prompt conveyance, we hereby waive our appeal on AA–6701–B and AA–6701–D."

One week later, on Oct. 17, 1975, the Bureau of Land Management issued interim conveyance #016 to Seldovia Native Association conveying the surface estate in certain lands in T. 8 S., R. 15 W., Seward Meridian and T. 9 S., R. 14 W., Seward Meridian, including U.S. Survey No. 2838, excluding homesite application #A–057774, in the aggregate amount of approximately 13,728.50 acres.

On the same date, the Bureau of Land Management issued interim conveyance #017 conveying to Cook Inlet Region, Inc., the subsurface estate to all those lands conveyed by interim conveyance #016 to Seldovia Native Association.

The State of Alaska, through the Acting Director of the Department of Natural Resources, timely appealed BLM's Decision #A–050903, which had rescinded tentative approval and rejected the State's selection of 11,190 acres. Subsequently, the State requested an extension of time in which to file its Statement of Reasons and Standing. The Board, in an Order Naming Necessary Parties and Requiring Service, designated the State of Alaska, the State Director, Bureau of Land Management, the Seldovia Native Association, Inc., Cook Inlet Region, Inc., and Kenai Peninsula Borough as parties to be served. The Board then in a separate Order granted the State's motion for a time extension.

On Nov. 7, 1975, within the 30-day appeal period subsequent to issuance of the decision to convey on Oct. 9, 1975, Cook Inlet Region, Inc., and Seldovia Native Association, Inc., through counsel, filed Notices of Appeal.

On Dec. 9, 1975, the Board issued an Order naming as necessary parties the State of Alaska, the State Director, Bureau of Land Management, the Seldovia Native Association, Inc., the Cook Inlet Region, Inc., and the Kenai Peninsula Borough, and requiring filing of specific documents. The Board granted Cook Inlet Region, Inc., an extension of time in which to file its Statement of Reasons and Standing in the appeal.

PROCEDURAL BACKGROUND

On Dec. 19, 1975, the Board issued an Order naming the holders of certain third-party interests as additional parties and requiring service upon them. CIRI, Seldovia, and the State were directed to file with the Board a list of the names and current addresses of all persons and organizations claiming an interest in the lands involved in the appeal. The appellants were directed to serve copies of the Notices of Appeal and other documents filed with the Board upon each of the persons so identified and the Bureau of Land Management was directed to serve upon such persons copies of BLM Decisions #AA-6701-B, #AA-6701-D and of the Board's Order. This process resulted in the filing of entries of appearances and in other responses by parties claiming possible interests in the lands involved in this appeal. All documents filed by third parties have been considered.

On Mar. 8, 1976, the Board on its own motion mailed to all persons identified as holding potential interests in the disputed lands a package of pertinent documents including a listing of all the issues involved in the appeals and copies of materials filed by principal parties. Understandably, receipt of such a formidable array of legal documents precipitated a second series of responses asserting third-party interests.

On Apr. 8, 1976, the Board by Order allowed time for additional briefing and closed the record effective Apr. 9, 1976.

On Apr. 7, 1976, regulations requiring the Bureau of Land Management to publish decisions to convey lands were published in the Federal Register (Title 43, Chap. II, Part 2650, Sec. 2650.7, 41 FR 14737 (1976). On May 26, 1976, the Board issued an Order requiring the Bureau of Land Management, consistent with this regulation to publish certain proposed decisions from which appeals currently before the Board had been filed. However, the Board deemed the record closed on certain appeals filed substantially before promulgation of these regulations, including the present appeals, and did not require publication of the decisions appealed from in these cases at that time.

The record before the Board consists of the BLM appeal files, notices of appeal, all documents filed by principal parties and third parties, and the Board's Orders.

STATUTORY AND REGULATORY PROVISIONS

Of particular relevance to the appeal are the following statutory and regulatory provisions quoted in the Appendix hereto:

1. Treaty of Cession, Mar. 30, 1867, Art. III, 15 Stat. 539, 542.

2. Organic Act of May 17, 1884, sec. 8, 23 Stat. 24, 26.

3. Alaska Statehood Act, July 7, 1958, 72 Stat. 339, secs. 4, 6(b) and 6(g).

4. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976) secs. 3(e), 4, 11(a)(1), 11(a)(2), 14(c), 14(g) and 22(b).

5. Regulations contained in 43 CFR 2650.3–1, 43 CFR 2650.4, 43 CFR 2650.7, 43 CFR 2650.8, 43 CFR 2651.4, 43 CFR 4.902, 43 CFR 4.905.

DISCUSSIONS OF ISSUES

The Board will consider the issues in this appeal in an order slightly different than that listed in the Board's Order of Mar. 8, 1976.

1. Whether the Board and/or the Department of the Interior have any jurisdiction after the issuance of interim conveyances?

A portion of the lands involved in these appeals was conveyed to Seldovia and CIRI by interim conveyances #016 and #017, both dated Oct. 17, 1975. Other lands included in selections of the State and Seldovia, from which the consolidated appeals arise, were not included in interim conveyances. This issue arises in connection with adjudication of easements.

[1, 2] For the purpose of determining whether or not the Secretary of the Interior retains jurisdiction to review easement interests reserved to the Federal government, interim conveyance and patent are documents of equal significance in the granting of title under ANCSA. Therefore, when an interim conveyance has been issued pursuant to ANCSA, the Secretary of the Interior and this Board lose all authority and jurisdiction over those interests in the land which have been conveyed. The Secretary is without jurisdiction to reserve any easements not originally contained in the conveyance or to deprive the grantee of the interim conveyance of any interests conveyed therein. (*Fernie M. Rogers*, 29 IBLA 192 (Mar. 18, 1977) and *Appeal of Eklutna, Inc.*, 1 ANCAB 305, 84 I.D. 105 (1977).

[3] However, the Secretary does retain jurisdiction, pursuant to 43 CFR 2650.4–7(c)(1) and S.O. 2982, to review easement interests reserved to the Federal government in an interim conveyance; and in the absence of regulations estab-

lishing a procedure for such review, the Board is not precluded from exercising the Secretary's authority to review easement reservation when such review is requested through an appeal to the Board. (*Appeal of Eklutna, Inc., supra.*)

The following lands are included in interim conveyances #016 and #017:

T. 8 S., R. 15 W., Seward Meridian (Unsurveyed)
section 25: fractional;
section 33: fractional;
sections 34 & 35: fractional, excluding Native allotment application AA-7203;
section 36: fractional.

T. 9 S., R. 14 W., Seward Meridian (Unsurveyed)
sections 1 & 2: all;
section 5: all;
sections 7 & 8: fractional;
section 9: all;
sections 12 & 13: all;
section 16: all;
sections 17 & 18: fractional;
section 20: fractional;
sections 21 & 22: all;
sections 26-29: all;
sections 33-35: all.

U.S. Survey No. 2838, excluding homesite application A-057774.

Aggregating approximately 13,728.50 acres.

As to the above-described lands for which interim conveyance has issued, the Board's jurisdiction is limited to review of interests reserved to the Federal government.

The Board's jurisdiction is not disputed as to lands for which interim conveyance has not been issued.

2. Whether Seldovia Native Association waived its right to appeal by letter of 10/10/75 from Fred Elvsaas, President, Seldovia Native Association, to State Director, Bureau of Land Management?

BLM's Decision on Seldovia's land selections #AA-6701-B, #AA-6701-D was issued on Oct. 9, 1975. The following day, Oct. 10, 1975, Fred Elvsaas, President of Seldovia, wrote to the State Director, BLM, stating, "In order to obtain prompt conveyance, we hereby waive our appeal on AA-6701-B, AA-6701-D." Mr. Elvsaas' letter, signed in his capacity as President of Seldovia Native Association, Inc., purports to bind the Corporation. On Oct. 17, 1975, the State Director issued interim conveyance #016 to Seldovia, conveying the surface estate to lands in T. 8 S., R. 15 W., Seward Meridian; T. 9 S., R. 14 W., Seward Meridian; and U.S. Survey No. 2838, approximating 13,728.50 acres. On the same day the BLM issued interim conveyance #017 to Cook Inlet Region, Inc., for the subsurface in the same lands.

On Nov. 7, 1975, Seldovia through counsel filed a Notice of Appeal from the BLM Decision of Oct. 9, 1975. This Notice of Appeal was timely filed within 30 days from the date of receipt of the BLM Decision and in accordance with the procedural requirements of 43 CFR Part 4, Subpart J. Although the Notice of Appeal did not refer to the prior waiver, the appeal raised numerous questions concerning the validity of various parts of the BLM Decision of Oct. 9, 1975, and the ap-

parent intention was to revoke the waiver.

ANCSA in sec. 14(a) provides:

> Immediately after selection by a Village Corporation for a Native village listed in section 11 which the Secretary finds is qualified for land benefits under this Act, the Secretary shall issue to the Village Corporation a patent to the surface estate * * *.

Regulations in 43 CFR 2650.8 provide:

> Any decision relating to a land selection shall become final unless appealed to the Alaska Native Claims Appeal Board by a person entitled to appeal, under, and in accordance with, Subpart J of Part 4, 43 CFR.

Regulations contained in 43 CFR 4.21 provide:

> * * * Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. * * *

Regulations in 43 CFR 4.902 authorize an appeal from the Decision of the BLM by any person "who claims a property interest" in lands affected by the Decision.

Regulations in 43 CFR 4.903 provide in paragraph (a):

> * * * Appellant shall file a written notice of appeal, signed by him or his authorized representative, with the Alaska Native Claims Appeal Board within 30 days after the date of receipt of the decision by appellant, or if publication of the decision in the FEDERAL REGISTER is made, within 30 days after publication of the decision in the FEDERAL REGISTER, whichever shall occur first; * * *

[4] While, under 14(a) of ANCSA, it is the responsibility of the Department to make conveyance "immediately," Departmental regulations provide for the elapse of a 30-day appeal period before decision to convey becomes final. BLM's Decision does not become effective so as to permit issuance of conveyance until the elapse of the appeal period, regardless of whether appeal is waived by one of a number of parties who might appeal. In this case, nearly 40 parties have been identified who have or claim property interests of various kinds related to the land involved in the BLM Decision of Oct. 9, 1975. Therefore, insofar as Seldovia could not, as a matter of law, barter its appeal rights for issuance of conveyance before elapse of the 30-day appeal, the Board finds that its attempt to do so was ineffective.

[5] Insofar as the appeal period remained open, the Board accepts Seldovia's proper filing of a Notice of Appeal within the 30-day period as a revocation of the prior waiver.

3. If Seldovia Native Association, Inc., waived its right to appeal whether Cook Inlet Region, Inc., is precluded from asserting Seldovia's interests on appeal?

[6] In view of the Board's acceptance of Seldovia's revocation of its waiver, this issue is moot. In any case, under regulations contained in 43 CFR 4.902, Cook Inlet Region has a right of appeal by reason of its status as a Regional Corporation.

4. Whether the Appeal of the State of Alaska should be dismissed for failure to file a Statement of Standing pursuant to 43 CFR 4.903(b)?

Regulations contained in 43 CFR 4.903(b)(2) do not prohibit, and in fact specifically permit inclusion of a Statement of Standing in the Statement of Reasons:

> * * * The statement of the appellant's standing may be filed as a separate document, or may be included with a statement of reasons, written arguments or briefs filed pursuant to paragraph (b)(1) of this section.

[7] Summary dismissal within the terms of 4.905 is within the discretion of the Board. The Board, in its discretion, will not summarily dismiss an appeal for failure to file a Statement of Standing merely because the Statement of Standing was not separately filed or separately labeled, where the timely filed Statement of Reasons clearly discloses the "claims of property interests," required for standing to appeal by 43 CFR 4.902.

5. Whether the State of Alaska has standing to assert the interests of persons, organizations, and agencies which have received a grant, lease, contract or permit from the State?

CIRI and Seldovia contend that the State has no "claims of property interest" required by 43 CFR 4.902 for standing to appeal, with regard to the interest of third parties holding grants, leases, or other less-than-fee interests from the State. The State claims, in support of its standing, to be adversely affected by the possibility of litigation by the holders of such third-party interests in the event that such interests were not protected in connection with conveyance to a Native Corporation.

In the appeal originally designated ANCAB #VLS 75–14, the State appealed a decision rescinding tentative approval and rejecting the State's application for certain lands selected under the Statehood Act. The decision found that such lands had been properly selected by Seldovia. The State clearly has standing to appeal, as a party claiming a property interest, a decision rejecting its selection under the Statehood Act in favor of a Native selection under ANCSA.

[8] The Board has consolidated ANCAB #VLS 75–14 and BLM's designated ANCAB #VLS 75–15 (ANCAB, 84 I.D. 349 (1977), 6701–D, appealed by Seldovia and designated ANCAB #VLS 75–15 (2 ANCAB 1, 84 I.D. 349 (1977)), and treats the matter as a single adjudication. Since the State clearly has standing to appeal BLM Decision #A–050903, the State's position should not be prejudiced by the administrative separation of that decision from the decision adjudicating Seldovia's interest in the same land. This procedural separation has been remedied by consolidation of the two decisions on appeal, and the State's interest is clearly interwoven with adjudication of both decisions.

6. Whether the Kenai Peninsula Borough should be dismissed as a party to the appeal?

The Kenai Peninsula Borough was designated a necessary party by the Board on its own motion, to insure that the Borough received notice of the conflict between land selections of the State and Seldovia

so that the Borough would be aware of conflicts with its own selections of the disputed State lands. The Borough's only response has been to enter an appearance. A Statement of Standing and Statement of Reasons was never filed.

CIRI has moved to dismiss the Borough for failure to show standing, file pleadings and other briefs, and otherwise respond to the appeal.

[9] The motion is granted; the Kenai Peninsula Borough is hereby dismissed as a party to this consolidated appeal for failure to prosecute. Where a person is designated a necessary party by Order of the Board and is given actual notice of administrative proceedings which may affect a claimed property interest, and such person fails to appear and assert any claim of the property interest, such person may be dismissed as party to the proceedings and the Board may adjudicate the property interest of other parties without regard to any interest which may be claimed by the party who fails to appear and assert his interest.

7. Whether the BLM Decision issued pursuant to ANCSA must notify all parties, known to BLM to be claiming an interest in the land, of the Decision rendered and their right to appeal the Decision?

This issue is not moot since notice requirements are now clearly set forth in 43 CFR 2650.7(d), 41 FR 14734, 14737. (*See* Appendix p. 387.) Current notice procedures would require BLM to give notice to all parties known by BLM to be claiming an interest in the land.

As to this appeal, the Board, on its own motion, directed service on those parties identified in the record as claiming an interest in the land involved. (*See* Procedural Background.)

THIRD-PARTY INTERESTS UNDER ANCSA

8. Whether the "valid existing rights" protected by ANCSA, are only those interests in the land created by the Federal government?

9. Whether a less-than-fee interest (*e.g.*, open-to-entry leases, other leases, contracts, permits) granted by the state of Alaska to a third party on lands tentatively approved under the Alaska Statehood Act can constitute a "valid existing right" protected by ANCSA?

10. If any open-to-entry leases granted by the State of Alaska constitute "valid existing rights" protected by ANCSA, whether the "right" protected includes the lessees' "right to purchase" under the Alaska Statutes 38.05.077, or merely their "right" to the enjoyment of the leasehold interests?

11. Whether a less-than-fee interest granted by the State Division of Lands to the State Division of Aviation on lands tentatively approved under the Alaska Statehood Act constitute a "valid existing right" protected by ANCSA?

Decision #A-050903, vacating the State's selection in favor of Seldovia, provided:

* * * * *

The State has created numerous third-party interests in the subject township. The conveyances to the Native village and regional corporations will be subject to all such non-title interests that were created prior to December 18, 1971. In

addition to non-title interests, the State issued four patents prior to the enactment of ANCSA for lands to which it had received tentative approval. In such a case, a valid existing right has been created and the lands so patented cannot be selected by a Native village pursuant to ANCSA. (*State of Alaska*, 19 IBLA 178, Mar. 18, 1975.)

In view of this, State selection application A–050903 remains in effect and tentative approval remains valid as to the following lands:

U.S. Survey No. 4734, lot 3;
U.S. Survey No. 4735;
Harbor Heights Alaska Subdivision (State of Alaska Survey), Block 1, lots 1–13 and Block 2, lots 1–11, located within T. 7 S., R. 12 W., Seward Meridian, sections 14 and 15;
That portion of Ismailof Island located in T. 7 S., R. 12 W., Seward Meridian, section 1.

These lands have been properly excluded from the village selection application; they will be patented to the State at a later date.

* * * * *

Decisions #AA–6701–B, #AA–6701–D, approving Seldovia's land selections, provided:

* * * * *

The grant of lands by the interim conveyance shall be subject to:

* * * * *

2. Valid existing rights therein, including but not limited to those created by any leases (including a lease issued under sec. 6(g) of the Alaska Statehood Act (72 Stat. 339, 341)), contract, permit, right-of-way or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Oil and gas lease A–064325 was issued by the Bureau of Land Management prior to Dec. 18, 1971. The interim conveyance will include the following lands embraced within the lease: T. 6 S., R. 14 W., Seward Meridian; section 4: W ½ SW ¼; section 5: E ½ SE ¼; and section 8: NW ¼ NE ¼, N ½ NW ¼. The conveyance will not cover all of the lands embraced within the lease.

The State of Alaska has identified the following third party interests on the lands to be conveyed, which were granted prior to December 18, 1971:

Free Use Permit	ADL No. 39033
Timber Sale	ADL No. 37447
Certificates of Appropriation of Water	ADL Nos. 40032, 42903, 47601 and 55131
Open to Entry Leases	41084, 41085, 41553, 41704, 42889, 42902, 42954, 44546, 45000, 45373, 47021, 47164, 51665, 55132, 55137, 55138, 55210

* * * * *

The Decision also excluded from conveyance to Seldovia the following interests:

T. 7 S., R. 12 W., Seward Meridian (Unsurveyed)
section 1: Ismailof Island
sections 14 & 15: lands within State of Alaska Patent No. 702, Block 1, lots 1–13 and Block 2, lots 1–11, Harbor Heights Subdivision (State of Alaska survey)
section 20: fractional Native allotment application AA–7602;
section 29: fractional Native allotment application AA–7602.

T. 8 S., R. 15 W., Seward Meridian (Unsurveyed) sections 34 & 35; fractional Native allotment application AA–7203

T. 9 S., R. 15 W., Seward Meridian (Unsurveyed) section 1: Native allotment application AA–7233

T. 10 S., R. 14 W., Seward Meridian (Unsurveyed) U.S. Survey 2838: homesite application A–057774

Summary of Arguments

Seldovia argues that the State did not acquire equitable title in lands tentatively approved under the Statehood Act until Congress extinguished Native rights in such lands and, therefore, could not convey title to third parties so as to defeat Native selections under ANCSA.

CIRI concurs, pointing out that those rights protected by sec. 22(b) of ANCSA are all interests created by the Federal government; all other valid existing rights must be less-than-fee interests of a temporary nature, with the Native patentee of the underlying interest in lands succeeding to the interest of the State or Federal government. Such interests are enumerated in sec. 14(g) of ANCSA, which specifically validates only one type of State created interest: leases under sec. 6(g) of the Alaska Statehood Act. CIRI asserts that although sec. 6(g) of the Statehood Act also authorized conditional sales by the State of lands tentatively approved but not yet patented under the Statehood Act, only conditional leases and not conditional sales are designated as valid existing rights in sec. 14(g) of ANCSA.

CIRI further argues that State TA'd lands within village withdrawal areas are available for Native selection under ANCSA, and the State cannot defeat Native selection rights by making itself a third party whose interests are protected.

The State argues that all State created interests may be protected as valid existing rights under ANCSA based on its interpretation of tentative approval of State land selections under the Alaska Statehood Act as tantamount to conveyance of title.

State's Title Prior to ANCSA

The State of Alaska's claim to the lands in dispute arises under the Alaska Statehood Act, which grants to the State the right to select approximately one hundred and three million acres of "vacant, unappropriated, and unreserved" land. (72 Stat. 339, 340, sec. 6(b).) The Statehood Act in sec. 6(g) authorized the State to execute *conditional* leases and *conditional* sales of selected lands, after tentative approval by the Secretary of the Interior but before issuance of patent. (Italics added.) (72 Stat. 339, 341.)

The nature of the State's interest in such lands is crucial to the present appeal. The Statehood Act was enacted against a backdrop of the Native presence in Alaska.

In express provisions of the Treaty of Cession and the Organic Act of 1884, and through disclaimers in the Statehood Act, aboriginal title in Alaska received statutory protection in addition to that normally extended on the basis of Native occupancy.

The Alaska Statehood Act (72 Stat. 339) provides in sec. 4:

> As a compact with the United States said State and its people do agree and declare that *they forever disclaim all right and title to any lands or other property* not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, * * * *the right or title to which may be held by any Indians, Eskimos, or Aleuts* * * * or is held by the United States in trust for said natives; that all such lands * * *, belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, * * * (Italics added.)

The effect of the Statehood Act, in its historical context, has been interpreted by the courts as follows:

* * * * *

> To summarize, the Statehood Act, read as a whole and read in the light of a legislative history showing an intent on the part of Congress to avoid any prejudice to Native possessory rights until such time as Congress should determine how to deal with them, did not authorize the State to select lands in which Natives could prove aboriginal rights based on use and occupancy. Accordingly, tentative approvals by the Secretary of Interior of land selections in which such rights can be proven were void at the time they were granted. * * *

(*Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1375 (1973)).

[10] The Board concludes that, until Congress acted to extinguish rights of Alaskan Natives to use and occupancy of aboriginal lands, such rights remained as an encumbrance on the fee, and title to land claimed by Alaska Natives, to which use and occupancy might be proved, was void when given. (*Appeal of Eklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976)

The Effect of ANCSA

In ANCSA, Congress, exercising its exclusive jurisdiction to extinguish aboriginal claims and to dispose of lands in Federal ownership, created in Alaska Natives a statutory entitlement, requiring no proof of use and occupancy, to 40 million acres of land. This entitlement must be satisfied, for the most part, from "public" lands, defined in sec. 3(e) as "all Federal lands and interests therein located in Alaska *except:* * * * land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, * * * ". (Italics added.)

[11] However, responding to the problem of villages in proximity to TA'd lands ANCSA also provides, in secs. 11(a)(2) and 12(a)(1), that each village may select up to 69,120 acres of its total entitlement from lands "that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act," within the area, usually 25-townships, surrounding the village. Such State land selections, already encumbered by aboriginal title to lands on which use and occupancy could be proved, were now subjected to a statutory prior right of selection by Native Corporations, based not on aboriginal title, but on Congressional grant in ANCSA.

Congress then, in ANCSA, extinguished all claims based on

aboriginal title, stating in sec. 4(a):

> All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to sec. 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

[12] As noted by the court in *Edwardsen, supra*, at 1378, sec. 4(a) operates retroactively by treating tentative approvals as extinguishment of aboriginal title. As a result of this retroactive extinguishment, the State's interest vested as equitable title in all those tentatively approved selections which had not, through sec. 11(a)(2) of ANCSA, become subject to the Natives' statutory right of selection. Thus, the retroactive validation of the State's title applied to those lands tentatively approved to the State which were located outside Native village withdrawal area.

[13] However, extinguishment of aboriginal title did not vest the State's title to those tentatively approved selections located *within* sec. 11(a)(2) withdrawal area, for Congress clearly conferred on Native Village Corporations a superior right to select up to 69,120 acres of such lands.

[14, 15] The Board finds, therefore, that the State's interest in lands located within sec. 11(a)(2) withdrawal areas did not vest prior to ANCSA, and did not vest subsequent to ANCSA as to those lands properly selected by Village Corporations within the three-year time period under sec. 12(a). However, the Board finds that the State's interest *does* vest in those TA'd lands within sec. 11(a)(2) withdrawals *not* selected by Village Corporations within the statutory deadlines mandated by sec. 12, for upon completion of Native selections, the last encumbrance on the State's title is removed. (*Appeal of Eklutna, Inc.*, 1 ANCAB 190 *supra.*)

This result is not inconsistent with *Edwardsen, supra*, and follows expressed Congressional intent. During discussion in the Senate on the Conference Report on H.R. 10367, Senator Stevens queried Mr. Bible as to whether or not *TA lands, withdrawn for village selection but not selected by villages would, at the end of the withdrawal period*, be patented to the State. Senator Bible replied: "** * * the answer is unquestionably yes.*" (117 Cong. Rec. 196, S 21655 (daily Ed. Dec. 14, 1971.)) (Italics added.)

It is clear from the legislative history of ANCSA that the single purpose of sec. 11(a)(2) is to make available for Native village selection those lands on which such villages would most likely be able to prove aboriginal use and occupancy—*i.e.*, lands surrounding each village.

[16] In withdrawing sec. 11(a)(2) lands tentatively approved to the State, Congress rejected the State's contention that tentative ap-

proval vested equitable title in the State, and in consequence, rejected the title the State had relied upon to dispose of TA'd lands to third parties. It was this consequence Senator Stevens was concerned with during hearings on S. 1830, 91st Cong., 1st Sess. (1969). In a discussion of the effect of Congressional disposition of tentatively approved lands, the following exchange occurred:

> *Senator Stevens:* Well, but this is the point; the State was given certain rights under the Statehood Act, the right to select these lands. Where the lands have been patented, there is no dispute. The only reason the patent was not issued under tentative approval was because the survey had not been done. The State and Federal Government have done everything there is to do except issue the patent.
>
> *Senator Gravel:* I understand that. But suppose the State does have patent. The natives would still be looking to the State for participation if there are certain areas of State land needed to fill out the allowable land grant area around the village. If that is the case they would get land from the State, just as they would from Federal Government lands, such as the Tongas National Forest or some wildlife refuge.
>
> That does not disturb me one iota, and I do not see an economic change of significance that will alter the wealth because they are not going to disturb the oil companies under the lease. That lease will be there.
>
> *Senator Stevens:* That is not true. *If the tentative approval is not recognized as equivalent of title, then the title goes to these people and the State does not have any right. The State-issued leases in this area are dependent upon State title,* and that title under tentative approval is the equivalent of title under the Statehood Act and, as I say, this is the first time I have ever heard that the AFN has disputed this significance of tentative approval. (Italics added.)

(Hearing on S. 1830 Before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. Part 2, 347 (1969))

[17] Since the State had not acquired equitable title to tentatively approved land selections within village withdrawal areas prior to ANCSA, a grantee of the State could not acquire a greater interest than its grantor, and could not, prior to ANCSA, acquire equitable title sufficient to deprive Congress of power to dispose of the land in settlement of Native claims. Accordingly, any protection or priority afforded to third-party interest in the disputed lands must be statutory, conferred by ANCSA.

This inherent defect in the State's title is recognized in the State Administrative Code, 11 AAC 54.480, which provides:

> The state may conditionally sell land it selects under various federal land grants and lands it reasonably believes it will own or will acquire title to prior to the actual receipt of title. Contracts issued on this conditional basis shall be cancelled * * * in the event the state is denied title to said lands. * * * However, the state shall in no way be liable * * * for any claim of any third party or to any claim that may arise from ownership. * * *

In order to resolve this appeal, it must be determined whether the third-party interests herein asserted are protected by ANCSA.

Protection of Third-Party Interests Under ANCSA

Selections by Native Corporations under ANCSA, must be from

withdrawal areas identified in sec. 11 of the Act. Sec. 11(a)(1) withdraws "public lands" within three tiers of townships. Public lands are defined in sec. 3(e) as:

> * * * all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969;

As to lands within the three tiers of secs. 11(a)(1), 11(a)(2) of ANCSA states:

> All lands located within the townships described * * * that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

Sec. 11 of ANCSA impliedly recognizes the existence of third-party interests created by the State prior to ANCSA, by prohibiting the creation of such interests after the withdrawal.

Sec. 12(a)(1) of ANCSA, then gives Village Corporations the right to select up to 69,120 acres of lands tentatively approved to the State and withdrawn under sec. 11(a)(2).

Sec. 22(b) protects the interests of entrymen under the Federal public land laws governing homesteads, headquarters sites, trade and manufacturing sites, and small tract sites. To avoid any confusion, sec. 22(b) provides a citation to the law governing the latter type of entry.

Patents are to be issued promptly to entrymen who have complied with all necessary prerequisites. Entrymen who have not yet complied fully with requirements for patent, whose title has therefore not vested, are protected in their use and occupancy until the requirements are met, and their right is specifically held superior to "the withdrawal provisions of this Act."

Regulations contained in 43 CFR 2650.3–1, implementing secs. 14(g) and 22(b) of ANCSA, require the BLM to *exclude* from conveyance "*any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title*, but * * * include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements." (Italics added.)

[18] ANCSA protects, as "valid existing rights," those rights, whether derived from the State or Federal government, which do not lead to a grant of fee title and which were created prior to enactment of ANCSA. Rights leading to

a fee, which had vested prior to enactment, would not be subject to Congressional disposal and would be excluded from withdrawals for Native selection. Rights of entrymen leading to grant of a fee under Federal public land laws, which had not vested prior to enactment of ANCSA, are treated by ANCSA as if vesting had occurred and are not categorized as "valid existing rights." (*Appeal of Eklutna, Inc., supra.*)

[19] "Valid existing rights" protected by ANCSA include not only interests created by the Federal government, but may also include interests created by the State of Alaska so long as the latter are not interests leading to acquisition of fee title.

Sec. 14(g) of ANCSA provides:

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

The specific provision for leases issued under sec. 6(g) of the Alaska Statehood Act is in accord with the recognition in sec. 11(a)(2) of the State's right to create third-party interests prior to enactment of ANCSA and withdrawal thereunder of the limited amount of State TA'd land vulnerable to Native selection.

The legislative history of ANCSA does not disclose detailed presentations to Congress on the range of State created interests which might conflict with Native selections. Referring to provisions in H.R. 10367, also contained in ANCSA, protecting conditional leases issued on TA'd lands under sec. 6(g) of the Statehood Act, the author of House Bill 92–523 observes:

> * * * the purpose of this * * * is to prevent the termination of a lease issued by the State which by its terms was made conditional on the issuance of a patent to the State. Selection by the Natives will prevent the issuance of a patent to the State, but the *lease* will be treated as though the patent had been issued * * * (Italics added.)

(H.R. Rep. No. 92–523, 92d Cong., 1st Sess. 9 (1971))

The legislative history reflects efforts of the oil and gas industry to protect such leases, and it is reasonable to conclude that this specific protection extended to State leases by sec. 14(g) results from such industry efforts. (Hearing on S. 1830 Before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969), submission of Max Barash, pp. 485–487.)

However, neither the language nor the legislative history of ANCSA indicate that such protection of State-issued oil and gas leases was intended to be exclusive; there is no reason to conclude that Congress intended to withhold such protection from all other less than fee interests which the State might have created prior to ANCSA.

Regulations in 43 CFR 2650.3–1 require "* * * land subject to valid existing rights of a temporary or limited nature such as those created by leases * * *" to be included in conveyances to Native Corporations. Section 14(g) of ANCSA provides for the administration of such interests so that the holders thereof may receive the benefit of their bargain, while the Native Corporation holding the land receives the revenues. It should be noted that sec. 14(g) treats State-created interests to some degree as a special inclusion; enumerating valid existing rights to which conveyances will be subject, it lists a lease, contract, permit, right-of-way, or easement and then adds expressly ("including a lease issued under sec. 6(g) of the Alaska Statehood Act) * * *." Similarly, in providing that the patentee shall succeed as landlord to the interests of the State or the United States, it is specifically stated that "* * * a lease issued under sec. 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. * * *"

Implementing regulations in 43 CFR 2650.4–1, Existing rights and contracts, provide:

> Any conveyance issued for surface and subsurface rights under this act will be subject to any lease, contract, permit, right-of-way, or easement and the rights of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted him.

Sec. 2650.4–2 provides for the grantee of a conveyance under ANCSA to succeed to the interest of the State or the United States as lessor, contractor, permitter, or grantor; and 2650.4–3 sets forth procedures for administration of leases, contracts, permits, rights-of-way, or easements to which a conveyance is made subject, by the Secretary of the Interior.

[20] As recognized in the regulations previously quoted, the interests described in sec. 14(g) of ANCSA are of a temporary or limited nature, in contrast to those interests derived from laws leading to a grant of fee title such as the entries protected by sec. 22(b). Inclusion in Native conveyances of lands subject to such interests, under administrative arrangements outlined in sec. 14(g) is appropriate, because such temporary or limited interests are not incompatible with Native ownership of the fee.

Summary of Interests

The following categories of interests are at issue in this appeal:

1. Patents issued by the United States;

2. Patents issued by the State of Alaska, conveying lands patented to the State by the United States;

3. Patents issued by the State of Alaska, conveying lands selected by the State pursuant to the Alaska Statehood Act and tentatively approved but not yet patented to the State;

4. Open-to-entry leases issued by the State of Alaska pursuant to A.S. 38.05.077;

5. Oil and gas leases issued by the United States prior to Dec. 18, 1971;

6. Free use permits issued by the State of Alaska to private organizations;

7. Timber sale contracts executed by the State of Alaska;

8. Certificates of appropriation of water issued by the State of Alaska;

9. Water rights claim by University of Alaska;

10. Free use permits issued by the State of Alaska to agencies of the State government.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the preceding discussion.

Patents issued by the United States; patents issued by the State of Alaska, conveying lands patented to the State by the United States

[21] Lands on which the United States has issued patent either to the State or to a private individual are not within the definition of "public lands" in sec. 3(e) of ANCSA, were not withdrawn by sec. 11 of ANCSA, and therefore are not available for selection under ANCSA. Interests which appear on the record to be affected by this ruling are: U.S.S. 4734, lot 4, held by Morgan and Jeannie Sherwood; U.S.S. 4734, lot 5, held by Tom Larsen; and the interests claimed by Elmer Sundsby in U.S.S. 1543, derived from a State issued patent following issuance of patent to the State in 1966.

Patents issued by the State of Alaska conveying lands selected by the State pursuant to the Alaska Statehood Act and tentatively approved, but not yet patented to the State

The State argues that patents issued by the State to third parties prior to ANCSA on tentatively approved lands located within sec. 11 (a)(2) withdrawals, are protected as valid existing rights under ANCSA.

In its support of this position, the State has relied upon *State of Alaska*, 19 IBLA 178 (Mar. 18, 1975) which upheld the validity of State patents issued on lands tentatively approved, but not yet patented, to the State under the Statehood Act. *State of Alaska*, *supra*, dealt in part with the State's selection of five acre tract for community purposes, which was tentatively approved by the Bureau of Land Management "after all three Native groups in the area withdrew their objections to issuance of patent" to the tract. (*State of Alaska*, *supra*.) The State then patented the tract to the local Borough government as a school site. The State argued

that patenting the land to the local borough, with the approval of the Federal government and the Native groups involved, created a valid existing right. IBLA agreed, noting that while sec. 14(g) of ANCSA did not explicitly refer to State patents as valid existing rights, languages in sec. 11(a)(2) of ANCSA withdrawing lands for Native selections from the creation of third-party interests already created by the State were to be treated as valid existing rights. The decision states:

> The implication of that section is that third part interests *already created* by the State of Alaska are to be treated as valid existing rights, while the creation by the State of *new* third party interests is prohibited. Therefore, where patents have been granted by the State of Alaska before the enactment of ANCSA and before receipt of final patent from the federal government, and particularly where all the native groups then concerned expressly approved the State's acquisition of the land for that purpose, a valid existing right has been created. The BLM decision with respect to lot 23 must be reversed.

(*State of Alaska*, *supra*. At 182)

* * * * * *

IBLA's specific ruling in this matter appears to be one of narrow application, based on a case where "all the Native groups then concerned expressly approved the State's acquisition of the land" for the purpose for which the land was then used. These circumstances differ from the situation in the present appeal and in the *Appeal of Eklutna, Inc.*, 1 ANCAB 190. In the latter case, a high school had been built on land tentatively approved to the State, and selected by the Municipality of Anchorage. However, the State had not issued patent on the land. Further, all the Native groups concerned had *not* expressly approved the State's acquisition and subsequent grant of the land to a local government entity for school site purposes; indeed, while one such group had approved the transaction before ANCSA, at least one other had protested State selections throughout the entire area.

In the present appeal, as in *Appeal of Eklutna, Inc.*, *supra*, there is no indication that affected Native groups had waived their claim of title to the land in dispute, when virtually the entire Cook Inlet area was subject to Native protests. (*See* Hearings on H.R. 13142 and H.R. 10193 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. Ser. #91–8, p. 94, Bureau of Land Management Protest Map, protests #A–062052, #AA–648, #AA–541 (1969)).

However, the circumstances of the present appeal differ from those of *Eklutna* in that the State, prior to ANCSA, appears to have issued patents on several parcels of land now included in Seldovia's withdrawal area, to which the State did not itself have patent.

As noted herein, extinguishment of aboriginal title did not vest the State's title to those TA'd lands lo-

cated *within* sec. 11(a)(2) withdrawal areas, for Congress clearly conferred on Native Village Corporations a superior right to select up to 69,120 acres of such land. The State's interest in such lands did not vest prior to ANCSA, and did not vest subsequent to ANCSA as to lands properly selected by Village Corporations within the three-year period mandated by sec. 12(a).

By withdrawing lands, around villages, tentatively approved to the State, Congress rejected the State's contention that tentative approval vested title in the State, and in consequence rejected the title the State had relied upon to dispose of TA'd lands to third parties. (*Appeal of Eklutna, Inc.*, 1 ANCAB 190, *supra.*)

Such interests could not be protected as valid existing rights pursuant to sec. 14(g) of ANCSA because they are not of a temporary or limited nature and thus do not constitute an interest subject to which a Native Corporation can receive patent.

Nor does it appear that such interest can be protected under sec. 22(b) of ANCSA, which applies only to entrymen under the Federal Public Land Laws governing homesteads, headquarters sites, trade and manufacturing sites, and small tract sites.

A review of the legislative history of ANCSA leads the Board to conclude: first, that Congress was aware that State-created third-party interests on TA'd lands would fail if the Native Corporations, rather than the State received title (Hearings on S. 1830 before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. Part 2, 1969, pp. 344–351); and second, that Congress did not have before it any assertions that the TA'd lands under discussion were already impacted by State-created interests leading to fee. The several discussions of State-created third-party interests deal exclusively with less-than-fee interests, primarily oil and gas leases. Congress simply was not aware that the State had issued patents on TA'd land.

Under these circumstances, the withdrawal and selection of TA'd lands by Native Corporations created no conflict with third-party interests issued by the State prior to ANCSA, for those interests, insofar as Congress was aware, consisted only of less-than-fee, and the use rights were protected under sec. 14(g), while the Native Corporations received the fee. This appears to be the explanation for the treatment of valid existing rights in sec. 14(g), and for the fact that State-created interests leading to fee are not excluded from selection in the same manner as federally created interests leading to fee are excluded in sec. 22(g).

It is possible that holders of State patents in this appeal may fall within categories of interest protected under sec. 14(c)(1), which provides:

> [t]he Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsis-

tence campsite, or as headquarters for reindeer husbandry;

However, in this appeal no party has asserted a 14(c) interest, and therefore the Board has insufficient information on which to base an identification under sec. 14(c).

For the above reasons, it appears to the Board that the holders of patents issued by the State on TA'd lands within sec. 11(a)(2) withdrawals are not provided for under the terms of ANCSA. At the same time, issued patent is not to be lightly dismissed through legislative oversight, nor is the Board convinced that the Native leaders, in asserting their claim to TA'd lands, intended to revoke patents issued prior to ANCSA. In arguing that TA'd lands were susceptible to selection, Emil Notti, President of the Alaska Federation of Natives, stated:

> Mr. Notti: Senator, we have discussed this in our meetings, and as far as *patented lands go to State or individuals*, we here make no claims against that. Lands that have not been patented, have not gone to final patent, and that includes tentative approval, we are not willing to concede at this time that we do not have selection rights in these areas. We think we do. (Italics added.)

(Hearings on S. 1830, *supra*, p. 345.)

While Mr. Notti was discussing federally issued patents, there is no reason to believe that State-issued patents would not have received the same treatment.

[22] The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction in the Department of the Interior over the lands conveyed. (*Fernie M. Rogers*, *supra*; *Basille Jackson*, 21 IBLA 54 (1975); *Everett Elvin Tibbets*, 61 I.D. 397, 399 (1954)) As to the issue of determining jurisdiction, the Board accords a final patent issued to a third party by the State of Alaska prior to ANCSA the same dignity as a Federal patent. The proper forum to adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue. BLM's treatment of such interests is therefore unaffected by this decision.

Interests which appear on the record to be affected by this ruling are U.S.S. 4734, lot 3, held by Warren H. Sherwood based on State Patent No. 847; and U.S.S. 4735, Harbour Heights Alaska Subdivision, Block 1, lots 1–13 and Block 2, lots 1–11, located within T. 7 S., R. 12 W., Seward Meridian, sections 14 and 15; and that portion of Ismailof Island located in T. 7 S., R. 12 W., Seward Meridian, section 1.

Open-to-entry Leases Issued by the State of Alaska Pursuant to A.S. 38.05.077

[23] The Board finds that open-to-entry leases issued by the State of Alaska pursuant to A.S. 38.05.077 are protected as valid ex-

isting rights by the specific terms of sec. 14(g) of ANCSA because they are leases issued under sec. 6(g) of the Alaska Statehood Act. It remains necessary to determine whether such protection extends to any right to purchase which the lessees may have under Alaska Statutes 38.05.077.

State statutes contained in A.S. 38.05.077 provide in paragraph (a):

When land has been classified as "land open to entry," a resident who is qualified under law to acquire state land may enter upon and occupy the land under the following procedures.

* * * * *

(2) Concurrent with the entry the entryman shall file with the division of lands an application to lease, which application shall be accompanied by the appropriate minimum annual rental and filing fee, together with a sketch plat of the area entered. When the application has been approved, the division shall tender the entryman a negotiated five-year lease, which is subject to renewal on its expiration date for a like term.

* * * * *

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

* * * * *

(6) When the entry has been made upon land that has been selected by the state and upon which the state has not received tentative approval or patent, the entry shall be approved only on the basis of a renewable lease. *When tentative approval or patent has been received by the state, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase upon the terms and conditions provided for in this section.* (Italics added.)

* * * * *

(8) When the entryman has qualified to receive title to the land upon which he has made entry by satisfying all the requirements of this section, he shall deposit with the director a sum of money equal to the fair market value. * * *

Thus, an entryman who meets all statutory requirements, including completion of survey "may relinquish his lease and acquire patent," only "when tentative approval or patent" has been received by the State.

[24] The Board has reviewed all copies of open-to-entry leases in the record and finds that they are identical and that they do not contain provisions to purchase the leased land. The leases provide only for renewal upon the expiration of the five-year term and for removal or disposal by sale of any improvements placed on the leasehold by the lessee upon termination of the lease. Therefore, while sec. 14(g) specifically provides that a patent issued under ANCSA shall be "subject to the lease * * * and the right of the lessee * * * to the complete enjoyment of all rights, privileges, and benefits thereby granted to him," the right of purchase asserted under A.S. 38.05.077 is not granted by the lease, but appears to be, rather an associated preference right granted in connection with the leasing program to individuals holding such leases.

[25] Further, the asserted right to purchase lands held under an open-to-entry lease can be exercised under the State statues only if the lease is relinquished. The relinquishment of the lease and subsequent issuance of patent would con-

stitute a new interest created subsequent to ANCSA, contrary to sec. 11(a)(2) which specifically withdraws lands TA'd to the State "from the creation of third party interests * * * under the Alaska Statehood Act."

[26] Finally, under ANCSA, the selecting Native Corporations will receive title to certain lands previously TA'd to the State of Alaska. Therefore, as to such lands, the State may not extend a preference right to purchase lands to which a Native Corporation, rather than the State, will hold title. Although a Native Corporation, succeeding under sec. 14(g) to the interest of the State as lessor may wish to sell the leased land to the lessee, the Board finds no mechanism in ANCSA for the enforcement of such a right in the lessee against a Native patentee.

The Board finds that any right to purchase associated with an open-to-entry lease is not protected as a valid existing right under ANCSA.

The interests which appear on the record to be affected by this ruling are the following open-to-entry leases: ADL No. 41084, held by Walter Johnson; ADL No. 41085, held by George Rhyneer; ADL No. 41553, held by LaVonne Rhyneer; ADL No. 41704, held by Susan Johnson; ADL No. 42889, held by Henry F. Kroll, II; ADL No. 42909, held by Geraldine Lenore Faller; ADL No. 42954, held by Theodore A. Richard; ADL No. 44546, held by Judith P. Miller; ADL No. 45000, held by Agnes Coyle; ADL No. 45373, held by Lucille Billings; ADL No. 47021, held by Charlotte L. Calhoun; ADL No. 47164, held by David Vanderbrink; ADL No. 51665, held by Vivian MacInnes; ADL No. 55132, held by Daniel B. Winn; ADL No. 55137, held by Phillip O. Nice; ADL No. 55138, held by W. Findlay Abbott; ADL No. 55210, held by Susan Campbell. In addition, the record indicates the existence of two additional open-to-entry leases, ADL Nos. 42903 and 44164, without disclosing the identities of the holders, which would be affected identically with those listed above.

Oil and gas leases issued by the United States prior to December 18, 1971;

Free use permits issued by the State of Alaska to private organizations;

Timber sale contracts executed by the State of Alaska;

Certificates of appropriation of water issued by the State of Alaska;

Water rights claim by University of Alaska.

[27] Leases issued for the surface or minerals covered by a Native selection constitute a valid existing right protected by sec. 14(g) of ANCSA and any conveyance to a Native Corporation of lands on which such a lease has issued must be subject to the leasehold interest. Interests appearing on the record to be affected by this ruling are BLM oil and gas lease or leases #A-064325 embracing the following lands within the interim conveyance: T. 6 S., R. 14 W., Seward Meridian; Section 4: W½ SW¼;

Section 5: E½ SE¼; and Section 8: NW¼ NE¼, N½ NW¼.

[28] State issued permits and contracts for resource uses issued to third parties before Dec. 18, 1971, are protected as valid existing rights under sec. 14(g) of ANCSA and any conveyance to a Native Corporation of lands on which such permits or contracts have been issued must be subject to such interests. Interests appearing on the record to be affected by this ruling are as follows: State Permit No. 25909 to Homer Electric Association; State Permit No. 42875, State Timber Sale Contract No. ADL 37447, and certificates of Appropriation of Water ADL Nos. 40032, 42903, 47601, and 55131. The Board is unable to comment on the University of Alaska's water rights claim as the record does not contain adequate information.

Free Use Permits Issued by the State of Alaska to Agencies of the State Government

[29] The Board concurs with CIRI's assertion that the State cannot defeat Native selection rights by, in effect, setting itself up as a third party whose interests are protected. Congress clearly intended to make tentatively approved State selections within Native withdrawal areas available for Native selection in total amounts up to 69,120 acres. Transfer by the State of a permit to extract natural resources from one State agency to another does not place the State in a position of a protected third party. When an interest in land selected by and tentatively approved to the State of Alaska was transferred from the State Division of Lands to the State Division of Aviation, the complete interest in the land remained in the State of Alaska and therefore remained subject to the withdrawal and selection provision of secs. 11(a) and 12 of ANCSA. The State of Alaska's interest in lands previously selected and TA'd to the State, which fall within the withdrawal areas described in secs. 11(a) (1) and (2) of ANCSA, are withdrawn for selection by Native Corporations by secs. 11(a) (1) and (2) of ANCSA and do not constitute valid existing rights within the meaning of secs. 11(a) or 14(g) of ANCSA.

Furthermore, CIRI asserts in the record that Free Use Permit ADL #39033 was issued after Dec. 18, 1971, and that sec. 11(a)(2) of ANCSA effective that date, automatically withdrew lands from the subsequent creation of third-party interests by the State under the Alaska Statehood Act. This assertion is unchallenged on the record. Insofar as tentatively approved State selections within village withdrawal areas are withdrawn by sec. 11(a)(2) of ANCSA "from the creation of third party interests by the State under the Alaska Statehood Act" any permits for the extraction of resources on such lands issued by the State after Dec. 18, 1971, were improperly granted; and such permits are not protected as valid existing rights by sec. 14(g) of ANCSA. The only interests appearing on the record to be af-

fected by this ruling is Free Use Permit ADL #39033 granted to the State Division of Aviation, which in any case appears to have been issued subsequent to the statutory deadline in sec. 11(a)(2) of ANCSA for creation of third-party interests by the State.

12. Whether the BLM procedure for the identification adjudication and protection of "valid existing rights" is proper and adequate?

Seldovia objects to BLM's procedures insofar as they result in the identification of third-party interests created by the Federal government as "valid existing rights" within the meaning of ANCSA. CIRI argues that mere identification by the State of third-party interests is not equivalent to a determination by BLM that such rights are valid because the State is not authorized to reserve interests in lands conveyed to Native Corporations and BLM is required to do so with particularity.

BLM argues that language in sec. 14(g) of ANCSA protecting valid existing rights is a statutory mandate for including in each decision to convey a general provision that the conveyance is subject to valid existing rights. Without such a general reservation, BLM contends, the conveyance document would not accurately represent the land status to a purchaser.

[30] BLM's administrative responsibilities under ANCSA differ from those under other Federal land laws. BLM is normally not required to search beyond its own records to ascertain interests which may have arisen in lands subject to the jurisdiction and administration of the United States. However, since the Settlement Act recognizes and protects State-created interests as valid existing rights, as well as interests recognized or created under Federal law, and thus involves interests which would not be of record in the BLM land office, it is apparent that BLM's administrative responsibilities to identify, adjudicate and protect "valid existing rights" under ANCSA, are broader than under most other Federal land laws.

Since "valid existing rights" are protected by ANCSA and by the requirements of due process, they may not be extinguished by administrative omission or inadvertence; and it is appropriate for the BLM to caution the Native Corporations receiving conveyances pursuant to ANCSA.

[31] Therefore, the Board concludes that decisions of the Bureau of Land Management and documents conveying title to Native Corporations pursuant to ANCSA properly contain a general provision protecting "valid existing rights" in accordance with the provisions of sec. 14(g) of ANCSA and the regulations in 43 CFR Part 2650. In addition, to provide the greatest possible protection to the holders of valid existing rights which have been identified in the administrative process, the decision

to convey must describe the nature and approximate location on the land of valid existing rights, and may incorporate by reference other materials, only as a supplemental source of information. Where the title conveyed to the Native Corporation will be "subject to" a less-than-fee interest as a valid existing right pursuant to sec. 14(g) of ANCSA, the nature of the right must be identified, and the lands affected must be described, at least by section and, where possible, according to the smallest legal subdivision.

[32] Under ANCSA and the regulations in 43 CFR Part 2650, the Bureau of Land Management has the duty to ascertain whether a less-than-fee interest, *e.g.*, a lease, contract, permit, etc., was issued to a third party, and must recite in the decision approving lands for conveyance to a Native Corporation that the conveyance is "subject to" such an interest.

Finally, BLM asserts that they are not required to specifically identify all valid existing rights in the conveyancing document itself because this would impose an impossible administrative burden. BLM concedes it must specifically identify only those valid existing rights required by sec. 17(b).

* * * * *

The grant of lands by the interim conveyance shall be subject to:

* * * * *

2. Valid existing rights therein, including but not limited to those created by any leases (including a lease issued under sec. 6(g) of the Alaska Statehood Act (72 Stat. 339, 341)), contract, permit, right-of-way or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Oil and gas lease A–064325 was issued by the Bureau of Land Management prior to December 18, 1971. The interim conveyance will include the following lands embraced within the lease: T. 6 S., R. 14 W., Seward Meridian; section 4: W ½ SW ¼; section 5: E ½ SE ¼; and section 8: NW ¼ NE ¼, N ½ NW ¼. The conveyance will not cover all of the lands embraced within the lease.

The State of Alaska has identified the following third party interests on the lands to be conveyed, which were granted prior to Dec. 18, 1971:

Free Use Permit	ADL No. 39033
Timber Sale	ADL No. 37447
Certificates of Appropriation of Water	ADL Nos. 40032, 42903, 47601 and 55131
Open to Entry Leases	41084, 41085, 41553, 41704, 42889, 42902, 42954, 44546, 45000, 45373, 47021, 47164, 51665, 55132, 55137, 55138, 55210

* * * * *

BLM's Answer Brief, filed Feb. 17, 1976, explains BLM's procedure:

BLM's procedure for processing third-party interests is a combination of providing information and determining those interests which may lead or have led to the acquisition of title. (*i.e.* a fee interest in the land). A village selection, in this case AA–6701–B and AA–6701–D, is reviewed by a BLM adjudicator to establish which lands can be conveyed by the Federal government to the village corporation. An ensuing DIC reflects the results of the adjudication process, both by identifying those lands which will be or will not be conveyed and by identifying third-party interests which involve a certain portion

of the land selected. If a validly created, third-party interest has led or will lead to a fee interest in land, it will be excluded from the IC or patent and the acreage will not be charged to the village's entitlement, unless a later determination reverses the validity of the interest. Lands incorporating third-party interests which do not lead to a fee interest are only identified in the DIC, and will not be included in the IC or patent. The land will be charged to the village's entitlement, and management of that interest will be in accordance with the pertinent portions of ANCSA. This procedure is based on the decision handed down in *State of Alaska*, 19 IBLA 178, 182 (1975) which stated in part:

* * * where patents have been granted by the State of Alaska before the enactment of ANCSA and before receipt of final patent from the federal government, and particularly where all the native groups then concerned expressly approved the State's acquisition of the land for that purpose, a valid existing right has been created.

BLM construes this language to include open-to-entry leases created by the State which have been validly maintained and processed by the lessee, since these leases, once issued, create a property interest which may lead to a fee interest in the land.

* * * * *

The DIC which was issued for land selections AA–6701–B and AA–6701–D identified the following interests:

(1) Free use permit: ADL No. 39033.
(2) Timber Sale: ADL No. 37447.
(3) Certificates of appropriation of water: ADL Nos. 40032, 42903, 47601, and 55131.
(4) Open-to-entry leases: 41084, 41085, 41553, 41704, 42889, 42902, 42954, 44546, 45000, 45373, 47021, 47164, 51665, 55132, 55137, 55138, 55210.

These interests were included in the DIC only for informational purposes to assist the village and regional corporation, and will not be included in the IC or patent.

* * * * *

(3) Open-to-entry leases: BLM's procedure for an open-to-entry lease is to maintain the validity of the State's tentative approval and to suspend the land from selection by village corporations. The particular parcel is not rejected from the village selection until the lease is converted to an actual patent. If the lessee fails to proceed to patent as required by 38 AS 05.077, the Native selections will fall in place and patent will be issued to the village and regional corporations.

* * * * *

Sec. 14(g) of ANCSA provides:

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

Regulations in 43 CFR 2650.4–1 provide:

Any conveyance issued for surface and subsurface rights under this act will be

subject to any lease, contract, permit, right-of-way, or easement and the rights of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted him.

With particular reference to open-to-entry leases under Alaska Statutes 38.05.077, in conformance with the previous discussion in this decision, the Bureau of Land Management is required to treat a lease issued to a third party by the State of Alaska on lands selected by and tentatively approved to the State prior to ANCSA, as a less-than-fee interest. This interest must be identified and described in the decision to convey, in the same manner as other leases, contracts, permits, etc., as an interest to which the title will be subject.

[33] Where the claimed "valid existing rights" were created by the State on lands tentatively approved to the State under the Statehood Act, the adjudication of the State's selection must be consolidated with the adjudication of the Native land selection, and valid existing rights in the land must be determined in a single decision.

The Board hereby finds and concludes:

[34] Both the decision to convey lands, and the interim conveyance, must specifically identify those interests protected under ANCSA as valid existing rights. Where the title conveyed will be "subject to" a less-than-fee interest, the nature of the interest must be identified and the lands affected must be described, at least by section and, where possible, according to the smallest legal subdivision.

EASEMENTS UNDER ANCSA

Decisions #AA-6701-B, #AA-6701-D provided for the inclusion of numerous reservations of rights-of-way and public easements. These included the rights-of-way for ditches and canals (43 U.S.C. § 945); rights-of-way for railroads, telegraph and telephone lines (43 U.S.C. § 975(d)); and public easements designated under sec. 17(b)(3) of ANCSA.

13. Whether S.O. 2982 limits the Board's jurisdiction to decide the issues relating to easements which are involved in this appeal?

The referenced Secretarial Order 2982, Feb. 5, 1976, 41 FR 6295 (Feb. 12, 1976) establishes the standard which the Board must apply to an appeal from a "decision to reserve" an easement pursuant to sec. 17(b)(3) of ANCSA:

> * * * The Alaska Native Claims Appeal Board (ANCAB) will review decisions pursuant to sec. 17(b)(3) of ANCSA only to determine whether the decision to reserve was arbitrary or capricious.
>
> (Sec. Order 2982 41 FR 6295, 6297 (Feb. 12, 1976.))

When an appeal to the Board challenges the "decision to reserve" an easement pursuant to sec. 17(b)(3) of ANCSA as arbitrary and capricious, the appeal is within the Board's jurisdiction.

Cook Inlet contends that S.O. 2982 was passed without rule-making procedures required by the Administrative Procedure Act and

without Native participation pursuant to § 2(b) of ANCSA, and therefore is void and cannot amend the duly promulgated regulations in 43 CFR 4.1(5) or limit the Board's jurisdictional authority.

Regulations contained in 43 CFR 4.1(5) provide:

> * * * The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act (85 Stat. 688), * * * except the Board shall not consider appeals relating to enrollment of Alaska Natives; and with respect to appeals from Departmental decisions on village eligibility under Section 11(b) of the Act, decisions of the board shall be submitted to the Secretary for his personal approval before becoming final.

[35] The validity of S.O. 2982 is being challenged on numerous grounds in pending litigation; (*Calista Corp., et al.* v. *Kleppe*, Civil No. 76–0771 DDC, filed May 5, 1976) however, pending the outcome of this suit, the Board is bound by Sec. Order 2982 and insofar as it purports to limit and restrict the Board's jurisdictional authority, the Board's jurisdiction is so affected.

14. Whether the Secretary of the Interior is authorized to reserve rights-of-way for ditches and canals by the Act of 1891, 43 U.S.C. § 945, and ANCSA?

15. Whether the Secretary of the Interior is authorized to reserve rights-of-way for railroads, telegraph lines and telephone lines by the Act of 1914, 43 U.S.C. § 975(d), and ANCSA?

The Board notes that while *Calista Corp., et al* v. *Kleppe*, *supra*, is primarily a challenge to the validity of Secretarial Orders No. 2982 and No. 2987, the reservations complained of specifically include the reservation, in interim conveyances, of rights-of-way for ditches and canals pursuant to the 1890 Act, and for railroads, telegraph and telephone lines under the 1914 Act. (*Calista* v. *Kleppe*, *supra*, Complaint, 8.) The relief sought includes a declaration that sec. 17(b) of ANCSA is the only statutory authority for public easements. (*Calista* v. *Kleppe*, *supra*, Complaint, 10.) Plaintiffs also request a declaration that easements must be exclusively for the purposes set forth in sec. 17(b)(1) of ANCSA and that easements must be for an anticipated public use or a planned or existing government function, not for a "speculative public purpose." (*Calista* v. *Kleppe*, *supra*, Complaint, 10.)

Pending decision in this litigation, the Board declines to rule on issues before the Court.

16. Whether reserved easements under sec. 17 of ANCSA must be specific as to use and location?

The easements complained of by Seldovia are all those easements reserved in paragraphs 1, 2, and 4 of BLM Decisions #AA–6701–B, #AA–6701–D of Oct. 9, 1975. Paragraphs 1 and 2 of the Decision reserve rights-of-way for ditches and canals under the 1890 Act and for railroads, telegraph and telephone lines under the 1914 Act: Pursuant to its conclusions above, the Board declines to make findings on these

easements. The Board likewise declines jurisdiction over the twenty-five foot continuous linear coastline easement contained in interim conveyance #016.

Paragraph 4 of the Decision lists a number of public easements to which Seldovia generally objects on the grounds that there is no indication on the face of the Decision that procedures outlined in sec. 17(b) of ANCSA and implementing regulations for identifying easements were followed. The second ground for Seldovia's general objection is that "many of the easement descriptions in par. 4 also fail to meet the test of specificity required in the regulations wherein they are described by width and reference to an easement file of the Bureau of Land Management." Cook Inlet Region, Inc., concurs, contending that ANCSA requires identification of easements across lands selected by Village Corporations and the Regional Corporations, and at periodic points along the courses of major waterways; and that regulations contained in 43 CFR 2650.4–7(b)(1) require easements to be specific as to use and corridor locations and size, and to be reasonably related to an anticipated public use or to a planned or existing governmental function.

The Board notes that the plaintiffs in *Calista* v. *Kleppe* address specificity of use and location of easements only with regard to Secretarial Order No. 2987, stating in the complaint:

> Order No. 2987 unlawfully requires the reservation of a corridor easement which is unidentified as to location and size for an uncertain and speculative future use in connection with the transportation of energy, fuels, or natural resources in violation of the statutory requirements that all such easements be "reasonably necessary" for an identified public use and located across specific identifiable land within a Native selection:

As the issue of specificity as raised in the present appeal is not raised in *Calista* v. *Kleppe*, the Board here rules on the limited issue of specificity of use and location, under Secretarial Order No. 2982.

The provisions of 43 CFR 2650.4–7(b)(1) require:

> A public easement shall be reserved only if it is specific as to use and corridor location and size and both use and corridor location and size shall be reasonably related to an anticipated public use or a planned or existing governmental function.

Secretarial Order No. 2982 provides in pertinent part:

> Easements will be precisely located whenever possible except in those instances where this would result in a substantial delay in the issuance of conveyances. Local public easements, especially existing transportation and utility easements, will be located in close proximity wherever possible. For this purpose, corridors carefully delineated in accordance with 43 CFR 2650.4–7(b)(4) may be used to permit the subsequent identification of the precise location of each easement. Local easement corridors will be specifically identified as to location, size, and use in terms of the public easements to be contained therein.
>
> Local easement corridors may be delineated by aliquot parts or by other means necessary to accommodate the easements. When the specific identification and definite location of all the ease-

ments within a corridor are made, those portions of the corridor reservation not used by the easements will be relinquished.

Easement provisions in interim conveyances and patents will identify uses through commonly accepted terminology, e.g., trail or road. When necessary, additional descriptive terms may be added to further identify uses. * * *

* * * * *

[The BLM State Director] * * * will issue a decision to convey that includes easements that will be reserved and all other terms and conditions relating to conveyance of the land.

(Secretarial Order #2982, *supra*, pp. 6295, 6297.)

[36] Accordingly, the Board finds that description of easements solely by reference to a BLM or State Division of Lands case file number is not sufficient to meet the requirements of sec. 17(b) of ANCSA, regulations promulgated thereunder, and Secretarial Order No. 2982.

[37] The Bureau of Land Management, having the responsibility for preparation of conveyance documents, is best able to develop an adequate format for land description. The Board therefore limits its finding on the issue of specificity as to use and location to the conclusion that decisions to convey and interim conveyances should, as a minimum, state the use for which each easement is reserved, state the width of each easement, state at least the sections through which an easement passes or, if a site easement, the section or sections in which the easement is located. Alternatively, the easement could be located by incorporating in the conveyance document a map depicting the easement.

Subsequent to the filing of this appeal, it is the Board's understanding based on materials filed in another appeal (Appeal of Natives of Afognak, Koniag, Inc., and the State of Alaska, 1 ANCAB 340 (1977) Answer of BLM to Appellant's Statement of Reasons, footnote 1, p. 2, May 27, 1976) that the Bureau of Land Management has developed a uniform procedure for the identification and description of easements and conveyance documents.

This procedure involves identification of easements by EIN's (Easement Identification Numbers). During the identification process each easement recommended is designated by an EIN which is also marked on an official map. Each easement included in a DIC (Decision to Issue Conveyance) is designated by an EIN number and a certified map depicting easements cross-referenced by EIN numbers to those in the DIC is sent to appropriate parties including the village and region affected.

[38] In recognition of the fact that BLM has developed new procedures for the reservation and identification of easements since the issuance of the decision to convey here appealed, and that the issue here in dispute is in part, a procedural one, the Board hereby remands to the State Director, Bureau of Land Management, for processing of the easements reserved in the DIC here

appealed according to the uniform easement identification system.

17. Whether the BLM Decisions #AA–6701–B, #AA–6701–D, dated Oct. 9, 1975 shows adequate compliance with the procedural prerequisites to the reservation of easements required by sec. 17 of ANCSA, 43 U.S.C. § 1616 and applicable regulations?

Seldovia asserts that the Decision fails to show on its face adequate compliance with procedural prerequisites because it fails to state that easements reservations are based on the Planning Commission's study and accordingly fails to show that the Reserved easements are "reasonably necessary," pursuant to sec. 17 (b) (1) of ANCSA.

Cook Inlet contends that the mandate in sec. 17(b) (3) of ANCSA to reserve "such public easements" as the Secretary determines necessary refers to those public easements identified and recommended by the Land Use Planning Commission. While the Secretary has discretion not to reserve *all* easements recommended by the Land Use Planning Commission, the Secretary has no authority to reserve easements which were *not* recommended by the Commission. Therefore, Cook Inlet argues, because the Commission did not recommend reservation of easements as provided by the Act of Aug. 30, 1890 and the Act of Mar. 12, 1914, these easements must not be included in Seldovia's patent.

Because this issue relates to easements for ditches and canals under the 1890 Act or for railroads, telegraph and telephone lines under the 1914 Act, and arguments as to the Secretary's authority to reserve easements not recommended by the Commission are before the court in the *Calista* suit, the Board again declines jurisdiction during the pendency of *Calista* v. *Kleppe*, *supra*.

MOTIONS

The State moved on Jan. 16, 1976 to consolidate appeals VLS 75–14 and VLS 75–15, 2 ANCAB 1, 84 I.D. 349 (1977), *supra*, on the grounds that pursuant to the doctrine of *Ashbacker Radio Corporation* v. *F.C.C.*, 326 U.S. 327, 333 (1945), mutually exclusive applications must be heard together. CIRI opposed consolidation on the grounds that the issues, lands and parties in the two appeals are substantially dissimilar and consolidation frustrates the Natives' right to determine the status of their land. CIRI also moved to dismiss the State for failure to file a Statement of Reasons and a Statement of Standing timely or to show itself an indispensable party, and to dismiss the Kenai Peninsula Borough (herein the Borough) for lack of standing.

Seldovia has moved for oral argument and hearing on the factual issue whether the land which is the subject of Seldovia's appeal was vacant and unoccupied as required by the Alaska Statehood Act at the time of the State's selection.

All motions not specifically granted or denied in this decision are denied.

This represents a unanimous decision of the Board.

DATED this 14th day of June, 1977, at Anchorage, Alaska.

JUDITH M. BRADY, *Chairman.*
ABIGAIL F. DUNNING, *Board Member.*
LAWRENCE MATSON, *Board Member.*

APPENDIX A

1. Treaty of Cession, Mar. 30, 1867, Art. III, 15 Stat. 539, 542.

Rights of inhabitants of the ceded territory.

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

2. Organic Act of May 17, 1884, sec. 8, 23 Stat. 24, 26.

That the said district of Alaska is hereby created a land district, and a United States land-office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land-office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States. [Italics supplied.]

3. Alaska Statehood Act, July 7, 1958, 72 Stat. 339, sec. 4:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the

authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation. [Italics supplied.]

Sec. 6(b):

The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied: *And provided further*, That no selection hereunder shall be made in the area north and west of the line described in section 10 without approval of the President or his designated representative.

Sec. 6(g):

Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection. The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation. Such preferred right of selection shall have precedence over the preferred right of application created by sec. 4 of the Act of Sept. 27, 1944 (58 Stat. 748; 43 U.S.C., sec. 282), as

now or hereafter amended, but not over other preference rights now conferred by law. Where any lands desired by the State are unsurveyed at the time of their selection, the Secretary of the Interior shall survey the exterior boundaries of the area requested without any interior subdivision thereof and shall issue a patent for such selected area in terms of the exterior boundary survey; where any lands desired by the State are surveyed at the time of their selection, the boundaries of the area requested shall conform to the public land subdivisions established by the approval of the survey. All lands duly selected by the State of Alaska pursuant to this Act shall be patented to the State by the Secretary of the Interior. Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. As used in this subsection, the words "equitable claims subject to allowance and confirmation" include, without limitation, claims of holders of permits issued by the Department of Agriculture on lands eliminated from national forests, whose permits have been terminated only because of such elimination and who own valuable improvements on such lands.

4. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), *as amended*, 85 Stat. 689 (1971) sec 3(e):

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969;

Sec. 4:

(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to sec. 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Sec. 11(a)(1):

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

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

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

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

* * * * *

Sec. 11(a)(2):

All lands located within the townships described in subsec. (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

Sec. 14(c):

Each patent issued pursuant to subsecs. (a) and (b) shall be subject to the requirements of this subsec. Upon receipt of a patent or patents:

(1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry:

(2) the Village Corporation shall then convey to the occupant, either without consideration or upon payment of an amount not in excess of fair market value, determined as of the date of initial occupancy and without regard to any improvements thereon, title to the surface estate in any tract occupied by a nonprofit organization;

(3) the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: *Provided*, That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres:

(4) the Village Corporation shall convey to the Federal Government, State or to the appropriate Municipal Corporation, title to the surface estate for existing airport sites, airway beacons, and other navigation aids, together with such additional acreage and/or easements as are necessary to provide related services and to insure safe approaches to airport runways; and

(5) for a period of ten years after the date of enactment of this Act, the Regional Corporation shall be afforded the opportunity to review and render advice to the Village Corporations on all land sales, leases or other transactions prior to any final commitment.

Sec. 14(g):

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under sec. 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or

easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement.

Sec. 22(b):

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

5. 43 CFR 2650.3–1 Lawful entries and lawful settlements.

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

(b) The right of use and occupancy of persons who initiated lawful settlement or entry of land, prior to Aug. 31, 1971, is protected: *Provided*, That:

(1) Occupancy has been or is being maintained in accordance with the appropriate public land law, and

(2) Settlement or entry was not in violation of Public Land Order No. 4582, as amended. Any person who entered or settled upon land in violation of that public land order has gained no rights.

(c) In the event land excluded from conveyance under paragraph (a) of this section reverts to the United States, the grantee or his successor in interest shall be afforded an opportunity to acquire such land by exchange pursuant to sec. 22(f) of the act.

Sec. 2650.4 Conveyance reservations.

Sec. 2650.4–1 Existing rights and contracts.

Any conveyance issued for surface and subsurface rights under this act will be subject to any lease, contract, permit, right-of-way, or easement and the rights of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted him.

Sec. 2650.4–2 Succession of interest.

Upon issuance of any conveyance under this authority, the grantee thereunder shall succeed and become entitled to any and all interests of the State of Alaska or of the United States as lessor, contractor, permitter, or grantor, in any such lease, contract, permit, right-of-way, or easement covering the estate conveyed,

subject to the provisions of sec. 14(g) of the act.

Sec. 2650.4–3 Administration.

Leases, contracts, permits, rights-of-way, or easements granted prior to the issuance of any conveyance under this authority shall continue to be administered by the State of Alaska or by the United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease, contract, permit, right-of-way, or easement, unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. In the latter event, the Secretary shall not renegotiate or modify any lease, contract, right-of-way or easement, or waive any right or benefit belonging to the grantee until he has notified the grantee and allowed him an opportunity to present his views.

Sec. 2650.7 Publication.

In order to determine whether there are any adverse claimants to the land, the applicant should publish notice of his application. If the applicant decides to avail himself of the privilege of publishing a notice to all adverse claimants and requests it, the authorized officer will prepare a notice for publication. The publication will be in accordance with the following procedure:

(a) The applicant will have the notice published allowing all persons claiming the land adversely to file in the appropriate land office their objections to the issuance of any conveyance. The notice shall be published once a week for 4 consecutive weeks in a newspaper of general circulation.

(b) The applicant shall file a statement of the publisher, accompanied by a copy of the published notice, showing that publication has been had for 4 consecutive weeks. The applicant must pay the cost of publication.

(c) Any adverse claimant must serve on the applicant a copy of his objections and furnish evidence of service thereof to the appropriate land office.

(d) For all land selections made under the act, in order to give actual notice of the decision of the Bureau of Land Management proposing to convey lands, the decision shall be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision, the appropriate regional corporation, and any Federal agency of record. In order to give constructive notice of the decision to any unknown parties, or to known parties who cannot be located after reasonable efforts have been expended to locate, who claim a property interest or other valid existing right in land affected by the decision, notice of the decision shall be published once in the FEDERAL REGISTER and, once a week, for four (4) consecutive weeks, in one or more newspapers of general circulation in the State of Alaska nearest the locality where the land affected by the decision is situated, if possible. Any decision or notice actually served on parties or constructively served on parties in accord with this subsection shall state that any party claiming a property interest in land affected by the decision may appeal the decision to the Alaska Native Claims Appeal[s] Board. The decision or notice of decision shall also state that: (i) any party receiving actual notice of the decision shall have 30 days from the receipt of actual notice to file an appeal; and, (ii) that any unknown parties, any parties unable to be located after reasonable efforts have been expended to locate, and any parties who failed or refused to sign a receipt for actual notice, shall have 30 days from the date of publication in the FEDERAL REGISTER to file an appeal. Furthermore, the decision or notice of decision shall inform readers where further information on the manner of, and requirements for, fil-

ing appeal may be obtained, and shall also state that any party known or unknown who may claim a property interest which is adversely affected by the decision shall be deemed to have waived their rights which were adversely affected unless an appeal is filed with the Alaska Native Claims Appeal Board in accordance with the requirements stated in the decisions or notices provided for in this subsec. and the regulations governing such appeals set out in 43 CFR Part 4, Subpart J.

Sec. 2650.8 Appeals.

Any decision relating to a land selection shall become final unless appealed to the Alaska Native Claims Appeal Board by a person entitled to appeal, under, and in accordance with, Subpart J of Part 4, 43 CFR.

Sec. 2651.4 Selection limitations.

(a) Each eligible village corporation may select the maximum surface acreage entitlement under secs. 12(a) and (b) and sec. 16(b) of the act. Village corporations selecting lands under secs. 12(a) and (b) may not select more than:

(1) 69,120 acres from land that, prior to Jan. 17, 1969, has been selected by, or tentatively approved to, but not yet patented to the State under the Alaska Statehood Act; and

(2) 69,120 acres of land from the National Wildlife Refuge System; and

(3) 69,120 acres of land from the National Forest System.

(b) To the extent necessary to obtain its entitlement, each eligible village corporation shall select all available lands within the township or townships within which all or part of the village is located, and shall complete its selection from among all other available lands. Selections shall be contiguous and, taking into account the situation and potential uses of the lands involved, the total area selected shall be reasonably compact, except where separated by lands which are unavailable for selection or a section in which a body of water comprises more than one-half of the total acreage of a section. The total area selected will not be considered to be reasonably compact if (1) it excludes other lands available for selection within its exterior boundaries; or (2) lands which are similar in character to the village site or lands ordinarily used by the village inhabitants are disregarded in the selection process; or (3) an isolated tract of public land of less than 1,280 acres remains after selection.

(c) The lands selected under sec. 12(a) or (b) shall be in whole sections where they are available, or shall include all available lands in less than whole sections, and, wherever feasible, shall be in units of not less than 1,280 acres. Lands selected under sec. 16(b) of the act shall conform to paragraph (b) of this section and shall conform as nearly as practicable to the U.S. land survey system.

(d) Village corporation selections within secs. 11(a)(1) and (a)(3) areas shall be given priority over regional corporation selections for the same lands.

(e) Village or regional corporations are not required to select lands within an unpatented mining claim or millsite. Unpatented mining claims and millsites shall be deemed to be selected, unless they are excluded from the selection by metes and bounds or other suitable description and there is attached to the selection application a copy of the notice of location and any amendments thereto. If the village or regional corporation selection omits lands within an unpatented mining claim or millsite, this will not be construed as violating the requirements for compactness and contiguity. If, during the selection period, the excepted mining claims or millsites are declared invalid, or under the State of Alaska mining laws are determined to be abandoned, the selection will no longer be considered as compact and contiguous. The corporation shall be required to amend its selection, upon notice from the authorized officer of the Bureau of

Land Management, to include the lands formerly included in the mining claim or millsite. If the corporation fails to amend its selection to include such lands, the selection may be rejected.

(f) Eligible village corporations may file applications in excess of their total entitlement. To insure that a village acquires its selection in the order of its priorities, it should identify its choices numerically in the order it wishes them granted. Such selections must be filed not later than Dec. 18, 1974, as to secs. 12(a) or 16(b) selections and Dec. 18, 1975, as to sec. 12(b) selections.

(g) Whenever the Secretary determines that a dispute exists between villages over land selection rights, he shall accept, but not act on, selection applications from any party to the dispute until the dispute has been resolved in accordance with sec. 12(e) of the act.

(h) Village or regional corporations may, but are not required to, select lands within pending Native allotments. If the village or regional corporation selection omits lands within a pending Native allotment, this will not be construed as violating the requirements for compactness and contiguity. If, during the selection period, the pending Native allotment is finally rejected and closed, the village or regional corporation may amend its selection application to include all of the land formerly in the Native allotment application, but is not required to do so to meet the requirements for compactness and contiguity.

Sec. 4.902 Who may appeal.

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

Sec. 4.905 Summary dismissal.

An appeal may, in the discretion of the Board, be dismissed for failure to file or serve, upon all persons required to be served, a notice of appeal, statement of reasons or of standing as required by § 4.903.

AMERICAN COAL COMPANY

8 IBMA 64

Decided *July 14, 1977*

Appeal by the American Coal Company from a decision by Administrative Law Judge Robert W. Mesch, dated June 17, 1976, in Docket No. DENV 75-196, in which Judge Mesch dismissed an Application for Review of an imminent danger withdrawal order issued by a Mining Enforcement and Safety Administration inspector under the authority of sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Applications for Review: Investigations

In the circumstances of a given case, an Administrative Law Judge may properly rule that a hearing, by itself, is sufficient to satisfy the requirement of sec. 105 of the Act that the Secretary shall cause an investigation to be made as he deems appropriate.

2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Admissibility of Evidence

When an inspector-trainee observes conditions and practices in a mine relevant to a notice or order issued under the Act by an inspector, the former's testimony in regard thereto is not inadmissible on the ground that he is not an authorized representative of the Secretary.

APPEARANCES: Robert D. Moore, Esq., for appellant American Coal Company; Robert J. Phares, Esq., Acting Assistant Solicitor and Frederick Moncrief, Esq., Trial Attorney, for appellee Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On Apr. 16, 1975 Mining Enforcement and Safety Administration (MESA) inspector Carl Thompson entered appellant American Coal Company's (American) Deseret Mine in Huntington, Utah, for the purpose of conducting a regular inspection of the mine under the authority of the Federal Coal Mine Health and Safety Act of 1969 (Act).[1] Accompanying the inspector during his tour through the mine was MESA inspector-trainee Larry Ganser and a number of American mine officials.

The group traveled a beltway approximately 2,700 feet into an escape airway in the main north section and then walked the remaining 500 feet of that airway. In a number of locations along this route, such as affected a significant portion of the section, Mr. Thompson observed conditions of inadequate rock dusting but, according to his later hearing testimony, none of these instances of inadequate dusting taken by itself was serious enough to rise to the level of "imminent danger" as that term is used in sec. 104(a) of the Act. Arriving thereafter at a raised bin used for the storage of coal, the inspector detected coal spillage around the bin and excessive accumulations of fine coal and float coal dust along 800 feet of a track entry in by the bin and along the tail section of the main north conveyor entry on the north or right side. The inspector deemed the accumulations in this area when considered with possible ignition sources (found by the Administrative Law Judge and essentially admitted by American to exist) to be imminently dangerous. As a result he issued a withdrawal order pursuant to the authority of sec. 104(a) of the Act affecting the entire main north section.

American filed its application for review of that order on May 12, 1975, and a hearing was held before the Administrative Law Judge (Judge) in the case on Dec. 16 and 17. In a decision dated June 17, 1976, the Judge upheld the validity of the order under review.

On July 7, 1976, American filed its notice of appeal from that decision. American also moved for oral argument in this case, and the Board held oral argument on Dec. 15, 1976.

Issues on Appeal

1. Whether an operator's employee's testimony that he had rock

[1] 30 U.S.C. §§ 801–960 (1970).

dusted an area is "uncontradicted" where MESA witnesses testified that that area was black with float coal dust.

2. Whether indeed there was any testimony, uncontradicted or not, that the entire crucial area had been adequately rock dusted.

3. Whether an operator is entitled to a favorable decision as a matter of law on a challenge to an imminent danger order issued because of an alleged accumulation of float coal dust where the issuing MESA inspector testified to his belief that a test would have disclosed that the incombustibility content of the dust in the operative area was within the standard set by 30 CFR 75.403.

4. Whether an operator's right to an investigation, as conferred by sec. 105, is accommodated by an adversary hearing before an Administrative Law Judge.

5. Whether the testimony of an inspector-trainee must be excluded from consideration in a hearing under the Act by reason of its resulting from an unconstitutional search and seizure because the trainee was not an "authorized representative of the Secretary," or for any other reason.

Discussion

I

The Judge recognized that the principal issue in the case before him was American's contention that the inspector was mistaken about the very existence of the alleged accumulations (Dec. 10). American felt that the following record evidence militated against a finding that the inspector could have been correct about the existence of any imminent danger:

a. The inspector testified that the existence of an excessive accumulation of float coal dust in a relatively small area of the section was the crucial fact which led him to find an imminent danger throughout the section (Tr. 71).

b. The inspector opined that if that same area had been recently rock dusted then the excessive accumulation could not exist (Tr. 75–76).

c. American's fire boss testified that he had rock dusted the important area shortly before the inspector's arrival (and MESA did not directly dispute that testimony) (Tr. 270–272).

The Judge considered this argument and concluded that the above-listed factors did not inescapably lead to the conclusion which American urged (Dec. 12–16). Before the Board American has characterized this same issue as the Judge's error in ignoring that portion of inspector Thompson's testimony in which he said that the crucial factor in his determination of imminent danger was the excessive accumulation of coal dust in a relatively small portion of the entire area affected by the withdrawal order (Par. a, above). Since the Judge's decision makes clear that he did not ignore that testimony (Dec. 12), it is equally clear that American is simply reasserting before the Board essentially the same argument it

made before the Judge, expressing incredulity that given the circumstances an imminent danger could possibly be deemed to have existed.

The first problem with American's argument on this score is that it assumes the validity of its premise that the fire boss' testimony was "uncontradicted." Although no witness did or probably could testify directly that the safety director did not carry out such a dusting operation, the testimony from the inspector and the inspector-trainee that the area in question was "black" with coal dust is indirect contradiction of the fire boss' testimony, in a legal sense at least, such as would raise a fact question resolvable only by the Judge. One way of resolving this question is through credibility findings. The Judge clearly felt that MESA's witnesses were the more credible based upon his personal observations of all the witnesses and other factors (Dec. 14–15).

Arguably, the Board could affirm the Judge's decision on the basis of his credibility findings, as discussed above. However, the more persuasive answer to American's argument is that whether the fire boss' testimony was contradicted or not, he simply did not testify that he had rock dusted all of the subject areas. The following is an excerpt from the third of three paragraphs used by the Judge to support his conclusion that the "testimony of the fire boss does not support the applicant's position" (Dec. 12):

> 3. The fire boss testified that he and another man had rock dusted down the cross belt entry for about 900 feet before the MESA inspector arrived (Tr. 273); that they rock dusted "mostly down the south" or left side of the belt (Tr. 272); that they had shovels and were throwing the rock dust under the belt and on the other side as far as they could (Tr. 272); and that "mostly" the south side of the belt "looked pretty fair" after they had rock dusted (Tr. 277). The safety director for the applicant testified that "it is real difficult to get on the other side," *i.e.*, the north side of the belt and that they normally rock dust the area with a tractor that will blow rock dust on both sides. (Tr. 323, 324.) The withdrawal order does not mention excessive accumulations of float coal dust along the south side of the belt. It describes only the north or right side of the belt and cross-cuts. The MESA inspector and trainee were not concerned with the south or left side of the belt. (Tr. 23, 26, 221, 224, 229, 252, 256.) They did testify, however, with respect to accumulations of float coal dust along the north side of the belt and in the crosscuts.
>
> (Dec. 13–14).

The Judge went on to conclude:

> In summary, the testimony of the fire boss shows only that some rock dusting was done in an area that was not the subject of the withdrawal order, *i.e.*, the south side of the cross belt. The testimony does not show, as asserted by the applicant, that rock dusting was done in any of the areas described in the withdrawal order other than possibly to a limited and questionable extent on the north or left [should read "right"] side of a portion of the cross belt entry.
>
> (Dec. 14)

We have examined the record, and it supports the Judge in this finding. American offers only the following argument directed to this portion of the decision: "Paragraph 3 [quoted above] is also of little help

in light of the total testimony of [the fire boss]." It is abundantly clear from the decision that the Judge did not ignore, as American asserts, that portion of inspector Thompson's testimony where he indicated that it was a relatively small part of the entire area covered by the order where the accumulations were such that he was prompted to issue the order for the entire area (Dec. 12). However, even if the Judge did ignore that testimony, it cannot be disputed that the operative areas were among "the areas described in the withdrawal order." (*See* quote from Dec. 14, *supra.*) Since the Judge found that rock-dusting, if done in any of the order areas at all, was done in only a very small portion thereof and then only to a limited and questionable extent, it follows that practically speaking none of the crucial areas were rock dusted. As noted, there is substantial evidence to support the Judge's position in this regard; accordingly, American's argument fails.

II

American's second major argument concerns the inspector's testimony that if he had taken a test sample of the dust in the operative area, he believed that the test would have disclosed an incombustibility content within the standards set by 30 CFR 75.403, the incombustibility regulation. American proposes essentially that if the dust in the area were "incombustible" by the standards of the regulation, then American is entitled to a judgment as a matter of law in a proceeding to review an imminent danger withdrawal order, issued because of "excessive coal dust." The Judge had reasoned that the inspector's opinion testimony was not necessarily of any consequence to the determination of imminent danger and he ultimately ruled against American on this issue (Dec. 5–7).

The short answer to America's argument is, as suggested by the Judge (Dec. 6), that it has long been settled that the presence or absence of the violation of a mandatory safety standard is inconsequential in the determination of the existence of an imminent danger. To say that the inspector's testimony may help American's position that no imminent danger existed is one matter, but to say that that testimony entitled American to a judgment as a matter of law is quite another. *See Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, 1973–1974 OSHD par. 16,567 (1973).

The more persuasive answer to American's argument, however, is that once again American has premised its argument on a factor that simply was not shown. American states that the inspector testified about his opinion that the incombustibility content of the dust in the area was within the requirements of 30 CFR 75.403 (American Br., pp. 20–22). The fact is that the inspector testified that "the rock dust *underneath mixed in with the float dust* would probably have been well within the incombustible requirement content" (Thompson

Deposition, p. 44). (Italics supplied.) The Judge recognized the clear implication of this language (Dec. 6) as did MESA (MESA Posthearing Br., p. 7), and that implication is that in fact the float dust and the rock dust were *not* mixed with one another. There is more than sufficient evidence in the record from inspector Thompson (Dep. pp. 42 and 93), a MESA expert witness and other sources, to the effect that the amount of rock dust in an area is inconsequential to the existence of an imminent danger caused by excessive coal dust if there is even a very thin layer of float coal on top of the rock dust. The record fully supports the Judge's view on the effect of the inspector's testimony, and the Judge, we feel, was totally justified in ruling as he did on this issue; we will therefore affirm that ruling.

III

American has raised two other arguments on appeal, both dealing with asserted procedural rights rather than substantive issues. The first of these concerns the right, as seen by American, to have the Secretary of the Interior cause an investigation into the circumstances surrounding the issuance of the subject order. The Judge ruled that the opportunity for hearing afforded American here was enough with nothing more to satisfy the "requirement" under sec. 105 of the Act that the Secretary conduct an investigation pursuant to a request by the operator (Dec. 4–5).

Sec. 105(a) of the Act reads in part as follows:

> Upon receipt of such application [for review], the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator * * * to enable the operator * * * to present information relating to the issuance * * * of such order. * * *

Since the first sentence of the passage quoted contains the word "shall" relating to the Secretary's duties *viz.* causing an investigation, American reasons, the plain meaning of the statute is that the Secretary was required to cause an investigation and that a hearing by itself is not enough to satisfy the requirements of the statute. To bolster this latter point on the plain meaning of the section's language, American cites 2 Am. Jur. 2d, *Administrative Law* sec. 257, in which a distinction is drawn between an "investigation" and a "hearing," the latter being quasi-judicial and adversarial in nature, while the former is nonadversarial, onesided and less formal (American Br., pp. 24–25). As evidence of the prejudice it suffered from the Secretary's failure to cause an investigation, American sets out the following statement (although it makes no record citation to support it): "An independent investigation in this case, no matter how cursory, would have disclosed the fact that rock dusting had occurred in the areas that the Government now contends

contained excessive amounts of coal dust" (American Br., p. 25).

There are several faulty aspects of American's argument on this issue. The first involves the asserted plain meaning of the statute. In determining the plain meaning, it is better to concentrate on the words "as he deems appropriate" in the first quoted sentence of sec. 105 rather than the word "shall." The plain meaning of the language as applied to this case is that the Secretary may cause *no* investigation to be conducted if he deems that appropriate, except that he must conduct a public hearing on the application *but only if* the operator so requests.

As far as the distinction between an investigation and a hearing goes, we quite agree that there is one in the general sense. However, the Am. Jur. 2d language appears to go to the general situation where one or the other is guaranteed by a statute, not the situation as here where both are mentioned in the same section in a manner which essentially defines the word "investigation" for purposes of that section as possibly including a "hearing," regardless of how those terms are generally understood in the law absent the unusual administrative scheme set out in this section. We will go beyond saying that a hearing is merely included in a sec. 105 investigation; a hearing, especially considering the plain meaning of the language as discussed above, may, in the proper circumstances, fulfill the "requirement" of an investigation with nothing more. (We further note that the cited Am. Jur. 2d section implies that a party's rights are better protected by a hearing than an investigation and that an investigation stands lower in the hierarchy of administrative law proceedings than does a hearing in terms of assuring the accuracy and impartiality of the particular proceeding's findings.)

The final problem with American's argument is the prejudice asserted to result to it by the Secretary's failure to conduct an investigation. The sentence from American's brief quoted above seems to contemplate an on-the-scene observation by a deputy of the Secretary to determine that "rock dusting had occurred" in the operative areas, presumably before the inspector arrived. This position is a curious one, because, whatever the nature of the Secretary's obligation under the Act to cause an investigation in this situation, it is clear that he has *no* obligation until he receives the application for review. Here, American did not file its application until May 12, or 26 days after the issuance of the order on Apr. 16. Moreover (although it is not clear from the record when or if the order was totally abated), inspector Thompson issued an order of partial abatement on Apr. 20, 22 days before American's "request" for an investigation. That partial abatement order noted that 250 tons of rock dust had been applied in the main north section and that certain accumulations had been cleaned up and removed. The order went on to allow the resumption of normal mining operations

after the application of additional rock dust to one still inadequately dusted area. How an investigation, accomplished by on-the-scene observation, at a time no earlier than May 12, "would have disclosed that rock dusting had occurred" before the inspector's arrival on Apr. 16 is difficult to grasp, and American has given us no more to go on than this assertion. If American had in mind an investigation team which took statements from miners, the inspector and others, rather than on-the-scene observation, we see no distinction between that type of investigation and a hearing, except that in the latter proceeding, because witnesses are under oath, cross-examination is allowed, and other due process guarantees are in effect, the results are likely to be fairer and more accurate.

[1] In view of the foregoing, we reject American's argument and we will affirm the Judge's ruling that a sec. 105 hearing, by itself, is sufficient in the circumstances of this case to fulfill the requirement that the Secretary cause an investigation as he deems appropriate as provided in sec. 105.

IV

[2] The last of American's arguments is that the Judge's decision must be reversed because his consideration of the case was tainted by his erroneous admission of inspector-trainee Ganser's testimony, which should have been excluded because it constituted evidence collected in violation of American's Fourth Amendment rights against unreasonable searches and seizures. The Judge treated this issue thoroughly in his decision, his conclusion thereon being that the Fourth Amendment does not demand exclusion of the testimony of the inspector-trainee (because he was not an "authorized representative of the Secretary") for the following reasons:

a. The search was not unreasonable because the Act requires inspectors to be trained and American could expect that an inspector-trainee would accompany an inspector on regular inspections. The reasonableness of finding that American had such an expectation is buttressed by American's failure to protest the trainee's presence.

b. The Judge was not convinced that American did not consent to the search by the inspector-trainee.

c. The exclusionary rule normally applies only in criminal actions, and American cited no authority for the proposition that the rule should be applied in a civil setting.

d. This evidence, being of a corroborative nature, does not constitute illegal evidence obtained as the result of an unlawful search, since the Judge saw no difference between it and any other corroborating evidence obtained, for instance, through the use of photographic equipment (Dec. 9–10).

The Judge considered American's authority, *Youghiogheny and Ohio Coal Company* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio, 1973), and rejected it as unpersuasive, in light of

those conclusions. American cited *Youghiogheny* for the assertion that the three-judge court in that case ruled that section 103 of the Act allows warrantless searches only by authorized representatives of the Secretary, not, by inference, by inspector-trainees. In *Youghiogheny*, the Court actually relied on sec. 103 as evidence of a Congressional declaration that each inspection by an authorized representative, even without a warrant, is a per se reasonable search; thus no judicial inquiry into its reasonableness is required. The Court rejected the operator's objections to warrantless searches in that case on other grounds as well, including the narrowed expectation of privacy in an industry, such as coal mining, which has been long and rigidly regulated by the government and which has shown itself to be a dangerous one from the standpoint of workers' loss of life and limb.

On both of these points, the Judge's finding that the "search" by the inspector-trainee was reasonable is of telling significance. Even if *Youghiogheny* teaches that sec. 103 exempts only the inspections of authorized representatives from judicial inquiry into their reasonableness, nevertheless the Judge here has found inspector-trainee Ganser's "search" to be reasonable. Moreover, it appears to the Board that American could not reasonably have an expectation of privacy which would exclude the presence of the inspector-trainee even as inspector Thompson's assistant, a reasonable tool in his investigative mission. Also persuasive on this score is the Judge's statement that he was unconvinced that consent was not given for Mr. Ganser's "search." If, after all, American felt, reasonably or not, it had a zone of privacy that would be violated by Mr. Ganser's presence, it certainly would have protested that presence.

In its brief, American takes no issue with any of the Judge's reasons for rejecting this argument before him. In light of *Youghiogheny*, it is clear that the Judge's reasoning is not inconsistent with the law on this issue and is sufficient for rejection of American's argument and affirmance of the Judge's decision on this point.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED, that the decision of the Administrative Law Judge appealed from in the above-captioned case IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

THE APPLICABILITY OF THE CONCEPT OF MITIGATION TO CRITICAL HABITAT

Endangered Species Act of 1973: Section 7: Critical Habitat: Mitigation

A federal agency's responsibility to insure against critical habitat modification or destruction can not be satisfied with the adoption of project modifications which ameliorate and reduce, but do not eliminate, the adverse impacts of the project upon critical habitat.

M–36895 *July 14, 1977*

OFFICE OF THE SOLICITOR

OPINION BY ACTING ASSOCIATE SOLICITOR WEBB

TO: KEITH M. SCHREINER
ASSOCIATE DIRECTOR, FEDERAL ASSISTANCE,
FISH AND WILDLIFE SERVICE

FROM: ACTING ASSOCIATE SOLICITOR, FISH AND WILDLIFE

SUBJECT: THE APPLICABILITY OF THE CONCEPT OF MITIGATION TO CRITICAL HABITAT

This memorandum responds to your request for a legal analysis of the applicability of the concept of "mitigation" to federal agency activities which are anticipated to modify or destroy the critical habitat of species listed under the Endangered Species Act of 1973 (16 U.S.C. §§ 1531–1543, hereinafter cited as the Act). This question involves an interpretation of federal agency responsibilities under sec. 7 of the Act (16 U.S.C. § 1536 Supp. V. (1975)):

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to sec. 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Sec. 7, read literally, prohibits all modifications of critical habitat. Such rigid reading of sec. 7 is not employed by the Fish and Wildlife Service. The Service has consistently maintained that numerous activities and their resultant habitat modifications can conceivably take place within critical habitat without conflicting with sec. 7. A consistent reading of the section is that habitat modifications per se are not prohibited, but only those modifications which appreciably diminish the value of the critical habitat for a listed species. (*See* generally the proposed definition of "destruction or adverse modification" published on Jan. 26, 1977, 42 FR 4868.) Manipulation of habitat to the clear

benefit of a listed species is permissible.

This memorandum, therefore, does not concern the impacts of compatible modifications of critical habitat. Rather, it addresses the propriety of mitigation as it relates to federal programs or activities that *adversely* modify or destroy critical habitat. Because of persistent demand for the acceptability of mitigation by other federal agencies, this memorandum will review the application of this concept in some detail.

The definition of the traditional concept of mitigation constitutes a logical starting point for discussion. Webster's New International Dictionary, Second Edition, defines "mitigate" and "mitigation" as follows:

> mitigate—(1) to render or become mild or milder; to modify (2) to moderate, or make or become less severe, violent, fierce, cruel, intense, harsh, rigorous, painful, etc.; to soften, appease, meliorate diminish, lessen, temper;
>
> mitigation—(1)(a) abatement or diminution of anything painful, harsh, severe, afflictive or calamitous; alleviation; moderation; palliation;

In the present context, therefore, the issue becomes whether a federal agency's responsibility to insure against critical habitat modification or destruction can be satisfied with the adoption of project modifications which ameliorate and reduce, but do not eliminate, the adverse impacts of the project upon critical habitat.

Federal agency responsibility to preserve critical habitat can be traced back to language in sec. 1(b) of the 1966 Endangered Species Act. 80 Stat. 926 (1966). In setting forth the general obligations of the major federal land managing agencies, sec. 1(b) stated:

> It is further declared to be the policy of Congress that the Secretary of the Interior, the Secretary of Agriculture and the Secretary of Defense, together with the heads of bureaus, agencies, and services within their departments, shall seek to protect species of native fish and wildlife, including migratory birds, that are threatened with extinction, *and, insofar as is practicable and consistent with the primary purposes* of such bureaus, agencies, and services, shall preserve the habitats of such threatened species on lands under their jurisdiction. (Italics added.)

This provision contained three important limitations. First, it was limited in applicability to the Departments of Agriculture, Interior and Defense and did not extend to other federal agencies. Second, it was permissive in nature and replete with qualifiers. The obligation to protect the habitat of a listed species arose only if it was practicable and subordinate to the primary functions of the three federal departments. Third, the obligation to protect habitat, when it arose at all, extended only to lands under the "jurisdiction" of the three departments. Thus, it was inapplicable to activities authorized, funded or carried out by one of the three federal departments on state or privately owned lands.

The traditional definition of mitigation would thus have been compatible with the habitat concepts set forth under sec. 1(b) of the 1966 Endangered Species Act. The reduction of a project's adverse im-

pacts upon an endangered species' habitat would have satisfied the obligations imposed upon the three federal departments, as long as the modifications were practicable and appropriate. Sec. 1(b) did not require the *elimination* of all such impacts. If the particular department could show that the elimination of all adverse impacts was economically or technologically impracticable, or contrary to departmental programs, sec. 1(b) ceased to apply.

From this impotent beginning in the 1966 Act, the habitat responsibilities of federal departments and agencies were expanded significantly under sec. 7 of the 1973 Act. Sec. 7's unqualified directive to protect the integrity of critical habitat represents a clear and definitive departure from the 1966 Act's approach to habitat protection. Sec. 7 unequivocally states that all federal agencies and departments *shall insure* that activities authorized, funded or carried out by them do not result in the destruction or adverse modification of critical habitat. Anything short of such a guarantee of total protection fails to satisfy an agency's responsibilities under sec. 7. In discussing the impact of sec. 7 during floor debate, the House sponsor of the Act, Representative John Dingell stated:

> * * * The purposes of the bill include the conservation of the species and of the ecosystems upon which they depend, and every agency of Government is committed to see that those purposes are carried out. It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier, but at least when and if that unfortunate stage is reached the agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

119 Cong. Rec. H. 11837 (daily ed. Dec. 20, 1973).

Thus, the traditional concepts of mitigation, which would have been acceptable under the 1966 Act, are no longer apropos.

This conclusion was implicitly endorsed in the case of *Hill v. TVA*, 549 F. 2d 1064 (6th Cir. 1977). In enjoining TVA from modifying or destroying the critical habitat of the snail darter, the Sixth Circuit Court of Appeals concluded that upon a finding of adverse modification or destruction, an offending project could only be salvaged in one of three ways. Either Congress could expressly exempt it from section 7 or the Secretary of Interior could delist the affected species or redefine its critical habitat. The adoption of mitigative measures was conspicuously absent from this list of alternatives. This was despite the fact that the Court acknowledged TVA's mitigative efforts to establish a second population of snail darters. Accord, *National Wildlife Federation v. Coleman*, 529 F. 2d 359 (5th Cir. 1976).

Some of the impetus for suggesting that mitigation is acceptable under sec. 7 may have come from agency familiarity with the role of that concept under the Fish and Wild-

life Coordination Act (16 U.S.C. §§ 661–666(c). Sec. 662 of that Act is quite specific in grafting the concept of mitigation into water resource development projects. In discussing the function of the wildlife studies authorized under the Act, section 662(b) states:

> * * * Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project *and the measures proposed for mitigating or compensating for these damages.* * * * (Italics added.)

Sec. 662(c) expressly authorizes the responsible federal agencies to modify their projects in order to incorporate the recommendations for wildlife conservation. Furthermore, section 663 specifically authorizes the acquisition of lands to compensate for a project's destruction of wildlife habitat.

Sec. 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f) (1970), contains yet another example of congressional use of the concept of mitigation. Sec. 4(f) prohibits the construction of roads through parks and refuges unless, among other things, a project "* * * includes all possible planning to *minimize* harm to such park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use." (Italics added.)

The Coordination Act and sec. 4(f) of the Department of Transportation clearly indicate that Congress is quite capable of expressly authorizing project mitigation when it wants to. The present language in sec. 7 of the Endangered Species Act contains none of these provisions or authorizations. The logical conclusion is that Congress considered the traditional concept of mitigation to be inappropriate for federal activities impacting on critical habitat.

While this memorandum has been limited to the issue of mitigation and critical habitat, its holding applies with equal force to a federal agency's responsibility to insure that its actions will not jeopardize the continued existence of a listed species. Mitigating the adverse impact of a project which would still jeopardize the continued existence of a listed species, can not be viewed as satisfactory agency compliance with sec. 7.

Please contact Mr. Donald J. Barry in this office (ext. 2172) if you have any further questions on this matter.

(Sgd.) JAMES D. WEBB,
Acting Associate Solicitor,
Fish and Wildlife.

APPEAL OF COMMONWEALTH ELECTRIC COMPANY

IBCA–1048–11–74

Decided *July 15, 1977*

Contract No. 14–03–3217A, Construction of Hanford-Ostrander 500 KV Line No. 1, Schedule IIB, Bonneville Power Administration.

Sustained.

1. Contracts: Construction and Operation: Construction against Drafter—Contracts: Construction and Operation: General Rules of Construction

When the contractor's interpretation of the contractual clauses is reasonable the Government cannot impose its own interpretation, since the Government, as the drafter, could have been explicit in conveying its intent but failed to do so.

2. Contracts: Formation and Validity: Formalities

When a federal procurement regulation makes an interest clause mandatory and the contract omits the clause, it is incorporated under the *Christian* doctrine.

APPEARANCES: Mr. Allen L. Overcash, Woods, Aitken, Smith, Greer, Overcash and Spangler, Attorneys at Law, Lincoln, Nebraska, for the appellant; Mr. J. Richard Baxendale, Mr. David E. Lofgren, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE VASILOFF

INTERIOR BOARD OF CONTRACT APPEALS

Findings of Fact

Awarded on Mar. 8, 1973, in the estimated amount of $1,930,236.70, the contract required the construction of approximately 8 miles of electrical transmission lines. The work involved consisted primarily of constructing Schedule IIB of the Hanford-Ostrander 500 KV Line No. 1. It included access road work, construction of footings, assembly, erection and stringing conductor for 36 steel towers crossing the Columbia River from Multnomah County, Oregon to Skamania County, Washington. Also included was the removal of approximately 13 miles of old transmission lines.

The contract included Standard Form 23–A (Oct. 1969 Edition). Work was to commence within 10 calendar days after date of receipt of notice to proceed and was to be completed by Nov. 1, 1973, which was changed by Addendum 3 to Oct. 15, 1973. Notice to proceed was received by appellant on Mar. 12, 1973. Change order C amended the completion date to Nov. 30, 1973.

After the appellant constructed tower footings the steel towers were erected upon the footings. Since the transmission line traversed a sensitive ecological right-of-way the con-

tract contained 34 [1] separate provisions pertaining to maintaining and preserving the environment of the right-of-way.

For example, Specifications 1–108 and 1–109 provided as follows:

1–108. *ECOLOGICAL REQUIREMENTS.* Special conservation practices are required to protect the soil, vegetation, farm lands, forests, wild life, and fish. Air and water pollution, dust abatement, erosion, and esthetics will be critically watched by Government Agencies, local land owners, the general public, and the press. The Tanner Creek Drainage is a source of water for the Bonneville Fish Hatchery.

1–109. *ENVIRONMENTAL CRITERIA.* The Contractor shall comply with all applicable anti-pollution laws and regulations in the prevention, control, and abatement of all forms of pollution. (Refer to Clause 12 of the GENERAL PROVISIONS, Standard Form 23–A.) Offices having jurisdiction are:

1. State of Washington
   Department of Natural Resources
   Mr. Charles R. Haight
   Glenwood, Washington 98619
2. Southwest Air Pollution Control Authority
   Fourth Plain Station, P.O. Box 2111,
   Vancouver, Washington 98661
   Telephone: (206) 696–2508
3. Director, Department of Environmental Quality
   State of Oregon
   1400 S.W. 5th Avenue
   Portland, Oregon 97201
   Telephone: Air—(503) 229–5630
   Water—(503) 229–5640
4. Columbia-Williamette Air Pollution Authority
   1010 N.E. Couch Street
   Portland, Oregon 97232
   Telephone: (503) 233–7176
5. Ray Sheldon, Manager
   Bonneville Fish Hatchery
   Box 262
   Bonneville, Oregon 97008
   Telephone: (503) 374–8393
6. Joseph Stockbridge, District Ranger
   U.S. Forest Service
   Columbia Gorge Ranger District
   Route 3, Box 44A
   Troutdale, Oregon 97060
   Telephone: (503) 665–0151
7. Forestry Department
   Office of the State Forester
   2600 State Street
   Salem, Oregon 97301
   Telephone: (503) 378–2560
8. Edward E. Ashley
   Project Engineer
   Bonneville Lock and Dam
   US Army, Corps of Engineers
   Bonneville, Oregon 97008
   Telephone: (503) 374–8442

The specifications placed a great emphasis upon not disturbing the area where the construction work was to be performed and also required that all debris was to be removed after the work was completed.

Of the total of 36 steel towers the contract specifically required appellant to erect 15 of them by use of a helicopter rather than by conventional means by use of a crane. Erecting the steel towers by helicopter required the appellant to haul the material to an assembly yard where the towers would be assembled. The completed portion of the tower would then be flown to the tower site and erected with the use of a helicopter. Under the conventional method the material would be hauled to the tower site and assembled at each site. After assembling it the tower would be erected by use of a crane. Use of

[1] Specifications 1–108, 1–109, 3–106, 4–101, 4–102, 4–103, 4–104, 4–105, 4–106, 4–402, 4–403, 4–404, 4–501, 4–502, 4–503, 4–504, 4–505, 4–506, 4–507, 5–101, 5–103, 5–104, 5–109, 5–110, 5–201, 5–203, 5–204, 7–101, 7–201, 7–203, 7–204, 7–208, 8–112.A.2, 8–204.

the helicopter method allows for a faster rate of erecting the steel towers (Tr. 17–19).

The contract had two bid items for erecting the steel towers. Item 35 required payment of $.22 per pound for tower steel erected by the conventional method and item 36 required payment of $.40 per pound for the helicopter method.

Specification 7–101.B.3.i provides that "Helicopter erection is required for towers 154/1 (FY 711) to 156/6 (FY 726R) inclusive."

Specification 8–101.C., provides:

C. *Helicopter Erection.* 1. Towers 154/1 (FY 711) to 156/6 (FY 726R), inclusive, shall be erected by helicopter. See Section 4–405 regarding helicopter operations.

2. The Contractor shall submit his plans, in writing, for erection of steel towers by helicopter to the Contracting Officer for approval prior to starting erection. If alterations to the tower steel are required the Contractor shall submit detailed drawings indicating such alterations at least 30 calendar days prior to making any alterations.

3. Payment will be made at the unit contract price for erecting tower steel by helicopter and shall be full compensation for all costs involved in furnishing all required drawings, making all required alterations, and erecting each tower, complete, including all leg extensions, body extension(s) tower body, ground wire brackets, step bolts, tower signs, and all appurtenances for which payment is not otherwise provided.

Payment provisions are found in Specifications 8–112.A.1., and 8–112.B., which provide:

Measurement will be in terms of computed weights shown on the erection drawings furnished the Government by the manufacturer. * * *

B. *Erect Tower Steel,* Payment will be made at the unit contract price and shall be full compensation for all costs involved in the erection of the complete tower, including all leg extensions, special body extension, tower body, ground wire brackets, step bolts, tower signs, and all appurtenances for which payment is not otherwise provided.

Referred to above is Specification 4–405 which provides:

4–405. *HELICOPTER.* A. *General.* All helicopter operations shall conform to Federal Aviation Regulation No. 133.

2. This specification designates certain areas where helicopters shall be used for removal and erection of steel towers. In other areas of limited or prohibited ground access the use of helicopters for logging, line removal, and construction is the preferred method.

B. *Landing Sites and Staging Areas.* The Contractor shall submit in writing his plans for the development of all helicopter landing sites and staging areas. The plans shall be submitted to and approved in writing by the Contracting Officer prior to the use thereof. Plans shall include but are not limited to:

a. Written permission of the land owners.
b. Complete description of the property containing location, topography, and any changes to be made.
c. The construction steps for which each site will be used.

Appellant submitted a plan to the Government describing its intention to utilize the helicopter method of tower erection. The helicopter method would be used for all towers in Oregon and Washington except for the river crossing towers and one specified tower in each state (Appeal File Ex. 2; Tr. 27, 47, 48). Although the Government in its answer to the complaint admitted the plan was filed before construc-

tion had begun, appellant's division manager testified the plan was actually submitted after construction had commenced, on May 4, 1973 (Tr. 48). Through discussions with appellant's personnel the Government was aware of appellant's intent to utilize the helicopter method in Apr. 1973 (Tr. 103–105). Appellant did not receive any objection from the Government after submitting the plan (Tr. 27). In his final decision the contracting officer states "the 'Method of Construction' document was received by BPA for information purposes to assist in planning its inspection work. BPA does not, nor did it in this case, approve the document."

Addendum 2 changed Specification 4–403.C.2.g. (2) to read as follows:

> (2) The Contractor shall use helicopters to fully suspend all cleared materials including debris, and footing and tower steel erection and removal.

The above language was applicable to the steel towers between stations 51+72 to 223+25. The steel towers between these stations were the 15 steel towers described above which were specifically required to be erected by helicopter, 154/1 to 156/6. In addition these stations included an additional tower 157/1 (Government Ex. 12). The effect of Addendum 2, found the contracting officer in his final decision, was to require that steel tower 157/1 be erected by helicopter. And accordingly, payment for the erection of steel tower 157/1 was made pursuant to item 36. With Addendum 2 the Government position is that the appellant was required to erect 16 steel towers by helicopter.

Although the appeal does not involve payment for the required removal of already existing steel towers the specifications regarding removal will be reviewed since they do provide the Board some means of interpreting the provisions in this contract. The contract provided appellant was to be paid a unit price per pound for removal of Government owned steel towers and another unit price per pound for removal of contractor owned steel towers (Specification 13–104.E.F.). For helicopter removal Specification 13–103.B.3., provides:

> Access to Tower 2 and Towers 5 to 19, inclusive, on the Bonneville-Oregon City Lines 1 and 2 and Tower 1/2 (AV2) on the Bonneville-Hood River Line is limited. All tower steel and materials that cannot be carried by the allowable vehicles shall be removed from each site by helicopter.

The contract does not provide for any distinction in payment between helicopter removal and conventional removal. The unit prices cover the entire removal operation and appellant was left free to choose his method of removal, but would receive the same unit price, whether the removal was by helicopter or by conventional means.

With respect to excavation for the tower footings the contract is specific in regard to payment for hand excavation and clamshell excavation. Only those tower foundations specified in writing by the contracting officer are to be paid pursuant to the unit price for hand

excavation or clamshell excavation (Specification 7–201.B., 7–201.C.). Appellant was free to use the hand excavation or clamshell excavation methods at sites other than those designated by the contracting officer but could not receive payment pursuant to the unit prices for these methods.

Appellant seeks to recover pursuant to the unit price in the contract for helicopter erection of steel towers beyond the 16 towers which were specifically required to be erected by helicopter. The position of the Government is that the appellant was required to erect only the 16 steel towers by helicopter and any steel towers erected beyond the 16 are compensable only pursuant to the unit price for conventional erection of steel towers. In short, appellant maintains it had discretion to erect by helicopter the steel towers beyond the 16 and therefore is also entitled to compensation for helicopter erection. The Government denies it is liable for payment of helicopter erection for any steel towers beyond the 16 specifically required to be erected by helicopter. Counsel for both appellant and the Government have stipulated the quantum to be $80,656.20.

In addition, appellant seeks to recover interest on its claim. The contract was awarded on Mar. 8, 1973. On Sept. 21, 1972, an amendment of the Federal Procurement Regulations, 41 CFR 1–1.322, became effective. It provides as follows:

(a) It is the Government's policy to pay interest on a contractor's claim when such claim is ultimately decided in favor of the contractor pursuant to the disputes clause of his contract.

(b) In order to implement the policy set forth in paragraph (a) of this section, all contracts, except for small purchases covered by Subpart 1–3.6, which contain a disputes clause shall also include the payment of interest on contractors' claims clause set forth below:

PAYMENT OF INTEREST ON CONTRACTORS' CLAIMS

(a) If an appeal is filed by the contractor from a final decision of the contracting officer under the disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92–41, 85 Stat. 97, from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal, and (2) interest shall not be paid for any period of time that the contracting officer determines the contractor has unduly delayed in pursuing his remedies before a board of contract appeals or a court of competent jurisdiction.

The above Section 1–1.322 was not physically a part of the contract nor was it incorporated by reference. Appellant seeks to include the interest clause under the authority

of *G. L. Christian And Associates* v. *United States*, 160 Ct. Cl. 1, *reh. denied*, 160 Ct. Cl. 58, *cert. denied*, 375 U.S. 954 (1963), *reh. denied*, 376 U.S. 929, 377 U.S. 1010 (1964). Relying upon *Gifford-Wood Company*, ASBCA 3816 (Feb. 18, 1957), 57-1 BCA par. 1192, the Government denies any liability for payment of interest.

In its complaint appellant seeks to recover attorney fees but apparently this portion of the claim is abandoned since no mention of attorney fees is made in its brief.

Decision

The Board is faced with two issues in this appeal. (1) Does the contract require payment of the unit price for all helicopter erection of steel towers beyond the initial 16 steel towers specifically required to be erected by such means? (2) Is the appellant entitled to recover interest should the appeal be sustained, even though the contract does not specifically contain an interest clause?

Helicopter Method

There is no dispute that appellant did utilize the helicopter method of steel tower erection on towers other than the 16 specifically required to be erected by helicopter. Pursuant to the requirements of the contract appellant forwarded a plan of its proposed method of helicopter erection. The contracting officer's statement in his final decision that the plan was received "for information purposes to assist in planning its inspection work" goes contrary to the specific requirements set forth in Specifications 4-405 and 8-101.C. The specifications require the contractor to submit its plan for helicopter erection of steel towers in writing, which appellant did do. The specifications also put the burden upon the contracting officer to approve the plan before erection work commenced, which the contracting officer did not do, but allowed appellant to proceed. To justify his inaction, the contracting officer states in his final decision, he did not approve the plan but merely accepted the plan to assist the Government in its inspection work. If the Government had any objection to the proposed plan of helicopter erection for the steel towers beyond the initial 16, the time to object was at the time of receipt of the appellant's proposed plan, and not after the construction work has been completed.

Due to the extreme concern with the necessity of preserving the environment of the right-of-way and surrounding area the contract contained many provisions directing the appellant to restrict its contruction operations. Appellant was required to comply with the orders of eight separate governmental jurisdictions.

The contractual provisions (Specification 4-405) encouraged appellant to utilize the helicopter method as the preferred method for those steel towers beyond the initial 16. Indeed, the contracting officer concedes in his final decision that

appellant had the option to use the helicopter method for the remaining steel towers after the initial 16, and that a preference for such use was stated in Specification 4–405.

In reviewing the specifications for the payment and erection of steel towers the Board notes no limitation on the utilization of the helicopter method. Appellant is specifically directed to erect 16 steel towers by helicopters; it is not prohibited by the specifications from erecting and receiving payment for helicopter construction for any number of steel towers beyond the initial 16.

[1] If the Government desired to limit payment of the unit price for helicopter erection it could, as the drafter of the contract, easily have done so. The specifications do not provide for any difference in payment for removal of existing steel towers by either helicopter or by conventional means (Specifications 13–103.B.3.). The specifications provide that only those tower foundations specified in writing by the contracting officer will be paid pursuant to the unit price for hand excavation or clamshell excavation. Although appellant could utilize these methods on other tower foundations, the contractual language was clear it would not be paid the unit price for such methods. If the Government intended to limit payment of the unit price for helicopter erection on towers other than the initial 16, it could have done so, as it did do on the removal of existing steel towers and tower foundation excavation. As the contracting officer stated in his final decision, the use of the helicopter method was optional with the appellant for those steel towers beyond the initial 16. The appellant exercised its option and is entitled to receive payment pursuant to the unit price for helicopter erection.

Since the parties have stipulated the quantum in the amount of $80,656.20, the appeal is sustained in this amount.

Interest

[2] The issue of whether the interest clause is incorporated in this contract under the *Christian* doctrine is one of first impression for this Board. Interest is only allowable under a contract or Act of Congress expressly providing for payment. 28 U.S.C. § 2516 (1970). See *S. W. Aircraft Inc., and Western Helicopter Service, Inc.* v. *United States*, — Ct.Cl. — (1977).

No interest clause is contained in this contract, nor does the contract incorporate the interest clause by reference. The Board knows of no statute authorizing payment of interest under the circumstances of this appeal. If the interest clause is to be included it must enter by way of the *Christian* doctrine.

Appellant's reliance upon *The Diomed Corporation*, ASBCA No. 20399 (Sept. 8, 1975), 75–2 BCA

par. 11,491 is misplaced. The ASBCA said:

> * * * we do not reach the issue of whether the *Christian* doctrine should be applied in this case * * *. (P. 54,822).

Neither counsel for the appellant nor the Government has directed the Board's attention to any decision directly on point.

The above-quoted interest clause is prescribed by regulation for inclusion in the contract involved in this appeal and was omitted. The record does not disclose whether the omission was by design or through inadvertence. Federal Procurement Regulations, this Board has held, have the force and effect of law. *Paul E. McCollum, Sr.*, IBCA-1080-10-75 (Feb. 24, 1976), 83 I.D. 43, 76-1 BCA par. 11,746. See *United States* v. *Nixon*, 418 U.S. 683 (1974), for a discussion of regulations having the force and effect of law.

In reviewing the language of the above-quoted interest clause the Board notes that, "It is the Government's policy to pay interest on a contractor's claim * * *." And "* * * to implement the policy * * * *all contracts*, except for small purchases covered by Subpart 1-3.6, which contain a disputes clause *shall also include the payment of interest on contractor's claims clause* set forth below:" (Italics supplied.)

The language in the above-quoted regulation is a mandatory direction to the Government procurement officials to include an interest clause in contracts. To allow the official charged with this Governmental responsibility to ignore this unequivocal direction through either design or inadvertence would allow the total frustration of declared Government policy. The mandatory requirement that the interest clause be included in Government contracts cannot be dependent upon the capriciousness of the official awarding the contract. The policy of the Government is to include an interest clause and this Board can do no less. Under the *Christian* doctrine the interest clause quoted above is incorporated into this contract and is applicable to this appeal.

Conclusion

The appeal is sustained in the amount of $80,656.20 with interest payable pursuant to 41 CFR 1-1.322.

KARL S. VASILOFF,
Administrative Judge.

WE CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

AUTHORITY TO EXTEND COAL PROSPECTING PERMITS: EFFECT OF SEC. 4 OF THE FEDERAL COAL LEASING AMENDMENTS ACT OF 1975

Coal Leases and Permits: Generally—Coal Leases and Permits: Permits: Generally

The Federal Coal Leasing Amendments Act of 1975, which amended sec. 2(b) of the Mineral Leasing Act, subject to "valid existing rights" terminated the Secretary's authority to extend previously granted prospecting permits.

M-36894 *July 21, 1977*

OFFICE OF THE SOLICITOR

OPINION BY DEPUTY SOLICITOR FERGUSON

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT

THROUGH: ASSISTANT SECRETARY—LAND AND WATER RESOURCES

FROM: DEPUTY SOLICITOR

SUBJECT: AUTHORITY TO EXTEND COAL PROSPECTING PERMITS: EFFECT OF SECTION 4 OF THE FEDERAL COAL LEASING AMENDMENTS ACT OF 1975

Question Presented

Did the Federal Coal Leasing Amendments Act of 1975 terminate the Secretary of the Interior's authority to grant extensions of coal prospecting permits?

Conclusion

The Federal Coal Leasing Amendments Act of 1975 which amended sec. 2(b) of the Mineral Leasing Act of 1920, *as amended*, terminated the Secretary's authority to grant extensions of outstanding coal prospecting permits because the holder of a permit has no right to an extension, and the Act only preserved the Secretary's authority to grant "valid existing rights."

Introduction

Prior to the passage of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, sec. 2(b) of the Mineral Leasing Act, 30 U.S.C. § 201(b), 41 Stat. 438, *as amended*, granted the Secretary the authority to issue prospecting permits for coal which ripened into a lease if the permittee's exploration was successful. Sec. 2(b) stated that where exploration was necessary:

> [T]he Secretary of the Interior may issue, to applicants qualified under this chapter, prospecting permits for a term of two years * * * and if within said period of two years thereafter the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease * * *.

Sec. 2(b) also provided that "Any coal prospecting permit * * * may be extended by the Secretary for a period of two years, if he shall find that the permittee has been unable, with the exercise of reasonable diligence, to determine the existence or workability of coal deposits in the area covered by the permit and de-

sires to prosecute further prospecting or exploration, or for other reasons in the opinion of the Secretary warranting such extension." On Aug. 4, 1976, the Federal Coal Leasing Amendments Act of 1975, became law. Sec. 4 of that statute completely revised sec. 2(b) of the Mineral Leasing Act, and states, in part:

> Subject to valid existing rights, Sec. 2(b) of the Mineral Lands Leasing Act (30 U.S.C. 201(b)) is amended to read as follows:
>
> (b)(1) The Secreary may under such regulations as he may prescribe, issue to any person an exploration license. No person may conduct coal exploration for commercial purposes for any coal on lands subject to this Act without such an exploration license. Each exploration license shall be for a term of not more than two years * * *. *An exploration license shall confer no right to a lease under this Act.* (Italics added.)

Under the amended sec. 2(b) of the Mineral Leasing Act, the Secretary retains the authority to allow persons to explore for coal on federal lands, but the holder of an exploration license unlike the holder of a prospecting permit issued before Aug. 4, 1976, has no right to receive a noncompetitive lease even if he discovers coal in commercial quantities. Any lease must be issued by competitive bidding.

On Aug. 4, 1976, private persons held unexpired coal prospecting permits or had filed timely applications for extensions of expired coal prospecting permits which the Department has neither approved nor disapproved.

The question to be resolved is whether an application for an extension of a prospecting permit or the opportunity to apply for an extension of a prospecting permit under the unamended provisions of sec. 2 (b) is a "valid existing right" that was protected by the savings clause in sec. 4. If it is not a "valid existing right," then the Secretary must reject all extension applications.

On Aug. 10, 1976, the Assistant Solicitor, Division of Energy and Resources, Branch of Minerals, in response to an inquiry from the Deputy Under Secretary, wrote, "I know of no basis on which to hold that the permittee had a valid existing right to an extension, and consequently, no extension can be granted to a permittee now." The Bureau of Land Management has requested the Solicitor's Office to issue a formal opinion to confirm the advice given in the Aug. 10, 1976, memorandum. I have reviewed the matter in great detail, and I agree in full with the prior advice of this Office.[1]

A. *Meaning of "valid existing right"*

Both Congress and the Executive Branch have used the phrase "valid existing right" and similar phrases, when they intended to terminate the opportunity for a person to acquire new rights, but intended to allow those who had initiated but had not fully earned a claim to continue to

[1] Even if the Federal Coal Leasing Amendments Act has preserved the Secretary's authority to extend a coal prospecting permit, he could still exercise his discretion and refuse to approve an extension.

pursue those rights. For example, in construing a 1924 Executive withdrawal of islands off the coast of Florida that included an exception for valid existing rights, the Department stated that, "[t]he withdrawal was designed to prevent the initiation of new claims, and not the destruction of rights theretofore fairly earned." *Williams* v. *Brening* (On Rehearing), 51 L.D. 225, 226 (1925). When the Timber and Stone Act was repealed by the Act of Aug. 1, 1955, subject to "valid existing rights," the Department ruled that a mere application under that Act was not a valid existing right. *Roy Francis Nesbit*, A–27331 (June 18, 1956). *See also Louis J. Hobbs*, 77 I.D. 5 (1970) (a preference right to a homestead which had been earned prior to the withdrawal was a valid existing right); *George J. Propp*, 56 I.D. 347 (1938) (an application to enter stock-raising lands which is subject to discretionary disapproval by the Secretary is not a valid existing right). In each of these cases, the Department held that only those rights that were protected from the exercise of Secretarial discretion were valid existing rights.

The Department's opinion of the proper interpretation of the phrase "valid existing rights" has been sustained by the Courts in cases involving a variety of statutes with similar clauses. *In Stockley* v. *United States*, 260 U.S. 532 (1923), the Supreme Court considered whether the claim of a person who had taken all the steps that were necessary to receive a homestead patent, but who had not received a register's certificate, was affected by an order withdrawing the land covered by the application from further appropriation subject to "existing valid claims." The court held that Stockley had an "existing valid claim" and was unaffected by the order. The court said, "[T]he purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which upon full compliance with the land laws would confer upon the entryman an exclusive right of possession which continues so long as the entryman complies in good faith with the requirements of the homestead law."

A valid existing right according to *Stockley*, is one which has been initiated and under which a person continues to have rights which the Secretary cannot interfere with as long as the person complies with the law. The *Stockley* rationale was followed in *Schraier* v. *Hickel*, 419 F. 2d 663 (D.C. Cir. 1969), which considered whether an oil and gas lease offer was a "valid existing claim, entry or location" under sec. 6(b) the Alaska Statehood Act, 72 Stat. 339. The Statehood Act permitted the State of Alaska to select certain lands owned by the United States, but barred the State selections from affecting "any valid existing claim, location or entry * * *." In construing this phrase, the court con-

cluded that a valid existing claim, location or entry was one which the Secretary of the Interior has no discretion to deny or grant—it was one where the Secretary had to act if the applicant meets the conditions that the statutes specifies, 419 F.2d at 666. The court then went on to find that oil and gas lease offer was not a valid existing right because an oil and gas lease applicant had only an expectation or a hope for a lease, which the Secretary could deny at any time. *See also United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971) (new rights cannot be initiated under the mining laws on lands withdrawn subject to "valid existing rights").

These cases show that a person who holds a mere expectation of a right and whose right may be denied as a matter of discretion by the Secretary of the Interior does not have a "valid existing right."

The only question which remains is to determine what rights the Mineral Leasing Act gave to an applicant for an extension of a coal prospecting permit. If the "right" is subject to the exercise of Secretarial discretion, it is not a valid existing right.

Prior to the amendment of sec. 2(b) of the Mineral Leasing Act, the statute provided that the Secretary "may" extend a prospecting permit for coal. 30 U.S.C. § 201(b) (1970). In general, the Courts have held that "may" is used to indicate an absence of duty to act. The Courts have consistently held that the use of the word "may" in the Mineral Leasing Act gives the Secretary the discretion whether to take a particular action, and until the Secretary acts, the applicant has no rights. In *Udall* v. *Tallman*, 380 U.S. 1 (1965), the Supreme Court held that under sec. 17 of the Mineral Leasing Act, 30 U.S.C. § 226(a) (1970) (which says the Secretary "may" issue oil and gas leases), the Secretary had the discretion to reject applications for leases. *See Krueger* v. *Morton*, 539 F.2d 235 (D.C. Cir. 1976); *Hunter* v. *Morton*, 529 F.2d 645 (10th Cir. 1976); *Hannifan* v. *Morton*, 444 F.2d 200 (10th Cir. 1971), each of which held that the Secretary has no mandatory duty to issue a prospecting permit.

The Department has similarly held that an application for an extension of a prospecting permit creates no rights in the applicant, and that the Secretary has the discretion to approve or disapprove an application for an extension. In an Opinion titled, *Interpretation of the Mineral Leasing Act of 1920 (41 Stat. 437, as amended (Interpretation)*, 56 I.D. 174 (1937), Solicitor Margold considered whether the Department's then existing authority to extend oil and gas prospecting permits involved the exercise of discretion. The statutory language in question (the Secretary may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall

prescribe), was essentially identical with the language at question now. The Solicitor concluded that "the authority of the Secretary of the Interior to grant or deny applications for the extension of permits about to expire is no less discretionary than his authority to grant or deny applications for the issuance of permits in the first place." 56 I.D. at 183.

A subsequent decision of the Department, *Need for Consent by Coal Prospecting Permittee and Applicant for Coal Lease to Government Exploration For Coal (Need for Consent)*, 57 I.D. 478 (1942), considered whether the Department could explore lands under lease, permit, or license to private parties. Without rejecting or even mentioning *Interpretation, supra*, the opinion said that a person who has diligently explored for coal during the term of a prospecting permit is entitled to an extension, 57 I.D. at 481, although a person who has failed to explore diligently is not. The opinion cites 43 CFR 193.25, 12 FR 417, as authority for this assertion. That regulation does not support the assertion because it fails to contain any language that creates a mandatory right to an extension. The interpretation in the opinion is also contrary to that expressed in the statute, and to that stated in *Interpretation, supra*. To the extent *Need for Consent* is inconsistent with the statute, it is overruled. The current regulations governing extensions provide that permits may be extended "in the discretion of the Secretary," 43 CFR 3511.3–1(b), and are consistent with the statute.

B. *Legislative History*

This interpretation of the rights of an applicant for an extension is consistent with the legislative history of the 1975 Act. The provisions of S. 391, eventually enacted as section 4 of the Federal Coal Leasing Amendments Act, were originally included in the similar provisions of sec. 102 of that bill. Sec. 102 included both the language that sec. 2(b) was being amended "subject to valid existing rights" and the language that the holder of an exploration license had no right to a lease. 121 Cong. Rec. S. 14542 (daily ed. July 31, 1975).

A section-by-section analysis of S. 391, including an analysis of sec. 102, was reprinted in the Congressional Record. The analysis specifically included consideration of the meaning of the word "valid existing right." The discussion makes clear that the term was used to ensure that the amendment of sec. 2(b) would not be construed to deprive holders of issued prospecting permits of the right to apply for and receive preference-right leases if they discovered coal in commercial quantities during the term of a prospecting permit. The analysis says:

> The Committee wishes to stress that the repeal of sec. 2(b) is expressly "sub-

ject to valid existing rights" and this is not intended to affect any valid prospecting permit outstanding at the time of the enactment of the amendments. Any applications for preference right leases based on such permits could be adjudicated on their merits and preference right leases issued if the requirements of Subsect. 2(b) and other applicable law, such as the National Environmental Policy Act of 1969, were met.

121 Cong. Rec. S. 14588 (daily ed. July 31, 1975). This legislative history shows that Congress intended to preserve the rights of those who had received prospecting permits prior to the enactment of the legislation to apply for and receive leases if warranted, and that it intended that no new prospecting permits could be granted under the old provisions of sec. 2(b). A similar discussion in the House Report on H.R. 6721, the companion bill to S. 391, shows that the House similarly intended only existing permits to be preserved. H. Rep. No. 94–681, 94th Cong., 1st Sess. 22 (1975). The comments of Congresswoman Mink, who was one of the principal sponsors of the legislation, expressed Congress' attitude to prospecting permits, in general, during the floor debates; "First, the preference right lease to holders of prospecting permits would be abolished. *Henceforth*, holders of prospecting permits would be required to compete in bidding with all other interested parties, their sole advantage being that any data they obtained via exploration would be held confidential until after the lease sale." [Italics supplied.] 122 Cong. Rec. H. 134 (daily ed. Jan. 21, 1976).

The legislative history does not directly address the question of the status of extensions of existing permits. However, the policy expressed by Congress in amending sec. 2(b) and the legislative history show the Congress was not sympathetic to the old prospecting permit system, and that it intended to ensure that no future prospecting permits would be issued or existing permits extended. The legislative history shows that Congress intended that existing holders of permits should be allowed to apply for a lease. I cannot construe the legislative history to favor retention of Secretarial authority to extend existing prospecting permits.

Summary

Prior to the amendment of sec. 2(b) of the Mineral Leasing Act by sec. 4 of the Federal Coal Leasing Amendments, the Secretary had discretion to reject all applications for extensions of coal prospecting permits and the filing of an application did not give the applicant any rights to an extension or otherwise reduce the Secretary's discretion to act. The interests arising from a coal prospecting permit extension application are not protected by the saving clause in section 4 of the Federal Coal Leasing Amendments Act. As an oil and gas lease offer was not a valid existing claim, location or entry under the Alaska Statehood Act, *Schraier* v. *Hickle*,

supra, a coal prospecting permit extension application is not a "valid existing right" under the Federal Coal Leasing Amendments Act. This conclusion is supported by 2 main sources. First, an application for an extension of a coal prospecting permit does not create any rights in an applicant, may be denied by the Secretary, in his discretion, and does not come within the traditional meaning of "valid existing right" as it has been defined by the Department and the courts. Under these definitions, a "valid existing right" is one which is lawfully initiated and which only requires full compliance with the law to be fully protected from denial by the Secretary. Second, the legislative history of the Act shows that only those persons who held outstanding permits were intended to be protected and the protection was limited to allowing them to complete the unexpired term of the permit and, if commercial quantities of coal were discovered, to apply for and receive a lease.

An application for an extension of a coal prospecting permit is not a "valid existing right" and was, therefore, not protected by sec. 4 of the Federal Coal Leasing Amendments Act. Since Aug. 4, 1976, the Secretary has been without authority to grant an extension of a coal prospecting permit.

FREDERICK N. FERGUSON,
Deputy Solicitor.

JOHN STUART HUNT
SHERMAN M. HUNT

31 IBLA 304

Decided *July 22, 1977*

Appeal from decision of Eastern States Office, rejecting Color of Title Application ES 13250.

Set aside and remanded.

1. State Grants—Swamplands

Although a grant to a state pursuant to the Swamp Land Act of 1849 or 1850 is a grant *in praesenti*, in that the state is immediately vested with an inchoate equitable title, the legal title does not pass until the Secretary has determined that the land is swamp in character and otherwise available for disposition.

2. Res Judicata—Rules of Practice: Appeals: Generally—Rules of Practice: Appeals: Failure to Appeal—Swamplands

Where a state swamp land selection has been rejected on the ground that the land selected has been disposed of, but in fact that land was available to the state, the judgment is valid and binding until set aside. Since the Secretary has jurisdiction to determine whether the land selected is available, he has jurisdiction to decide erroneously. The erroneous decision will not be set aside where the state did not appeal and the decision has remained unchallenged for over 100 years, the state itself sold the land to a color of title applicant's predecessor, and an adverse right has intervened.

3. Color or Claim of Title: Generally—Swamplands

A color of title claim stemming from a tax sale by a state in 1900 to a color of title applicant's predecessor in interest on which taxes have since been paid is an

adverse claim sufficient to warrant the Department in not setting aside an 1853 decision erroneously rejecting a swamp-land selection or from not giving a new state selection priority over the color of title application.

APPEARANCES: Michael R. Mangham, Esq., Hargrove, Guyton, Ramey & Barlow, Shreveport, Louisiana; C. Walter Harris, Esq., Washington, D.C., for appellants.

OPINION BY ADMINISTRATIVE JUDGE RITVO INTERIOR BOARD OF LAND APPEALS

John Stuart Hunt and Sherman M. Hunt appeal from the July 30, 1975, decision of the Eastern States Office, Bureau of Land Management (BLM), which rejected their application to purchase the NW 1/4 NW 1/4, section 4, T. 16 N., R. 5 E., L.M., Richland Parish, Louisiana, filed pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1970). The State of Louisiana has also selected the land under the Swamp and Overflowed Lands Act of Sept. 28, 1850, 43 U.S.C. § 982 (1970) under ES 15099. Appellants' application was rejected after the BLM determined that equitable title to the land had passed to the State of Louisiana pursuant to the swamp and overflowed land grants of 1849 and 1850, 9 Stat. 352 and 9 Stat. 519, respectively, *as amended*, 43 U.S.C. § 981 *et seq.* (1970), and thus was unavailable for disposition. The State Office held that the grant under the Swamp Land Act is a grant *in praesenti* and once it is determined that the lands are of the character described in the Act, the state's inchoate title becomes perfect as of the date of the Act, citing *Michigan Land and Lumber Co.* v. *Rust*, 168 U.S. 589 (1897), and 43 CFR 2625.0–3 (a) and (b).

Appellants deny that the Department lacks authority to settle their claim in their favor, also citing *Michigan Land and Lumber Co.* v. *Rust*, *supra*. Moreover, argue the appellants, this is precisely the kind of claim contemplated by the Color of Title Act, 43 U.S.C. § 1068 (1970). Finally, appellants assert that the equities of the case weigh heavily in their favor.

The Color of Title Act, 43 U.S.C. § 1068 (1970), provides that the Secretary of the Interior shall convey title to a claimant who has held a tract of public land under claim or color of title in good faith and peaceful adverse possession for more than 20 years and has placed valuable improvements on the land or has cultivated part of it, and he may convey title to a claimant who has adversely possessed a tract of public land under similar claim or color of title since not later than Jan. 1, 1901, and has paid the state and local taxes levied on the land since that date.

The implementing regulations, 43 CFR Part 2540 and 2540.0–5(b), label the first kind of claim "class 1" and the second kind, "class 2." The claim in this case is a class 2 claim. The facts are as follows.

Duncan W. Murphy entered the NW 1/4 NW 1/4 of section 4, T. 15 N. R. 5 E., L.M., and other lands on Aug. 25, 1848, under military

bounty warrant 14981 and received patent to the land dated November 1, 1849. Unfortunately, the patent was entered in General Land Office tract books as NW 1/4 NW 1/4, section 4, T. *16* N., R. 5 E., L.M., instead of T. *15* N.[1] After enactment of the swamp land grant in 1849, the State of Louisiana applied for patent for the land in section 4, T. 16 N., R. 5 E., L.M. By decision of the General Land Office (predecessor of the BLM) dated June 22, 1853, the application for patent to the NW 1/4 NW 1/4, sec. 4, T. 16 N., L.M., was rejected on the ground that the land had already been disposed of to another person.[2] Apparently, no appeal was ever taken from this decision.

In 1898, the State of Louisiana adopted Act No. 170, approved July 14, 1898, under which the land at issue became subject to state ad valorem taxes. On July 23, 1900, the NW ¼ of NW ¼ of section 4, T. 16 N., R. 5 E., assessed in the name of Duncan W. Murphy, was sold by the State of Louisiana at tax sale for 1899 taxes to F. G. Hudson, W. F. Cummings and Hy. Bernstein for the sum of $11.87. Since that time, the land has changed hands sixteen (16) times among private parties. In addition, the land has actually been used and possessed as timber land. The landowners have sold timber, managed the timber growth, selectively cut and marketed the timber production. Further, each year since 1900 up to and including 1973, the State of Louisiana and Parish of Richland have assessed and collected taxes on the NW ¼ of NW ¼, section 4, T. 16 N., R. 5 E.

Appellants were informed by the Eastern States Office, BLM, on November 16, 1973, that the land had in fact never been patented. On Jan. 8, 1974, they filed their application for patent, ES 13250, under the Color of Title Act, *supra*. The State of Louisiana, as we have seen, also filed an application, ES 15099, on Nov. 20, 1973, for patent to the land pursuant to both Swamp Land Acts of 1849 and 1850.

The case cannot be disposed of solely on the ground that if the land was swamp in character in 1849 or 1850 the title passed to the state and nothing else matters.

More weight must be given, in our view, to the effect of the 1853 decision, the state's tax sale in 1900, and appellant's (and his predecessors') possession of the land since then.

The cases discussed below establish that, for reasons of fairness and sound policy, a swamp land grant, although it is a grant *in praesenti*, must be found to be swamp in character and available for disposition under the grant before legal title passes and that the Secretary or his delegate has jurisdiction to decide

[1] The homestead entry of Murphy embraced SE¼ SE¼ sec. 32, SW¼ SW¼ sec. 33, T. 16 N., R. 5 E., NW¼ NW¼ sec. 4, NE¼ NE¼ sec. 5, T. 15 N., R. 5 E., L.M.

[2] After rejection of the State's application for NW¼ NW¼ sec. 4, T. 16 N., R. 5 E., Louisiana applied for NW¼ NW¼ sec. 4, T. 15 N., R. 5 E., and received proof of title in approved List No. 1, Monroe Land Office. May 6, 1852.

the eligibility of land for the swamp land grant. Having such jurisdiction, his judgment, even though erroneous, is valid and binding until set aside.

Further, whether consisting of the equitable title or based upon preference, rights can be, and are, lost by acquiescence in an erroneous decision for a lengthy period of time, whether the error is one of law or of fact, or stems from erroneous public records. The intervention of an adverse right inhibits the Department from reconsidering its past error, despite the fact that the land is still within the public domain. A valid color of title claim is an adverse right. Therefore the appellants' application is to be processed, and if all is regular, allowed and the State's application then rejected.

We now turn to a detailed discussion of these propositions.

[1] While the swamp land grants are grants *in praesenti* and equitable title would have passed in 1849 or 1850, all else being regular, the Acts were not self-executing. Since the Act applied only to swamps or overflowed lands and lands remaining unsold, 43 U.S.C. § 982 (1970), the Department was obligated to examine the facts and records to see whether the land was indeed swamp in character and, if so, was still available for disposition. The Secretary may investigate the character of the land and its eligibility for disposition, as long as the title remains in the United States. *Michigan Lumber Co.* v. *United States*, *supra* at 593.

In *U.S.* v. *Minnesota*, 270 U.S. 181, 202–203 (1926), the Court explained the meaning of saying the swampland grant was a grant *in praesenti:*

> By the act of Sept. 28, 1850, Congress granted to the several States the whole of *the swamp lands therein then remaining unsold*, c. 84, 9 Stat. 519. The first section was in the usual terms of a grant *in praesenti*, its words being that the lands described "shall be, and the same are hereby, granted." The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governor's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. The third section directed that, in making out the lists and plats, all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but where the greater part was not of that character the whole should be excluded. The question soon arose whether, in view of the terms of the first and second sections, the grant was *in praesenti* and took effect on the date of the Act, or rested in promise until the issue of the patent and took effect then. *The then Secretary of the Interior, Mr. Stuart, concluded that the grant was in praesenti in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549.* That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253, was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases. *French* v. *Fyan*, 93 U.S. 169, 170 [1876]; *Wright* v. *Roseberry*, 121 U.S. 488, 500, *et seq.* [1887]; *Rogers Locomotive [Machine] Works* v. *[American] Emigrant Co.*, 164 U.S. 559, 570 [1896]; *Work* v.

Louisiana, 269 U.S. 250 [1925]. A case of special interest here is *Rice* v. *Sioux City & St. Paul R.R. Co.*, 110 U.S. 695 [1884]. The question there was whether the Act of 1850 operated, when Minnesota became a State in 1858, to grant to her the swamp lands therein. The Court answered in the negative, saying that the Act of 1850 "operated as a grant *in praesenti* to the States then in existence," that it "was to operate upon existing things, and with reference to an existing state of facts," that it "was to take effect at once, between an existing grantor and several separate existing grantees," and that as Minnesota was not then a State the Act made no grant to her. [Italics supplied.]

As the quote makes clear, the *in praesenti* grant did not become effective until the Secretary made the determinations required of him under the Swamp Land Act. He had to decide (1) whether the land had been previously sold and (2) whether it was swamp in character.

The Supreme Court held in *Work* v. *Louisiana*, 269 U.S. 250, 260 (1925), that mineral lands were not excluded from the swampland grant to Louisiana, and the Secretary could not refuse to issue a patent to such land pending his determination of its mineral character. The Court then held:

3. A question remains as to the effect of the decree awarding the injunction. This, after commanding the Secretary to vacate the ruling operating to withhold title from the State for any reason dependent upon the mineral character of the lands or to require that their non-mineral character be shown, contained the following supplemental clause: "and further restraining him, and them from making any disposition of said described lands or from taking any action affecting the same save such immediate steps as are necessary to the further and final recognition of plaintiff's rights under the acts of Mar. 2, 1849 (9 Stat. 352) and Sept. 28, 1850 (9 Stat. 519), to the end that evidence of title may be given to plaintiff as by said acts provided and required." *If, as urged, the effect of this supplemental clause is to divest the United States of title to the lands and leave the Secretary to do nothing but furnish the State evidence of title in final recognition of its asserted rights, the decree in this respect is plainly erroneous, aside from any question as to the scope of the bill or the necessary presence of the United States as a party. The State has not as yet finally established its right to the lands, and the administrative processes necessary thereto are not complete. The Secretary, it appears, has not as yet determined that they were swamp and overflowed lands.* The finding of the Commissioner that they were "swamp or overflowed" was not brought in question before the Secretary, and his decision involved no approval of such finding, but related merely to the ruling of the Commissioner requiring the State, independently of this finding, to establish the non-mineral character of the lands. *The Secretary, in the exercise of the administrative duty imposed upon him, is necessarily required, before furnishing evidence of title under either of the Acts, to determine whether the lands claimed were in fact swamp lands; and he may not be restrained from investigating and determining this in any appropriate manner.*

The decree is inartifically framed. We think that the supplemental clause which we have quoted, in effect requires the Secretary to recognize that the State has already established its right to the lands and to do nothing further in reference to them except to furnish it evidence of title in final recognition of such established right, and restrains him from investigating and determining, without reference to the mineral character of the lands, whether they were in fact swamp and overflowed lands, before giving final

recognition to such right as the State may establish under either of the Acts and issuing to it any evidence of title. The decree is accordingly modified by striking out this supplemental clause. Thus modified it should stand. [Italics supplied.]

Again, it is clear that the Swampland Act leaves to the Secretary the right and duty to determine whether the land sought by the State meets the qualifications of the Act.[3]

Since the grant applies only to lands "remaining unsold," one of the two issues the Secretary must decide is whether the land is unsold. *Mays* v. *Kirks*, 414 F. 2d 131, 134 (5th Cir. 1969); *U.S.* v. *O'Donnell*, 303 U.S. 501 (1938); *Warner Valley Stock Company* v. *Smith*, 9 App. D.C. 187, *reversed on other grounds*, 165 U.S. 28 (1897). Here the Secretary decided, albeit erroneously, that the land had been sold. We must examine the consequences of an erroneous decision.

[2] When the Department has made a determination that for some reason the title did not pass, its decision is of some consequence. Whether it was right or wrong, it denied the States' claim and left the land in question as public domain. It is well established that an erroneous decision which the Department had authority to make will not be set aside where the decision has remained unchallenged for a lengthy period of time and an adverse right has intervened.

The effect of an erroneous decision was thoroughly discussed in a case raising a similar issue. *State of New Mexico* v. *Robert S. Shelton*, 54 I.D. 112 (1932). There, New Mexico held the same status as Louisiana does here. New Mexico had earned equitable title to an indemnity school land selection by performing all things needful to perfect its selection, but the Secretary had not approved the selection. The Secretary, acting under a misapprehension of law that a later withdrawal cut off the State, rejected and canceled the selection. The land was thereafter restored to entry and opened to homestead entry. About 14 years later the State appealed to have its selection reinstated.

In discussing the effect of an erroneous decision holding that a state indemnity school selection in all respects regular and complete could be defeated by a subsequent withdrawal, Secretary Edwards first pointed out that in many cases the Department has refused to correct applications rejected because of an erroneous interpretation of the law where there was acquiescence or laches. He then stated:

> The appellants do not rely, however, on the fact that they did not acquiesce in the erroneous decision. Their application for reinstatement appears to be based chiefly on the contention, deduced from certain language of the Supreme Court in *Payne* v. *New Mexico*, *supra*, and *Wyoming* v. *United States* and related cases, that the Department's judgment of cancellation was absolutely void and it was immaterial whether the State ignored it or not. That contention is not tenable. *It should not be overlooked that the State had merely the equitable, not the legal title. Until legal title passes from the Government, inquiry as to all equitable*

[3] For numerous citations, see cases collected in 43 U.S.C.A. § 982, n. 23.

rights comes within the cognizance of the Land Department. Brown v. *Hitchcock* (173 U.S. 473, 476 [1899]); *Plested* v. *Abbey* (228 U.S. 42 [1913]). *Confessedly the land belonged to the United States when it was listed, and the Land Department had jurisdiction to determine whether it should be listed to the State or not. "Having such jurisdiction, it had jurisdiction in making the necessary determination to render an erroneous and voidable judgment." Stutsman* v. *Olinda Land Company* (231 Fed. 525, 527 [1916]). The judgment, though voidable, was entitled to respect until set aside by direct attack in some manner recognized by law. *Noble* v. *Union River Logging Co.* (147 U.S. 165 [1893]); *Burke* v. *Southern Pacific Railroad Company* (234 U.S. 669 [1914]). *Want of jurisdiction must be distinguished from error in the exercise of jurisdiction.* Where jurisdiction has once attached, mere errors and irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. Until set aside it is valid and binding for all purposes and cannot be collaterally attacked. See "Judgments," sec. 39 (33 C.J. 1078). [Italics supplied.]

The case of *Leutholtz* v. *Hotchkiss* (259 Pac. 1117 [1927]), decided by the Court of Appeals of the First District, Division 2, California, shows that the court considered a contention substantially the same as appellants are making here, in connection with a state of facts closely paralleling those at bar. The case also shows the importance of the elements of acquiescence in the same error of law by the Department that is conceded to have been committed in the case at bar, and the application of the doctrine of laches where the State or one claiming under it has been dilatory in seeking to enforce its or his equitable rights.

In that case, in January, 1908, one Clarrage applied to purchase the land—then public land of the United States—from the State. The State filed indemnity lieu selection for the same Feb. 17, 1908, issued a certificate of purchase to Clarrage in 1912, who sold the land to defendant on Mar. 12, 1921, and gave him a grant deed Jan. 9, 1923. By reason of a classification of the land as valuable for oil and gas subsequent to the completion of the selection, the State's application was suspended in 1909, and on July 17, 1916, the State and its transferee received notice of the Commissioner's order, requiring them within 30 days to accept a patent with reservation of oil and gas, or appeal, to which no reply was made by either, and the selection was ordered canceled July 20, 1927. *Neither the transferee* nor *his grantee ever occupied the land,* and the land, in so far as the record showed, being open for prospecting, an oil and gas permit was issued to plaintiff on May 23, 1921, who entered thereon and drilled a well to the depth of 2,600 feet at an expense of $70,000. The court, after stating the rule in the Supreme Court cases relied on in the case here at bar, and observing that the Land Department's action on the selection was erroneous, said:

The trial court concluded that the State and its transferee had accepted the construction of the law as announced by the Commissioner of the General Land Office by failing to appeal from his decision to the Secretary of the Interior and thereby abandoned his claim; "also that defendant is barred from relief by the court by his long delay, including that of his predecessor in interest, in asserting an interest in the land.

"Appellant attacks these conclusions. He claims that an equitable interest having once vested in the State upon making the lieu land selection, it was not defeated by the erroneous ruling of the Land Department on a question of law; that, it being a mistake of law, the Secretary of the Department of the Interior should, and can, correct it at any time on application; that it is his function and duty to correct such mistake, and until the Secretary has determined the ques-

tion of whether the land was known to be mineral or nonmineral at the time of selection, the appellant's equitable title cannot be questioned. In support of the authority or duty of the Secretary to correct a mistake of law, appellant cites the case of *Gage* v. *Gunther*, 136 Cal. 338, 68 P. 710, 89 Am. St. Rep. 141 [1902]. This might be urged, were it not for the intervening rights of the respondent, and it could be said without question that appellant and his predecessors in interest had not by their acts and delay led one to the conclusion that they had abandoned whatever right they may have had to the land. Appellant did not avail himself of his right of appeal to the Secretary of the Interior from the Commissioner's ruling. The State's selection was canceled, and both the State and Clarrage acquiesced in such cancellation.

True, the right once having vested, it could not be lost merely by the subsequent discovery of the land's being mineral in character, but the right could be, and was, we think, lost by permitting the Government's cancellation of the selection duly made according to its rules and regulation to stand for the time it did. After the cancellation, the prospecting permit was duly issued to respondent, and at that time it does not appear that respondent was aware of any outstanding claim to the land. The land was open for prospecting for oil so far as the Government's records showed. Neither appellant nor his grantor has ever occupied the land. Appellant took no steps to establish any equitable interest he may have had in the land until suit was brought by respondent to quiet title to her prospecting right, and this notwithstanding the fact that the Supreme Court of the United States had decided the Payne case, *supra*, and Wyoming case, *supra*, some two years before. Such delay as is shown here must, we think, be treated as abandonment of his claim. The appellant slept on his rights. As was said by the court below: [Italics supplied.]

"A party defeated by the decision of the Land Department may not wait many years after an adverse decision there, especially of an intermediate department, and, when the Supreme Court shall have announced a new construction of the law in an entirely different action, successfully reassert his claim under such circumstances as are here disclosed. * * * The Government, through its cancellation of the State selection, reasserted its title to the land, and resumed control of it for a much longer period than the statute of limitations (Code Civ. Proc. Secs. 315–328) provides, and which may be relied upon in adverse proceedings to quiet title to real property."

For the reasons stated, the judgment is affirmed.

The cases above discussed are readily distinguishable from the instant case. In the latter, nothing appears wherein the State by its acts acquiesced in the erroneous decision of the Department, or abandoned its claim. On the contrary, at all times it, through its lessee, has continuously asserted its equitable title by actual possession and improvement of the land, thus effectually precluding the lawful initiation of any rights under the homestead laws. The homestead entries must be canceled and the State's selections should be reinstated and the list approved.

The Commissioner's decision is accordingly REVERSED.

54 I.D. 119–121.

The language in the decision is a forceful statement of the consequences flowing from an erroneous decision long acquiesced in.

In an earlier case, *Honey Lake Valley Company*, 48 L.D. 192 (1921), the Department considered a situation in which a state indemnity selection, otherwise proper, was rejected in 1915 on the basis of an interpretation of law, as to the effect of a later withdrawal on a pending selection, which later was held by

the Supreme Court to be incorrect. The land was thereafter entered in 1918 under the desert land law. The state filed a second selection in 1919, which it said was amendatory of its first one. The Commissioner of the General Land Office ruled that the first selection was canceled of record on July 15, 1915, was not subject to amendment and the second selection was properly rejected for conflict with a lawful entry of record. In affirming that decision the Department held:

> In determining what rights, if any, the State may have under the original, or first selection (0405), filed March 20, 1908, the Department has considered the issues in the light of the opinion rendered by the Supreme Court of the United States, Mar. 7, 1921, in the case of Payne, Secretary of the Interior *et al. v.* The State of New Mexico (255 U.S., 367 [1921]).
>
> In so determining two questions necessarily arise, first, whether, recognizing the right of the present homesteader, Rogers, a subsequent change in the interpretation of a statute justifies the reopening of a claim formerly disposed of adversely in accordance with the then prevailing rule or construction placed upon a similar statute; and, secondly, whether or not even though it may have acquired an equitable right, or title, under its former filing (0405), within the meaning of the recent opinion of the Supreme Court hereinbefore referred to and rendered in a proceeding separate and distinct from the case under consideration, such right, or title, had been lost by the State through its laches.
>
> The first proposition needs little or no discussion. It could not be seriously contended that upon a change by either this Department, or the courts, in the interpretation of any law, which different construction was brought about through the diligent prosecution of the claim of another in a separate and distinct proceeding having no bearing upon this case, the reopening of a former case properly disposed of in accordance with the governing rule then in force, would be justifiable to the detriment of the property rights acquired by another in the meantime. Such a course of procedure would bring about chaotic conditions and promote endless litigation.
>
> In this connection it was held in the case of Thomas Hall (44 L.D., 113, 114 [1915])—
>
> "It is a well-settled doctrine that a final adjudication will not be later disturbed because of a subsequent change in the construction of the law which governed the case at the time it was originally adjudicated. This rule has been generally enforced by this Department, even in cases where the Department's construction of statutes has been declared erroneous by the Supreme Court. (Frank Larson, 23 L.D., 452 [1896]; Mee *v.* Hughart *et al.*, 23 L.D., 455 [1896].)"
>
> It would be immaterial as the record stands before this Department whether or not the State of California acquired an equitable right, or title, under its former selection (0405), within the meaning of the Supreme Court's opinion in the case of Payne, Secretary of the Interior *et al. v.* The State of New Mexico, *supra*. In the case at bar the cancellation order of the original selection was entered July 31, 1915. No action was taken by the State until January 20, 1919, with the view to reselecting the land as it had a right to do in its own interest or that of its transferee. During the time that elapsed from date of cancellation of the selection, and entry of the land by Hender, Mar. 21, 1916, the State failed to avail itself of the privileges accorded by the governing regulations and principles enunciated in the case of Albert M. Salmon, * * * [44 L.D. 491 (1915).]
>
> The State will not at this late date be heard to say that the former selection should be reinstated, or amended, and the entry of contestant, Rogers, canceled. The

State's laches and the intervening adverse claim bar the assertion of any such contention. As was said (syllabus) in Moran *v.* Horsky (178 U.S., 205 [1900])—

"A neglected right, if neglected too long, must be treated as an abandoned right, which no court will enforce."

The rule applicable here is well stated in Galliher *v.* Cadwell (145 U.S., 368, 373 [1892]), wherein the court stated that—

"* * * [L]aches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

The Department concurs in the conclusion reached by the Commissioner in the decision appealed from which is hereby affirmed.

48 L.D. 194–195.

The Department has also found that a state could lose its right to a designated school section, to which it has a right of the same nature as it does to swamp lands, *i.e.*, a grant *in praesenti*, *State of Michigan*, 8 L.D. 308, 310 (1899), by action which amounts to a waiver or is sufficient for estoppel. *State of Colorado (On Rehearing)*, 49 L.D. 341 (1922).[4]

Here Louisiana acquiesced in an erroneous decision for over 100 years and indeed itself sold the land for a tax delinquency based on the erroneous land office record.

The consequences of a failure to appeal a decision which is erroneous because it was based on incorrect public land records was examined at length in *Charles D. Edmonson, et al.*, 61 I.D. 355 (1954). The Department held that even where the erroneous ground for rejecting a preference-right application was an matter of fact reflected in the official records of the Bureau of Land Management and within the peculiar competency of the official in charge of the records and acting upon that application, and the applicant had no reason to question the factual determination, his application could not be reinstated with priority over a subsequent applicant. The Department concluded that to hold otherwise would place such lease titles in jeopardy and would nullify the idea of administrative finality.[5]

Finally, the Department again and again has refused to reexamine swamp land cases where the land had been held not to be swamp in character and many years have elapsed since the original decision. *State of Louisiana*, 61 I.D. 170 (1953); *John C. Armas*, A–26545 (1952).

To recapitulate, the cited cases establish, for reasons of fairness and sound policy, that a swamp land grant, although it is a grant *in praesenti*, must be found to be

[4] In another situation in which the claimant has also carried equitable title, a failure to appeal from an erroneous decision holding a mining claim invalid was held to prevent a later attack on that decision. *Gabbs Exploration Company*, 67 I.D. 160, 165 (1960); *aff'd Gabbs Exploration Co.* v. *Udall*, 315 F.2d 37 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 822 (1963). *See also John W. Roth*, 8 IBLA 39, 41 (1971).

[5] In *Edmondson*, the Department reexamined a decision *Bettie H. Reid, Lucille H. Pipkin*, 61 I.D. 1 (1952), in which it had held that a first qualified applicant for an oil and gas lease retained her preference right even though she failed to appeal from a decision rejecting her offer on the ground that land had been withdrawn; in fact the land had not been withdrawn, but Reid had no reason to question the manager's decision. It held that Reid must be reversed. For a full discussion, *see* 61 I.D. 362–365.

swamp in character and available for disposition under the grant before legal title passes, and that the Secretary or his delegate has jurisdiction to decide the eligibility of land for the swamp land grant. Having such jurisdiction, his judgment, even though erroneous, is valid and binding until set aside.

Rights, whether constituting equitable title or based upon a statutory preference, can be and are lost by acquiescence in an erroneous decision for a lengthy period of time, whether the error is one of law or fact, or stems from erroneous public records. The intervention of an adverse right inhibits the Department from reconsidering its past error, despite the fact that the land is still within the public domain.

None of the cases cited by Judge Stuebing's dissent deals with a situation where the State had applied for a patent, was denied one, and failed to appeal. Furthermore, most of them arose in California and were considered under sec. 4 of the Act of July 23, 1866, 43 U.S.C. § 987 (1974), which directed the Secretary to issue patents for all California swamp lands without regard to anything else that might have transpired. *See Work* v. *United States*, 23 F.2d 136, 137 (App. D.C. 1927). The special circumstances leading to the passage of the 1866 Act are set out in *Tubbs* v. *Wilhoit*, 138 U.S. 134, 137–139 (1891).

[3] The only remaining question is whether a Class II color of title claim is such an adverse right. The Department has stated that what constitutes an "adverse right" depends upon the circumstances of each case. It has held claims arising under the Color of Title Act, *supra*, where bona fide and substantial rights thereunder exist, to be "valid existing rights" within the savings clause of the withdrawal imposed by Executive Order of Nov. 26, 1934. *Secretary's Opinion*, 55 I.D. 205, 210–211 (1935). Here the color of title is opposed to the State, not the United States, since if it were not present, the swamp land grant could be allowed, so that the United States in any event would dispose of the land. The color of title claim originated in the act of the state itself, and the appellant derives his title from the state's action. He or his predecessors have held the land for over 70 years and there is not the slightest hint of bad faith. In these circumstances, I find that Hunt's color of title claim is an adverse right, which, if valid, should be allowed and the state's application rejected. Accordingly, the State Office's decision is set aside and the case remanded for adjudication of appellants' offer. If it is found valid, the State's offer should be rejected; if it is not, the State's application would be ripe for adjudication.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside

and the case remanded for further proceedings consistent herewith.

MARTIN RITVO,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

ADMINISTRATIVE JUDGE STUEBING, DISSENTING

On the date of enactment of the Swamp and Overflowed Land Grants of 1849 and 1850, respectively, the land in question was of the character described by those statutes and was legally open and available for such disposition by the Congress to the State of Louisiana. Thus, there was no impediment to the operation of the statutes, and title vested immediately in the State as a grant *in praesenti.* Having so vested, the land office could not subsequently divest the State of its title by writing an erroneous decision to the effect that the land was not available and did not vest in the State, nor was the State obliged to appeal such decision on pain of losing that which it had already gained.

The vice in the majority opinion is exemplified in the following two sentences therefrom:

> [2] When the Department has made a determination that for some reason title did not pass, its decision is of some consequence. Whether it was right or wrong, it denied the State's claim and left the land in question in the public domain. * * *

The land was not "left in the public domain." It had already passed out of the public domain. The majority treat a grant *in praesenti* as a grant *in futuro.* There is no way to reconcile that a grant which legally vested *in praesenti* in the State in 1849 by an Act of Congress was still available to be "left in the public domain" by an erroneous administrative decision in 1853.

The author is the owner of land through a chain of title which originated with a patent from the United States. Hypothetically, if the Bureau of Land Management now or subsequently were to issue a decision erroneously declaring that my land is still public domain, would my only choices be to either accept the decision as final and be divested of my title, or else avail myself of the Department's appellate procedures and successfully prove that the decision was wrong in order to preserve my title? Of course not. Secure in my knowledge that my title is good I could elect to disregard the decision *as a matter of no consequence*, and my failure to appeal would not diminish my entitlement at all. This is because the Department of the Interior has no jurisdiction or authority to revoke vested interests in real property by administrative fiat, particularly when such a determination is demonstrably wrong. Property in-

terests are protected from such a result by the Constitutional guarantee of due process.

The swamp land Acts of 1849 and 1850 each provide that swamp lands "shall be, and the same are hereby, granted to" certain states. The Supreme Court has frequently characterized the various swamp land grants as *in praesenti* grants; that is, all lands within the border of the particular state which were swamp in character on the date of the Act were granted to the state on that date. *See e.g.*, *Michigan Land and Lumber Co.* v. *Rust*, *supra* at 591, and *United States* v. *O'Donnell*, 303 U.S. 501, 509 (1938). It is true that so long as legal title to the land remains in the United States, the Department of the Interior may inquire into the character of the land. *Michigan Land and Lumber Co.* v. *Rust*, *supra* at 593. This does not mean that the Department may then divest a state of its equitable title to the swamp land. The only determination to be made is *whether* the land was swamp land as of the date of the applicable act. If the land was swamp in character, then equitable title passed as of the date of the act and may not be divested by a later act of Congress, *United States* v. *Minnesota*, 270 U.S. 181 (1926), and, *a fortiori*, may not be divested by this Department. In *United States* v. *Minnesota*, *supra*, land had been patented to the state under the swamp land grants, even though the land, *at the time of the patent*, was within the boundaries of lands ceded to Indians by treaty. However, most of the land patented as swamp land was not part of an Indian reservation on the date of enactment of the swamp land grants. Later inclusion of the lands in such a reservation could not divest the state of equitable title that it had received as of the date of the grant.

In the present case title had vested in the State of Louisiana with the enactment of the granting statute. The application for patent was rejected thereafter due to a clerical error in the land office tract book. Such a mistake could not divest the state's equitable title to the land. As the Department stated in *State of Louisiana* v. *State Exploration Co.*, 73 I.D. 148, 158 (1966):

> "The identification of the lands and the transfer of legal title were mere matters of administration, which could not either enlarge or diminish the grant."

The views of the Supreme Court are nearly identical:

> It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. When identified, the title would become perfect *as of the date of the act.* The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The de-

termination of the Secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. *But the right of the state under the first section would not be enlarged by the action of the Secretary,* except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; *nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and embarrassments which might ensue.* [Italics added.]

Wright v. *Roseberry*, 121 U.S. 488, 500–501 (1887).

It is clear from a reading of *Wright* and other cases that equitable title to the land is vested in the State of Louisiana in this case, and thus the land is not public land within the meaning of the Color of Title Act, 43 U.S.C. § 1068 (1970). Therefore, appellants' application to purchase ought to be rejected.

There remains the question of whether the doctrine of res judicata or its administrative counterpart, the doctrine of administrative finality, should be applied in this case. The pronouncements of general rules by both the courts and this Department with respect to the applicability of res judicata seem to present a study in inconsistency. For example, in *Ben Cohen*, 21 IBLA 330 (1975), the Board stated:

> In the absence of compelling legal or equitable reasons for reconsideration, the principle of *res judicata*, and its counterpart, finality of administrative action, will operate to bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues. See *United States* v. *Blythe*, 16 IBLA 94, 101 (1974); *L. M. Perrin, Jr.*, 9 IBLA 370, 373 (1973); *Elsie V. Farington*, 9 IBLA 191, 194 (1973); *Eldon L. Smith*, 6 IBLA 310, 312 (1972); *Gabbs Exploration Co.*, 67 I.D. 160, 165–66 (1960), *aff'd Gabbs Exploration Co.* v. *Udall*, 315 F.2d 37 (D.C. Cir.), *cert. denied*, 375 U.S. 822 (1963). * * *
>
> 21 IBLA at 331–32.

On the other hand, the Department stated in *United States* v. *United States Borax Co.*, 58 I.D. 426, 430 (1943):

> The Secretary of the Interior has a continuing duty as guardian of the public lands. He loses this power and his jurisdiction ends only when the Government no longer has legal title. Thus, in dealing with those who claim or apply for an interest in public land, so far as the Government is concerned the Secretary's decisions are not controlled by the principle of *res judicata*. His first duty is to see that the public domain is conserved, managed and disposed of in the manner Congress has directed. And while he has jurisdiction over the land, he may open any proceeding and correct or revise or reverse any decision of the Department or the General Land Office provided interested persons in appropriate cases have notice and opportunity to be heard. Before the passing of legal title, his findings and decisions are as completely subject to revision as are those of a court before final judgment or before the end of its term.

Moreover, as Davis notes in his treatise on administrative law, 2 K. Davis, *Administrative Law Treatise*, §§ 18.01 to 18.12 (1958, Supp. 1965), the courts likewise have seemed of mixed opinion. But the better view is that res judicata is ap-

propriate in *some* circumstances. Those circumstances obtain when the conditions for determining rights in the administrative context closely parallel those in judicial proceedings. For example, in *Pearson* v. *Williams*, 202 U.S. 281 (1906), Justice Holmes seems to state that *res judicata* is not applicable to administrative determinations. But it is clear that he so held in that case because of the summary nature of the proceedings. In *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929), the Supreme Court held that the Department had the authority to reopen proceedings at any time before the passage of title. An earlier Secretary of the Interior had determined that the land was not known to be mineral in character in 1903, the date of the survey. Consequently, the land would pass to the State of California and its grantees as a result of various school land grants. Notwithstanding the earlier determination, a later Secretary reopened the proceedings and reversed the findings. The Court affirmed the Department's later action in reopening the proceedings. The decision emphasized two things. First, the Secretary's duty as guardian of the public lands obliges him to see that none of the public domain is disposed of to those not entitled to receive it. Second, the earlier determination had not been based on a factual hearing but on a misapprehension of the law. The Court held that the pertinent facts had not been adduced at the first hearing.

Those two considerations are the same considerations the Department has relied on when refusing to apply the doctrine of res judicata. For example in *Whitten* v. *Read*, 53 I.D. 453 (1931), a very complex swamp land case, the Department stated in the syllabus at 454:

> The rule of *res judicata* is not applicable to a decision by the Commissioner of the General Land Office holding that the land was not swampy in character when he had no facts before him other than the preliminary showing by the State that the land was swamp and inured to the State under the [S]wamp [L]and [A]ct.

In *United States* v. *United States Borax Co.*, *supra*, the Department went even further:

> The principle of res judicata has no application to proceedings in the Department relating to disposition of the public domain until legal title passes, and findings and decisions are subject to revision in proper cases. Where an expert witness in a former proceeding subsequently changes his opinion on a material issue of fact, the determination of which is entirely dependent upon the reasoning of such experts, another hearing may be ordered.

58 I.D. at 426.

The case law of both the Supreme Court and this Department may be summarized as follows. While the doctrine of res judicata may be applicable in some instances, two principles will militate against its application. First, if there has been less than a complete exploration of all the relevant facts, the doctrine probably will not be applied. Second, the doctrine will not be applied where the land is about to pass from own-

ership by the United States to a private party. The Secretary's duty as guardian of the public lands obliges him to see that none of the public domain is passed to those not entitled to receive it. *See e.g.*, *Knight* v. *United States Land Ass'n.*, 142 U.S. 161, 181 (1891).

In the case at bar we note that the June 22, 1853, decision of the General Land Office was based on the assumption that the land in question had already been patented to another person. That assumption in turn was based upon a clerical error in the land office records. It is doubtful that the merely clerical nature of the decision rejecting Louisiana's swamp land selection should be characterized as an "adjudication." But even if it were to be dignified with such a characterization, it is nevertheless clear that the decision was summary in nature and based upon a misapprehension of the facts. Moreover, the State of Louisiana had no reason to believe that the official land office records were incorrect. As a result, there was no realistic opportunity for a full exposition of the relevant facts. For these reasons, the June 22, 1853, decision of the General Land Office is not res judicata.

Accordingly, I would hold that title to the land vested in the State as a grant *in praesenti*, that the 1853 decision of the land office was of no consequence, and that the 1975 decision of the Eastern States Office should be affirmed.

I further would suggest that this is a case in which the doctrine of after-acquired title may be applicable, as appellants' chain of title originates with a conveyance from the State. However, appellants' avenues for recognition of their claim properly would lie in and to the State of Louisiana.

EDWARD W. STUEBING,
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ADMINISTRATIVE JUDGE GOSS DISSENTING:

In order to grant either the State or appellants the land, the Department must specifically or by implication set aside the Department action of June 22, 1853, which rejected the State application for patent for the erroneous reason that the land had previously been patented. Since the land remains in Federal ownership, the decision that it was patented should be set aside. The doctrine of res judicata—administrative finality cannot be applied.

For Louisiana's *in praesenti* right to be cut off, therefore, the State must be deemed to have (1) voluntarily waived its right or (2) be involuntarily estopped from asserting its claim.

The State of Louisiana refiled its swamp selection on Nov. 20, 1973. Appellants filed Jan. 8, 1974. Under 43 U.S.C. § 1068 (1970) the State claim should be adjudicated prior to any patent to appellant. The State Office should have consolidated the

two cases,[1] and first considered the rights of Louisiana against those of the United States.

Here the *in praesenti* right of the State stands on a higher plane than a Class II color of title right, which is subject to the discretion of the Secretary pursuant to sec. 1068, *supra*. I do not believe that such a discretionary color of title right should be considered an intervening right sufficient to bar the State's claim. It was the error of the Department which originally caused the problem here, and any doctrine by which such error is used to deprive a State of its valuable rights should be very strictly construed.

It has not been shown that Louisiana had or should have had the sufficient knowledge of the true facts and sufficient intent to be charged with voluntary waiver of its rights. As to whether Louisiana waived its unknown interest when it made a tax sale to appellants' predecessors, it appears Louisiana has followed the doctrine that a tax sale is intended to pass and does pass only the interest of the delinquent taxpayer. In the 1964 decision *Kallenberg* v. *Klause*, 162 So. 2d 73 (La. 4th Cir. 1964), writ ref. 246 La. 356, 164 So. 2d 354, the Court discussed the then Louisiana law at 162 So. 2d 75:

> The interest conveyed at a tax sale for delinquent state taxes by a tax collector is only that owned by the delinquent taxpayer. LSA-Revised Statutes, § 47:2183–§ 47:2184.
>
> * * * The adjudication for delinquent taxes to a tax purchaser by a sheriff under LSA-Revised Statutes, § 47:2183, is distinguished from an express adjudication to the State, in that the State is not invested with title to the involved property and, therefore, cannot and does not itself grant title thereto. It possesses only a lien and privilege on the property to secure payment of its delinquent taxes and, in the enforcement of that security can, pursuant to legislative authority, cause the sale of the property. *Dyer* v. *Wilson*, La. App., 190 So. 851.

In the case herein, apparently the State's sale passed no interest to appellants' predecessors; hence there would be no State waiver by virtue of the sale. It is not clear from the record whether appellants' chain of title permits them to claim color of title for any greater interest than that which passed at the tax sale. Appellants should be given the opportunity to present any further analysis of Louisiana law.

For both voluntary waiver and for an involuntary estoppel, Louisiana and appellants are in the same positions as to constructive knowledge and whether they should have looked behind the tract book. There can be no legally cognizable reliance by appellants and their predecessors; here appellants' predecessors, the State and the Department all had the same means of determining the condition of the title. *See Oklahoma* v. *Texas*, 268 U.S. 252, 257–58 (1925). The State cannot be charged with waiver of an unknown right, especially where the State was misled by the United States. This concept was discussed in *Hun-*

[1] The State Office decision lists the number of the Louisiana claim, ES 15099, but does not show Louisiana as a party in its decision.

ter v. *Baker Motor Vehicle Co.*, 225 F. 1006, 1013 (N.D. N.Y. 1915):

> This plaintiff waived nothing, as the doctrine of waiver rests on full knowledge of the facts. 7 Am. & Eng. Encyclopedia of Law, p. 155, citing several cases. It is there said:
>
> "Waiver implies knowledge, and one cannot be held to have forfeited any rights by reason of acts done in ignorance of the extent of those rights.[2] Thus, if workmanship contracted for has been inadequately performed, one who accepts it in ignorance of the deficiency does not waive his right to insist upon the defect. *So, too, if he has been put off his guard or misled by the conduct of the other party, a waiver induced by such deception will not be charged against him.*" [Italics added.]

Neither is Louisiana barred by estoppel through acquiescence or waiver. Appellants cannot be deemed to have relied because of the constructive knowledge discussed *supra*. Further, the State has been guilty of no gross negligence; under *Crary* v. *Dye*, 208 U.S. 515, 521 (1908), there can be no estoppel, particularly since rights to real property are involved:

> The principal of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. *Brant* v. *Virginia Coal & Iron Co.*, 93 U.S. 326 [1876]; *Hobbs* v. *McLean*, 117 U.S. 567 [1886]. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel *Brant* v. *Virginia Coal & Iron Co.*, *supra*. These principles are expressed and illustrated by cases in the various text books upon equitable rights and remedies. * * *

It is clear that the conduct of Louisiana herein does not approach that referred to in *Crary*.

Rather than the State, it could be argued that the United States is estopped to deny relief to Louisiana. *See, e.g., In the Matter of Petitions for Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). The misrepresentation herein, although innocent, was made not by the State but by the Department with a special constructive knowledge of its error. *See Zielinskyi* v. *Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E. D. Penn. 1956). It will be noted that the provisions of 43 CFR 1810.3 would be inapplicable to this case, for Louisiana (unless it is estopped) has a statutory right to the property.

Louisiana filed its application prior to that of appellants, an additional element of priority.

In addition to the above, the facts of this case can be distinguished from those cited by the majority. For example, Class II color of title rights are less than those of an entryman. In *Leutholtz* v. *Hotchkiss*, *supra*—the California Court of

[2] *Accord, Himmelfarb* v. *United States*, 175 F.2d 924 (9th Cir. 1949); *United States* v. *Johnson*, 23 IBLA 349, 356 (1976).

Appeal's decision on which the Department based *State of New Mexico*, *supra*—the acquiescence was with full knowledge of the facts involved and the subsequent *United States* permittee had expended $70,000 in drilling an oil well.

I submit that to carry out the mandate of Congress as expressed in the Swamp Lands Act, the State Office should be affirmed and appellants' color of title application should be denied, subject to evaluation by the State Office of any submissions regarding waiver and the law of Louisiana tax sales. Such submissions could be reviewed by the State Office as part of its adjudication of the State claim, ES 15099.

It may be that appellants must seek their remedy pursuant to any Louisiana equitable relief statutes.

JOSEPH W. GOSS,
Administrative Judge.

ADMINISTRATIVE APPEAL OF JAMES ROSENBERG v. AREA DIRECTOR, PORTLAND AREA OFFICE

6 IBIA 124

Decided *August 1, 1977*

Appeal from an administrative decision of the Area Director, Portland Area Office, Bureau of Indian Affairs, concerning sale of grazing privileges on the Umatilla Reservation, Oregon.

REVERSED IN PART AND AFFIRMED IN PART.

1. Indian Lands: Grazing: Appeals: Generally

A person who has no interest that would be adversely affected by the outcome of an appeal is not an interested party and service of an appeal on such person is not necessary under 25 CFR 2.11(a).

2. Indian Lands: Grazing: Sales: Generally

Submission of more than one bid on any one unit by any given bidder is considered proper unless prohibited by the sale terms.

APPEARANCES: Ralph Currin, Esq., of Currin and Storie, for appellant, James Rosenberg.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before the Board for review and decision pursuant to the provisions of 25 CFR 2.19(b).

Briefly stated, the facts regarding the appeal are as follows:

In response to notice styled Sale of Grazing Privileges, dated Apr. 14, 1975, sealed bids received on or before 9 a.m., Pacific Daylight Time, Apr. 30, 1975, were opened immediately thereafter at the Umatilla Indian Agency in the presence of bidders who desired to attend.

Four bids were received on Range Unit No. 12 which is the subject of

this appeal. The bidders and the amounts bid are as follows:

1. Anderson Land and Livestock—$1,488.29.
2. John K. McLean—$1,200
3. James Rosenberg—$1,550
4. Anderson Land and Livestock—$2,200

Anderson Land and Livestock was declared the high bidder on Range Unit No. 12 and on May 5, 1975, was officially awarded the grazing privileges thereon by the Superintendent of the Umatilla Indian Agency for the period Jan. 1, 1975, to Dec. 31, 1979. All bidders on the unit involved were notified of the award.

Thereafter, on May 23, 1975, James Rosenberg, through his attorney, Ralph Currin, filed a petition appealing the Superintendent's decision awarding the grazing privileges to Anderson Land and Livestock. The petitioner alleges he was the high bidder on the unit in question based on the following assertions:

> That prior to Apr. 30, 1975, your petitioner filed a sealed bid with the Bureau of Indian Affairs, Umatilla Agency, in the sum of $1,550.00 and deposited therewith a Cashier Check No. 68019, issued by First National Bank of Oregon, Pendleton Branch, in the sum of $387.05. There were three bids opened in the amounts as follows:
>
> Anderson Land and Livestock ---------- $1,486.29
> John McClean [*sic*]---------- $1,200.00
> James Rosenberg---------- $1,550.00
>
> Thereafter, Anderson Land & Livestock was permitted to file an additional bid for the same grazing unit in the sum of $2,200.00 and the grazing privileges were awarded to said Anderson Land & Livestock. Your petitioner understood that any bidder was allowed only one bid for each range unit. After Anderson Land & Livestock heard the bid of your petitioner, it was allowed to bid again at a larger figure than its first bid.
>
> Your petitioner alleges that the procedure followed on the allowance of the second bid violates the spirit, if not the law, on sealed, competitive bidding.

Upon receipt of the Notice of Appeal, the Assistant Area Director on June 2, 1975, requested of appellant's attorney via certified mail, return receipt requested, proof of service of the petition on John K. McLean, one of the bidders on Range Unit No. 12.

On July 10, 1975, the Area Director via certified mail, return receipt requested, advised appellant's counsel that proof of service on John K. McLean had not been received and the failure to do so was grounds for summary dismissal of the appeal. The Area Director also advised appellant's counsel that the appeal had been considered on its merits and that the Superintendent's decision awarding the grazing privileges to Anderson Land and Livestock was being sustained. Among other things, the Area Director reported that the record did not show "that an additional bid of a larger figure was submitted by Anderson Land and Livestock after the bid of Mr. Rosenberg was read at the bid opening."

On Aug. 1, 1975, the Area Director further advised appellant's counsel that the appeal of May 23, 1975, had been dismissed on July 10, 1975, specifically for failure to file proof of service on John K. McLean as required by 25 CFR

2.11(a). No mention is made in the letter of August 1, 1975, that the merits of the appeal of May 23, 1975, had been considered and a decision rendered thereon.

It is from this decision of Aug. 1, 1975, that the appellant on Aug. 7, 1975, filed a notice of appeal to the Commissioner, Bureau of Indian Affairs, setting forth the following grounds:

1. The action of the Area Director in dismissing the appeal was arbitrary and contrary to law because John McLean is not an interested party;

2. The appellant has not been heard on the merits of his appeal which challenges the procedure whereby a bidder is permitted two sealed bids in different sums on one grazing range unit at one bid opening.

On Jan. 27, 1975, the Acting Deputy Commissioner of Indian Affairs via certified mail, return receipt requested, advised appellant's attorney that the Board of Indian Appeals would review and render a final decision on the appeal since the Commissioner had failed to act on the appeal within the 30-day limit set forth in 25 CFR 2.19. Copies thereof were furnished the Portland Area Director, Anderson Land and Livestock Company, John K. McLean and Leslie Minthorn of the Confederated Tribes of Umatilla.

No copy of the letter of Jan. 27, 1975, was furnished the Board. As a consequence, the Board had no knowledge of the intended referral of the appeal until July 13, 1977, when the appeal record was submitted to the Board by the Bureau of Indian Affairs. No explanation was given as to why the Board had not been furnished a copy of the Jan. 27, 1975, letter.

The passage of some 2½ years without any action on the appeal has for all intents and purposes mooted the appeal. However, it is the opinion of this Board that a decision is in order to dispose of the issues raised in the appeal and to clarify the record in regards thereto.

[1] The Board is in agreement with appellant's first contention that John K. McLean was not an interested party for service purposes under the provisions of 25 CFR 2.11(a) which provide for service on *each interested party known to him as such* (Italics supplied). The appellant in this particular instance did not consider McLean as such since he would not be affected by the outcome of the appeal. 25 CFR 2.1(b) defines "interested party" as any person whose interest would be adversely affected by proceedings conducted under this part. McLean, in the opinion of this Board, had no interest in the matter that would be adversely affected by the final outcome of the appellant's appeal. Accordingly, the Area Director's decision holding to the contrary should be reversed.

The Board however is not in agreement with the appellant's second contention that no bidder is permitted two sealed bids in different sums on one grazing range unit at one bid opening.

[2] An examination of the terms of the sale of grazing privileges indicates no prohibition against the submission of more than one bid on any one unit by any given bidder. The record shows Anderson Land and Livestock submitted two separate bids on Range Unit No. 12, one on Apr. 29, 1975, which was received by the Agency at 3:55 p.m., and the other on Apr. 30, 1975, at 8:55 a.m. The record further indicates all bids submitted on Range Unit No. 12 were received prior to 9 a.m., Pacific Daylight Time, and opened thereafter in accordance with the terms of the sale. We find no merit in appellant's allegation that Anderson Land and Livestock was permitted to file an additional bid after appellant's bid was opened and heard. The evidence clearly does not support such an allegation. On the contrary, the evidence indicates the four bids on Range Unit No. 12 were properly received and opened and the award made accordingly. For the foregoing reasons the Area Director's decision of July 10, 1975, sustaining the Superintendent's decision in awarding Anderson Land and Livestock Range Unit No. 12 should be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's decision of July 10, 1975, summarily dismissing the appellant's appeal of May 23, 1975, is hereby REVERSED for the reasons hereinabove stated and the Area Director's decision sustaining the Superintendent's decision awarding Range Unit No. 12 to Anderson Land and Livestock is hereby AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

WM. PHILIP HORTON,
Administrative Judge.

THE EFFECT OF MINING CLAIMS ON SECRETARIAL AUTHORITY TO ISSUE PROSPECTING PERMITS FOR COAL AND PHOSPHATE

Coal Leases and Permits: Permits: Generally

A prospecting permit for coal cannot be issued for land subject to a claim. If a prospecting permit for coal purports to cover land subject to a mining claim, it is invalid as to that land. Consequently, in demonstrating a discovery of coal in commercial quantities in land subject to a prospecting permit, the permittee must exclude coal in land covered by a mining claim.

Phosphate Leases and Permits: Permits

A prospecting permit for phosphate cannot be issued for land subject to a claim. If a prospecting permit for phosphate purports to cover land subject to a mining claim, it is invalid as to that land. Consequently, in demonstrating a discovery of a valuable deposit of phosphate in land subject to a prospecting permit, the permittee must exclude any phosphate in land covered by a mining claim.

Multiple Mineral Development Act: Generally

The Multiple Mineral Development Act did not amend the Mineral Leasing Act to authorize the issuance of prospecting permits for coal which cover lands subject to mining claims.

M-36893

August 2, 1977

OPINION BY SOLICITOR KRULITZ

OFFICE OF THE SOLICITOR

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: THE EFFECT OF MINING CLAIMS ON SECRETARIAL AUTHORITY TO ISSUE PROSPECTNG PERMITS FOR COAL AND PHOSPHATE

Question Presented

Sec. 9(b) of the Mineral Leasing Act of 1920 states:

> Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any *unclaimed*, undeveloped area, the Secretary of the Interior is authorized to issue * * * a prospecting permit * * *. (Italics added.)

30 U.S.C. § 211(b) (1970).

Almost identical language was found in sec. 2(b), 30 U.S.C. § 201(b) (1970), prior to its amendment by sec. 4 of the Federal Coal Leasing Amendments Act of 1975, Aug. 4, 1976 (90 Stat. 1085). I have been asked to determine what effect the emphasized language has on the Secretary's authority to issue prospecting permits for those two minerals on lands subject to mining claims located under the Mining Law of 1872, 30 U.S.C. §§ 21-54 (1970).

In a memorandum dated Jan. 19, 1977, then Deputy Solicitor Garner concluded that lands included in an unpatented mining claim cannot be made subject to a prospecting permit for phosphate or coal. The opinion stated that a coal or phosphate permit which included land embraced in a mining claim was a nullity with respect to that land, and any discovery on that land could not support the issuance of a noncompetitive lease. This memorandum was not formally published.

Because of the importance of the question, I have reexamined the matter and agree with the conclusion of the memorandum.

Summary of Opinion

In 1920, Congress established a limitation on the issuance of coal prospecting permits to "unclaimed" areas. It failed to repeal that limitation in the Multiple Mineral Development Act of 1954. In 1960, Congress enacted an amendment containing an identical limitation on the issuance of prospecting permits for phosphate. Consequently, I conclude that Congress intended permits for these two minerals to be limited to "unclaimed" areas. This precludes the issuance of valid coal and phosphate prospecting permits in those areas subject to an unpatented mining claim, but does not mean that previously issued prospecting permits which include claimed land are invalid; rather, it means that those permits are applicable only to those lands embraced in the permits which were "unclaimed" at the time the permits were issued.

I. Background—Passage of Mineral Leasing Act

In 1920, Congress enacted legislation prescribing how private parties could acquire rights to federally owned coal, sodium, oil shale, gas, oil and phosphate,[1] which made a radical departure from the prior method of disposing of mineral resources owned in the United States. Prior to 1920,

—These minerals with the exception of coal were subject to location under the Mining Law of 1872, 30 U.S.C. § 21–54, which had allowed prospectors and mining operators, without the prior approval of the Secretary of the Interior, to explore for mineral resources anywhere on the public lands

—if the exploration was successful, a person could develop the minerals and was guaranteed the right of exclusive possession against all including the United States

—he could also become the owner of the property containing the minerals by filing a patent application and paying a minimal charge for the land

—Coal was subject to purchase under the coal land laws, 30 U.S.C. § 71–77, either through application, 30 U.S.C. § 71, or through a preference entry earned by opening and improving a coal mine, 30 U.S.C. § 72. *See* generally, *Regulations*, 46 L.D. 131 (1917).

In 1920, legislation authorized the Secretary to grant prospecting permits for coal, 30 U.S.C. § 201(b) (since repealed by the Federal Coal Leasing Amendments Act of 1975); oil and gas, 30 U.S.C. § 221 (since repealed); and sodium, 30 U.S.C. § 261 (1970). Of these four minerals, only the coal section limited the Secretary to issuing permits on "unclaimed. undeveloped" areas.[2]

[1] In 1917, Congress had removed potassium from the mining laws, and introduced a system similar to that for coal, oil, gas, and sodium under the 1920 Act. In 1926, Congress removed sulphur in Louisiana (and later, in 1932, in New Mexico) from the mining laws, and treated it similarly to those minerals that were included in the Mineral Leasing Act. 30 U.S.C. § 271–276 (1970). In 1927, Congress included potassium under the Mineral Leasing Act, 30 U.S.C. § 281–87 (1970).

[2] Sec. 2(b) was amended on Aug. 4, 1976 by sec. 4 of the Federal Coal Leasing Amendments Act of 1975 (90 Stat. 1083, 1085), and no longer authorizes the granting of prospecting permits for coal. Although the Mineral Leasing Act, *as amended* and supplemented, also authorizes the Department to issue prospecting permits for sodium, sulphur, and potassium, 30 U.S.C. §§ 261, 271, 281, these sections do not

(Continued)

There is no clear explanation in the legislative history of the 1920 Act why there was a limitation of coal prospecting permits to "unclaimed" areas. The bill which became the Mineral Leasing Act of 1920 did not, as introduced, permit prospecting permits for coal. S. 2775, 66th Cong., 1st Sess. A section authorizing such permits was added in committee without extensive discussion. H. Rep. No. 398, House Committee on Public Lands, p. 13 (1919).

Because the reason for including the "unclaimed" limitation is not explained in the legislative history, there is no clear expression of Congress' motive. It is, however, worth noting that in previous deliberations over bills to create a mineral leasing system, Congress had rejected amendments which would have authorized prospecting permits for coal. The reason expressed was that no coal exploration was needed; there were large areas of the public lands where coal was known to exist:

> Twenty million acres of [public land withdrawn as valuable for coal] has been classified and offered for sale so the areas of coal are known. It is not like oil and other unknown minerals. No preliminary permit is here necessary. * * *

51 Cong. Rec. at 15182 (1914) (Remarks of Congressman Ferris).

In light of this background, the addition of the "unclaimed" limitation to the bill in 1919 was presumably to ensure that coal prospecting permits would never be granted on lands that had been explored for any mineral. Congress probably determined, in other words, that it is not in the public interest for persons to obtain prospecting permits, and eventually noncompetitive leases, for coal in areas where, under mining claims or through other mineral development, knowledge has already been obtained about the land's potential value for coal.[3]

II. The Meaning of "Unclaimed"

The Department has never formally defined "unclaimed" as it was used in 30 U.S.C. § 201(b) (1970). The Department has, however, ruled several times on the meaning of the phrase "valid claims," which is used in sec. 37 of the Mineral Leasing

(Continued)
use the words "unclaimed, undeveloped." However, the Bureau of Land Management's regulations, as they were recodified in 1970, state that prospecting permits will be granted only on "unclaimed, undeveloped" lands. 43 CFR 3510.1–1.

[3] This explanation is further supported by Congress' limiting the issuance of coal prospecting permits to "undeveloped" as well as "unclaimed" lands. Just as when land has been claimed under the Mining Act, when land has been "developed" for its mineral value under some other law, knowledge of its potential value for coal has probably been obtained. By inserting this limitation, Congress deemed it improper for a person with that prior knowledge gained under another statute to obtain a noncompetitive lease. Because of the difficulty of determining whether a person had such prior knowledge, Congress made the prohibition a blanket one. *See, e.g., Sinclair Mines, Inc.*, A–27160 (Aug. 18, 1955) (the Department cannot grant a prospecting permit for lands on which abandoned mines are present).

Act. 30 U.S.C. § 193 (1970). That phrase, the Department has said, includes both claims under the mining laws and claims under the coal land laws, and any other claims to the land which may have existed. *Oil and Gas Instructions*, 47 L.D. 437 (1920) (Oil and gas mining claims are valid claims under § 37 of the Mineral Leasing Act); *John B. Forrester*, 48 LD. 188, 190 (1921) (a coal land claim can be valid under sec. 37, as are other types of claims which if regularly followed up would ripen into ownership of the land); *Accord*, *Southport Land & Commercial Co.* v. *Udall*, 371 F.2d 526 (9th Cir. 1967). Based on these decisions, "unclaimed" land must be that land which is not subject to a valid mining claim, coal land claim, or any other claim which could ripen into full ownership of the land.

III. Early Administration of Mineral Leasing Act: Mining Claims and Mineral Leases

The initial regulations of the Department implementing the Mineral Leasing Act did not give any special attention to the "unclaimed" limitation on the issuance of coal permits. 47 L.D. 489–512 (1920).

In fact, the Department interpreted the Mineral Leasing Act to prohibit the issuance of permits and leases for all leasable minerals on lands subject to valid mining claims.

Although this result was not expressly dictated by the Mineral Leasing Act (except for the express limitation on coal prospecting permits), it was based on the principle that mineral leases and mining claims were incompatible. For example, since the Supreme Court had ruled in *Deffenback* v. *Hawke*, 115 U.S. 401, 406 (1885), that the Department could not grant less than full title to a mining claimant, the Department decided in 1924 that a mining claim could not be located on lands subject to a mineral lease. *Joseph E. McClory*, 50 L.D. 623, 626 (1924).

More to the point here, the Department also ruled that a mineral lease or permit could not be issued on lands subject to a mining claim. In *Henry W. Pollack*, 48 L.D. 5 (1921), the Department ruled that a subsisting mining location barred the issuance of a prospecting permit under the Act of October 2, 1917, because "the Land Department cannot, with propriety, recognize any other disposition or appropriation of the land unless and until it has been shown that the mining claim has been abandoned." 48 L.D. at 10. Although made in the context of the Potassium Act, the *Pollack* ruling was equally applicable to the Mineral Leasing Act. And in fact, the Department later ruled leases under the 1920 Act could not be granted for lands subject to valid mining claims. *Ohio Oil Co. v. W. F. Kissinger*, 58 I.D. 753 (1944); *Marion F. Jensen*, 63 I.D. 71 (1956).[4]

[4] The rule involved in these cases is not unique to the Mineral Leasing Act. The Department had long had a rule that conflicting entries for the same land could not be permitted. *E.g.*, *Arthur K. Lee*, 51 L.D. 119 (1925) (no mining claims can be located on classified coal lands that are valuable for coal). *See also*, *Roos* v. *Altman*, 54 I.D. 47 (1932), and cases cited in that decision.

From 1920 until 1954, then, the Department construed its authority under the Mineral Leasing Act and the Mining Law, to preclude the issuance of a mineral lease on lands subject to a mining claim, and vice-versa. This rule applied not only to coal, which uniquely contained the unclaimed, undeveloped" language, but to all leasable minerals.[5] As the Department said in one case, "[T]here is no record in the land office of lands covered by mining claims, and one who takes an oil and gas lease, or makes any entry on public lands, does so subject to the possibility that a valid mining claim exists thereon." *Marion F. Jensen*, *supra* at 74. Because of the Department's interpretation of the Mineral Leasing Act as it applied to other minerals, there was no occasion prior to 1954 to specially address the unique limitation on coal prospecting permits to "unclaimed" land.

IV. Enactment of the Multiple Mineral Development Act

When the demand for uranium, oil and gas rapidly increased after World War II, the conflicts between mineral leases and mining claimants became significant because many areas that were potentially valuable for uranium were also valuable for oil and gas leasing. At that time some sixty million acres of land were covered by oil and gas leases. These lands were off-limits to location for uranium claims. Nonetheless, many persons located mining claims on them. Congress temporarily relieved this problem in 1953 by validating a limited class of illegally located claims. Act of Aug. 12, 1953, 30 U.S.C. §§ 501–505 (1970).

In 1954, Congress passed the Multiple Mineral Development Act, 30 U.S.C. §§ 521–531 (1970), as a permanent solution to this problem. The purpose of that legislation was to eliminate conflicts between those claiming under the Mineral Leasing Act, and those claiming minerals under the Mining Law. In the past, these conflicts "prevented mineral development of the same tracts of public lands from going forth under both systems." S. Rep. No. 1610, 83d Cong., 2d Sess. 1 (1954).

The legislative history makes clear that, although the language of the statute was general, Congress was primarily concerned with the immediate problem of conflicts between uranium and oil and gas development. For example, Senate Report No. 1610, 83d Congress, 2d Session, states at p. 1 that:

> The intent of the bill S. 3344 is to resolve conflicts between the mining laws of the United States and the Mineral Leasing Act which have prevented mineral development of the same tracts of the public lands from going forward under both systems. Land on which mineral locations have been made under the Mineral Leasing Act, and on the other hand, land covered by an oil and gas lease or a permit or an application or offer for the same

[5] Prospecting permits for phosphate were not authorized until 1960. *See* pp. 9–10, below.

under the Mineral Leasing Act or known to be valuable for oil and gas or other Leasing Act minerals could not be located under the mining laws.

S. 3344 would permit the development of mineral resources of the public lands, including uranium, to go forward on the same tracts of land under both systems. It would thus be a step forward in the development of the natural resources of the nation. An immediate effect would be the opening of some 60 million acres of public land, now under oil and gas leases, to location for uranium and other minerals. At the same time, it would stimulate oil and gas development on the public lands by authorizing operations for leasable minerals on lands open to location under the mining laws, and by establishing a means for determining the validity of any rights claimed for Leasing Act minerals under patents and mining claims located prior to the effective date of this Act.

The Multiple Mineral Development Act did not expressly repeal the unique prohibition against the issuance of coal prospecting permits in areas subject to mining claims. Indeed, there is no indication that either the House or the Senate addressed the question of the effect of the Multiple Mineral Development Act on the Department's authority to issue coal prospecting permits. Except for the fact that the language of the 1954 Act does not expressly exclude coal prospecting permits from its ambit—that is, it is generally phrased to cover all minerals[6]—there is nothing to indicate that Congress intended in 1954 to repeal the special limitation on coal prospecting permits. In particular, there is no indication that Congress determined that the presumed reason for originally including the limitation—the prevention of unfair advantage against the United States because of knowledge of coal lands gained by prospecting for non-leasable minerals—had disappeared with the passage of time.

Repeals by implication are generally not favored; *Morton* v. *Mancari*, 417 U.S. 535, 549–51 (1974); *United States* v. *Greathouse*, 166 U.S. 601 (1897). Rather, courts have usually held that Congress must express itself clearly and unequivocally in order to repeal existing law. The presumption is based on the fact that the legislature is "presumed to envision the whole body of law when it enacts new legislation; and, therefore, if a repeal of a prior law is intended, expressly to designate the offending provisions rather than to leave the repeal to arise by necessary implication of the later enactment." 1A Sutherland *Statutory Construction*, § 23.10 (4th Ed. 1972); *see also*, *Continental Insurance Co.* v. *Simpson*, 8 F.2d 439 (4th Cir. 1925). The Supreme Court has recently observed: "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by impli-

[6] There is mention in some of the testimony in Committee hearings on the 1954 Act that the Act would apply to coal leases. *See, e.g.*, Hearings before the Subcommittee on Public Lands, Committee on Interior and Insular Affairs, United States Senate, on S. 3344, 93d Cong., 2d Sess., p. 40 (May 18, 1954) (Testimony of Clair M. Senior, private attorney). It is undisputed that the 1954 Act applies to competitive coal leases; the only question here is whether it also applies to coal prospecting permits. There is no mention in the legislative history of that narrower issue.

cation is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, *supra* at 550 (citation omitted). This is not the case here. Construing the 1954 Act not to repeal the "unclaimed" limitation on coal permits is entirely consistent with Congress' original decision to include a unique limitation on coal permits in the Mineral Leasing Act of 1920.

It is also an axiom of interpretation that ordinarily every word in a statute is to be given meaning, and the plain meaning of words is to be enforced. *Cf. District of Columbia National Bank* v. *District of Columbia*, 348 F. 2d 808, 810 (D.C. Cir. 1965) ("The plain meaning of the words is generally the most persuasive evidence of the intent of the legislature * * * and must be given application, however hard or unexpected the particular effect, where ambiguous language calls for a logical and sensible result.") I construe the fact that Congress left the "unclaimed" limitation in the coal section after 1954 to mean that it was intended to remain a limitation on the issuance of coal prospecting permits.

V. 1960 Amendment to the Mineral Leasing Act Authorizing Phosphate Prospecting Permits

In fact, only six years later, Congress gave a further clear indication that it intended "unclaimed" to remain in the Mineral Leasing Act. In 1960, Congress amended the Mineral Leasing Act to provide for prospecting permits for phosphate. In doing so, it used the "unclaimed, undeveloped" language that had previously been included in the coal prospecting permit provisions. 30 U.S.C. § 211(b) (1970).

The legislative history showed that Congress expressly parroted the language of the coal section. In fact, both the House and the Senate bills, as introduced, merely added "phosphate" to the existing section authorizing the issuance of prospecting permits for sodium (30 U.S.C. § 261 (1970), which did not contain a limitation to "unclaimed" land. (S. 2061, 86th Cong., 1st Sess.; H.R. 7987, 86th Cong., 1st Sess.) Both the House and Senate bills were reported out of committee in revised form, modeled after the coal section, upon the request of the Department.[7]

Other sections in the Mineral Leasing Act authorized the issuance

[7] Prior to 1960, the Department issued noncompetitive leases for phosphate, even though such leases were not explicitly authorized by § 9 of the Mineral Leasing Act. Such leases served essentially the same purpose as prospecting permits, but were not limited to unclaimed, undeveloped areas. Believing that there were practical problems with issuing noncompetitive leases for phosphate, the Department supported the 1960 amendment giving it express authority to issue prospecting permits. Although an argument can be constructed that Congress, desiring to encourage exploration for phosphate, would not have limited permit issuance more strictly than had previously been the case, this argument finds only faint support in the legislative history, *see* H. Rep. No. 1278, 80th Cong., 2d Sess. (1960), and is refuted by the deliberate selection of the coal provision as the model for this amendment.

of prospecting permits for other minerals without such a limitation. *See, e.g.*, 30 U.S.C. § 201 (sodium); 30 U.S.C. § 271 (sulphur); 30 U.S.C. § 281 (potash). Because Congress failed to select any of these as models for the phosphate prospecting permit section, and because phosphate, like coal, is a bedded mineral whose existence may be discovered relatively easily, Congress' selection of the coal permit provision as a model for the phosphate permit section must be deemed deliberate.

VI. Subsequent Interpretation by the Department

The Department has formally considered whether the existence of a mining claim barred the issuance of a phosphate prospecting permit in only one case since 1960. In *Arthur L. Rankin*, 73 I.D. 305 (1966), Rankin appealed from a decision by the Chief, Branch of Mineral Appeals, Bureau of Land Management, that dismissed his protest against issuance of a phosphate prospecting permit to Kenneth Davis. Rankin owned two mining claims, on which he claimed to have discovered gold and silver, on the land included in Davis' permit. He had also filed a phosphate prospecting permit application for that land, and claimed that he, rather than Davis, should obtain the phosphate permit.

The decision states that before any permit could be issued, it must first be determined that the land applied for is an "unclaimed, undeveloped" area. 73 I.D. at 308. Since Rankin's mining claims had not been declared invalid, they "must be regarded as outstanding *prima facie* valid claims," and further: "Consequently, the lands embraced in them cannot be considered as 'unclaimed' lands for which phosphate prospecting permits may be issued." 73 I.D. at 314. And if Rankin takes no further action, the decision states, his own permit application "will have to be rejected as being for land which is not 'unclaimed.'" 73 I.D. at 315. The holding, then, is that land is not "unclaimed" for the purposes of 30 U.S.C. § 211(b) if it is covered by an outstanding *prima facie* valid mining claim.

The import of the decision is however, not so straightforward once its surface is scratched. The decision discusses the historical conflict between mining claims and mineral leasing, and appears to assume that the Multiple Mineral Development Act of 1954 resolved this conflict insofar as phosphate was concerned. (Of course, it must be remembered that it *did* resolve the conflict until 1960, when Congress enacted the special provision for phosphate permits with the "unclaimed" limitation.) But the decision did not address itself at all to the impact of the 1960 amendment on the 1954 Act. Instead, it remanded the case for further proceedings, noting that Davis could institute proceedings under sec. 7 of the Multiple Mineral Development Act to attempt to eliminate Ran-

kin's right to the phosphate under his mining claim. 73 I.D. at 315.[8]

On remand, Rankin relinquished any rights to phosphate, and also withdrew his application for a phosphate prospecting permit. He retained, however, his right to nonleasable minerals under the unpatented mining claims he held. Subsequently, Davis was issued a prospecting permit for phosphate.

The ultimate result of this dispute assumes that the holder of a mining claim may waive and surrender his rights to a leasable mineral, and thus permit issuance of a prospecting permit. It assumes, in other words, that sec. 8 of the Multiple Mineral Development Act, authorizing such a waiver, applies.

If this was the interpretation implicitly adopted, I find it contrary to the spirit as well as language of the Mineral Leasing Act. If the purpose of the "unclaimed" limitation was to prohibit a person from enjoying a noncompetitive lease on the basis of knowledge he obtained under a mining claim, it should also bar the relinquishment of that right, especially if for consideration, to another who may reap that same benefit. Although there is no evidence whether Rankin shared with Davis whatever knowledge he had about phosphate deposits on his claim, the plain language of the Act is that a permit cannot be issued for land on which a mining claim exists. Allowing retroactive surrender of such a mining claim to reinstate or validate a previously issued permit is contrary to this language and its assumed purpose.

It is readily apparent that the *Rankin* decision is confused and confusing. Specifically, its language and reasoning seem not to be entirely consistent with the eventual outcome—the issuance of a prospecting permit to Davis. It expressly gives meaning to the "unclaimed" limitation on the one hand, and then appears implicitly to deny it meaning on the other.

In seeking to ascertain *Rankin's* meaning, it is worth noting that no evidence of a consistent administrative practice on this issue has been discovered. Although the ultimate result of the *Rankin* dispute was that a phosphate prospecting permit was issued in a "claimed" area, no regulation, administrative decision, instructional memorandum, or other written evidence of Departmental policy was, to the best of my knowledge, ever issued either before or after the *Rankin* decision.

Because of its internal confusion, and its failure to consider the effect of the 1960 amendment on the 1954 Act, this decision provides little help in determining whether a phosphate prospecting permit may be issued on lands subject to mining claims. To the extent that it may hold that phosphate prospecting

[8] The decision notes the incongruity of Rankin's argument that the land was "claimed" under the Mining Act, because his own pending application for a phosphate prospecting permit assumed that the land was "unclaimed" *ibid.*

permits issued under the 1960 Act remain subject to the Multiple Mineral Development Act of 1954, despite the "unclaimed" limitation subsequently imposed on such permits by Congress, I hold it is clearly inconsistent with the manifest congressional intent.[9]

VII. The Effect of This Decision

It should be noted that the effect of this interpretation is a narrow one. It does not prevent the Department from competitively leasing coal or phosphate on lands subject to a mining claim. Rather, it only precludes issuance of a prospecting permit for these minerals. As suggested above, this comports with Congress' presumed reason for originally incorporating the "unclaimed" limitation into the coal subsection; *i.e.*, to limit exploration to situations where no previous knowledge of the character of the land had been obtained through mineral exploration under the Mining Act of 1872 or the coal land laws.

The only issue remaining is whether the Department should examine existing preference-right leases resulting from prospecting permits which may have been issued on "claimed" areas. This could involve permits extending back to 1954 for coal[10] and 1960 for phosphate. Because this opinion represents the first time the question has been squarely and fully considered, the practical effect of making this opinion retroactive is not clear.

To the extent that existing leases may have been based on invalid permits, however, I must consider whether this opinion should be made applicable to them. Since the Department has not had a well-considered and unequivocally expressed position on this issue, but since its agents may have issued leases pursuant to an interpretation contrary to the new one expressed herein, the observation of the Court of Appeals in *Atlantic Richfield Co.* v. *Hickel*, 432 F. 2d 587, 591–92 (10th Cir. 1970) is particularly apt: "[T]he United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the United States be waived by unauthorized agents' acts." The acquiescence by the government's agents and acceptance of a lesser royalty were held in that case not to estop the government or alter the Secretary's obligation to enforce the law. *See also*, *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 185 (1957); *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384–85 (1947); *Utah Power and Light Co.* v. *Morton*, 243 U.S. 389, 410 (1917).

There are several examples where the Department has concluded that

[9] As noted earlier, however, this holding seems consistent with the *Rankin* decision's conclusion that lands embraced in valid mining claims generally cannot be considered as "unclaimed" lands for which prospecting permits may be issued.

[10] Prior to passage of the Multiple Mineral Development Act of 1954, the Department's policy was to issue coal permits only in "unclaimed" areas. After 1954, I can only assume that policy remained in effect, since there is no record of a contrary policy being adopted.

prior practice or interpretation was simply erroneous. In some of these, the revised interpretation was made applicable to claims or applications then pending before the Department; *e.g.*, where the interest of the United States in preventing improper disposition of the public lands was deemed to outweigh the speculative interest of oil shale claimants. *United States* v. *Winnegar*, 81 I.D. 370 (1974), reversed *sub nom.*, *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977). Appeal pending No. 77-13-46 (10th Cir.) (reversal of long-standing interpretation of application of Mining Law of 1872 to oil shale claimants).

In others, the ruling was made prospective only. For example, in *Issuance of Noncompetitive Oil and Gas Leases on Lands Within the Geologic Structure of Producing Oil and Gas Fields*, 74 I.D. 285 (1967), the Solicitor concluded that, contrary to prior practice, noncompetitive oil and gas lease offers must be rejected if they were included in a known geologic structure any time before the lease was issued. 74 I.D. at 285–86. Failure to apply this principle in the past undoubtedly cost the United States revenue—at a minimum, leases were obtained without competitive bidding or the payment of bonuses. Applying the doctrine to existing leases would have, on the other hand, possibly resulted in the cancellation of scores of leases, some of which could have been almost fifty years old. Consequently, the decision was made prospective only. 74 I.D. at 290. This position was approved in *McDade* v. *Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd*, 494 F. 2d 1156 (D.C. Cir. 1974). *See also*, *Franco Western Oil Co.* (*Supp.*), 65 I.D. 427 (1958), *approved*, *Safarik* v. *Udall*, 304 F. 2d 944 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 901 (1962).

There is no specific evidence to suggest that these lessees acted in less than good faith in securing these leases. And, a requirment that lessees relinquish those portions of their leases which are subject to mining claims could impose a serious burden on them. Coal or phosphate is being extracted pursuant to some of these leases. People are employed in planning, mining, and reclamation; other are relying on the coal or phosphate being produced. Consequently, this decision should not apply to existing leases.

There is much less reason not to apply the opinion to pending applications. The "unclaimed" limitation is apparent on the face of the statute. No applicant has a justifiable reliance interest until a lease is actually granted. There should be no adverse impact on coal or phosphate production. In "claimed" areas where deposits worth mining exist, the Department may, consistent with this opinion, decide to offer these deposits for competitive leasing. In general, considering the purpose of the "unclaimed" limitation

and the fact that no firm precedent or longstanding interpretation is being reversed, this opinion should apply to existing preference-right lease application.

This interpretation does not render illegal or invalid all outstanding prospecting permits for coal and phosphate; it merely means that those permits are applicable only to the lands embraced within them which are "unclaimed." This result comports with the consistent practice of the Department not to warrant title when it issues a permit or lease. For example, the Solicitor has decided that an oil and gas lease is applicable only to those lands to which it may be applied under the law. In *Solicitor's Opinion, M–36051 (Supp.)* (Nov. 1, 1951), the Solicitor stated (p. 2):

> The situation here is analogous to other situations which have arisen in this Department. It is my understanding that, where an oil and gas lease has been issued covering both land which the Department had authority to lease and, inadvertently, land which the Department had no authority to lease, it has been the customary procedure to notify the lessee that the land which the Department had no authority to lease will be eliminated from the lease and that the lease shall henceforth cover only the land which the Department had authority to lease.

Applying this standard to outstanding phosphate and coal prospecting permits means that any land on which a mining claim had been located must be excluded from the scope of the permit, even though the land description in the permit appears to include it. A prospecting permit which includes land embraced in a mining claim is, in other words, a nullity with respect to that land, and any discovery on that land could not support the issuance of a noncompetitive lease.

This Solicitor's Opinion was prepared with the assistance of Frederick Ferguson, John Leshy and Robert Uram.

LEO M. KRULITZ,
Solicitor.

ARMCO STEEL CORPORATION

8 IBMA 88

Decided *August 17, 1977*

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge George A. Koutras (Docket No. 75–669), dated June 10, 1975, granting an application for review filed by Armco Steel Corporation pursuant to sec. 105(a) of the Federal Coal Mine Health and Safety Act of 1969, and cross-appeal by Armco from such portion of said decision which rejected Armco's theory on the procedural validity of the order sought to be reviewed.

Affirmed in result.

Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Specificity

Where a sec. 104(a) withdrawal order fails to give *any* description of the conditions or practices assertedly creating the alleged imminent danger, the various portions of the Act relating to the sec. 104(e) requirement that orders issued contain a detailed description of such

conditions or practices demand that such an order be vacated.

APPEARANCES: Robert W. Long, Esq., Associate Solicitor, Thomas Mascolino, Esq., Assistant Solicitor and Robert A. Cohen, Esq., Trial Attorney, for appellant/cross-appellee, Mining Enforcement and Safety Administration; Stephen H. Watts II, Esq., and William C. Payne, Esq., for appellee/cross-appellant, Armco Steel Corporation.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

This appeal has been taken by the Mining Enforcement and Safety Administration (MESA) from a decision of Administrative Law Judge George A. Koutras (Judge) in which decision the Judge concluded contrary to MESA's position and vacated the order of withdrawal which was the subject of the action. The prevailing party on that issue, Armco Steel Corporation (Armco), cross-appealed, contending that it was error for the Judge to reject its argument that the subject order was procedurally invalid.

On Sept. 30, 1974, Armco notified MESA that an involuntary roof fall burying a continuous mining machine, the machine operator, and a helper had occurred at about 9:15 that evening in the No. 7 right section of Armco's No. 9 Mine near Twilight, West Virginia. MESA, following standard procedure, in turn notified various of its people and dispatched inspectors to the scene. Inspector William S. Pauley arrived at the mine at approximately 1:30 a.m. on Oct. 1, 1974, and shortly thereafter entered the mine and surveyed the fall scene. After observing conditions and conducting certain rudimentary tests, Inspector Pauley at about 4 a.m. the same morning issued an order of withdrawal covering the No. 7 right section under sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).[1] This order, designated 1 WSP, ultimately became the subject of the action which led to the instant appeal. The order described the conditions which led to its issuance as follows:

> A roof fall-type fatal accident has occurred in the 7 right section of this mine which indicates that "imminent danger"-type conditions and/or practices exists [*sic*] at the mine, which could reasonably be expected to result in the injury or death to another person before such conditions and/or practices are abated should normal mining operations be permitted to continue. Therefore, this Withdrawal Order is issued in accordance with section 104(a) of the Act, to prevent such an occurrence until the heretofore conditions and/or practices are abated. This Withdrawal Order shall remain in effect for the "area of the mine" as described below until such conditions and/or practices are abated and the affected areas of the mine are returned to normal during which time an investigation will be conducted to establish the details of the accident and suitable procedures to pre-

[1] 30 U.S.C. §§ 801–960 (1970).

vent a future occurrence in accordance with section 103 of the Act.

The next day, Oct. 2, 1974, another MESA inspector, Darlie F. Anderson, a roof control expert, entered the mine and conducted an extensive examination of roof conditions. The results of that examination were twofold. First, Inspector Anderson modified the above-mentioned withdrawal order to describe the conditions precedent to a termination of the order. Second, Inspector Anderson's findings were incorporated in a report of the incident bearing the name of Inspector Pauley as author. Armco having satisfied the conditions contained in Inspector Anderson's modification, MESA terminated the order on Oct. 7, 1974.

On Oct. 29, 1974, Armco filed an Application for Review of the order, claiming that it was invalid because (a) it did not comply with sec. 104(e) of the Act and (b) it was issued in the absence of a valid imminent danger finding. After a hearing conducted on Feb. 4, 1975, the Judge, on June 10, 1975, issued a decision in which he granted the Application for Review and vacated the order upon concluding that "[t]he preponderance of the evidence and the facts adduced fail to support a finding that the roof support * * * was inadequate and constituted an imminent danger * * *." As to the procedural claim, the Judge found that although the order failed to give a detailed description of the imminent danger conditions, this essentially was a technical defect and that insofar as Armco was apprised of the conditions and was not prejudiced by the defect, the order effectively was validly issued.

On June 27, 1975, MESA filed a Notice of Appeal in regard to the Judge's decision herein. On July 2, 1975, Armco noted a cross-appeal on that portion of the Judge's decision which concluded adversely to Armco's procedural claim. Both parties filed timely reply briefs in regard to the respective appeals.

Contentions of the Parties

On appeal, MESA contends that there were at least four errors in the Judge's decision according to its characterizations of the nature of his decision and of the points he considered in reaching that decision. In view of our emphasis in this case and our decision on Armco's cross-appeal, it is unnecessary for us to reach MESA's appeal. It is thus similarly unnecessary to set out MESA's contentions and Armco's counter arguments on MESA's appeal.

As to its cross-appeal, Armco contends that insofar as the Judge agreed that the subject order failed to meet the particularity requirements of sec. 104(e), he erred in rejecting Armco's theory based on that failure.[2] The Judge's rationale for ignoring the technical defect of

[2] Sec. 104(e) reads as follows:
"Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard and, where appropriate, a description of the area of the coal mine from which persons must be withdrawn and prohibited from entering."

the order was that Armco had suffered no prejudice as a result of that defect. Perceiving that rationale to go only to providing sufficient notice to the operator so that it might adequately prepare for the subsequent hearing, Armco first emphatically asserts that it never claimed that it was subjected to prejudicial surprise nor that it did not receive a full and fair hearing. Armco then indicates that another reason for sec. 104(e)'s mandate is the protection it affords operators against "arbitrary use and abuse of the powers delegated [to MESA inspectors] under sec. 104(a) * * *." A point pervasive throughout Armco's brief is that an administrative agency must proceed in accordance with its own regulations and mandates from its controlling statutes. (Although Armco's argument centers on an agency's compliance with its regulations, we have taken the argument to encompass statutory mandates, because sec. 104(e) is, of course, a statute.)

MESA in its reply brief supports the Judge in his denial of Armco's claim based on section 104(e) deficiency, but goes further to assert, that despite the fact that the order was admittedly poorly drafted, it nevertheless "clearly indicates a serious roof control problem * * *."

Issue Presented

Whether the failure of an order to contain a detailed description of the conditions or practices which cause or constitute an imminent danger pursuant to sec. 104(e) renders such order invalid.

Discussions

In its posthearing brief designed to assist the Judge in deciding the case, Armco cited a number of federal court precedents for the notion that an administrative agency is inexorably bound to follow its own regulations in dealing with cases committed to its jurisdiction. On appeal, Armco has cited the same cases and a few more in an effort to contravene the Judge's decision on this point. Our review of these authorities leads us to conclude that all of these cases are distinguishable from this case because each presented a situation where the challenging party was subjected to prejudice resulting from the failure to follow the regulations precisely. Each involved a substantial prejudice to the challenging party, and, beyond that, the type of deficiency involved in these cases generally was a matter of deprivation of due process, *i.e.*, the failure to hold a mandated hearing, the use of a hearing examiner unqualified to deal with the issues, or a relinquishment of a decision-making power to a body or party which may not exercise that power under the operative regulation. The Judge concluded that this case did not present a situation of prejudice to Armco.

However, the lack of prejudice to the operator does not provide full answers to its questions of whether the order was validly issued because there are interests contemplated by

the Act in relation to the sec. 104(e) specificity requirement other than possible prejudice to the operator. For instance, sec. 107 of the Act deals with several situations unrelated to prejudice to the operator in which sec. 104(e) specificity has applicability. Sec. 107(a) requires that a copy of all notices and orders issued by MESA inspectors be posted conspicuously on the mine bulletin board. Sec. 107(b) requires the Secretary to mail a copy of any notice or order to the representative of miners at the particular mine and to the appropriate state public official or agency charged with administering state coal mine health or safety laws. This scheme makes clear that Congress intended that a variety of persons other than the operator be notified of any notices or orders, and the importance to such persons of clearly specifying the conditions and practices which are the subject of the notice or order is obvious.

We also note that sec. 104(f) requires that each notice or order to be in writing;[3] logically, this requirement applies to all constituent parts of notices and orders and thus to the description of the allegedly violative conditions or practices which are the subject of the notice or order. In the instant case, the "description" of the conditions or practices on the face of the subject order was not merely inadequate or insufficiently detailed, it was nonexistent. A quick review of the language of the "description" discloses that it is not a description at all. It is, more than anything else, a parroting of the language of sec. 104(a) with no description of any kind as to the nature of the "imminent-danger-type" conditions and/or practices." Thus, the order is faulty not only because it fails to be specific as required by sec. 104(e), but also because it fails to set out any description in writing as required by sec. 104(f). Because the total scheme of the Act puts a premium on detailed, written descriptions of conditions and practices in a notice or order, in the circumstances of this case, we may not contemplate the verbal or otherwise circumstantial communication of the description of the operative practices or conditions as fulfilling the requirements of this essential part of a validly issued order.

In consideration of the points set out in the foregoing discussion, we are compelled to conclude that the Act contemplated a specific written description of the conditions or practices and that the subject order was faulty for failure adequately to describe the conditions or practices giving rise to its issuance. Since the Judge's decision was ultimately in Armco's favor on the basis of the case's substance we will affirm that ultimate judgment, and we will vacate the order as requested by Armco.

[3] Sec. 104(f) reads as follows:
"Each notice or order issued under this section shall be given promptly to the operator of the coal mine or his agent by an authorized representative of the Secretary issuing such notice or order, and all such notices and orders shall be in writing and shall be signed by such representative."

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from in the above-captioned appeal IS AFFIRMED IN RESULT and the subject imminent danger withdrawal order No. 1 WSP of Sept. 30, 1974, IS VACATED in accordance with the decision herein.

HOWARD J. SCHELLENBERG, Jr.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

OLD BEN COAL COMPANY

8 IBMA 98

Decided *August 17, 1977*

Appeal by Mining Enforcement and Safety Administration and the United Mine Workers of America to review an initial decision entered Mar. 19, 1975, by Administrative Law Judge John R. Rampton, Jr. (Docket No. VINC 74-11), granting an application for review filed by Old Ben Coal Company and vacating an order of withdrawal issued pursuant to sec. 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Accumulations of Combustible Materials

The phrase "shall be cleaned up and not permitted to accumulate" encompasses but one act of violation of the safety standard set forth in section 304(a) of the Act and in 30 CFR 75.400.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Accumulations of Combustible Materials: Congressional Purpose

The Congressional purpose of the safety standard contained in sec. 304(a) of the Act was to *minimize*, rather than *eliminate*, the inevitable accumulations of combustible materials in active workings of coal mines so that they would be unlikely to contribute to coal mine fires or propagate coal mine explosions.

3. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Accumulations of Combustible Materials: Coal Mine Operator Responsibility

At least three specific obligations are imposed upon coal mine operators by the provisions of sec. 304(a) of the Act and 30 CFR 75.400: (1) to inaugurate and maintain regular programs to clean up combustible materials that inevitably accumulate as a result of ordinary and routine mining operations; (2) to clean up as promptly after discovery as reasonable, extraordinary accumulations of combustibles resulting from such incidents as roof falls, belt breakage, and haulage accidents; and (3) to diligently pursue prompt discovery of such accumulations in active workings.

4. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Accumulations of Combustible Materials: Violations

The mere presence of a deposit or accumulation of coal dust, float coal dust, loose coal or other combustible materials in active workings in a coal mine is not, by itself, a violation of sec. 304(a) of the Act or 30 CFR 75.400.

5. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Accumulations of Combustible Materials: Elements of Proof

The elements of proof required to establish a violation of the safety standard under sec. 304(a) of the Act, or 30 CFR 75.400, are: (1) that an accumulation of coal dust, float coal dust deposited on rock dusted surfaces, loose coal, or other combustible materials existed in the active workings of a coal mine; (2) that the coal mine operator was aware, or, by the exercise of due diligence, should have been aware of the existence of such accumulation; and (3) that the operator failed to clean up such accumulation, or undertake cleanup, within a reasonable time after discovery, or after discovery should have been made.

6. Federal Coal Mine Health and Safety Act of 1969: Mandatory Health Standards: Accumulations of Combustible Materials: Reasonable Time

What constitutes a "reasonable time" within which an operator may clean up an accumulation after discovery, in order to avoid violation of sec. 304(a) of the Act, or 30 CFR 75.400, depends upon a case-by-case evaluation of the likelihood of the spillage to contribute to a mine fire or to propagate an explosion. Factors to be considered include the mass, extent, combustibility, and volatility of the accumulation, as well as its proximity to an ignition source.

7. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Accumulations of Combustible Materials: Violation

Where a large accumulation of combustible material was present in the active workings of a coal mine, consisting mostly of spillage caused by a defective beltline, and the coal mine operator, within a reasonable time after discovery, dispatched a sufficient number of mine personnel to promptly clean up the accumulation, the operator *did not permit* the accumulation, and thus, did not violate the safety standard of sec. 304(a) of the Act or 30 CFR 75.400.

APPEARANCES: Richard V. Backley, Esquire, Assistant Solicitor, and Frederick W. Moncrief, Esquire, Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Steven B. Jacobson, Esquire, for appellant, United Mine Workers of America; Michael C. Hallerud, Esquire, for appellee, Old Ben Coal Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On July 13, 1973, at 9 a.m., a Mining Enforcement and Safety Administration (MESA) Inspector, David Blackburn, issued to Old Ben Coal Company (Old Ben) at its No. 24 Mine in Franklin County, Illinois, an order of withdrawal for an alleged violation of 30 CFR 75.400, which is the regulatory counterpart of the mandatory safety standard set forth in sec. 304(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).[1] This order, No. 1 DB, was issued pursuant to sec. 104(c)(2) of

[1] 30 U.S.C. §§ 801–960 (1970).

the Act and indicated on its face findings by the inspector that the violation was caused by an unwarrantable failure to comply with such standard and was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The following conditions or practices were described in that order by Inspector Blackburn:

> Accumulations of loose coal and coal dust were observed where the 8 south belt head of unit 405.12 dumps on to the 5 east south belt. The accumulations of loose coal and coal dust were along and under the 8 south belt for approximately 60 feet. Also float coal dust was observed a distinct black in color in the 8 south belt head airlock. Accumulations of loose coal and coal dust were observed from the 8 south belt drive to 20 feet outby the 710 survey mark a distance of approximately 925 feet. The accumulations of loose coal and coal dust ranged in depth from 2 to 14 inches on the east side of the belt and from 2 to 6 inches on the west side.
>
> Three shuttle car dumping stations had accumulations of loose coal and coal dust averaging in depth of from 4 to 10 inches and each were approximately 8 to 10 feet in length.
>
> Float coal dust was observed along this 8 south belt line from the belt drive to the 710 foot mark a distance of approximately 925 feet. This float coal dust a distinct black in color was in the adjoining crosscuts of both the east and west side of the belt.
>
> This belt line had been previously reported in the preshift examiner books four (4) times.

On July 16, 1973, at 8:50 a.m., the same inspector issued Order No. 1 DB terminating the July 13, 104(c)(2) order for the reason that the violation had been totally abated. On Aug. 9, 1973, Old Ben filed an application for review of the July 13, 1973, order. Both MESA and UMWA joined issue by responsive pleadings and an evidentiary hearing on the matter was held at St. Louis, Missouri, on July 22, 1974.

In a decision dated Mar. 19, 1975, Administrative Law Judge Rampton (Judge) made the following findings of fact: that the inspector failed to verify with a 200 mesh screen or positively identify by visual observation alone the float coal dust indicated in the order, and the credible testimony at the hearing reflected that no significant float coal dust was present in the affected section of the mine; that the materials observed consisted mostly of belt spillage which had recently taken place and that witnesses Mr. Rowland and Mr. Yattoni satisfactorily explained how such problems can develop during normal mining operations; that Old Ben could not reasonably have been expected to know and did not know of the presence of the materials cited in the Order until the shift began at 8 a.m., because at that time the mine manager reviews the examiner's report based on inspections made between 4 a.m. and 7 a.m.; that there was no unwarrantable failure by Old Ben to take corrective action in light of the fact that men were assigned to clean up the accumulation and expected to eliminate the cited conditions during the first half of the shift beginning at 8 a.m. on July 13, 1973; and

that, particularly because testimony established that the accumulation was "mine run" coal which has a higher than usual incombustible content and since there was no possible ignition source, the conditions were not likely to significantly and substantially contribute to a safety hazard.

The Judge made the following conclusions of law: MESA failed to prove by a preponderance of the evidence that the combustible materials were not being cleaned up and were permitted to accumulate because evidence showed that Old Ben was cleaning up the combustible material of its own initiative and Old Ben commenced corrective action within a reasonable time; the coal spillage along the conveyor belt does not, by itself, significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and as soon as the operator became aware of the cited conditions, enough employees were promptly assigned to abate the conditions within a reasonable time so that there was no unwarrantable failure to comply with the mandatory standard; the subject order of withdrawal was unlawfully issued and must be vacated ab initio. Whereupon, the Judge granted the application for review and vacated the subject order of withdrawal as void ab initio. Timely notices of appear were filed by MESA and UMWA.

On Apr. 28, 1975, Old Ben filed a motion to strike UMWA's notice of appeal on the ground that after filing a responsive pleading, there was no participation by UMWA in the proceedings below. On Aug. 28, 1975, the Board granted Old Ben's motion. Timely briefs were filed by MESA and Old Ben.

Contention of the Parties on Appeal

MESA urges the Board to reverse the decision below and to dismiss the application for review, contending that the Judge erred in his initial decision:

(1) by finding that there was no violation of 30 CFR 75.400;

(2) by finding that Old Ben had not unwarrantably failed to comply with the law;

(3) by concluding that a significant and substantial contribution to mine health and safety is a criterion for a sec. 104(c)(2) order; and

(4) by substituting the word "would" for the word "could" in applying the significant and substantial contribution test.

Old Ben, on the other hand, contends that the findings of fact and conclusions of law embodied in the initial decision of the Judge are fully supported by the record and are proper as a matter of law and urges the Board to affirm the decision and sustain the application for review.

Issues Presented on Appeal

1. Whether the Administrative Law Judge erred as a matter of law or fact in finding there was no violation of 30 CFR 75.400.

2. Whether the Administrative Law Judge erred as a matter of law

or fact in finding that the cited conditions were not of such nature as could significantly and substantially contribute to the cause and effect of a mine health or safety hazard.

3. Whether the Administrative Law Judge erred as a matter of law or fact in finding that there was no unwarrantable failure on the part of the operator to comply with 30 CFR 75.400.

DISCUSSION

Holding of the Board

Our review of the record convinces us that there is substantial, reliable, and probative evidence to support Judge Rampton's finding that MESA failed to make out a prima facie case establishing a violation of 30 CFR 75.400. Therefore, we must uphold the decision and order of the Judge granting the application for review and vacating as void, ab initio, Order of Withdrawal No. 1 DB, July 13, 1973.

This disposition of the first issue obviates the necessity of reaching the other two issues set forth above.[2] Consequently, our discussion will be confined to an analysis of the safety standard alleged to have been violated and of the evidence adduced which resulted in the vacation of the subject withdrawal order.

PURPOSE OF THE MANDATORY SAFETY STANDARD PERTAINING TO ACCUMULATIONS OF COMBUSTIBLE MATERIALS

The mandatory safety standard alleged to have been violated in the withdrawal order under review, set forth in 30 CFR 75.400 and in its statutory counterpart, sec. 304(a) of the Act (30 U.S.C. § 864(a)), reads as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up *and* not be permitted to accumulate in active workings, or on electric equipment therein [Italics supplied.]

[1] At first blush it would appear that the foregoing language permits the conclusion of alternative violations. That is to say, there may be one violation of the mandate to clean up accumulations of combustible materials and another violation of the prohibition against permitting such accumulations in active workings. However, we reject this concept as being out of focus with the purpose of the standard and with the practical realities of underground coal mining. Furthermore, the two phrases "shall be cleaned up" and "not be permitted to accumulate" are conjunctive—not disjunctive—indicating that only one act of violation of the standard was contemplated.

[2] To ascertain the Board's construction of section 104(c) of the Act (30 U.S.C. § 814(c)) with respect to the terms, "unwarrantable failure" and "violation of such nature as could significantly and substantially contribute to the cause and effect of a mine health or safety hazard," *see Zeigler Coal Company*, 7 IBMA 280, 83 I.D. 127, 1976–1977 OSHD par. 26,676 (1977), and *Alabama By-Products Corporation*, 7 IBMA 85, 83 I.D. 574, 1976–1977 OSHD par. 21,298 (1976).

[2] Any person who has been in a coal mine and observed it in operation is aware of the fact that there is no way of completely eliminating accumulations of combustible materials. Where coal is being mined, deposits or accumulations, either large or small, of coal dust, float coal dust, or loose pieces of coal are inescapably bound to exist. Therefore, it seems to us that the Congressional purpose of establishing this standard was to *minimize*, rather than eliminate, accumulations of combustible materials so that they would simply be less likely to present a safety hazard source. Obviously, the ultimate hazards sought to be eliminated are coal mine fires and coal mine explosions.[3]

Responsibilities Imposed Upon the Coal Mine Operators

It is implicit in the standard that the accumulations of combustible material be kept at a minimum at all times in every coal mine. This suggests that Congress intended that coal mine operators maintain regular cleanup programs. How else, in the ordinary course of mining operations, can they expect to *not permit* accumulations of combustible materials?[4]

[3] However, we believe that this standard also was intended to impose the requirement to clean up and not permit accumulations of combustible materials which occur as a result of unusual circumstances, including, but not limited to, roof falls, belt breakage and haulage accidents. This responsibility lies outside the scope of a regular cleanup program and necessarily entails the all-important time factor within which corrective action must be taken. We know of no precise time formula or hard and fast time schedule which could have general application to all of these unusual situations, except, that cleanup should be accomplished within a "reasonable time" after discovery. This time factor necessarily imposes a third obligation upon the operator, and that is, to be conscientiously alert and diligent toward prompt discovery of accumulations of combustibles in active workings.

What constitutes a reasonable time must be dictated by the urgency created under the circumstances of each case. The urgency, in turn, will depend upon the mass and extent of the accumulation, as well as the degree of danger posed by other circumstances of the hazard, such as the proximity of

[3] The section-by-section analysis in the legislative history pertaining to the subject standard reads as follows:

"*Section 205. Combustible materials and rock dusting*

"Section 205(a)

"This section requires that the operator not allow coal dust, loose coal, float coal dust or other combustible materials to accumulate underground.

"Tests, as well as experience, have proved that inadequately inerted coal dust, float coal dust, loose coal, or any combustible material when placed in suspension will enter into and propagate an explosion. The presence of such coal dust and loose coal must be kept to a minimum through a regular program of cleaning up such dust and coal." S. Rep. No. 91-411, 91st Cong., 1st Sess. 65 (1969).

[4] *Id.*

ignition sources. The longer the accumulation remains without cleanup, the greater the threat of a mine fire or explosion. Likewise, the greater the mass and extent of the accumulation, the greater the chance it may contribute to a disaster because of the increased surface area of combustible material exposed to possible ignition sources.

Although each case must rest strictly on objective judgment as to whether a given operator at a given time is in compliance with the subject standard, we will venture to set forth some general guidelines. With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine, or normal mining operation, it is our view that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shift, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the-ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the unusual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the act upon a coal mine operator to protect the safety of the miners.

CITATION AND ROOF OF VIOLATIONS UNDER THE STANDARD PERTAINING TO ACCUMULATIONS OF COMBUSTIBLE MATERIAL

Judging from the extraordinary number of cases and amount of controversy that has been generated under this standard, it is apparent that the citation procedures by inspectors and the elements of proof required to uphold the validity of citations for alleged violations of the standard bear discussion at some length.

[4] In the great number of citations for alleged violations of this standard, which we have observed, rarely does the inspector include more in his description of the violative conditions and practices than a statement of the location, size, extent, and general combustible content of accumulations which he observed in the course of the inspection. But in this proceeding the operator has raised the subsidiary issue of whether proof of the mere presence or existence of an accumulation of combustible materials in active workings of the mine is sufficient, by itself, to establish a violation. (*See* Appellee's Br. p. 10.) We hold that it is not. Certainly, the existence of such an accumulation may be *one* element of proof, but it is not, *per se*, sufficient to sustain a prima facie case.

The crux of the violation of this standard is the failure to clean up, or undertake to clean up, an accumulation of combustible material

which is already in existence. When a coal mine operator undertakes, or is engaged in, cleaning up accumulations of combustible material, he is then certainly not permitting such accumulation. It is also true that an operator is permitting such accumulations if he fails within a resonable time to clean them up or to undertake the cleanup.

The next logical inquiry is, from what point should an inspector start to measure the time factor in determining what is a reasonable time. We believe such measurement should commence with the time when the operator first became aware of the accumulation, either actually or constructively. Counsel for Old Ben suggests that this element of the time factor is critical to the establishment of a violation. We agree, but subject to the condition that if an operator is not aware, but, by the exercise of due diligence, should have been aware of the existence of the accumulation, then, the period of time subject to the reasonableness test commences with the time when such operator should have been aware. In other words, we feel that a coal mine operator cannot reasonably be charged with the failure to clean up an accumulation of combustibles when he does not know that it exists, and even by exercising due diligence could not be expected to know.

Application of this time factor necessarily imposes a responsibility upon the coal mine inspectors to ascertain, before issuing a citation under 30 CFR 75.400, the time when the operator or its agents discovered, actually or constructively, the existence of the accumulation of combustibles. This may be done by the use of logical conclusions drawn from the circumstantial evidence. An easier method might be, however, simply asking the miners and foremen familiar with the mining operations in the active workings when and how the accumulation occurred and when and how, if at all, it was discovered. It is, of course, also important that the inspectors further ascertain what was done by the operator, if anything, after discovery of the accumulation. Did the operator immediately undertake to clean up the accumulation? Was it ignored completely? Was the operator aware of the accumulation, but, rightly or wrongly, decided that it should be handled routinely through the regular cleanup program? All of these questions need due consideration and resolution before deciding to issue a citation charging a violation of the subject standard. If the inspector does decide to issue such a citation, his determinations with regard to time of discovery and time of inauguration of cleanup by the operator, it seems to us, are key elements of, and should be included in, the factual description of the conditions and practices which are alleged to constitute a violation. In making these detailed factual evaluations, the inspectors, hopefully, will not lose sight of the controlling inquiry under sec. 304(a) of the Act—whether the operator is making every reasonable effort to minimize the ac-

cumulations of combustible material.

[5] What, then, are the precise elements of proof required under sec. 304(a) of the Act (30 U.S.C. § 864(a) (1970)), or 30 CFR 75.400, to make out a prima facie case of violation? We hold them to be as follows: (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings, of a coal mine; (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

[6] As mentioned in our discussion of the responsibilities imposed upon the coal mine operators, what constitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

Evidence Adduced in this Case

In this case, the Judge observed that there was no substantial evidence adduced at the hearing which supported the inspector's allegation of the presence of any significant amount of float coal dust. He noted that the inspector did not verify the content of the accumulated material with a 200 mesh screen and that the inspector admitted that he could not identify float coal dust by visual observation alone. (Dec. 3.) The record supports these observations (Tr. 40, 46). Mr. Guy Yattoni, the safety director for Old Ben, in the opinion of Judge Rampton, effectively refuted the inspector's testimony as to the alleged float coal dust (Tr. 125–126) and we are disinclined to disturb the credibility findings of the Judge on this point.

The witnesses for the operator did not dispute the testimony of the inspector pertaining to the *existence* of accumulations of loose coal and coal dust along the 8 south beltline for a distance of approximately 925 feet. However, Old Ben did effectively establish at the hearing that the inspector made no attempt to determine the basic questions of how or when the accumulations accrued or what cleanup by the operator was undertaken. This was illustrated by the following testimony of the inspector on cross-examination (Tr. 73):

Q. Did you go there [the affected area] because anyone told you about a problem there or anything like that?

A. No sir.

Q. Did you by any chance speak to any of the preshift examiners who had told you that this area was having problems or something?

A. No sir.

Q. Did you make any effort to find out from company personnel or bargaining unit people how long the material that you saw had been left?

A. Not that I can remember, no.

Q. You say you didn't make any effort at all to find out how long the material along the belt or at the dumping stations had been there?

A. I don't remember making any effort, no.

The operator's witnesses provided the only evidence explaining how and when the combustible materials had accumulated and what and when corrective action was taken. Mr. Steve Rowland, a graduate mining engineer, and production foreman of Mine No. 24 for Old Ben, testified that the accumulations occurred during the shift preceding the morning shift of July 13, when the inspection took place, and that they were caused by a belt separation (Tr. 154); that there had been alignment and tension problems with the belt (Tr. 157) and that the mine manager sent men to restore tension to the belt and realign it to prevent continued spillage, which was done (Tr. 158); that also, on the morning of the inspection, after checking the preshift examination reports, inspecting the beltline, and making the face areas, he immediately assigned the bobcat and shuttle car operators to shovel the side dumps along the belt (Tr. 156); and that the mine manager had told him that two belt shovelers had been sent to the 8th south belt in response to the preshift examination report which showed the belt dirty on the just-concluded shift (Tr. 156). Mr. Yatoni verified this by his testimony that he observed the two belt shovelers beginning their work at 185 station along the beltline as he walked in with the inspector (Tr. 114).

On the basis of the foregoing discussion of the evidence, together with our reading of the total record in this case, we are satisfied that substantial, reliable, and credible evidence was adduced to support the findings of fact made by Judge Rampton in substance as follows: (1) that the accumulations alleged in the subject order consisted almost exclusively of belt spillage which had developed during the midnight shift, immediately preceding the shift during which the inspection took place, and mostly during the latter part of that shift (Dec. 3, Finding No. 7); (2) that the operator could not reasonably have been expected to know of the presence of the combustible materials until the beginning of the second shift based on the midnight examiner's report of inspections made between 4 a.m. and 7 a.m. (Dec. 4, Finding No. 8); (3) that the operator first gained actual knowledge of the accumulations when the mine manager and the production manager reviewed the mine examiner's report and the production manager walked the belt at the section shortly before the inspection began (Dec. 4, Finding No. 9); (4) that the operator took corrective action upon discovery of the problem by assigning men to clean up prior to the arrival of the inspector and could have expected elimination of the cited con-

ditions during the first half of the shift (Dec. 4, Finding No. 10); (5) that the operator was in compliance with its MESA-approved cleanup plan. (Dec. 4, Finding No. 12.)

We also agree with the conclusions reached by Judge Rampton that: an order of withdrawal issued pursuant to sec. 104(c)(2) of the Act must be vacated as void ab initio if there is a failure of proof of a violation of a mandatory health or safety standard (Dec. 5, Conclusion No. 3); and that there was no violation of 30 CFR 75.400 because MESA failed to prove by a preponderance of the evidence that the combustible materials were not being cleaned up and were permitted to accumulate (Dec. 5, Conclusion No. 4).

[7] The evidence here conclusively establishes that although most of the combustible materials did exist in the subject mine as alleged in the order under review, as soon as the operator became aware of the cited conditions, enough employees were promptly dispatched to abate the conditions within a reasonable time. The evidence further clearly established that the operator was following a regular procedure reasonably calculated to alert its personnel to the hazards posed by accumulations of combustible materials. Consequently, there was no permitting of an accumulation by the operator and no violation of the subject standard.

Also, we are in full accord with Judge Rampton's conclusions that the determination of what constitutes a reasonable time must be made with respect to the facts of each case, considering: (1) the extent of the danger created by the presence of combustible materials; (2) the urgency with which corrective action must be taken; and (3) the operator's adherence to its own established cleanup procedures. (See Dec. 5, Conclusion No. 4.)

The holding and order of the Administrative Law Judge, that Order of Withdrawal No. 1 DB, July 13, 1973, was unlawfully issued and void ab initio, must be affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED, that the decision of the Administrative Law Judge in the above-captioned case IS AFFIRMED.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

PEABODY COAL COMPANY

8 IBMA 121

Decided *August 24, 1977*

Appeal by Mining Enforcement and Safety Administration from a decision

by Administrative Law Judge John R. Rampton, dated Sept. 24, 1975, in Docket Nos. VINC 74-142-P, 74-200-P, 74-201-P, 74-230-P, 74-243-P, and 74-279-P, in which the Judge affirmed 30 violations, vacated 17 Notices of Violation, and assessed civil penalties in the aggregate sum of $5,300 pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed in part and reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Ventilation Plan

Evidence of failure by an operator to comply with the provisions of its approved ventilation plan constitutes a violation of 30 CFR 75.316.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Roof Control

A violation of 30 CFR 75.200 is established where it is shown that an operator failed to comply with the provisions of its approved roof control plan in that the roof bolting pattern prescribed therein was destroyed by loosening two roof bolts for use as cable anchors.

APPEARANCES: Thomas A. Mascolino, Esq., Assistant Solicitor, and Leo J. McGinn, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; David S. Hemenway, Esq., Assistant Secretary and Assistant General Counsel, for appellee, Peabody Coal Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

In its appeal in the instant case, the Mining Enforcement and Safety Administration (MESA), challenges a decision by the Administrative Law Judge which vacated 10 notices of violation on the ground that MESA had failed to establish the fact of violation of the various mandatory standards.

With respect to eight of these notices of violations which MESA claims were erroneously vacated by the Judge, the Board has reviewed the record and considered the briefs of both MESA and Peabody Coal Company (Peabody). The Board has concluded that the decision of the Judge is supported by the substantial evidence of record and that MESA has failed to demonstrate why the findings of fact and conclusions of law should not be affirmed.

Five of those eight violations arise under 30 CFR 75.400 and were vacated by the Judge because MESA failed to meet its prima facie burden of establishing that the operator had permitted combustible materials to accumulate. No evidence was submitted with respect to how long the conditions cited existed or whether efforts to clean up were undertaken within a reasonable time by the operator (Dec. 10, 20, 23, 26, 46). The Board has recently held that in the absence of such evidence a violation of 30 CFR 75.400 cannot be found to have been established. *Old Ben Coal Com-*

pany, 8 IBMA 98, 84 I.D. 459 (1977).

The decision will, therefore, address the remaining two challenged violations which the Board believes were established by a preponderance of the evidence, and which should be reinstated.

Factual Background

A.

On Nov. 5, 1973, a MESA inspector issued Notice of Violation No. 2 LDC to Peabody which alleged a violation of 30 CFR 75.316 in that: "There were (5) five open crosscuts in the line of pillars separating the intake from the return aircourses." (VINC 74–142–P.)

The notice was based upon Peabody's failure to comply with its ventilation plan, submitted and adopted pursuant to 30 CFR 75.316. In its posthearing brief, Peabody stated in pertinent part: "[T]he real problem and admitted violation is the failure to have the three permanent stoppings in the crosscuts. This was the cause of the issuance of the first notice [No. 1 LDC, Nov. 5, 1973] and in reality is the only proven violation which Respondent readily concedes exists." (Italics added.) (Br. p. 12.)

The violation which Peabody concedes was based upon 30 CFR 75.301, the notice alleging that there was insufficient air flow in the last open crosscut.

The Judge affirmed the notice based upon violation of 30 CFR 75.301, and vacated the notice based upon 30 CFR 75.316 on the ground that such regulation required only the submission and adoption of a ventilation plan. The Judge stated that if sufficient air was not reaching the face, a notice of violation of 30 CFR 75.301 should have been issued.

In its brief on appeal, MESA submitted that the Judge erred as a matter of law, citing the Board's decision in *Zeigler Coal Company*, 4 IBMA 30, 82 I.D. 36, 1974–1975 OSHD par. 19,237 (1975), *aff'd*, *Zeigler Coal Company* v. *Kleppe*, 536 F.2d 398 (D.C. Cir. 1976), which held that from the requirement of section 303(o) of the Act (the statutory counterpart of 30 CFR 75.316), a ventilation plan be submitted and adopted by the operator, it "follows that the Secretary must have powers to enforce adherence to the plan." Peabody responded that the Judge based his action not only on the ground that 30 CFR 75.316 was not the proper mandatory standard to cite, but also on the fact that the instant violation was directly related to and probably caused the violation of 30 CFR 75.301, a violation for which a penalty was assessed.

B.

On June 26, 1973, a MESA inspector issued Notice of Violation No. 2 DB, alleging a violation of 30 CFR 75.200 in that:

> There was a violation of the roof control plan in that roof bolts, two in number, had been loosen [*sic*] to anchor the two shuttle cars' trailing cables, thereby

destroying the roof bolt pattern in that the nearest bolt to the rib was 8 feet and 7½ feet between bolts in the 3rd west section off the main south entries.

At the hearing, the inspector testified in pertinent part: "Well, the roof control plan as I remember it states that roof bolts should be installed four feet from the rib and on five foot centers, * * *" (Tr. 203; Docket No. VINC 74-200-P).[1]

Peabody offered no rebutting evidence, nor did it question the inspector's recollection as to the requirements of the roof control plan.

In vacating this notice, the Judge found that:

> There was no testimony or available evidence that any person had proceeded underneath this area, or that this was an active underground roadway, travelway, or working place. In the absence of such testimony, the bare description of the violation as contained in the notice, which does not specify that any of the miners had proceeded beyond the last permanent support, I can make no finding that a violation has occurred.

(Dec. 33).

MESA submitted on appeal that the notice adequately described a violation of 30 CFR 75.200 in that the operator had failed to comply with its roof control plan and that it was an active working area of the mine. Accordingly, MESA contended that a prima facie case of violation had been established which Peabody did not rebut. Peabody responded, on appeal, that the Judge was correct when he found that there was insufficient evidence to support a finding of violation.

Issues Presented

A.

Whether the Judge erred in concluding that the violation of a ventilation plan does not constitute a violation of 30 CFR 75.316.

B.

Whether the Judge erred in concluding that noncompliance with the provisions of a roof control plan was not a violation of 30 CFR 75.200 in the absence of evidence that miners had proceeded into the violative portion of the mine.

Discussion

A.

[1] Although Notice of Violation No. 2 LDC did not state on its face that the condition cited existed in violation of Peabody's ventilation plan, unrebutted testimony, elicited at the hearing, indicates that the condition existed because Peabody failed to comply with its plan. In reaching his decision that no violation had been proved by MESA, the Judge concluded that a violation of a ventilation plan is not a violation of 30 CFR 75.316 (Dec 13). The Board disagrees. In *Zeigler Coal Company*, *supra*, the Board held that the failure by an operator to comply with its approved ventilation plan would

[1] The citation to the transcript refers to that portion of the hearing which commenced at 4 p.m. on Jan. 7, 1975. Unfortunately, the separate volumes of the transcript were not properly numbered in sequential order, nor were the many exhibits correctly numbered when admitted.

support the issuance of a sec. 104 (b) notice of violation. In that case, the inspector cited the condition as a violation of 30 CFR 75.316 and the Board reasoned that because a ventilation plan must be approved by the Secretary, it logically followed that the Secretary must have power to enforce compliance with such plan.

Accordingly, the Board is of the opinion that the Judge erred in dismissing the Petition for Assessment of Civil Penalty with respect to this violation on the ground that the wrong regulation was cited. Inasmuch as the inspector's testimony indicated that Peabody's ventilation plan required the missing stoppings and Peabody admitted such noncompliance with its plan in its posthearing brief, the Board concludes that the violation existed as alleged.[2]

In the interests of expedition the Board will assess a penalty for this violation rather than remand the case to the Judge for that purpose. We accept the Judge's determinations with respect to the statutory criteria of size of business, effect of penalty on ability to continue in business, history of previous violations, and good faith in abatement as they are supported by the substantial evidence of record. With respect to the remaining criteria of negligence and gravity, because this condition was a major and easily recognizable deviation from the approved ventilation plan, we find Peabody to have been negligent. Further, inasmuch as the condition contributed to the situation cited in Notice of Violation No. 1 LDC and an insufficient quantity of air could lead to a buildup of methane, we are of the opinion that the violation was serious. Based upon the foregoing, the Board considers a penalty assessment of $200 to be warranted for this violation.

In his decision with respect to the second alleged violation described above, the Judge held that an unrefuted allegation of noncompliance with a roof control plan was insufficient to support a finding of violation of 30 CFR 75.200 in the absence of evidence that miners were present in the violative portion of the mine.

[2] To the contrary, the Board has held that the provisions of roof control plans are enforceable as mandatory standards. *Zeigler Coal Company*, 5 IBMA 132, 82 I.D. 441, 1975–1976 OSHD par. 19,998 (1975). Accordingly, inasmuch as the uncontroverted evidence of record indicates that due to the loosening of two roof bolts the prescribed roof bolt pattern was destroyed and Peabody's roof control plan violated, the Board holds that the condition cited constitutes a violation

[2] The Judge did not address Peabody's contention that the violation of its ventilation plan resulted in the condition which gave rise to the violation of 30 CFR 75.301 and therefore, only one violation existed. The Board believes that this argument is without merit as a deviation from an approved ventilation plan is a separate violation irrespective of its possible causal connection to another distinct violation of a mandatory standard.

of 30 CFR 75.200. It is unnecessary to the establishment of this violation that MESA prove that a miner had proceeded beyond the last permanent roof support.

As in the case of the previous violation, the Board accepts the Judge's determinations with respect to the statutory criteria of size of business, effect of the penalty assessment, good faith in abatement, and history of previous violations. With respect to the remaining criteria of negligence and gravity, we find that Peabody was negligent due to the fact that the roof bolts were intentionally loosened to provide cable anchors. The gravity of this violation will be deemed nonserious because there is no indication in the record of the condition of the roof other than that the roof bolting pattern was destroyed. Accordingly, the Board is of the opinion that a penalty assessment of $100 is warranted for this violation.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior 43 CFR 4.1(4), IT IS HEREBY ORDERED that:

(1) The Judge's decision with respect to Notices of Violation No. 2 LDC, November 5, 1973, and No. 2 DB, June 26, 1973, IS REVERSED, the Notices REINSTATED, and a penalty of $200 for the first, and $100 for the latter IS ASSESSED;

(2) The remainder of the Judge's decision IS AFFIRMED; and

(3) Peabody Coal Company pay the penalty assessed in the aggregate sum of $5,600 on or before 30 days from the date of this decision.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, Jr.,
Administrative Judge.

BUREAU OF LAND MANAGEMENT
v.
ROSS BABCOCK

32 IBLA 174

Decided *September 15, 1977*

Appeal from the decision of Administrative Law Judge Michael L. Morehouse directing appellant to pay damages for grazing trespass.
IDAHO 030-76-3003(SC).

Affirmed as modified.

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

One who grazes livestock in a grazing allotment without authorization prior to the issuance of a license commits a grazing trespass.

2. Grazing Permits and Licenses: Trespass—Trespass: Measure of Damages

Under existing regulations, where a grazing trespass is not clearly willful, damages are to be computed at the rate of $2 per AUM of federal forage consumed or the commercial rate, whichever is greater.

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

Where there is a final administrative determination of the assessment of damages for a grazing trespass by a licensee, no license or permit should thereafter be issued or renewed until payment of the assessed amount.

4. Administrative Procedure: Burden of Proof—Administrative Procedure: Decisions—Administrative Procedure: Hearings—Administrative Procedure: Substantial Evidence—Evidence: Burden of Proof—Evidence: Sufficiency—Hearings—Rules of Practice: Evidence

After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative, and substantial evidence. Because a grazing trespass proceeding is not a criminal proceeding, it need not be proved beyond a reasonable doubt that a particular individual committed the trespass.

5. Evidence: Generally—Grazing Permits and Licenses: Trespass—Rules of Practice: Evidence—Trespass: Measure of Damages

When 33 percent of the available forage in a grazing allotment is on federal land and the remainder is on private land, it is appropriate to find that 33 percent of the forage consumed by cattle throughout the allotment was federal forage, in the absence of evidence to the contrary.

6. Administrative Authority: Generally—Constitutional Law: Generally—Grazing Permits and Licenses: Trespass—Secretary of the Interior—Trespass: Generally

Pursuant to the Property Clause of the U.S. Constitution, art. IV, § 3, cl. 2, Congress has enacted the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* (1970), and other statutory authority which empower the Secretary of the Interior to define what conduct constitutes a grazing trespass and to determine whether or not an individual has committed a trespass.

7. Administrative Procedure: Hearings—Constitutional Law: Generally—Grazing Permits and Licenses: Trespass—Hearings—Rules of Practice: Hearings—Trespass: Generally

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There is no constitutional right to a jury trial in an administrative proceeding such as a grazing trespass hearing.

8. Administrative Procedure: Administrative Law Judges—Administrative Procedure: Administrative Procedure Act—Administrative Procedure: Hearings—Constitutional Law: Generally—Grazing Permits and Licenses: Administrative Law Judge—Grazing Permits and Licenses: Trespass—Hearings—Rules of Practice: Hearings

Administrative hearings required in grazing trespass cases are not an unlawful exercise of judicial power and meet constitutional requirements and the standards of the Administrative Procedure Act. The constitutional requirement of due process is not violated merely because an Administrative Law Judge is employed by the Department of the Interior.

9. Administrative Authority: Generally—Constitutional Law: Generally—Grazing Permits and Licenses: Generally—Public Lands: Generally—Secretary of the Interior—State Laws

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, federal laws, including federal grazing regulations, override conflicting state laws with respect to public lands.

10. Accounts: Payments—Contracts: Performance or Default: Release and Settlement—Grazing Permits and Licenses: Trespass—Trespass: Generally

Where cattle are admitted to an allotment at the beginning of the usual grazing season but prior to the issuance of a license for that season, and payment is later made by a check which recites that it is "payment in full for 1975 grazing fee," the Bureau of Land Management may properly deposit the check, allotting part of the proceeds for the grazing license for the rest of the season, and deposit the remainder of the proceeds in a suspense account pending resolution of the trespass. Such action indicates that the check was not accepted in settlement of the trespass damages, and cashing the check does not constitute an accord and satisfaction of the trespass damages.

APPEARANCES: Ross Babcock and Lawrence Babcock, Moore, Idaho, for appellant; Robert S. Burr, Esq., Boise Field Office, Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

This is an appeal from the Jan. 19, 1977, decision of Administrative Law Judge Michael L. Morehouse, directing the appellant, Ross Babcock, to pay $149 as additional payment for grazing cattle on the Beck Canyon Allotment before a grazing license was issued. The total amount in damages was determined to be $225, but a $76 credit was allowed because appellant had made an overpayment in that amount for the license when it was finally issued. Throughout these proceedings, Ross Babcock has been represented by his son, Lawrence, who assists his father in his business.

The Beck Canyon Allotment consists of private and federal lands. No fences separate the private land from the federal land within the allotment, although the allotment itself is separated from the surround-

ing land by fences and natural barriers. It appears that appellant has been obtaining annual licenses for grazing in the allotment pursuant to a 1958 range adjudication. Judge Morehouse summarized the facts in this case as follows:

> Respondent's usual license is for 85 cattle from May 1 through Oct. 15 and, in his application dated Oct. 23, 1974, he applied for this use for the grazing year 1975 (Govt. Ex. 2). BLM went on a system of computerized billing notices for the first time in 1975 and this computerized billing notice was mailed to the Babcocks in late March or early Apr. 1975. It had on it information concerning nonuse and suspended nonuse AUM's that had not been contained on previous billing notices although the number of active AUM's remained the same. It also had on it the statement to the effect that grazing on Federal range without authorization was prohibited and unauthorized grazing would be deemed to be in trespass. This notice was not paid and a subsequent notice was forwarded on May 16, 1975. A further notice was forwarded on May 28, 1975, again requesting payment and stating further that if payment was not made within 15 days the billing would be cancelled. On June 11, 1975, a letter dated June 9 was received from Ross Babcock stating that he would pay the grazing fee but there were a number of discrepancies regarding his grazing rights in the Beck Canyon Allotment which needed resolution and he requested that a meeting be scheduled for that purpose. Shortly thereafter a letter was sent to Mr. Babcock arranging a meeting for June 20, 1975, however, this was postponed at the request of Mr. Reid J. Bowen, attorney for the Babcocks.
>
> The conference was then rescheduled for July 21, 1975. In the meantime, the billing was cancelled for nonpayment. On July 9, 1975, the district manager and area manager made a trip to the Beck Canyon Allotment and observed 25 Babcock cattle grazing in the allotment. On July 10, 1975, a trespass notice was forwarded to Mr. Babcock advising him his livestock were in trespass. On July 21, 1975, a meeting took place between the district manager, the area manager, and the Babcocks. At this meeting, various issues in dispute concerning the allotment were discussed and, in addition, the Babcocks advised that they had turned out approximately 80 head of cattle onto the allotment on May 25, 1975. The Babcocks were advised at that time that they should pay their grazing fee for the balance of the season but they would be considered in trespass from May 25 up to the date of receipt of payment of the grazing fee. On July 22, 1975, a check was received from the Babcocks for $155, the amount of the grazing fee for the full year, and on the check was written "payment in full for 1975 grazing fee." This check was cashed by BLM and the financial clerk was instructed by the area manager to credit $79 toward payment of the grazing fees from July 22 through Oct. 15 and to put the remaining $76 in a suspense account pending resolution of the trespass issue. Receipts to this effect were immediately forwarded to the Babcocks.

[1] The record clearly establishes that appellant turned out his cattle onto the allotment on May 25, 1975, and that he had no license to do so until July 22, 1975. Appellant's cattle were free to graze on the Federal range and the inspection on July 9 demonstrates that they did so, despite appellant's placement of salt licks intended to keep the cattle on appellant's private land within the allotment. This evidence establishes a violation of a provision of the Federal

Range Code, 43 CFR 4112.3–1, which provides in part as follows:

> The following acts are prohibited on the Federal range: [1]
>
> (a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.

The violation of this regulation constitutes a trespass within the meaning of 43 CFR 9239.3–2. *See Eldon Brinkerhoff*, 24 IBLA 324, 83 I.D. 185 (1976).

[2] Where the trespass was not clearly willful, the damages are to be computed at a rate of $2 per AUM or the commercial rate, whichever is greater. 43 CFR 9239.3–2(c)(2). The Judge properly found that BLM had correctly computed the damages at $4.50 per AUM which a range survey had shown as being the applicable commercial rate. An AUM is defined as "the amount of natural or cultivated feed necessary for the sustenance of one cow or its equivalent, for a period of one month." 43 CFR 4110.0–5(o). Thus, BLM properly concluded that 80 cattle consumed 150 AUM's in the allotment in a period of slightly less than 2 months. Because the forage on federal land constituted 33 percent of the total forage available to the cattle, it is reasonable to conclude that the cattle consumed 50 AUM's of forage on federal land and that the damages are properly computed by multiplying this figure by the commercial rate to obtain a total amount of $225 in damages, for which the $76 credit is to be subtracted, leaving $149 due.

[3] Appellant raises many issues and objections to the assessment of these trespass damages. The Bureau of Land Management contends that his arguments are without merit or have not been framed adequately so as to require a response. As will be discussed, *infra*, we disagree with appellant's contentions and find that the assessment of the trespass damages is proper in this case. While the monetary amount in this case is small, the determination that trespass damages are owed to the United States has important consequences. For example, while no ruling has been made at this time to suspend, reduce or revoke appellant's license, permit, or base property qualifications as authorized by 43 CFR 9239.3–2(e)(2), such action may be taken in the future if the facts warrant it. See *Eldon Brinkerhoff*, *supra*. More significantly here, regulation 43 CFR 9239.3–2(d) provides, in effect, that grazing licenses or permits will not be issued or renewed until payment has been made of trespass damages. The Judge ruled that if there is a failure to make payment of the assessed damages, the District Manager is au-

[1] 43 CFR 4110.0–5(h) provides as follows: "'Federal range' means land within established grazing districts administered by the Bureau of Land Management under the Federal Range Code for Grazing Districts (this part), including the vacant, unappropriated, and unreserved public land of the United States chiefly valuable for grazing and forage crops; State, county, and privately owned land leased for such administration; and lands so administered pursuant to a cooperative agreement with the Federal department or agency having jurisdiction over such land."

thorized to take such action as may be proper under the regulations. Since this decision on appeal is the final administrative decision on the trespass damage assessment, we modify the Judge's decision to clarify that no further license or permit should be issued or renewed in this case until the trespass damages are paid. *Eldon L. Smith*, 5 IBLA 330, 79 I.D. 149 (1972).

Furthermore, the issues raised by appellant go to the propriety of the administrative proceedings within this Department determining grazing trespass damages. They also go to other matters of wide and general applicability concerning trespass damages, evidence, contract, administrative and constitutional law.

[4] Appellant asserts generally that the decision is contrary to the evidence, the facts, the law, the Constitution of the United States and the Constitution of the State of Idaho. He argues that the Judge erred in not ruling on the issues of law he presented at the hearing. He argues that the Judge should have dismissed the Order to Show Cause which initiated the trespass proceeding. He claims that he should have received a jury trial. He contends that the decision "does not conform to the totality of the circumstances as they were presented therein," that the Government's evidence was insufficient to support the decision, and that the "decision is based on inference and/or assumption, unsupported by legal evidence, and as such, constituted a denial of due process."

In an additional statement of reasons, appellant expanded upon the above assertions and further contended that the Government did not meet its burden to "prove beyond a reasonable doubt that the defendant did in fact commit the crime as charged" and that facts do not support the charge. Noting that the procedures had been authorized under the Administrative Procedure Act, appellant attacks the constitutionality of that statute. He enumerates provisions of the Federal and Idaho Constitutions which he contends were violated by the decision, and cites the Judge for failure to follow these authorities over departmental regulations.

We shall first consider the burden of proof and evidence issues. Appellant contends that the record did not show beyond a reasonable doubt that there was a violation of the regulation as charged. Although a review of the record dispels any doubt that appellant violated the regulation, the Government did not have to prove beyond a reasonable doubt that the violation occurred. That standard for the burden of proof applies only in criminal proceedings, not in civil proceedings. *Edwards* v. *Mazor Masterpieces, Inc.*, 295 F. 2d 547 (D.C. Cir. 1961).

In a hearing held pursuant to the Administrative Procedure Act, a decision must be in accordance with and supported by reliable, probative, and substantial evidence, but the decision need not be supported by so much evidence as would dispel all reasonable doubt. 5 U.S.C. § 556

(d) (1970). Therefore, an Administrative Law Judge may properly find a grazing trespass has been committed where there is reliable, probative and substantial evidence of the trespass.

[5] Appellant asserts that the evidence only shows that he turned 80 cattle out onto his privately owned land within the allotment, and that only 25 cattle were found on federal land on one particular day. He contends that we may not presume that the trespass has been continuous since the time when he turned his cattle out onto his private land until he obtained his license, and because the regulations purport to control what appellant may do on his private land, he asserts that they are unconstitutional.

Appellant's land is included in an allotment with federal land. Within the allotment, no physical barriers separate the private land from the federal land. In the absence of any effective restraint, appellant's cattle were free to graze throughout the allotment. In the absence of evidence to the contrary, as we indicated, it is therefore reasonable to conclude that of the total forage consumed by appellant's cattle, federal forage comprised the same percentage as it comprised of the total forage available in the allotment, *i.e.*, 33 percent. This same presumption has been used to calculate damages in other grazing trespass cases involving allotments with mixed federal and private lands. *See, e.g., Nick Chournos*, A-29040 (Nov. 6, 1962); *J. Leonard Neal*, 66 I.D. 215 (1959). This measure of damages is applied to determine the value of the federal forage consumed, not the forage consumed on the private land within the allotment. We find that the Judge's decision is supported by substantial evidence of the trespass violation and damages. Furthermore, we see no merit to appellant's contentions that the regulations here are unconstitutional. *Cf. Kleppe* v. *New Mexico*, 426 U.S. 529 (1976); *Camfield* v. *United States*, 167 U.S. 518 (1897), and see discussion, *infra*.

[6] Some of the references cited by appellant indicate that it is appellant's view that the Department may not regulate the public lands because the Constitution assigns all legislative power to Congress and all judicial power to the Judiciary. Appellant would raise the separation of functions doctrine and the nondelegation doctrine as barriers to this Department's regulation of grazing and adjudication of this case. The nondelegation doctrine and separation of powers doctrine were only invoked to invalidate those delegations of power which were considered so broad as to be standardless. *See, e.g., A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). The doctrine has little, if any, vitality today. Recognizing the practical necessity for Congress to delegate the exercise of its authority, courts have ruled that to invalidate such delegations would be tantamount to a denial of Congress' own powers

under the Constitution. *See, e.g., Sunshine Anthracite Coal Co.* v. *Adkins, Collector of Internal Revenue*, 310 U.S. 381, 395–96 (1940). *See generally*, 1 K. Davis, *Administrative Law*, Chapter 2 (1958, Supp. 1970 & Supp. 1976). For similar reasons, the courts have rejected the argument that the administrative agencies unlawfully infringe on the judicial function. *See, e.g., Sunshine Anthracite Coal Co.* v. *Adkins, Collector of Internal Revenue, supra* at 393. *See generally*, 1 K. Davis, *supra*, § 1.09.

The above discussion has been directed to the validity of the regulatory and adjudicative powers of administrative agencies in general. Even when the issues discussed above were considered to have merit, the authority of the Department of the Interior over public land was firmly established and well recognized. Implicit in several court decisions is the recognition of the regulatory and judicial nature of this Department's authority. *See, e.g., Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Knight* v. *U.S. Land Association*, 142 U.S. 161, 181 (1891); *Williams* v. *United States*, 138 U.S. 514, 524 (1891); *Lee* v. *Johnson*, 116 U.S. 48 (1885). This Department's authority over public lands derives from a great number of statutes, many of which have been compiled in Titles 30 and 43 of the United States Code, and is rooted in the Property Clause of the U.S. Constitution, art. IV, § 3, cl. 2, which provides as follows: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." The Department may control grazing on Federal land pursuant to appropriate statutory authority. *Shannon* v. *United States*, 160 F. 870 (9th Cir. 1908). *See also, Kleppe* v. *New Mexico, supra.*

Pursuant to its authority under the Property Clause, Congress has enacted the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* (1970), which confers upon the Secretary of the Interior the authority to regulate grazing on public land. Pursuant to this statutory authority, the Secretary has published regulations, including the one which appellant has violated and the ones prescribing the procedures to be used in determining this case. Indeed, the Secretary has been authorized to enforce and to carry into execution every provision of the public land laws, 43 U.S.C. § 1201 (1970). This provision gives the Secretary the authority to define a trespass on public land and to take appropriate action to enforce the Department's regulations. The Supreme Court has noted this Department's authority to promulgate regulations under the Taylor Grazing Act. *Brooks* v. *Dewar*, 313 U.S. 354 (1941). The constitutionality of this authority is implicit in the decision.

[7] Appellant also asserts that the procedures violate his asserted right to a jury trial. The instant case is not a criminal proceeding, so the Sixth Amendment's requirement for a jury trial is not applicable. As we have explained above, the trespass in the instant case is defined by regulation, not by the common law, and because the regulatory action was unknown at common law, the Seventh Amendment does not require the use of a jury in administrative proceedings. *Atlas Roofing Co., Inc.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442, 97 S. Ct. 1261 (1977); *United States* v. *Eugene Stevens*, 14 IBLA 380, 387–388, 81 I.D. 83, 86 (1974), and authorities cited therein.

[8] With respect to other procedural due process issues raised concerning the hearing procedure followed here, we point out that the procedures followed here resemble mining claim contest proceedings which have been found to meet Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970), and constitutional due process requirements. *See United States* v. *Stevens*, *supra* at 14 IBLA 385–387, 81 I.D. 84–86, and authorities cited therein. Although appellant attacks the Administrative Procedure Act, the Act has not been regarded as an intrusion upon the powers of the judiciary. Indeed, courts have required agencies to follow the requirements of the Act not only when another statute requires an agency to make its decision on the basis of a record at a hearing, but also when such hearings are required as a matter of constitutional due process. *See, e.g.*, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). It therefore follows that adherence to the requirements of the Administrative Procedure Act will usually satisfy the due process requirements of the Constitution. Because the Administrative Procedure Act, 5 U.S.C. § 554(d) (1970), prohibits employees engaged in investigative or prosecutory functions from acting as examiners or Administrative Law Judges in factually related cases, the constitutional requirement of due process is not violated by the fact that the official who presides at the hearing is also an employee of the agency. *Wong Yang Sung* v. *McGrath*, *supra; United States* v. *Stevens*, *supra*. The Administrative Procedure Act conferred no new power upon federal agencies; it was designed to ensure fairness in administrative proceedings which were otherwise authorized, such as those in this case.

[9] As for appellant's contention that the decision is contrary to Idaho law including that State's trespass provision, we need only answer that under the Supremacy Clause of the United States Constitution, federal law necessarily overrides conflicting state laws with respect to federal public lands. U.S. Const., art. VI, cl. 2; *Kleppe* v. *New Mexico*, *supra* at 543. "A different rule would place the public domain of the United States completely at the mercy of state legislation." *Camfield* v. *United States*, *supra* at 526; *see also*, *Utah Power & Light Co.* v.

United States, 243 U.S. 389, 404–405 (1917). The federal laws and regulations are the relevant body of law in this case.

[10] The final issue which warrants discussion concerns appellant's specific argument that the Bureau's acceptance of the check for $155 constituted an accord and satisfaction with respect to the trespass damages. Neither the facts recited previously nor the law warrants such a conclusion. There was no knowing acceptance of the amount in settlement of the trespass damages. The fact that the Bureau deposited a portion of that amount in a "suspense" account shows that the check was not accepted in settlement of trespass damages. Therefore the fact that the check was cashed does not constitute an accord and satisfaction, even though the check recited that it was in "payment in full for 1975 grazing fee." That recitation would not include trespass damages. *Cf* 1 C.J.S., *Accord and Satisfaction* § 35 at 539 (1936); *Edward Malz*, 24 IBLA 251, 83 I.D. 106 (1976); *see generally*, *United States* v. *Aetna Cas. & Sur. Co.*, 480 F. 2d 1095 (8th Cir. 1973). Judge Morehouse's refusal to accept appellant's argument on this point was correct.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, as modified by our ordering that no further license or permit should be issued or renewed until the $149 remaining trespass damage due is paid.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

APPEAL OF W. F. SIGLER & ASSOCIATES

IBCA–1159–7–77

Decided *September 27, 1977*

Contract No. H50C14209487, W. F. Sigler & Associates, Bureau of Indian Affairs.

Motions granted in part and denied in part.

Contracts: Construction and Operation: Contracting Officer

Motions to add four claims were granted in part and denied in part on the basis of the Board's findings that the contracting officer had or had not had a reasonable time within which to decide the specific claim.

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

OPINION BY ADMINISTRATIVE JUDGE STEEL

INTERIOR BOARD OF CONTACT APPEALS

1. The appellant on Aug. 1, 1977, filed five motions (and made service of copies on the Government) as follows:

(a) Designation of record on appeal.

(b) Oral hearing.

(c) Advance the hearing.

(d) Hearing in Salt Lake City, Utah.

(e) Motion to add four claims to the appeal.

The Board by Order dated Aug. 16, 1977, gave the Government 20 days from receipt thereof to file any opposition it might have to said motions.

2. The Government on Sept. 12, 1977, by telephone (and on September 15 by written response) advised the Board that it had no objection to motions (b), (c) and (d).

3. Motions (b) and (d) are allowed.

4. The Board reserves ruling on motion (c) until it receives further information. The Board orders the parties to file a statement, within 10 days of receipt of this order (serving copies on the other party) setting forth the following information:

(1) Mutually agreeable dates for the hearing in Salt Lake City, Utah—or if agreement cannot be reached thereon,

(2) proposed dates for the hearing in Salt Lake City, Utah.

(3) A list of the parties' intended witnesses with a short description of the subject matter of their testimony and an estimate of the length of each party's direct examination of each of its witnesses.

5. On Sept. 12, 1977, the Government, by telephone, and on Sept. 15, by written motion, asked the Board to extend the time for the Government's response to motions (a) and (e) until the time the Government filed the answer, *i.e.*, Sept. 22, 1977.

6. In view of the time required to determine the position to be taken on the newly asserted claims and their relationship to the answer, the Government's motions for extension of time are allowed.

7. The Board has considered the arguments in the "Government's Answer and Response to Certain Motions of Appellant."

8. The "Contractor's Designation of Record on Appeal" is allowed. The appellant could have offered them under 43 CFR 4.103(c). The parties are notified that all documents hereby made part of the appeal file are "in evidence." Nevertheless, a document in evidence may only be slight evidence of the facts mentioned therein and often will be inadequate evidence to establish a fact *if there is contrary "in person" testimony, presented on that issue at the hearing.* The Board does not hereby rule on the "Contractor's Objections to Certain Parts of Appeal File submitted by Contracting Officer" and appellant may renew said objection at the time of the hearing. The Government may renew its objections to specific documents in the "Contractors Designation of Record on Appeal" by a document filed within 10 days of receipt of this order.

9. *Motion to add four claims to appeal.* The appellant on pages 49–

56 of its "Contractor's Response to findings of Fact and Decision by the Contracting Officer dated July 25, 1977," has asked that four other claims under this contract be added to the instant appeal.

(1) The disputes clause provides that *first* the contracting officer will consider and decide any dispute of fact arising under the contract *and then*—if there is an appeal—the IBCA will conduct a hearing and receive evidence and decide the dispute. *VTN Colorado*, IBCA–1073–8–75 (Oct. 29, 1975), 82 I.D. 527, 75–2 BCA par. 11,542.

(2) Thus, the appellant as the moving party on these motions must by affidavit or other evidence establish that the four additional claims were submitted to (filed with) the contracting officer and that the contracting officer has for an unreasonably long time period failed to decide those claims. *Manpower, Inc. of Tidewater* v. *United States*, 206 Ct. Cl. 726, 730 (1975). The courts have long insisted that contractors must exhaust their administrative remedies as long as those remedies are available and adequate, *United States* v. *Holpuch*, 328 U.S. 234 (1946); *Bianchi* v. *United States*, 373 U.S. 709 (1963). However, if those administrative remedies are not adequate, the contractor may go directly to court. *Manpower, Inc. of Tidewater*, *supra*, *New York Shipbuilding* v. *United States*, 180 Ct. Cl. 446 (1967).

(3) *Additional Claim No. 1.* In this claim the appellant asserts that the contracting officer has improperly failed to negotiate overhead rates and that the appellant has therefor suffered additional interest costs. However, the issue to be decided now is whether appellant has submitted such a *claim* to the contracting officer and, if so, when.

(4) A "Claim" should concisely state that operative facts, the amount claimed, the clauses that allow or provide relief, state or estimate the dollar, or other type of relief requested and indicate thereby that a claim is being made under (or outside of) the contract.

(5) What clauses allow claims for relief under this contract? The "changes" clause may, the termination clause may, the Government Property clause may, the allowable cost clause may, as may the overhead rates clause and others. But these clauses are not very helpful in defining what constitutes a "claim."

(6) Appellant points to letters of complaint, for example, Exhibit B to "Contractor's Response * * * Dated July 25, 1977." But a "complaint" is different from a straight out "claim."

(7) Appellant points to Exhibit 49–1 to the final decision as being an erroneous denial of a request to adjust the overhead rates. However, except for the "Contractor's Response * * * Dated July 25, 1977," the appellant appears not to have *made a claim* for added costs caused by the contracting officer's action or inaction.

(8) This Board is authorized to hear and decide disputes under the contract. But first the contractor must clearly *make a claim* under the contract, and he must file that claim *with the contracting officer.* The Board assumes that interest on borrowings made necessary by the contracting officer's allegedly improper failure to negotiate provisional overhead rates would be allowable costs under the contract. Thus, the contractor's remedy is not to complain too long but to promptly file claims.

(9) The appellant also points to Exhibit K to the "Contractor's Response * * * Dated July 25, 1977," as a claim. That letter appears to fulfill all the requirements of a claim. The Government under *Manpower, ante* is obligated to investigate and decide claims promptly. The claim for $37,367.37 was filed June 27, 1977. The "damages" for the allegedly improper failure to promptly allow the claim are stated to be $1,962 (p. 50 of the "Contractor's Response * * * Dated July 25, 1977,") and could fairly be inferred from the June 27, 1977, letter.

(10) The only remaining issue is whether the contracting officer has had a reasonable time from June 27, 1977, to today to act on the claim. The answer to this question turns on the reasonableness of the delay to date.

(11) The standard of reasonableness relates to the size, nature and complexity (or simplicity) of the contract and claim and the contractor's organization and the purpose of (and need for) the contract and does not necessarily relate to the workload or number of personnel available to the Government to investigate the claim. Stated differently, the standard of reasonableness is what a normally prudent businessman familiar to some degree with this kind of Government work would regard as reasonable at the time the contract was signed. The motion to add claim number one is denied as premature. The contracting officer should consider and decide the claim promptly.

(12) *Additional Claim No. 2.* This is a claim that certain property was Government Property within the meaning of clause 318, that it failed to perform properly, that the contractor incurred costs of $10,563.01 to correct the equipments; that claim was made on Mar. 17, 1976, modified on June 7, 1976, and allowed in part and denied in part by the contracting officer on Sept. 24, 1976.

(13) It is the Board's opinion that the contracting officer either has already had the reasonable opportunity to consider and decide this claim within the meaning of *VTN Colorado, supra,* or will have such opportunity in the next 30 days. The motion as to additional claim No. 2 is allowed. The Government shall file an "Answer to Additional Claim No. 2" within 30 days of receipt of this Order.

(14) *Additional Claim No. 3.* This is a claim for numerous allegedly improper actions of the con-

tracting officer. The first cited example is the length of time used by the contracting officer in issuing his final decision.

(15) *Manpower*, *supra*, and the cases cited therein discuss individual situations where the court had to (and did) decide whether specific actions or omissions by the Government were breaches of contract (allowing suit in the court) or were such as to require the contractor to proceed with the administrative disputes resolution process.

(16) This Board can provide only that relief allowed by a clause (as construed by the Board or Court of Claims). The doctrines of constructive change order or similar doctrines do not provide relief for causes of action properly sounding as breach of contract claims.

(17) However, the major problems—entirely aside from the question of the "appellate" nature of our jurisdiction, *VTN Colorado*, *supra*,—that arise by reason of additional claim No. 3 is the lack of precision and detail of the allegedly numerous claims.

(18) For these reasons, the motion to add claim number 3 is denied without prejudice to its renewal in conformity with the principles stated in this Order. The parties are also referred again to *Manpower*, *supra*. There the Court said "It is the Government's obligation, not the contractor's, to see that a proper 'final decision' is rendered once a claim has been tendered" at p. 729–30, and "A contractor is not required to continue to press the Government agency to decide his claim. It is the [Government's] obligation to take that step in reasonable time." The parties may also wish to consider the appeal of *CFR, A Joint Venture of CEMCO and R. F. Communications*, ASBCA No. 18748 (Oct. 22, 1976), 76–2 BCA par. 12,129 at page 58,288, where the Board said:

> Government contracting agencies have a general obligation, implied in law, to cooperate with their contractors and not to administer the contract in a manner which hinders, delays or increases the contractor's cost of performance. *WRB Corp.* v. *United States*, 183 Ct. Cl. 409, 424 (1968), *Joseph H. Roberts* v. *United States*, 174 Ct. Cl. 940, 950–51 (1966), *Dale Construction Co.* v. *United States*, 168 Ct. Cl. 692,700–01 (1964), *Commerce International Co.* v. *United States*, 167 Ct. Cl. 529, 536 (1964), *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 94–95 (1947), *John F. Burke Engineering & Constr. Co.*, ASBCA 8182, 1963 BCA 3713 at p. 18,560; *Nanofast, Inc.*, ASBCA No. 12545, 69–1 BCA par. 7566 at p. 35,049; *Space Dynamics Corp.*, ASBCA No. 12085, 69–1 BCA par. 7662 at p. 35,568.

See also, *G. W. Galloway*, ASBCA 17436, 77–2 BCA par. 12,620.

(19) Nevertheless, of course, the Government has the contractual rights stated in the changes and termination clauses and if action is taken by the contracting officer under those clauses the contractor may seek the relief promised therein.

(20) *Additional Claim No. 4.* This is a claim for allowance of costs associated with a retirement plan. Claim was made by a letter dated, Apr. 5, 1977. The appellant's

motion to add this approximately $9,000 claim to the instant appeal is allowed. The Government shall file a responsive pleading within 30 days of receipt of this Order.

(21) For the purpose of ruling on these motions the Board has taken the written statements of counsel as argument and not testimony, *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (Dec. 2, 1968), 75 I.D. 378, 68-2 BCA par. 7390; *see also* A.B.A. Code of Professional Responsibility—(to Feb. 24, 1970), EC 5-9, DR 5-101 B, 5-102; Black's Law Dictionary, revised 4th Ed. pp. XLII-XLVII.

12. The Board notes that the parties to this appeal are: (1) "W. F. Sigler & Associates, Inc." sometimes called the "contractor" or the "appellant" and "United States of America, United States Department of the Interior, Bureau of Indian Affairs" sometimes called the "Government" or the "respondent." All pleadings should hereafter so indicate. If appellant seeks to add a party to this appeal—a very unusual procedure—it should attempt to do so by motion supported by a memorandum of authorities.

13. The Government impliedly moves to strike paragraph 11 of the complaint, citing *Cosmo Construction Company*, IBCA-412 (Feb. 20, 1964), 71 I.D. 61, 1964 BCA par. 4059, and *John Martin Company, Inc.*, IBCA-316 (Sept. 21, 1962), 1962 BCA par. 3486.

Neither case appears to be dispositive, however, of the questions presented.

Nevertheless, the implied motion to strike is denied, without prejudice. The Board is hopeful that counsel will fully brief the topic in their posthearing briefs.

GEORGE S. STEELE, JR.,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

POCAHONTAS FUEL COMPANY

8 IBMA 136

Decided *September 28, 1977*

Appeal by Pocahontas Fuel Company from a decision by Administrative Law Judge Edmund M. Sweeney, dated July 16, 1975, in Docket Nos. HOPE 75-670 and 75-671, in which Judge Sweeney denied Pocahontas Fuel Company's applications for review of two orders of withdrawal issued pursuant to sec. 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

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

In a proceeding for review of a sec. 104(c)(2) order of withdrawal, the validity, substantive or procedural, of a precedent sec. 104(c)(2) order of withdrawal is not in issue and may not be decided by the Office of Hearings and Appeals.

motion to add this approximately $9,000 claim to the instant appeal is allowed. The Government shall file a responsive pleading within 30 days of receipt of this Order.

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

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

The erroneous and inarticulate comprehension of the standard for unwarrantable failure by the issuing inspector does not prejudice the operator where the facts as found support a conclusion of unwarrantable failure using the proper standard.

3. Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Unwarrantable Failure

The misfeasance of a preshift examiner in failing to detect the existence of a violation of the Act may be imputed to the operator so as to support a conclusion of unwarrantable failure on the operator's part.

APPEARANCES: L. Thomas Galloway, Esq., for appellant, Pocahontas Fuel Company; Thomas A. Mascolino, Esq., Assistant Solicitor, and David Barbour, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On Oct. 8, 1974, Mining Enforcement and Safety Administration (MESA) Inspector Donald C. Phillips entered Pocahontas Fuel Company's (Pocahontas) Maitland Mine for the purpose of conducting an inspection under the authority and direction of the Federal Coal Mine Health and Safety Act of 1969 (Act).[1] During that inspection Mr. Phillips issued a withdrawal order under sec. 104(c)(2) of the Act, charging a violation of the mandatory safety standard contained in 30 CFR 75.603, which prohibits exposed wires in trailing cables. The order, subject of the case numbered HOPE 75-670, alleged a violative condition, as follows: "The energized trailing cable supplying electric current to the No. 8 shuttle car (Serial No. 83) in 3 left section contained four damaged areas in the outer jacket to the extent that the bare power conductors were exposed."

Later and during the same inspection, Mr. Phillips issued another sec. 104(c)(2) withdrawal order, citing a violation of the mandatory safety standard set forth in 30 CFR 75.703, which requires effective grounding of the frames of all D.C. offtrack machines. The order, subject of the case numbered HOPE 75-671, alleged that the following condition was violative of that standard: "The No. 5 shuttle car (Serial No. 82) being used in 3 left section was not provided with frame ground protection, in that the frame ground wire within the trailing cable had been removed at a damaged permanent splice." Later still, Inspector Phillips terminated both of these orders, because the allegedly violative conditions had been abated.

[1] 30 U.S.C. §§ 801-960 (1970).

The inspector used the sec. 104 (c) (2) form of withdrawal order because there had been three prior citations in the mine under a sec. 104(c) series. On Apr. 25, 1974, a MESA inspector had issued a sec. 104(c) (1) notice of violation. Seven days later, on May 2, 1974, a MESA inspector issued a sec. 104(c) (1) order of withdrawal. Finally on Aug. 26, 1974, 116 days later, still another citation was issued, this being a sec. 104(c) (2) order.

Pocahontas filed applications for review of the two Oct. 8 orders on Nov. 7, 1974. By decision dated July 16, 1975, Administrative Law Judge Sweeney (Judge) affirmed the issuance of the subject orders. The Judge concluded that MESA had made a prima facie case of violation and that Pocahontas had failed to carry its burden of rebutting MESA's case as to substantive issues. On Pocahontas' procedural claims that MESA was required to complete an inspection within 90 days of the issuance of any sec. 104 (c) order and that MESA did not "count" spot inspections between May 3 and July 1, 1974, towards the completion of a full inspection of the mine before Aug. 26, the Judge concluded that Pocahontas was not prejudiced by such practices in that they were "fair and reasonable under the circumstances." Pocahontas appealed from the decision on Aug. 1, 1975. Both parties filed timely briefs in support of their respective contentions in this appeal.

Contentions of the Parties

In appealing the Judge's decision, Pocahontas has contended that the Judge erred in two general areas of his decision, one substantive and the other procedural. As to the former, Pocahontas challenges the Judge's findings and conclusions regarding the second order issued (Docket No. HOPE 75–671) as having an insufficient evidentiary basis. (Apparently, Pocahontas has chosen not to challenge the substantive underpinnings of the Judge's decision in Docket No. HOPE 75–670.) As to the latter, Pocahontas contends, in essence, that both orders should have been vacated for the failure of MESA to comply with what Pocahontas contends is a statutory mandate to inspect the entire mine within 90 days of the issuance of a sec. 104(c) order.

More particularly, regarding the substantive claims, Pocahontas makes the following contentions:

1. The Judge erred in using a standard for the determination of unwarrantable failure which differed from that of the inspector who issued the order.

2. The inspector's conception of unwarrantable failure was incorrect because it seemed to emphasize the operator's intention or willfulness rather than the more appropriate knowledge or constructive knowledge.

3. The Judge, though using the correct "knowledge" standard himself, erred in concluding there was

an unwarrantable failure on the part of the operator, because to find the necessary knowledge element, the Judge looked to the knowledge (or the constructive knowledge of two union employees and of a foreman who decided "to attend to other pressing matters" rather than to conduct the inspection which would have led to actual knowledge of the violative condition.

Centering on Pocahontas' argument that it should not be charged with the knowledge of its employees, MESA counters that the master is responsible for the servant's improper performance of his duties, and that the employee's knowledge, whether actual or constructive, is properly attributed to the operator here.

Issues on Appeal

1. Whether an operator may challenge the validity of a sec. 104(c)(2) withdrawal order on the basis of the asserted invalidity of a precedent and prerequisite sec. 104(c)(2) order, application for review of which was not timely filed.

2. Whether the Judge's conclusion that the violation charged by the order reviewed in HOPE 75-671 was a result of the operator's unwarrantable failure was supported by substantial evidence.

a. Whether the knowledge of any employee regarding a violative condition may be imputed to the operator.

248-048—77——2

Discussion

I

As indicated, a major thrust of Pocahontas' case on appeal is that the subject orders are invalid because they depend on the validity of a sec. 104(c)(2) order issued in Aug. and that the Aug. order was invalid.

The basis for Pocahontas' argument that the earlier order is invalid is the asserted requirement in the Act that MESA conduct a full inspection of the mine within 90 days after the issuance of a sec. 104(c) withdrawal order. If MESA does not complete an inspection within that time, reasons Pocahontas, then the continuing chain of operator liability under sec. 104(c) is broken and MESA may deal with an "unwarrantable failure" violation only by use of the sec. 104(c)(1) notice (assuming that other elements prerequisite to the issuance of that notice are also present).

[1] It is clear that the essence of the Pocahontas argument is an indirect challenge to the validity of the earlier Aug. 26 order. Our cases have consistently held that the validity of an earlier order is not in issue in an application for review of a later order dependent for its procedural validity on the earlier order, unless the operator files for review of the earlier order within the statutorily prescribed time period of 30 days. 30 U.S.C. § 815

(a) (1970). Our cases have variously described this holding as being "a limitation on the Secretary's jurisdiction" (*Consolidation Coal Company*, 1 IBMA 131, 79 I.D. 413 (1972)), as the operator's being deemed "to have waived * * * review" and as being precluded from review. (*Kentland-Elkhorn Coal Corporation*, 4 IBMA 166, 82 I.D. 234, 1974–1975 OSHD par. 19,633 (1975). *See also*, *Zeigler Coal Company*, 6 IBMA 182, 83 I.D. 232, 1976-1977 OSHD par. 20,818 (1976), and *Zeigler Coal Company*, 5 IBMA 346, 82 I.D. 632, 1975-1976 OSHD par. 20,232 (1975)). Here, Pocahontas never timely applied for review of the Aug. 26 order. As a result, consistent with our case precedents, we may reach this issue and will affirm in result the Judge's decision on this point since he decided against Pocahontas on it in any event.[2]

II

[2] On the issue of the substantive validity of the withdrawal order in Docket No. HOPE 75–671, Pocahontas asserts that since the inspector used an erroneous concept of unwarrantable failure in issuing the order, despite the fact that the Judge used the correct standard (Pocahontas Br., pp. 10–12), the order must be vacated for the reason that MESA failed to make a prima facie case of unwarrantable failure. The short answer to this problem is that if the order is sustainable, using the *proper* standard on the facts as found by the Judge, then Pocahontas is not prejudiced by the inspector's erroneous or inarticulate comprehension of the standard. Thus, Pocahontas' argument on this issue fails and we must look to see whether the facts as found do indeed sustain a conclusion of unwarrantable failure when the proper standard is applied.

[3] The visual evidence of the violation was a 4- to 5-inch split in a permanent splice to a shuttle car's trailing cable. The portion of the cable containing the damaged splice was hanging on a wire connected to a roof bolt, and the ground wire was not connected (Dec. 4). The Judge noted that it was not clear from the record precisely when the violative condition first occurred but found that it was likely that it occurred prior to the shift in which the order was issued (Dec. 17). No argument has been advanced to persuade us that the Judge erred in this finding.

The operative section of the Act, sec. 104(c)(1) (30 U.S.C. § 814(c)(1)), speaks in terms of "an unwarrantable failure of [an] operator to comply" with the health and safety standards. The term "operator" is defined in sec. 3(d) of the Act (30 U.S.C. § 803(d) (1970)) as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." Recently, the Board has construed unwarrantable fail-

[2] We mean our decision on this point to convey no message regarding the Board's view of the issue raised by Pocahontas. The Board recognizes the interests of both parties in obtaining a decision on the issue, but they and we must wait for another case where the question is directly and properly presented.

ure to include the failure to abate a violative condition or practice the operator knew or should have known existed. *Zeigler Coal Company*, 7 IBMA 280, 84 I.D. 127, 1977–1978 OSHD par. 21,676 (1977). Reading these three legal points together, we point out that a sec. 104(c)(2) withdrawal order can be sustained, assuming the existence of procedural prerequisites and other necessary elements, whenever the operator actually knows or should know of a violation which it fails to abate. However, it would be a tortured construction of the statute to sustain such an order only when the mine superintendent or the chairman of the board of the mine company, for instance, has the required knowledge or constructive knowledge personally. A far more reasonable construction would charge the operator with the knowledge or constructive knowledge of employees responsible to the operator. In this regard the Judge's most significant conclusion was that since the violation was in existence before the beginning of the shift, the condition should have been discovered and corrected during the preshift examination required by 30 CFR 75.303. The Judge also noted that there were two other required inspections, one by the section foreman and one by the shuttle car operator, which also should have revealed the problem (Dec. 17–18).

Pocahontas' argument apparently assumes all of the foregoing but goes farther to answer the question of which employees are responsible to the operator by eliminating from that category all those who are not management employees. Pocahontas treats the three purportedly revealing inspections one by one. The evidence developed that Pocahontas requires its foreman to check the entire area of his supervision for safety violations sometime during the shift (Dec. 13), but, argues Pocahontas, the order was issued before half the shift was over "and the foreman was very busy that morning on various matters, including safety, that in his judgment required his attention first" (Pocahontas Br., p. 14).[3] Pocahontas notes that the other two inspections required by the Judge's decision would be conducted by employees of Pocahontas who are members of the UMWA. Because of that status, according to the argument, they "are not management employees," and are not "the company," and thus their knowledge, actual or constructive, may not be attributed to Pocahontas. In sum, Pocahontas' argument is that of the three employees who could possibly have knowledge of the violation, the knowledge of only one, the foreman, may be charged to the operator since the other two are not management employees. Since it is unreasonable to expect the foreman to have had knowledge of the

[3] Pocahontas makes no record citation to support this assertion, but, in light of our ultimate decision in this case, we will accept the assertion at face value, since it is unnecessary to make a determination of the foreman's actual or constructive knowledge.

violation because he had not enough time to inspect the section completely at the time of the issuance of the order, Pocahontas asserts, then Pocahontas cannot be said to have had actual or constructive knowledge of the violation, and unwarrantable failure therefore, may not properly be found.

The Act provides little guidance on this problem, but in the law generally, the acts or knowledge of an agent are attributable to the principal. The Act does, however, make clear that Congress recognized that the preshift examination is a most important function of the operation of a coal mine. The Act (30 U.S.C. § 863(d)(1) (1970)) goes into lengthy detail regarding the areas to be examined and the safety procedures to be followed as part of the preshift examination. In light of the fact that the Act further requires the operator to designate a certified person to conduct the preshift examination (30 U.S.C. § 863 (1970)), we hold that in this case the preshift examiner was an agent of Pocahontas for the purpose of performing this most important function, and his knowledge or constructive knowledge is properly imputed to Pocahontas. The Board recognizes that the duties delegated to the preshift examiner here are duties that one might expect an employer more normally to delegate to management personnel. *See Ocean Electric Corporation* v. *OSHRC*, — F. 2d —, 1977–1978 OSHD par. 22,043 (4th Cir. 1977). That, however, does not negate the fact that Pocahontas delegated the duty of providing a safe workplace for his brother employees to this preshift examiner, nor does it absolve Pocahontas of the responsibility for the negligent conduct of his duties. As noted, the Act requires Pocahontas to designate a certified person to conduct the preshift examination, but the choice is Pocahontas', and in the absence of evidence to the contrary the designation is clearly a delegation of responsibility to the preshift examiner. In light of this holding and our discussion of the preshift examiner's conduct in this case, *infra*, it is unnecessary for us to decide whether the shuttle car operator is an employee to whom the operator has similarly delegated responsibility for safety matters and whether the foreman should have known of the violation when less than half the shift was completed at the time of the issuance of the order.

The only remaining issue is whether the preshift examiner could reasonably have overlooked the violative condition in his examination. The MESA inspector testified that the condition was "real noticeable," but Pocahontas contends that it was only "real noticeable," "if one happened to turn one's head as one passed that portion of the hanging cable" (Pocahontas Br., p. 13). Our understanding of the function of this preshift examiner leads us to conclude that it is reasonable to expect him to turn his head so as to view all reasonably observable

areas in the mine which could harbor a safety violation. We are also persuaded by the Judge's analysis of the evidence in answer to Pocahontas' contention that the condition could be easily missed. The Judge stated that, "it would seem that a 5-inch split in a cable splice, hanging down 6 to 8 inches from a 60-inch high area (Tr. 249–250), should be susceptible of more prompt detection than [Pocahontas] allows" (Dec. 18). In short, Pocahontas has not convinced us that there was inadequate record evidence to support the Judge's ultimate conclusion of unwarrantable failure based on the preshift examiner's failure to detect and cause abatement of a violation he should have known about. Since we have already decided that this preshift examiner's constructive knowledge is attributable to the operator, we will affirm the Judge's decision.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's dismissal of the case in the above-captioned appeal IS AFFIRMED, and the Judge's decision in that case also IS AFFIRMED, except for such portion thereof as dealt with the asserted procedural invalidity of the subject orders based on the asserted invalidity of an Aug. 26, 1974, sec. 104(c)(2) order, which portion IS SET ASIDE.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

APPEALS OF JB&C COMPANY

IBCA–1020–2–74 and IBCA–1033–4–74.

Decided *September 28, 1977*

Contract No. 14–06–100–6785, Contract No. 14–06–100–6727, Specifications No. 100C–1101, Specifications No. 100C–1097, Columbia Basin Project, Washington, Bureau of Reclamation.

Sustained in Part.

1. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Construction and Operation: Action of Parties—Contracts: Disputes and Remedies: Equitable Adjustments

A first category differing site condition claim based upon excessive rock encountered in excavation under a construction contract is sustained where the Board finds there was an adequate pre-bid site investigation and that the contract indications of subsurface conditions did not reveal the excessive quantities of rock in the areas where it was encountered.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: General Rules of Construction

Where the contract required separated excavation and stockpiling of topsoil and the restoration of rights-of-way as near as practicable to pre-existing conditions, claims for complying with the Government's directions to strip 12 feet in width on one side of the trench to store unsuitable material other than topsoil and to handpick rocks from the covered trench are sustained because the directed work was beyond what was necessary to satisfy the contract requirements and constituted a constructive change.

3. Contracts: Construction and Operation: Differing Cite Conditions (Changed Conditions)—Contracts: Construction and Operation: Action of Parties—Contracts: Disputes and Remedies: Equitable Adjustments

A first category differing site condition claim based upon migrating subsurface water and rock excavation encountered is sustained where the Board found that the Government knew of the subsurface migrating water but failed to disclose such information to bidders and that both the rock and the subsurface migrating water encountered differed materially from the contract indications.

APPEARANCES: Mr. Fred A. Pain, Jr., Attorney at Law, Pain & Julian PA, Phoenix, Arizona, for the appellant; Mr. William N. Dunlop, Mr. Riley C. Nichols, Department Counsel, Boise, Idaho, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE LYNCH**

INTERIOR BOARD OF CONTRACT APPEALS

These appeals involve claims for constructive changes and differing site conditions. Issues of liability and quantum are before us.

IBCA–1033–4–74
Findings of Fact

Contract No. 14–06–100–6727, hereinafter Specification No. 100–C–1097 or Block 82, in the estimated amount of $320,858.09, was awarded to JB&C Company, a partnership, on May 13, 1970. The contract included standard Form 23–A, June 1964 Edition, as amended to reflect, *inter alia*, the 1967 revision to the "Changes" clause and the substitution of the clause "Differing Site Conditions" in lieu of the "Changed Conditions" clause. Work required by the contract included excavation for and installation of approximately 19.2 miles of buried pipe drains, ranging in size from 4- to 15-inch pipe, and related structures on Block 82, Grant County, Washington.

The drains were located in systems, referred to as the D 82–50, –53, –53–7 and –66 systems (Location Map, Govt. Exh. 1). The 50 system was located in the extreme southeastern portion of the project, the 53 system (including laterals D 82–54 and –60) was located in the south and central portion, the 53–7 system was to the north of the 53 system and the 66 system occupied the western and northern portion of the project. Apparently to facilitate bidding by small business concerns, the work was divided into schedules, Schedule I, totaling approximately 8.6 miles of drains and consisting of

*This appeal was heard by former Administrative Judge Nissen who made a major contribution to the first draft of this opinion.

the 50 and 53 systems (including laterals D 82–54 and –60) and laterals 66–2 and 66–3 of the 66 system and Schedule II, totaling approximately 10.6 miles of drains and consisting of the 53–7 system and the balance of the 66 system.

All excavation under Specifications 1097 was unclassified. JB&C Company bid $1.42 a cubic yard for an estimated quantity of 36,000 cubic yards of excavation and backfill for drain pipe trenches on Schedule I and $1.32 per cubic yard for an estimated quantity of 44,100 cubic yards of excavation and backfill for drain pipe trenches on Schedule II. Although he recognized that Schedule II contained the more difficult excavation,[1] Mr. Jack Butler, general construction manager for JB&C, testified that it was his and common practice where there was not a bid item for mobilization to front load the first part of the work in order to have money to work with early in contract performance (Tr. 225–27). Other bids on Schedule I, which were below the engineer's estimate of $1.50 per cubic yard, were at $1.40 and $1.45 per cubic yard (Abstract of Bids, Govt. Exh. 81). On Schedule II, the engineer's estimate for excavation and backfill of pipe trenches was $1.70 per cubic yard while the second and third low bids were at $1.40 and $1.56 per cubic yard. Because JB&C was low bidder on Schedule I only by virtue of its bids on items other than excavation and backfill of pipe trenches and its bid for that item on Schedule II was approximately 94.3 percent of the next low bid, we conclude that no substantial underbidding by JB&C Company for excavation and backfill of pipe trenches has been demonstrated.[2]

[1] He indicated that JB&C anticipated eight times as much hard or difficult boring [excavation] on Schedule II as on Schedule I (Tr. 226–27).

Pre-Bid Site Investigation

JB&C Company had not previously performed any contracts in the Columbia Basin area and the Government attacks JB&C's pre-bid site investigation as totally inadequate, asserting that JB&C's bid was based on a misconception of the job.

JB&C's site investigation was made by Jack Butler, accompanied by two engineers for JB&C, Messrs. Bill Ericson and Walt Farr (Tr. 168, 227). The plans for Specifications 1097 showed 111 logs of exploration (bore logs) and four test pits. These bore logs and test pits on lines where differing site conditions are claimed are described in Appendix I, p. 583. Prior to the site visit Mr. Ericson had made up charts or "spread sheets" showing

[2] The other bidders referred to, and the next low bidders on the project as a whole, were George A. Grant, Inc., of Richland, Washington, and John M. Keltch, Inc., of Pasco, Washington, each of which has had previous drain jobs for the Bureau in the Columbia Basin. Mr. Keltch, who appeared as a witness for the Government, indicated that he had performed at least eight drain jobs for the Bureau in the Columbia Basin (Tr. 1959).

the bore logs and average depths of anticipated hard digging.[3]

Mr. Butler testified that they were able to find only two of the test pits, one of which had been partly backfilled (Tr. 168). This may have been because the location of Test Pit No. 4 was erroneously stated on Sheet 42 of the plans (*see* Appendix). They then made arrangements for and conducted the balance of their site inspection accompanied by a Bureau representative, Mr. Berlyn Plant (Tr. 169, 2254–55). Mr. Plant informed the JB&C personnel in substance that the test pits were located in what the Bureau regarded as the toughest areas to excavate (Tr. 174, 234). Accompanied by Mr. Plant, the JB&C representatives examined Test Pits 2, 3 and 4 (Tr. 2257–58). According to Mr. Plant, he informed Mr. Butler with respect to the caliche shown in Test Pit No. 4 (photos, Govt. Exhs. 7, 8) that "* * * it looked like it would be a hard, rubbery, dense formation" (Tr. 2258).

Mr. Butler was aware that the test pits had been blasted (Tr. 171). However, he was not overly concerned because he stated that in all instances the holes in which the dynamite was inserted were not drilled at or below the depth of the excavation (Tr. 171). As indicated in the Appendix, this is true in all of the test pits except No. 3 where the holes were drilled to 10 feet, the depth of the excavation. The significance of this information is that strongly cemented or hard material below the depth of the drilling will not be affected by the blast. (*See* p. 3 of Differing Site Conditions Claim Booklet, appeal file, Exh. 25.) Mr. Butler was also influenced by the fact excavation of the test pits was accomplished with what he regarded as a very small backhoe[4] and that all digging was described as easy. In Mr. Butler's words, "We felt that dynamite [blasting] was not a real issue in the situation" (Tr. 171). *See also* Beard (Tr. 537). Mr. Butler and Mr. Beard,[5] who was consulted in the preparation of JB&C's bid, were both influenced by the fact that the job was unclassified and in their experience unclassified jobs did not mean rock (Tr. 225, 559).

The precise date of JB&C's site visit has not been established. Mr. Butler fixed the date as Apr. of 1970 (Tr. 170) and Mr. Plant testified that it was early Apr., a few days prior to the bid opening (Tr. 2255), which was Apr. 16, 1970. In any event, at this time, John M. Keltch, Inc. (note 2, *supra*), was performing a drain job for the Bureau (specifications 1073, App. Exh. TT), which is located on Block 82 immediately to the east (to

[3] Tr. 167, 233. Although he indicated that it was JB&C's practice to retain such spread sheets and that the sheets could be in existence, Mr. Butler denied having knowledge of the location of the sheets or what had happened to them (Tr. 236–37).

[4] The backhoe used was a Case 580 with 6" rock teeth.

[5] Mr. Bud Beard was a construction superintendent for JB&C then engaged on an Industrial Park job at Parker, Arizona (Tr. 155, 536). His study of the plans and specifications was limited to the spreadsheets (note 3, *supra*) prepared by Mr. Ericson (Tr. 306).

the north of the 50 system) of the principal work performed by JB&C under Specifications 1097. Included in the work required under the Keltch contract was the construction of an open drain or wasteway, referred to as DRB4C, which runs in a north and south direction and forms a boundary between the work performed by JB&C and that performed by Keltch. The DRB4C drain had been completed and in fact, Specifications 1097 required the construction of several drains (53–2, –3, –4, –5 and 53–7) which outletted directly into the DRB4C.

Mr. Plant was aware of the work performed by Keltch under Specifications 1073 and suggested to the JB&C personnel that they look at that job (Tr. 2269). He testified that on the way to the Keltch work site, they stopped at the DRB4C and that he told Mr. Butler that would give him an indication of conditions in the general area. Although the Government now maintains that caliche in the embankment resulting from the excavation of the DRB4C was obvious and should have alerted JB&C to the difficult excavation actually encountered, it is noteworthy that Mr. Plant gave no testimony as to the extent of caliche observed in the embankment at the time and indeed, was not asked whether he saw any caliche in the embankment.[6] Be that as it may, if the caliche in the embankment of the DRB4C was as plentiful and obvious as the Government now contends, it is noteworthy that bore logs located within 850 feet of the DRB4C on lines 53–2 and 53–3, which lines as we have seen were to outlet directly into the DRB4C, show nothing but fine sandy loam, sand, loamy sand and silty clay interspersed at points with occasional caliche gravels or occasional basalt and caliche gravels.

John M. Keltch, Inc., utilized a trencher specially designed and constructed for drain excavation in the Columbia Basin (Tr. 1891; photos, Govt. Exhs. 13, 14). When Mr. Plant and the JB&C representatives arrived on the site of 1073, the trencher was not in operation (Tr. 2260). Mr. Butler recalled that the Keltch trencher was in operation (Tr. 247) and he testified that there was no caliche of any kind where the trencher was located and that the soil was completely black (Tr. 173, 174). He stated that we [JB&C representatives] concluded that a good share of the digging [on 1097] was probably what Keltch was digging (Tr. 254). Although the Government introduced photos

[6] In support of the contention that caliche in the embankment of the wasteway was obvious, the Government relies on Exhibit 85, a piece of caliche allegedly taken randomly from the embankment, which is concededly and obviously extremely hard rock, and photos (Exhs. 101 and 102). Exhibit 85 bears the notation "Pieces obtained above station 0+00, DS2–53–5, on DRB4C." Exhibit 85 was obtained and the photos were taken in October 1974 and we have viewed skeptically such evidence garnered after the fact and in preparation for litigation insofar as it is offered for the purpose of showing what should have been obvious on a prebid site investigation. See *PHL Contractors*, IBCA–874–11–70 (Oct. 23, 1973), 80 I.D. 667–698, at 682, 73–2 BCA par. 10,293 at 48,598.

(Govt. Exhs. 76A–76R) of the work in progress under Specifications 1073, the most pertinent of which were taken on Apr. 1, 3 and 14, 1970, which show caliche in the excavation, the precise location of the Keltch trencher operation at this time has not been established. Mr. Plant testified that the open trench behind the trencher showed normal digging operations for the area (Tr. 2260–61). While normal digging for the area might be construed as encompassing caliche or substantial quantities thereof, in the absence of evidence that this was Mr. Plant's conception of the term, we decline to so construe it.[7] Rather we view Mr. Plant's testimony as confirming Mr. Butler's statement that caliche was not evident in the excavation at the location of the Keltch trencher at the time of the site visit. Mr. Keltch confirmed that his firm encountered an easy stretch of excavation during the latter phase of the first stage of 1073, which ended Apr. 17, 1970 (Tr. 1930–32). Obviously, the material excavated is more significant than the factors relied upon by the Government (note 7, *supra*).

Of the 111 bore logs shown on the plans, all except one were drilled with a Hugh B. Williams Hole Digger, Model BDH–3, with 70 Brake horsepower gasoline engine using a 16-inch diameter earth bit or a 6-inch diameter rock bit. In all instances where drilling with the 16-inch earth bit was discontinued, further drilling, if accomplished, was with a 6-inch rock bit. Although generalizations concerning the bore logs are difficult, 40 of the bore logs show hard or moderate boring in strongly cemented or indurated caliche.[8] Mr. Butler testified that JB&C had just completed jobs in Parker and Tucson, Arizona, which called for excavation of what he characterized as hard or moderately hard caliche that had been excavated without difficulty by an old Cleveland Model 320 trencher (Tr. 166, 223). He asserted that because, in most instances, the bore logs on the plans showed the caliche as extending only about 1½ feet or 2 feet in depth with easy excavation below that and only in three or four instances, did the caliche extend to the bottom of the trench, they (JB&C personnel) felt that the excavation would be relatively easy or normal (Tr. 166–67, 175, 185). According to Mr. Butler caliche at the bottom of the trench excavation is much more difficult to excavate than caliche in the middle of the trench (Tr. 184–85, 220). He indicated that JB&C planned to obtain a new trencher and perform several drainage contracts for the Bureau in the Columbia Basin.

Mr. Butler described the process by which JB&C estimated the amount of hard or difficult excavation anticipated. In general, this consisted of adding the hard boring (with one or two exceptions indi-

[7] Significantly, the Government places primary reliance on the size of the Keltch machine (165,000 pounds) and the fact that it was equipped with rock teeth as factors which should have alerted JB&C to the conditions actually encountered.

[8] Caliche, according to Mr. Butler, was harder than normal soil, but not as hard as rock (Tr. 228–29).

cated to be in strongly cemented or indurated caliche) shown by the bore logs to be within the trench excavation and dividing by the number of bore logs on the line including those showing easy boring (Tr. 181–83, 186–220). In some instances, they projected or extrapolated from the nearest bore log as to what they assumed a bore log would have shown had one been present.[9] Mr. Butler further testified that in bidding, footages of line had to be and were considered in determining averages of difficult and normal excavation (Tr. 206–07). He asserted that JB&C's basic conclusion was that there was no rock in the area [10] and that the difficult excavation, mostly being in the middle of the excavation, and averaging something less than ½ foot overall would present very few problems (Tr. 220–21). JB&C concluded that hard digging throughout the job would average four tenths of a foot or 5 percent of total excavation (Tr. 244–45). Mr. Butler regarded moderate boring as no different than hard dry clay and more efficient to work with than easy or soft boring because there would be less sloughing (Tr. 297–98).

Although conceding that they were extremely wrong on the type of equipment they initially decided to use, he stated that the power equipment JB&C anticipated using would excavate a foot or foot-and-a-half of caliche [with layers of easy excavation above and below], if it were in fact caliche, without slowing down significantly (Tr. 185, 222–23). He conceded that if they used small equipment for excavation they anticipated that blasting would be required from station 0+00 to 5+00 on 66Q, which he regarded as the worst line on the entire job (Tr. 200, 238–39, 244).

The Government cites Mr. Keltch's (note 2, *supra*) testimony that he would have anticipated encountering 75 percent caliche on 1097 and that if he had not had his specially designed Jetco trencher, he would have planned drilling and shooting 50 percent of the job (Tr. 1949). However, to Mr. Keltch even a bore log describing weakly and strongly cemented sandy loam was indicative of caliche and it is clear that his conclusions were based as much on his knowledge of the general area as the bore logs.[11] Mr. Mac-

[9] Department counsel are highly critical of what they regard as a simplistic method of estimating the amount of difficult excavation anticipated (Respondent's Brief at 41 *et seq.*). However, counsel selected a particularly unfortunate example to illustrate the alleged fallacies of Mr. Butler's calculations because on one of the lines selected (66J) Mr. Butler anticipated an average of 1.13 feet of hard excavation, while Mr. MacGregor, respondent's expert witness, anticipated an average of 1 foot of caliche on that line (App's Exh. ZZ). While there are many instances where Mr. MacGregor's conclusions differ substantially from those of Mr. Butler, projection or extrapolation is, of course, an accepted and necessary technique. See *The Arundel Corporation* v. *United States*, 207 Ct. Cl. 84 (1975).

[10] The conclusion that no rock would be encountered was based upon the bore logs and in part upon the fact that the excavation was unclassified (Tr. 255).

[11] Tr. 1952–53, 1963. Although Mr. Keltch had several contracts with the Bureau prior to the construction of the Jetco trencher, in his words "he had steered clear" of the Royal City area because of the necessity to drill and shoot (Tr. 1967).

Gregor anticipated finding no rock as defined in the specifications [12] on Schedule I and 5 percent or less on Schedule II (Tr. 2530). His conclusions on caliche will be considered in connection with the separate systems and lines.

We find JB&C's site investigation to have been reasonable under the circumstances. Of course, to the extent that JB&C was influenced by its understanding or assumption that unclassified excavation indicates that no rock would be encountered, it was wrong as a matter of law.[13] Although JB&C's bid price for excavation on Schedule II was at best marginal, we further find that no substantial underbidding has been demonstrated.

Performance

JB&C moved a Cleveland Model Delta 160 ladder type trencher onto the job on May 25, 1970, and the machine was tested at approximately station 31+70 on 66E, where EOC (end of construction) is at station 28+00, the following day (Inspectors' Reports of even date, Govt. Exh. 9). The machine excavated a trench 7.5 feet in depth for a distance of approximately 20 feet in material described as hard caliche from 1.2 feet to the bottom of the trench.[14] The trencher proved inadequate to satisfactorily excavate hard caliche (Tr. 312, 545–46, Inspectors' Reports).

A second test of the Delta 160 trencher was conducted at station 1+00 on the 53 mainline in material characterized as very unstable on June 3, 1970 (Inspector's Report). Because of sloughing, the machine was also considered inadequate to excavate softer material and was subsequently removed from the job (Tr. 312, 548; Inspectors' Reports).

Mr. Bud Beard, superintendent for JB&C, testified that he then rented a Drott 50 backhoe, which has a yard-and-a-quarter size bucket, and commenced excavation at 0+00 on mainline 53, proceeding northward (Tr. 312–13, 514). He indicated that the capabilities of this machine were well above the

[12] While trench excavation was unclassified, rock was defined in Paragraph 45 of the specifications as follows:

"Where the terms 'rock' and 'rock excavation' and 'common' and 'common excavation' are used in these specifications the following definitions shall apply:

"*Rock excavation.*—Rock is defined as sound and solid masses, layers, or ledges of mineral matter in place and of such hardness and texture that it:

"(1) Cannot be effectively loosened or broken down by ripping in a single pass with a late model tractor-mounted hydraulic ripper equipped with one digging point of standard manufacturer's design adequately sized for use with and propelled by a crawler-type tractor rated between 210- and 240-net flywheel horsepower, operating in low gear, or

"(2) In areas where it is impracticable to classify by use of the ripper described above, rock excavation is defined as sound material of such hardness and texture that it cannot be loosened or broken down by a 6-pound drifting pick. The drifting pick shall be Class D, Federal Specification GGG–H–506d, with handle not less than 34 inches in length.

"*Common excavation.*—Common excavation includes all material other than rock excavation."

[13] *Promacs, Inc.*, IBCA–317 (Jan. 31, 1964), 71 I.D. 11, 1964 BCA par. 4016.

[14] It is of interest that a bore log approximately 140 feet from this station on 66E at station 30+32 shows hard boring caliche from 2 to 4 feet in depth while the balance of the material is described as fine sandy loam, easy boring. This bore log is more particularly described in Appendix I.

breaking power of rock as described in the specifications (Tr. 316).

On June 15, 1970, JB&C brought a Cleveland Model 400W Wheel type trencher onto the job.[15] At the time, this machine was the largest and most powerful trencher commercially available (Tr. 318), being described by Mr. Jack Butler as the "Cadillac" of trenching machines (Tr. 3700) and by Mr. Keltch as the best trencher on the market for digging "hard stuff or any other material." There is a conflict in the evidence as to the depth to which this machine will excavate a trench. Mr. Beard testified it would excavate to 9.5 feet (Tr. 554–55), while respondent's evidence is to the effect that its maximum excavation depth is 8.3 feet (Tr. 2148, 2158, 2710; Inspector's Report, Sept. 2, 1970).

The Cleveland 400W trencher was utilized to excavate the 53 mainline from approximately station 25+15 to EOC at 27+19.5, the balance of the mainline having been excavated with backhoes (Inspectors' Reports). The trencher was also utilized to excavate all or portions of laterals 53G through 53P, except for 53M which was excavated in its entirety with a backhoe.[16]

JB&C completed trench excavation on the 53 system, including lines 53.2 through 53.5, on July 30, 1970 (Inspectors' Reports). Lines D82–54 and –60 were then excavated and JB&C proceeded to the 66–2 and 66–3 lines.

JB&C completed trench excavation of the mainline, including laterals 66A through 66E, to a point immediately south of Hallsten Road, which intersects the mainline at approximately station 26+04. At this point, JB&C was directed to skip an area extending northward and including laterals 66F through P because of unharvested potatoes in the right-of-way (Tr. 2403). JB&C's claim for costs attributable to this skip, in addition to those allowed by the contracting officer, is considered infra.

Lateral 66K extends in a northwesterly direction a distance of approximately 1,386 feet from the 66 mainline at station 44+32.8, then extends eastward a distance of approximately 927 feet and again runs in a northwesterly direction, terminating at station 38+33.9. JB&C proceeded to that leg of 66K which runs in an east-west direction. After completing 66K, excepting the initial leg extending from the mainline and laterals 66K–2 and K–3, appellant excavated the mainline from station 56+59 to EOC at 65+05 (Inspectors' Reports, dated September 18 and 21, 1970). There-

[15] Tr. 317, 318; Inspector's Reports. Mr. MacGregor was of the opinion that a self-propelled wheel type excavator would be the best type of equipment to use because it was capable of accomplishing most of the excavation without blasting (App. Exh. CC).

[16] Mr. Duane Pedersen was an assistant field engineer for the Bureau. His diary (Govt. Exh. 114) for June 26, 1970, states, "Digging in pretty hard caliche. Logs show sandy loam." Although the line referred to in the dairy is not identified, we find it to be 53 N (Tr. 2853; Inspectors' Reports). On cross-examination, Mr. Pedersen admitted that the logs did not indicate to a reasonably prudent bidder what was in fact encountered at the Station (Tr. 2856).

after, JB&C proceeded to the 66T line, which extends to the east of the mainline from station 65+05.2, 66S line, which extends east of the mainline from station 61+05.2 and 66T line, which extends to the northwest of the mainline at station 61+05.2. It was necessary to blast portions of the 66T and S lines as the material was too hard to excavate with the trencher.

Thereafter, the trencher excavated portions of laterals 66F, 66L, 66N, 66P, all of 66G and the balance of the 66 mainline (Inspectors' Reports, dated Oct. 12 thru 14, 20 thru 24, Oct. 26 and 30 and Nov. 2 and 3, 1970). On Nov. 3, 1970, the trencher was moved from Block 82 to Block 87. The balance of excavation on Block 82 (the remainder of the 66 system, the 53–7 and 50 systems) was accomplished with large Insley backhoes, which Mr. Butler described as the largest available in the Pacific Northwest (Tr. 1089). The work was accepted as substantially complete on March 1, 1971, the scheduled completion date.

The trencher had been operated from 100 to 150 hours when it was rented by JB&C and was considered to be essentially new (Tr. 378). Mr. Beard testified that the machine was beginning to get brittle or tired as they proceeded on the lower portion of the 66 system. He asserted that they had at least three serious breakdowns on the 66E line, one of which was a twisted axle. An Inspector's Report, dated Sept. 8, 1970, confirms that the trencher at EOC on 66E was "down all day for repairs." The nature of the repairs is not disclosed. Mr. Beard attributed the breakdowns to the hardness of the material and asserted that "* * * it was just beyond what you should ask a machine to do." [17] He stated that the trencher was removed from the job because it had been broken and repaired many times and was unable to excavate hard material without breaking down (Tr. 580–81). He described the condition of the machine as "very, very poor" when it was moved off of the job.

Respondent attributes part of the difficulties with the trencher to the pipe laying shield or "boat" which appellant attached to the rear of the trencher and for which it was not designed (Tr. 558–59; App.'s Exhs. K & EEE; Govt's. Exh. 30). The "boat" included a hopper or bin for filter gravel, which when fully loaded weighed approximately 12,000 lbs. (Tr. 1205, 2735–36). However, Mr. Beard testified that the action of the wheel was the primary factor governing progress of the trencher and that the boat did not create any appreciable drag on the machine (Tr. 577–78).

Another controversy concerning the trencher is the width of the trench it would excavate. Although the purchase order specifies 40-inch buckets (Govt's. Exh. 87–143), Mr. Beard testified that he thought the digging buckets were 34 to 36 inches in width (Tr. 551). The actual

[17] Tr. 379. Bureau records confirm that there were numerous breakdowns of the trencher, including the main drive system and several broken axles. See, *e.g.*, Inspectors' Reports, dated Sept. 10, 19, 21, 22, 24, 29 and 30, and Oct. 13, 14, 20, 22, 23, 27 and 30, 1970.

width of the buckets was 35 inches (Tr. 3794–95). Nevertheless, the minimum width of the trench, because of the cutter teeth, was 40 inches. Respondent's evidence is to the effect that the trencher was actually excavating a trench 50 to 54 inches in width (Tr. 2148; Inspector's Reports, dated June 25, 26, 30 and September 9 and 10, 1970; Govt's. Exh. 29 and appeal file, Exh. 36, photo No. 8). The payline width was only 28 inches and respondent attributes JB&C's excavation difficulties, its problems with stripping and cleanup and the use of extra filter material in principal part to the wide trench. These matters are considered infra. JB&C installed narrower buckets on the trencher in Oct. 1970 and thereafter excavated a trench approximately 37 to 39 inches wide (Tr. 2756).

Mr. Beard testified that narrower buckets had been ordered at an earlier date, but that they were not available (Tr. 554). This testimony was corroborated by Jack Butler (Tr. 3698). *See also* Pedersen at Tr. 2754.

Differing Site Conditions Claim

Mr. Beard expressed concern to the Bureau on or about June 27, 1970, that rock had been encountered on the 53 system.[18] He testified that a meeting was held thereafter with Bureau officials in Othello, Washington (Tr. 348–50). He asserted that Bureau personnel Messrs. Wilcox, Pedersen and Westfahl would not make any commitment as to whether rock was being encountered, but pointed out that the contract called for unclassified excavation and that any claim for changed or differing site conditions would have to be submitted to higher authority (Tr. 350–51, 354). Mr. Westfahl's diary for Aug. 13, 1970 (Govt's. Exh. 87) confirms that Messrs. Beard and Degeest attended a meeting in Othello with Messrs. Kolterman, Weisell and Pedersen. Although Mr. Beard admitted that conditions indicated by the bore logs were not discussed at the time, he asserted that the bore logs were discussed after the meeting with Mr. Westfahl in JB&C's Royal City office on numerous occasions and that he (Beard) insisted that the bore logs were different from actual site conditions (Tr. 353–54). Mr. Westfahl denied knowledge of any such discussions and stated that he did not pay a great deal of attention to the bore logs (Tr. 2189–90). He admitted having told the contractor in effect that because trench excavation was unclassified, conditions encountered were irrelevant (Tr. 2209).

[18] Chief Inspector Westfahl's diary (Govt. Exh. 87) for June 27, 1970, states that he was to meet Superintendent Beard for the purpose of classifying material on 53N, but that when he arrived the line had been backfilled from station 0+00 to 6+00. Mr. Beard is quoted as saying forget this one and they would check the next one where hard material was encountered. *See also* Inspector's Report for June 27, 1970, which states that Mr. Beard was concerned about rock in the material excavated from the trenches.

JB&C's formal claim was submitted under date of Aug. 29, 1970 (Appeal file, Exh. 9). Because the Bureau has chosen to interpret the letter as asserting a claim based on an erroneous interpretation of Paragraph 45 of the specifications rather than differing site conditions, we will quote the first paragraph of the letter in full:

> In conjunction with excavation to date, numerous layers of consolidated strata have been encountered resulting in most difficult excavation and additional effort (see Incl. #1). It is our belief and contention that this increased digging effort is due to "Rock Excavation" as compared to "Common Excavation" defined in Par. 45, Spec. #100C–1097 for which the contractor should be reimbursed in accordance with Par. 4, General Provisions.

Paragraph 4 of the General Provisions is the "Differing Site Conditions" clause. The enclosure to the letter claimed a uniform 7 feet of rock was encountered on the 53 mainline from station 17+20 to 27+20 and on all or parts of lines 53J through 53P inclusive and also on all or portions of lines 53–2 through 53–5 inclusive. A uniform 9 feet of rock was claimed from station 7+00 to 16+50 on 53H and from station 8+00 to 10+00 on 53F. Rock claimed to have been encountered on the 53 system totaled 7,578 c.y. or slightly less than one-half of total excavation on this system of approximately 15,978 c.y. JB&C also claimed to have encountered 7 feet of rock from station 42+00 to 50+00 on 66.2 and from station 13+25 to 50+00 on 66.3. Rock to a depth of 8 feet was claimed from station 11+50 to 29+00 on 66A, from station 0+00 to 5+00 on 66B and from station 10+80 to 29+00 on 66C. From station 0+00 to 7+50 on 66C, JB&C claimed to have encountered 10 feet of rock.

The foregoing letter was signed and the claim, which included excavation through Aug. 26, 1970, was prepared by Mr. Ronald Whitlock, an engineer and trouble shooter for JB&C, who arrived on the job on or about Aug. 20, 1970 (Tr. 74, 95, 108, 122, 600–01). Rock quantities were computed by Mr. Whitlock from available records, information supplied by JB&C supervisory personnel and by personal observation (spot checks) on lines that were still open (Tr. 72, 73, 81, 84, 99, 110, 139). Although the lines had been backfilled and the 53 system essentially completed at the time of his arrival (Tr. 74, 601–02; Inspectors' Reports), Mr. Whitlock observed chunks of hard material on the surface of various lines, which in his judgment, confirmed that rock had been encountered in the excavation (Tr. 97). Appellants' claim for costs of cleanup in excess of contract requirements is considered *infra*.

A dollar amount was placed on the foregoing rock claim in a separate letter, dated Sept. 1, 1970 (Appeal file, Exh. 10), which asserted claims totaling $200,894.21, of which $116,726.08 was assertedly attributable to rock excavation. The letter referred to Paragraph 3,

Changes, and Paragraph 4, Differing Site Conditions, as the bases for the claims. The letter signed by Mr. Whitlock as well as the latter letter signed by Duane Butler, a JB&C partner, were handcarried to the office of Mr. B. L. Mendenhall, then Chief of the Construction and Engineering Division and authorized representative of the contracting officer, in Ephrata, Washington, on Sept. 1, 1970. Representatives for JB&C were Mr. Whitlock, Mr. Duane Butler and Mr. Roy Charles, an accountant for JB&C. Although Mr. Mendenhall, who had retired at the time of the hearing, testified that the rock claim was based on an interpretation of Paragraph 45 of the specifications (Tr. 2957), the accuracy of this testimony is refuted by the opening sentence of a memorandum, signed by Mr. Mendenhall, summarizing the conference (Govt. Exh. 72). The memorandum states that they (JB&C) were encountering significant amounts of rock in the drain lines which they felt was a changed condition and for which they should receive extra compensation. Notwithstanding this clear statement of the basis for the claim and the equally clear references to the Differing Site Conditions clause in the claim letters, Mr. Mendenhall testified that he did not direct any additional investigation of the rock claim because he considered that the claim concerned an interpretation of the specifications (Tr. 2960). He asserted that the Bureau knew hard material existed in the excavation so that there was no reason to investigate that condition (Tr. 2960–61). His letter of Sept. 25, 1970 (Appeal file, Exh. 11) responding to the rock claim does not mention a claim for differing site conditions, quotes Paragraph 45 of the specifications and asserts that the definitions of common and rock excavation contained therein are not applicable to drain pipe trenches. The letter states that the Bureau is making no attempt to deny the existence of material which could be classified as rock, but points out that drain trench excavation is unclassified for payment and that the difficulty of excavation should have been taken into account in computing JB&C's bid prices.

JB&C's claims were discussed at a meeting with the contracting officer and other Bureau representatives in Boise, Idaho, on Nov. 6, 1970 (Tr. 442–43, 718, 785–88, 1000–15, 1017–18, 2230; Govt. Exh. 82). JB&C's representatives were told essentially that if substantially more rock than indicated in the contract was encountered, then the claim would be recognized (Tr. 2323–24). JB&C agreed to resubmit the claim and the Bureau agreed to consider a claim properly presented on its merits. However, as the events to be recounted hereinafter make clear, there was no way that JB&C could meet the Bureau's standard for a properly presented claim.

JB&C submitted a claim covering excavation through Nov. 30, 1970, under date of Dec. 16, 1970 (App.

Exh. D; Appeal file, Exh. 12). The claim for rock excavation was in the amount of $130,233.04 based on the excavation of an alleged quantity of 17,252.3 cubic yards of rock at a cost of $7.62 per cubic yard, reduced by the amount received for excavation under the contract. Total rock excavation claimed on the 53 system was reduced to 4,740.2 cubic yards.[19] Rock excavation claimed on the 66 system totaled 12,512.1 cubic yards (Schedule III, IV, V and VI). The rock computations in this claim were also made by Mr. Whitlock chiefly from available records (Tr. 110). However, he conceded that his primary sources of information on work performed prior to his arrival were Bud Beard and Virgil Degeest, the latter a JB&C foreman (Tr. 98, 99).

The contracting officer responded to JB&C's claim for differing site conditions and its other claims under date of Mar. 26, 1971 (Appeal file, Exh. 14). Notwithstanding the fact that JB&C had submitted a detailed list of stations where rock was assertedly encountered, notwithstanding the contracting officer's clear obligation under the Differing Site Conditions clause to conduct a prompt investigation and make a determination, and notwithstanding the further fact that, as will be seen infra, the Bureau had inspection records allegedly showing conditions encountered at each station, JB&C was informed in substance that until it furnished, in detail, substantiation of the allegation that conditions encountered differed from those indicated in the contract, but the contracting officer had no proper basis for a decision other than a denial of the claim.

Under date of May 3, 1973,[20] appellant's counsel addressed a letter to the Bureau (Appeal file, Exh. 15) enclosing a colored trench profile assertedly showing rock encountered, a bore log summary allegedly indicating no rock and a photo depicting rock assertedly taken at the location of the bore log and inquired whether that was the type of evidence the Bureau wished submitted. The contracting officer responded on May 14, 1973, pointing out various asserted deficiencies in the evidence furnished including, *inter alia*, that it was not possible to determine the type of material shown in the photo, admitting that rock was encountered in the trenches, but pointing out that excavation was unclassified for payment and that the bore logs showed difficult excavation which should have been taken into account in bid prices. With respect to appellant's burden of proof, the letter stated that, "Essentially you must prove that the data furnished in the contract was erroneous or failing that you have

[19] This is the total set forth on Schedules I and II of the Dec. 16 letter. However, using average rock depths claimed to have been encountered, it is not possible from the lines and stations given to verify amounts claimed. See Bureau recomputations, Tr. 1740–42.

[20] Appellant was in financially straitened circumstances and in effect signed itself over to the bonding company, Gulf Insurance Company, in Mar. of 1971 (Tr. 926). JB&C's books and records were in the custody of the bonding company and out of JB&C's control for approximately 2 years (Tr. 23). This probably accounts for the hiatus in pursuing the claims.

the more difficult task of proving that the conditions encountered were unknown, unusual and differed materially from those ordinarily encountered in drain construction on the Columbia Basin Project." The standard stated in the letter necessary for the establishment of a category one differing site condition claim was, of course, erroneous as a matter of law.[21]

On June 20, 1973, appellant's counsel wrote the contracting officer enclosing a photograph and colored log profile and again inquired whether this evidence was of the type needed (Appeal file, Exh. 17). The contracting officer's reply, dated July 6, 1973 (Exh. 18), stated that the profile and photo were not acceptable evidence to substantiate a claim for changed conditions. The letter stated there is no provision in the specifications for photographic classification of excavation as the soundness, hardness and texture of the material cannot be determined by photographs. Paragraph 45 of the specifications was quoted for the definitions of rock, but the letter then pointed out that the terms "rock" and "rock excavation" were not used in the specifications applicable to drain pipe excavation and that accordingly, the definitions of rock were not applicable thereto. Appellant was again informed that it must prove that data furnished in the specification was erroneous and then: "It would appear that your client could establish this only by drilling new exploratory holes and/or test pitting in undisturbed material in the immediate vicinity of the original drill holes and showing that the data thus obtained differed materially from the data which was included in the specifications." [22]

Appellant's counsel again wrote the contracting officer on July 18, 1973 (Appeal file, Exh. 19), requesting a meeting and pointing out that even if new holes were drilled, it would be necessary to take witness accounts, photographs, etc., to record the data from the "new holes." The contracting officer replied under date of July 30, 1973 (Appeal file, Exh. 20), stating that the Bureau was interested in resolution of JB&C's claim, but that despite numerous oral and written requests over a period of years for backup material, JB&C had not furnished any acceptable evidence to support its claim. The letter then went on to demonstrate in unequivocal terms that there was no evidence that would be considered acceptable.

We have repeatedly explained to your client that it must be proven that the logs in the specifications were incorrect.

[21] See *PHL Contractors*, note 6, *supra*, at 48,600–01:

"* * * the issue is whether there were such indications which induced reasonable reliance by the successful bidder that subsurface conditions would be more favorable than those encountered."

This is more than a mere semantical difference, because proving the bore logs and other data in the contract erroneous is clearly a more onerous task.

[22] This suggestion is clearly the result of carrying the Bureau's erroneous standard of proof for the existence of a category one differing site condition to its logical conclusion.

Witness statements that rock was encountered or photographs purporting to show rock are unacceptable as a means of establishing the existence of rock as neither method establishes the soundness, hardness, or texture of the material. Classification of rock is subject to the definitions in Paragraph 45 of the specifications.[23]

As we see it, the only way our logs and test pits can be proven inaccurate would be by drilling new holes and excavating new test pits in undisturbed material in the immediate vicinity of the original exploration holes and pits. A direct comparison of the materials excavated would then support or refute the claim.

Having informed JB&C that the only way it could prove its claim for differing site conditions was by drilling new holes and excavating new test pits, the Bureau backed away from this approach when JB&C offered to put up $50,000 to have an open trench excavated, the validity of the claim to turn upon expert analysis of the results in comparison to the bore logs (Tr. 950, 974–76, 981, 984; JB&C letter, dated Nov. 28, 1973, App's. Exh. X). Not only did the Bureau reject JB&C's offer, but the successor contracting officer informed Mr. Duane Butler that JB&C had no right to even make such a proposal (Tr. 982). The foregoing recitation establishes to our satisfaction that the Bureau was attempting to enforce an impossible burden of proof in an effort to force JB&C to abandon the claim and lends support to JB&C's charge that the Bureau was not acting in good faith.[24]

At a meeting in Boise on Aug. 6, 1973, JB&C presented a mass of material, including cost data, in support of its claims (Appeal file, Exh. 21–25, inclusive). Included in this material was a document entitled "Water and Rock Quantity computations" (Appeal file, Exh. 23; App. Exh. A).[25] Exhibit A includes excavation for the entire job, was substantially prepared by Mr. Whitlock during the period Aug. 20, 1970, to Feb. 3, 1971, when he left the job, and represents, according to Mr. Whitlock, a refinement[26] based on a review of available records and discussions with JB&C supervisory personnel, chiefly Bud Beard and Virgil Degeest (Tr. 111, 117–18). Mr. Whitlock professed amazement at how closely the information imparted orally by

[23] The latter statement represents a reversal from the position stated in the contracting officer's letter of July 6 that the definitions of rock in Paragraph 45 were inapplicable to trench excavation.

[24] JB&C's letter to the contracting officer, dated Nov. 28, 1973 (App. Exh. X), written following a meeting with Bureau personnel in Boise on November 20, states that one reason given by Bureau representatives for not settling the claim was that it would cause problems with other contractors in the area who were watching the outcome of JB&C's claim. The letter quotes Bureau representatives as stating that they were prepared to spend more money defending the case than they would ever pay JB&C company on its claim.

In this connection, it is significant that Mr. Mendenhall informed the surety, Gulf Insurance Company, in late March or early April 1971, that JB&C would not be paid any money for differing site conditions (Tr. 1051) and that the contracting officer's findings were substantially prepared by Mr. Weisell in Ephrata.

[25] Appellant withdrew its claim for differing site conditions insofar as it was based on water conditions (Tr. 2789).

[26] The refinement resulted in an increase in the total quantity of rock claimed to have been encountered on the 53 system to 5,701.8 cubic yards.

Messrs. Beard and Degeest correlated with what he later observed and was able to verify (Tr. 96). Mr. Whitlock had no part in the computations of rock quantities on the 50 and 53–7 systems (Tr. 91, 122).

Records referred to by Mr. Whitlock included daily progress reports as well as so-called transit type note or field books.[27] The field books were maintained by JB&C supervisory personnel (Bud Beard, who left the job about Thanksgiving, 1970, Virgil Degeest and Bob Burke). Mr. Whitlock acknowledged that the field books did not show rock depths at each specific station, that the books were not always in agreement and that he computed average depths of rock, based on what was reported and what he observed (Tr. 755, 757–59). His recomputations and analysis were based in part on his knowledge and observations of the capabilities of the machinery as compared with excavation progress made (Tr. 145). Confronted with discrepancies between the amount of rock on particular lines and stations, he acknowledged that neither Exhibits A or D were correct in their entirety and that he did not have a full answer for the discrepancies. He insisted, however, that both exhibits were more correct than incorrect (Tr. 146).

Mr. Beard testified as to the various records maintained by JB&C Company (Tr. 507–10). He stated that some of the daily progress reports contained not so much rock quantities, but rather the stations where problems with rock were encountered. He explained that the log or field engineering books (note 27, *supra*) were not based on surveys or crawling into the trench and measuring the rock with a ruler, but were fair estimates of the average depth of rock (Tr. 479, 509, 519). He insisted, however, that the records were accurate and complete, were not maintained solely to support a claim, and would have been maintained in any event (Tr. 516, 517). He attributed discrepancies and inconsistencies in the stations and lines where varying quantities of rock were claimed to the judgment of the individual making the record (Tr. 518).

Mr. Whitlock testified that he turned all of his notes and worksheets over to JB&C upon the termination of his employment (Tr. 760). He stated that the last time he saw most of the field books was when he left the Othello, Washington area (Tr. 764). However, he admitted that he saw some of the field books after the conglomeration of material was released from storage by the surety, Gulf Insurance Company. Respondent seizes upon this testimony as indicative that these records were and are available to JB&C and complains that no ade-

[27] Tr. 16, 18, 43, 48, 96, 477–81. JB&C progress reports, three of which are in the record (Appeal file, Exh. 21; Govt. Exhs. 87–150), were kept on a daily basis, reflected the amount of trench excavation and other work accomplished and to that extent would tend to show whether trench excavation was difficult or easy. Records of rock encountered were maintained in log or field books (Tr. 479, 480–81).

quate explanation has been presented for the failure to produce these records (Tr. 494–97; Brief at 56–59). However, we accept Mr. Duane Butler's unrebutted testimony that except for miscellaneous pictures and records maintained or retained by various individuals, all of JB&C's records were placed in custody of the surety, that the field books were among items missing when the records were returned to JB&C, that he has been unable to find the daily logs or field books and that in discovery proceedings counsel for respondent has had access to all available JB&C records (Tr. 52, 1055, 1068–69, 1072, 1075, 1078).

The above finding does not, of course, resolve the question of the weight to be accorded the various exhibits representing claimed quantities of rock encountered. We conclude that no useful purpose would be served in reciting the discrepancies in the various rock claims and accept Exhibit A as representing JB&C's final refinement of rock quantities allegedly encountered.

Bureau Evidence of Rock or Hard Excavation

While Mr. Beard indicated an awareness that the Bureau was keeping records of conditions encountered, he testified that the Bureau refused to classify material exposed (Tr. 512–13). Nevertheless, when the findings were issued, the Bureau for the first time revealed the existence of records of soil classifications purportedly made by the inspectors at each 100-foot station. These classifications are contained in the Inspector's Reports (Govt. Exh. 9) and have also been compiled into a separate volume (Govt. Exh. 10). Although Mr. Pedersen and Mr. Weisell testified that such classifications were routine even on unclassified jobs (Tr. 1726, 2661–63, 2703), Mr. Weisell admitted that the classifications were made and the records maintained because of indications received shortly after the work began (note 18, *supra*) that a claim might arise because rock was being encountered (Tr. 1726). This testimony was confirmed by Mr. Mendenhall (Tr. 2959).

Using these records, the Bureau (Mr. Weisell) has determined that a total of 8,323 cubic yards of MHC (moderately hard caliche) and 2,865.4 cubic yards of hard caliche or rock was encountered in the excavation (Summary attached to "As-built" Drawings, Govt. Exh. 12). The foregoing figures are to be compared with 6,105.9 cubic yards of MHC and 6,087.1 cubic yards of hard caliche or rock which the Bureau allegedly anticipated would be encountered from examination of the bore logs. There is no evidence that quantities of moderately hard caliche and rock allegedly anticipated by the Bureau were computed prior to contract performance. The overly facile conclusion we are asked to draw is that conditions encountered were more favorable than those anticipated. We reject this contention since it is obvious that the terminology used by the inspec-

tors making the classifications is not self explanatory and it is equally obvious that Mr. Weisell has resolved doubts as to the meaning of the terms used in a manner to support respondent's position.

For example, the soil classifications use terms such as "solid caliche gravel," "soft caliche," "cemented caliche gravel," "fractured caliche," "caliche chunks," "broken caliche," "hard caliche gravel," "caliche" and "caliche sand" in reporting conditions encountered. Only if the classification reported hard caliche, MHC or rock would Mr. Weisell give any credit for hard or moderately hard excavation having been encountered. Appellant refers to these terms as "57 varieties" and asserts that had the contracting officer not breached his duty to conduct an investigation as required by the Differing Site Conditions clause, someone with authority would, as a minimum, have made an effort to determine what the inspectors meant by the terms used (Opening Brief at 13, 14).

Respondent did not call as witnesses the inspectors and has not alleged that they were unavailable or otherwise attempted to explain their absence. Although counsel for respondent attack (Brief at 63) as unsupported the statement of appellant's counsel (Opening Brief at iii) that he repeatedly called for the inspectors to be produced, counsel overlooks appellant's objections to conclusionary testimony of Mr. Weisell concerning use of a drifting pick in making the soil classifications and the statement that if these witnesses (inspectors) are available they should be put on the stand (Tr. 1752–53). *See also* Tr. 3187 wherein counsel specifically inquired whether respondent intended to call Inspector Scanlon as a witness.

Because the inspectors were not called as witnesses, there is no persuasive evidence in the record as to the extent a drifting pick was utilized in making the classification.[28] However, in the view we take of the matter, it is unnecessary to resolve this question. For the reasons hereinafter appearing, we accept the soil classifications and profiles [29] as evidence of conditions encountered, construing them most strongly against respondent and resolving all doubts in favor of appellant.

53 System Conditions Reasonably Anticipated

Jack Butler testified that JB&C anticipated practically no hard boring [digging] on the 53 system (Tr. 218). He asserted:

[28] As indicated in Appendix I, the Inspectors' Reports contain several statements from which it could be inferred that a drifting pick was used in making the classifications at particular stations. *See also* Govt. Exh. 29, a photo showing a Bureau inspector in the trench, holding the handle of a pick in his right hand.

[29] Beginning with Aug. 31, 1970, the Inspectors' Reports contained, in addition to the soil classifications, a sketch, referred to as a profile, of the trench describing conditions encountered at the various depths at the indicated stations, generally every 100 feet. It is clear that the inspectors were directed to make the profiles because of JB&C's formal claim for differing site conditions (Tr. 1839, 2074–75).

> Just the one [referring to the one bore log on 53L indicating hard boring] but again if you total your borings you are going to find that you won't even have one one-hundreth of a foot of hard boring in this particular area.

(Tr. 218). We do not, of course, agree that difficult excavation anticipated on 53L can be reduced to the percentage indicated by Mr. Butler by averaging it over the entire 53 system. We, nevertheless, find that the only difficult excavation reasonably anticipated on the 53 system would be on line 53L. Other than the 53L line, all instances of moderate boring shown in the bore logs were in material described as weakly cemented sandy loam, noncemented loamy sand, strongly cemented loam, noncemented silty clay, strongly cemented loamy sand, fine sandy loam, weakly and strongly cemented fine sandy loam or loamy fine sand with no cementation. These bore logs are summarized in Appendix I.

Mr. Pilz, appellant's expert witness, testified that sandy loam or loamy sand denoted unconsolidated excavation and would not normally be expected to be difficult excavation (Tr. 664). He asserted that he would not expect difficult excavation in sands no matter how the sands were described (Tr. 668, 730). The result would, of course, be otherwise if the material was described as sandstone and we note that although some of the soil classification applicable to the 66 system describe material encountered as sandstone, none of the bore logs or test pits on the entire job use that term.

Mr. Butler's analysis of the 53 system was confirmed in part by Mr. MacGregor, respondent's expert witness, who anticipated an average depth of 3 feet of caliche on the 53L line for a total of 471 cubic yards and no caliche on the balance of the 53 system (App. Exh. ZZ). Regarding all instances of moderately hard boring as meaning moderately hard caliche, a process appellant aptly characterizes as "pure rationalization," respondent claims to have anticipated 366.8 cubic yards of moderately hard caliche of which 139.8 cubic yards were on 53L, and 288 cubic yards of hard caliche, all on 53L, on the 53 system (Summary attached to "As built," Govt. Exh. 12). This position is clearly untenable and we conclude that whether viewed as a matter of fact or of law,[30] no reasonable bidder would anticipate difficult excavation on the 53 system except for a minimum of 471 cubic yards on the 53L line.

Conditions Encountered

[1] JB&C claims to have encountered a total of 838.80 cubic yards of rock on the 53 mainline, including an average of 2.5 feet from station 0+00 to 12+75 (App. Exh. A). Mr. Beard testified that although hard material had been encountered at an earlier point, it

[30] See *John M. Keltch, Inc.*, IBCA–830–3–70 (June 22, 1971), 78 I.D. 208, 76–2 BCA par. 12,063, *affirmed* (Trial Judge Opinion, Jan. 23, 1974), 19 CCF par. 82,785, adopted generally by the Court, 206 Ct. Cl. 841 (1975).

was not to a depth that caused significant problems until approximately station 17+08 on the mainline (Tr. 314–15; App. Exh. F). This testimony is supported by the bureau classifications up to station 14+00, which show substantial amounts of topsoil, ranging from 2.5 to 9.0 feet, with the balance of excavation indicated to be saturated sand and clay, fine sandy silt with light clay or firm clay mixed with fine sandy loam.[31]

However, the bureau classifications reflect substantial amounts of hard caliche beginning at approximately station 14+00. In fact, in the area from station 14+00 to 20+50 respondent has calculated depths of caliche ranging from 4.8 to 5.8 feet and credited appellant with 285.9 cubic yards of moderately hard caliche. We accept this computation and therefore conclude that Mr. Beard was mistaken as to the station at which difficult or hard excavation was encountered.

The 53 mainline averages 9.0 feet in depth (App. Exh. 33). Mr. Beard testified that as they proceeded northward on the 53 mainline the topsoil became thinner and hard material he described as rock became deeper and more difficult to excavate (Tr. 325–27, 330, 338). He estimated that there was 6.5 feet of hard rock at the final manhole on the 53 mainline which is at station 27+19.5.[32] The bureau classifications from station 22+00 to EOC reflect amounts of topsoil ranging from 1.5 to 3.6 feet with the remainder of excavation at station 22+00 described as caliche gravel. From station 23+00 to EOC, the balance of excavation is described as "solid caliche gravel." Although respondent's classification has not credited JB&C with any moderate or hard excavation in this area, there can be no gainsaying that depths from 5.4 to 7.5 feet represent substantial amounts of caliche gravel in a trench averaging 9.0 feet in depth. The inspectors not having been called as witnesses, there is little probative evidence in the record as to their conception of the terms "caliche gravel" and "solid caliche gravel." It is clear, however, that "solid caliche gravel" was regarded

[31] It is of interest that soil classifications on 53 station 13+00 do not mention caliche in any form. Nevertheless, an Inspector's Report, dated Apr. 8, 1971, states that the contractor is picking caliche [chunks] along a row of trees on 53 which were located at station 10+80 (See Inspector's Report, dated June 19, 1970). In this connection, JB&C asserts that material which was not classified as rock in the trenches, nevertheless, was referred to as rock for cleanup purposes. See Inspectors' Reports, dated July 21, 1970, concerning 53H.

[32] Mr. Beard described the results of a test conducted with a pick at or near the manhole where laterals 53N and 53P tie into the mainline (Tr. 347–48). He said that the material was extremely hard, that the pick bounced and that some fragments chipped. He considered this as only natural from the shattering effect of the machine excavation on the trench. He stated that if the topsoil were stripped from an unexcavated parcel, there was no way a drift pick could penetrate the material (Tr. 340–41). Mr. Whitlock emphasized the same point, *i.e.*, that use of a drift pick in the open trenches after the material had been fractured was not a proper test (Tr. 115–116). Although Mr. Beard regarded the material as rock, Bureau inspectors (Messrs. Westfahl and Pedersen) refused to classify the material because the excavation was unclassified for payment.

as hard excavation.[33] In any event, what the inspector who made these classifications described as "solid caliche gravel" material has been referred to by respondent's own witness as solid hard caliche.[34] Under these circumstances we find that JB&C encountered rock-like material and hard excavation from approximately station 21+50 to EOC.[35] The details of our calculations are in Appendix I.

Mr. Beard testified that no particular problems were encountered on laterals 53A through 53F (Tr. 317). This testimony is consistent with the Inspectors' Reports and bureau classifications and is accepted as accurate.[36] Mr. Beard further testified that laterals 53G through 53P were too hard to dig with backhoes. He described material shown in a photo taken at an unspecified location on lateral 53J (App. Exh. N) as typical of laterals 53J, 53L, 53N and the balance of the mainline. While conceding that some of the material depicted in the photo might appear to be gravel, he attributed this to the shattering effect of the machine excavation and asserted that the material was a solid mass of extreme hardness (Tr. 338–39).

We find Mr. Beard's testimony to be not entirely accurate in that all of lateral 53M and portions of laterals 53G, 53H, 53J and 53K appear to have been excavated with backhoes (Inspectors' Reports). Nevertheless, in other respects his testimony is corroborated by the Inspectors' Reports and other evidence in the record. We have previously referred to the evidence confirming the existence of rock and very hard caliche on 53G (note 34, *supra*). In addition, an Inspector's Report, dated July 2, 1970, referring to excavation of 53H from station 0+90 to 10+60, states that there was a very hard layer of caliche just under 1.3 foot of topsoil, which the backhoe could not excavate. At station 15+25, caliche appeared in the trench and was within 1.5 foot of ground surface at the end of the line (Inspector's Report, dated July 9, 1970). The bureau classifications merely refer to this material as "caliche gravel."

The bureau classification would credit JB&C with excavating 43.9 cubic yards of rock and 441 cubic yards of moderately hard caliche on laterals 53G through 53P. However, the classifications are subject

[33] An Inspector's Report, dated July 9, 1970, states that the trencher pulled off the 53L line because they got into hard excavation (solid caliche gravel) at station 9+25.

[34] The reverse of a photo (Govt. Exh. 29) taken at station 12+00 on 53G states it shows "depth of caliche and width of trench." Mr. Keltch testified that the photo depicted "hard digging caliche" (Tr. 1953). This testimony was based in part on teeth marks shown in the photo, which Mr. Keltch asserted were indicative of extremely hard caliche (Tr. 1991). In other testimony he answered affirmatively questions whether the caliche was of the Exh. 85 type and whether the photo showed a solid wall of caliche (Tr. 1957).

[35] Because it is illogical to expect that there were abrupt changes to conditions described at each station, we have generally assumed that the conditions so described extended to approximately equal distances on each side of the station.

[36] The only rock claimed by JB&C on these lines is an average of 1.75 feet from station 8+00 to 9+80 on 53F.

to interpretation,[37] and there is no evidence that the inspectors who made the classification had a common understanding with office personnel making the computations as to the meaning of terms used.[38] Another reason for impugning the validity of the classifications is the testimony of Mr. Westfahl, chief inspector for the Bureau, that in making the classification "We used as a guideline the bore log information * * * (Tr. 2,125). Accordingly, we have interpreted the classification most strongly against respondent and, irrespective of whether the material would classify as rock under the definition in the specifications, have determined that JB&C encountered substantial quantities of rock-like material (a total of 4,855.51 cubic yards) over and above that allowed by respondent. This total takes into account 471 cubic yards which Mr. MacGregor anticipated on 53L and which we have concluded is reasonable.

On 53–4, respondent has credited JB&C with 190.9 cubic yards of moderately hard caliche while admitting that it anticipated none of this line.[39] We, of course, accept this figure as another instance where the fact that JB&C encountered material not reasonably anticipated from the contract indications is established by respondent's own records.[40]

Including lines 53–4 and 53–5,[41] we conclude that appellant encountered 5,308.31 cubic yards of rock-like material beyond that indicated in the contract on the 53 system. *See* Appendix I for details.

66 System

JB&C claims that substantial amounts of rock were encountered on the 66–2 line. However, Mr. Beard testified that conditions on this line were ideal and that no rock was encountered (Tr. 355, 527–57, 540). The soil classifications cover the area only through station 36+00 (EOC is at 50+00), and report deposits of topsoil ranging from 2.0 feet to 7.0 feet, while the remainder of material (average trench depth is 8.0 feet) is described as clay and silty sand, clay or silty sand. We

[37] For example, because the word "and" appears in some classifications between "caliche" and "sand," we have concluded that a comma or the word "and" was omitted between the words "caliche" and "sand" in other classifications from station 2+00 to and including 9+00 on 53G.

[38] Respondent's calculations were made by Mr. Weisell or under his direction (Tr. 1724). According to Mr. Weisell moderately hard caliche meant removal [with a pick] of a chunk of caliche up to the size of a person's fist (Tr. 1,719). There is no evidence of the inspectors' understanding of this term.

[39] Summary attached to Govt.'s Exh. 12. Line 53–4 averages 8.0 feet in depth and material encountered is described as a uniform 2.0 feet of topsoil, while the remainder of excavation is stated to be silty sand and 2.0 feet of caliche or 2.0 feet of silty sand and the balance caliche. Mr. MacGregor did not anticipate any caliche on this line.

[40] On 53–4 JB&C claims an average of 1.8 feet of rock from station 2+00 to EOC at 6+60.

[41] While JB&C stipulated at the hearing that no rock was claimed on 53–4 and 53–5, it is clear that we may relieve a contractor of a stipulation that is contrary to the evidence. *Armstrong & Armstrong, Inc.*, IBCA–1061–3–75 and IBCA–1072–7–75 (Apr. 7, 1976), 83 I.D. 148, 76–1 BCA par. 11,826 and cases cited.

find that conditions on this line did not differ materially from those indicated in the contract. Bore log data and details of JB&C's claim are in Appendix I.

JB&C claims substantial depths of rock were encountered on 66–3 from station 1+25 to EOC at 51+60. Although Mr. Beard's testimony concerning conditions on 66–2 also applied to 66–3, Inspectors' Reports, dated Aug. 18 and 19, 1970, state that caliche, which slowed the trencher down considerably, was encountered at station 43+00 and that hard caliche, which made progress slow, was encountered from station 47+50 to 51+60. Chunks of caliche up to 8 inches and 14 inches in diameter were reported on original ground outside of the right-of-way. From station 42+00 to EOC, the soil classifications report depths of topsoil ranging from 0 feet to 1.5 feet, while the balance of the excavation is described as caliche gravel [42] and sandy loam. These conditions are indicated in an area where the applicable bore log indicates caliche gravel only in the top 2.7 feet. Mr. MacGregor did not anticipate any caliche would be encountered on 66–3. We, therefore, conclude that subsurface conditions in the area from station 42+00 to 51+60 on 66–3 differed materially from those indicated in the contract.

Mr. Beard testified that hard material was encountered on the 66 mainline where it makes the second turn to the north, which is at station 16+54 (Tr. 355–57). The plans for the mainline call for 15 inch pipe through approximately station 35+75. Because this size of pipe was too large for the laying shield attached to the trencher, JB&C planned to excavate that area with a backhoe. Mr. Beard stated, however, that they arrived at a point where the backhoe could no longer dig the material (Tr. 357–58). Inspectors' reports confirm that commencing at station 18+00 excavation was accomplished with the trencher.

From 16+50 through EOC at 65+05, the 66 mainline averages 9.0 feet in depth. In the area from station 18+00 to 25+00, the soil classifications reflect amounts of topsoil ranging from 1.9 feet to 4.0 feet while the remainder of material is described as substantially all caliche in one form or another, except for station 19+00 where 3.5 feet of sand is reported. Rock to a depth of 1.2 feet is indicated from station 20+95 to 31+35 and rock to a depth of 1.0 feet is reported at station 22+90, increasing to 2.6 feet at station 23+00 and decreasing to 1.0 feet at station 25+00. Caliche in varying amounts is described as "moderately hard," "loose" and "loose caliche chunks." [43]

[42] We conclude that excavation of caliche gravel would not result in chunks of caliche of the size reported off of the right-of-way (8 inches and 14 inches in diameter), and agree with Mr. Weisell that caliche gravel would not be expected to represent difficult excavation (Tr. 2099). Accordingly, we find that what was reported as caliche gravel was in fact caliche.

[43] These as well as the majority of classifications on the 66 system were made by inspectors L. Teske and E. Baker. Another inspector, Mr. T. Lynch, appears to have classified most of this material as moderately hard caliche. *See* Inspector's Report, dated Sept. 28, 1970, which reflects moderately hard caliche

In the area on the 66 mainline from station 26+00 to 35+00, soil classifications (there are no profiles in the record for this area), show 3.0 feet of topsoil with the balance of the excavation described as "brown broken caliche" or "broken to moderately hard caliche." This indicates an average of 6.0 feet of caliche, however designated, in the mentioned 900 foot reach. Although the soil classifications state that this area was excavated with a backhoe, it was, in fact, excavated through station 34+50 with the trencher (Inspectors' Reports, dated Oct. 7, 8 and 13, 1970). Errors of this nature are an additional reason for questioning the validity of the classifications and construing them most strongly against respondent.

In the 1,200 foot stretch from station 36+00 to 48+00, the soil classifications reflect amounts of topsoil ranging from 1.0 feet to 2.3 feet (amounts of rock ranging from 0.5 foot to 1.3 feet are reported from station 37+00 to 43+00), while the balance of excavation is referred to as simply "common." Nevertheless, the soil profiles reflect substantial amounts of "caliche," "loose caliche," "caliche with rock chunks," "soft caliche" and "fractured and soft caliche." We have already referred to the fact (note 43 *supra*) that these inspectors described as common material in the area from station 45+00 to 48+00 which was classified by another inspector as moderately hard caliche and which ranged in depth from 7.5 feet to 8.5 feet.[44] Accordingly, we think we are justified in treating all material described as rock or caliche in some form as hard rock-like material.

Soil classifications and profiles for the area from station 48+00 through 54+00 show depths of topsoil ranging from 1.0 feet to 2.0 feet with the balance of material shown as moderately hard caliche. At stations 55+00 and 56+00, classifications (no profiles for those stations are in the record) show 2.0 feet and 1.0 feet, respectively, of topsoil, 3.0 feet of rock and the remainder of excavation is shown as 5.0 feet and 6.0 feet of "hard brow" [*sic*] clay and sand mixture with minor amounts, 0.6 feet and .04 feet respectively of sand and gravel. From station 57+00 to EOC at 65+05, the soil classifications show topsoil ranging from 1.2 feet to 1.9 feet, rock from station 58+00 to 60+00 ranging from 0.5 feet to 1.3 feet and rock ranging from 0.5 feet to 1.0 feet from 62+00 to 65+00, while the balance of the material is shown as common. However, the soil profiles reflect substantial amounts of moderately hard caliche, compacted caliche chunks, soft caliche, loose caliche, etc.

ranging from 4.2 feet to 5.0 feet in the area from station 23+69 to 26+33. In another instance, Messrs. Baker and Teske reported as common, material in the area from station 45+00 through 48+00 on the mainline, which Mr. Lynch reported as moderately hard caliche and which ranged in depth from 7.5 feet to 8.5 feet.

[44] This may have been one of the areas referred to by Mr. Westfahl when he testified to the effect that it was not unusual to find 7.0 feet to 8.0 feet of moderately hard caliche in a trench (Tr. 2,207).

Inspection records, referring to the area from 56+59 to 61+05, state that the trencher moved slowly due to moderately hard caliche and referring to the area from 61+05 to 65+05, state that "excavation was hard going on the way" (Inspectors' Reports, dated Sept. 18 and 21, 1970).

JB&C's claim for rock in the area from station 18+50 to EOC on the 66 mainline is summarized in Appendix I. Mr. MacGregor anticipated an average of 3.0 feet for a total of 1,257 cubic yards of caliche in the area from 16+50 to 65+00. We accept this figure as reasonable. We have, however, determined that JB&C actually encountered 2,434.72 cubic yards of rock-like caliche material in the mentioned area or 1,177.72 cubic yards in addition to that indicated in the contract. Appendix I.

Lateral 66A extends to the east a distance of 2,900 feet from the 66 mainline at station 16+54. JB&C does not claim to have encountered rock on this line until station 11+50. However, soil classifications at stations 8+10 and 9+00 show no topsoil and that all material excavated (the trench averages 9.0 feet in depth) consists of "caliche gravels and sandy caliche." Although minor amounts of topsoil are thereafter indicated, material excavated, with one or two exceptions, is reported to be substantially all caliche gravels and sandy caliche through station 16+00. At station 17+00, the classification shows 0.8 feet of topsoil and the balance of material is described as "solid caliche and sandy caliche." From station 22+00 to EOC, the material excavated is reported to be substantially all "solid caliche and sandy caliche." Although JB&C indicates excavation from station 20+00 to 29+00 as "normal" (Exh. A), respondent has determined that 329.2 cubic yards of moderately hard caliche were excavated from station 19+80 to 28+50.[45]

Mr. Beard described initial excavation on 66A as good or easy, but asserted that it became more difficult as they proceeded eastward, the material becoming solid rock (Tr. 362). This testimony is substantiated in part by inspection records which state that caliche was encountered at less than 1.0 foot in places in the area from station 8+00 to 24+00 and that from station 26+00 to 29+00 the dozer could not strip deeper than 2.5 feet without a ripper (Inspection Reports, dated August 19 and 21, 1970). Progress of the trencher from 16+50 to 29+00 is reported as slow due to hard caliche.[46]

Mr. MacGregor anticipated an average of 2.0 feet of caliche on la-

[45] This appears to have been computed by subtracting the reported amount of topsoil from trench depth and assuming that 50 percent of the remainder was solid or moderately hard caliche. We have used the same method in our determinations. See Appendix I.

[46] This line was checked by the chief inspector at station 28+70 resulting in a finding of weak to moderately hard caliche, from invert +3 to invert +7. (Inspector's Report, dated Aug. 21, 1970). The report states that the material could be broken down with a pick. If all the classifications were made by inspectors with a pick as respondent alleges, the reason for this check is not apparent.

teral 66A for a total of 501 cubic yards. While we have some reservations as to the manner in which this quantity was determined,[47] we accept it as reasonable. We have determined that 730.91 cubic yards of rock-like material were encountered on this line or 46 percent more than reasonably anticipated. The result is a finding that conditions encountered on this line differed materially from the contract indications. See Appendix I.

Lateral 66B extends to the west of the 66 mainline at station 20+54 a distance of 500 feet. Lateral 66C extends to the east of the mainline a distance of 2,900 feet and is in effect a continuation of 66B. Although there are no soil classifications for 66B in the record, respondent has credited JB&C with a total of 6.7 cubic yards of moderately hard caliche on this line. This calculation ignores respondent's own records which describe excavation on 66B as very tough and as including 5.0 feet of hard caliche. Mr. Beard testified that excavation on lines 66 B and C was extremely hard all the way except for 350 feet to 400 feet. Mr. MacGregor did not anticipate any caliche on lateral 66B and as we have determined that 215.74 cubic yards of hard caliche were in fact encountered (*see* Appendix I), conditions on this line differed materially from the contract indications.

Respondent has credited JB&C with excavation of 6.7 cubic yards of moderately hard caliche and 523.3 cubic yards of rock on 66C. Based on three bore logs, one at 20+54 on the 66 mainline, two on 66C and test Pit No. 3, Mr. MacGregor anticipated an average depth of 3.0 feet of caliche for a total of 751 cubic yards. This figure is not divided into moderately hard or hard caliche or rock. We conclude that a reasonable bidder would not have anticipated encountering more than an average of 2.0 feet of caliche or 500.52 cubic yards. Construing the soil classifications most strongly in favor of appellant, we have determined that 734.78 cubic yards of caliche material were encountered on 66C or 48 percent more than reasonably anticipated (Appendix I). It follows and we find that conditions on this line differed materially from the contract indications.

Lateral 66D extends to the west of the mainline, a distance of 400 feet from station 24+54.3. There were no bore logs on this line and Mr. MacGregor did not anticipate any caliche. Respondent's calculations show that 30.9 cubic yards of moderately hard caliche and 88.3 cubic yards of rock were encountered. An Inspector's Report, dated September 1, 1970, describes excavation from station 3+10 to 0+10 as "hard all the way." Mr. Beard stated that the depth of hard material on laterals 66 A, B, C, and E was 5.5 feet to 6.5 feet "almost all

[47] The computation appears to have been made by averaging in the bore log at station 13+06 on the 66 mainline, which shows no caliche except occasional basalt and caliche gravels, with the bore log on 66A at station 21+26, 68 feet left, which shows 2.7 feet of hard boring caliche.

the way" but especially on the ends (Tr. 387). Construing the rock classifications and profiles most strongly against respondent, we have determined that a total of 128.14 cubic yards of caliche were excavated in this line. It follows that conditions encountered differed materially from the contract indications.

Lateral 66E extends to the east of the 66 mainline, a distance of 2,800 feet from station 24+54.3. Respondent has credited JB&C with a total of 326.4 cubic yards of rock and 485.7 cubic yards of moderately hard caliche. Mr. MacGregor anticipated a total of 483 cubic yards of caliche on this line. Mr. Beard's testimony that the hard material in lines, including 66E, extended to a depth of 5.0 feet to 6.5 feet has been alluded to *supra*. Testifying with reference to a photo (App.'s Exh. R–3) taken at station 23+00 on 66E, Mr. Beard described the material as "solid hard rocky material that was almost unbearable [unbreakable]" (Tr. 371). Inspection records confirm that hard material was encountered which made progress with the trencher slow (Inspectors' Reports, dated Sept. 1, 3 and 4, 1970).

Construing the soil classifications and profiles most strongly against respondent, we have determined that 1,045.29 cubic yards of hard material were encountered and that conditions on this line differed materially from the contract indications.

The 66F lateral extends to the east from the 66 mainline, a distance of 5,000 feet from station 28+54.3. Respondent has credited JB&C with excavation of 277.7 cubic yards of rock and 730.6 cubic yards of moderately hard caliche on this line. This, of course, is over three times the 319 cubic yards of caliche anticipated by Mr. MacGregor, which we accept as reasonable.

According to Mr. Beard, the rock was fairly uniform in depth from station 0+00 to approximately 12+80, where 66F is intersected by a north-south county road (Tr. 432, 460). He asserted that a photo taken at station 3+00 (App.'s Exh. U) showed 5.5 feet to 6.5 feet of rock (Tr. 454). East of the county road there was a boggy area of approximately 300 feet where no rock was encountered (Tr. 461). This is confirmed by the classifications and profiles which show material from approximately station 11+50 to 14+150 as "all native." Thereafter, according to Mr. Beard, the rock was approximately 6.5 feet in depth (Tr. 462). The trencher pulled off of the line at approximately station 25+80, having proceeded as far as it could go (Inspector's Report, dated Oct. 12, 1970). An Insley backhoe was used to excavate 66F from station 26+61 to EOC (Inspectors' Reports, dated Dec. 9, 10, 14, 15, 16 and 17, 1970).

We have concluded that JB&C encountered 1,666.85 cubic yards of caliche on 66F. *See* Appendix I. It follows that conditions encountered on this lateral differed materially from the contract indications.

The 66G lateral extends to the east of the 66 mainline, a distance of 2,520 feet from station 32+54.3. Respondent has credited JB&C with excavation of 132.5 cubic yards of rock and 158.2 cubic yards of moderately hard caliche on this line. Mr. MacGregor anticipated an average of 2.0 feet or a total of 435 cubic yards of caliche would be encountered on 66G. Mr. Beard remembered excavating this lateral only as far east as the north-south county road at approximately station 13+00 (Tr. 465). He stated that conditions in this area were about the same as were encountered to that station on 66F. From mid-October 1970, onward, Inspectors' Reports are largely devoid of comments as to difficulty of excavating the trenches. A hard spot at station 15+00 was blasted (Inspector's Report, dated Oct. 16, 1970). Construing the profiles and soil classifications most strongly against respondent, we have concluded that 820.60 cubic yards of rock-like material (caliche) were encountered on 66G and that these differed materially from the contract indications.

Lateral 66H extends eastward from mainline 66 at 35+72.5, a distance of 2,520 feet. Respondent's computations credit JB&C with excavating of only 77.8 cubic yards of rock and 243.2 cubic yards of moderately hard caliche, which is far below the 870 cubic yards anticipated by Mr. MacGregor. While our computations total 881.84 cubic yards (average depth 4.0 feet) of difficult excavation (caliche), we find that conditions encountered on 66H did not differ materially from those reasonably anticipated.

Mr. MacGregor anticipated only 217 cubic yards of caliche (average depth of 1.0 feet) would be encountered on lateral 66J which is 2,520 feet in length and extends east off the mainline from station 39+97.5. Respondent has credited JB&C with excavation of 82.7 cubic yards of rock and 306 cubic yards of moderately hard caliche. Mr. Beard described conditions on laterals, including 66J, in the area west of the north-south county road (which intersects these laterals at approximately station 13+00), as being uniform in containing approximately the same amounts of topsoil and 4.0 feet of rock (Tr. 474–75). Excavation in the area between station 20+50 and 22+00 was described as very difficult due to very hard caliche (Inspector's Report, dated Dec. 5, 1970). We conclude that JB&C excavated 713.87 cubic yards of rock-like hard material and accordingly, find that conditions on this line differed materially from the contract indications.

Lateral 66K extends to the northwest of the mainline from section 44+32.8, a distance of approximately 1,386 feet, then extends eastward approximately 927 feet and again turns to the northwest, terminating at station 38+33.9. Mr. MacGregor anticipated an average depth of 1.0 feet and a total of 331 cubic yards of caliche on this lat-

eral. Respondents' calculations show that 191.6 cubic yards of rock and 480.4 cubic yards of moderately hard caliche were excavated. Mr. Beard testified that it took the Drott 50 backhoe approximately 4 to 5 hours to dig a hole approximately 8.0 feet deep in which to set the trencher at the manhole at station 23+13 (Tr. 385–86). He stated that this was a long time to dig a small hole with that size backhoe. He attributed the difficulty to the hardness of the material and the necessity for the backhoe to chip the material. He admitted, however, that the material was not as hard as some of that encountered on the lower system. Photos taken on Sept. 15, 1970, at station 32+00 (App.'s Exh. S–4) and at station 23+80 (Govt's. Exh. 27) show a Drott 50 backhoe excavating in what, from the pieces and chunks depicted, appears to be exceedingly hard material.

Testifying with reference to a photo (App.'s Exh. 5–3) taken at station 25+00, Mr. Beard described the material as rock from the base of the trench to ground surface (Tr. 397–98). Inspectors' Reports confirm that topsoil in the area from station 19+00 to 25+75 was extremely thin [48] and that a layer of hard rock was encountered in the area from 22+50 to 24+50 (Inspectors' Reports, dated Sept. 10, 14, and 15, 1970). The initial leg of 66K to station 13+85.9 was excavated with backbones, principally the large Insleys (Inspectors' Reports, dated Sept. 30 and Nov. 20, 21, 23 and 30, 1970). From station 12+42 to 11+75, approximately 3.0 feet of very hard caliche were reported in the bottom of the trench (Inspector's Report, dated Sept. 30, 1970). The soil classifications and profiles skip the area from 11+00 to 14+00 and consequently give JB&C no credit for this difficult excavation. We conclude that 1,269.16 cubic yards of rock-like excavation (caliche) were encountered on the 66K lateral. It follows that conditions encountered differed materially from the contract indications.

Lateral 66K–2 extends to the northwest of the K line from station 13+85.9, a distance of 320 feet and lateral 66K–3 extends to the northwest of the K line from station 18+91.6, a distance of 1,100 feet. Respondent has credited JB&C with 10.8 cubic yards of moderately hard caliche on K–2, and 32.1 cubic yards of rock and 89.2 cubic yards of moderately hard caliche on K–3. However, the soil classifications and profiles for K–2 show 1.0 feet of rock at station 0+50, 0.8 feet of rock at station 1+100 and 1.5 feet of rock at station 2+00. Mr. MacGregor anticipated 28 cubic yards of caliche on K–2 and none on K–3. Mr. Beard testified that 66K–2 was relatively more easy than the other

[48] Inspector Talbot, referring to the stripping operation, reported only 0.8 feet of topsoil, which had some caliche gravel in it, in the area from station 19+00 to 25+75 (Inspector's Report, dated Sept. 10, 1970). Soil classifications and profiles by Inspectors Baker and Teske, nevertheless, report amounts of topsoil ranging from 1.8 feet to 2.0 feet in that area.

two [66K and 66K–3] and that the [caliche] strata seemed to ease as they proceeded west (Tr. 389). Inspection records indicate that the trencher moved slowly from station 0+00 to 1+50 because of moderately hard caliche and describe material from 1+25 to EOC at 320 as moderately hard caliche (Inspectors' Reports, dated Sept. 17 and 18, 1970). Mr. Beard stated that material encountered on 66K–3 became more severe as they advanced (Tr. 389). Excavation on K–3 from station 5+00 to 5+75 was described as fairly hard going (Inspector's Report, dated September 16, 1970). We conclude that JB&C encountered 52.33 cubic yards of rock-like excavation on K–2 and 237.69 cubic yards of difficult excavation on K–3. Thus, conditions on these lines differed materially from the contract indications.

Mr. MacGregor anticipated a total of 660 cubic yards of caliche on lateral 66L, which is 2,520 feet in length and extends to the east of the 66 mainline from station 44+32.8. Respondent credits JB&C with 111.5 cubic yards of rock and 245 cubic yards of moderately hard caliche. While we have computed a much higher figure, 698.39 cubic yards of difficult excavation (caliche), we find that conditions on this line did not differ materially from those reasonably anticipated.

The 66M lateral extends to the northwest, a distance of 500 feet from the mainline at station 48+32.8. Mr. MacGregor did not anticipate that any caliche would be encountered on this line. Respondent credits JB&C with 64.1 cubic yards of rock and 131.9 cubic yards of moderately hard caliche. Our interpretation of the soil classifications and profiles results in a finding of 227.81 cubic yards of difficult excavation (caliche) on this line. We find that conditions encountered differed materially from the contract indications.

Mr. MacGregor anticipated 436 cubic yards of caliche on the 66N lateral which is 2,525 feet in length and extends to the east from the mainline at station 48+32.8. Respondent credits JB&C with 152.1 cubic yards of rock and 269.4 cubic yards of moderately hard caliche. Our interpretation of the soil classifications and profiles results in a finding that 926.91 cubic yards of rock-like material (caliche) were encountered on lateral 66N. We accordingly find that conditions on this lateral differed materially from the contract indications.

On lateral 66P, which is 2,800 feet in length and extends eastward from the mainline at station 52+51.4, Mr. MacGregor anticipated an average of 3.0 feet or a total of 725 cubic yards of caliche. Respondent has credited appellant with 425.6 cubic yards of moderately hard caliche and 65.2 cubic yards of rock.

Mr. Beard testified that basalt was encountered east of the north-south county road which intersects 66P at approximately station 12+50 (Tr. 411–13). He stated that the basalt in that area to EOC averaged

about 1.0 feet in depth at the bottom of the trench (Tr. 414–15). He asserted that topsoil was more plentiful, averaging 2.0 feet to 2.5 feet, but that the balance of material was extremely hard (Tr. 416–17). This testimony is confirmed in part by an Inspector's Report, dated Oct. 30, 1970, which states that basalt started appearing at station 25+70, that basalt was approximately 3.0 feet at station 26+00 and that at station 26+37, the basalt was too hard for the trencher to excavate. The balance of excavation was accomplished with an Insley backhoe. Although the profile at station shows 5.0 feet of weathered basalt, respondent has credited JB&C with only 1.9 feet of rock at this point.

Our interpretation of the logs and profiles results in a finding of 1,017.16 cubic yards of rock-like material (caliche and basalt) or approximately 43 percent more than reasonably anticipated. We find that conditions on this line differed materially from the contract indications.

Mr. MacGregor anticipated a total of 764 cubic yards of caliche on 66Q, which is 2,950 feet in length and extends eastward from the 66 mainline at station 56+59.8. Respondent credits JB&C with 277.1 cubic yards of moderately hard caliche and 148.2 cubic yards of rock. The record shows that excavation of this line to approximately station 7+80 was attempted with the trencher. However, the trencher suffered numerous breakdowns, *i.e.*, twisted pins, axles, etc. (Inspectors' Reports, dated Sept. 24, 28, 29, and 30, 1970). Mr. Beard attributed these and other breakdowns to the hardness of the material. He asserted that except for 18 inches of topsoil, the hard material, which in his judgment was extremely hard rock, extended to the bottom of the trench (Tr. 417–18). While admitting that the material might have cracks or impurities, he stated that in general it was a solid mass of rock. An Inspector's Report, dated Sept. 28, 1970, referring to the area from 1+80 to 7+00, states that material is hard and that the trencher moved slowly.

Beyond station 7+50, excavation on 66Q was accomplished with an Insley backhoe (Inspectors' Reports, dated Nov. 16, 17, 18, 19 and 21, 1970). We have concluded that JB&C excavated 960.18 cubic yards of rock-like material (caliche) or approximately 26 percent more than reasonably anticipated. We find that conditions on this line differed materially from the contract indications.

The 66R lateral extends to the northwest of the mainline from station 61+05.2 and is 730 feet in length. Relying in part on test Pit No. 4 which is approximately 200 feet to the north and slightly to the east of the point where 66R intersects the mainline, Mr. MacGregor anticipated an average depth of 3.0 feet and a total of 189 cubic yards of caliche on this lateral. As the bore log at station 0+20 on 66S shows 3.5 feet of caliche (hard boring) we think that Mr. MacGregor's determination is reasonable for approximately one-half of 66R or through

station 3+65. However, the bore log at 6+00 does not show any caliche other than basalt and caliche gravels and shows only 1.0 feet of moderate boring in weakly cemented, fine sandy loam. Accordingly, we conclude that the average depth of caliche reasonably anticipated would not exceed 1.5 feet or 94.49 cubic yards.

Respondent has credited JB&C with 13.1 cubic yards of rock and 59.2 cubic yards of moderately hard caliche on 66R. Our construction of the soil classifications and profiles results in a finding of 131.17 cubic yards of rock-like material (caliche) or 39 percent more than reasonably anticipated. We find that conditions encountered on this line differed materially from the contract indications.

Mr. MacGregor anticipated an average depth of 3.0 feet and a total of 456 cubic yards of caliche on the 66S lateral which extends to the east of the 66 mainline from station 61+05.2 and is 1,760 feet in length. The bore log at station 0+20 shows caliche hard boring, from 4.0 feet to 7.5 feet and we accept this determination as reasonable through station 6+60. However, the bore log at station 13+45, although showing moderate boring from 3.0 feet to 7.0 feet in sandy loam having no cementation, does not show any caliche other than caliche gravels in the top 3.0 feet. We, accordingly, conclude that a reasonable bidder would not anticipate more than an average of 1.5 feet of caliche or 227.82 cubic yards on this lateral.

The trencher excavated to approximately station 4+60 and then pulled out due to the hardness of the material (Inspectors' Reports, dated Sept. 23 and 24, 1970).

This line was blasted from station 5+00 to 7+00 (Inspectors' Reports and Blasting Report dated Sept. 25 and 30, 1970). Nevertheless, the soil classifications and profiles report only 1.5 feet of rock at station 5+00, 0.7 feet of rock at station 6+00 and 1.0 feet of rock at station 7+00. Mr. Beard testified that conditions on 66S were the same as on 66P, *i.e.*, extremely hard, the material extending to the depth of the trench minus a foot or less of topsoil (Tr. 416–17). Our computations indicate that a total of 603.92 cubic yards of rock-like material (caliche) were encountered on 66S. We find that conditions on this line differed materially from the contract indications.

Lateral 66T extends to the east of the mainline from station 65+05.2, a distance of 1,230 feet. Mr. MacGregor anticipated an average depth of 3.0 feet and a total of 318 cubic yards of caliche on this line. Because the bore log at 0+20 shows only 1.2 feet of hard boring in strongly cemented sandy loam and no caliche other than caliche gravels and the bore log beyond the end of construction at station 13+46 shows only 1.0 feet of caliche (hard boring), we find that Mr. MacGregor's determination places undue emphasis on test Pit No. 2, located approximately 200 feet to the south, and we do not accept it as reason-

able. We conclude, rather, that no reasonable bidder would anticipate encountering more than an average of 1.5 feet of hard excavation on this lateral or 159.2 cubic yards.

Mr. Beard answered a question as to the hard material encountered on 66T: "Most of it was seven feet. It was right to the top. There was very little topsoil. * * *" (Tr. 417). An Inspector's Report, dated Sept. 21, 1970, referring to the area from 0+00 to 1+75, states that there is a large formation of a different type of caliche and sands and that excavation is hard and slow. Between station 5+00 and 6+30, the trencher was reported as "almost to a standstill" and having minor breakdowns due to the hardness of the material (Inspector's Report, dated Sept. 22, 1970). The classification and profiles report 1.5 feet of rock at station 5+00, 2.4 feet at station 5+50 and 1.9 feet of rock at station 6+00. Because of the severe strain on the machine, the trencher was removed from the line. The area from station 6+42 to 8+00 was blasted (Inspector's Report, dated Sept. 28, 1970). The blasted area was excavated with a backhoe, the material being described as caliche. Excavation was accomplished with trencher in the area from station 9+00 to 9+70. The material was so hard that the trencher was raised 1.0 feet and the trench was not excavated to specification grade. The high area was subsequently excavated with a backhoe (Inspectors' Reports, dated Oct. 2, 6 and 16, 1970).

Respondent has credited JB&C with 36.6 cubic yards of rock and 139.1 cubic yards of moderately hard caliche on lateral 66T. Our construction of the soil classifications and profiles results in a total of 426.21 cubic yards of rock-like excavation (caliche) on this line or 168 percent more than reasonably anticipated. We find that conditions encountered differed materially from the contract indications of subsurface conditions.

53–7 System

Mr. MacGregor did not anticipate any caliche would be encountered in trench excavation on the 53–7 system. We find this determination to be reasonable. Mr. Jack Butler testified that a considerable amount of very hard rock was encountered on the 53–7 system (Tr. 1087). He estimated that the rock averaged 4.5 feet in depth (Tr. 1098–99). Respondent has credited JB&C with 913.4 cubic yards of moderately hard caliche and 72.1 cubic yards of rock on this system. We conclude that 2,790.25 cubic yards of rock-like material (caliche) were encountered and that conditions on this system differed materially from those reasonably anticipated from the contract indications.

50 System

Lateral 50B is 920 feet long and extends to the east of mainline 50 from station 6+12.9. Mr. MacGregor did not anticipate that any caliche would be encountered on

this lateral. Our study of the bore logs convinces us that this determination is reasonable. Jack Butler estimated that an average of 2 feet of rock was encountered on the 50 system (Tr. 1100). JB&C claims an average of 2.5 feet of rock was encountered on this line. The soil classifications indicate that the material excavated was principally topsoil and the profiles show minor amounts of caliche gravels. We find that conditions on this lateral did not differ materially from those reasonably anticipated from the contract indications.

The 50C lateral is 1,770 feet long and extends to the west of the 50 mainline from station 6+12.9. Mr. MacGregor anticipated an average of 3.0 feet of caliche in the first 1,020 feet and an average of 2.0 feet of caliche in the remaining 750 feet for a total of 393 cubic yards. We find this to be reasonable. JB&C claims an average of 2.6 feet of rock from 0+00 to 9+00 and an average of 3.0 feet of rock from station 9+00 to 15+70. Respondent has credited JB&C with 33.6 cubic yards of moderately hard caliche. Our construction of the soil classifications and profiles results in a determination of 587.17 cubic yards of rock-like material (caliche) or 49 percent more than reasonably anticipated. We find that conditions on this lateral differed materially from the contract indications.

Lateral 50D extends to the east of the 50 mainline, a distance of 970 feet from station 10+63.9. Mr. MacGregor did not anticipate that any caliche would be encountered on this lateral. We find this conclusion to be reasonable. JB&C claims an average of 1.8 cubic yards of rock. Our interpretation of these profiles results in a finding that 18.12 cubic yards of hard material (caliche) were excavated. To that extent, we find that conditions encountered differed materially from the contract indications.

The 50E lateral is 1,820 feet in length and extends westward from the 50 mainline at station 10+63.9. Mr. MacGregor anticipated an average depth of 3.0 feet to station 10+50 and an average of 2.0 of caliche from station 10+50 to 18+20 for a total of 405 cubic yards. We conclude that this is reasonable. JB&C claims an average depth of 4.3 feet of rock from station 0+00 to 5+75 and an average of 3.2 cubic yards of rock from 5+75 to 18+20. Respondent credits JB&C with 102.7 cubic yards of rock and 144.1 cubic yards of moderately hard caliche. Our interpretation of the profiles results in a total of 535.55 cubic yards of rock-like material (caliche) on this lateral or approximately 32 percent more than reasonably anticipated. We find this to be a material difference.

JB&C claims an average of 2.3 feet of rock on lateral 50F, which is 720 feet long and extends east of the 50 mainline from station 13+34.7. Mr. MacGregor did not anticipate that any caliche would be encountered on this line, a conclusion we find to be reasonable. The only caliche indicated by the profiles to

have been encountered on this lateral is described as "caliche gravels and sandy loam." We conclude that conditions encountered did not differ materially from the contract indications.

The 50G lateral is 1,720 feet in length and extends to the west of the mainline from station 13+34.7. JB&C claims to have encountered rock over the full length of this line, ranging from an average of 3.0 feet in the area from station 0+00 to 4+50 to an average of 16.5 feet in the area from station 11+00 to 17+25. Mr. MacGregor anticipated an average of 3.0 feet of caliche for a total 446 cubic yards. We find this determination to be reasonable. Respondent has credited appellant with only 69.5 cubic yards of moderately hard caliche. Our interpretation of the profiles results in a total of 635.44 cubic yards of rock-like material (caliche) or approximately 42 percent more than reasonably anticipated. We find that conditions on this line differed materially from those indicated.

Lateral 50H extends to the west of the 50 mainline from station 17+16.3 and is 1,570 feet in length. Mr. MacGregor anticipated an average of 1.0 feet of caliche to station 11+70 and an average of 2.0 feet of caliche from station 11+70 to EOC for a total of 170 cubic yards. While we find this conclusion reasonable as to the latter 570 feet of the line, the bore log at station 6+00 shows 2.0 feet of easy boring in strongly cemented fine sandy loam, does not show any caliche and shows only occasional basalt gravels from 10.0 feet to 15.0 feet, average trench depth being approximately 10.0 feet. Accordingly, we conclude that a reasonable bidder would not anticipate any caliche or difficult excavation to station 10+00. JB&C claims an average of 1.2 feet of rock to station 8+00 and 3.4 feet of rock from station 8+00 to EOC. Respondent has not credited JB&C with any moderate or hard caliche on this line. We have concluded that 286.68 cubic yards of rock-like material (caliche) were encountered on this line and that conditions differed materially from those indicated in the contract.

Lateral 50J is 1,120 feet in length and extends to the west of the mainline. Mr. MacGregor anticipated an average of .5 feet of caliche or 48 cubic yards. We find this determination to be reasonable. We conclude that appellant encountered 244.75 cubic yards of rock-like material on this line and that conditions encountered differed materially from those indicated in the contract.

Decision

Although JB&C has asserted and prosecuted its claim for differing site conditions on the theory that the hard material encountered was rock, under the view we have taken it is unnecessary to decide whether the material would classify as rock as defined in the specifications. It is clear that we are not restricted to the theory upon which a claim is asserted, but may decide an appeal upon any basis properly disclosed

by the evidence.[49] The issue in our view is whether the difficult excavation or rock-like material materially exceeded that reasonably indicated by the contract. Our over-all findings above have answered this question in the affirmative.

Our conclusion that the soil classifications and profiles should be interpreted most strongly against respondent is based upon three factors: (1) the contracting officer's utter disregard of his obligation under the Differing Site Conditions clause to make a prompt investigation and determination of whether subsurface or latent conditions at the site differed materially from those indicated in the contract; [50] (2) the fact that the soil classifications and profiles were made with JB&C's rock claims in mind, and that the existence of these documents was not disclosed to JB&C until the findings were issued; [51] and (3) respondent's failure to call as witnesses the inspectors who made the classifications and profiles or to explain their absence.[52]

Respondent has raised other objections to JB&C's recovery, which do not warrant extensive discussion. Basic to these is the assertion that without reliance upon the bore logs [and/or other contract information], there cannot be a first category differing site condition. The principle may be sound,[53] but has no application here. It is, of course, true that the evidence discloses and we have found that JB&C's conclusion that no rock would be encountered was influenced by the fact that trench excavation was unclassi-

[49] See *Pre-Con, Inc.*, IBCA-986-3-74 (Sept. 4, 1972), 73-2 BCA par. 10,227 (footnote 7 and accompanying text).

[50] Counsel for respondent argues that the formal rock claim of Aug. 29, 1970, was based upon Paragraph 45 of the specifications. We have found that the claim was asserted under the Differing Site Conditions clause and that respondent was well aware of the basis of the claim (findings under heading of Differing Site Conditions Claim). Respondent would apparently require a detailed comparison of conditions expected from the bore logs with those encountered before recognizing a differing site conditions claim. It is clear that such specificity is not required. See *e.g., Edgar M. Williams, General Contractor,* ASBCA Nos. 16058, *et al.* (Oct. 16, 1972), 72-2 BCA par. 9734 (written notice of a differing site condition is not a prerequisite to recovery under all circumstances). Cf. *W. C. Shepherd* v. *United States,* 125 Ct. Cl. 724 (1953). Our findings above cast into doubt any contention that the contracting officer's delay in acting upon the claim can be attributed to good faith requests for additional information.

[51] Appellant argues that the whole purpose of Paragraph 4 of the General Provisions requiring a prompt investigation is to protect the contractor from just this type of after-the-fact desk-work, involving paper shuffling of figures, done in secret (Opening Brief at 14). Be that as it may, there is no room for doubt that had the soil classification and profiles been presented to appellant at the time the claims were filed the meaning of terms used by the inspectors as well as the accuracy of their classifications could readily have been determined.

[52] It is well settled that the failure to call or explain the absence of a material witness, may justify an inference that his testimony would be adverse. *See Dana Corporation,* ASBCA No. 16566 (Nov. 15, 1973), 74-1 BCA par. 10,370 at 48,973 and cases cited.

[53] Logically, there would seem to be no more reason for denying recovery to one who has not looked at the bore logs than there is for denying recovery to one who has failed to make a site investigation. *See Continental Drilling Company,* Eng. BCA No. 3455 (Sept. 9, 1975), 75-2 BCA par. 11,541. In the latter case, it is clear that a bidder will be charged with all information that a reasonable site investigation would have disclosed, but that recovery, in an otherwise proper case, may not be denied solely because of the failure to make such an investigation.

fied for payment. To that extent, JB&C was in error as a matter of law (note 13, *supra*). However, it is also clear that JB&C considered the bore logs and the test pits and that any errors in its expectations of conditions to be encountered have been fully taken into account in determining the amount of the equitable adjustment. Cases cited by respondent are inapposite.[54]

JB&C's claim for differing site conditions is sustained to the extent indicated and is otherwise denied. The amount of recovery is determined *infra*.

Cleanup

This claim is inextricably entwined with the claim for excavation of additional topsoil.[55]

Paragraph 46b. of the specifications entitled "Excavation" provides in part:

> Where separated excavation is prescribed on the drawings, the material removed in exacavating the upper portion of the drain trench, to the full width of the excavated trench, shall be stockpiled separately along the trench. The upper portion of the trench shall be the top 2 feet or the depth of suitable topsoil material, as determined by the contracting officer, whichever is less.

With the exception of portions of the 50 system,[56] the drawings showed all excavation was separated.

Paragraph 39c. entitled "Restoration of rights-of-way through farm lands" provides as follows:

> After the drain pipe trenches have been backfilled, stones, gravel, chunks of caliche, or other material detrimental to farming operations remaining as a result of the contractor's operations shall be carefully separated from the in-place topsoil material within the right-of-way and disposed of as directed; and, except for mounding over the trench, and crops or other improvements approved for removal within the rights-of-way, the properties shall be restored to a condition determined by the contracting officer, to be as near as practicable to that which existed before the contractor started work. The contractor's methods for separation of unsuitable excavated materials from the in-place or stockpiled material shall be such that excessive amounts of topsoil are not removed, and shall be subject to the approval of the contracting officer.

Sheet No. 1 of the plans contains the following note:

> Where "separate excavation" is shown on the Profile Drawings (1) the top 24'' of excavation, or less as directed, shall be stockpiled separately and replaced adjacent to ground surface. (2) Excavation

[54] *Key, Inc. & Jones-Robertson, Inc.*, IBCA-690-12-67 (Nov. 29, 1968), 68-2 BCA par. 7385 (contractor admitted having knowledge that actual river flow would be greater than shown on the drawings); *Roger V. Burke*, IBCA-661-8-67 (Feb. 8, 1969), 69-1 BCA par. 7493 (reference to *Key, Inc. & Jones-Robertson, Inc., supra*, in context of allegation that particular method of performance not considered until after contract was awarded). Respondent's complaint that JB&C in its original claims demanded compensation for all rock encountered is, of course, consistent with JB&C's evidence that no rock was anticipated.

[55] Although not referred to in the complaint, testimony on these claims was received without objection from respondent. We will consider the complaint as amended to include counts for cleanup and excavation of additional topsoil. *See* sec. 4.108(b) of our rules.

[56] Lateral 50F was the only line on the project calling for totally shielded excavation. Laterals 50B and 50D called for shielded and separated excavation and portions of 50 E, G, H and J required shielded excavation.

from the lower portion of trench containing gravel, rocks, chunks of caliche or other materials detrimental to farming operations shall be excluded from backfill in the top 12" of trench, and excess materials disposed of as directed.

Paragraph 46b. of the specifications, quoted above, requires, where separated excavation is specified, that topsoil be stockpiled separately for the full width of the drain trench (28 inches). However, Mr. Beard testified that they were requested by Bureau inspectors to strip an area at least 20 feet wide (including 4 feet on either side considered normal) so that the unsuitable material (spoil) not lie on original ground, but on the stripped section in order to avoid contamination (Tr. 332–337; sketch, App.'s Exh. O). In later testimony, he stated that he was directed and ordered to perform the additional stripping (Tr. 570–71).

This situation was brought to the attention of the contracting officer's authorized representative, Mr. Mendenhall, by a letter signed by Superintendent Beard, dated July 30, 1970 (Appeal file, Exh. 33), which states in part: "We have been ordered by the Assistant Field Engineer, Mr. Peterson [*sic*], to strip two feet above trench and an additional 12 inches in depth and 12 feet in width on the left side of the trench for the purpose of piling unsuitable material." The letter pointed out that this was regarded as an extra and that a statement based on the number of yards excavated would follow. An essentially identical letter, dated Aug. 31, 1970, and signed by Mr. Whitlock (Appeal file, Exh. 34), states that the directive for additional excavation must be regarded as a change under Paragraph 3 of the General Provisions. This letter was among letters presented to Mr. Mendenhall at the meeting of Sept. 1, 1970 (memorandum, dated Sept. 8, 1970, Govt.'s Exh. 72). The dollar amount claimed for additional topsoil excavation was $34,748.11, based on the excavation of an asserted 24,470.5 cubic yards at the contract price of $1.42 per cubic yard (letter of Sept. 1, 1970, Appeal file, Exh. 10). The amount claimed was later increased to $49,981.06 based on the excavation of an alleged 36,963 cubic yards at the contract price (letter of Dec. 15, 1970, App.'s Exh. D).

The Bureau responded to the letters of July 30, Aug. 31, and Sept. 1, on Sept. 4, 1970 (Appeal file, Exh. 35), denying that any particular manner of performing separated excavation had been directed and alleging that JB&C's method of performing separated excavation resulted in an excess of material detrimental to farming operations being retained in the topsoil after completion of backfill which the contractor had been directed to remove pursuant to Paragraph 39c. of the specifications. The accuracy of this letter is belied by a memorandum summarizing the conference held in Boise on Nov. 6, 1970, which indicates that the additional excavation was required in order to save

all available topsoil in reaches where topsoil was scarce.[57] Significantly, Mr. Beard testified that most of their cleanup problems were in areas where there was not much topsoil "to begin with" (Tr. 572).

Although Mr. Pedersen testified that he merely suggested a method of separation to Mr. Beard (Tr. 2,926, 2,938), this version of events is contradicted by Mr. Westfahl's diary (Govt.'s Exh. 87) entry for July 22, 1970, which refers to a conversation between Messrs. Pedersen and Beard and stated: "Present operation of separating material from excavation is not satisfactory—stripping or leveling surface for spoil is required in the future." [58] On cross-examination, Mr. Pedersen stated that he did not recall giving such a direction, but in view of Westfahl's diary entry admitted "* * * I am sure that I did" (Tr. 2,905). A Westfahl diary entry for Sept. 4, 1970, referring to the area from station 20+00 to 25+00 on 66E, stated that Mr. Kolterman pointed out to Mr. Beard the unsatisfactory method of separated excavation, resulting in Mr. Beard directing a scraper operator to remove topsoil over a wider area so that unsuitable material was not placed over topsoil. *See also* Inspector's Report, dated Aug. 24, 1970, which states that separated excavation from station 5+00 to 2+50 on 66R was unsatisfactory as the area where the spoil was being placed had not been stripped and caliche was getting into the [irrigation] corrugations. This situation is depicted in photos, Govt.'s Exhs. 51 and 52. It should be pointed out, however, that under the specifications the separation of material detrimental to farming operations from the in-place topsoil was to take place after the trenches had been backfilled (Paragraph 39c.).

Mr. Beard admitted that if he did not strip the area for the spoil pile, he would be required to clean-up the area (Tr. 572–73). The record shows that JB&C was required to do both. He also admitted that the wider the cut the trencher was making, the more area that would be required in which to deposit the spoil.

The record is confused as to the preferred method of accomplishing separated excavation. Mr. Keltch, whose operations were apparently regarded as a model by at least Mr.

[57] Paragraph 3 of the memorandum (Govt's Exh. 82), states in part:

"Bud Beard, Superintendent for JB&C Co., drew a picture of a trench on the blackboard to show 2 feet of topsoil to be stripped. He also showed the Government's requirements for stock-piling and backfilling of trench. He first claimed that he was instructed to excavate and stock pile in the manner pictured. But after questioning admitted that he chose to perform the excavation and stock piling in the manner depicted as it appeared to be the only method which would be approved by the inspectors. There followed a [back-and-forth, give-and-take] discussion between Beard and Kolterman [Chief Construction Field Branch] concerning the requirement for excavation of additional one-foot depth to the side of the 2-foot depth top soil excavation. Kolterman's justification for requiring this additional excavation was that they were trying to save all available topsoil in the reaches where topsoil was scarce * * *."

[58] Mr. Pedersen's diary (Govt.'s Exh. 114) entry for July 22, 1970, refers to the fact that cleanup and separation were discussed with Mr. Beard. No details of the discussion are recounted.

Pedersen,[59] testified that other than blading off the irrigation rills, he stripped behind the trenching operation (Tr. 2,006–09). Because any contamination of topsoil with unsuitable material would already have occurred, the purpose of this stripping was apparently to avoid having to haul excess unsuitable material to a disposal area. Mr. Pedersen described an acceptable method of separation which he admitted resulted in unsuitable material being mixed with the topsoil (Tr. 2,805–06, 2,925; Govt.'s Exh. 113). Respondent's criticisms of JB&C's method of performing separated excavation are not regarded as valid.

Under Paragraph 46a. of the specifications, backfilling of excavated portions of drains was to be completed within 7 calendar days. Cleanup was not a separate pay item and the costs thereof were to be included in the bid prices for other items, *i.e.*, excavation and backfill. The record shows that unless backfilling and final cleanup was performed to respondent's satisfaction within the 7-day period, the percentage of completion for payment purposes would be reduced and JB&C would be threatened with a prohibition of further excavation. *See* Inspectors' Reports, dated July 7, July 13, Aug. 28 and Sept. 23, 1970. Under these circumstances, it makes little or no difference whether the method of separation desired or specified by Bureau personnel was couched in the form of directives or suggestions for the contractor had little alternative but to comply.

Mr. Duane Butler testified that when he arrived on the job about mid-Aug. 1970, he observed JB&C employees with buckets in their hands picking rocks and pebbles on one of the lines (Tr. 989–991). He was informed that Bureau inspectors would not pass the line and that JB&C could not get paid until all the pebbles were picked up. He asserted that similar rocks were more numerous in the undisturbed areas. We find the latter assertion credible in view of the respondent's position that caliche is very prevalent and noticeable in Grant County and Mr. Weisell's testimony that caliche cobbles were visible in numerous agricultural fields (Tr. 1,694). Accordingly, respondent's present position that there was no caliche in the top 12 inches of the adjacent undisturbed areas strains credibility to the breaking point.[60] Photos cited in respondent's brief as corroborative of the absence of caliche on the undisturbed surface are not persuasive as the pictures

[59] Mr. Pedersen's diary contains repeated references to the Keltch job (specs 1073) "looking good."

[60] Mr. Westfahl admitted that it was rather common to find caliche gravel in the topsoil (Tr. 2,188). Mr. Beard testified to the same effect (Tr. 3,591). This testimony is corroborated by inspection records. *See, e.g.*, Inspectors' Reports, dated June 25, Aug. 15 and 19, Sept. 10, 14 and 22 and Oct. 10, 1970. Mr. Pedersen, who described an investigation off the right-of-way as a result of JB&C's claim, admitted that they found caliche albeit in minor amounts (Tr. 2,733).

do not clearly show original ground surface or stockpiled topsoil.

Beginning with July 17, 1970, Inspectors' Reports contain numerous references to laborers hand picking chunks of caliche, rocks, etc., on various lines.[61] JB&C's letter of September 1, 1970, claimed that cleanup required by the Bureau was unreasonable and excessive (Appeal file, Exh. 37). The dollar amount attributed to this claim was $23,270.63 (letter of September 1, 1970, Appeal file, Exh. 10). These letters were presented to the contracting officer's authorized representative, Mr. Mendenhall, at the meeting in Ephrata of Sept. 1, 1970.

At the meeting of Nov. 6, 1970, in Boise, JB&C representatives alleged that farmers were never satisfied with the way their land was left after it had been disturbed and that the Bureau had required hand picking of hard material as small as 1 inch in diameter (Memo dated Nov. 6, 1970, Govt.'s Exh. 82). Mr. Pedersen estimated that the amount of cleanup required of JB&C was 30 to 40 percent in excess of that performed by other contractors (Tr. 2,734–35).

It appears that the Bureau rigidly enforced the provisions of the note on the drawing relative to the exclusion of materials detrimental to farming operations from the top 12 inches of backfill to the exclusion of the qualifying language of Paragraph 39c. of the specifications that such detrimental material be the result of the contractor's operations and that the restoration be as near as practicable to that which existed before the work was begun. We have little difficulty in concluding that handpicking was not a practicable means of restoration and was thus prima facie beyond the requirements of Paragraph 39c.[62]

Respondent argues that JB&C's problems with cleanup were exacerbated by the wide trench, 50 to 54 inches, excavated with the trencher and numerous instances where the material from the lower portion of the trench, spoil, was placed against stockpiled topsoil resulting in contamination (Photos, Govt.'s Exhs.

[61] Inspectors' Reports indicate rock picking taking place on the days and with the number of laborers listed below. In the absence of evidence to the contrary we assume the days represent full 8-hour days: Two laborers on July 17, 21 and 27, 1970; one laborer on July 31, Aug. 4, 5, 6 and 7, 1970; five laborers on Aug. 13; four laborers on Aug. 14; three on Aug. 26; and Oct. 1, 1970; two on Oct. 16 (4 hours w/flatbed truck); four laborers on Oct. 30 (5 hours); two laborers on Mar. 2, 1971 (9 hours; flatbed truck 4, pickup 5); three laborers on Mar. 12 and 13, 1971 (9 hours; flatbed truck and driver 9 hours), this totals 302 man hours. The reports do not always show equipment used. We nevertheless allow a flatbed truck for a full 8 hours on each day rock picking was taking place except where the reports show the contrary or a total of 131 hours. While other equipment was used in connection with cleanup, we conclude that its use was necessary in any event and the mentioned 131 hours amply compensates for equipment usage.

[62] While the dictionary reveals that practicable may mean possible, and hand picking is certainly a possible means of cleanup, we are of the view that practicable in this context implies the capability of being easily and readily effected. Handpicking of the right-of-way is not, in our opinion, within this concept. It is evident that respondent considered that handpicking was an appropriate means of cleanup in areas where topsoil was scarce. *See* Inspector's Report, dated Mar. 12, 1971. Areas where topsoil was the thinnest would, of course, be more likely to have had caliche within 12 inches of the surface.

50, 66 and 70; Appeal file, Exh. 36, Photo No. 6). Mr. Beard admitted that on occasion the spoil was deposited on the same side as the topsoil because to do otherwise created problems in laying pipe and in vehicle operation along the trench.[63] He asserted, however, that the contamination cited by the Bureau was no problem in that a motor grader could remove as much of the [cobbles] as you want in that "It would cut like this table top" (Tr. 3,667). Moreover, Mr. Westfahl's testimony was to the effect that it was unusual for the topsoil and the spoil to be placed on the same side of the trench (Tr. 2,160–61). While we accept Mr. Beard's assessment of the capabilities of a motor grader, we note Mr. Whitlock's testimony that in his judgment some of the caliche chunks he observed on the surface of backfilled lines of the 53 system came from the trenches. We, therefore, find that at least some of the rocks and caliche chunks found in the top 12 inches after backfilling were the result of JB&C's operations. (*See*, *e.g.*, photos 3, 4 and 5, Appeal file, Exh. 36.) These photos do not, of course, establish the extent to which chunks of similar size were present in the top 12 inches of backfilled topsoil. We think it clear that if such chunks were the result of JB&C's operations, JB&C had the obligation of excluding the chunks from the top 12 inches of topsoil.[64]

Decision

[2] The only stripping required by the contract for separated excavation was in the 28-inch area immediately above the area where the trench was to be excavated. Mr. Pedersen admitted suggesting a method of separation involving stripping an area of sufficient width for the spoil pile. However, other evidence which we have recited above establishes that it was not understood as a mere suggestion by either JB&C or respondent's chief inspector and that, in any event, JB&C had little alternative but to comply. Under these circumstances, we think it is clear that the additional stripping constituted a constructive change. Accordingly, the appeal as to this item is sustained.

The 49,900 linear feet of extra topsoil excavation, which times 1 foot in depth and 20 feet in width and divided by 27 equals the number (36,963) cubic yards for which additional compensation is claimed, was apparently intended to include all excavation with the trencher. However, we note that only approximately 200 feet of the 53 mainline was excavated with the trencher, that line 53–3 was exca-

[63] Tr. 3,666. An Inspector's Report, dated Jan. 26, 1971, referring to the 50J line, states that after Mr. Pedersen had [backhoe] operator put topsoil on right side of line they could not get gravel to shield and both loaders get stuck.

[64] The record reflects that in areas where topsoil was plentiful JB&C accomplished final cleanup ordered by the Bureau by excavating shallow trenches adjacent to the backfilled trenches, burying the unsuitable material in the shallow trench and then covering it with topsoil. See Inspectors' Reports, dated Mar. 12, 24, 25, 26, 27, and 29, 1971.

vated with a backhoe and that the claim includes lines on the 53 system which were excavated prior to July 22, 1970, the date we have determined that the directive for additional excavation was given. With these adjustments, the linear feet of extra excavation is 44,436 which times 20 feet in width and divided by 27 equals 32,841.48 cubic yards. The appeal as to extra excavation of topsoil is sustained. The amount of the equitable adjustment is determined *infra*.

More difficult of resolution is the claim for cleanup. We conclude that machine cleanup such as described (note 64, *supra*) was JB&C's responsibility, but that the required handpicking was unreasonable. We accept as full 8-hour days the days shown by the Inspectors' Reports (note 61, *supra*) when handpicking was accomplished unless otherwise indicated and conclude that at least 302 hours of laborer's time were occupied in handpicking chunks of caliche. Although it is clear that a flatbed truck was utilized in some cases with the laborers in the cleanup operation, the amount of equipment usage is not clear. We accept 131 hours of flatbed truck time as reasonable (note 61, *supra*).

The claim for cleanup is sustained as indicated and otherwise denied. The equitable adjustment is determined *infra*.

Over-excavation Sloping

Paragraph 6 of the General Conditions required the contractor to fully comply with the Bureau of Reclamation publication "Construction Safety Standards" and amendments thereto on the date the invitation was received. Section 14.5 of this publication (Govt.'s Exh. 71) is entitled "Trench Excavation." Subsection 14.5.1 provides as follows:

> **14.5.1 Cave-in Protection. All excavation over 5 feet in depth, unless in splice rock, hard shale, hardpan, cemented sand or gravel, or similar stable material, shall be either shored, sheeted and braced, or sloped to a minimum of ¾ to 1. Should any question arise over the sloping or the installation of shoring for safety of personnel, the decision of the contracting officer's authorized representative shall prevail.**

The Inspectors' Reports are replete with directives to JB&C to slope the trenches a minimum of ¾ to 1. Mr. Pedersen's diary entry for June 19, 1970, states "Told USBR and Elton Ollar [JB&C foreman], & [backhoe] operator unless in caliche or solid rock slopes will be ¾:1." [65] This directive ignores the fact that cemented sand and gravel are listed as stable materials in the safety standard and also ignores the possibility that other types of material could quality as "similar stable material" within the meaning of subsection 14.5.1 of the Construction Safety Standards.

[65] This language should be compared with the note appended to an Inspector's Report dated June 19, 1970, by Mr. Pedersen: "Informed contractor that if it wasn't rock-hard sandy loam-hard caliche slopes would be 3/4:1." The words "hard sandy loam" are above the words "rock-hard caliche" and because the report contains the initials of six reviewers, including those of Mr. Pedersen, may have been added at a later time.

An Inspector's Report, dated July 7, 1970, referring to lateral 53M states that excavation ceased at 11:23 a.m. by orders of D. Pedersen because the trench sides were not sloped ¾ to 1. According to the report, operations resumed at 12 noon with permission of Mr. Pedersen. A note appended to the report by Mr. Pedersen states that the depth of material to be sloped was sandy loam and that the last 2 to 3 feet was stable material with some caliche. Slope measurements of the 53M and 53F lines on the reverse of the report indicate that in only one instance prior to the 11:23 a.m. shutdown did the horizontal distance equal or exceed ¾ of the vertical distance.[66]

At the time of the cited incident, Mr. Don Heinrich, project safety officer for the Bureau, was present taking pictures of the slopes. He testified that he visited the job site on an average of twice a month and that one of the principal safety infractions observed was failure to maintain ¾ to 1 slopes (Tr. 2,328–29). Apparently referring to the 53M line, he testified that the stability of the material was "Fair; it was good material" (Tr. 2,330). On cross-examination, he admitted that the trench walls at that point were stable (Tr. 2,336). This assessment is confirmed in part by Mr. Pedersen's diary entry for July 7, 1970, which states that the trench looked good but was not ¾ to 1. The diary quotes Mr. Beard as stating the Bureau was being unfair. Soil classifications on 53M reflect that topsoil ranged from 3.1 feet to 4.4 feet in depth and that the remainder of the material was caliche gravel. Caliche gravel is prima facie stable material within the meaning of the safety standard.

The requirement for ¾ to 1 sloping is not unqualified and it would seem that it was the responsibility of Bureau inspectors to determine if the trench was being excavated in stable material. Nevertheless Mr. Heinrich testified that none of us [Bureau personnel] were qualified to determine if the trench was safe (Tr. 2,330). Bureau inspectors required ¾ to 1 sloping in material they recognized as being firm.[67]

JB&C's claim for trench excavation beyond the pay lines caused by the Bureau's enforcement of ¾ to 1 sloping was among items discussed at the meeting in Ephrata on Sept. 1, 1970. JB&C representatives argued that interpretation of the sloping requirement by Bureau field

[66] The greatest vertical distance reported is 4.5 feet, which exceeds the depth of topsoil stated in the soil classifications for 53M. However, the trench at this point averages 8.0 feet in depth and it does not appear that ¾ to 1 sloping was required for the full depth of the trench.

[67] An Inspector's Report, dated July 10, 1970, referring to the 53–4 line, states that material was firm and there was no caving, but that the slopes were not ¾ to 1 and the backhoe operator was told to slope them to the minimum. Slope measurements and a sketch on the reverse of the report indicate that in this instance ¾ to 1 slopes were based on the full depth of the trench. The Bureau has recognized depths of caliche to 4.7 feet on 53–4 and the soil classifications show that 53.5 is predominantly caliche gravel, both of which are prima facie stable material as defined in the safety standard.

personnel was too stringent. Significantly, the memorandum summarizing the meeting (Govt.'s Exh. 72) refers to ¾ to 1 sloping as being applicable to common excavation. The claim was set forth in a letter presented at the meeting, dated Aug. 29, 1970 (Appeal File, Exh. 29), which after referring to instances where excavation beyond pay lines had been directed to prevent sloughing of the trenches and stating that JB&C was very cognizant of its safety responsibilities, asserted that the additional excavation was beyond that required by Paragraph 46(b) of the specifications and Paragraph 6 of the General Conditions unless specified as shielded excavation on the drawings. It was also asserted that the additional excavation caused the usage of extensive quantities of extra filter gravel.

JB&C's letter of Sept. 1, 1970 (Appeal File, Exh. 10) alleges that the additional excavation amounted to 15,944.76 cubic yards which at the contract price of $1.42 per cubic yard totals $22,641.56. The additional excavation was alleged to have been incurred on lines 53, 53A through 53E and on the 66 mainline.

The claim was denied in a letter from the COAR, dated Sept. 23, 1970 (Appeal File, Exh. 30) which, *inter alia*, quoted a portion of Paragraph 46(b) of the specifications,[68] asserted that the requirement for shielded excavation was a design requirement unrelated to safety, that shielded excavation only required the bottom portion of the trench to the top of the filter gravel to be supported against sloughing and alleged that sloping had only been required where the material was other than stable material as defined in the Construction Safety Standards.

The lines upon which shielded excavation was specified have been identified (note 56, *supra*). It is noteworthy that Mr. Kolterman testified that the Bureau specified shielded excavation where it expected sloughing (Tr. 2,362). It is, of course, clear from the last sentence of Paragraph 46(b) of the specifications (note 68, *supra*) that specifying shielded excavation does not relieve the contractor of responsibility for safety under Paragraph 6 of the General Conditions.

Discussions at the Boise meeting of November 6, 1970, revealed that the principal differences between the parties as to sloping involved judgment as to the stability of material excavated (Govt.'s Exh. 82).

[68] Paragraph 46b. reads in pertinent part:

"Where shielded excavation is prescribed on the drawings, the sides of the drain pipe trench below the elevation of the top of the graded gravel filter shall be excavated to vertical sides, which shall be supported by means of an approved shield, cribbing, sheeting or other approved methods which will prevent sloughing of the sides of that portion of the trench until after the gravel filter material is in place. The portion of the trench above the elevation of the graded filter shall be excavated or maintained to prevent sloughing of the sides. The reaches shown on the drawings for shielded excavation shall be considered minimum and are not to be construed as relieving the contractor of the full responsibility for safety of persons, or for damage to property because of his operations under the contract, as provided in Paragraph 6 of the General Conditions."

Because stationing of lines involved in the claim has not been furnished, it is not clear that the claim is restricted to backhoe excavation. We note that the 53 line from station 25+00 to EOC was excavated with the trencher prior to the installation of the laying shield.[69] Although backhoe excavation on the 66 mainline was limited to the area from station 6+00 to 18+00, a manhole at approximately station 27+00, the area from station 33+70 to 35+60 and the area from station 55+00 to 56+00, the portion of this line excavated through station 35+75 involved 15-inch pipe which was too large for the laying shield. Nevertheless, the clear implication of Mr. Beard's testimony is that the claim for additional sloping encompasses only backhoe excavation (Tr. 1,386). He estimated that the sloping required by the Bureau was 20 percent in excess of contract requirements.

Laterals 53A through 53E involved in the claim were excavated with backhoes. Examination of the soil classifications for these lines indicates that material excavated was principally described as sandy loam, sandy silt, or sand. Some clay mixed with caliche was reported on 53D and some "sand caliche" [sandy caliche] was reported on 53E. Absent evidence to the contrary, we conclude that the material described is not stable material as defined in the Construction Safety Standards and was thus such that sloping of ¾ to 1 was required unless the contractor elected to shore, sheet or brace. The evidence would not support a finding that the Bureau required sloping in excess of ¾ to 1 on these lines (Summary of Slope Measurements, Govt.'s Exh. 73).

Material on the 53 line through station 13+00 is described in the classifications as principally topsoil with the remainder of material shown to be chiefly saturated sand and clay or fine sandy silt with light clay. From station 11+00 to 13+00 topsoil is 2.8 feet to 3.0 feet in depth and the remainder of the material is shown as firm clay mixed with fine sandy loam. We have little difficulty in concluding, absent a showing to the contrary, that material so described is not stable as defined in the Construction Safety Standards.

As indicated in considering the claim for differing site conditions, the soil classifications in the area from station 14+25 through 20+00 show amounts of topsoil ranging from 3.3 feet to 4.3 feet with the remainder of material shown as hard caliche and cemented brown sand. Material so described would appear to be within the definition of stable material in the safety standard. However, an Inspector's Report, dated June 19, 1970, referred to previously, covering the area from station 12+10 to 14+30, states that the backhoe operator was instructed to slope trench to a minimum of ¾ to 1 as in the contracting officer's opinion material was not

[69] The laying shield was attached during the period July 20–27, 1970 (Inspectors' Reports).

solid enough to support vertical walls. The cited report contains the notation by Mr. Pedersen quoted above that unless material was rock, hard sandy loam or hard caliche slopes would be ¾ to 1. Material in addition to topsoil described in the classifications would appear to be within the exceptions in Mr. Pedersen's notation and although subsequent Inspectors' Reports indicate that sloping was discussed, it is not clear that ¾ to 1 sloping was required from station 14+30 to station 20+00.

An Inspector's Report, dated June 22, 1970, states there was severe caving on the 53 line at station 21+20. Soil classifications at stations 20+90 and 21+05 show 4.0 feet and 6.1 feet, respectively of topsoil and that the balance of material excavated was saturated sandy silt. Such material is clearly not stable and ¾ to 1 slopes could properly be required. Material from station 22+00 to EOC at 27+24.3 is shown by the classifications to be topsoil ranging from 1.5 feet to 3.6 feet in depth with the remainder listed as caliche gravel or hard caliche gravel. The requirement for separated excavation called for the removal of 2.0 feet or the depth of topsoil, whichever was less, and the amount of topsoil remaining was negligible. Caliche gravel or hard caliche gravel is prima facie stable material within the meaning of the safety standard. Nevertheless, an Inspector's Report, dated June 23, 1970, apparently covering the area from station 21+00 to 23+30 states that the backhoe operator was instructed to slope trench sides more. A separate Inspector's Report of the same date shows trench depths at stations 23+00 and 24+00 of 9.29 feet and 9.13 feet, with horizontal measurements of 7.0 feet, which is slightly in excess of ¾ to 1. Excavation of the 53 line from station 25+00 to EOC was accomplished with the trencher and although the laying shield was not yet attached, there is no evidence that ¾ to 1 sloping was required.

Material in the soil classifications for the 66 mainline through station 17+00 is predominantly topsoil and the remainder of material is shown to be clay, fine sandy clay or caliche mixed with silt. Instructions to maintain ¾ to 1 slopes in clay material were given (Inspector's Report, dated Aug. 27, 1970). Material so described may not be considered stable material within the meaning of the safety standard. Material excavated on the balance of the 66 mainline has been described in connection with the claim for differing site conditions and in Appendix I. Portions of this material would clearly be stable material as defined in the safety standard. However, there is no persuasive evidence that ¾ to 1 sloping was required in this area by the Bureau.

The record does show repeated directives by Bureau inspectors to lay back the slopes more on the 66 H, J and L lines and on the 53–7 line (Inspector's Reports, dated Nov. 6 and 9, Dec. 7 and 31, 1970). The specific directive on the 66H line appears to be applicable to the area from station 14+25 to 16+80.

Soil profiles for this area show 4.0 feet to 4.5 feet of topsoil and that the remainder of the material is rock or some form of caliche. While the material other than topsoil appears prima facie to be stable within the meaning of the safety standard, there is no evidence that ¾ to 1 sloping was enforced beyond the depth of topsoil.

Directives to lay the slopes back more on 66J appear to be applicable to the area from station 0+25 to 1+00 and from 5+00 to 9+00. The former area was unclassified and the soil classifications and profiles for the latter area show 4.0 feet to 4.6 feet of topsoil with the balance of material shown as some form of caliche. While we consider caliche as prima facie stable within the meaning of the safety standard, again there is no evidence that the sloping requirement was enforced beyond the depth of topsoil.

The same findings are applicable to the other instances of specific directives recited in the Inspectors' Reports to lay the slopes back more on lines 66L and 53–7, that is there is no evidence that the additional sloping extended beyond the depth of topsoil. A sketch labeled "typical backhoe trench excavation" [70] appearing in the soil profiles for the 66L line is deserving of comment. This shows a trench width of 13.5 feet to 14.0 feet at original ground, a topsoil depth of 3.0 feet to 4.0 feet with the remainder of the excavation being shown as caliche. The narrow part of the trench having vertical walls is in caliche. Restricting slope measure to the depth of topsoil and assuming a topsoil depth of 4.0 feet, over 3.0 feet of horizontal distance was excavated for every 1.0 feet of vertical distance or a ratio exceeding 6 to 1 when it is considered that 2.0 feet of topsoil has been excavated and stockpiled in accordance with the requirements for separated excavation. However, these ratios are drastically reduced if slope angles are based on the full depth of the trench and if the measurements exclude the width of the trench, which the sketch indicates to be 4.0 feet to 4.3 feet. While the foregoing indicates that there is room for interpretation as to the application of the ¾ to 1 sloping requirement and certainly room for reasonable differences of opinion as to whether material was stable, we simply cannot say on this record that sloping required by the Bureau was in excess of that specified in the standard.

Decision

Our findings establish that Bureau inspectors enforced the ¾ to 1 sloping requirement in material they recognized as firm and which might well have qualified as stable material within the meaning of the safety standard. It also appears that slope angles were computed at times based on depth of topsoil and at

[70] Similar sketches appear in the profiles applicable to the 66K, 66P, 66Q and 66S lines. *See also* the sketch on the reverse of an Inspector's Report, dated July 10, 1970, applicable to the 53–4 and 53–5 lines (note 65, *supra*).

other times based on full depth of trench even though material other than topsoil appeared to be stable as defined in the safety standard. Nevertheless, we hold that appellant has failed to prove that the Bureau's interpretation and enforcement of sloping requirements was beyond that required by the safety standard. It follows that the claim for over-excavation on sloping must be, and hereby is denied.

Miscellaneous Claims

JB&C's claim for the costs of skipping the potato field was originally asserted in the amount of $15,966 by letter, dated Oct. 14, 1970 (Appeal File, Exh. 40). The claim included equipment moving costs of $9,104.80 and 17 10-hour days of pumping time for 3 pumps during the period September 14 to October 8, 1970, at a rate of $40.36 per hour or a total of $6,861.20. Respondent requested a detailed breakdown of the costs and substantiating data in support of the claim (letter, dated Oct. 23, 1970, Appeal File, Exh. 41). This letter was apparently never answered. However, in a letter from appellant's counsel, dated October 4, 1973 (Appeal File, Exh. 27), the claim was reduced to $10,760.22 based on equipment costs of $6,487.70, labor and supervisory costs of $2,081.49, overhead of 15 percent and profit of 10 percent.

The contracting officer determined that an appropriate equitable adjustment was $1,886.21 based on alleged actual moving time of equipment involved [71] as reported in Inspectors' Reports and summarized (Govt.'s Exh. 78) plus a minimal allowance of time for preparing to move at hourly rates set forth in the letter from appellant's counsel of Oct. 4, 1973 (Appeal File, Exh. 27). The amount allowed by the contracting officer included 1 month's rent for each of four pumps (two 4-inch pumps, a 3-inch and a 2-inch pump) and 56 hours of actual pumping time at $2 an hour. Rental rates for the pumps were assertedly based on the Associated Equipment Distributors Publication for 1970. It is not apparent where the $2 per hour operating cost which included fuel and some labor was obtained and there is no record support for this figure. A flat 15 percent was allowed for overhead and profit.

Operating time for pumps allowed by the contracting officer does not include all pumping time during the period September 14 to October 7, 1970. For example, operating time for a 3-inch diaphragm pump allowed by the contracting officer was only 6¼ hours on September 15, 1970. Nevertheless, this pump is reported to have operated the entire shifts of Sept. 30 and Oct. 1, and 4 hours on Oct. 2 at the manhole at station 13+85 on 66K (Inspectors' Reports, dated Oct. 1 and Oct. 5, 1970). We think also that the amount allowed by the contract-

[71] Equipment listed (Govt.'s Exh. 78) consists of an Austin Western grader, an AC 260 elevator scraper, a Drott backhoe, the Cleveland 400 trencher, an AC 545H front-end loader and an AC HD21 dozer.

ing officer is inadequate in failing to recognize the effects of the move on the efficiency of the contractor's operations generally. However, appellant did not offer any specific evidence in support of the amount claimed at the hearing.

A claim for 617.8 cubic yards of additional filter material used on the 53 system at the contract price of $3.81 for a total of $2,353.82 was presented at the meeting in Ephrata on Sept. 1, 1970 (Appeal file, Exh. 10). Inspectors' Reports establish that JB&C was directed to over-excavate and place additional filter material on the 53 system. (*See, e.g.*, Reports, dated June 11, 17, 18, 23 and July 7, 8, 15, 17, 1970). *See also* Inspector's Report, dated Sept. 3, 1970, concerning over-excavation for a manhole on the 66E line. In a letter, dated Oct. 1, 1970 (Appeal file, Exh. 48), JB&C referred to a specific instance on the 66 mainline (date and station, not specified) where it had been directed to place additional filter gravel even though in the opinion of JB&C representatives the material had been placed in accordance with the specifications.[72] It was also asserted that 2.85 times the specification quantity of filter gravel had been used on the 66 mainline for which a billing would follow.

[72] Although it is not entirely clear, the incident referred to apparently took place on September 18, 1970, and involved the area from station 56+59 to 58+00 on the 66 mainline. An Inspector's Report for that date states there was only 2 inches of filter gravel over the pipe in places. The minimum required by the specifications and drawings is 4 inches. *See also* Pedersen diary entry for Sept. 18, 1970.

The Bureau responded to the October 1 letter on October 15, 1970 (Appeal File, Exh. 50), pointing out that the filter gravel placed at particular stations (note 72, *supra*) did not meet the minimum prescribed by the specifications and that material placed beyond the paylines (trench width at the cited stations was assertedly approximately 50 inches) was not compensable.

The claim for additional filter material in the amount of $12,569.19, based on usage of 3,299 cubic yards above specification requirements at the contract price was reasserted by letter dated Dec. 15, 1970 (App.'s Exh. D). Excess filter gravel of 7,344 cubic yards was claimed in the letter of October 4, 1973 (Appeal file, Exh. 27), and at the contract price of $3.81 totals $27,980.64. The contracting officer determined that quantities of filter gravel for which JB&C was paid included 154 cubic yards resulting from directives of Bureau personnel to place material in excess of minimums required by the specifications. Because the total quantity (10,602 cubic yards) paid for by the Government exceeds the estimated quantity (10,550 cubic yards) by only 52 cubic yards, it is not apparent how the figure of 154 cubic yards was computed.

The contracting officer also determined that extra filter gravel used by appellant was due to the trench width exceeding 50 inches in many instances as compared to the paylines of 28 inches, wastage resulting

from having to relay off grade pipe and other factors for which the Government was not responsible. It is, of course, not unusual for actual quantities of filter gravel used to exceed pay quantities by from 30 percent to 100 percent.[73] Apart from the instances cited in the Inspectors' Reports referred to above, there is no evidence that JB&C was directed to place filter gravel in excess of minimums required by the specifications. Despite the apparent discrepancy of 102 cubic yards in the amount above estimated quantities for which appellant was paid as determined by the contracting officer and that shown by the record (Construction Summary and Voucher, Gov't.'s Exh. 11), there is no evidence that appellant has not been paid for all quantities directed to be placed by the Bureau in excess of specification minimums.

Item No. 8 of Schedule No. 1 and Item No. 28 of Schedule No. 2 provided for loading unsuitable material for disposal. Item Nos. 9 and 29 of Schedules 1 and 2, respectively, called for overhaul on the basis of a unit of a mile cubic yard. A mile cubic yard was defined in Paragraph 55 of the specifications as a cubic yard of excavated material hauled 1 mile in excess of the free-haul limit. The free-haul limit was defined as 500 feet. Under Paragraph 54(b) of the specifications, excavated material not suitable for backfill as determined by the contracting officer was to be deposited at designated points along the right-of-way. This paragraph provided that "Waste banks shall be left with reasonably even and uniform surfaces."

In a letter, dated July 27, 1970 (Appeal file, Exh. 1), JB&C asserted that its contract did not require the spreading of excess material on the roadway as directed by Bureau inspectors and requested reimbursement in the amount of $227.50. The Bureau did not respond to this letter until Nov. 10, 1970 (Appeal, file Exh. 2). While referring to the specification provision requiring waste banks to be left with reasonably even and uniform surfaces, some liability for the additional work was recognized. Appellant was requested to resubmit its costs. The contracting officer determined that an appropriate equitable adjustment for the additional work was $168.50.

In the letter of Oct. 4, 1973, from its counsel, JB&C asserted a claim for disposal of unsuitable materials in the amount of $36,884.80. The claim is based on operating time at hourly rates for a dozer, scraper, wheel loader and motor grader during a period beginning in July and ending in October 1970. No attempt was made to relate the amount claimed to cubic yards of material loaded or hauled in excess of the free-haul limit of 500 feet. The contracting officer determined

[73] Tr. 2791, 2807–08. An Inspector's Report, dated June 30, 1970, reflects a discussion between Messrs. Westfahl and Beard to the effect that actual quantities of filter gravel might exceed estimated quantities by from 25 percent to 100 percent and that Mr. Beard was aware of this fact. *See also Whalen & Company*, IBCA–1034–5–74 (July 18, 1975), 82 I.D. 335, 75–2 BCA par. 11,377.

that appellant had been paid under the schedule items (Nos. 8 and 9 under Schedule 1 and 28 and 29 under Schedule 2) for all loading and overhaul for which payment was due.[74] Appellant has presented no evidence to controvert this conclusion and there is no evidence in the record to support a finding that the contracting officer erred in his determination that appellant has been paid for all loading and overhaul for which payment was due.

The final claim under this heading involves claims for costs resulting from Bureau survey or profile errors. Paragraph 20(a) of the specification provides, *inter alia*, that lines and grades for proper execution of the work would be established by the contracting officer. The depth to which the trench was to be excavated was marked on survey stakes set by the Bureau. Inspectors' Reports, dated Aug. 24 and 25, 1970, indicate that there was a survey error on the 66B line and that JB&C shut down operations on August 24 as a result of the error.

This situation was brought to the attention of the COAR in a letter, dated Aug. 31, 1970 (Appeal file, Exh. 31). The letter stated that cost and accounting data would be submitted at a later date. Appellant's letter of Oct. 4, 1973, established the amount of the claim as $4,079.53 for time lost on Aug. 5 and 31, 1970. The contracting officer determined that an appropriate equitable adjustment for the lost time (3 hours for equipment and 3 hours for laborers) was $419.04. In its answer to the complaint, the Government admitted that, because the contractor had to relay some pipe as a result of the error, an additional $529.99 was due appellant.

In its complaint, JB&C alleged that there was a survey error on the 66S, which apparently accounts for bringing in the date of Aug. 31, 1970, as a date for which delay costs are claimed. While the record does not reflect that there was a survey error on the 66S line, an Inspector's Report, dated Sept. 18, 1970, shows that there was a survey error on the 66T line. However, the report states that the contractor did not lose any time. Appellant has not presented any evidence to establish that the amount conceded by the Government to be due for the survey error on the 66B line is inadequate or that any delays were incurred as a result of survey errors on the 66S or 66T lines.

Decision

On brief, respondent has taken the position that the listed claims have been abandoned. While this is a permissible conclusion, we have gone into the claims in some detail because it was not self-evident from the record that the claims were without merit. We deny the claims for lack of evidence that the sums allowed by the contracting officer were erroneous or that the contract-

[74] An Inspector's Report, dated Sept. 3, 1970, states that the contractor hauled 10 loads of surplus unsuitable material from station 13+00 to 28+00 on 66C to stabilize a wet area, station 10+00 to 12+00, on 66E.

ing officer's denial of the claims was improper.

Equitable Adjustment

In its initial claim (Appeal file, Exh. 10), JB&C alleged that the cost of excavating 13,732.48 cubic yards of rock was $116,726.08 or $8.50 per cubic yard. The cost of excavating 17,252.3 cubic yards of rock was alleged to be $7.62 a cubic yard in the submission of December 15, 1970 (App.'s Exh. D). Appellant credited the Bureau with the amount paid ($1.42 a cubic yard for Schedule 1 and $1.32 a cubic yard for Schedule 2) in determining the sum allegedly due.

Cost data presented by appellant at a meeting with the Bureau in Boise on Aug. 6, 1973 (Appeal file, Exh. 21) shows revenue under the contract of $322,090.24 as compared with total costs of $681,709.08 for a net loss of $359,618.84. Included was a statement signed by JB&C's accountant Roy M. Charles, that

> Accounting for additional construction costs due to changed conditions has been completed on the basis that any changed condition results in not only direct costs on the specific item but also indirectly on all related items. Using this line of reasoning the cost accounting for the purposes of determining additional costs includes all costs involved on the contract.

The Bureau requested additional information including the precise amount claimed for rock excavation as well as details and cost data to support the other claims (letter, dated Sept. 14, 1973, Appeal File, Exh. 26). The response from appellant's counsel (Appeal file, Exh. 27) indicated that $491,593.20 was claimed as additional costs for rock excavation. It was alleged that of 81,660 cubic yards excavated, 32,130 cubic yards were rock. A cost factor of $602 per cubic yard including overhead and profit was determined by subtracting from total expenses for the month of January 1971 ($54,526.80) the amount of revenue received for that month ($24,044.75) and dividing the difference of $30,482.05 by the total amount allegedly excavated within paylines (6,298 cubic yards) for the month. Mr. Charles testified that the month of January was selected because he thought that it represented a peak month for the use of manpower and equipment (Tr. 1,614). He admitted that there was no such thing as a typical month on either contract. The figure of $6.02 was multiplied not by the amount of rock allegedly encountered, but by the total amount of excavation. It is also noted that computed costs for January 1971 included $2,616.98 for the trencher even though the trencher was not used on Block 82 after Nov. 3, 1970.

Undoubtedy because of these and other deficiencies in its costs presentation, appellant presented a revised cost computation at the hearing (App.'s Exh. 00). This document and 18 supporting schedules attempt to allocate income and expenses incurred under the three Bu-

reau contracts.[75] Counsel for respondent objected to the introduction of this document and on brief have attacked its validity, denying that it represents a proper basis for determining appellant's costs. Revenue for the Block 82 contract is identical to that shown on the schedule submitted to the Bureau on Aug. 6, 1973 (Appeal file, Exh. 21). Total expenses are now shown as $718,250.81 including $60,209.81 in indirect costs as compared to $47,190.20 in indirect costs shown on Exhibit 21. This increase as well as increases in direct costs were attributed by Mr. Charles to the location of additional invoices in the vendor files, which in turn was assisted by the receipt of certain records from Gulf Insurance Company (Tr. 1,414–15).

Two large boxes of records were produced in the hearing room. Mr. Charles testified that the boxes contained, as nearly as could be located, complete vendor files on the Washington jobs performed by JB&C (Tr. 1,402–03). He testified that although some items (invoices) were missing, the records were 85 or 90 percent complete and adequate for the purpose of determining profit and loss on the three jobs (Tr. 1,408–09, 1,432–33). He conceded, however, that assistance was needed in, for example, allocating equipment usage among the three Bureau contracts. For this and other information as to allocating costs between the contracts, he relied chiefly on Jack Butler (Tr. 1,428–29, 1,551, 1,558, 1,562, 1,564, 1,566, 1,583).

On brief, counsel for respondent argue that, despite extensive efforts in discovery proceedings to ascertain appellant's costs they did not have an adequate opportunity to examine the records supporting the costs shown on Exhibit 00. While it is true that counsel were not given an opportunity to examine the two boxes of records produced in the hearing room until approximately one week prior to the commencement of the hearing, counsel were specifically informed that they could request a continuance if more time was required to examine or audit the records (Tr. 1,406–07, 1,423–24). No such request was ever made. Accordingly, the objection is considered to have been waived.

Accountants for respondent did examine 22 of the vendor files, 19 of which were selected by counsel (Tr. 3,521, 3,531, 3,542; Govt.'s Exh. 87–142). Schedule 4 of Exh. 00 is entitled "Repairs" and reflects that costs were allocated ½ to Block 82, 5/12 to Block 87 and 1/12 to Block 20. Mr. Layne, one of the Bureau accountants, testified that he was unable to determine whether that allocation was proper (Tr. 3,527–28). Examination of a file (B–8, Chaler Co.) under Schedule 2, Equipment Rental, showed total charges of $45,406.60 of which $30,051 assertedly was not applicable to the Bu-

[75] JB&C had a third contract (100C–1131), referred to as Block 20. This contract generated income in the amount of $136,733.31 and was performed in the period mid-December 1970 to mid-February 1971 without apparent difficulty.

reau contracts (Tr. 3,529). Mr. Charles allegedly agreed that the charge was in error. Respondent's examination also revealed that a $20,000 payment by JB&C on equipment rental file B–32, Northwest Roads, was overlooked and that the amount of a $5,000 check returned for insufficient funds was not added to the amount owed (File B–17, Hagen Equipment Co.). However, if the total amounts invoiced or billed were correctly computed, it is not apparent how these oversights as to credits could effect costs incurred under the Bureau contracts.[76]

File C–6 (Belcoe, M. V.) under Schedule 4, Equipment Repair, concerns a claim for damages to private property allegedly caused by JB&C trespasses while performing the Block 87 contract. This obviously is not a proper charge to Block 82 work. Respondent's accountants also found that several of the files examined did not contain invoices fully substantiating amounts charged and that items invoiced to one contract were charged in whole or in part to the other contracts.

We share respondent's concern relative to allocating costs among the three contracts. Jack Butler testified that he was called a couple of years after the contracts were completed and that he gave figures "off the top of my head" (Tr. 1,650). He conceded that the allocation as to filter material should probably have been 62 percent to Block 87 and 38 percent to Block 82 rather than 50/50 (Tr. 1,650–51). He also testified concerning a bill for $7,000 or $8,000 for a new motor for a Kenworth truck (Tr. 1,646). We note that file C–60, N. W. Kenworth, under the schedule of repairs reflects a charge of $8,726.18. If this sum in fact represents the cost of a new engine, it would appear that it should be capitalized rather than expensed. A similar comment might well be applicable to the charge of $9,022.76 shown in file C–19, Diamond Reo. Charges for tires totaling $9,282.60 are certainly substantial and might be excessive.

Indirect expenses, Schedule 15, include a charge of $19,241 for legal services which was allocated equally between Block 82 and Block 87. It is clear that a portion of this sum represents services in connection with appellant's claims against respondent, including the meeting in Boise on Nov. 6, 1970, and that another portion is for correspondence and telephone calls with various JB&C creditors (App.'s Exh. SS). While the latter or a pro rata share thereof may well be a proper charge against the Bureau contracts, the former involving claims against the Government would not be. In this connection, Schedule 16 represents engineering expenses in the total amount of $642.75, which were allocated equally among the three Bureau contracts. Of this sum, $288.75 is for testing of samples,

[76] Respondent's examination revealed understatements totaling $1,273.21 and on brief appellant argues that the total undercharges almost offset the overcharges. Although Mr. Layne appeared to agree (Tr. 3,560), errors as to credits cannot effect total costs incurred.

expert opinions, etc., related to JB&C's efforts to prove the existence of rock. These being expenses incurred in support of a claim are considered unallowable. However, the sum of $354.01 (Wenatchee Aggregate) is apparently for testing aggregate for conformance to contract requirements and we accept this as a proper charge to the Bureau contracts.

The foregoing indicates that there are eliminations and adjustments to be made to appellant's cost presentation. These adjustments are shown below:

Direct Costs

Item	*Presented*	*Adjustment*	*Accepted*
Labor (including employer taxes—fringe benefits)	$176,234.61		[77] $176,234.61
Material (pipe, filter gravel, concrete, etc.) and hauling	153,443.18 (23.93% of direct costs	[78] $153,443.18	0
Equipment Rental	245,090.53	[79] 12,955.95	232,134.58
Repairs	41,802.42	[80] 2,197.50	39,604.92
Fuels	20,942.49		20,942.49
Supplies	9,339.24	[81] 551.82	8,787.42
Equipment hauling	7,197.45		7,197.45
Subcontractors	782.50	[78] 782.50	0
Bond	3,208.58		3,208.58
	$658,041.00	$169,930.95	$488,110.05

Indirect costs allocated to contracts on basis of revenue: (revenue under 3 contracts—$772,223.38, revenue under Block 82—$322,090.24 or 41.7 percent).

Direct costs ($488,110.05) and indirect costs ($51,040.66) which we have accepted total $539,145.71.

We have found that JB&C was required to excavate 17,110.09 cubic

[77] We accept direct labor, payroll taxes and fringe benefits in full. While in view of our elimination of material and hauling costs from costs considered affected by differing site conditions (note 78, *infra*), it might be argued that a pro rata share of labor costs should also be eliminated for the same reason, we decline to do so in this instance because labor costs were directly affected by differing site conditions.

[78] Costs considered not to have been affected by differing site conditions.

[79] Represents allocable portion of adjustment of $28,791 to equipment rental costs due to fact $30,051 of rental charges were not attributable to Bureau contracts and that equipment rental charges were understated by $1,260. Allocation was determined on basis that of original amount claimed ($45,406.60) under file B–8 (Chaler Co.), $20,432.97 was allocated to Block 82 and $24,973.63 to Block 87.

[80] Represents claim for damages due to JB&C trespass while working on Block 87.

[81] Represents reimbursement of Bud Beard expenses allocated one-half to Block 82, of which any amount allowable is considered to be more properly an overhead expense.

Item	*Total*	*41.7%*
Office Rent	$3,821.26	$1,593.47
Communications	20,270.45	8,452.78
Utilities	412.54	172.03
Travel	14,274.26	5,952.37
Home Office Supervision	[82] 41,812.32	17,435.74
Legal	[83] 16,096.00	6,712.03
Engineering	354.01	147.62
Printing Office	4,572.90	1,909.90
Insurance (exclusive of bond)	19,454.74	8,112.63
Bud Beard Expenses		[84] 551.82
		$51,040.66

yards of rock-like material over and above the 9,869.41 cubic yards that should reasonably have been anticipated. The total amount of rock excavation on Block 82 was about 27,000 cubic yards. There appears to be no difference of opinion between the parties that relatively thin layers of rock-like material measuring 1 to 2 feet in thickness could have been excavated with little difficulty using the trencher or backhoe equipment. However, much of the unanticipated rock was encountered in layers between 2 to 10 feet in thickness. Under such circumstances, the effect on JB&C's work was that the thicker layering of rock-like materials encountered impeded the speed of the excavating equipment, resulted in frequent breakdowns and required substitute methods of excavating. Consequently, the quantity of rock that was to be reasonably anticipated cannot fairly be considered as a reduction or credit against the reasonably unanticipated excavated rock found to constitute a differing site condition.

We allow an additional $182,000 in costs for the added rock excavation made necessary by the differing site condition. Such amount is determined in the nature of a jury verdict because of the lack of credible evidence on the actual cost of rock excavation. While we recognize that this method of computing an equitable adjustment is not favored, we have made adjustments to the costs as presented and thus consider that under the circumstances [85] this represents the most

[82] We have accepted this figure on the assumption that it represents only the portion allocable to the Bureau contracts as JB&C had other jobs in progress at the time.

[83] Total amount invoiced for legal expenses was $19,321. We consider $3,225 as applicable to claims against the Government and thus unallowable.

[84] There was evidence that some of Mr. Beard's expenses were for entertainment (Tr. 1,586). We note that Mr. Beard left the job shortly after substantial work commenced on Block 87 and accept one-half of the amount claimed as a proper indirect charge to Block 82.

[85] The adjustments which we have made assure that JB&C is not being reimbursed for losses not chargeable to the differing site condition. In any event we agree with the ASBCA: "Moreover, while estimating methods are to be preferred above the total cost approach, we are reminded that any adjustment

appropriate method of determining the amount due, exclusive of profit and bond cost, for the differing site conditions.[86]

We have also sustained the appeal as to excavation of additional topsoil (1′ x 20′) in the amount of 44,336 linear feet or 32,841.48 cubic yards. In the absence of a better measure, we simply accept Mr. Keltch's estimate that moving this material in and out costs $.50 a cubic yard (Tr. 1,903). Accordingly, the amount due on this aspect of the claim, exclusive of profit and bond costs, is $16,420.74.

The claim for excessive cleanup has been sustained as to 302 hours of laborer's time and 131 hours for a flatbed truck.[86A] The hourly cost for laborers as stated in the letter of October 4, 1973 (Appeal file, Exh. 27), is $5.51 which times 302 equals $1,664.02. The hourly operating rate for a flatbed truck with driver is $11, the rate indicated in appellant's letter of October 4, 1973. This multiplied by 131, the number of hours we have determined a flatbed truck was used equals $1,441. While we allow an overhead rate of 8 percent on the laborer's wages ($51,002.92 divided by 641,242.87 equals .0795). AGC rates normally include an allowance for overhead and no additional allowance for overhead on truck usage is proper.[87] Our allowance for excessive cleanup, exclusive of bond cost and profit, thus becomes:

Labor	$1,664.02
Overhead at 8 percent	133.12
	$1,797.14
Truck	1,441.00
Total	$3,238.14

is necessarily a subjective matter, in the sense that the particular contractor damaged is to be made whole. It is some measure for guidance to know what damages should amount to using a 'should cost' approach as the Government urges, * * * but we must bear in mind that we are interested in the subjective damages suffered by this appellant, assuming it did not compound them by its own fault, for the equitable adjustment for this contract." *Robert McMullan & Sons, Inc.*, ASBCA No. 19,129 (August 10, 1976), 76–2 BCA par. 12,072 at 57,962–63.

[86] Although vigorously denying any liability for differing site conditions, counsel for respondent, nevertheless, were at some pains to establish, through Mr. Mendenhall, respondent's view of appropriate methods of computing an equitable adjustment (Tr. 2,964–84). One such method consisted of determining the additional time expended due to rock excavation by comparing what were considered to be normal rates of progress using the trencher and backhoes with the actual rates of progress as determined from inspection records and applying hourly cost factors to the difference. Another method consisted of simply multiplying the amount of rock JB&C claimed to have encountered by what was considered to be a reasonable bid price for a substantial quantity of rock excavation, crediting the amount paid for excavation under the contract. Either method might be proper under appropriate circumstances. However, we conclude that neither method would have properly compensated JB&C for the damage suffered (note 85, *supra*).

[86A] We recognize that a portion of this labor expense was incurred more than 20 days prior to the time JB&C submitted the written notice required by the Changes Clause. The picking up of rock by hand was pursuant to the Government's direction, however, and the performance of such work was contemporaneously recorded in the Inspectors' Reports (note 61, *supra*). This is sufficient compliance with the written notice requirement of the Changes Clause. *Hartford Accident and Indemnity Company*, IBCA–1139–1–77 (June 23, 1977), 84 I.D. 296, 77–2 BCA par. 12,604.

[87] *See, e.g.*, ASPR 15.402–1(c), 32 CFR 15.402–1(c).

Our total allowance in addition to the amount determined by the contracting officer ($2,473.75) is as follows:

Differing Site Conditions	$182,000.00
Extra Excavation Topsoil	16,420.74
Excessive Cleanup	3,238.14
	$201,658.88
Profit at 10 percent	20,165.89
	$221,824.77
Plus additional amount conceded in Govt.'s answer (assumed to include overhead and profit)	529.99
	$222,354.76
Bond at 1 percent	2,223.55
	$224,578.31

Appellant has demanded interest (Amended Complaint, dated Nov. 6, 1974) and attorneys' fees. The instant contract does not contain a clause [88] providing for payment of simple interest on the amount finally determined to be due after an appeal and in the absence of statute or a contract provision providing therefor interest for mere delay in payment may not be awarded against the Government.[89] While interest has, nevertheless, been allowed as part of an equitable adjustment upon a showing that the increased costs invoiced by the contractor in, *e.g.*, performing changed work, has required the payment of additional interest,[90] such a result is not open here, even if the required showing had been made, because Paragraph 15 of the Special Conditions entitled "Contract Adjustments" provides in pertinent part that "Determinations of allowable costs shall be made conformably with the principles stated in 41 CFR (Federal Procurement Regulations) Part 1–15 * * *" and 41 CFR 1–15.205–17 specifically provides, *inter alia*, that interest on borrowings, however represented, bond discounts, costs of financing and refinancing operations are unallowable.

Paragraph 15 of the Special Conditions entitled "Contract Adjustments" provides, *inter alia*, that an amount for interest, including any paid for capital investments, may be considered in establishing an allowable amount of profit. There has been no showing of interest paid and we think we have made an adequate allowance for profit. The claim for interest is denied.

As to the claim for attorneys' fees, the American rule is, of course, that attorneys' fees incurred in liti-

[88] FPR 1–1.322(b), 41 CFR 1–1.322(b).

[89] 28 U.S.C. § 2516. *See also William C. Ramsey* v. *United States*, 121 Ct. Cl. 426 (1951) and *J. L. Simmons Company, Inc.*, 188 Ct. Cl. 684 (1969).

[90] *Joseph Bell, et al.* v. *United States*, 186 Ct. Cl. 189 (1968); *Sun Electric Corporation*, ASBCA No. 13031 (June 30, 1970), 70–2 BCA par. 8371. *Cf. New York Shipbuilding Co. a Division of Merritt Chapman & Scott Corporation*, ASBCA No. 16164 (June 25, 1976), 76–2 BCA par. 11,979 (contractor entitled to recover as profit imputed interest on equity capital used to finance changes in contract work).

gation are not ordinarily recoverable.[91] The same rule as we have indicated, *supra*, is applicable to other costs, such as consulting fees, incurred in prosecuting claims against the Government.[92]

The appeal is sustained in the amount of $224,578.20 in addition to that allowed by the contracting officer and is otherwise denied.

IBCA–1020–2–74
Findings of Fact

Contract No. 14–06–100–6785, Specification No. 100C–1101, hereinafter Block 87, in the estimated amount of $316,016 was awarded to JB&C Company on July 2, 1970. The contract called for the furnishing and installation of approximately 18.7 miles of buried pipe drains ranging from 4-inch to 18-inch diameter pipe and related structures. As in Block 82, the work was divided into two schedules: Schedule 1 consisting of the 139 system, constituting approximately 9 miles of pipe drains and related structures and Schedule 2, consisting of the 159 system, lines 157 B, C & D, the DW279 line, the 49 line and the 49.2 line constituting approximately 9.7 miles of pipe drains and related structures.

The contract included Standard Form 23–A, June 1964 Edition, with the 1967 revision to the Changes clause and the substitution of the "Differing Site Conditions" clause for the Changed Conditions clause.

JB&C bid $1.15 per cubic yard for common trench excavation on both schedules and $1.75 per cubic yard for rock trench excavation on both schedules (Govt.'s Exh. 87–85). Rock excavation in the trenches was estimated to be 2,450 c.y. under Schedule 1 and 3,100 c.y. under Schedule 2. These estimated quantities do not include an estimated 190 c.y. of rock in trenches with one to one side slopes (Item 4) for which JB&C bid $2.10 a c.y. JB&C's bid is to be compared with the engineer's estimate of $1.40 per c.y. for common excavation and $2.50 for rock excavation on both schedules and $1.40 per c.y. for both common and rock trench excavation on both schedules submitted by the next low bidder John M. Keltch, Inc., JB&C's total bid on Schedule 1 was $164,432.50 as compared to Keltch's $176,172.45 and $151,583.50 on Schedule 2 as compared to Keltch's $166,343.

The DW279 is an open drain which extends approximately 1,330 feet in a northerly and westerly direction from County Road 12 SE at station 49+99, terminating at station 36+25.5. Station 36+25.5 on DW279 coincides with station 0+00 of the D87–49 line. EOC on the 49 line is station 48+50. The 49–2 line extends to the east, parallel-

[91] *F. D. Rich Co., Inc.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974). *See Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *See also*, P.L. 94–559, approved October 1976, 90 Stat. 264 (The Civil Rights Attorneys Fees Award Act of 1976).

[92] *James Hamilton Construction Company and Hamilton's Equipment Rentals, Inc.*, IBCA–493–5–65 (July 18, 1968), 68–2 BCA par. 7127 and cases cited at 33,036. *See also* 41 CFR 1–15.205–31(d).

ing County Road 12 SE, from DW 279 at station 49+54.8, turns northward at station 4+83.6, thus forming what appellant refers to as the "dipper area," terminating at station 17+49.5.

Among work required was the conversion of the DW279 open drain into a closed drain. The DW 279 is in a draw and the slope of the land is generally to the north and west. For example, pipe invert at the road crossing of County Road 12 SE is approximately 1035.90 elevation, while pipe invert at station 48+50 (EOC) on the 49 line, which as we have seen is a continuation of the DW279, is at elevation 1159.28. The plans showed a total of 32 bore logs on lines in the dipper area laterals 279A, 279B, 279C, the 49 line and laterals 49A through 49N, the 49–2 line and laterals 49–2A through 49–2D. These bore logs are described in Appendix II. There were no bore logs on the DW279, a fact which respondent attributes to the continuous flow of water in that drain. Only a few of these bore logs warrant particular mention.

Of the 32 bore logs, 11 showed a water surface after drilling at or above trench depth and 20 described material encountered in part as saturated. Saturated means that the material cannot absorb or hold any more water (Tr. 3284). In addition, 8 of the 32 bore logs showed indications of hard or moderate boring in caliche and basalt gravels with strongly cemented peds, strongly cemented basalt gravels and strongly cemented caliche or weathered basalt. However, in all but three of these bore logs the moderate or hard boring was shown at depths below pipe invert. In two of the three bore logs showing hard or moderate boring above pipe invert, 49J at 5+00 and 49K at 3+00, drilling was accomplished with a hand auger and the logs show a refusal due to hard boring approximately 0.8 foot and 0.1 foot, respectively, above pipe invert. The final instance of a bore log reflecting hard boring at a depth which may be above pipe invert was drilled beyond EOC on the 49 line at station 49+58 and shows approximately 4. feet of hard boring (caliche), considering pipe invert at the nearest point.

Material shown by the logs was principally described as "non-cemented or no cementation, nonsticky, nonplastic," which according to Mr. Briggs, a Bureau engineer, means an essentially noncohesive material which would be expected to have little or no stability when disturbed (Tr. 3284–85).

The 159 system portions of the 139 system and lines 157B, 157C, and 157D lie to the south of County Road 12 SE. Other portions of the 139 system lie to the west and north of the DW279, terminating at a point very close to the West Canal. The West Canal is part of the irrigation distribution system and forms a northern boundary for the project. To the north of the West Canal [93] lies Block 80, which was partially developed for irrigation purposes at an earlier time (App.'s

[93] On brief, respondent repeatedly refers to the West Canal as unlined. There is no record support for this assertion.

Exhs. JJJ & NNN). Elevations on Block 80 are generally higher than those on Block 87. The significance of this information will appear and is discussed *infra*.

In addition to the bore logs, the specifications contained other provisions indicating the presence of water. For example, paragraph 39, entitled "Interference with Flow in Existing Laterals" provided in part:

> The existing laterals are used for the delivery of irrigation water during the irrigation season, between about Apr. 1 and Oct. 25, and no work within the limits of or adjacent to the existing laterals that would interfere with the flow in the laterals shall be done during the irrigation season except upon specific authorization of the contracting officer.

Paragraph 40 "Water Conditions and Handling Water" provides:

> a. General.—Ground water, surface drainage, and irrigation water will be encountered during construction of the drains, and it is anticipated that flow of water will increase in the existing drainage facilities and tributaries proximate to the drains after about April 1 due to irrigation operations.
>
> Water flows throughout the year in the existing DW279 Open Drain. There are no recorded data available as to the quantity of such flows, but it is estimated that in February, 1970 approximately 0.75 to 1 cubic feet per second of water was flowing in the drain at the county road crossing at Station 49+99. Flow in the drain is expected to increase substantially during the irrigation season.
>
> The existing D87-157 Buried Pipe Drain flows water continuously, however no recorded data are available as to the quantity of such flows.
>
> Water table elevations and the dates on which water elevations were measured are indicated on the drawings. During the completion period for this contract, it is anticipated that the water table elevations will be at the same or higher elevations than those shown on the drawings.
>
> The pipe drains to be constructed under these specifications have been designed for the estimated flows that will occur after initial drainout of the affected land area is complete. The discharge rate of the initial flows will vary depending on geological and groundwater conditions, irrigation operations on adjacent lands, the weather, and other factors. The Government does not represent that the size of pipe specified for any drain or portion of drain is of sufficient size to carry the initial flow of water which may enter the drain pipe trench during construction. The contractor shall be responsible to provide for any flows encountered as required to perform the construction in accordance with these specifications.
>
> The Government does not represent that the above information shows or describes completely the conditions which may be encountered in performing the work and the contractor must assume all responsibility for any deductions or conclusions which he may derive from such information.
>
> b. Handling water.—Where the excavation to be performed under these specifications crosses or otherwise encounters ponds or pools of water or where excavation is performed in material below the ground water surface or in running water, the contractor shall provide for controlled drawdown of water during the progress of the work so that no damage will result to either public or private interests. The contractor's method of excavation and handling of excavated materials and method for control of drawdown of the water surfaces, including ground water surfaces, shall prevent drainout of bank storage at a rate that

will cause significant sloughing of the banks, and shall prevent excavated or loosened material from washing downstream into the downstream waterways by any amount that in the opinion of the contracting officer, impairs the usefulness of the waterway.

At manholes or other structures sites, the flow in an incoming drain pipe shall not be interrupted by a temporary plug unless it is determined by the contracting officer that such temporary plugging will not cause damage to the gravel filter. Care shall be taken to prevent the obstruction or silting-up of an outflowing drain pipe by installing temporary screens, baffles, or by other approved means.

The contractor shall construct and maintain all necessary cofferdams, bulkheads, channels, flumes, or other temporary diversion and protective works; shall furnish all materials required therefor; and shall furnish, install, maintain, and operate all pumping and other equipment, including well points, necessary to maintain the excavations in good order during construction. After having served their purpose, all cofferdams or other protective works shall be removed.

c. Costs.—The costs of all work required by this paragraph shall be included in the prices bid in the schedule for excavation.

Paragraph 42 "Records of Subsurface Investigations" provides:

The drawings included in these specifications show the available records of subsurface investigations for the work covered by these specifications. The Government does not represent that the available records show completely the existing conditions and does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological or ground-water conditions. Bidders and the contractor must assume all responsibility for deductions and conclusions which may be made as to the nature of the materials to be excavated, the difficulties of making and maintaining the required excavations, and of doing other work affected by the geology and ground-water elevations at the site of the work.

Separated excavation has been defined in connection with the claims on Block 82, IBCA–1033–4–74. As indicated previously, the Bureau specifies shielded excavation where sloughing is expected. Although various witnesses for respondent testified that the purpose of shielding was to maintain the soil structure adjacent to the trench wall, we accept the testimony of respondent's witness, Mr. Kolterman (Tr. 1818–19) and Mr. Beard (Tr. 1360) that the purpose of shielding is to prevent contamination or clogging of the filter or bedding material surrounding the pipe, which could impede the function of the pipe as a drain.

Shielded excavation was specified on the 139 line, on lateral 139B, lateral 49–2D and on laterals 279B and 279C. Neither shielded nor separated excavation was specified on the DW279, 279A, part of the 159 line, and laterals 49D, 49E and 49F. Separated excavation was specified on all other lines.

JB&C Site Investigation

JB&C's site investigation was made by Messrs. Jack Butler and Bud Beard in late May or early June 1970 (Tr. 1122, 1208A). They walked the 279 system, the 49 system, a large portion of the 159 system and a portion of the 139 system, below or south of the

County Road 12 SE (Tr. 1209, 1339).

They observed that there were fields under cultivation on each side of the DW279, 49 and 49–2 lines (Tr. 1132, 1346, 3579). This is confirmed by photos (Govt.'s Exhs. 27–29, inclusive; Slides, App.'s Exhs. MMM–1, 3, 4, 5, 6, 8, 9 and 10). The ground appeared to be completely firm in areas where water was not draining off of the fields (Tr. 1133, 1210, 1361). They observed water flowing in the DW279 open drain and through an 8- or 10-inch corrugated metal pipe under County Road 12 SE. Mr. Beard estimated that the flow was approximately ¼ to ⅝ the capacity of the pipe (Tr. 1351–53). He calculated that the flow of .75 to 1 cubic feet per second in February 1970 as stated in Paragraph 40 the Specifications was approximately 440 gallons a minute, which he stated could be handled by a 4-inch pump.

They also observed cattails and all kinds of growth (Tr. 1133, 1353). The existence of tule and heavy growth in the area of the DW279, 279 A, B and C drains, the 49–2 system and portions of the 49 system (49 A, B and C) is amply documented by Bureau photos taken on June 11, 1970 (Appeal file, Exh. 12, photos 1 thru 9; Govt.'s Exhs. 27 thru 31). Government's Exh. 28, a photo taken at station 0+15 on 49–2 shows a corral in the background and ponded water along the DW279 in the foreground. While respondent asserts that the only source for this ponded water was ground water, Mr. Beard attributed the ponds to a small embankment, resulting from cleaning of the DW279, which prevented water from flowing into the ditch except where there were breaks in the embankment (Tr. 1353–54).

Messrs. Beard and Butler attached considerable significance to the fact that while shielded excavation had been specified on the 139 line it was not specified on the DW279, 279A or 49–2 lines. Mr. Beard talked to a farmer and was informed that the construction of the DW279 had helped to drain and stabilize the area (Tr. 1358–1360, 1378–79). They, therefore, concluded that the Government did not specify shielded excavation because it did not anticipate serious sloughing, caving and ground water problems in the area of the DW279 (Tr. 1285, 1360). They attributed the flow in the DW279 principally to surface water which could be diverted (Tr. 1355, 1361, 1367). While on cross-examination Mr. Beard admitted expecting small quantities of underground water (Tr. 1376, 1380), their overall conclusion was that the area would stabilize once the irrigation season ended (Tr. 1285, 1377–78, 1380).

Although Paragraph 39 of the specifications stated that the irrigation season extended from about April 1 to Oct. 25, Mr. Butler had friends and relatives in the area and knew that in most instances the irrigation season ended approximately Sept. 1 (Tr. 1134–35, 1213).

They therefore, planned to commence operations approximately Sept. 15 or as soon thereafter as possible. The reasonableness of the conclusion as to when the irrigation season ends is cast into some doubt by Paragraph 38b of the specifications which indicates a crop harvest date of Nov. 10 for the DW279 A & B lines and for the 492B & 2D lines.

Mr. Butler and Mr. Beard recognized that bore logs on the 49–2 line at station 0+70 and 4+83.6, 15 feet right, drilled on June 16, 1969, and May 8, 1968, respectively, showed water surfaces after drilling of approximately 4.8 and 3.5 feet, below ground surface. Indeed, the latter log shows a water surface on July 15, 1968, approximately 1.5 feet below ground surface. Three bore logs on the lower 49 line at stations 2+50, 8+63, 75 feet left and 12+80, all drilled on Aug. 19, 1969, show a water surface after drilling approximately 1.5 feet below ground surface. Messrs. Beard and Butler were influenced by the fact that the bore logs on the lines leading into the mainline [49] did not show any water surface after drilling (Tr. 1213, 1214). They apparently overlooked or attached little significance to the log at station 0+00 on 49N, equivalent to station 26+25.5 on the 49 line, drilled on Aug. 19, 1969, which shows a water surface after drilling approximately 3.0 feet below ground surface. Another log which should be mentioned was drilled on centerline of the 49–2A at stations 4+00 on Nov. 14, 1969, and shows a water surface after drilling approximately 7.0 feet below ground surface.[94]

Mr. Butler testified that even though there was what he referred to as a rock clause in the contract, JB&C expected that most excavation on Block 87 would be easy or relatively easy (Tr. 1145–46. He asserted that there was no rock or hard boring indicated on the 279 or 49 mainlines (Tr. 1132). Although this is literally accurate, we note that a bore log drilled with a hand auger on centerline of 49J at station 5+00 shows refusal at 9.0 (apparently because of caliche) due to hard boring and that pipe invert is approximately 9.8 feet below ground surface. A bore log drilled with a hand auger on centerline of 49K at station 3+00 shows refusal at 8.0 feet due to hard boring with pipe invert approximately 8.1 feet below ground surface.

Bore logs on 49–2 at 0+70 (surface elevation 1046.7) and 4+83.6 (surface elevation 1043.1) and 279B at 1+00 (surface elevation 1060.0) show weathered basalt and basalt gravels approximately 13.0 to 15.0 feet below ground surface. These depths are all below pipe invert.

As noted above, there was a corrugated metal pipe under County Road 12 SE which allowed water in the DW279 to flow southward. Mr. Butler testified that the first order

[94] Appellant has interpreted this log as showing a water surface after drilling at or below trench grade (Exhs. BB & CC). However, the water surface shown is approximately 7.0 feet below ground surface and pipe invert is approximately 10 feet below ground surface.

of work on the 279 would be to construct the road crossing which he anticipated would drain the area (Tr. 1134, 1210). Although he stated that the existing culvert was silted almost full (Tr. 1210), there is no evidence that the pipe, whatever its size,[95] was incapable of handling the flow in the DW279. Nevertheless, the reasonableness of constructing the road crossing as the first item of work was supported by Mr. Mendenhall (Tr. 3434, 3458).

JB&C recognized that they would have some sloughing and water to contend with.[96] According to Mr. Beard, their plan was to construct a diversion ditch or trench along the hillside parallel to the DW279 and two or three cofferdams approximately 1,500 to 2,000 feet upstream (Tr. 1355–56). Water would then be pumped into the diversion ditch and would flow around the worksite and down to the road.

There can, of course, be no gainsaying the fact that the continual flow of water in the DW279, ponded water and water oriented vegetation, bore logs showing water surface above pipe invert in several instances and saturated and severely caving conditions in other instances and the information provided by Paragraph 40 of the specifications clearly warned of water and water related problems to be encountered during the course of the work. Nevertheless as Mr. Beard pointed out, the area was a desert prior to its being irrigated and it is reasonable to conclude that water surface elevations are directly affected by irrigation operations. Indeed, Paragraph 40 of the specifications providing, *inter alia*, that the flow in the DW279 was expected to increase substantially during the irrigation season, at least inversely says as much. The fact that areas adjacent to the DW279 and 49–2 and on the 49 were farmed attests to the stability of at least the surface.

Also of significance is the sentence of Paragraph 40 of the specifications providing: "The discharge rate of the initial flows will vary depending on geological and ground water conditions, *irrigation operations on adjacent lands*, the weather and other factors." (Italics supplied.) We think that no reasonable bidder, not possessed of special knowledge, would conclude

[95] Mr. Beard's estimate that the existing pipe was 8 to 10 inches in diameter is cast into doubt by Photo No. 1 of Appeal file, Exhibit 12, which shows the DW279 at station 50+44 upstream (the south side of County Road 12 SE looking north) and appears to show the pipe in question with a flow approximately 15 to 20 percent of capacity. Comparison of the pipe with other objects in the photo and with what the plans describe as two 12-inch metal pipes, which appear to be shown at right angles to the DW279 on Photo No. 3 of appeal file, Exhibit 12, leads to the conclusion that angles to the DW279 on Photo No. 3 of Appeal road was greater than 10 inches.

[96] Tr. 1145, 1147. According to Mr. Butler, the toughest working conditions were anticipated on the 139 system. This was partly because of the shielded excavation specified on part of the system and partly because of the number of logs showing hard boring or a water surface after drilling. Of 82 bore logs on the 139 system, 30 showed a water surface after drilling or at a later time above pipe invert and 18 showed hard boring above pipe invert. Mr. Briggs conceded that logs on the 139 by themselves showed more severe water conditions (Tr. 3333).

that irrigation on adjacent lands included lands north of the West Canal.

We conclude that, while JB&C was in error in assuming that the flow in the DW279 was solely or principally surface water and over optimistic in its expectations as to the stability of the land after the irrigation season was over, for reasons hereinafter appearing, neither of these conclusions is dispositive of this appeal.

Performance

JB&C received notice to proceed on July 17, 1970. However, the first attempt to perform excavation on Block 87 was on Oct. 28, 1970. In a letter, dated Oct. 2, 1970 (Govt.'s Exh. 87–89), respondent expressed concern about the delay, pointed out that the contract required that work commence within 30 calendar days after receipt of notice to proceed and requested that JB&C submit its plans for the prosecution of the work in order to meet the completion date of Mar. 10, 1971. JB&C's response (letter of Oct. 13, 1970, Govt.'s Exh. 87–91) asserted that the crop dates were such that it was difficult to begin the construction program.[97] Respondent uses this letter, a letter, dated Nov. 29, 1970, signed by Jack Butler (Govt.'s Exh. 87–103) and a letter dated Mar. 2, 1971, discussed *infra*, as a basis for attacking the credibility of the testimony of Messrs. Butler and Beard (Tr. 1135, 1214, 1327, 1377–78, 1380) that they anticipated waiting for the end of the irrigation season and for the area to drain before starting construction. The contract, as respondent had reminded JB&C, required that work commence within 30 days after receipt of notice to proceed and this may well account for the failure to refer at the time to the end of the irrigation season as a reason for delay. In any event, we find the testimony of Messrs. Beard and Butler to be credible in this regard and accept it as accurate.

The attempt at excavation on October 28, 1970, consisted of stripping on both sides of the DW279 with a bulldozer in order to find a suitable place to construct a cofferdam (Tr. 1194–95, 1364–65). The bulldozer became mired and stuck on the right-hand side of the open drain approximately 450 to 500 feet upstream from the county road (Inspectors' Reports, Photos, Govt.'s Exhs. 54, 55 and 56). JB&C consumed approximately 3 days extricating the bulldozer from the mud (Tr. 1364–66; Inspectors' Reports). According to Mr. Beard, JB&C then pulled out of the 279 area in order to let it drain more and in order to accomplish production and obtain a decent pay estimate (Tr. 1366).

The next attempt at excavation on the DW279 occurred on Jan. 4,

[97] Harvest dates listed in Paragraph 38b of the specifications (before which or the harvest of the crop, whichever was earlier, work could not begin) ranged from August 15 to November 10, 1970, and covered the majority of lines to be excavated. There were lines such as the 279 and the 139 up to station 45+90 upon which no date restrictions for prosecution of the work were imposed.

1971 (Inspector's Report). JB&C commenced excavation at station 49+40 with a Hopto backhoe. There was some sloughing of the side slopes and the bottom of the trench appeared unstable. After making an attempt to pump out water flowing into the excavation, JB&C's foreman was reported to have decided delaying further work until a shield could be obtained. Although Mr. Jack Butler recalled that the crossing of County Road 12 SE was accomplished in December 1970 (Tr. 1171, 1195–96), corrugated metal pipe for the crossing was actually installed during the period January 11–14, 1971.[98]

Excavation and pipe laying for the DW279 was acomplished during the period January 20 through March 5, 1971. Mr. Harvey Ussery, who assumed duties as JB&C's superintendent on Block 87 after the crossing of County Road 12 SE for the DW279 had been completed, testified that the surface water in the DW279 was stopped by means of cofferdams (Tr. 1226, 1259–61, 1275). This testimony was confirmed by Jack Butler (Tr. 3616). He stated that the first cofferdam which had been constructed before his arrival, was located at approximately the point where the 279 ended and the 49 line commenced (Tr. 1259, 1276). On a chart, App.'s Exh. EE, he affixed the location of the first cofferdam just above the point where the 49A and 49B lines intersect the 49 mainline, which is at station 0+00, and the location of the second cofferdam at approximately station 10+00 on the 49.[99]

Mr. Ussery asserted that water was diverted around the work area by means of ditches and pumped or allowed to flow back into the DW279 at points, manholes, where pipe had already been laid (Tr. 1260–61, 1277–78, 1281). Mr. Ussery's testimony that the cofferdams stopped the flow in the DW279 is confirmed in part by a photo taken at station 47± on Jan. 28, 1971 (Govt.'s Exh. 71), which shows water appearing to flow from the sides of the excavated area, but little or no flow upstream from the excavation. A photo taken at station 46+50 looking upstream on Jan. 29, 1971 (Govt.'s Exh. 72) shows water flowing below the work area but none in the channel at or above the excavation site. *See also* J. Butler at Tr. 1163, 1170–71. A photo taken at station 45+90 on the DW279 on Feb. 9, 1971 (Govt.'s Exh. 74) shows water flowing in a ditch around the work area and back into the DW279 below the point where excavation was underway. To the same effect is a photo taken at station 46+ on Feb. 17, 1971 (Govt.'s Exh. 75). This photo also shows

[98] Inspectors' Reports, dated Jan. 11 through 14, 1971; Slide App.'s Exh. MMM–26. Respondent considered that the crossing was not properly marked with signs and protected with barricades. Respondent stationed inspectors at the crossing around the clock to protect the public and charged JB&C for the resulting expense.

[99] Tr. 1277. An Inspector's Report, dated Jan. 16, 1971, refers to a plug or dam being placed across the 279 at station 44+55±.

water flowing from the sides of the embankment (Tr. 1172). Other photos, *e.g.*, Govt.'s Exhs. 70, 73 and 76, show substantial amounts of water in the DW279 below the work area.

Two photos (Govt.'s Exhs. 79 and 82) taken at stations 44+50 and 41+90, respectively, on the DW279 on February 25, 1971, show water in the work area. According to Mr. Ussery, the water was coming "right out of the ground" and "up from underneath" (Tr. 1241, 1275).

Other than the "plug" previously referred to (note 99, *supra*), Inspectors' Reports do not mention the presence of cofferdams across the DW279. However, their existence was confirmed by Mr. Wilcox, field engineer for the Bureau, and Mr. Robert Atkins, chief inspector for the Bureau on Block 87 (Tr. 3139, 3374). Mr. Atkins was critical of JB&C's method of diking and diverting the water. He stated that the diversion ditch was not lined and that it would silt up.[100] In addition, he complained that the pumps were not operated continuously with the result that the dike or dam would overflow and washout (Tr. 3139–40). He asserted that the banks of the diversion ditch were also washed out because of too much water and too much silt, flooding the work area (Tr. 3141).

[100] Asked how he would have proceeded, Mr. Atkins replied that he would have constructed the dam or dike on the 279 approximately where JB&C did. However, he would have lined the diversion ditch with polyethylene to keep the banks from washing out and would have operated the pumps continuously (Tr. 3140).

While Mr. Wilcox in effect confirmed Mr. Atkins' testimony, stating that the diversion ditch would break many times (Tr. 3374), Inspectors' Reports do not confirm such events and, indeed, rarely mention the existence of such a ditch or ditches. An Inspector's Report, dated Mar. 10, 1971, referring to excavation on the 49–2, states that a small ditch by the side of the trench sloughed in. This is the only instance of a diversion ditch breaking or sloughing mentioned in the Inspectors' Reports. Mr. Ussery denied that JB&C had any problem with the diversion ditches breaking and water flowing back into the work area (Tr. 1281). He asserted that the diversion ditches were generally far enough away from the work area (to prevent this from happening). He acknowledged having to clean the ditches "a lot of times" so that the water could flow.

Mr. Butler testified that after starting work on the DW279 they soon realized that because of the extreme sloughing, the backhoes did not have the reach to excavate the area (Tr. 1153). JB&C then ordered cranes, referred to as a clamshell and a dragline, to dip out what Mr. Butler referred to as "a complete mass of very, very wet muck." He asserted that the material was so wet that it would run out of your hands almost like water (Tr. 1153–54). As they excavated the center line, the material kept running into the excavated area. According to Mr. Butler, the excavated area was as wide as 125 to 150 feet (Tr. 1154). Mr. Butler denied that JB&C had any

problems with surface water on the DW279 (Tr. 3617).

Mr. Ussery estimated the width of the trench on the DW279 in places at from 100 to 150 feet due to sloughing (Tr. 1227–28). He attributed the cause of the sloughing to underground water (Tr. 1268). As will be seen *infra*, Inspectors' Reports show the trench on the DW 279 as wide as 100 feet and that widths in the 25- to 40-foot range were common.

Mr. Butler attributed part of the difficulty with extreme sloughing to hard rock in the bottom of the excavation (Tr. 1154). He stated that rock was encountered at the first manhole north of County Road 12 SE and that the rock was 2 or 3 feet above the elevation where the pipe was to be laid. Although there was a surface water inlet, which is equivalent to a manhole, very near the county road at station 49+54.8, in subsequent testimony Mr. Butler fixed the location where rock was encountered at station 46+34.2, the intersection of the 279A and 279 lines, approximately 280 feet from the road (Tr. 1152). He asserted that the Government was as surprised at encountering rock as JB&C and did not require a base on the manhole, allowing it to be set on the rock.[101]

Respondent's records indicate that rock was first encountered on the DW279 at station 47+40 (Inspector's Report, dated Jan. 23, 1971; Grade Book, Govt.'s Exh. 22). The subgrade was 0.3 feet ± into caliche and rock from station 47+20 to 47+00 (Inspector's Report dated Jan. 25, 1971). The inspector reported that the saturated silt sides sloughed in so fast it was impossible to see exactly what the hard material was. Boulders up to 1 cubic foot in diameter were being excavated, but as the material was excavated with a clamshell, the inspector assumed that the material was loose rock.

JB&C moved an air compressor and a jackhammer onto the job on Jan. 29, 1971 (Inspector's Report). Silt was excavated with the clamshell. However, the material sloughed in so fast they were unable to work with the jackhammer. Four joints of pipe were laid on that day by constructing a gravel embankment around the work area to keep out water and mud. According to Mr. Butler, men operating the jackhammer were never able to see what they were jackhammering because of the muck (Tr. 1154). Rock encountered was 1.0 feet in depth from station 47+00 to 46+75 (Govt.'s Exh. 22). However, in the inspector's opinion saturated silt was the main problem slowing

[101] Tr. 1151–52, 1288–89. Inspectors' Reports do not confirm that either the manhole at 46+34.2 or at 42+09.2 (intersection of 279B and 279C) were allowed to be set without the concrete base required by the specifications and drawings. An Inspector's Report, dated March 5, 1971, referring to the manhole at station 42+09, confirms that the base of the manhole was set on rock. Mr. Ussery testified that because of the hard rock, he tried getting the grade of the manholes raised 0.2 feet, but that the Bureau would not approve the request (Tr. 1227, 1270–71). Accord, see Shashi Kant Sharma, an engineer for JB&C, at Tr. 954, 956–59, 966.

progress (Inspector's Report, dated Jan. 30, 1971).

Rock was 1.5 feet in depth from station 46+75 to 46+38 (Govt. Exh. 22). At least 1.3 feet of solid rock was encountered in the manhole at station 46+34.2 requiring use of a jackhammer. Work was hampered by mud and water seeping and flowing into the trench. Trench width was 20 to 25 feet from station 46+55 to 46+45, 30 feet from station 46+45 to 46+36 and 40 feet ± from 46+36 to 46+14 (Inspectors' Reports).

Trench width averaged 14 feet from station 46+14 to 45+77 (Inspector's Report, dated Feb. 8, 1971). Seepage continued to cause troublesome, difficult conditions and the banks were caving, making it difficult to properly set the clamshell and mobile crane. The inspector thought this condition would get worse as they proceeded upstream. JB&C excavated the trench an extra width and backfilled with gravel in an effort to keep the gravel envelope around the pipe clean. This helped but was reported to be slow and costly. The inspector suggested to JB&C that a shield or similar device be obtained.[102]

Trench width was 25 to 30 feet from station 45+77 to 45+51 and averaged 30 feet from station 45+51 to 44+54 (Inspectors' Reports). In the area from station 45+77 to 45+51, incoming water was controlled to a greater extent by diking up the channel, laying two or three joints of pipe and then pumping out the water. Less seepage from the sides was experienced. The inspector thought conditions might improve upstream if they continued to dam or divert the water (Inspector's Report, dated Feb. 9, 1971).

Hard rock was encountered at station 45+72 (Govt.'s Exh. 22). The rock was 0.4 feet in depth at station 45+65, 0.6 feet in depth at station 45+56 and was 0.8 feet in depth from station 45+56 to 45+36. Rock, becoming deeper and harder as they proceeded upstream, was 1.2 feet in depth at 45+30 and 1.1 feet in depth at station 45+20. The inspector expressed doubt as to whether the drain pipe and filter in the area to station 45+05 could carry off the water as intended.[102A] Each morning the work area or pit was full of semi-fluid mud, which had to be removed before excavation and pipe laying operations could begin. Trench width was 40 feet ± in the area from station 44+54 to 44+36, 50 feet from station 44+36 to 43+90, 50 to 60 feet from station 43+90, to 43+75, and 100 feet from station 43+77.5 to 43+65 (Inspectors' Reports).

On Feb. 15, 1971, JB&C brought timber mats and a boat or shield to the work site (Inspector's Report; Gov't. Exh. 22). These mats, referred to as swamp pads, were for

[102] Appellant contends that the inspector suggested a shield because of the difficulty JB&C experienced in keeping the filter gravel clean (Reply Brief at 79). Considering the context in which the statement was made, we find this to be a reasonable interpretation. In any event, respondent's failure to call Inspector Scanlon as a witness justifies resolution of the matter in appellant's favor.

[102A] Inspector's Report dated Feb. 12, 1971. This was apparently because he saw ponded water remaining just above the filter gravel and he thought the filter gravel might have been partially sealed by silt.

the purpose of supporting a backhoe while it attempted to rip and chop the hard basalt in the trench. Mr. Ussery testified that (the rock was so hard) they were breaking teeth on the backhoe bucket, that the backs of the buckets were breaking and that ripper teeth were being pulled "right out." [103] The shield was for the purpose of preventing mud and water from flowing into the trench while the pipe was laid and the filter envelope placed. Excavation in the rock was not sufficient to accommodate the shield, resulting in the shield being set at an angle and allowing what the inspector regarded as excessive silt laden water to flow into the filter gravel. Consequently, he refused to accept the pipe. Recognizing the difficult and unusual conditions, the Bureau subsequently accepted this pipe which had been laid to station 44+92. The inspector noticed water standing and collecting in numerous places where he thought it would normally drain and was of the opinion that the soil might prove difficult to drain. Rock depth was 1.0 feet at station 45+02.

Muck excavated from the trench oozed in and dammed up the trench, preventing material in the work area from flowing downgrade (Inspector's Report, dated Feb. 16, 1971). The inspector reported that the mud upstream and on the side slopes was getting worse, continuously flowing into the trench excavation. A more highly saturated area was reached and fluid mud flowed back into the trench from wherever it was cast (Inspector's Report, dated Feb. 17, 1971). Rock depth was 0.9 feet at station 44+85 and 0.8 feet at station 44+75 and 44+60.

Hard rock tapered out at station 44+20 and the excavation was not as difficult. Flowing mud continued to be a problem. The inspector reported that JB&C was incurring a large non-pay overrun of filter gravel because so much gravel was used in attempting to prevent sludge and water from flowing into the shield (Inspector's Report, dated Feb. 18, 1971). Small diversion ditches were excavated on Feb. 19, 1971 (Govt.'s Exh. 22). The sides of the trench had caved and sloughed so that the clamshell had difficulty reaching the shield.

Rock was again encountered at station 43+90 and was 0.5 feet in depth at station 43+80 (Inspector's Report, dated Feb. 22, 1971). Three pumps were utilized to pump out the boat and work area. The inspector was of the opinion that the pumps should be operated continuously.[104]

[103] Inspector's Report, dated February 15, 1971, states that the ripper tooth was set at the wrong angle and that mechanics installed a longer more straight tooth at noon. The point of the tooth was soon broken and was not repaired. Progress was reported to be slow thereafter. A mechanic welded the hard-faced bucket and teeth of backhoe on Feb. 19, 1971 (Govt.'s Exh. 22).

[104] Inspectors' Reports indicate that the pumps were operated at night on Feb. 23, 24 and 25, and Mar. 2, 8, 12 and 14, 1971. Mr. Butler stated that it was impossible to man the pumps on a 24-hour basis because of the weight of the lines and pumps, inability to get proper lighting into the work area, the mud and muck and safety considerations (Tr. 1158, 3607–09).

Work started at the manhole at station 42+09.2, the intersection of 279B and 279C with the DW279, on Feb. 23, 1971 (Inspectors' Reports). Extensive sloughing occurred and the excavation reached a width of 60 to 70 feet. Basalt was encountered at a depth of 2.5 to 2.9 feet above proper elevation for the manhole base (note 101, *supra*). JB&C had a separate crew laying pipe on the DW279, reaching station 43+72.5 (Inspector's Report, dated Feb. 24, 1971). JB&C bailed water and sludge from the trench, but the inspector reported that it seemed hopeless as more continually flowed into the excavation. Trench width reached 100 feet. Work stopped because the backhoe bucket needed repair.

Appellant attempted to work at night, but little was accomplished because of the mud and water (Tr. 1230; Inspectors' Reports, dated Feb. 23 and 24, 1971). Only three joints of pipe were laid at the station 43+72 worksite on Feb. 25 (Inspector's Report, Govt.'s Exh. 22). This was partly because of time required to clean out the shield, but principally because teeth on the backhoe were broken from chopping basalt. Trench width was 100 feet. More progress was made at the other (station 41+90) worksite, pipe laying proceeding to 41+17.5. Trench width was 60 feet. Appellant excavated the trench 1 foot beyond the grade shown on the drawings and was able to lay pipe and place filter gravel before the mud closed in. Although many yards of extra filter gravel were used, the inspector reported that it resulted in a good job.[105]

Silt in the shield and trench work area at station 43+62 had to be removed partly by hand on Feb. 26, 1971 (Inspector's Report). Eight joints of pipe were laid, reaching station 43+42. Trench width was 70 feet ±. The inspector attributed better progress at the 41+17.5 worksite, pipe being laid to 40+30, to the fact the pumps were operated on the previous night. It is noted, however, that trench width was 20 feet ± as compared to 70 feet ± at the other location.

No progress was made at the 43+38 worksite on Feb. 27, 1971, because the banks caved in and mud inundated the work area (Inspector's Report). Trench width was 100 feet. At the other worksite (beginning station 40+30, ending station 39+44), the ground was less saturated and did not cave as badly. Trench width was 20 feet. Hard rock averaged 0.5 feet in depth from station 43+38 to 43+15 and trench width was 90 to 100 feet (Inspector's Report, dated Mar. 1, 1971).

Appellant removed the shield and used the open trench method of pipe laying from station 43+15 to approximately 42+81 (Inspector's

[105] The Grade Book (Gov't. Exh. 22) entry for Feb. 25, 1971, states that no shield was used at the manhole at station 42+09 and that (without a shield) the gravel envelope could not be confined to pay lines. This entry also indicates that much gravel was wasted, which was attributed in part to the fact that the clamshell could not always place the gravel where it was needed.

Report, dated Mar. 2, 1971). Many yards of extra gravel were used to hold back the mud. Trench width was 100 feet and hard rock increased to 1.0 feet in depth at station 42+90. Open ditch pipe laying continued on Mar. 3, 1971. Hard rock was 1.0 feet in depth at station 42+55 and trench width was 65 feet ±.

The manhole at station 42+09.2 was completed on Mar. 4, 1971. The lower 4.5 feet of excavation was rock of which 3.5 feet consisted of hard basalt. After attempting to chop the basalt with a backhoe, appellant brought in a compressor and jackhammer to break up the rock.

Appellant excavated and laid pipe in the upper reaches of the 49 line (station 31+39 to EOC at 48+50) with a trencher on Feb. 21, 1971 (Inspector's Report). Another reach of the 49 (station 16+30 to 17+10) was excavated with a backhoe and pipe laid on Feb. 22, 1971 (Inspector's Report). Material was sufficiently "soupy" to require use of a shield. What was described as soft caliche ranging in depth from 2.0 to 2.5 feet was encountered in the area from station 16+60 to 16+90. Hard caliche ranging in depth from 0.7 to 1.5 feet was encountered in the area from station 18+70 to 19+20 (Inspector's Report, dated Feb. 23, 1971). In areas where there was no caliche, extra filter gravel was used to stabilize the sides and bottom of the trench. Hard caliche ranging in depth from 0.6 to 1.5 feet was again encountered in area from station 19+70 to 20+70.

Water seepage and sloughing impeded progress at station 20+70 on the 49 line. Appellant started a pump, but the inspector reported that the more they pumped, the more water came in (Inspector's Report, dated Feb. 23, 1971—night shift). Hard caliche from 1.0 to 2.7 feet in depth was encountered from station 20+85 to 21+68 (Inspector's Report, dated Feb. 24, 1971). Mud and water continued to be a problem. Conditions were sufficiently wet to require use of a shield in the area from station 21+81.8 to 24+14. Hard caliche from 0.8 to 2.0 feet in depth was encountered in the area from station 25+15 to 26+00. Caliche was 3.6 feet in depth in the manhole at station 26+25 (Inspector's Report, dated Feb. 26, 1971). Excavation and pipe laying reached the point (approximately station 31+29) where pipe had previously been laid by the trencher on Mar. 1, 1971 (Inspector's Report). Excavation was accomplished with a backhoe and the ground continued to be sufficiently wet as to require use of a shield.

At this time, the lower portion of the 49 line had not yet been connected to the DW279. A manhole was installed at station 8+64 and pipe was laid to 10+00 (Inspector's Report, dated Mar. 1, 1971). Water continued to be a problem and pumping was necessary. Trench width was 32 feet. Excavation and pipe laying proceeded from station

12+64 to 15+20 on Mar. 4, 1971 (Inspector's Reports). Top width of trench averaged from 18 to 21 feet. Pipe was laid to station 16+35 the point where pipe had previously been laid, and work began on the reach below station 8+64 on Mar. 5, 1971. The ground was saturated and sloughed into the excavation (Inspector's Report, dated Mar. 8, 1971). Water was lowered by excavating a hole to the side of the trench and pumping water from the hole. Over-excavation and use of extra gravel was necessary for stabilizing pipe bedding. The inspector reported that a large amount of extra filter gravel was being used and that there was no practical way to confine gravel to specification paylines with JB&C's method of placing gravel. Excavation and pipe laying on the 49 were completed on Mar. 11, 1971 (Inspector's Report). This involved the approximately 40-foot reach from 8+25 to the manhole at station 8+64. Trench width was 30 feet. Average over-excavation for filter gravel was 1.0 feet.

Lateral 279B (station 2+90 to EOC at 5+00) and Lateral 279C (station 3+56 to EOC at 5+50) were excavated and pipe was laid with the trencher (Inspectors' Reports, dated Mar. 1 and 4, 1971). Trench was excavated and pipe was laid from station 1+80 to EOC at 4+00 on the 279A lateral on Mar. 3, 1971. Although the trench was excavated from 0+00 to 1+80, pipe could not be laid in that reach because the bottom of the trench had silted up. Pipe was laid from 0+85 to 1+75 on the 279A on Mar. 12, 1971. From station 0+90 to 1+50, about 3.0 feet of extra filter gravel was placed under the pipe. The inspector attributed this to carelessness of JB&C's employees. Pipe laying (station 0+00 to 0+85) on the 279A was completed on Mar. 13, 1971. Again more gravel than necessary was used due to what the inspector considered the contractor's carelessness.

Trench was excavated and pipe laid on the 279B from station 3+00 to station 1+44 and from 0+00 to 0+20 on Mar. 13, 1971. On Mar. 15, 1971, trench on the 279B was excavated from station 0+40 to 1+40. However, only about 15 feet of pipe was laid because of excessive mud. The inspector reported they appeared to be making a "bigger mess out of a mess." Seeping water and semi-fluid mud inundated the trench and prevented closing of the gap on the 279B (station 0+47 to 1+43) (Inspector's Report, dated Mar. 16, 1971). The excavated area was level full of oozing mud on Mar. 17, 1971, so that there was no trace of where excavation had ended the previous day. Much difficulty was experienced with hoses on the pumps clogging up with roots, cattails and debris. The inspector attributed this to the lack of cages or baskets in which to place strainer cages. Appellant finally gave up trying to lower the water level. Laying of pipe was completed on the 279B on Mar. 18, 1971, after a dike was removed which was damming water in the trench. Water could then flow to the lower end of trench

(station 47+00), the point where pipe had previously been laid.

Trench was excavated from 0+00 to 0+35 (pipe was laid to 0+25) on the 49–2 on February 10, 1971. It was very wet and progress was impeded by the running water which was dammed up. Pipe laying reached station 2+09 on February 11, 1971. Water seeped into the trench approximately 2.0 feet above subgrade. Top width of trench ranged from 12 to 20 feet.

Top width of trench ranged from 16.0 to 19.0 feet in the area from 2+09 to 4+00. Excavation and pipe laying reached station 5+00 on February 16, 1971. Top width of trench was 14.0 feet at station 5+00, 22 feet at station 6+00, and 37 feet at 7+00. At station 7+20 material excavated was referred to as slop (Inspector's Report, dated Feb. 19, 1971). No progress was made because material came into the excavation too fast.

No further work appears to have been attempted on the 49–2 system until Mar. 4, 1971, when portions of the 49–2B and 49–2D laterals were excavated with the trencher. Portions of the 49–2A and 49–2B laterals were excavated with the trencher on Mar. 5, 1971. Excavation and pipe laying proceeded to station 7+50 on the 49–2 mainline on Mar. 8, 1971. The ground was saturated and sloughing impeded progress. No progress was made on Mar. 9, because ground water was running into the trench and the trench sidewalls were sloughing.

Appellant began work on the manhole at station 12+30 (intersection of 49–2B and 49–2C laterals with 49–2) on Mar. 9, 1971, without having completed the 480–foot reach from station 7+50 to 12+30. Trench width at the manhole was 24 feet. Trench was excavated and pipe laid to station 12+67. Trench excavation and pipe laying reached 7+90 on Mar. 10, 1971. Pumping was necessary to keep seep water out and progress was slowed by sloughing.

Top width of trench was 24 to 30 feet from station 12+67 to 14+33. The backhoe could not place excavated material far enough away from the trench and the material would slide back in. Excavation and pipe laying reached station 15+50 on March 11, 1971. The backhoe had to be supported by swamp pads.

Excavation and pipe laying proceeded from station 7+90 to 8+60 on the 49–2 on March 11, 1971. Ground water and sloughing of trench sides slowed progress. Although a pump was used most of the day, trench bottom was described as "real sloppy." Pumps were operated at the manhole at station 12+30 on the nights of Mar. 11 and 12, 1971. The inspector thought they needed another pump. Pipe was laid to station 17+40 on Mar. 12 and the manhole at 17+49.2 was installed. An average of approximately 0.8 feet of extra filter gravel was used from station 12+30 to 17+49.5.

At the other worksite on the 49–2, pipe was laid to station 9+05. Water had to be pumped before excavation could proceed and it was necessary to pump out seep water most of the day. Sides of the trench sloughed in and the inspector reported that the dragline had to work a long time to make any headway. Trench excavation and pipe laying reached station 9+55 on Mar. 13.

Excavation proceeded on 49–2C on Mar. 13. When the excavation reached the point where pipe had previously been laid, they had what was described as a flood. The crew on the 49–2A were also reported to have been flooded out. The 49–2A, 49–2C and 49–2D laterals were completed on Mar. 15. Also excavation on that date proceeded from 9+55 to 11+40 on the 49–2. The ground was not as saturated. Excavation and pipe laying on the final sections on the 49–2 (station 11+40 to 12+30 and 0+00 to 1+84) were completed on Mar. 16, 1971.

Work under the contract was accepted as substantially complete on Apr. 2, 1971, a delay of 23 days. JB&C was charged liquidated damages at the rate of $170 per day ($85 under each schedule) for a total of $3,910.

Claims

Under date of March 2, 1971, appellant requested an extension of time for completion of the work (Govt.'s Exh. 117; Appeal file, Exh. 2). The letter states in part:

> We have made every effort possible to complete this project but because of the extreme sluffing [*sic*] conditions we have encountered on line 279 as well as the rock excavation which has had to be done by hand and the extreme weather conditions prevailing in this area, we have lost 30 days of productivity. The rock conditions mention was [*sic*] not shown any place on the drawing nor was it [*sic*] mentioned in the specifications.
>
> * * * * *
>
> We would like to request an extention [*sic*] of 15 days on both the crop dates and the completion date for the constitution.

The foregoing letter constitutes the only written notice in the record of a claim by JB&C during the period of contract performance. However, Mr. Ussery testified that he delivered a letter to the Bureau offices in Othello concerning the water and rock conditions (Tr. 1243–44, 1247–48). He further testified that he wrote the letter in the JB&C office trailer out on the job with the assistance of Jack Butler. He could not recall to whom the letter was delivered. At another point, he indicated there were several letters delivered to the Bureau in Othello.

Mr. Butler confirmed that on two separate occasions he helped Mr. Ussery prepare letters concerning the rock and the extreme sloughing and water conditions encountered on the 279 and 49 lines (Tr. 1299, 1300). He asserted that the letters concerned differing site conditions and requested compensation for the additional filter and other materials being used in an effort to stop the sloughing. He admitted that he did not know as a fact that the letters were delivered to the Bureau, but stated that Mr. Ussery intended to

deliver the letters and said that he had delivered them (Tr. 1298).

Although neither Mr. Ussery nor Mr. Butler testified specifically that the letters were signed by Mr. Ussery, the clear implication of the testimony is that such was the fact (Tr. 1243, 1298). This seems anomalous in view of the fact that Mr. Butler, as construction manager for JB&C was Mr. Ussery's superior and aided in the composition of the letter or letters. There is no evidence in the record of any correspondence to the Bureau signed by Mr. Ussery.

The Bureau has denied receiving any letters claiming differing site conditions on Block 87 and JB&C has not produced copies of any such letters. However, a contemporaneous document which lends some support to the testimony of Messrs. Ussery and Butler is a letter to the Bureau dated Apr. 6, 1971, signed by Mr. Butler (Govt.'s Exh. 127; App.'s Exh. GG) which refers to a letter from the Bureau dated Mar. 19, 1971 (Govt.'s Exh. 123), concerning release of retainages under the three JB&C contracts, and provides in pertinent part:

> You are fully aware that we have been subjected to several changed conditions. We do realize that the Bureau was not aware of these conditions in awarding the contract, however, with the fact in mind that the Bureau was not aware of the existing conditions how could you expect a contractor to bid accordingly.
>
> We have substantial claims on Block 87 exceeding a quarter of a million dollars and at this time we do insist that our retainage be reduced to a minimum as set forth in the contract. You are aware that JB&C has been trying to appease suppliers with very little cooperation from the Bureau of Reclamation. * * *

When asked what claims he was referring to in the second paragraph of the aforementioned letter, Mr. Butler replied that he was referring to the claim for changed conditions that Mr. Harvey Ussery hand carried to the Othello Office.[106] Under cross-examination he testified that he did not know the date of Mr. Ussery's letter and asserted that he and Mr. Ussery had written half-a dozen letters to the Bureau which he had not seen to date (Tr. 1332). His only explanation as to why a copy of Mr. Ussery's letter had not been produced was the difficulty in assembling JB&C's records in order to process the claims (Tr. 1333). For the reasons hereinafter appearing, we find it unnecessary to decide the question of whether the Bureau received written notice of a claim for differing site conditions during contract performance.

Mr. Ussery testified that he had conversations with Bureau personnel in the field concerning the fact that more water was encountered than shown on the prints (plans) and concerning extras for rock and pipe bedding (Tr. 1245). He as-

[106] Tr. 1313–14. Although the COAR, in a memorandum to the contracting officer, dated Apr. 28, 1971 (Govt.'s Exh. 130), took the position that the reference to claims was intended to refer to Block 82, file data on the Butler letter refers to Specifications 1000C–1101 and 1131, which are Blocks 87 and 20, respectively. Mr. Butler emphatically denied suggestions from counsel for respondent that the reference was to creditors' claims against JB&C (Tr. 1332).

serted that the discussions involved rock, hardness of rock and water shown on the borelogs as being different than what was encountered (Tr. 1246). The only individual he specifically recalled having such discussions with was Duane Pedersen who had no official duties on Block 87 (Tr. 1246–47).

The first formal indication in the record of a claim for differing site conditions under Block 87 was presented at a meeting in Boise on Aug. 6, 1973,[107] wherein claims under Block 82 were also discussed (Appeal file, Exhs. 4, 5, 6, 7 and 8). Among documents presented, was a differing site conditions claim booklet (Appeal file, Exh. 8) wherein it was alleged, *inter alia*, that volume of hard material indicated by the contracts for Blocks 82 and 87 was less than 8 percent whereas 64.8 percent of material encountered was solid, ledged rock ranging from 4,000–8,000 psi, which is over three times harder than concrete. This percentage was assertedly based on 38 miles of excavation where 3 or more feet of subsurface rock was encountered. It was further alleged that the bore logs for Block 87 indicated a water level 6 to 10 feet below surface, whereas an average of 0 to 3 feet of water was encountered on the surface. The trench was assertedly excavated as wide as 160 feet and the contractor's difficulties were allegedly compounded by 2 feet of solid ledge rock at the bottom of the muck.

Also presented at this meeting was a statement prepared by Roy Charles, accountant, showing revenue under Block 87 of $313,499.83 as compared to costs of $777,321.34.

By letter, dated Sept. 14, 1973 (Appeal file, Exh. 9), the contracting officer pointed out that the only claim received under specifications 1000C–1101 (Block 87) was the Mar. 2, 1971, request for an extension of time and inquired whether JB&C was still pursuing that claim. The contracting officer also inquired whether appellant was making a claim for improper rock classification, whether a claim for differing site conditions was being asserted and, if so, the nature of the conditions claimed and the specific locations at which encountered. Appellant was also requested to state the amount of its claim and to provide cost data in support thereof.

In a letter, dated Oct. 4, 1973 (Appeal file, Exh. 10), counsel for appellant answered in the affirmative the question of whether a claim for improper rock classification was being made and asserted that rock was encountered throughout Block 87. Of the 81,891.92 cubic yards excavated per the paylines on Block 87, 21,579 cubic yards were asserted to be rock. Water conditions differing from those described in the contract were alleged to have been encountered on the DW279, D87–139, D87–159, D87–139M and D87–49 lines or virtually throughout the entire contract work. Because of water

[107] There are no memoranda or notes in the record summarizing discussions at this meeting. Mr. Beard testified that requests to tape record the meeting of Nov. 6, 1970, had been denied by Bureau Officials (Tr. 504–05).

and muck encountered, a quantity in excess of 1,000,000 cubic yards was allegedly excavated.

Using the month of Feb. 1971, as a study month, appellant computed a cost factor of $5.90 per cubic yard as the additional cost for excavating rock and water (Exh. 10, pp. 13–15). This figure was multiplied by total excavation per pay lines on Block 87 (89, 190 c.y.) to reach a total of $526,221. Additional filter material of 13,936 c.y. was allegedly used at a cost of $4.95 c.y. for a total of $68,983.20. Adding this figure to the amount claimed for additional costs of rock and water excavation, appellant's total claim on Block 87 became $595,204.20.

By a decision and findings, dated January 18, 1974, the contracting officer denied the claims in their entirety.

Discussion and Ultimate Findings

[3]At the hearing and on brief, appellant has abandoned any claim that differing site conditions existed throughout Block 87 and has maintained that rock and water encountered on the DW279, 49 and 49–2 lines, the so-called dipper area, constituted differing site conditions. Concluding that lack of timely notice differing site conditions is no longer in issue,[108] we consider the claims on the merits.

Citing the testimony of one of its engineer witnesses to the effect that basalt was laid down in an essentially horizontal fashion (Tr. 3233, 3257), respondent argues that a reasonable bidder would have anticipated encountering basalt at or above pipe invert on the DW279. The primary basis for this argument is a bore log at station 1+00 on the DW279B (approximately 60 feet from the 279), which shows basalt 14.0 feet below ground surface of 1060.0 or at approximate elevation 1046. The 279B lateral intersects the 279 at station 42+09.2 where pipe invert at the southern entrance to the manhole is 1046.52. An immediate problem with this contention is that basalt seems to be approximately 13.0 to 15.0 feet below ground surface irrespective of surface elevation. *See, e.g.*, the bore log at station 4+83.6 on 49–2 where surface elevation is 1043.1 and basalt was encountered at 14.5 feet below ground surface or at elevation 1028.6. Another problem with this contention is that if extensive basalt were present it would be just

[108] By an order, dated Dec. 5, 1974, we denied the Government's motion to dismiss for lack of timely written notice the claim for differing site conditions due to water, upon the ground, *inter alia*, that written notice of differing site conditions was not under all circumstances a prerequisite to recovery. *See* cases note 50, *supra*. While the order specifically stated that the denial was without prejudice to renewal of the motion at the close of the hearing or on posthearing brief, respondent has not seen fit to renew the motion. We note that the contracting officer considered the claims in the dipper area on the merits and that prejudice has not been alleged or shown. *See, e.g., Ardelt-Horn Construction Company* v. *United States*, 207 Ct. Cl. 995 (1975), *affirming* trial judge opinion (June 27, 1975), 21 CCF par. 84,096. We also note the testimony of Mr. Kolterman, Chief of the Field Construction Branch for the Bureau, to the effect that respondent would probably have done nothing different had written notice of differing site conditions been received (Tr. 3415–18).

as logical to project a basalt outcrop on the 279 in the area adjacent to the county road (station 49+54.8) where ground surface is below elevation 1045. There is no evidence of such an outcrop. More basic and fatal to respondent's arguments is the fact that respondent did not anticipate encountering rock on the DW279 (memorandum, dated May 20, 1970, and attached drawings App.'s Exhs. KKK and KKK-1). The drawings show anticipated rock in red. Conspicuous by its absence is any red on page 222-116-37166 which shows the DW279. We find that rock encountered on the DW279 constituted a differing site condition.

More difficult of resolution is the claim for water and water related problems in the dipper area. Respondent argues that the difficulties were clearly indicated by the contract and should have been anticipated. In any event, respondent asserts that appellant's difficulties were principally due to its own inefficiencies.

There can be no doubt that the contract contained ample indications of water and water related problems. First and foremost was the water flowing in the open DW 279 drain. Paragraph 40 of the specifications stated that this flow was continuous throughout the year, estimated the flow in February 1970, at approximately 0.75 to 1 cubic feet per second and warned that the flow was expected to increase substantially during the irrigation season. This paragraph also stated that discharge rate of initial flows will vary depending on geological and groundwater conditions, irrigation operations on adjacent lands, the weather and other factors. Paragraph 40 also contained a reference to use of pumping equipment including well pointing.

The bore logs also warned of saturated and severely caving conditions. Indeed, several bore logs showed a water surface after drilling, or at a later time, substantially above pipe invert. See in particular bore logs on the 49 line at station 2+50 (centerline), station 8+63 (75 feet left), 12+80 (centerline) and station 22+65, 0+00 on 49N (centerline). These borings were accomplished during the irrigation season where the water surface would be expected to be at its highest. In addition, bore logs on the 49-2 at station 0+70 (centerline), 4+83.6 (15 feet right) and on the 49-2A at station 4+00 (centerline) and on the 279A at station 0+40 (centerline) show a water surface after drilling, or at a later time, above pipe invert. The bore log on the 49-2A was drilled on Nov. 14, 1969. All of the other bore logs referred to above were drilled during the irrigation season.

Respondent would explain away the general absence of bore logs showing a water surface after drilling on the laterals leading to the mainlines (279, 49 and 49-2) by the assertion that the laterals were at higher elevations and it is only natural that water would flow or percolate to the lower levels. This is, of course, generally true and has logic on its side. However, it lends some support to JB&C's expectation that

the area would drain out and stabilize after the irrigation season.

Respondent cites the *Keltch* case (note 30, *supra*) wherein we held that a quick condition in the trench bottoms was indicated by bore logs not essentially different from those described above. Our decision was upheld by the Court of Claims upon the ground that plaintiff had failed to prove that its difficulties were attributable to an artesian reservoir not indicated by the contract. The instant case is distinguishable from *Keltch* for that reason alone. Moreover, it is clear that rock encountered on the DW279, which we have found constituted a differing site condition, added significantly to JB&C's other problems with water and sloughing. Even if that were not so, the *Keltch* case is not controlling for the reason set forth below.

Basic to appellant's case is the position that the surface or visible flow of water in the DW279 was stopped by means of cofferdams, that the water was diverted around the work area by means of diversion ditches and pumping, and that its difficulties were attributable to a virtually unstoppable subsurface flow of water.

As we have seen, Inspector's Reports are strangely silent on the existence of the cofferdams and only rarely mention or imply the existence of diversion ditches. Nevertheless, the existence of the cofferdams and diversion ditches was confirmed by witnesses for respondent and JB&C. Although witnesses for respondent were critical of the depth to which the diversion ditches were excavated and the manner in which they were maintained, with the exception of Chief Inspector Atkins, these witnesses were on the job only occasionally. We find that the surface flow in the DW279 was successfully diverted around the work area and that appellant's problems with water and sloughing were attributable to ground water.

The contract Paragraph 40 of the specifications and bore logs referred to above, clearly indicated the presence of ground water. Appellant relies heavily upon the fact that respondent was in possession of information as to sources of ground water which it failed to disclose. This contention is based upon a memorandum, dated February 25, 1969, from the Chief, Drainage Branch, to the Project Manager (App.'s Exh. JJJ) providing in part:

> Subject: Drain Construction—D87–49, D87–49–2, D87–139 and D87–159. Drain Systems and additions to the DW279 and D87–157. Drain Systems—Farm Units 41–50, 138–143, 156 and 159—Block 87.
>
> The water table has risen and is continuing to rise, under a large portion of Block 87. The high water table is causing wet land, reduction in crop yields and limited farming operations on portions of the subject units. The high water table is also causing bank instability and serious sloughing along the upper 1,400 feet of the DW279 seriously impeding the flow in the channel and rendering the operation and maintenance roads impassable.
>
> No applications were received for partial relief of 1969 water service charges due to wet land. However, our investigations in July, 1968 showed approximately 90 acres of irrigable land on the

subject units had a water table less than 4 feet below the ground surface, with an additional 340 acres being subjected to a water table 4 to 8 feet below the ground surface.

Our investigations indicate the high water table is caused by application of irrigation water on the subject units, minor seepage losses from the distribution system serving the area, and deep-percolation losses migrating into the area from irrigation of the higher lands in Irrigation Block 80, to the north.

The soils in the area are generally 4 to 12 feet of fine sandy loam topsoils over loamy sands, and caliche which overlay the silty clay Ringold formation. The depth to the less permeable Ringold formation is generally 16 to 20 feet below the ground surface.

* * * * *

We have also concluded that lining the distribution system serving the area will not eliminate or materially reduce the need for conservation of drainage facilities to maintain the area in permanent agricultural production.

It is appellant's position that the reason flows of subsurface water were virtually unstoppable is the percolating losses migrating from Block 80 to the north, a fact of which it was unaware. While respondent alleges that the water was propelled to Block 87 by no more mysterious a force than gravity and that the possibility of migrations of water from higher lands to the north should have been obvious from a reasonable site investigation, we are inclined to accept appellant's contention that it would be reasonable to expect that the West Canal, which forms the northern boundary of Block 87, constituted a barrier to such flows. Respondent also cites the *Keltch* case, *supra*, for the proposition that it had no duty to disclose its opinions. In *Keltch* we were careful to point out that all factual data were disclosed and that all that was withheld were opinions drawn from data presented to bidders. Here it is clear that subsurface migration from Block 80 is a fact known to the Government, but which has not been shown to be obvious or a matter of general knowledge.

Under such circumstances the duty of disclosure is clear. *See PHL Contractors* (note 6 *supra* and cases cited in footnote 37). Having concluded that respondent had a duty to disclose the migration of water from Block 80 to the north and failed to do so, remaining for consideration is the effect of this finding. Although the Court of Claims has held that the failure to disclose material information affecting costs is a breach of contract beyond the scope of the Changes or Differing Site Conditions clause,[109] the Boards have not found themselves powerless to grant relief under such circumstances.[110] In *PHL Contractors*, *supra*, we used the Government's failure to disclose a soils report, which was also alleged to show only the obvious, to buttress our conclusion that the contractor's site investigation was reasonable under the circumstances. *See also Power City Electric, Inc.*, IBCA–950–1–72, 80 I.D. 753, 74–1 BCA par. 10,376 and cases cited footnotes 19 and 21.

[109] *Hardeman-Monier Hutcherson* v. *United States*, 198 Ct. Cl. 472 (1972).

[110] *Maryland Painting Company*, Eng. BCA No. 3337 (August 17, 1973), 73–2 BCA par. 10,223, *Anderson & Guerrero*, AGBCA No. 17041 (Nov. 29, 1972), 73–2 BCA par. 9802.

Having found that appellant successfully diverted the surface flow of water indicated in the contract and accepted appellant's contention that it was reasonable to expect that the West Canal constituted a barrier to subsurface flows of ground water from the adjacent Block 80, we find further that the undisclosed subsurface flow of virtually unstoppable water from Block 80 was a differing site condition. Had there not been this continuous subsurface migration of water from Block 80, it is reasonable to believe, as appellant did, that the ground water indicated to be present by the contract would have subsided at the end of the irrigation season and that the residual ground water would have been dealt with as competently as the diverted surface water.

We note here an important distinction between the *Keltch* case, *supra*, and the instant case. In *Keltch*, after being informed of the claim of a differing site condition, the contracting officer order the continuation of the work using added quantities of gravel to stabilize the bottom of the trench under contract provisions requiring the Government to pay both for the added gravel and the attendant overexcavation. Instead of following the directions of the contracting officer, Keltch resorted to a well-pointing system which proved effective, but was not an approved reimbursable method of stabilizing the work area. In the instant case, after knowledge of the claimed massive underground water flowing into the work area, and the unanticipated underlying rock, the contracting officer made no site inspection and refused to consider any of appellant's suggestions to alleviate the greatly worsened work conditions (note 101, *supra*). Appellant had no alternative but to continue to work to meet the specifications while struggling to cope with the constant inundation of the work area with water and silt, and to use jackhammers and hand labor when machinery could no longer be moved within reach of the work.

Before turning to determination of the equitable adjustment, we will deal briefly with respondent's contention that appellant's water problems were largely of its own making. Respondent's arguments in this regard are based primarily on upstream excavation without an outlet for the water, failure to well point and failure to have or operate sufficient pumps.

Dealing with the former contention first, it is true that JB&C excavated and laid pipe in upstream segments of lines in the dipper and other areas on Block 87 prior to completion of lower or downstream segments of such lines. However, we note that Inspectors' Reports refer to this method of operation as adding to JB&C's water related problems on only two occasions. See Inspectors' Reports of Mar. 10 and 13, 1971, concerning the 49, 49–2A and 49–2C lines. We conclude that while JB&C's method of operation in this respect is not favored, its adverse effects can easily be exaggerated and that its overall impact, although not readily determinable, was not great.

Respondent's arguments concerning well pointing are based on estimates by Mr. Mendenhall that the DW279 could have been well pointed for an estimated cost of approximately $25,000 (Tr. 3434–35). While he conceded that rock would have prevented the well points from being placed or driven to the depth of the excavation he was of the opinion that well pointing would have allowed the top 4 or 5 feet of soil to dry and stabilize the work area. However, Mr. Jack Butler testified that in January 1971, he contacted Stang Well Pointing Company, a nationwide firm specializing in well pointing, and that a representative of that firm examined the area and concluded that well pointing would not work because rock would not allow the points to be driven below the depth of the water and the silt would plug the points and prevent free pumping (Tr. 1156–57, 1290–91, 1289, 1329). Mr. Mendenhall asserted that plugging of the points could be prevented by a gravel collar, which he compared to the gravel envelope placed around the drain pipe (Tr. 3436–37, 3460–63, 3503). The difference between gravity flow into the gravel around the drain pipe and pumping action for successful well pointing would seem to be obvious. Mr. Mendenhall's experience with well pointing was limited to observation. We conclude that respondent has not established the feasibility of well pointing in the dipper area.

Concerning pumps, Jack Butler testified that JB&C had as many as 20 to 22 pumps on the job (Tr. 1154–55, 3608, 3778). He asserted that there was a lot o down time in that the pumps would be down for repairs or other reasons (Tr. 3779). Mr. Ussery stated that he had four or five pumps on the DW279, 49 and 49–2 lines (Tr. 1231). Inspectors' Reports rarely include pumps in the lists of equipment used and the largest number of pumps indicated by the Inspectors' Reports is seven (Report, dated February 24, 1971). A JB&C Progress Report (Govt.'s Exh. 87–150), referring to the DW 279, lists eight pumps among equipment on the job. Inspectors' Reports, as we have seen, are silent on the existence of cofferdams, and Mr. Butler testified that the pumps at the dams were operated 24 hours a day at all times (Tr. 3616). We accept seven as the number of pumps used on the DW279. However, more important than the number of pumps is the manner in which they were used. The pumps, as we have seen (note 104, *supra*), were operated at night on occasion. Perhaps the pumps could and should have been operated around-the-clock more frequently. Nevertheless, we think there is considerable validity in Mr. Butler's reasons why this could not be accomplished (note 104) and that respondent criticisms overlook the differing site conditions which we have found to exist.

In any event, we conclude that any inadequacies with respect to pumps and the manner of their use as well as JB&C's asserted inefficiencies resulting from alleged acceleration because of the late start of the work, inadequate supervision and the turn-over in supervision should be taken into account in our

determination of the equitable adjustment.

Equitable Adjustment

As indicated, *supra*, appellant initially claimed $526,221 as additional cost of excavating rock and water on Block 87 and $68,983.20 for additional filter material for a total claim of $595,204.20. The amount claimed was based on using February 1971 as a study month even though Mr. Charles admitted that there was no such thing as a typical month on either contract.

Expenses under the contract as recomputed by appellant total $813,001.31, of which $52,187.74 are indirect costs (App.'s Exh. 00). Direct Costs as submitted, total $760,813.57. Our adjustments to this figure result in accepted direct costs of $755,405.48. This adjustment is made by revising upward by $10,794.47 submitted material costs of $171,345.40 (representing cost of filter gravel, concrete, pipe, etc., and hauling) to reach a total of $182,139.87, based on Jack Butler's testimony that allocation of filter gravel should have been 62 percent to Block 87 and 38 percent to Block 82 rather than 50/50 (Tr. 1650–51). While it is not clear from Schedule 2 of App.'s Exh. 00 exactly which account numbers relate to filter gravel, we have assumed that at least G & W Sand and Gravel in the amount of $53,039.02, Bob Haram (trucking) in the amount of $14,914.86 and Wymore Construction in the amount of $22,000 are so related. Next we reduce submitted equipment rental costs of $286,955.17 by $15,835.05, representing the allocable portion of equipment rental not applicable to Bureau contracts (note 79, *supra*). Finally, we reduce the cost of supplies by $367.51 representing the portion of reimbursement of Bud Beard expenses, which we have determined were more properly an overhead expense to Block 82 (note 81, *supra*).

Income under the contract totaled $313,499.83 or 41 percent of revenue under the three contracts, Block 82, Block 87 and Block 20. Indirect costs represent 41 percent of accepted indirect costs shown, *supra*, for Block 82, exclusive of Bud Beard expenses. Indirect costs thus total $49,627 or 6.57 percent of direct costs. The total of accepted indirect and direct costs total $805,-032.48, less income of $313,499.33 equals $491,532.65.

Appellant has abandoned its claim that differing site conditions existed throughout Block 87 and the total cost with adjustment method which we found appropriate for determining an equitable adjustment on Block 82 is not applicable. We have found differing site conditions as to rock and water on the DW279 and as to water on the 49–2 line and a portion of the 49 line. Although costs were not segregated for each line, various computations of excessive equipment and manpower usage can be derived from the Inspectors' Reports for the time periods during which work was accomplished on the DW 279, 49–2 and 49 lines. However, none of these com-

putations fully account for the additional filter material, material for filling the uncontrollable widening of the excavation,[111] constant hauling, use of jackhammers to excavate the unanticipated rock under the water on DW 279, excessive equipment repairs and the inability to properly use the appropriate excavating equipment.

Even more difficult of precise calculation are the unplanned expenditures of JB&C on other portions of Block 87 where the difficulties encountered were the subject of claims now abandoned. Similarly, the record requires that the determination of an equitable adjustment take into account the shortened time available to complete Block 87 because of the late start of work and the consequent need for acceleration, and the inadequacies and inefficiencies inherent in the changes of supervision during the performance period.

Therefore, we find it necessary to rely entirely on the jury verdict method to arrive at an equitable adjustment deemed sufficient to fully pay JB&C for the additional work attributable to the differing site conditions found to exist on lines DW 279, 49–2 and 49. By this method we conclude that the allowable equitable adjustment for Block 87 is $300,000, which includes the amount awarded for direct and indirect costs, profit at 10 percent and bond at 1 percent.

[111] Our conclusion reflects the fact that extra gravel and other material was hauled in for stabilization purposes. Mr. Butler testified that at all times JB&C had four or five trucks hauling filter gravel or waste material to stabilize the banks (Tr. 3611).

The Board also finds that by reason of the differing site conditions encountered on this contract, the time for performance of the contract work should be extended by 23 days. The appellant is therefore entitled to return of liquidated damages which were withheld in the amount of $3,910. Appellant's claim for interest and attorney's fees is denied for the reasons set forth in IBCA–1033–4–74. The appeal is sustained in the amount of $303,910 including return of liquidated damages and is otherwise denied.

Summary

1. In IBCA–1033–4–74 the amount of the equitable adjustment is	$224,578.31
2. In IBCA–1020–2–74 the amount of the equitable adjustment is	300,000.00
3. In IBCA–1020–2–74 the amount of liquidated damages to be refunded to appellant is	3,910.00
Total amount of award	528,488.31

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

APPENDIX I

53 MAINLINE

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
12+50 to 13+40	9.0′	2.8′	firm clay & fine sandy loam
13+40 to 13+80	9.0′	3.0′	6.0′ caliche gravel at subgrade, balance firm clay & fine sandy loam

Board Determination

$$\frac{50 \times 3.0' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bore log at 13+38, 57′ left, shows in part:

0.0′–4.0′—loamy sand, moderate boring, noncemented, few caliche gravels to 3″ diameter.

4.0′–6.2′—loam, moderate boring, strongly cemented.

6.2′–12.1′—sandy loam, moderate boring 6.2′–9.0′, easy boring 9.0′–12.1′, weakly cemented, scattered caliche gravels 2″ diameter, (16″ auger to 9.0′.)

Bureau Classification

13+60 to 14+00	9.0′	3.0′	1.5′ above subgrade-caliche gravel & hard brown sand

Board Determination

$$\frac{40 \times 4.5' \times 2.33}{27} = \frac{419.40}{27} = 15.53 \text{ cubic yards}$$

Bureau Classification

14+00 to 14+25	9.0′	3.8′	hard caliche at 3.8′ below o.g.

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{25 \times 5.1' \times 2.33}{27} = \frac{297.07}{27} = 11.00$ cubic yards
			Bureau Classification
14+25 to 14+75	9.0′	3.8′	5.1′ hard caliche & cemented brown sand
			Board Determination
			$\frac{50 \times 5.1' \times 2.33}{27} = \frac{594.15}{27} = 22.00$ cubic yards
			Bureau Classification
14+75 to 15+50	9.0′	3.5′	5.5′ hard caliche & cemented brown sand
			Board Determination
			$\frac{75 \times 5.5' \times 2.33}{27} = \frac{961.12}{27} = 35.59$ cubic yards
			Bureau Classification
15+50 to 16+50	9.0′	3.3′	5.7′ hard caliche & cemented brown sand
			Board Determination
			$\frac{100 \times 5.7' \times 2.33}{27} = \frac{1,328.10}{27} = 49.18$ cubic yards
			Bureau Classification
16+50 to 17+50	9.0′	3.8′	5.2′ hard caliche & cemented brown sand

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1,211.60}{27} = 44.87$ cubic yards
			Bureau Classification
17+50 to 18+50	9.0′	4.3′	4.7′ hard caliche & cemented brown sand
			Board Determination
			$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.55$ cubic yards
			Bureau Classification
18+50 to 19+50	9.0′	4.0′	5.0′ hard caliche & cemented brown sand
			Board Determination
			$\frac{100 \times 5.0' \times 2.33}{27} = \frac{1,165}{27} = 43.14$ cubic yards
			Bureau Classification
19+50 to 20+40	9.0′	3.8′	5.2′ hard caliche & cemented brown sand
			Board Determination
			$\frac{90 \times 5.2' \times 2.33}{27} = \frac{1,090.44}{27} = 40.38$ cubic yards

Bore log at 20+55, 60′ left, shows in part:
0.0′–15.0′—loamy sand: easy boring.
0.0′–5.5′—moderate boring 5.5′–11.5′, easy boring 11.5′–15.0′, noncemented 0.0′–8.5′, strongly cemented 8.5′11.5′; few caliche gravels 3″ diameter, became numerous 5.5′–11.5′. (16″ auger to 5.5′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
20+40 to 20+90	9.0′	4.0′	saturated sandy silt
20+90 to 21+50	9.0′	6.1′	saturated sandy silt
21+50 to 22+50	9.0′	5.4′	caliche gravel

Board Determination

$$\frac{100 \times 5.4' \times 2.33}{27} = \frac{1{,}258.20}{27} = 46.60 \text{ cubic yards}$$

Bureau Classification-Exh. 10

22+50 to 23+50	9.0′	3.3′	5.7′—hard caliche gravel

Board Determination

$$\frac{100 \times 5.7' \times 2.33}{27} = \frac{1{,}328.10}{27} = 49.19 \text{ cubic yards}$$

Bore log on centerline at station 22+72 shows in part:
0.0′–5.0′—fine sandy loam: easy boring; no cementation.
5.0′–12.0′—fine sandy loam: easy boring, numerous basalt & caliche gravels ¼″ to 2″. (16″ auger to 4.5′.)

Bureau Classification

23+50 to 24+50	9.0′	3.0′	6.0′—hard caliche gravel

Board Determination

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1398}{27} = 51.78 \text{ cubic yards}$$

Bureau Classification

24+50 to 25+50	9.0′	2.1′	6.9′—hard caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1,607.70}{27} = 59.54 \text{ cubic yards}$$

Bureau Classification

25+50 to 26+50	9.0′	1.6′	7.4′—hard caliche gravel

Board Determination

$$\frac{100 \times 7.4' \times 2.33}{27} = \frac{1,724.20}{27} = 63.86 \text{ cubic yards}$$

Bureau Classification

26+50 to 27+00	9.0′	1.5′	7.5′—hard caliche gravel

Board Determination

$$\frac{50 \times 7.5' \times 2.33}{27} = \frac{873.75}{27} = 32.36 \text{ cubic yards}$$

Bureau Classification

27+00 to 27+24.6 (EOC)	9.0′	1.5′	7.5′— hard caliche gravel

Board Determination

$$\frac{24.6 \times 7.5' \times 2.33}{27} = \frac{429.88}{27} = 15.92 \text{ cubic yards}$$

53 Main Line Total=634.43 cubic yards

Bore log on centerline at station 27+19.5 shows in part:

0.0′–2.5′—fine sandy loam: easy boring; numerous basalt & caliche gravels ¼″–2.0″ from 1.0′–2.5′.

2.5′–12.0′—fine sandy loam (calcareous): moderate boring; numerous basalt & caliche gravels ¼″–2.0″ (16″ auger to 2.5′).

JB&C Rock Claim (Exh. A)

53 Mainline

Station	Average Depth	Total
0+00 to 12+75	2.5′	275.07
12+75 to 20+00	3.0′	187.69
20+00 to 23+00	5.5′	142.76
23+00 to 27+19	6.5′	217.8
Total		823.32

53G

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+26.1 to 0+76.1			Bureau figure, MHC—10.8

Station 0+00 on lateral 53G coincides with station 14+49.5 on the 53 mainline. The bore log on the mainline at station 13+38, 57′ left, has been described *supra*. The only caliche indicated is fine or scattered caliche gravels.

Bureau Classification

76.1 to 1+50	9.0′	2.0′	firm sand, 2′ of caliche and sand

Board Determination

$$\frac{73.9' \times 1.0' \times 2.33}{27} = \frac{172.19}{27} = 6.38 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	9.0′	2.0′	4.0′—sandy silt 3.0′—caliche[,] sand and water

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100' \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	9.0′	2.0′	4.0′—sandy silt 3.0′—caliche[,] sand & water in bottom

Board Determination

$$\frac{100' \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9.0′	2.0′	4.0′—weathered caliche [gravel] size ¼″ to 3″ 2.6′—caliche[,] sand & water

Board Determination

$$\frac{100' \times 5.3' \times 2.33}{27} = \frac{1,234.90}{27} = 45.74 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+00	9.0′	2.0′	4.0′—caliche [gravel] ¼″ to 3″ mixed w/sandy silt 2.0′—caliche[,] sand & water

Board Determination

$$\frac{50 \times 4.0' \times 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
5+00 to 6+00	9.0′	2.0′	4.0′—caliche gravel ¼″ to 3″ [3.0′]—caliche[,] sand & water

Board Determination

$$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1{,}281.50}{27} = 47.46 \text{ cubic yards}$$

Bureau Classification

6+00 to 7+00	9.0′	2.0′	4.0′—caliche gravel 1.5′—caliche[,] sand & water

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

7+00 to 8+00	9.0′	2.0′	4.0′—caliche gravel 1.5′—caliche[,] sand & water

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

8+00 to 9+00	9.0′	2.0′	4.5′—caliche gravel 2.0′—caliche[,] sand & water

Board Determination

$$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1{,}281.5}{27} = 47.96 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+00 to 10+00	9.0′	2.0′	5.0′—hard caliche *1.5′—caliche & sand & water

Board Determination

$$\frac{100 \times 5.75' \times 2.33}{27} = \frac{1{,}339.75}{27} = 49.62 \text{ cubic yards}$$

*The "and" between caliche and sand in the above classification and in the classification at station 1+100 makes reasonable our conclusion that a comma was omitted between these words from stations 2+00 through 9+00.

Bureau Classification

10+00 to 10+50	9.0′	1.6′	7.4′—solid caliche gravel

Board Determination

$$\frac{50 \times 7.4' \times 2.33}{27} = \frac{862.10}{27} = 31.93 \text{ cubic yards}$$

Bore log on centerline at station 11+00 shows in part:
0.0′–6.0′—fine sandy loam: easy boring 0.0′–2.8′, moderate boring. 2.8′–6.0′; no cementation 0.0′–2.8′, weakly and strongly cemented 2.8′–6.0′; calcareous 2.8′–6.0′; occasional caliche gravels 2.3′–6.0′.
6.0′–10.0′—loamy sand: easy boring; no cementation; occasional coarse basalt & caliche particles. (16″ auger to 2.8′.)

Bureau Classification

10+50 to 11+50	9.0′	1.9′	7.1′—solid caliche gravel

Board Determination

$$\frac{100 \times 7.1' \times 2.33}{27} = \frac{1{,}654.30}{27} = 61.27 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+50	9.0′	1.7′	7.3′—solid caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 7.3' \times 2.33}{27} = \frac{1,700.90}{27} = 63 \text{ cubic yards}$$

Bureau Classification

12+50 to 13+50	9.0′	1.4′	7.6′—solid caliche gravel

Board Determination

$$\frac{100 \times 7.6' \times 2.33}{27} = \frac{1,770.80}{27} = 65.58 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	9.0′	1.0′	8.0′—solid caliche gravel

Board Determination

$$\frac{100 \times 8.0' \times 2.33}{27} = \frac{1,864}{27} = 69.04 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	9.0′	1.1′	7.9′—solid caliche gravel

Board Determination

$$\frac{100 \times 7.9' \times 2.33}{27} = \frac{1,840.70}{27} = 68.17 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+50	9. 0′	1. 3′	7.7′—solid caliche gravel

Board Determination

$$\frac{100 \times 7.7' \times 2.33}{27} = \frac{1,794.10}{27} = 66.45 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+50 to 18+00 (EOC)	9.0′	1.5′	7.5′—solid caliche gravel

**Board Determination*

$$\frac{50 \times 7.5' \times 2.33}{27} = \frac{873.75}{27} = 32.36 \text{ cubic yards}$$

53G Line Total=775.76 cubic yards

*A footnote in the Bureau Classification (Exh. 10) applicable to stations 12+00 thru 18+00 contains the following: "There is a solid mass between 0.2 & 1.2 at inv. +4.0 to 5.2 ft. these mass layers are from 8 to 10 ft. long & at 8 to 10 ft. intervals." In different handwriting is the statement: "This is classified as rock. DGP." (The initials "DGP" are those of assistant field engineer Duane G. Pedersen.)

A bore log beyond end of construction at station 19+00, 50′ right, shows in part:

0.0′–8.6′—loamy sand: easy boring; noncemented; scattered caliche gravels 3″ diameter, compacted 7.0′–8.6.′

8.6′–15.0′—sandy loam: easy boring; noncemented; scattered caliche gravels to 1″ diameter. (16″ auger to 10.0′.)

JB&C Rock Claim (Exh. A)

53G

Station	Average Depth	Total
1+50—3+00	1.5′	19.4 cubic yards
3+00—4+00	4.0′	34.6
4+00—4+50	5.0′	21.6
4+50—18+00	6.5′	758.2
Total		833.8 cubic yards

53H

0+00 to 0+50	Bureau figure, MHC—10.8

Station 0+00 on 53H coincides with station 14+59.5 on the 53 mainline. The bore log on the mainline at station 13+38, 57′ left, has been described *supra*. The only caliche indicated is a few caliche gravels to 3″ diameter and scattered caliche gravels to 2″ diameter.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	9′	3. 8′	5.2′—solid caliche gravel

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1{,}211.60}{27} = 44.87$$

Bureau Classification

8+50 to 9+50	9′	1. 5′	7.5′—solid caliche gravel

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1{,}747.50}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	9′	1. 5′	7.5′—solid caliche gravel

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1{,}747.50}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	9′	1.3′	7.8′—solid caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 7.8' \times 2.33}{27} = \frac{1,817.40}{27} = 67.31 \text{ cubic yards}$$

Bore log on centerline at station 11+00 shows in part:
0.0'–10.0'—sandy loam, easy boring 0.0'–2.5', moderate boring 2.5'–5.5', easy boring 5.5'–10.0', no cementation 0.0'–2.5', weakly cemented 2.5'–5.5', no cementation 5.5'–10.0'; occasional caliche gravels 2.0'–10.0', calcareous 2.5'–5.5'. (16'' auger to 2.5'.)

Bureau Classification

11+50 to 12+50	9.0'	7.0'	2.0'—caliche gravel

Board Determination

$$\frac{100 \times 1.0' \times 2.33}{27} = \frac{233}{27} = 8.63 \text{ cubic yards}$$

Bureau Classification

12+50 to 13+50	9.0'	3.6'	5.4'—caliche gravel

Board Determination

$$\frac{100 \times 5.4' \times 2.33}{27} = \frac{1,258.20}{27} = 46.60 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	9.0'	6.0'	3.0'—caliche gravel

Board Determination

$$\frac{100 \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
14+50 to 15+50	9.0′	8.27′	

Bureau Classification

15+50 to 16+00	9.0′	1.5′	7.5′—caliche gravel

Board Determination

$$\frac{50 \times 7.5' \times 2.33}{27} = \frac{873.75}{27} = 32.36 \text{ cubic yards}$$

Bureau Classification

16+00 to 16+50 (EOC)	9.0′	3.0′	6.0′—caliche gravel

Board Determination

$$\frac{50 \times 6.0' \times 2.33}{27} = \frac{699}{27} = 25.89 \text{ cubic yards}$$

53H Line Total=368.04 cubic yards

JB&C Rock Claim (Exh. A)

53H

Station	Average Depth	Total
7+00–16+50	2.25′	184.7 cubic yards

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+26.1 to 0+76.1	9. 0′		Bureau figure MHC—12.5 cubic yards

A bore log on centerline at 0+30 shows in part:
0.0′–6.0′—fine sandy loam: easy boring; no cementation; occasional caliche gravels 5.0′–6.0′.
6.0′–12.0′—loamy fine sand: easy boring 6.0′–8. 5′, moderate boring 8.5′–9.5′, easy boring 9.5′–12.0′; weakly cemented 6.0′–8.5′, no cementation 8.5′–12.0′; no cementation 8.5′–12.0′; occasional caliche gravels 6.0′–8.5′. (16″ auger to 8.5′.)

Bureau Classification

0+76.1 to 2+50	9. 0′	2. 8′	6.2′–solid caliche gravel

Board Determination

$$\frac{173.9 \times 6.2' \times 2.33}{27} = \frac{2{,}512.16}{27} = 93.04 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	9. 0′	2. 5′	6.5′–solid caliche gravel

Board Determination

$$\frac{100 \times 6.5' \times 2.33}{27} = \frac{1{,}514.50}{27} = 56.09 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9. 0′	2. 2′	6. 8′—solid caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.8' \times 2.33}{27} = \frac{1{,}584.40}{27} = 58.68 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9.0′	2.4′	6.6′—solid caliche gravel

Board Determination

$$\frac{100 \times 6.6' \times 2.33}{27} = \frac{1{,}537.80}{27} = 56.95 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.0′	2.1′	6.9′— caliche gravel in o.g. to EOC

Board Determination

$$\frac{100 \times 6.9' \times 2.33}{27} = \frac{1{,}607.70}{27} = 59.54 \text{ cubic yards}$$

Bureau Classification

6+50 to 7+50	9.0′	2.0′	7.0′— caliche gravel

Board Determination

$$\frac{100 \times 7.0' \times 2.33}{27} = \frac{1{,}631}{27} = 60.41 \text{ cubic yards}$$

Bureau Classification

7+50 to 9+50	9.0′	1.8′	7.2′— caliche gravel

Board Determination

$$\frac{200 \times 7.2' \times 2.33}{27} = \frac{3{,}355.20}{27} = 124.27 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	9.0′	1.1′	7.9′ caliche gravel

Board Determination

$$\frac{100 \times 7.9' \times 2.33}{27} = \frac{1{,}840.70}{27} = 68.17 \text{ cubic yards}$$

Bureau Classification

10+50 to 12+50	9.0′	1.0′	8.0′ caliche gravel

Board Determination

$$\frac{200 \times 8.0' \times 2.33}{27} = \frac{3{,}728}{27} = 138.07 \text{ cubic yards}$$

A bore log on centerline at station 11+00 shows in part:
0.0′–10.0′—fine sandy loam: easy boring 0.0′–2.4′, moderate boring 2.4′–6.5′, easy boring 6.5′–10.0′; no cementation 0.0′–2.4′, weakly and strongly cemented 2.4′–6.5′, no cementation 6.5′–10.0′; occasional caliche gravels 2.4′–6.5′; occasional coarse basalt sands 6.5′–10.0′. (16″ auger to 2.4′)

Bureau Classification

12+50 to 13+50	9.0′	1.1′	7.9′ caliche gravel

Board Determination

$$\frac{100 \times 7.9' \times 2.33}{27} = \frac{1{,}840.70}{27} = 68.17 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	9.0′	0.9′	8.1′ caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 8.1' \times 2.33}{27} = \frac{1,887.30}{27} = 69.90 \text{ cubic yards}$$

Bureau Classification

14+50 to 16+50	9.0′	0.7′	8.3′ caliche gravel

Board Determination

$$\frac{100 \times 8.3' \times 2.33}{27} = \frac{1,933.90}{27} = 71.62 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+00	9.0′	1.1′	7.9′ caliche gravel

Board Determination

$$\frac{50 \times 7.9' \times 2.33}{27} = \frac{920.35}{27} = 34.09 \text{ cubic yards}$$

Bureau Classification

17+00 to 17+10	9.0′	5.8′	3.2′ solid caliche gravel

Board Determination

$$\frac{10 \times 3.2' \times 2.33}{27} = \frac{74.56}{27} = 2.76 \text{ cubic yards}$$

Bureau Classification

17+10 to 17+50	9.0′	6.1′	2.9′ solid caliche gravel

Board Determination

$$\frac{50 \times 2.9' \times 2.33}{27} = \frac{237.85}{27} = 12.51 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+50 to 18+05	9.0′	4.4′	4.6′ solid caliche gravel

Board Determination

$$\frac{55 \times 4.6' \times 2.33}{27} = \frac{589.49}{27} = 21.83 \text{ cubic yards}$$

Bureau Classification

18+05 to 18+20 (EOC)	9.0′	2.6′	6.4′ solid caliche gravel

Board Determination

$$\frac{15 \times 6.4' \times 2.33}{27} = \frac{223.68}{27} = 8.28 \text{ cubic yards}$$

53J Line Total=1,004.38 cubic yards

53M

Bureau Classification

0+50 to 1+50	8′	3.3′	4.7′ caliche gravel

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56 \text{ cubic yards}$$

Station 0+00 on 53M coincides with station 22+99.5 on the 53 mainline, and the bore log at station 22+72 on the mainline has been described *supra*. As previously indicated, it shows all easy boring in fine sandy loam with numerous basalt and caliche gravels ¼″ to 2″ from 5.0′ to 12.0′.

Bureau Classification

1+50 to 2+50	8′	3.8′	4.2′ caliche gravel

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 4+50	8′	3.6′	4.4′ caliche gravel

Board Determination

$$\frac{200 \times 4.4' \times 2.33}{27} = \frac{2{,}050.40}{27} = 75.94 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8′	3.7′	4.3′ caliche gravel

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	8′	3.1′	4.9′ caliche gravel

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.28$$

Bureau Classification

6+50 to 8+50	8′	3.3′	4.7′ caliche gravel

Board Determination

$$\frac{200 \times 4.7' \times 2.33}{27} = \frac{2{,}190.20}{27} = 81.11 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8′	3.6′	4.4′ caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

A bore log on centerline at station 9+00 on 53M shows in part:
0.0′–2.0′—fine sandy loam: easy boring; no cementation.
2.0′–5.8′—loamy sand: easy boring, no cementation, occasional caliche gravels.
5.8′–10.0′—fine sandy loam: easy boring; weakly cemented; occasional caliche gravels. (16″ auger to 5.8′)

Bureau Classification

9+50 to 10+50	8′	2.8′	5.2′ caliche gravel

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1{,}211.60}{27} = 44.87 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	8′	4.4′	3.6′ caliche gravel

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+00 (EOC)	8′	4.2′	3.8′ caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{50 \times 3.8' \times 2.33}{27} = \frac{442.70}{27} = 16.40 \text{ cubic yards}$$

53 M Line Total 443.55 cubic yards

Line 53M appears to have been excavated in its entirety with a backhoe (Inspectors' Reports dated July 1, 6, and 7, 1970). The latter report describes material excavated as sandy loam, the last 2′ to 3′ being stable material containing some caliche. This, of course, does not agree with the classifications which indicate at almost all stations that one-half or more of the excavation is caliche gravel.

JB&C Rock Claim (Exh. A)

53M

Station	Average Depth	Total
0+00 to 8+00	4.0′	276. 5 cubic yards
8+00 to 12+00	2.0′	69. 1
Total		345. 6 cubic yards

53N

Bureau Classification

0+50 to 1+50	8′	1.8′	6.2′ caliche gravel, hard

Board Determination

$$\frac{100 \times 6.2' \times 2.33}{27} = \frac{1,444.60}{27} = 53.50 \text{ cubic yards}$$

Station 0+00 on 53N coincides with station 27+19.15 on the 53 mainline. The bore log on the mainline at station 27+19.5 has been described in detail *supra*. As indicated, the only caliche shown is numerous basalt and caliche gravels ¼″ to 2.0″ in diameter.

Bureau Classification

1+50 to 2+50	8′	1.9′	6.1′ caliche gravel, hard

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.1' \times 2.33}{27} = \frac{1{,}421.30}{27} = 52.64 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+00	8′	1.6′	6.4′ caliche gravel, hard

Board Determination

$$\frac{50 \times 6.4' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

3+00 to 3+50	8′	1.55′	6.45′ caliche gravel on O.G. surface, solid caliche gravel

Board Determination

$$\frac{50 \times 6.45' \times 2.33}{27} = \frac{751.42}{27} = 27.83 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+00	8′	1.4′	6.6′ caliche gravel on O.G. surface, solid caliche gravel

Board Determination

$$\frac{50 \times 6.6' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

4+00 to 4+50	8′	1.3′	6.7′ caliche gravel on O.G. surface, solid caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{50 \times 6.7' \times 2.33}{27} = \frac{780.55}{27} = 28.91 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8′	9′	7.1′ caliche gravel on O.G. surface, solid caliche gravel

Board Determination

$$\frac{100 \times 7.1' \times 2.33}{27} = \frac{1,654.30}{27} = 61.27 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	8′	.8′	7.2′ caliche gravel on O.G. surface, solid caliche gravel

Board Determination

$$\frac{100 \times 7.2' \times 2.33}{27} = \frac{1,677.60}{27} = 62.13 \text{ cubic yards}$$

Bureau Classification

6+50 to 7+50	8′	.5′	7.5′ caliche gravel on O.G. surface, solid caliche gravel

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1,747.50}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+00	8′	.4′	7.6′ caliche surface, solid caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{50 \times 7.6' \times 2.33}{27} = \frac{885.40}{27} = 32.79$ cubic yards

Bureau Classification

8+00 to 9+00	8′	.3′	7.7′ caliche gravel on O.G. surface; solid caliche gravel

Board Determination

$$\frac{100 \times 7.7' \times 2.33}{27} = \frac{1,794.10}{27} = 66.45 \text{ cubic yards}$$

53N Total—506.33 cubic yards

A bore log on centerline, beyond the end of construction at station 10+65, shows in part:

0.0′–12.0′—fine sandy loam: easy boring 0.0′–1. 3′, moderate boring 1.3′–8.0′, easy boring 8.0′–12.0′; no cementation 0.0′–1.3′, weakly and strongly cemented 0.0′–11.0′, no cementation 11.0′–12.0′; calcareous 1.3′–8.0′; occasional caliche gravels 1.3′–11.0′. (16″ auger to 1.3′)

An Inspector's Report, dated June 25, 1970, reports the existence of "firm solid caliches" in the trench.

JB&C Rock Claim (Exh. A)

53N

Station	Average Depth	Total
0+00 to 9+00	6.75′	524.9′

JB&C Rock Claim (Exh. A)

53J

Station	Average Depth	Total
0+00 to 0+75	2.1′	13.59 cubic yards
0+75 to 2+50	1.5′	22.7
2+50 to 6+50	5.0′	172.8
6+50 to 18+20	7.0′	707.6
Total		916.69 cubic yards

53K

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	9.0′		Bureau figure, MHC—12.5 cubic yards

Bureau Classification

0+50 to 1+50	9.0′	4.5′	4.5′ sandy caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	9.0′	4.0′	5.0′ mixed sandy caliche and loam

Board Determination

$$\frac{100 \times 2.5' \times 2.33}{27} = \frac{582.50}{27} = 21.57 \text{ cubic yards}$$

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 3+50	9.0′	5.5′	3.5′ mixed sandy caliche and loam

Board Determination

$$\frac{100 \times 1.75' \times 2.33}{27} = \frac{407.75}{27} = 15.10 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9.0′	6.0′	3.0′ mixed sandy caliche and loam

Board Determination

$$\frac{100 \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9.0′	5.8′	3.2′ mixed sandy caliche and loam

Board Determination

$$\frac{100 \times 1.6' \times 2.33}{27} = \frac{372.80}{27} = 13.81 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.0′	5.5′	3.5′ mixed sandy caliche and loam

Board Determination

$$\frac{100 \times 1.75' \times 2.33}{27} = \frac{407.75}{27} = 15.11 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	9.0′	6.0′	3.0′ sandy gray caliche

Board Determination

$$\frac{100 \times 3.0' \times 2.33}{27} = \frac{699}{27} = 25.88 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	9.0′	7.0′	2.0′ sandy gray caliche

Board Determination

$$\frac{100 \times 2.0' \times 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

9+50 to 12+50	9.0′		8.0′ to 8.5′ top soil

Bureau Classification

12+50 to 13+50	9.0′	8.0′	1.0′ caliche gravel and sand pockets

Bureau Classification

13+50 to 16+45 (EOC)	9.0′	5.0′	4.0′ caliche gravel and sand pockets

Board Determination

$$\frac{300 \times 2.0' \times 2.33}{27} = \frac{1,398}{27} = 51.78 \text{ cubic yards}$$

53K Line Total=212.28 cubic yards

JB&C Rock Claim (Exh. A)

53K

Station	Average Depth	Total
0+00 to 2+00	2.2′	37. 9 cubic yards
2+00 to 9+60	2.0′	131. 3
9+60 to 16+45	3.0′	177. 6
Total		346. 8 cubic yards

Bureau Classification

53L

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+50 to 2+50	9′	1.5′	7.5′ caliche gravel

Board Determination

$$\frac{200 \times 7.5' \times 2.33}{27} = \frac{3{,}495}{27} = 129.44 \text{ cubic yards}$$

Station 0+00 on 53L coincides with station 22+99.5 on the 53 mainline. The bore log at station 22+72 on the mainline has been described *supra.* It shows all easy boring in fine sandy loam with numerous basalt and caliche gravels ¼″ to 2″ appearing from 5.0′ to 12.0′.

Bureau Classification

2+50 to 3+00	9′	2.5′	6.5′ caliche gravel

Board Determination

$$\frac{50 \times 6.5' \times 2.33}{27} = \frac{757.25}{27} = 28.25 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9′	3.0′	6′ caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 3.0' \times 2.33}{27} = \frac{699}{27} = 25.89$ cubic yards
			Bureau Classification
5+50 to 6+50	9′	3.5′	5.5′ caliche gravel
			Board Determination
			$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1,281.5}{27} = 47.46$ cubic yards
			Bureau Classification
6+50 to 7+50	9′	2.5′	4′ solid caliche 2.5′ caliche gravel
			Board Determination
			$\frac{100 \times 6.5' \times 2.33}{27} = \frac{1,514.5}{27} = 56.09$ cubic yards
			Bureau Classification
7+50 to 8+50	9′	1.5′	4′ solid caliche 3.5′ caliche gravel
			Board Determination
			$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1,747.5}{27} = 64.72$ cubic yards
			Bureau Classification
8+50 to 10+50	9′	1.2′	4′ solid caliche 3.8′ caliche gravel

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{200 \times 7.8' \times 2.33}{27} = \frac{3,634.8}{27} = 134.62 \text{ cubic yards}$$

Bureau Classification

10+50 to 15+50	9′	1.0′	4′ solid caliche 4′ caliche gravel

Board Determination

$$\frac{500 \times 8' \times 2.33}{27} = \frac{9,320}{27} = 345.18 \text{ cubic yards}$$

The bore log on centerline at station 11+00 shows in part:

0.0′–1.6′—fine sandy loam: easy boring; no cementation, occasional caliche gravels.

1.6′–5.0′—caliche; hard boring; strongly cemented.

5.0′–10.0′—sandy loam; moderate boring 5.0′–7.0′, easy boring 7.0′–10.0′; weakly cemented; occasional caliche gravels. (16″ auger to 1.6′)

Bureau Classification

15+50 to 18+20 (EOC)	9′	1.2′	4′ solid caliche 3.8′ caliche gravel

Board Determination

$$\frac{270 \times 7.8' \times 2.33}{27} = \frac{4,906.98}{27} = 181.74 \text{ cubic yards}$$

Line Total—1,013.39 cubic yards

Beginning at station 7+00 to EOC the classifications contain a footnote stating "Caliche gravel with the solid caliche inv.+4′."

A bore log beyond the end of construction on centerline at station 19+69 shows in part:

0.0′–3.2′—loamy sand: easy boring, no cementation, scattered caliche gravels.

3.2′–8.6′—caliche: moderate boring; strongly cemented with scattered indurated nodules.

8.6′–15.0′—sand: easy boring, no cementation; scattered basalt gravels. (16″ auger to 3.0′)

JB&C Rock Claim (Exh. A)

53L

Station	Average Depth	Total
0+00 to 3+50	5.0′	151.2 cubic yards
3+50 to 18+20	7.0′	889.1
Total		1,040.3 cubic yards

53P

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	8′	1.6′	6.4′ solid caliche gravel

Board Determination

$$\frac{50 \times 6.4' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Station 0+00 on 53P coincides with station 27+19.5 on the mainline, the bore log on the 53 mainline at 27+19.5 has been described in detail *supra*. As previously indicated the only caliche shown is numerous basalt and caliche gravels from ¼″ to 2.0″ in diameter.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+50 to 1+50	8′	2. 2′	5.8′ solid caliche gravel

Board Determination

$$\frac{100 \times 5.8' \times 2.33}{27} = \frac{1,351.40}{27} = 50.5 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	8′	1. 8′	6.2′ solid caliche gravel

Board Determination

$$\frac{100 \times 6.2' \times 2.33}{27} = \frac{1,444.60}{27} = 53.50 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+00	8′	1. 6′	6.4′ solid caliche gravel

Board Determination

$$\frac{50 \times 6.4' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

3+100 to 3+10	8′	1. 95′	4.2′ saturated fine sand and caliche, caving bottom 2.5′ is hard caliche.

Board Determination

$$\frac{10 \times 2.5' \times 2.33}{27} = \frac{58.25}{27} = 2.16 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+10 to 3+40	8′	2.35′	5.65′ solid caliche gravel

Board Determination

$$\frac{30 \times 5.65' \times 2.33}{27} = \frac{394.93}{27} = 14.63 \text{ cubic yards}$$

*The Bureau conceded the existence of 4.3 c.y. of rock in the area station 3+00 to 3+40.

Bureau Classification

3+40 to 3+70	8′	2.4′	5.6′ solid caliche gravel

Board Determination

$$\frac{30 \times 5.6' \times 2.33}{27} = \frac{391.44}{27} = 14.50 \text{ cubic yards}$$

Bureau Classification

3+70 to 4+50	8′	1.8′	6.2′ solid caliche gravel w/small pockets of sand

Board Determination

$$\frac{80 \times 6.2' \times 2.33}{27} = \frac{1,155.68}{27} = 42.80 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8′	1.7′	6.3′ solid caliche gravel w/small pockets of sand

Board Determination

$$\frac{100 \times 6.3' \times 2.33}{27} = \frac{1,467.90}{27} = 54.37 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
5+50 to 6+50	8′	1.7′	6.3′ solid caliche gravel

Board Determination

$$\frac{100 \times 6.3' \times 2.33}{27} = \frac{1{,}467.90}{27} = 54.37 \text{ cubic yards}$$

Bureau Classification

6+50 to (EOC)	8′	1.8′	6.2′ solid caliche gravel

Board Determination

$$\frac{50 \times 6.2' \times 2.33}{27} = \frac{722.30}{27} = 26.75 \text{ cubic yards}$$

53P Line Total 368.35 cubic yards

JB&C Rock Claim (Exh. A)

53 P

Station	Average Depth	Total
0+00 to 2+00	5.5′	95 cubic yards
2+00 to 7+00	4.5′	272.2
Total		367. 2 cubic yards

53–5

Bureau Classification

0+50 to 2+50	9′	2′	7′ caliche gravel

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

Board Determination

$$\frac{200 \times 7' \times 2.33}{27} = \frac{3,262}{27} = 120.81 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	9′	2.5′	6.5′ caliche gravel

Board Determination

$$\frac{100 \times 6.5' \times 2.33}{27} = \frac{1,514.50}{27} = 56.09 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9′	3.0′	6.0′ caliche gravel

Board Determination

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1,398}{27} = 51.78 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+00 (EOC)	9′	1.3′	7.7′ caliche gravel

Board Determination

$$\frac{50 \times 7.7' \times 2.33}{27} = \frac{897.05}{27} = 33.22 \text{ cubic yards}$$

53–5 Total—261.90 cubic yards

Excavation was accomplished with the trencher, which was generally used in harder material. An Inspector's Report, dated August 13, 1970, states that a front-end loader and 5 laborers were picking rock on the 53–5 line. *See also* Inspector's Report, dated August 14, 1970, which states JB&C is picking rock on 53–2, 53–3, 53–4 and 53–5 lines.

JB&C ROCK CLAIM (EXH. A)

53–5

Station	Average Depth	Total
0+40 to 5+00	1.8′	71.3 cubic yards

66–2

The bore log at station 0+98, 24′ right, shows in part:

0.0′–3.7′—sandy loam: easy boring, no concentration; numerous caliche gravels and nodules, ½″–2″, 2.6′–3.7′.

3.7′–5.6′—Caliche (gravels): easy boring; indurated; scattered basalt gravel rounded and subrounded 1″–3″

5.6′–8.0′—sand: easy boring; no cementation; numerous caliche and basalt gravel ½″–3″, 5.6′–8.0′. (16″ auger to 1.0′)

The three other bore logs on this line all indicate easy boring in very fine sandy loam, loamy sand, fine sandy loam, silty clay loam or sand and do not mention caliche or caliche gravel in any shape or form.

JB&C ROCK CLAIM (EXH. A)

Station	Average Depth	Total
20+50–42+00	2.4′	445.3 cubic yards
42+00–45+00	2.5′	64.5
45+00–50+00	5.7′	246.2
Total		756 cubic yards

66–3

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
42+50 to 44+50	8′	.8′	7.2′ sandy loam and caliche gravels

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{200 \times 3.6' \times 2.33}{27} = \frac{1,677.60}{27} = 62.13 \text{ cubic yards}$$

A bore log on centerline at station 41+09 shows in part:

1.0'–2.7'—fine sandy loam: easy boring; numerous basalt and caliche gravels ¼'' to 3''.

2.7'–6.0'—Loam: easy boring; no cementation.

6.0'–10.0'—fine sandy loam: easy boring, no cementation. (16'' auger to 2.7')

Bureau Classification

44+50 to 45+50	8'	.5'	7.5' caliche gravels and sandy loam

Board Determination

$$\frac{100 \times 3.75' \times 2.33}{27} = \frac{873.75}{27} = 32.36 \text{ cubic yards}$$

Bureau Classification

45+50 to 46+50	8'	.8'	7.2' caliche gravels and sandy loam

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

46+50 to 47+50	8'	1.2'	6.8' mixed caliche gravels and sandy loam

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
47+50 to 48+50	8′	.8′	7.2′ mixed caliche gravels and sandy loam

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
48+50 to 49+50	8′	1.0′	7′ mixed caliche gravels and sandy loam

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
49+50 to 51+60 (EOC)	8′	1.5′	6.5′ mixed caliche gravels and sandy loam

Board Determination

$$\frac{100 \times 3' \times 2.33}{27} = \frac{699}{27} = 25.89 \text{ cubic yards}$$

66–3 Total 242.06 cubic yards

JB&C Rock Claim (Exh. A)

66–3

Station	Average Depth	Total
1+25–23+00	3.7′	694. 5
23+00–30+00	5.5′	332. 2
30+00–35+25	3.0′	84. 2
40+50–51+60	6.0′	575. 4
Total		1, 686. 30

66

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
18+00 to 18+50	9′	3′	2′ soil and small caliche chunks 2.5′ soft caliche 2.7′ sand and layers of soft caliche

Board Determination

$$\frac{50 \times 5.2' \times 2.33}{27} = \frac{605.80}{27} = 22.44 \text{ cubic yards}$$

The bore log at station 18+54, 13′ right, shows in part:

0.0′–2.7′—sandy loam, easy boring, no cementation, numerous caliche gravels 2.3′–2.7′.

2.7′–10.0′—caliche, moderate boring, indurated.

10.0′–12.3′—loam, moderate boring, no cementation. (16′ auger to 2.7′).

Bureau Classification

18+50 to 19+50	9′	2.4′	1.0′ caliche chunks 1.5′ moderately hard caliche 1.1′ small chunks of caliche 0.6′ sand 0.9′ soft caliche 3.5′ sand 8. 6

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

19+50 to 20+50	9′	2.8′	1.2′ loose caliche 2.5′ moderately hard caliche 1.4′ sand 0.6′ soft caliche 2.2′ sand 1.1′ soft caliche

Board Determination

$$\frac{100 \times 5.4'^{*} \times 2.33}{27} = \frac{1{,}258.20}{27} = 46.60 \text{ cubic yards}$$

*All caliche so designated.

The bore log on centerline at station 20+54 shows in part:
0.0′–12.0′—very fine sandy loam; easy boring 0.0′–3.3′, moderate boring 3.3′–12.0′; no cementation 0.0′–3.3′; strongly cemented 3.3′–12.0′; calcareous 3.3′–12.0′; occasional caliche gravels 2.5′–12.0′. (16″ auger to 3.3′).

Bureau Classification

20+50 to 21+50	9′	3.6′	1.0′ loose caliche 1.2′ rock 3.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.8' \times 2.33}{27} = \frac{1{,}351.40}{27} = 50.05 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
21+50 to 22+50	9′	3.0′	1.5′ soil w/small amounts caliche gravel .6′ loose caliche chunks 5.0′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.6' \times 2.33}{27} = \frac{1{,}304.80}{27} = 48.32 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+50	9′	4.0′	1.2′ loose caliche chunks 2.6′ rock 2.5′ sand & caliche

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1{,}118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	9′	3.4′	2.2′ loose caliche and chunks 1.7′ rock 1.8′ mod. hard caliche 1.7′ sands and gravels

Board Determination

$$\frac{100 \times 5.7' \times 2.33}{27} = \frac{1{,}328.10}{27} = 49.18 \text{ cubic yards}$$

Bore log at 25+95, 20′ right, shows in part:

0.0′–4.0′—sandy loam: easy boring; no cementation, scattered caliche gravels 1″ to 1½″.

4.0′–10.0′—caliche: moderate boring 4.0′–5.7′, easy 5.7′–7.0′, moderate 7.0′–10.0′; indurated.

10.0′–14.0′—loamy sand: easy boring, no cementation, scattered caliche and basalt particles. (16″ auger to 4.0′).

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
24+50 to 25+50	9′	2. 6′	1.0′ loose caliche 1.0′ rock 3.4′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.4'^{*} \times 2.33}{27} = \frac{1{,}258.20}{27} = 46.60 \text{ cubic yards}$$

*all except 1.7′ sands and gravels

Bureau Classification

25+50 to 35+50	9. 0′	3. 0′	Broken to moderately hard caliche

Board Determination

$$\frac{1{,}000 \times 6.0' \times 2.33}{27} = \frac{13{,}980}{27} = 517.78 \text{ cubic yards}$$

Bore log on centerline at 28+54 shows in part:

0.0′–3.0′—very fine sandy loam: easy boring; no cementation; occasional caliche gravels 2.8′–3.0′.

3.0′–5.0′—caliche; hard boring, strongly cemented.

5.0′–10.0′—fine sandy loam: moderate boring, strongly cemented; calcareous.

(16″ auger to 3.0′).

Bore log on centerline at 32+54 shows in part:

0.0′–3.4′—sandy loam: easy boring, no cementation; occasional caliche gravels 3.0′–3.4′.

3.4′–5.5′—caliche: hard boring, strongly cemented.

5.5′–10.0′—fine sandy loam: moderate boring, strongly cemented; calcareous. (16″ auger to 3.4′).

Bore log at station 35+42, 33′ left, shows in part:

0.0′–3.6′—sandy loam: easy boring, no cementation.

3.6′–8.5′—caliche (gravels): moderate boring 3.6′–4.6′, easy boring 4.6′–8.3′; indurated; caliche in gravel form from 3.6′–4.6′; caliche from 4.6′–8.3′.

8.3′–15.0′—loamy sand: moderate boring 8.3′–11.0′, easy boring 11.0′–15.0′; strongly cemented 8.3′–11.0′, non-cemented 11.0′–15.0′ (16″ auger to 4.6′).

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
35+50 to 36+50		2.3′	1.4′ loose caliche 3.3′ caliche w/rock chunks 3′ sand

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

36+50 to 37+50		2.0′	1.8′ loose caliche 0.8′ rock 1.2′ moderately hard caliche 0.5′ rock 3.6′ caliche

Board Determination

$$\frac{100 \times 7.9' \times 2.33}{27} = \frac{1{,}840.70}{27} = 68.17 \text{ cubic yards}$$

Bureau Classification

37+50 to 38+50		1.4′	1.5′ loose caliche 1.0′ moderately hard caliche 0.7′ rock 1.6′ moderately hard caliche 3.5′ sand

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1{,}118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
38+50 to 39+50	9. 0′	1. 5′	1.2′ loose caliche 1.5′ moderately hard caliche 1.2′ rock 2.1′ moderately hard caliche w/ rock chunks

Board Determination

$$\frac{100 \times 5.4' \times 2.33}{27} = \frac{1,258.2}{27} = 46.60 \text{ cubic yards}$$

Bore log on centerline at station 39+43 shows in part:

0.0′–3.2′—fine sandy loam: easy boring; numerous caliche gravels 1/4″ to 2″.

3.2′–4.0′—caliche: hard boring, strongly cemented.

4.0′–6.5′—fine sandy loam (calcareous): moderate boring; occasional caliche and basalt gravels 1/4″–1″.

6.5′–8.0′—caliche: hard boring, strongly cemented.

8.0′–10.0′—sandy loam: easy boring; no cementation. (16″ auger to 3.2′).

Bore log on centerline at station 39+97 shows in part:

0.0′–3.4′—sandy loam: easy boring; no cementation, occasional caliche gravels 3.0′–3.4′.

3.4′–5.5′—caliche: hard boring; strongly cemented.

5.5′–10.0′—fine sandy loam: moderate boring; strongly cemented; calcareous. (16″ auger to 3.4′).

Bureau Classification

39+50 to 40+50		1.2′	1.5′soil and caliche 0.5′rock 1.5′moderately hard caliche 4′ caliche w/hard layers of cemented sand

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1,398}{27} = 51.78 \text{ cubic yards}$$

Bureau Classification

40+50 to 41+50		1.2′	1.7′ loose caliche 2.4′ moderately hard caliche 0.6′ rock 2.9′ caliche

Board Determination

$$\frac{100 \times 6.75' \times 2.33}{27} = \frac{1,374.70}{27} = 50.91 \text{ cubic yards}$$

Bureau Classification

41+50 to 42+50		1.1′	1.2′ loose caliche 2.3′ moderately hard w/soft layers 0.5′ rock 3.4′ caliche w/sand layers

Board Determination

$$\frac{100 \times 7.3' \times 2.33}{27} = \frac{1,700.90}{27} = 63 \text{ cubic yards}$$

Bureau Classification

42+50 to 43+50		1.0′	1.1′ loose caliche 0.7′ rock 2.0′ moderately hard caliche 3.7′ caliche

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1,747.5}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
43+50 to 44+50		1.3′	2′ caliche chunks 1.8′ soft caliche 1.4′ sand and caliche 2.9′ brown sand

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.5}{27} = 38.83 \text{ cubic yards}$$

Bore log at station 44+01, 30′ left, shows in part: 0.0′–1.0′—loamy sand: easy boring; no cementation. 1.0′–8.0′—caliche: moderate boring; indurated.
8.0′–10.0′—sand: easy boring; no cementation; scattered caliche nodules. (16″ auger to 3.2′).

Bureau Classification

44+50 to 45+50		1.5′	7.5′ moderately hard caliche

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1,747.50}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

45+50 to 46+50	9.1′	1.5′	7.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 7.6' \times 2.33}{27} = \frac{1,770.80}{27} = 65.58 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
46+50 to 47+50	9.2′	1.0′	8.2′ moderately hard caliche

Board Determination

$$\frac{100 \times 8.2' \times 2.33}{27} = \frac{1{,}910.60}{27} = 70.76 \text{ cubic yards}$$

Bureau Classification

47+50 to 49+50	9.5′	1.0′	8.5′ moderately hard caliche

Board Determination

$$\frac{200 \times 8.5' \times 2.33}{27} = \frac{3{,}961}{27} = 146.70 \text{ cubic yards}$$

Bureau Classification

49+50 to 50+50	9.7	1.0′	8.7′ moderately hard caliche

Board Determination

$$\frac{100 \times 8.7' \times 2.33}{27} = \frac{2{,}027.10}{27} = 75.08 \text{ cubic yards}$$

Bureau Classification

51+50 to 52+50	10′	1.0′	9.0′ moderately hard caliche

Board Determination

$$\frac{100 \times 9.0' \times 2.33}{27} = \frac{2{,}097}{27} = 77.67 \text{ cubic yards}$$

Bureau Classification

52+50 to 53+50	9.4′	1.0′	8.4′ moderately hard caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 8.4' \times 2.33}{27} = \frac{1,957.20}{27} = 72.49 \text{ cubic yards}$$

Bureau Classification

53+50 to 54+50	10.6′	2.0′	8.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 8.6' \times 2.33}{27} = \frac{2,003.80}{27} = 74.21 \text{ cubic yards}$$

Bore log at 53+10 (centerline) shows in part:

0.0′–2.0′—sandy loam (spoil bank): easy boring occasional caliche gravels.

2.0′–3.5′—sandy loam: easy boring; occasional caliche gravels 2.0′–3.0′; numerous caliche gravels 3.0′–3.5′.

3.5′–6.0′—caliche: hard boring, strongly cemented.

6.0′–8.5′—fine sandy loam: easy boring, numerous caliche fragments.

8.5′–14.0′—sandy loam: easy boring; occasional coarse basalt sands. (16″ auger to 3.5′).

Bureau Classification

54+50 to 55+50	10.6′	2.0′	3.0′ rock 5.0′* hard brown clay and sand mixture 0.6′ sand and gravel

Board Determination

$$\frac{100 \times 8.0' \times 2.33}{27} = \frac{1,864}{27} = 69.04 \text{ cubic yards}$$

* Considered as caliche or its equivalent.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
55+50 to 56+50	10.4′	1.0′	3.0′ rock 6.0′* hard brown clay and sand mixture 0.4′ sand and gravel

Board Determination

$$\frac{100 \times 9.0' \times 2.33}{27} = \frac{2,097}{27} = 77.67 \text{ cubic yards}$$

* This material has no counterpart in the bore logs and is considered as caliche or its equivalent.

Bureau Classification

56+50 to 57+50	10′	1.9′	4.0′ moderately hard caliche 1.2′ soft caliche 2.9′ brown sand

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1,211.60}{27} = 44.87 \text{ cubic yards}$$

Bureau Classification

57+50 to 58+50		1.8′	0.9′ rock 4.3′ compacted caliche chunks w/ soil mixed 2.8′ sand and fine gravel layers

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1,211.60}{27} = 44.87 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
58+50 to 59+50		1.6′	1.1′ caliche gravel 0.9′ moderately hard caliche 1.3′ rock 0.8′ sand w/layers of caliche 3.9′ sand and fine gravel layers

Board Determination

$$\frac{100 \times 2.6' \times 2.33}{27} = \frac{605.80}{27} = 22.44 \text{ cubic yards}$$

Bureau Classification

59+50 to 60+50		1.5′	1.7′ compacted caliche chunks 2.0′ moderately hard caliche 0.5′ rock 1.4′ sandstone 2.6′ brown sand

Board Determination

$$\frac{100 \times 5.6' \times 2.33}{27} = \frac{1,304.80}{27} = 48.32 \text{ cubic yards}$$

Bureau Classification

60+50 to 61+50		1.3′	0.7′ small caliche chunks 2.6′ moderately hard caliche 2.8′ sand w/3 or 4 0.1′ layers of soft caliche 2.2′ brown sand

Board Determination

$$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
61+50 to 62+50		1.2′	1.5′ small caliche chunks and soil 0. 5′ rock 1. 8′ moderately hard caliche 0. 5′ rock 1. 0′ moderately hard caliche 2.7′ sands mass w/gravel seams

Board Determination

$$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1{,}234.90}{27} = 45.74 \text{ cubic yards}$$

Bureau Classification

62+50 to 63+00		1.3′	2.0′ loose caliche and soil 0. 8′ moderately hard caliche 1. 0′ rock 1.2′ moderately hard caliche and sands 3.0′ mass sands and gravel layers

Board Determination

$$\frac{50 \times 4.0' \times 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bore log at station 63+51, 34′ right, shows in part:

0.0′–3.0′—sandy loam: easy boring; no cementation; scattered caliche gravel round and subrounded 1′′–2′′ 2.0′–3.0′.

3.0′–6.5′—caliche: moderate boring 3.0′–5.0′; hard boring 5.0′–6.5′; indurated.

6.5′–7.5′—loamy sand: easy boring; weakly and strongly cemented sand particles.

7.5′–9.0′—gravels (caliche and basalt): moderate boring; indurated.

9.0′–10.0′—sand (medium grain): easy boring; no cementation. (16′′ auger to 3.0′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
63+00 to 63+51		1.3′	1.2′ loose caliche 0.5′ rock 1.3′ moderately hard caliche 1.0′ cemented sands and gravels 2.0′ mass sands 1.9′ sands and gravels

Board Determination

$$\frac{51 \times 3.0' \times 2.33}{27} = \frac{356.49}{27} = 13.20 \text{ cubic yards}$$

Bureau Classification

63+51 to 64+50		1.4′	2.4′ loose caliche 0.5′ rock 2.4′ moderate hard sands w/caliche seams 2.2′ sands mass

Board Determination

$$\frac{99 \times 3.9' \times 2.33}{27} = \frac{899.61}{27} = 33.31 \text{ cubic yards}$$

Bureau Classification

64+50 to 65+00		1.2′	1.0′ loose caliche 0.5′ rock 2.0′ moderate hard caliche 2.5′ sands and gravels 1.9′ sands loam

Board Determination

$$\frac{50 \times 3.5' \times 2.33}{27} = \frac{407.75}{27} = 15.10 \text{ cubic yards}$$

Line total=2,434.72 cubic yards

JB&C Rock Claim (Exh. A)

66 MAINLINE

Station	Average Depth	Total
18+50–20+50	2.5′	43.2
20+50–24+50	4.0′	138.2
24+50–25+00	4.5′	19.4
25+00–26+10	4.5′	47.7
26+10–28+55	3.25′	68.5
28+55–42+00	5.0′	232.5
42+00–50+00	5.5′	173.0
50+00–54+59	6.5′	258.0
54+59–56+59	6.5′	112.2
56+59–57+00	4.75′	16.4
57+00–58+00	7.25′	62.6
58+00–59+00	8.0′	69.1
59+00–61+05	5.25′	91.0
		1,331.8 cubic yards

66A

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
10+50 to 11+50	9′	3′	6′ caliche gravels and sandy caliche

Board Determination

$$\frac{100 \times 3'^{*} \times 2.33}{27} = \frac{699}{27} = 25.89 \text{ cubic yards}$$

*½ of caliche gravels and sandy caliche.

Bureau Classification

11+50 to 12+50	9′	8.6′	
12+50 to 13+50	9′	1.2′	7.8′ caliche gravel and sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.9'^{*} \times 2.33}{27} = \frac{908.70}{27} = 33.65 \text{ cubic yards}$$

*½ caliche gravel and sandy caliche.

Bureau Classification

13+50 to 14+50	9′	1.2′	7.8′ caliche gravel and sandy caliche

Board Determination

$$\frac{100 \times 3.9'^{*} \times 2.33}{27} = \frac{908.70}{27} = 33.65 \text{ cubic yards}$$

*½ caliche gravel and sandy caliche.

Bureau Classification

14+50 to 16+50	9′	.8′	8.2′ caliche gravel and sandy caliche

Board Determination

$$\frac{200 \times 4.1' \times 2.33}{27} = \frac{1{,}910.60}{27} = 70.76 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+50	9′	.8′	8.2′ solid caliche and sandy caliche

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
20+50 to 21+50	9′	.8′	8.2′ caliche gravels and sandy caliche

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

Bureau Classification

21+50 to 22+50	9′	1.2′	7.8′ solid caliche and sandy caliche

Board Determination

$$\frac{100 \times 7.8' \times 2.33}{27} = \frac{1,817.40}{27} = 67.31 \text{ cubic yards}$$

Bore log at 21+26, 68′ left, shows in part:

0.0′–1.4′—sandy loam: easy boring; noncemented; few caliche gravels to 3″ diameter.

1.4′–3.6′—loamy sand: easy boring; noncemented; few caliche gravels to 3″ diameter.

3.6′ to 9.0′—gravelly sand: moderate boring; noncemented; basalt gravels 1″ diameter.

9.0′–15.0′—loamy sand: moderate boring; noncemented; numerous basalt gravels 1″ diameter, along with strongly cemented caliche peds, basalt gravels end 11.0′. (16″ auger to 3.6′.)

Bureau Classification

22+50 to 23+50	9′	1.5′	7.5′ solid caliche and sandy caliche

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1,747.50}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
23+50 to 24+50	9′	1. 2′	7.8′ solid caliche and sandy caliche

Board Determination

$$\frac{100 \times 7.8' \times 2.33}{27} = \frac{1,817.40}{27} = 67.31 \text{ cubic yards}$$

Bureau Classification

24+50 to 26+50	9′	1. 5′	7.5′ solid caliche and sandy caliche

Board Determination

$$\frac{200 \times 7.50' \times 2.33}{27} = \frac{3,495}{27} = 129.44 \text{ cubic yards}$$

Bureau Classification

26+50 to 27+50	9′	1. 3′	7.7′ solid caliche and sandy caliche

Board Determination

$$\frac{100 \times 7.7' \times 2.33}{27} = \frac{1,794.10}{27} = 66.45 \text{ cubic yards}$$

Bureau Classification

27+50 to 29+00	9′	1. 2′	7.8′ solid caliche and sandy caliche

Board Determination

$$\frac{150 \times 7.8' \times 2.33}{27} = \frac{2,726.10}{27} = 100.97 \text{ cubic yards}$$

66A Line total 730.91 cubic yards

JB&C Rock Claim (Exh. A)

Station	Average Depth	Total
11+50–14+00	2.0′	43.2 cubic yards
14+00–16+00	4.0′	69.1
16+00–20+00	2.0′	69.1
20+00–29+00	normal	
		181.4 cubic yards

66B

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 5+00	8.0′	3.5′	*5.0′ hard caliche

Board Determination

$$\frac{500 \times 5.0' \times 2.33}{27} = \frac{5{,}825.00}{27} = 215.74 \text{ cubic yards}$$

Station 0+00 on 66B coincides with station 20+54.3 on the 66 mainline. The bore log at station 20+54 on the 66 mainline has been described in detail *supra*. The log does not show any caliche other than occasional caliche gravels.

*There are no soil classifications or profiles in the record for this lateral. The figures for top soil and hard caliche are derived from an Inspector's Report, dated August 24, 1970.

JB&C Rock Claim (Exh. A)

66B

Station	Average Depth	Total
0+00—5+00	5.0′	216 cubic yards

66C

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	9′	3.0′	3.1′ medium hard caliche—Bureau figure— *6.7*

Station 0+00 on 66C corresponds with station 20+54.3 on the 66 mainline. The bore log at 20+54 on the 66 mainline has been described *supra*. It does not show any caliche other than occasional caliche gravels.

Bureau Classification

0+50 to 2+50	9′	2.5′	6.5′ soft caliche w/hard layer of caliche

Board Determination

$$\frac{200 \times 3.25' \times 2.33}{27} = \frac{1{,}514.50}{27} = 56.09 \text{ cubic yards}$$

Bureau Classification

2+50 to 11+50	6′ to 10′ of topsoil balance soft caliche

Bureau Classification

11+50 to 12+50	9′	1.0′	8.0′ caliche

Board Determination

$$\frac{100 \times 8.0' \times 2.33}{27} = \frac{1{,}864}{27} = 69.03 \text{ cubic yards}$$

Test pit No. 2 was located on centerline at station 12+50 and shows in part:

0.0′–2.5′—fine sandy loam: easy digging; no cementation.
2.5′–8.5′—caliche: easy digging; strong cementation.
8.5′–12.0′—sandy loam: easy digging; no cementation; occasional coarse sands and caliche gravels.

(This pit was blasted with 6 sticks of dynamite after drilling 4 holes a depth of 8.0′ on 3′ centers.)

The bore log on centerline at station 13+00 shows in part:

0.0′–1.7′—fine sandy loam: easy boring; numerous basalt and caliche gravels ¼″ to 3″.

1.7′–3.7′—caliche: hard boring; strongly cemented.

3.7′–7.0′—sandy loam: moderate boring; weakly cemented.

7.0′–10.0′—loamy sand: easy boring; no cementation. (16″ auger to 1.7′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
12+50 to 13+50	9′	1.0′	1.5′ of caliche gravel, then layer of hard caliche

Board Determination

$$\frac{100 \times 6.5' \times 2.33}{27} = \frac{1{,}514.50}{27} = 56.09 \text{ cubic yards}$$

Bureau Classification

13+50 to 16+50	9′	1.5′	1.5′ caliche gravel, then layer of hard caliche

Board Determination

$$\frac{300 \times 6.0' \times 2.33}{27} = \frac{4{,}194}{27} = 155.33 \text{ cubic yards}$$

Bureau Classification

16+50 to 19+50	9′	1.5′	1.5′ loose caliche, 4.0′ hard caliche, rest sand

Board Determination

$$\frac{300 \times 4.0' \times 2.33}{27} = \frac{2{,}796}{27} = 103.55 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
19+50 to 22+50	9′	2.0′	1.0′ loose caliche, 3.8′ hard caliche, rest sand

Board Determination

$$\frac{300 \times 3.8' \times 2.33}{27} = \frac{2{,}656.20}{27} = 98.38 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
22+50 to 23+50	9′	1.5′	1.0′ loose caliche, 1.0′ hard caliche, 1.0′ cemented caliche gravel, 1.5′ hard caliche, rest sand

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
23+50 to 24+50	9′	1.8′	1.5′ loose caliche, 4.2′ hard caliche, 2.3′ sand

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
24+50 to 25+50	9′	1.7′	1.4′ loose caliche, 3.4′ hard caliche, 1.7′ cemented sand and gravel, 1.5′ sand

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
25+50 to 26+50	9′	1.6′	2.3′ loose caliche, 3.6′ hard caliche, 2.4′ rust color sand

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

26+50 to 27+50	9′	1.3′	1.5′ loose caliche and soil, 3.2′ hard caliche, rest cemented sand and caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

27+50 to 28+50	9′	1.2′	1.0′ loose caliche and soil 3.2′ hard caliche, rest cemented sand and caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

28+50 to 29+00	9′	1.5′	1.3′ loose caliche and soil 3.3′ hard caliche balance hard cemented sands and caliche

Board Determination

$$\frac{50 \times 3.3 \times 2.33}{27} = \frac{384.45}{27} = 14.24 \text{ cubic yards}$$

66C Line Total 734.78 cubic yards

A bore log on centerline beyond end of construction at 30+31 shows in part:

0.0′–3.0′—fine sandy loam: easy boring; numerous basalt and caliche gravels ¼″ to 3″ in size from 1.0′–3.0′.

3.0′–4.5′—caliche: hard boring; strongly cemented.

4.5′–6.5′—fine sandy loam: moderate boring; weakly cemented; calcareous.

6.5′–10.0′—fine sandy loam: easy boring; no cementation. (16″ auger to 3.0′.)

On the basis of samples taken from 66B at station 5+00, 66C at station 29+00 and 66D at station 1+58, appellant's expert witness, Mr. Hugo Pilz, determined that the material was very competent with rebound hammer readings indicating compressive strengths of 2,400 p.s.i. to 8,000 p.s.i. with a preponderance of readings in the 4,000 p.s.i. to 6,000 p.s.i. range (letter dated Aug. 27, 1970, Appeal file, Exh. 9). Mr. Pilz was of the opinion that equivalent material should be considered solid rock (Tr. 712). He visited the site and was unable to dislodge material with a pick (Tr. 717, 718).

JB&C Rock Claim (Exh. A)

LINE 66C

Station	Average Depth	Total
0+00–5+00	5.0′	216.0 cubic yards
5+00–7+00	2.5′	43.2
10+00–13+00	3.0′	77.8
13+00–29+00	5.5′	760.3 cubic yards
Total		1,097.3 cubic yards

66D

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	8′	3.8′	0.6′ loose caliche 2.8′ rock 1.9′ moderate hard caliche

Board Determination

$$\frac{50 \times 4.7' \times 2.33}{27} = \frac{547.55}{27} = 20.28 \text{ cubic yards}$$

Bureau Classification

0+50 to 1+50	8′	4.0′	1′ broken chunks of caliche 0.5′ hard caliche 3.5′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	8′	3.0′	1.2′ caliche gravel and soil 3.5′ hard caliche

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8′	3.5′	0.7′ caliche and soil 0.5′ hard cemented caliche 3.0′ hard caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{37} = 30.20 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+00	8′	4.0′	1.2′ loose caliche of soil 3.0′ hard caliche

Board Determination

$$\frac{50 \times 3.0' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

*66D Line Total 128.14 cubic yards

*An Inspector's Report, dated September 1, 1970, describes excavation from station 3+00 to 0+10 as "hard all the way." Mr. Beard described the depth of the hard material on lines 66A, B, C, D, and E as 5.5′ to 6.5′ "almost all the way," but especially on the ends (Tr. 387).

JB&C Rock Claim

66D

Station	Average Depth	Total
0+00–4+00	4.0′	138.2

66E

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	10′	2.8′ rock, Bureau figure	14.65 cubic yards

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

The bore log at the 66 mainline at 25+95.20′ right, is approximately 140′ from the point on the mainline (station 24+54.3) corresponding with 0+00 on 66E. This bore log has been described in detail *supra* and shows caliche from 4.0′–10.0′; moderate boring 4.0′ to 5.7′ and 7.0′ to 10.0′ with the balance easy boring.

Bureau Classification

0+50 to 1+50	10′	3.5′	1.0′ chunks of caliche and soil 4.0′ hard caliche or rock .7′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	10′	2.6′	1.0′ broken caliche 0.9′ hard caliche 4.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1.398}{27} = 51.78 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	10′	3.6′	1.0′ broken caliche 5.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 6.1' \times 2.33}{27} = \frac{1{,}421.30}{27} = 52.64 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	10′	3.8′	1.0′ caliche and soil 4.0′ caliche (not hard) 1.7′ brown sand

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+40	10′	4.4′	5.7′ moderately hard caliche

Board Determination

$$\frac{90 \times 5.7' \times 2.33}{27} = \frac{1,195.29}{27} = 44.27 \text{ cubic yards}$$

Bureau Classification

5+40 to 6+40	10′	Bad caving appeared mostly topsoil, no measurements or classifications were taken.

Bureau Classification

6+40 to 7+20	10′	2.5′	1.0′ loose caliche and soil 6.5′ moderately hard caliche

Board Determination

$$\frac{80 \times 7.0' \times 2.33}{27} = \frac{1,304.80}{27} = 48.33 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+20 to 7+70	10′	2.5′	1.0′ loose caliche and soil 6.5′ moderately hard caliche

Board Determination

$$\frac{50 \times 7.0' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

7+70 to 8+50	10′	3.0′	0.8′ loose caliche 2.5′ moderately hard caliche 1.2′ hard caliche 2.0′ sands and caliche gravel 1.5′ hard caliche

Board Determination

$$\frac{80 \times 5.6' \times 2.33}{27} = \frac{1,043.84}{27} = 38.66 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	10′	3.0′	1.0′ loose caliche 2.0′ hard caliche 2.0′ moderately hard caliche 1.0′ sands and caliche gravels

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	10′	3.6′	0.6′ loose caliche 2.5′ hard caliche 2.6′ moderately hard caliche 1.6′ sands and hard sandstone

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.2'^{*} \times 2.33}{27} = \frac{1{,}444.60}{27} = 53.50 \text{ cubic yards}$$

*Includes 0.8′ hard sandstone.

Bureau Classification

10+50 to 11+60	10′	2.5′	0.8′ loose caliche 3.5′ moderately hard caliche 3.0′ hard caliche

Board Determination

$$\frac{110 \times 6.9' \times 2.33}{27} = \frac{1{,}768.47}{27} = 65.50 \text{ cubic yards}$$

Bureau Classification

11+60 to 14+00	1.0′	no classification because of extreme caving

A bore log at station 13+02 on the centerline shows in part:
0.0′–5.0′—fine sandy loam: easy boring; no cementation.
5.0′–9.5′—very fine sandy loam: easy boring; no cementation.
9.5′–10.0′—caliche gravels: easy boring; occasional basalt gravels ½″–3″. (16″ auger.)

Bureau Classification

14+00 to 14+40	10′	1.7′	2.0′ cemented caliche 3.8′ caliche gravels, gravels and sand layers

Board Determination

$$\frac{40 \times 2.0' \times 2.33}{27} = \frac{186.40}{27} = 6.90 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
14+40 to 15+50	10′	2.1′	0.9′ broken caliche 2.7′ hard caliche 4.2′ caliche gravels and sand

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{922.68}{27} = 34.17 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+75	10′	2.5′	1.0′ caliche and soil 2.0′ hard caliche in layers 1.8′ hard caliche 1.5′ mostly sands

Board Determination

$$\frac{125 \times 4.3' \times 2.33}{27} = \frac{1,252.38}{27} = 46.38 \text{ cubic yards}$$

Bureau Classification

16+75 to 17+50	10′	2.0′	0.7′ caliche gravel 2.7′ cemented caliche (moderately hard) 3.2′ sandstone

Board Determination

$$\frac{75 \times 5.9' \times 2.33}{27} = \frac{1,031.02}{27} = 38.19 \text{ cubic yards}$$

Bureau Classification

17+50 to 18+50	10′	1.9′	0.6′ broken caliche 2.7′ cemented caliche (moderately hard) 2.5′ sandstone 1.0′ rock

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.5' \times 2.33}{27} = \frac{1{,}574.50}{27} = 56.09 \text{ cubic yards}$$

Bureau Classification

18+50 to 19+50	10′	1.5′	0.5′ caliche chunks 2.7′ caliche (moderately hard) 0.8′ sandstone 1.2′ rock 1.5′ brown sand

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

19+50 to 20+50	10′	1.8′	0.5′ caliche gravel 3.0′ caliche (moderately hard) 0.8′ sand 1.6′ rock 1.5′ brown sand

Board Determination

$$\frac{100 \times 5.01' \times 2.33}{27} = \frac{1{,}167.43}{27} = 43.23 \text{ cubic yards}$$

Bureau Classification

20+50 to 21+50	10′	1.6′	1.0′ loose caliche 2.0′ moderately hard caliche 2.0′ rock 2.6′ sand (cemented)

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

21+50 to 22+75	10′	1.4′	1.5′ loose caliche and top soil 1.5′ moderately hard caliche 2.0′ hard caliche 3.2′ cemented sand and gravel

Board Determination

$$\frac{125 \times 4.25' \times 2.33}{27} = \frac{1{,}237.81}{27} = 45.84 \text{ cubic yards}$$

Bureau Classification

22+75 to 23+50	10′	1.4′	1.0′ caliche gravel and topsoil 2.0′ loose caliche 2.2′ rock 1.8′ moderately hard caliche 1.3′ saturated sand

Board Determination

$$\frac{75 \times 5.0' \times 2.33}{27} = \frac{873.75}{27} = 32.36 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	10′	1.8′	1.0′ loose caliche 1.0′ rock 2.0′ moderately hard caliche 0.5′ rock 2.9′ sand

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
24+50 to 25+50	10′	1.9′	1.0′ loose caliche 1.0′ rock 1.0′ moderately hard caliche 0.8′ rock 1.0′ moderately hard caliche and sand 2.3′ sand

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

25+50 to 26+50	10′	1.7′	1.0′ loose caliche 1.7′ rock 1.0′ moderately hard caliche 2.0′ cemented sand and caliche

Board Determination

$$\frac{100 \times 4.2'^{*} \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

*Includes 1.0′ caliche in cemented sand and caliche.

Bureau Classification

26+50 to 27+50	10′	2.0′	1.0′ rock 1.5′ moderately hard caliche 1.0′ rock 3.3′ cemented sand

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
27+50 to 28+00 (EOC)	10′	1.5′	1.0′ caliche gravel and soil 1.0′ caliche chunks 2.5′ rock 2.4′ sand and, sand and gravel layers

Board Determination

$$\frac{50 \times 3.0' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

66E Line Total=1,045.29 cubic yards

A bore log on centerline beyond EOC at station 30+32 shows in part:
0.0′–2.0′—fine sandy loam: easy boring; no cementation 0.0′–1.0; numerous basalt and caliche gravels 1.0′–2.0′.
2.0′–4.0′—caliche: hard boring, strongly cemented.
4.0′–7.0′—fine sandy loam: easy boring, no cementation, calcareous
7.0′–10.0′—fine sandy loam: easy boring; no cementation. (16″ auger to 2.0′.)

JB&C Rock Claim (Exh. A)

Station	Average Depth	Total
0+00–10+00	5.0′	432.0
10+00–11+25	3.0′	32.4
13+50–16+00	5.0′	107.8
16+00–28+00	6.0′	622.0
		1,194.20 cubic yards

66F

Bureau Classification

0+00 to 1+50	8′	3.0′	1.0′ soft caliche 2.5′ moderately hard caliche 1.6′ cemented sand

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{150 \times 3.5' \times 2.33}{27} = \frac{1,223.25}{27} = 45.30 \text{ cubic yards}$$

Station 0+00 on 66F coincides with station 28+54.3 on the 66 mainline. The bore log at station 28+54 on the 66 mainline has been described in detail *supra*. It shows hard boring caliche from 3.0′ to 5.0′.

Bureau Classification

1+50 to 2+50	8.5′	3.7′	0.8′ soft caliche 1.2′ moderately hard caliche 0.5′ rock 0.7′ caliche 1.2′ cemented sand 0.5′ rock

Board Determination

$$\frac{100 \times 2.6' \times 2.33}{27} = \frac{605.80}{27} = 22.44 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8.9′	3.7′	0.8′ soft caliche 1.3′ layers of small caliche chunks, gravel and sand 3.1′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.65 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	9.2′	3.9′	1.0′ soft caliche 1.1′ rock 1.4′ fractured caliche and sand in cracks 1.8′ loosely cemented sand

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9.6′	4.5′	1.0′ soft caliche 1.3′ moderately hard caliche w/ rock chunks 0.8′ rock 2.0′ cemented caliche and sand

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.5′	4.1′	1.0′ soft caliche 1.0′ rock 3.4′ soft caliche (wet)

Board Determination

$$\frac{100 \times 5.4' \times 2.33}{27} = \frac{1,258.20}{27} = 46.60 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	9.2′	3.0′	1.3′ soft caliche 0.5′ rock 1.5′ moderately hard caliche 1.0′ rock 1.9′ soft caliche (wet)

Board Determination

$$\frac{100 \times 6.2' \times 2.33}{27} = \frac{1,444.60}{27} = 53.50 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	9.2′	2.1′	1.0′ soil and caliche 0.8′ rock 2.5′ soft caliche w/hard chunks 1.5′ soft caliche 1.3′ sands, cemented

Board Determination

$$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1,234.90}{27} = 45.74 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
8+50 to 9+50	9.3′	2.9′	1.3′ soil and caliche 0.8′ rock 2.2 moderately hard caliche 0.6′ rock 1.5′ soft caliche (wet)

Board Determination

$$\frac{100 \times 5.75' \times 2.33}{27} = \frac{1,339.75}{27} = 49.62 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	9.2′	2.1′	1.2′ loose caliche 0.5′ rock 1.0′ moderately hard caliche 2.5′ soft caliche 2.0′ cemented sands w/caliche mined

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1{,}211.60}{27} = 44.87 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	9.3′	2.0′	1.2′ loose caliche 0.5 rock 2.0′ moderately hard caliche 0.5′ rock 0.5′ sand seams (bleeding) 2.5′ soft caliche and sands (wet)

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1{,}211.60}{27} = 44.87 \text{ cubic yards}$$

Bureau Classification

11+50 to 14+50	all native

The bore log at section 13+00 on centerline shows in part:
0.0′–10.0′—sandy loam: easy boring; no cementation; numerous caliche gravels up to 3″, 9.0′–10.0′. (16″ auger.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
14+50 to 15+50	6.9′	none	2.5′ soft caliche 1.9′* moderately hard caliche 2.5′soft caliche and sands

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

*Soil profiles show 1.0′ moderately hard caliche. However, Bureau figures do not total depth of trench by 0.9′ and this figure is added to total for MHC.

Bureau Classification

15+50 to 16+50	8.7′	1.4′	0.8′ broken caliche w/sand in caliche 2.6′ moderately hard caliche 1.7′ coarse sand 1.3′ soft caliche 0.9′ sand

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+50	9.3′	2.9′	0.7′ soft broken caliche 0.5′ caliche 2.1′* moderately hard caliche 2.1′ coarse sand

*Soil profiles show 1.3′ of MHC. However, Bureau figures do not equal depth of trench by 0.8′ and 0.8′ is added to total of MHC.

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+50 to 18+50	9.9′	2.9′	1.2′ soft caliche 1.2′ rock 1.8′ caliche, sand and caliche seams 2.8′ sand

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

18+50 to 19+50	9.5′	2.9′	0.5′ loose, small caliche chunks 2.1′ caliche 0.8′ moderately hard caliche 0.6′ caliche 2.6′ sand

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

19+50 to 20+50	9.1′	2.6′	0.5′ loose caliche 3.0′ caliche 1.7′ sand and layers of cemented sand 1.3′ sand

Board Determination

$$\frac{100 \times 3.1' \times 2.33}{27} = \frac{722.30}{27} = 26.75 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
21+50 to 22+50	8.6′	2.0′	0.7′ soil and small caliche gravel 2.4′ caliche 3.5′ sand w/a few layers of cemented sand

Board Determination

$$\frac{100 \times 2.4' \times 2.33}{27} = \frac{559.20}{27} = 20.71 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+50	8.4′	1.5′	1.0′ fractured caliche w/soil in cracks 1.2′ soft caliche 1.5′ layers of sand of cemented sand 1.0′ cemented gravel 2.2′ caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1,025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	8.2′	2.0′	0.8′ fractured caliche w/soil in cracks 0.5′ moderately hard caliche 2.2′ layers of cemented and coarse sand 1.7′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.0' \times 2.33}{27} = \frac{699}{27} = 25.89 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
24+50 to 25+50	8.3′	1.7′	0.8′ soil and caliche gravel 0.8′ fractured caliche w/soil in cracks 2.1′ moderately hard caliche 1.0′ cemented sand and gravel 1.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

25+50 to 26+50	A Common

A bore log on centerline station 26+22 shows in part:
0.0′–4.0′—sandy loam: easy boring, no cementation.
4.0′–4.8′—fine sandy loam: easy boring; no cementation.
4.8′–5.5′—caliche: moderate boring; strongly cemented.
5.5′–10.0′—sandy loam (calcareous): easy boring; no cementation.
(16″ auger to 4.8′.)

Bureau Classification

26+50 to 27+50	7.67′	2.0′	1.0′ loose caliche 1.5′ rock 3.7′ sand and caliche

Board Determination

$$\frac{100 \times 3.35' \times 2.33}{27} = \frac{780.55}{27} = 28.91 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
27+50 to 28+50	7.90′	2.0′	0.8′ loose caliche 1.5′ moderately hard caliche 1.0′ rock 3.7′ sand and caliche

Board Determination

$$\frac{100 \times 4.35' \times 2.33}{27} = \frac{1{,}013.55}{27} = 37.54 \text{ cubic yards}$$

Bureau Classification

28+50 to 29+50	7.53′	2.0′	1.8′ loose caliche 2.0′ rock 2.2′ sand and caliche

Board Determination

$$\frac{100 \times 3.1' \times 2.33}{27} = \frac{722.30}{27} = 26.75 \text{ cubic yards}$$

Bureau Classification

29+50 to 30+50	7.89′	2.0′	1.0′ loose caliche 1.0′ moderately hard caliche 1.7′ rock 3.0′ sand and caliche

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
30+50 to 31+50	7.78′	2.0′	2.0′ moderately hard caliche 2.0′ rock 2.3′ sand and caliche

Board Determination

$$\frac{100 \times 5.15' \times 2.33}{27} = \frac{1{,}199.95}{27} = 44.44 \text{ cubic yards}$$

Bureau Classification

31+50 to 32+50	7.79′	1.5′	1.0′ loose caliche 2.5′ moderately hard caliche 1.0′ rock 2.3′ sand and caliche

Board Determination

$$\frac{100 \times 4.65' \times 2.33}{27} = \frac{1{,}083.45}{27} = 40.13 \text{ cubic yards}$$

Bureau Classification

32+50 to 33+50	7.76′	1.6′	1.0′ loose caliche 2.0′ moderately hard caliche 1.5′ rock 2.2′ sand and caliche

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1{,}071.80}{27} = 39.70 \text{ cubic yards}$$

Bureau Classification

33+50 to 34+50	8.06′	2.0′	0.8′ loose caliche 2.3′ moderately hard caliche 1.5′ rock 2.0′ sand and caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1{,}118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

34+50 to 35+50	8.30′	2.0′	1.0′ loose caliche 2.5′ moderately hard caliche 1.0′ rock 2.2′ sand and caliche

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1{,}071.80}{27} = 39.70 \text{ cubic yards}$$

Bureau Classification

35+50 to 36+50	8.35′	2.0′	1.5′ loose caliche 3.0′ moderately hard caliche 1.8′ rock 2.3′ sand and caliche

Board Determination

$$\frac{100 \times 5.95' \times 2.33}{27} = \frac{1{,}386.35}{27} = 51.35 \text{ cubic yards}$$

Bureau Classification

36+50 to 37+50	7.98′	1.8′	1.5′ loose caliche 3.0′ moderately hard caliche 1.0′ rock 1.0′ sand and caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
37+50 to 38+50	8.32′	2.4′	1.0′ loose caliche 4.4′ moderately hard caliche 1.0′ sand and caliche

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1,141.70}{27} = 42.28 \text{ cubic yards}$$

Bureau Classification

38+50 to 39+20	7.81′	2.0′	1.0′ loose caliche 3.5′ moderately hard 1.3′ sand and caliche

Board Determination

$$\frac{70 \times 4.65' \times 2.33}{27} = \frac{758.41}{27} = 28.09 \text{ cubic yards}$$

A bore log on centerline at station 39+43 shows in part:

0.0′–3.0′—fine sandy loam: easy boring; numerous caliche gravels ¼″ to 2″. (16″ auger to 3.0′.)

4.0′–8.5′—caliche: hard boring; strongly cemented.

4.0′–8.5′—fine sandy loam (calcareous): moderate boring strongly cemented.

8.5′–10.0′—fine sandy loam: easy boring; no cementation.

Bureau Classification

39+20 to 39+61	9.4′	3.0′	3.5′ moderately hard caliche 1.0′ rock 2.0′ sand and caliche

Board Determination

$$\frac{41 \times 5.5' \times 2.33}{27} = \frac{525.41}{27} = 19.46 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
39+61 to 40+50	All Common		

Bureau Classification

40+50 to 41+50	8.05′	2.0′	1.5′ loose caliche 2.0′ moderately hard caliche 1.0′ rock 2.1′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.1' \times 2.33}{27} = \frac{1{,}188.30}{27} = 44.01 \text{ cubic yards}$$

Bureau Classification

41+50 to 42+50	8.04′	2.0′	1.5′ loose caliche 5.0′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.0' \times 2.33}{27} = \frac{1{,}165}{27} = 43.15 \text{ cubic yards}$$

Bureau Classification

42+50 to 43+50	7.81′	1.8′	2.0′ loose caliche 4.5′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
43+50 to 44+50	8.09′	2.2′	2.5′ loose caliche 1.3′*rock 2.9′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

*Profile shows 1.0′ of rock at station 44+00. However, total is 0.3′ short of trench depth as shown by Bureau. Accordingly, 3.0′ is added to depth of rock.

Bureau Classification

44+50 to 45+50	7.98′	2.0′	2.0′ loose caliche 1.3′ rock 3.1′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1,025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

45+50 to 46+50	8.29′	2.0′	1.0′ loose caliche 2.0′ moderately hard caliche 2.0′ rock 1.8′ sandy and caliche

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1,141.70}{27} = 42.28 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
46+50 to 47+50	7.80′	2.0′	1.0′ moderately hard caliche 1.6′ *rock 3.2′ sandy caliche

Board Determination

$$\frac{100 \times 3.7' \times 2.33}{27} = \frac{862.10}{27} = 31.93 \text{ cubic yards}$$

*Profile shows 1.5′ of rock. However, figures are 0.1′ less than depth of trench. Accordingly, 0.1′ is added to depth of rock.

Bureau Classification

47+50 to 48+50	8.09′	1.7′	1.5′ moderately hard caliche 1.5′ rock 3.9′ sandy caliche

Board Determination

$$\frac{100 \times 4.95' \times 2.33}{27} = \frac{1,153.35}{27} = 42.72\tfrac{7}{27} \text{ cubic yards}$$

Bureau Classification

48+50 to 49+50	8.09′	2.0′	1.0′ loose caliche 2.0′ moderately hard caliche 3.6′ sandy caliche

Board Determination

$$\frac{100 \times 3.8' \times 2.33}{27} = \frac{885.40}{27} = 32.79 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
49+50 to 50+00	7.71′	2.0′	1.0′ loose caliche 3.0′ moderately hard caliche 2.2′ sandy caliche

Board Determination

$$\frac{50 \times 4.1' \times 2.33}{27} = \frac{477.65}{27} = 17.69 \text{ cubic yards}$$

Line total—	1, 666.85 cubic yards
Less quantity reasonably anticipated—	319.00
	1, 347. 85 cubic yards

JB&C Rock Claim (Exh. A)

66F

Station	Average Depth	Total
0+00–12+85	7.4′	820.6 cubic yards
19+00–26+24	3.5′	62.6
26+24–36+50	2.8′	247.9
36+50–50+00	5.0′	582.5
Total		1, 713.6 cubic yards

66G

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 1+50	8.2′	2.9′	1.1′—soft caliche *1.1′—rock 3.2′—cemented caliche and sand with hard seams mixed throughout.

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{150 \times 4.8' \times 2.33}{27} = \frac{1,677.60}{27} = 62.13 \text{ cubic yards}$$

*Profile shows 1.0′ of rock at station 1+100. However, figures total 0.1′ less than depth of trench as shown by Bureau figures. Accordingly, 0.1′ is added to rock at this point.

Station 32+54.3 on 66 mainline is equivalent to 0+00 on 66 G. A bore log at 32+54 has been described in detail, *supra*. It shows caliche, hard boring, strongly cemented from 3.4′ to 5.5′.

Bureau Classification

1+50 to 2+50	8.6′	3.5′	1.0′—soft caliche 0.5′—rock 3.6′—cemented sands and caliche

Board Determination

$$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8.8′	3.8′	1.0′—soft caliche 0.8′—rock 2.0′—moderately hard caliche 1.2′—cemented sands and caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1,025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	9′	5.0′	0.5′—rock 1.0′—moderately hard caliche 1.6′—cemented sands and caliche

Board Determination

$$\frac{100 \times 2.3' \times 2.33}{27} = \frac{535.90}{27} = 19.85 \text{ cubic yards}$$

Bureau Classification

4+50 to 6+50	No measurement taken		

Bureau Classification

6+50 to 7+50	9.4′	4.5′	1.0′—loose caliche 3.9′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	9.7′	4.0′	1.0′—loose caliche *2.0′—caliche 2.7′—moderately hard caliche

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1{,}211.60}{27} = 44.87 \text{ cubic yards}$$

*There are two profiles at station 8+00. One describes this 2.0′ of caliche as soft, the other does not.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
8+50 to 9+50	9.6′	3.7′	1.1′—loose caliche *2.0′—caliche 1.0′—rock 1.8′—soft caliche

Board Determination

$$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1{,}234.90}{27} = 45.74 \text{ cubic yards}$$

*There are two soil profiles at section 9+00. One describes this 2.0′ of caliche as soft, the other does not.

Bureau Classification

9+50 to 10+50	9.8′	3.8′	1.0′—loose caliche 0.9′—moderately hard caliche 0.8′—rock *3.3′—caliche

Board Determination

$$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1{,}281.50}{27} = 47.46 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	9.9′	3.6′	1.0′—loose caliche and gravel *1.7′—rock 2.0′—moderately hard caliche 1.6′—sand

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

*There are two soil profiles at station 10+00. One describes this 3.3′ of caliche as soft, the other does not.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
11+50 to 12+50	10.2′	3.6′	1.8′—loose caliche 1.6′—rock 1.5′—moderately hard caliche 1.7′—sand

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

12+50 to 13+50	9.3′	3.7′	1.0′—loose caliche 1.6′—rock 1.4′—sand with some caliche chunks *1.6′ caliche

*There are two soil profiles at section 13+00. One describes this 1.6′ of caliche as soft, the other does not.

Board Determination

$$\frac{100 \times 3.7' \times 2.33}{27} = \frac{862.10}{27} = 31.93 \text{ cubic yards}$$

A bore log on centerline at station 13+00 shows in part:

0.0′–4.0′—fine sandy loam: easy boring, no cementation; numerous caliche gravels ¼″–3″ at 3.0′–4.0′, calcareous 3.0′–4.0′.

4.0′–6.5′—caliche: hard boring; strongly cemented.

6.5′–10.0′—fine sandy loam: easy boring, numerous caliche gravels ¼″ to 1″, calcareous. (16″ auger to 4.0′.)

Bureau Classification

13+50 to 14+50	10.2′	3.8′	0.8′—caliche gravel 1.6′—rock 4.0′—caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 5.6' \times 2.33}{27} = \frac{1,304.80}{27} = 48.32 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	9.4′	3.3′	0.4′—caliche gravel 1.7′—fractured caliche, sand in cracks 1.6′—rock 1.0′—soft caliche 1.9′—coarse sand

Board Determination

$$\frac{100 \times 3.8' \times 2.33}{27} = \frac{885.40}{27} = 32.79 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	All soil

Bureau Classification

16+50 to 17+00	6.1′	3.0′	3.1′—soft caliche

Board Determination

$$\frac{50 \times 3.1' \times 2.33}{27} = \frac{361.15}{27} = 13.38 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+00* to 17+50	6.0′	2.5′	3.5′—soft caliche

Board Determination

$$\frac{50 \times 3.5' \times 2.33}{27} = \frac{407.75}{27} = 15.10 \text{ cubic yards}$$

*Profile states that stations 17+00 and 17+25 were not taken with a pick due to danger of caving.

Bureau Classification

17+50 to 18+50	All soil		

Bureau Classification

18+50 to 18+85	8.3′	2.5′	1.0′—caliche 1.3′—cemented sand and caliche 3.5′—soft caliche

Board Determination

$$\frac{35 \times 5.15' \times 2.33}{27} = \frac{419.98}{27} = 15.55 \text{ cubic yards}$$

Bureau Classification

18+85 to 19+25	9.0′	1.2′	0.6′—caliche gravel 2.1′—cemented caliche and sand 1.5′—sand with caliche seams 3.6′—soft caliche

Board Determination

$$\frac{40 \times 6.75' \times 2.33}{27} = \frac{629.10}{27} = 23.30 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
19+70 to 20+50	10.4′	2.6′	1.0′—loose caliche 0.8′—rock 1.8′—moderately hard caliche 2.2′—hard sandstone 2.0′—caliche

Board Determination

$$\frac{80 \times 7.3' \times 2.33}{27} = \frac{1{,}360.72}{27} = 50.40 \text{ cubic yards}$$

Bureau Classification

20+50 to 21+50	10.1′	2.1′	1.0′—loose caliche with hard chunks 0.5′—rock 2.4′—caliche 4.1′—cemented sandstone

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1{,}747.50}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

21+50 to 22+50	9.8′	2.1′	1.4′—loose caliche 0.5′—rock 1.8′—moderately hard caliche 0.7′—rock 3.3′—cemented sauces

Board Determination

$$\frac{100 \times 3.7' \times 2.33}{27} = \frac{862.10}{27} = 31.93 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
22+50 to 23+50	9.7′	2.2′	0.7′—loose caliche 0.5′—rock 2.2′—caliche with rock chunks 1.3′—sandstone 2.8′—sands

Board Determination

$$\frac{100 \times 4.35' \times 2.33}{27} = \frac{1{,}013.55}{27} = 37.54 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	9.2′	2.2′	1.0′—loose caliche 1.2′—moderately hard caliche 0.7′—rock 1.5′—caliche 1.1′—sandstone 1.5′—sand

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}147.70}{27} = 42.29 \text{ cubic yards}$$

Bureau Classification

24+50 to 25+20	9.0′	1.8′	1.2′—loose caliche 1.8′—moderately hard caliche 0.7′—rock 3.9′—sands and gravels

Board Determination

$$\frac{70 \times 3.0' \times 2.33}{27} = \frac{489.30}{27} = 18.12 \text{ cubic yards}$$

Line Total 820.60 cubic yards

A bore line on centerline beyond end of construction at station 26+24 shows in part:

0.0′–4.5′—sandy loam: easy boring; no cementation; numerous caliche gravels 3.5′–4.5′.
4.5′–6.0′—caliche: moderate boring, strongly cemented.
6.0′–10.0′—sandy loam (calcareous): easy boring; no cementation (16″ auger to 4.5′).

JB&C Rock Claim (Exh. A)

66G

Station	Average Depth	Total
0+00–12+83	2.3′	257. 8 cubic yards
18+50–25+20	4.0′	231. 6
Total		489. 4 cubic yards

66H

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 1+50	8.07′	3.0′	0.5′—loose caliche 1.2′—moderately hard caliche 3.4′—soft caliche

Board Determination

$$\frac{150 \times 4.6' \times 2.33}{27} = \frac{1{,}607.70}{27} = 59.54 \text{ cubic yards}$$

Lateral 66H intersects the 66 mainline at station 35+72.5. A bore log on the mainline at 35+42, 33′ left has been described in detail, *supra*. It shows in part:

3.6′–8.3′—caliche (gravels)—moderate boring 3.6′–4.6′, easy boring 4.6′–8.3′, indurated; caliche in gravel from 3.6′–4.6′, caliche from 4.6′–8.3′.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
1+50 to 2+50	7.99′	3.0′	0.8′—moderately hard caliche 4.0′—soft caliche

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1{,}118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	7.80′	4.5′	0.8′—loose caliche 1.2′—moderately hard caliche 1.3′—cemented caliche gravel

Board Determination

$$\frac{100 \times 2.5' \times 2.33}{27} = \frac{582.50}{27} = 21.57 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	7.99′	5.0′	2.5′—moderately hard caliche 1.0′—cemented caliche gravel

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	7.88′	5.0′	2.0′—moderately hard caliche 0.9′—cemented caliche gravel

Board Determination

$$\frac{100 \times 2.9' \times 2.33}{27} = \frac{675.70}{27} = 25.03 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
5+50 to 6+50	8.12′	5.0′	*1.12—cemented caliche gravel 2.0′—soft caliche

Board Determination

$$\frac{100 \times 3.12' \times 2.33}{27} = \frac{726.96}{27} = 26.92 \text{ cubic yards}$$

*Bureau shows 1.0′ cemented caliche gravel at station 5+00. However, Bureau figures are 0.12′ less than depth of trench. Accordingly, this amount is added to cemented caliche gravel.

Bureau Classification

6+50 to 7+50	8.06′	5.0′	1.0′—cemented caliche gravel 2.6′—soft caliche

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 3.07 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	8.22′	5.0′	1.6′—cemented caliche gravel 1.6′—soft caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8. 27′	5. 0′	2.0′—cemented caliche gravel 1.3′—soft caliche

Board Determination

$$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	8.41′	4.5′	0.5′ —soft caliche 3.4′—cemented caliche gravel

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.65 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	8.41′	4.0′	*4.41′—cemented caliche gravel

Board Determination

$$\frac{100 \times 4.41' \times 2.33}{27} = \frac{1,027.53}{27} = 38.06 \text{ cubic yards}$$

*Profile shows 4.0′ cemented caliche gravel. However, Bureau figure totals 0.41′ less than depth of trench. Accordingly, this figure is added to cemented caliche gravel.

Bureau Classification

11+50 to 12+50	8.23′	4.0′	0.8′—soft caliche 3.5′—cemented caliche gravel

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1,001.90}{27} = 37.11 \text{ cubic yards}$$

Test pit No. 3 was located at station 12+00, 45′ left, shows in part:
0.0′–4.2′—fine sandy loam: easy digging, no cementation.
4.2′–10.0′—caliche: easy digging, strong cementation.
(Digging was accomplished after blasting—5 holes drilled to a depth of 10. 0′ on 3′ centers—5–8 sticks of dynamite).

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
12+50 to 13+50	8.8′	4.5′	1.8′—soft caliche 3.1′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.28 \text{ cubic yards}$$

A bore log at station 12+77, 25′ right, shows in part:

0.0′–2.5′—loamy sand: easy boring; noncemented.

2.5′–4.6′—sandy loam: easy boring; noncemented; scattered caliche gravels 1″.

4.6′–5.3′—loamy sand: easy boring; noncemented; few caliche gravels to 3″ diameter.

5.3′–13.3′—caliche: hard boring, indurated.

13.3′–15.0′—loamy sand: easy boring; noncemented (16″ auger to 5.3′.)

Bureau Classification

13+50 to 14+50	8.34′	4.5′	1.5′—soft caliche 2.8′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	8.27′	4.0′	1.0′—soft caliche 1.0′—moderately hard caliche 1.2′—rock 1.1′—moderately hard caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	8.81′	4.0′	1.0′—soft caliche 1.3′—moderately hard caliche *1.4′—rock 1.1′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1{,}118.40}{27} = 41.42 \text{ cubic yards}$$

*Profile shows 1.2′ rock at 16+00. However, Bureau figures total 0.2′ less than depth of trench as shown by Bureau figures. Accordingly, 0.2′ is added to rock.

Bureau Classification

16+50 to 17+50	4.5′		1.0′—soft caliche 1.0′—rock 1.7′—moderately hard caliche

Board Determination

$$\frac{100 \times 3.7' \times 2.33}{27} = \frac{862.10}{27} = 31.93 \text{ cubic yards}$$

Bureau Classification

17+50 to 18+50	7.98′	3.5′	1.0′—soft caliche 1.5′—rock 2.5′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
18+50 to 19+50	7.87′	3.0′	1.0′—soft caliche 1.2′—rock *2.67′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.87' \times 2.33}{27} = \frac{1{,}134.71}{27} = 42.03 \text{ cubic yards}$$

*Extrapolated figure not shown on Bureau classification or profile.

Bureau Classification

19+50 to 20+50	7.29′	3.0′	0.8′—soft caliche 1.4′—moderately hard caliche 1.0′—rock 1.2′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

20+50 to 21+50	7.56′	2.0′	2.8′—MCH 1.0′—rock 2.3′—sand and caliche

Board Determination

$$\frac{100 \times 4.95' \times 2.33}{27} = \frac{1{,}153.35}{27} = 42.72 \text{ cubic yards}$$

Bureau Classification

21+50 to 22+50	8.32′	2.0′	1.0′—soft caliche 2.0′—rock 3.8′—sand and caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 4.9 \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.28 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+50	8.20′	2.4′	0.8′—soft caliche 1.4′—rock 1.0′—MHC 3.1′—sand

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	8.08′	2.0′	1.0′—soft caliche 3.0′—moderately hard caliche 2.6′—sand

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

24+50 to 25+20	8.07′	2.8′	1.4′—soft caliche 2.8′—moderately hard caliche 2.0′—sand

Board Determination

$$\frac{70 \times 4.2' \times 2.33}{27} = \frac{685.02}{27} = 25.37 \text{ cubic yards}$$

66H Line Total=881.84

Bore log at 26+12, 88′ left, shows in part:
0.0′–3.4′—loamy sand; easy boring; noncemented
3.4′–4.3′—gravels; noncemented; moderate boring
7.0′–10.5′—loamy sand; moderate boring; noncemented; numerous caliche gravels to 1″ diameter

JB&C Rock Claim (Exh. A)

Station	Average Depth	Total
	66H	
0+00–12+76	3.4′	375 cubic yards
12+76–25+20	5.8′	622.6
Total		997.6 cubic yards
	66J	
0+00	Bureau figure	Rock and moderately hard caliche–4.1 cubic yards

Lateral 66J intersects the 66 mainline at station 39+97.5. A bore log at 39+97 on the mainline has been described in detail, *supra*, and shows caliche, hard boring, strongly cemented from 2.3′ to 4.7′.

0+50 Material was not classified. Nevertheless an Inspector's Report, dated November 6, 1970, referring to the area from station 0+25 upstream, states the backhoe was laying topsoil on right side of line and caliche material on the left.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	7.57′	4.0′	1.4′—soft caliche 0.8′—moderately hard caliche 1.4′—caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07$ cubic yards
			Bureau Classification
4+50 to 5+50	7.57′	4.0′	1.2′—soft caliche 0.4′—rock 2.0′—moderately hard caliche
			Board Determination
			$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07$ cubic yards
			Bureau Classification
5+50 to 6+50	7.64′	4.6′	0.7′—soft caliche 0.5′—rock 1.9′—caliche
			Board Determination
			$\frac{100 \times 3.1' \times 2,33}{27} = \frac{722,30}{27} = 26.75$ cubic yards
			Bureau Classification
6+50 to 7+50	7.90′	4.5′	0.6′—soft caliche 1.0′—moderately hard caliche 1.8′—caliche
			Board Determination
			$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34$ cubic yards

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	7.86′	4.4′	0.9′—soft caliche 1.1′—moderately hard caliche 1.5′—caliche gravel

Board Determination

$$\frac{100 \times 3.5^{*} \times 2.33}{27} = \frac{466}{27} = 30.20 \text{ cubic yards}$$

*Mr. Pedersen's diary indicates there was about 4 feet of caliche at station 8+00 (entry of November 9, 1970).

Bureau Classification

8+50 to 9+50	8.07′	4.3′	1.3′—soft caliche 1.2′—moderately hard caliche 1.3′—caliche

Board Determination

$$\frac{100 \times 3.8' \times 2.33}{27} = \frac{885.40}{27} = 32.79 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	7.98′	4.0′	1.2′—soft caliche 1.5′—moderately hard caliche 1.3′—caliche gravel

Board Determination

$$\frac{100 \times 2.7' \times 2.33}{27} = \frac{629.10}{27} = 23.30 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
10+50 to 11+50	8.09′	4.0′	1.8′—soft caliche *1.19′—moderately hard caliche 1.1′—soft caliche

Board Determination

$$\frac{100 \times 4.09' \times 2.33}{27} = \frac{952.97}{27} = 35.29 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+50	8.37′	3.8′	1.3′—soft caliche *0.57′—moderately hard caliche 1.0′—soft caliche 1.7′—caliche

Board Determination

$$\frac{100 \times 4.57' \times 2.33}{27} = \frac{1,064.81}{27} = 39.44 \text{ cubic yards}$$

*Profile shows 0.4′ moderately hard caliche at station 12+00. However, figures total 0.17′ less than depth of trench as shown by Bureau. Accordingly, 0.17′ is added to depth of moderately hard caliche.

12+50 to 13+50	No classification

Bore log at station 13+00 (centerline) shows in part:

0.0′–4.5′—sandy loam; easy boring; no cementation 0.0′–3.0′; numerous caliche gravels 3.0′–4.5′

4.5′–5.5′—caliche; hard boring, strongly cemented

5.5′–8.5′—sandy loam; moderate boring, numerous caliche gravels

8.5′–10.0′—sandy loam; easy boring; numerous peds. (16″ auger to 4.5′)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
13+50 to 14+50	8.13′	4.0′	1.0′ soft caliche 3.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1{,}071.80}{27} = 39.70 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	8.03′	4.0′	1.5′ soft caliche 3.0′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	7.64′	4.0′	1.0′ soft caliche 1.0′ rock 2.1′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+50	7.33′	4.0′	1.6′ soft caliche 1.2′ rock 1.0′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.8' \times 2.33}{27} = \frac{885.40}{27} = 32.79 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+50 to 18+50	77.78′	4.0′	1.0′ soft caliche 1.0′ moderately hard caliche 1.48′ rock* 0.3′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.78' \times 2.33}{27} = \frac{880.74}{27} = 32.62 \text{ cubic yards}$$

*Profile shows 1.0′ of rock at station 18+00. However, figures total 0.48′ less than depth of trench at this point as shown by Bureau. Accordingly, 0.48′ is added to depth of rock.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
19+50 to 20+50	8.44′	3.5′	1.0′ soft caliche 1.0′ rock 3.1′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.1' \times 2.33}{27} = \frac{1,188.30}{27} = 44.01 \text{ cubic yards}$$

Bureau Classification

20+50 to 21+50		3.5′	1.5′ soft caliche 2.0′ rock 2.8′ moderately hard caliche

Board Determination

$$\frac{100 \times 6.3' \times 2.33}{27} = \frac{1,467.90}{27} = 54.37 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
21+50 to 22+50	8.29′	3.5′	1.5′ soft caliche 1.0′ rock 2.8′ moderately hard caliche

Board Determination

$$\frac{100 \text{ x } 5.3' \text{ x } 2.33}{27} = \frac{1{,}234.90}{27} = 45.74 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+50	8.27′	4.0′	1.0′ soft caliche 3.0′ moderately hard caliche 1.0′ sandy caliche

Board Determination

$$\frac{100 \text{ x } 4.5' \text{ x } 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	8.09′	3.5′	1.0′ soft caliche 1.0′ rock 2.6′ moderately hard caliche 1.1′ sandy caliche

Board Determination

$$\frac{100 \text{ x } 5.2' \text{ x } 2.33}{27} = \frac{1{,}211.60}{27} = 44.87 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
24+50 to 25+20	8.57′	3.0′	2.0′ moderately hard caliche 1.0′ rock 3.1′ sandy caliche

Board Determination

$$\frac{70 \times 4.55' \times 2.33}{27} = \frac{742.10}{27} = 27.48 \text{ cubic yards}$$

Line Total—713.87 cubic yards

JB&C Rock Claim (Exh. A)

66J

Station	Average Depth	Total
0+00–12+79	5.8′	640.1 cubic yards
12+79–25+20	3.2′	342.7
Total		982.8 cubic yards

66K

0+00 to 0+50	Bureau figure, rock to moderately hard caliche, 8.6 cubic yards

Lateral 66K intersects the 66 mainline at station 44+32.8. A bore log at 44+01 (44+00) on the mainline has been described in detail *supra* and shows caliche, moderate boring, indurated from 1.0′ to 8.0′.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+50 to 1+50	8.18′	1.3′	2.0′ loose caliche 1.0′ rock 3.0′ moderately hard caliche 1.4′ sand and caliche

Board Determination

$$\frac{100 \times 6.7' \times 2.33}{27} = \frac{1{,}561.10}{27} = 57.82 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
1+50 to 2+50	8.54′	1.3′	2.0′ loose caliche 0.8′ rock 3.0′ moderately hard caliche 1.9′ sand and caliche

Board Determination

$$\frac{100 \times 6.75' \times 2.33}{27} = \frac{1{,}572.75}{27} = 58.25 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 3+50	9.04′	1.5′	2.0′ loose caliche 1.5′ rock 3.5′ moderately hard caliche 2.0′ sand and caliche

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1{,}747.50}{27} = 64.72 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	92.6′	1.2′	1.2′ loose caliche 1.2′ rock 3.4′ moderately hard caliche 2.8′ sand and caliche

Board Determination

$$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1{,}747.50}{27} = 64.72 \text{ cubic yards}$$

Bore log on centerline at station 4+23 shows in part:

0. 0′–4. 5′—fine sandy loam, easy boring, occasional basalt and caliche gravels, 2.0′–4.5′

4.5′–7.0′—fine sandy loam, moderate boring, weakly cemented

7.0′–10.0′—fine sandy loam, easy boring, occasional basalt and caliche gravels (All boring with 16″ auger)

Bureau Classification

4+50 to 5+50	9.39′	1.2′	1.0′ loose caliche 2.2′ rock 2.0′ moderately hard caliche 3.5′ sand and caliche

Board Determination

$$\frac{100 \times 6.95' \times 2.33}{27} = \frac{1{,}619.35}{27} = 59.98 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.67′	1.4′	1.5′ loose caliche 2.0′ rock 2.3′ moderately hard caliche 3.0′ sand and caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 7.3' \times 2.33}{27} = \frac{1,700.90}{27} = 63$ cubic yards
			Bureau Classification
6+50 to 7+50	9.54′	1.5′	1.0′ loose caliche 1.8′ rock 2.0′ moderately hard caliche 4.0′ sand and caliche
			Board Determination
			$\frac{100 \times 6.8' \times 2.33}{27} = \frac{1,584.40}{27} = 58.68$ cubic yards
			Bureau Classification
7+50 to 8+50	9.67′	1.2′	2.0′ loose caliche 1.0′ rock 3.0′ moderately hard caliche 3.0′ sand and caliche
			Board Determination
			$\frac{100 \times 7.5' \times 2.33}{27} = \frac{1,747.50}{27} = 64.72$ cubic yards
			Bureau Classification
8+50 to 9+50	9.43′	1.2′	1.0′ loose caliche 1.0′ rock 3.0′ moderately hard caliche 3.7′ sand and caliche
			Board Determination
			$\frac{100 \times 6.85' \times 2.33}{27} = \frac{1,596.05}{27} = 59.11$ cubic yards

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	9.06′	4.0′	1.0′ loose caliche 1.5′ rock 3.0′ sand and caliche

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	8.75′	4.0′	2.0′ moderately hard caliche 3.3′ sand and caliche

Board Determination

$$\frac{100 \times 3.55' \times 2.33}{27} = \frac{850.45}{27} = 31.49 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+50	All common

Bore log on centerline at 12+80 shows in part:

0′–2.0′—fine sandy loam (spoil bank): easy boring, occasional basalt and caliche gravels

2.0′–6.0′—fine sandy loam: easy boring, occasional basalt and caliche gravels

6.0′–7.5′—caliche: hard boring, strongly cemented

7.5′–10.0′—sandy loam: easy boring (16″ auger to 6.0′)

Bureau Classification

13+50 to 14+50	9.2′	4.0′	0.7′ soil and caliche 0.3′ rock 1.4′ moderately hard caliche 2.8′ brown sand

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 2.05' \times 2.33}{27} = \frac{477.65}{27} = 17.69 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	9.2′	5.6′	0.5′ gravel 1.0′ moderately hard caliche 2.0′ brown sand

Board Determination

$$\frac{100 \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	9.4′	4.3′	0.5′ gravel 1.3′ moderately hard caliche 1.6′ soft caliche 1.7′ brown sandstone

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1{,}071.80}{27} = 39.70 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+50	9.2′	4.5′	1.5′ gravel 3.2′ soft caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+50 to 18+50	9.6′	2.6′	1.2′ caliche gravel and soil 3.0′ light grayish sand and caliche layers

Board Determination

$$\frac{100 \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

18+50 to 18+90	10.4′	1.7′	3.0′ moderately hard caliche with rock chunks 5.7′ sandy clayish loam

Board Determination

$$\frac{40 \times 3.0' \times 2.33}{27} = \frac{279.60}{27} = 10.35 \text{ cubic yards}$$

Bore log at 18+86, 80′ right, shows in part:

0′–1.0′—sandy loam (spoil bank): easy boring, occasional basalt and caliche gravels

1.0′–6.5′—sandy loam: easy boring 1.0′–2.0′; moderate boring 2.0′–6.5′; occasional basalt and caliche gravels 1.0′–2.0′; occasional caliche gravels 2.0′–6.5′

6.5′–10.0′—very fine sandy loam: easy boring, no cementation (16″ auger to 2.0′)

Bureau Classification

18+90 to 19+50	8.4′	1.8′	1.5′ loose caliche 0.5′ rock 1.5′ moderately hard caliche 3.0′ sandy loam and clayish

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{60 \times 3.5' \times 2.33}{27} = \frac{489.30}{27} = 18.12$ cubic yards
			Bureau Classification
19+50 to 20+50	8.8′	1.1′	1.0′ loose caliche 2.0′ moderately hard caliche with rock chunks 1.0′ sands and caliche gravels 3.7′ sandy loam and clayish mixed
			Board Determination
			$\frac{100 \times 3.0' \times 2.33}{27} = \frac{699}{27} = 25.89$ cubic yards
			Bureau Classification
20+50 to 21+50	9.0′	1.4′	1.3′ loose caliche and soil 0.5′ rock 1.8′ solid moderately hard caliche 0.5′ rock 1.0′ cemented sands and caliche 2.5′ sandy loam and clay mixed
			Board Determination
			$\frac{100 \times 3.95' \times 2.33}{27} = \frac{920.35}{27} = 34.09$ cubic yards
			Bureau Classification
21+50 to 22+50	9.3′	1.4′	3.5′ moderately hard caliche, rock chunks mixed 1.0′ rock 1.4′ cemented sands and gravels 2.0′ sands, cemented

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.1' \times 2.33}{27} = \frac{1{,}421.3}{27} = 52.64 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+40	9.2′	1.5′	1.0′ soil and caliche 1.2′ moderately hard caliche 2.3′ rock 1.2′ hard sands

Board Determination

$$\frac{90 \times 4.0' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bore log at 23+13, 15′ right, shows in part:

0′–1.5′—fine sandy loam: easy boring; numerous caliche gravels; hard boring at 1.5′

1.5′–4.5′—caliche: hard boring, strongly cemented

4.5′–7.0′—sandy loam: easy boring; no cementation; calcareous

7.0′–10.0′—loamy sand: easy boring; numerous basalt and caliche gravels (16″ auger to 1.5′)

Bureau Classification

23+40 to 24+50	9.6′	1.3′	1.0′ soil and caliche 1.0′ moderately hard caliche 2.3′ moderately hard caliche with rock seams 2.3′ sands and fine gravels 1.8′ cemented sands and gravels

Board Determination

$$\frac{110 \times 3.8' \times 2.33}{27} = \frac{973.74}{27} = 36.07 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
24+50 to 25+50	10.0′	2.0′	1.8′ loose caliche 0.8′ soil 2.0′ cemented layers of moderately hard caliche 4.2′ sands with mixed hard layers of fine caliche

Board Determination

$$\frac{100 \times 5.9' \times 2.33}{27} = \frac{1,374.70}{27} = 50.91 \text{ cubic yards}$$

Bureau Classification

25+50 to 26+50	10′	2.0′	3.0′ loose caliche and gravel 2.0′ cemented sands and gravels 0.5′ rock 0.5′ cemented gravels 2.0′ sands and gravels mixed

Board Determination

$$\frac{100 \times 0.5' \times 2.33}{27} = \frac{116.50}{27} = 4.31 \text{ cubic yards}$$

Bureau Classification

26+50 to 27+50	9.9′	2.0′	1.0′ —soft loose caliche 3.5′—sands and thin layers moderately hard caliche 2.9′—clayish and sandy loam

Board Determination

$$\frac{100 \times 1.75' \times 2.33}{27} = \frac{407.75}{27} = 15.10 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
27+50 to 28+50	10.0′	2.2′	1.7′—broken caliche 1.0′—rock 1.1′—moderately hard caliche 4.0′—sand

Board Determination

$$\frac{100 \times 3.8' \times 2.33}{27} = \frac{885.40}{27} = 32.79 \text{ cubic yards}$$

Bureau Classification

28+50 to 29+50	10.2′	2.8′	1.0′—caliche chunks 1.3′—rock 5.1′—sand with clayish seams

Board Determination

$$\frac{100 \times 2.3' \times 2.33}{27} = \frac{535.90}{27} = 19.85 \text{ cubic yards}$$

Bureau Classification

29+50 to 30+50	9.1′	2.8′	0.8′—caliche chunks 0.6′—rock 1.1′—soft caliche 1.3′—sand 2.5′—clay

Board Determination

$$\frac{100 \times 2.5' \times 2.33}{27} = \frac{582.50}{27} = 21.57 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
30+50 to 31+50	8.5′	3.6′	1.5′—caliche, soil and gravel mixed 2.3′—sandstone 1.1′—clay

Board Determination

$$\frac{100 \times 3.05' \times 2.33}{27} = \frac{710.65}{27} = 26.32 \text{ cubic yards}$$

Bureau Classification

31+50 to 32+50	8.8′	3.6′	1.0′—gravel and caliche 2.3′—moderately hard caliche 1.9′—sand

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

32+50 to 33+50	9.3′	4.0′	2.3′—mostly soil with some caliche 1.0′—rock 2.0′—coarse sand

Board Determination

$$\frac{100 \times 2.15' \times 2.33}{27} = \frac{500.95}{27} = 18.55 \text{ cubic yards}$$

**Bureau Classification*

33+50 to 34+50	9.8′	6.3′	3.5′—caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20$ cubic yards
			**Bureau Classification*
34+50 to 35+50	9.5′	6.0′	3.5′—caliche
			Board Determination
			$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20$ cubic yards
			**Bureau Classification*
35+50 to 36+50	9.2′	6.1′	1.5′—caliche 1.6′—sandstone
			Board Determination
			$\frac{100 \times 3.1' \times 2.33}{27} = \frac{722.30}{27} = 26.75$ cubic yards
			**Bureau Classification*
36+50 to 37+50	8.8′	5.5′	0.5′—caliche 2.8′—cemented gravel
			Board Determination
			$\frac{100 \times 1.9' \times 2.33}{27} = \frac{442.70}{27} = 16.40$ cubic yards
			**Bureau Classification*
37+50 to 38+33.9	8.1′	4.4′	1.5′—soil and caliche gravel 2.2′—caliche

*A note on profiles states, that from 34+00 to 38+33.9, classifications below top soil are estimates.

Board Determination

$$\frac{83.9 \times 2.2' \times 2.33}{27} = \frac{430.07}{27} = 15.93 \text{ cubic yards}$$

Line Total	1,269.16 cubic yards
Less: Quantity reasonably anticipated	331.00
	938.16 cubic yards

A bore log on centerline at station 38+33.9 shows in part:

0.0′–1.0′—very fine sandy loam: easy boring; no cementation

1.0′–5.5′—fine sandy loam; easy boring; occasional basalt and caliche gravels ¼″–3″.

5.5′–7.5′—sandy loam (calcareous): moderate boring; strongly cemented

7.5′–10.0′—fine sandy loam: easy boring; no cementation. (16″ auger to 5.5′.)

JB&C Rock Claim (Exh. A)

66K

Section	Average	Depth Total
0+00–12+00	7.3′	756.0 cubic yards
12+00–14+30	3.6′	71.5
14+30–18+91	normal	
18+91–20+25	3.5′	41.1
20+25–22+25	7.5′	129.4
22+25–25+00	3.7′	88.0
25+00–38+00	4.8′	538.5
Total		1, 624.5 cubic yards

66K–2

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	3.7′		1.0′—loose caliche 1.0′—rock 1.0′—moderately hard caliche 0.5′—rock 1.3′—hard cemented [sand]

Board Determination

$$\frac{50 \times 3.5' \times 2.33}{27} = \frac{407.75}{27} = 15.10 \text{ cubic yards}$$

Line 66 K–2 extends northwest from station 13+85.9 on 66K. The bore log on centerline of 66K at station 12+80 shows caliche, hard boring, strongly cemented from 6.0′ to 7.5′.

Bureau Classification

0+50 to 1+50	8.2′	2.2′	2.8′—mass sands, seams of small gravels 0.8′—rock 2.4′—cemented sands and gravels moderately hard

Board Determination

$$\frac{100 \times 0.8' \times 2.33}{27} = \frac{186.40}{27} = 6.90 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	7.9′	4.0′	1.5′—rock 1.0′—MHC 1.4′—brown sand

Board Determination

$$\frac{100 \times 2.5' \times 2.33}{27} = \frac{582.50}{27} = 21.57 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 3+20	8.4′	3.0′	0.5′—fine gravel 2.0′—sand and small chunks caliche 2.9′—sand with large chunks caliche

Board Determination

$$\frac{70 \times 1.45' \times 2.33}{27} = \frac{236.49}{27} = 8.76 \text{ cubic yards}$$

66K-2 Line Total 52.33 cubic yards

JB&C Rock Claim (Exh. A)

66-K2

Station	Average Depth	Total
0+00—3+20	4.0′	110.1 cubic yards

66K-3

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 1+50	9.5′	1.7′	0.7′—soil and small caliche chunks 2.0′—moderately hard caliche 5.0′—sand and seams of sandstone

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{150 \times 4.5' \times 2.33}{27} = \frac{1,572.75}{27} = 58.25 \text{ cubic yards}$$

Station 0+00 on 66K–3 is equivalent to station 18+91.6 on 66K. The bore log on 66K at station 18+86, 80' right, has been described in detail, *supra*. The only caliche shown is occasional basalt and caliche gravels and occasional caliche gravels.

Bureau Classification

1+50 to 2+50	9.0'	3.2'	1.4'—gravel 1.6'—soft caliche 2.8'—sand and seams of sandstone

Board Determination

$$\frac{100 \times 3.0' \times 2.33}{27} = \frac{699}{27} = 25.89 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8.6'	2.9'	1.0'—gravel 2.0'—moderately hard caliche 2.7'—brown sand

Board Determination

$$\frac{100 \times 2.0' \times 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	8.5'	2.5'	1.7'—soil and some gravel 0.1'—rock 0.8'—moderately hard caliche 1.0'—soft caliche 2.4'—brown sand

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 1.9' \times 2.33}{27} = \frac{442.70}{27} = 16.40 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8.9′	4.7′	0.9′—rock 1.7′—moderately hard caliche with small volcanic type rocks about 1″ diameter 1.6′—soft caliche

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.0′	3.6′	2.0′—soil-sand 1.5′—moderately hard caliche 1.9′—brown sand

Board Determination

$$\frac{100 \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

6+50 to 7+50	8.7′	2.8′	2.5′—soil and gravel 1.0′—caliche chunks 1.0′—rock 1.4′—moderately hard caliche

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	8.7′	2.4′	3.5′—mass sands with layers of small gravels 0.5′—rock 1.5′—sands and cemented caliche 0.8′—moderately hard cemented caliche gravels

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
8+50 to 9+50	8.6′	2.0′	5.6′—mass sands and layers of small gravels 1.0′—could be some type of hard pan (trench unsafe to enter)

Board Determination

$$\frac{100 \times 1.0' \times 2.33}{27} = \frac{233}{27} = 8.63 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	8.5′	3.5′	4.5′—fine sands mass, small gravel seams appearing 0.5′—layer hard substance

Board Determination

$$\frac{100 \times 0.5' \times 2.33}{27} = \frac{116.50}{27} = 4.31 \text{ cubic yards}$$

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

Bore log at station 10+50, 100′ left, shows in part:
0.0′–4.6′—sandy loam: easy boring, no cementation
4.6′–11.0′—loamy sand: easy boring, no cementation; scattered caliche and basalt gravel, ½″ to 2″. (16″ auger.)

Bureau Classification

10+50 to 11+00	8.7′	2.1′	6.6′—mass sands and fine gravels mixed

Line Total—233.42 cubic yards

JB&C Rock Claim (Exh. A)

66K–3

Station	Average Depth	Total
5+25–6+00	2.5′	16.2 cubic yards
6+00–11+00	5.0′	215.7
Total		231.9 cubic yards

66L

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	Bureau figure—5.6 cubic yards moderately hard caliche		

Station 0+00 on 66L coincides with 44+32.8 on the 66 mainline. The bore log at station 44+01 on the 66 mainline has been described in detail. *supra*, and shows caliche, moderate boring, indurated from 1.0′ to 8.0′.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+50 to 1+50	8.0′	1.8′	1.0′—soil and caliche gravel 1.5′—moderately hard caliche 1.7′—soft caliche 1.1′—moderately hard caliche 0.9′—tan sand

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	8.0′	2.0′	1.2′—soil and caliche gravel 1.0′—small cemented caliche chunks. 0.6′—rock 1.5′—caliche 1.7′—brown sand

Board Determination

$$\frac{100 \times 3.1' \times 2.33}{27} = \frac{722.30}{27} = 26.75 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	7.8′	2.0′	1.1′—soil and caliche gravel 1.6′—moderately hard caliche 1.5′—caliche 1.6′—brown sand

Board Determination

$$\frac{100 \times 3.1' \times 2.33}{27} = \frac{722.30}{27} = 26.75 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	7.9′	2.5′	0.6′—caliche gravel 3.2′—moderately hard caliche 1.6′—brown sand

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8.1′	2.9′	0.6′—caliche gravel 1.9′—cemented caliche chunks 0.8′—rock 1.5′—caliche chunks and soil 0.4′—brown sand

Board Determination

$$\frac{100 \times 3.45' \times 2.33}{27} = \frac{803.85}{27} = 29.77 \text{ cubic yards}$$

Bureau Classification

5+50 to 7+50	No classification

Bureau Classification

7+50 to 8+50	8.15′	3.8′	1.0′—loose caliche 0.3′—rock 1.2′—moderately hard caliche 1.9′—caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1,025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
8+50 to 9+50	8.42′	4.0′	0.5′—sand 1.6′—soft caliche 0.3′—rock 2.0′—moderately hard caliche

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.65 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	8.44′	4.7′	1.3′—soft caliche 0.4′—rock 2.4′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
10+50 to 11+50	8.82′	4.8′	1.3′—soft caliche 0.4′—rock 0.3′—sand and gravel 0.4′—rock 1.7′—caliche

Board Determination

$$\frac{100 \times 3.8' \times 2.33}{27} = \frac{885.40}{27} = 32.79 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
11+50 to 12+50	8.97′	4.5′	0.6′—soft caliche 1.2′—cemented caliche 1.1′—rock 1.6′—cemented caliche gravel

Board Determination

$$\frac{100 \times 2.9' \times 2.33}{27} = \frac{675.70}{27} = 25.03 \text{ cubic yards}$$

Bureau Classification

12+50 to 12+84	10.82′	4.5′	0.8′—loose caliche 1.0′—rock 2.5′—moderately hard caliche 2.0′—soft caliche

Board Determination

$$\frac{34 \times 6.3' \times 2.33}{27} = \frac{499.09}{27} = 18.48 \text{ cubic yards}$$

A bore log at 12+80, 20′ right, shows in part:
0.0′–2.1′—loamy sand, easy boring, noncemented
2.1′–3.3′—sandy loam, easy boring, noncemented
3.3′–5.6′—loamy sand, easy boring, noncemented, few caliche gravels to 2″ diameter, 4.3′–5.6′
5.6′–10.0′—caliche, moderate boring 5.6′–7.0′, hard boring 7.0′–8.3′, moderate boring 8.3′–10.0′ (16″ auger to 5.0′)

Bureau Classification

12+84 to 13+50	9.34′	4.5′	1.3′—loose caliche 2.0′—rock 2.0′—moderately hard caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{66 \times 5.3' \times 2.33}{27} = \frac{815.03}{27} = 30.19 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	8. 08′	4. 0′	1.2′—loose caliche 1.5′—rock 1.9′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1,071.80}{27} = 39.70 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	7. 82′	4. 0′	0.5′—loose caliche 1.5′—rock 2.3′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1,001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	7. 93′	4. 0′	1.8′—rock 2.6′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{792.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
16+50 to 17+50	7.8′	5.0′	1.3′—loose caliche 1.0′—rock 1.0′—moderately hard caliche

Board Determination

$$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

17+50 to 18+50	7.73′	4.0′	1.5′—loose caliche 1.0′—rock 1.7′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

18+50 to 19+50	7.92′	4.0′	2.5′—soft caliche 0.8′—rock 1.1′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

19+50 to 20+50	7.97′	4.0′	1.5′—soft caliche 2.8′—moderately hard caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11$ cubic yards
			Bureau Classification
20+50 to 21+50	7.84′	4.5′	1.0′—soft caliche 2.8′—moderately hard caliche
			Board Determination
			$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48$ cubic yards
			Bureau Classification
21+50 to 22+50	7.99′	4.5′	1.2′—soft caliche 1.0′—rock 1.8′—soft caliche
			Board Determination
			$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52$ cubic yards
			Bureau Classification
22+50 to 23+50	7.55′	5.0′	3.1′—sand and gravels
			Bureau Classification
23+50 to 24+50	7.67′	5.0′	3.2′—sandy loam
			Bureau Classification
24+50 to 25+20 (EOC)	7.67′	5.0′	3.2′—moderately hard caliche

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

Board Determination

$$\frac{70 \times 3.2' \times 2.33}{27} = \frac{521.92}{27} = 19.33 \text{ cubic yards}$$

Line Total—698.39 cubic yards*

*A sketch included in the profiles depicting typical trench excavation shows 3.0′ to 4.0′ top soil and 4.0′ to 4.3′ caliche.

0.0′–3.5′—fine sandy loam: easy boring; no cementation
3.5′–5.0′—gravels (caliche): moderate boring; gravels ¼″ to 8″
5.0′–8.0′—fine sandy loam (calcareous): moderate boring; weakly cemented
8.0′–10.0′—fine sandy loam: easy boring; no cementation (16″ auger to 3.5′)

JB&C Rock Claim (Exh. A)

66L

Station	Average Depth	Total	
0+00–12+79	5.2′	573.9	cubic yards
12+79–25+20	5.0′	535.5	
Total		1,109.4	cubic yards

66M

Bureau Classification

0+00 to 0+50	Bureau figure—moderately hard caliche and rock 55.9 cubic yards

Bureau Classification

0+50 to 1+50	8.45′	1.0′	0.8′—loose caliche 1.0′—rock 4.0′—moderately hard caliche 3.2′—sand and caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

Bureau Classification

$$\frac{100 \times 6.6' \times 2.33}{27} = \frac{1{,}537.80}{27} = 56.95 \text{ cubic yards}$$

1+50 to 2+50	8.55′	1.0′	0.5′—loose caliche 1.5′—rock 2.0′—moderately hard 4.0′—sand and caliche

Board Determination

$$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1{,}281.50}{27} = 47.46 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8.51′	1.0′	0.8′—loose caliche 2.5′—rock 2.0′—moderately hard caliche 2.7′—sand and caliche

Board Determination

$$\frac{100 \times 5.85' \times 2.33}{27} = \frac{1{,}363.05}{27} = 50.48 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	8.26′	1.0′	1.0′—loose caliche 1.8′—rock 2.0′—moderately hard caliche 2.8′—sand and caliche

Board Determination

$$\frac{100 \times 5.8' \times 2.33}{27} = \frac{1{,}351.40}{27} = 50.05 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+00	8.26′	1.0′	1.0′—loose caliche 1.8′—rock 2.0′—moderately hard 3.0′—sand and caliche

Board Determination

$$\frac{50 \times 5.3' \times 2.33}{27} = \frac{1{,}617.45}{27} = 22.87 \text{ cubic yards}$$

66M Line Total—227.81 cubic yards

JB&C Rock Claim (Exh. A)

66M

Station	Average Depth	Total
0+00–5+00	6.9′	569.2 cubic yards

66N

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	Bureau figure—moderately hard caliche and rock—23.5 cubic yards		

Bureau Classification

0+50 to 1+50	8.4′	1.2′	1.5′—loose caliche 0.5′—rock 5.2′—caliche (medium)

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 6.45' \times 2.33}{27} = \frac{1,328.10}{27} = 55.66$ cubic yards
			Bureau Classification
1+50 to 2+50	8.3′	1.3′	1.5′—caliche chunks and soil 1.0′—moderately hard caliche 2.4′—soft caliche 2.1′—sands (wet)
			Board Determination
			$\frac{100 \times 4.15' \times 2.33}{27} = \frac{966.95}{27} = 35.81$ cubic yards
			Bureau Classification
2+50 to 3+50	8.5′	1.6′	1.5′—caliche and soil 0.5′—rock 1.8′—moderately hard caliche 2.1′—soft caliche 1.0′—sands
			Board Determination
			$\frac{100 \times 4.15' \times 2.33}{27} = \frac{966.95}{27} = 35.81$ cubic yards
			Bureau Classification
3+50 to 4+50	8.6′	1.6′	0.7′—caliche and soil 0.4′—rock 1.51′—moderately hard rock 3.1′—soft caliche and sands layer 1.5′—caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1{,}234.90}{27} = 45.73 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8.5′	2.4′	0.8′—caliche and soil 0.51′—rock 1.4′—moderately hard caliche 0.6′—rock 2.0′—soft caliche 0.8′—sands (bleeding)

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.28 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	8.9′	2.9′	1.7′—moderately hard caliche 0.6′—rock 3.7′—caliche with hard chunks

Board Determination

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1{,}398}{27} = 51.78 \text{ cubic yards}$$

Bureau Classification

6+50 to 7+50	8.9′	3.0′	1.0′—loose caliche 2.4′—caliche with rock chunks 1.2′—moderately hard caliche 1.3′—caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 5.9' \times 2.33}{27} = \frac{1,374.70}{27} = 50.91$ cubic yards

Bureau Classification

7+50 to 8+50	8.8′	3.6′	1.1′—loose caliche 0.5′—rock 0.8′—hard caliche 0.5′—rock 2.3′—caliche with hard seams

Board Determination

$$\frac{100 \times 4.65' \times 2.33}{27} = \frac{1,083.45}{27} = 40.13 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8.8′	4.0′	1.1′—loose caliche 3.7′—caliche mass (no section taken)

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1,118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	8.8′	1.2′	1.2′—loose caliche 3.3′—caliche mass (no section taken)

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
10+50 to 11+50	8.8′	5.1′	1.2′—loose caliche 2.5′—caliche mass (no section taken)

Board Determination

$$\frac{100 \times 3.7' \times 2.33}{27} = \frac{862.10}{27} = 31.93 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
11+50 to 12+50	8.25′	3.3′	1.5′—loose caliche 1.0′—rock 3.0′—moderately hard rock

Board Determination

$$\frac{100 \times 4.75' \times 2.33}{27} = \frac{1{,}106.75}{27} = 40.99 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
12+50 to 13+50	8.64′	5.0′	1.0′—rock 2.64′—moderately hard rock

Board Determination

$$\frac{100 \times 3.64' \times 2.33}{27} = \frac{848.12}{27} = 31.41 \text{ cubic yards}$$

Bore log on centerline at 13+00 shows in part:

0.00′–1.5′—very fine sandy loam, easy boring, no cementation
1.5′–6.0′—fine sandy loam, easy boring, no cementation, occasional caliche gravels
6.0′–7.5′—caliche, hard boring, strongly cemented
7.5′–10.0′—sandy loam, moderate boring, weakly cemented (16″ auger to 6.0′)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
13+50 to 14+50	8.3′	4.0′	1.0′—loose caliche 1.8′—rock 2.1′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	8.42′	4.0′	1.0′—loose caliche 1.8′—rock 2.1′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	8.19′	5.0′	0.8′—loose caliche 1.3′—rock 1.6′—moderately hard caliche

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+50	8.41′	5.0′	1.2′—loose caliche 2.0′—rock 0.9′—moderately hard caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

17+50 to 18+50	8.26′	5.0′	1.0′—loose caliche 1.0′—rock 1.8′—moderately hard caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

18+50 to 19+50	7.67′	4.5′	2.5′—loose caliche 1.0′—rock 2.0′—moderately hard rock

Board Determination

$$\frac{100 \times 4.25' \times 2.33}{27} = \frac{990.25}{27} = 36.68 \text{ cubic yards}$$

Bureau Classification

19+50 to 20+50	8.45′	4.5′	2.0′—loose caliche 1.0′—rock 1.4′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
20+50 to 21+50	8.36′	4.5′	2.0′—loose caliche 1.0′—rock 1.4′—moderately hard caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

21+50 to 22+50	8.23′	5.0′	0.8′—loose caliche 2.0′—sandy caliche 0.9′—rock

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+50	7.72′	5.0′	2.7′—sandy caliche 0. 5′—moderately hard caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	7.08′	4.0′	1.0′—loose caliche 2.6′—sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 2.6' \times 2.33}{27} = \frac{605.80}{27} = 22.44$ cubic yards
			Bureau Classification
24+50 to 25+50 (EOC)	8.0′	4.0′	1.3′—sandy caliche 0.7′—rock 2.5′—moderately hard caliche
			Board Determination
			$\frac{75 \times 4.5' \times 2.33}{27} = \frac{786.37}{27} = 29.12$ cubic yards
			Line Total—926.91 cubic yards

Bore log on centerline at station 26+22 shows in part:
0.0′–5.0′—fine sandy loam: easy boring; no cementation; occasional caliche gravels
5.0′–7.5′—caliche: hard boring; strongly cemented
7.5′–10.0′—fine sandy (calcareous): moderate boring; occasional caliche gravels (16″ auger to 5.0′)

JB&C Rock Claim (Exh. A)

66N

Station	Average Depth	Total
0+00–12+79	5.2′	246. 4 cubic yards
12+79–25+25	4.8′	516. 1
Total		762. 5 cubic yards

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
		66P	
0+00 to 5+50			Bureau figure—MHC—18.8 cubic yards

Station 0+00 of lateral 66P coincides with station 52+51.4 on the 66 mainline. A bore log on centerline at station 55+10 has been described in detail *supra* and shows, *inter alia*, caliche, hard boring strongly cemented from 3.5′ to 6.0′.

Bureau Classification

0+50 to 1+50	9.3′	0.7′	1.5′ fractured caliche 1.0′ soft caliche 1.0′ fractured caliche w/sand in fractures. 0.6′ cemented sand 2.2′ brown sand 0.6′ seams of caliche 1.7′ brown sand

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	9.5′	1.2′	1.1′ broken caliche 1.5′ caliche and cemented sand 0.8′ rock 1.8′ moderately hard caliche 2.2′ light brown sand 0.9′ brown sand

Board Determination

$$\frac{100 \times 4.45' \times 2.33}{27} = \frac{1{,}036.85}{27} = 38.40 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 3+50	9.5′	1.1′	0.8′ broken caliche and soil 3.3′ fractured caliche w/sand in cracks 1.0′ rock 3.3′ light brown, fine sand

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9.3′	1.3′	1.5′ caliche chunks & soil 1.0′ rock 1.8′ broken caliche & sand 1.0′ rock 0.6′ broken caliche & sand 2.1′ light brown fine sand

Board Determination

$$\frac{100 \times 3.95' \times 2.33}{27} = \frac{920.35}{27} = 34.09 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9.3′	1.5′	0.7′ soil & caliche gravel 0.6′ layers of caliche & sand 0.8′ rock 1.4′ fractured caliche w/sand in fractures 0.9′ rock 1.1′ fractured caliche 2.3′ moderately hard caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 6.8' \times 2.33}{27} = \frac{1,584.40}{27} = 58.68$ cubic yards
			Bureau Classification
5+50 to 6+50	9.3'	1.5'	1. 4' soil, caliche gravel and caliche 4.6' MHC 1.8' brown sand
			Board Determination
			$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1,234.90}{27} = 45.74$ cubic yards
			Bureau Classification
6+50 to 7+50	9.3'	2.2'	0.8' soil w/some caliche gravel 1.9' MHC 1.6' soft caliche 1.5' fractured caliche w/sand in fractures 1.3' MHC
			Board Determination
			$\frac{100 \times 6.3' \times 2.33}{27} = \frac{1,467.90}{27} = 54.37$ cubic yards
			Bureau Classification
7+50 to 8+50	9.2'	2.6'	1.4' soil caliche gravel 1.9' MHC 3.3' layers of caliche & sand
			Board Determination
			$\frac{100 \times 3.55' \times 2.33}{27} = \frac{827.15}{27} = 30.64$ cubic yards

*Bureau Classification**

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	9.1′	4.0′	0.4′ caliche gravel & soil 1.2′ moderately hard caliche 1.5′ rock 2.0′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

*Bureau Classification**

10+50 to 11+50	8.8′	4.3′	4.5′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

A bore log at 11+23, 40′ left, shows in part:
0.0′–5.3′—fine sandy loam, easy boring, no cementation, scattered caliche gravels.
5.3′–10.0′—caliche; hard boring
5.3′–8.3′, 8.3′–10.0′—moderate boring, indurated. (16″ auger to 5.3′)

*Bureau Classification**

11+50 to 12+50	8.8′	4.7′	4.1′ moderately hard caliche (estimated) last 1.0′ could be sand

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

*Bureau Classification**

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
12+50 to 13+50	9.2′	4.9′	1.5′–2.0′ soft caliche 2.8′–3.4′ moderately hard caliche (estimate)

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.29 \text{ cubic yards}$$

*Bureau Classification**

13+50 to 14+50	9.1′	5.5′	3.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

*Bureau Classification**

14+50 to 15+50	9.4′	5.4′	1.5′ moderately hard caliche 2.5′ caliche

*Note states that at stations 10+00 thru 15+00, sections were taken w/rod with prong on end as trench was unsafe to enter.

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.51 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	8.9′	3.9′	1.3′ loose caliche 4.1′ caliche mass

Board Determination

$$\frac{100 \times 4.75' \times 2.33}{27} = \frac{1{,}106.75}{27} = 40.99 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
16+50 to 17+50	9.0′	3.6′	1.0′ loose caliche 4.4′ caliche mass

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.29 \text{ cubic yards}$$

Bureau Classification

17+50 to 18+50	9.1′	4.0′	1.4′ loose caliche 3.7′ caliche mass

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

18+50 to 19+50	9.0′	4.2′	1.5′ loose caliche 3.3′ caliche mass

Board Determination

$$\frac{100 \times 4.05' \times 2.33}{27} = \frac{943.65}{27} = 34.95 \text{ cubic yards}$$

Bureau Classification

19+50 to 20+50	8.8′	4.5′	1.2′ loose caliche 3.1′ caliche mass

Board Determination

$$\frac{100 \times 3.7' \times 2.33}{27} = \frac{862.10}{27} = 31.93 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
20+50 to 21+50	8.8′	3.6′	1.5′ soil w/some caliche 3.7′ layers of soft & moderately hard caliche

Board Determination

$$\frac{100 \times 4.45' \times 2.33}{27} = \frac{1{,}036.85}{27} = 38.40 \text{ cubic yards}$$

Bureau Classification

21+50 to 22+50	8.3′	4.4′	3.9′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+50	8.3′	3.9′	0.8′ soft caliche 1.7′ moderately hard caliche 1.0′ hard caliche 0.9′ moderately hard caliche (above are estimates)

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

23+50 to 24+50	7.8′	2.0′	5.8′ fine, tan colored sand (estimate, trench not safe to enter)

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

Bore log at station 24+59, 53′ left, shows in part:

0.0′–5.6′—loamy sand; easy boring, noncemented, numerous caliche gravels 3′′ diameter.

5.6′–7.5′—sand: easy boring; noncemented, numerous caliche gravels 1½′′ diameter.

8.9′–10.0′—loamy sand: easy boring, strongly cemented (16′′ auger to 7.0′.)

Bureau Classification

24+50 to 25+50	7. 5′	2. 9′	1.0′ caliche gravel & soil 3.6′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

25+50 to 26+50	8.2′	2.3′	0.6′ soil & small caliche gravel 1.0′ moderately hard caliche 1.0′ layers of sandstone & basalt 2.8′ rock (basalt)

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1{,}118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

26+50 to 26+74	7.47′	3.0′	1.3′ moderately hard caliche 3.7′ weathered basalt w/isolated basalt cobbles

Board Determination

$$\frac{24 \times 5.0' \times 2.33}{27} = \frac{279.60}{27} = 10.36 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
26+74 to 27+50	8.98′	2.4′	1.6′ caliche 5.0′ weathered basalt

Board Determination

$$\frac{76 \times 6.6' \times 2.33}{27} = \frac{1{,}168.73}{27} = 43.29 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
27+50 to 28+00 (EOC)	10.33′	2.7′	1.9′ hard caliche 5.8′ weathered basalt

Board Determination

$$\frac{50 \times 7.7' \times 2.33}{27} = \frac{897.05}{27} = 33.22 \text{ cubic yards}$$

Line Total	1,017.16 cubic yards
Less: Quantity reasonably anticipated	−725.00
	292.16 cubic yards

JB&C Rock Claim (Exh. A)

66P

Station	Average Depth	Total
0+00 to 19+00	5.1′	836.2 cubic yards
19+00 to 28+00	4.1′	318.4
		1,154.60 cubic yards

66q

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50			Bureau figure—MHC & rock 6.7′

A bore log on centerline at 0+00 shows in part:
0.0′–2.5′—fine sandy loam; easy boring, no cementation, numerous caliche gravels ½″–2″.
2.5′–7.5′—caliche: hard boring, strongly cemented.
7.5′–10.0′—sandy loam (calcareous): easy boring; no cementation, numerous basalt & caliche gravels. (16″ auger to 2.5′.)

Bureau Classification

0+50 to 1+50	10.2′	1.5′	2.4′ moderately hard caliche w/ rock chunks 0.7′ rock 2.2′ layers of caliche & sand 3.6′ sands

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	10.3′	1.3′	2.1′ chunks of caliche & soil 1.7′ moderately hard caliche 1.5′ soft caliche w/coarse sand 0.5′ sand 2.0′ soft caliche 0.4′ sand 0.8′ soft caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.3' \times 2.33}{27} = \frac{1,467.90}{27} = 54.37 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	10.9′	2.0′ w/small chunks caliche	1.3′ chunks of caliche w/soil 1.0′ moderately hard caliche *6.1′ hard caliche all fractured w/sand in between fractures 0.5′ soft caliche

*Profile shows 3.6′ hard caliche all fractured. However, Bureau figures total 2.5′ less than depth of trench as shown by Bureau. Accordingly, 2.5′ is added to hard caliche.

Board Determination

$$\frac{100 \times 8.25' \times 2.33}{27} = \frac{1,922.25}{27} = 71.19 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	10.3′	1.2′	2.3′ small caliche chunks & soil 1.2′ caliche chunks & soil 1.2′ moderately hard caliche 1.4′ hard caliche all fractured w/sand in between fractures 0.5′ sand & caliche chunks 0.6′ soft caliche 1.9′ sand

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1,118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+50	9.9′	1.8′	1.5′ soil & caliche gravel 1.0′ cemented caliche 0.7′ rock 3.5′ hard caliche all fractured w/sand in between fractures 0.5′ soft caliche

Board Determination

$$\frac{100 \times 5.7' \times 2.33}{27} = \frac{1,328.10}{27} = 49.19 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.2′	1.7′	1.2′ caliche gravel & soil 1.0′ soft caliche 1.8′ moderately hard caliche 0.8′ rock 1.4′ hard caliche, all fractured w/sand in between fractures 1.8′ soft caliche

Board Determination

$$\frac{100 \times 6.8' \times 2.33}{27} = \frac{1,584.40}{27} = 58.68 \text{ cubic yards}$$

Bureau Classification

6+50 to 7+50	No classification indicated

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	8.1′	3.2′	0.5′ small caliche gravel & soil 1.2′ moderately hard caliche 1.5′ large chunks fractured caliche w/soil in fractures 0.7′ rock 1.0′ soft caliche

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1{,}025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8.2′	3.7′	4.5′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	8.8′	4.0′	1.0′ small caliche gravel & soil 0.8′ moderately hard caliche 0.7′ chunks of caliche & soil 2.3′ moderately hard caliche

Board Determination

$$\frac{100 \times 3.45' \times 2.33}{27} = \frac{803.85}{27} = 29.77 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	No classification indicated

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

A bore log on centerline at station 11+30 shows in part:
0.0′–4.5′—very fine sandy loam: easy boring, no cementation, numerous caliche gravels.
4.5′–9.0′—caliche: hard boring, strongly cemented.
9.0′–10.0′—sandy loam (calcareous): easy boring, no cementation.
(16″ auger to 4.5′.)

Bureau Classification

11+50 to 12+50	9.84′	5.0′	0.8′ soft caliche 3.0′ cemented caliche gravel 1.0′ sandy caliche

Board Determination

$$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

12+50 to 13+50	9.75′	5.0′	0.8′ soft caliche 1.6′ cemented caliche 1.0′ rock 1.3′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	9.49′	4.5′	1.0′ [soft caliche] 1.6′ cemented caliche 1.4′ rock 1.0′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 5.0' \times 2.33}{27} = \frac{1,165}{27} = 43.15 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	9.28′	4.5′	0.5′ soft caliche 1.0′ rock 3.3′ cemented caliche gravel

Board Determination

$$\frac{100 \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	9.57′	5.0′	1.4′ soft caliche 2.0′ rock 1.2′ cemented caliche gravel

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+50	9.41′	5.0′	0.8′ soft caliche 1.4′ rock 2.2′ cemented caliche gravel

Board Determination

$$\frac{100 \times 2.2' \times 2.33}{27} = \frac{512.60}{27} = 18.99 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+50 to 18+50	9.54′	5.0′	1.0′ soft caliche 1.2′ rock 2.5′ cemented caliche gravel

Board Determination

$$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

18+50 to 19+50	9.54′	5.0′	1.0′ soft caliche 3.5′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

19+50 to 20+50	9.48′	5.0′	0.5′ soft caliche 2.5′ moderately hard caliche 1.5′ rock

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

20+50 to 21+50	9.55′	6.0′	1.0′ soft caliche 1.6′ moderately hard caliche 1.4′ rock

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52$ cubic yards
			Bureau Classification
21+50 to 22+50	9.65′	6.0′	1.4′ soft caliche 1.0′ rock 1.3′ moderately hard caliche
			Board Determination
			$\frac{100 \times 3.7' \times 2.33}{27} = \frac{862.10}{27} = 31.93$ cubic yards
			Bureau Classification
22+50 to 23+50	9.42′	7.0′	0.5′ soft caliche 1.0′ rock 1.0′ moderately hard caliche
			Board Determination
			$\frac{100 \times 2.5' \times 2.33}{27} = \frac{582.50}{27} = 21.57$ cubic yards
			Bureau Classification
23+50 to 24+50	9.13′	5.0′	1.0′ soft caliche 3.6′ moderately hard caliche
			Board Determination
			$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1,071.80}{27} = 39.70$ cubic yards

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
24+50 to 25+50	8.59′	4.0′	2.0′ moderately hard caliche *2.09′ rock 0.5′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.59' \times 2.33}{27} = \frac{1,069.47}{27} = 39.61 \text{ cubic yards}$$

*Profile shows 1.5′ of rock. However, Bureau figures total .59′ less than depth of trench as shown by Bureau. Accordingly, this figure is added to depth of rock.

Bureau Classification

25+50 to 26+50	7.95′	4.0′	0.8′ soft caliche 1.5′ rock 2.3′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1,071.80}{27} = 39.70 \text{ cubic yards}$$

Bureau Classification

26+50 to 27+50	6.53′	3.0′	1.4′ caliche gravel & sand 1.3′ rock 0.9′ MHC

Board Determination

$$\frac{100 \times 2.2' \times 2.33}{27} = \frac{512.60}{27} = 18.99 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
27+50 to 28+50	6.45′	2.0′	3.5′ silty caliche gravel 1.2′ sandy caliche

Board Determination

$$\frac{100 \times 1.2' \times 2.33}{27} = \frac{279.60}{27} = 10.36 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
28+50 to 29+25	6.63′	2.0′	1.0′ silty caliche gravel 3.6′ sandy caliche

Board Determination

$$\frac{75 \times 3.6' \times 2.33}{27} = \frac{629.10}{27} = 23.30 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
29+25 to 29+50 (EOC)	7.44′	2.0′	4.0′ silty caliche gravel 1.5′ sandy caliche

Board Determination

$$\frac{25 \times 1.5' \times 2.33}{27} = \frac{87.37}{27} = 3.24 \text{ cubic yards}$$

Line total	960. 18
Less: quantity reasonably anticipated	764. 00
	196. 18 cubic yards

JB&C Rock Claim (Exh. A)

66Q

Station	Average Depth	Total
0+0 to 11+26	4.8′	466.4
11+26 to 15+00	4.5′	145.2
15+00 to 29+50	6.0′	750.8
		1.362.4 cubic yards

66R

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50			Bureau figure—MHC—11.5 cubic yards

Stations 0+00 on laterals 66R and S coincide with station 61+05.2 on the 66 mainline. A bore log on the centerline at station 0+20 on 66S shows in part:

0.0′–4.0′—fine sandy loam: easy boring, no cementation, numerous caliche gravels 2.0′–4.0′.

4.0′–7.5′—caliche: hard boring, strongly cemented.

7.5′–10.0′—sandy loam: easy boring, no cementation, occasional basalt & caliche gravels ½″. (16″ auger to 4.0′.)

Board Determination

0+50 to 1+50	8.5′	1.7′	0.7′ caliche chunks & soil 2.7′ moderately hard caliche 3.4′ cemented sand w/narrow caliche seams

Board Determination

$$\frac{100 \times 4.75' \times 2.33}{27} = \frac{1{,}106.75}{27} = 40.99 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
1+50 to 2+50	8.7′	1.3′	1.0′ loose caliche 2.4′ mass of moderately hard caliche w/1.2′ layer of rock 1.5′ cemented sands & caliche gravels 2.5′ brown sands w/layers of fine gravels

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	9.3′	1.8′	2.2′ moderately hard caliche w/ rock chunks 0.8′ rock 1.9′ cemented sands & caliche 2.6′ brown sands

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9.0′	4.6′	1.5′ cemented sands & caliche 2.9′ sands mass

Board Determination

$$\frac{100 \times .75' \times 2.33}{27} = \frac{174.75}{27} = 6.47 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+50	8.9′	5.1′	4.8′ cemented caliche gravels & sands

Board Determination

$$\frac{100 \times 2.4' \times 2.33}{27} = \frac{559.20}{27} = 20.71 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50 9.3′ 5.5′ 3.5′ sands and gravels

Bore log on centerline at station 6+00 shows in part:

0.0′–5.0′—fine sandy loam: easy boring, numerous basalt and caliche gravels.

5.0′–8.5′—loamy sand: easy boring, no cementation.

8.5′–10.0′—sand: easy boring, no cementation.

(16″ auger to 5.0′)

Bureau Classification

6+50 to 7+30 8.7′ 4.1′ 2.2′ caliche gravels
2.4′ sandy loam

Line Total—131.17

JB&C Rock Claim (Exh. A)

66R

Station	Average Depth	Total
0+00 to 7+30	3.1′	195.3 cubic yards

66S

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+20	9.3′	1.5′	3.5′ moderately hard caliche 0.5′ rock 2.2′ cemented sands & caliche 1.6′ brown sand

Board Determination

$$\frac{20 \times 5.1' \times 2.33}{27} = \frac{237.66}{27} = 8.80 \text{ cubic yards}$$

See 66R, *supra*, for description of bore log at station 0+20. Although Sheet No. 42 of the plans show test Pit No. 4 located on the centerline of the 66 mainline beyond the end of construction at station 66+90, this test pit was actually located to the east of the mainline between laterals 66S and 66T at approximately station 63+00 (Location Map, Gov'ts. Exh. 1). Material in the test pit is described in part:

0.0′–2.0′—fine sandy loam, easy digging, no cementation.
2.0′–7.0′—caliche, easy digging, strong cementation.
7.0′–8.5′—sand, easy digging, no cementation.
8.5′–9.5′—caliche, easy digging, strong cementation, numerous coarse basalt sands and occasional basalt gravels.
9.5′–12.0′—sand, easy digging, no cementation. (This pit was blasted with 6 sticks of dynamite after drilling 4 holes, each to a depth of 8′ on 3.0′ centers.)

Bureau Classification

0+20 to 1+50	9.4′	1.3′	1.0′ loose caliche & soil 2.0′ moderately hard caliche w/ rock seams 0.7′ rock 2.0′ sands cemented & caliche seams 2.4′ sand

Board Determination

$$\frac{130 \times 4.2' \times 2.33}{27} = \frac{1,272.18}{27} = 47.12 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
1+50 to 2+50	9. 6′	1. 0′	2.6′ moderately hard caliche 0.5′ rock 1.8′ cemented sands & gravels 1.0′ gravels & sands 2.7′ sand

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	10. 0′	1. 9′	1.7′ soil & small caliche gravel 1.8′ large caliche chunks & soil 0.6′ rock 1.3′ layers of caliche small gravel & sand 2.7′ sand

Board Determination

$$\frac{100 \times 2.15' \times 2.33}{27} = \frac{500.95}{27} = 18.55 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+20	9. 9′	1. 4′	1.1′ soil & caliche chunks 3.3′ small chunks of cemented caliche 0.7′ moderately hard caliche 3.4′ sand

Board Determination

$$\frac{70 \times 4.55' \times 2.33}{27} = \frac{742.11}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+20 to 4+70	9.9′	1.3′	1.0′ soil & caliche gravel 1.0′ caliche chunks & soil 0.8′ moderately hard caliche 0.4′ rock 3.6′ cemented caliche chunks 1.9′ sand

Board Determination

$$\frac{50 \times 5.3' \times 2.33}{27} = \frac{617.45}{27} = 22.87 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+70 to 5+50	9.9′	1.9′	1.5′ caliche chunks & soil 2.0′ cemented caliche 1.5′ rock 1.0′ cemented caliche 2.0′ sand

Board Determination

$$\frac{80 \times 5.25' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
5+50 to 6+50	9.7′	2.3′	1. 0′ caliche chunks & soil 3.7′ moderately hard caliche cemented 0.7′ rock 1.4′ gravel seams & sands cemented 0.6′ sands

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1,141.70}{27} = 42.29 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	9.5′	3.1′	1.2′ caliche chunks & soil 1.7′ moderately hard cemented caliche 1.0′ rock 1.0′ sands cemented 1.5′ sands

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.29 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	8.8′	3.0′	1.0′ caliche chunks & soil 2.2′ moderately hard caliche 0.8′ rock 1.8′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1{,}234.90}{27} = 45.74 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8.0′	2.8′	1.0′ caliche gravels 0.5′ rock 3.7′ soft caliche w/moderately hard chunks

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	8.0′	3.6′	1.0′ soils & caliche gravels 0.5′ rock 1.9′ moderately hard caliche w/sand seams 0.5′ rock 0.5′ cemented sands & caliche

Board Determination

$$\frac{100 \times 2.9' \times 2.33}{27} = \frac{675.70}{27} = 25.03 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
10+50 to 11+50	8.5′	3.6′	2.6′ caliche chunks & sands, caliche gravels layers 0.5′ rock 1.8′ cemented sands & caliche layers

Board Determination

$$\frac{100 \times 2.4' \times 2.33}{27} = \frac{559.20}{27} = 20.71 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
11+50 to 12+50	8.1′	3.4′	0.4′ soil & small caliche gravel 0.9′ loosely cemented small caliche chunks 1.4′ moderately hard caliche 0.5′ rock 1.5′ cemented sand

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
12+50 to 13+10	8.4′	2.8′	0.4′ soil & small caliche gravel 1.3′ loosely cemented small caliche chunks 1.0′ moderately hard caliche 1.9′ chunks of fractured caliche, soil in fractures 1.0′ cemented sand

Board Determination

$$\frac{60 \times 4.2' \times 2.33}{27} = \frac{587.16}{27} = 21.75 \text{ cubic yards}$$

Bureau Classification

13+10 to 13+60		2.5′	0.6′ loose caliche 3.4′ poorly cemented caliche 1.4′ sand & gravel 1.4′ brown sand

Board Determination

$$\frac{50 \times 1.7' \times 2.33}{27} = \frac{198.05}{27} = 7.34 \text{ cubic yards}$$

Bore log on centerline at station 13+45 shows in part:

0.0′–3.0′—very fine sandy loam: easy boring, no cementation 0.0′–2.5′, numerous caliche gravels ¼"–3" from 2.5′–3.0′.

3.0′–7.0′—sandy loam (calcareous): moderate boring, no cementation.

7.0′–10.0′—loamy sand (coarse): easy boring, no cementation. (16" auger to 3.0′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
13+60 to 14+50	9.13′	2.6′	0.6′ loose caliche 3.4′ poorly cemented caliche 1.0′ sand & gravel 1.6′ brown sand

Board Determination

$$\frac{90 \times 3.4' \times 2.33}{27} = \frac{712.98}{27} = 26.41 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	8.49′	2.6′	0.8′ soft caliche 0.6′ moderately hard caliche 0.6′ soft caliche 1.9′ caliche 1.0′ sand & gravel—brown sand

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	8.2′	2.0′	1.2′ loose caliche 0.8′ rock 1.3′ moderately hard caliche 2.2′ caliche 0.7′ gray sand

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1,141.70}{27} = 42.29 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
16+50 to 17+10	8.11′	2.0′	2.0′ loose caliche 1.2′ rock 2.0′ sandy caliche 1.0′ gray sand

Board Determination

$$\frac{60 \times 4.2' \times 2.33}{27} = \frac{587.16}{27} = 21.75 \text{ cubic yards}$$

Bureau Classification

17+10 to 17+60	8.13′	2.5′	1.1′ soft caliche 1.0′ moderately hard caliche 0.6′ rock 2.4′ caliche 0.6′ sand

Board Determination

$$\frac{50 \times 5.1' \times 2.33}{27} = \frac{594.15}{27} = 22.0 \text{ cubic yards}$$

66S Line Total—603.92 cubic yards

JB&C Rock Claim (Exh. A)

66S

Station	Average Depth	Total
0+00 to 17+60	6.5′	987.2 cubic yards

66T

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	9.4′	1.2′	1.0′ loose caliche 0. 5′ rock 4. 4′ sands & gravel 2. 0′ moderately hard caliche

Board Determination

$$\frac{50 \times 3.5' \times 2.33}{27} = \frac{407.75}{27} = 15.10 \text{ cubic yards}$$

A bore log on centerline at station 0+20 shows in part:
0.0′–8.0′–fine sandy loam: easy boring, layer hard boring 2.0′–3.2′, strongly cemented 2.0′–3.0′, numerous caliche gravels 0.0′–3.0′.
8.0′–10.0′—loamy sand: easy boring, no cementation, occasional basalt & caliche gravels ¼″ to 2″. (16″ auger to 2.0′.)

Bureau Classification

0+50 to 1+50	9.1′	1.2′	1.0′ caliche & soils 1.3′ moderately hard caliche *1.6′ rock 1.8′ sands & gravels 2.2′ mass sands

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

*Profile shows 0.5′ of rock at station 1+00. However, Bureau figures total 1.1′ less than depth of trench as shown by Bureau. Accordingly, 1.1′ is added to depth of rock.

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
1+50 to 2+50	9.3′	1.0′	2.3′ soil & caliche chunks 1.4′ moderately hard caliche 1.9′ soft caliche w/layers of sand 1.3′ sand w/layers of soft caliche 1.4′ brown sand

Board Determination

$$\frac{100 \times 4.05' \times 2.33}{27} = \frac{943.65}{27} = 34.95 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	9.6′	1.4′	1.5′ soil & caliche chunks 3.5′ moderately hard caliche 1.8′ sand w/seams of soft caliche 1.4′ brown sand

Board Determination

$$\frac{100 \times 5.15' \times 2.33}{27} = \frac{1,199.95}{27} = 44.44 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9.5′	1.4′	1.0′ soil & caliche gravel 1.0′ caliche chunks 1.8′ consolidated chunks caliche 1.6′ caliche seams & sand 0. 3′ rock 2.4′ brown sand

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+10	9.2′	1.3′	0.7′ soil & caliche gravel 1.2′ caliche chunks & soil 1.0′ rock 1.5′ caliche chunks & soil 0.5′ rock 0.5′ caliche & sand 2.5′ brown sand

Board Determination

$$\frac{60 \times 3.5' \times 2.33}{27} = \frac{489.30}{27} = 18.12 \text{ cubic yards}$$

Bureau Classification

5+10 to 5+60	9.9′	1.8′	0.8′ soil & caliche gravel 2.0′ caliche chunks & soil 2.4′ rock 1.5′ moderately hard caliche 0.6′ brown sand

Board Determination

$$\frac{50 \times 4.9' \times 2.33}{27} = \frac{570.85}{27} = 21.14 \text{ cubic yards}$$

Bureau Classification

5+60 to 6+50	8.9′	1.5′	1.3′ soil & caliche gravel 1.0′ caliche chunks 1.3′ caliche chunks & soil 1.9′ rock 1.9′ moderately hard caliche

Board Determination

$$\frac{90 \times 6.1' \times 2.33}{27} = \frac{1,279.17}{27} = 47.38 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50			No classification indicated

Board Determination

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{13.98}{27} = 51.78 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	7.9′	2.8′	0.6′ soil & small caliche gravel 2.6′ moderately hard caliche 1.0′ caliche chunks 0.8′ cemented sand

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1,025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	7.8′	3.3′	1.0′ caliche gravel & soil 3.5′ moderately hard caliche w/ seams of sand & cemented sand

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	8.4′	4.0′	2.0′ cemented sand & caliche gravel 1.0′ rock 1.4′ cemented sand

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 2.0' \times 2.33}{27} = \frac{466.00}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	8.5′	6.0′	2.5′ estimated strongly cemented sand

Board Determination

$$\frac{100 \times 2.5' \times 2.33}{27} = \frac{582.50}{27} = 21.57 \text{ cubic yards}$$

(Profile states trench was unsafe to enter.)

Bureau Classification

11+50 to 12+30	8.6′	6.0′	2.6′ estimated strongly cemented sand

Board Determination

$$\frac{100 \times 2.6' \times 2.33}{27} = \frac{605.80}{27} = 22.44 \text{ cubic yards}$$

(Profile states trench was unsafe to enter.)
Line Total—426.21

A bore log on centerline beyond end of construction at station 13+46 shows in part:

0.0′–1.5′—very fine sandy loam: easy boring; no cementation.
1.5′–5.5′—fine sandy loam: easy boring; numerous caliche gravels.
5.5′–6.5′—caliche: hard boring; no cementation.
6.5′–10.0′—loamy sand: easy boring; no cementation.
(16″ auger to 5.5′.)

JB&C Rock Claim (Exh. A)

66T

Station	Average Depth	Total
0+00 to 12+30	6.0′	637 c.y.

Thereafter, according to the report, the trencher operation was almost to a standstill due to the hardness of the material. Because of the severe strain on the machine, the trencher was removed from the line.

An Inspector's Report, dated Sept. 28, 1970, states that the contractor was drilling 4′ deep on 4′ centers in the area from station 6+42 to 8+00. After shooting, the area from 6+40 to 7+00 was excavated with a backhoe (Inspector's Report, dated Oct. 2, 1970). The report describes material excavated as caliche. The balance of 66T was excavated with the trencher, the area from station 9+00 to 9+20 being described as hard going (Inspector's Report, dated Oct. 6, 1970). In fact, the material was so hard that the trencher was raised 1.0′ and the trench in the area from 9+00 to 9+70 was not excavated to specification grade. This high area was excavated with a backhoe (Inspector's Report, dated Oct. 16, 1970).

Mr. Beard answered a question as to the depth of hard material encountered on 66T: "Most of it was at seven feet. It was right to the top. There was very little top soil * * *" (Tr. 417). In further testimony, he described the depth of top soil on this line as less than one foot.

53–7

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+150	4.89′	2.5′	2.0′ sands & gravels 0.9′ caliche

Board Determination

$$\frac{150 \times 0.9' \times 2.33}{27} = \frac{314.55}{27} = 11.66 \text{ cubic yards}$$

Bore log at station 1+00, 29′ right, shows in part:

0.0′–4.5′—sandy loam: easy boring, noncemented 0.0′–1.2′, weakly cemented 1.2′–4.5′.

4.5′–6.9′—loamy sand: easy boring, noncemented, numerous caliche gravels to 3″ diameter.

6.9′–12.2′—caliche: hard boring, indurated.

(Although this log shows drilling to 46′, this depth as well as the depth of the caliche shown above is below grade for the trench.)

(16″ auger to 6.0′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+00 to 2+50	5.16′	2.5′	3.2 'sand & gravels
2+50 to 3+50	5.92′	3.5′	2.9′ sands & gravels
3+50 to 4+50	5.69′	4.6′	1.6′ soft caliche

Board Determination

$$\frac{100 \text{ x } 1.6' \text{ x } 2.33}{27} = \frac{372.80}{27} = 13.81 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	6.09′	2.5′	4.1′ sandy loam & gravels 2.0′ soft caliche

Board Determination

$$\frac{100 \text{ x } 2.0' \text{ x } 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.43′		2.0′ gravelly loam 4.5′ top soil 3.4′ soft caliche & sand

Board Determination

$$\frac{100 \times 1.7' \; 2.33}{27} = \frac{396.10}{27} = 14.67 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	7.51′	4.0′	1.0′ soft caliche 3.0′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	9.15′	4.0′	1.5′ caliche gravel 3.0′ moderately hard caliche 2.5′ sandy caliche

Board Determination

$$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1,281.50}{27} = 47.46 \text{ cubic yards}$$

Bore log on 53–7 centerline at station 8+14 shows in part:

0.0′–4.5′—fine sandy loam: easy boring, no cementation.

4.5′–6.0′—loamy sand: easy boring, weakly and strongly cemented, numerous caliche gravels & coarse basalt sands.

6.0′–9.0′—fine sandy loam: moderate boring, weakly and strongly cemented, occasional coarse basalt and caliche gravels; calcareous.

9.0′–10.0′—loamy fine sand: easy boring, no cementation.

(16″ auger to 6.0′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
8+50 to 9+50	8.37′	4.5′	2.0′ soft caliche 2.5′ MHC

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	9.12′	4.5′	2.0′ soft caliche 3.1′ MHC

Board Determination

$$\frac{100 \times 5.1' \times 2.33}{27} = \frac{1{,}188.30}{27} = 44.01 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	9.81′	4.0′	2.0′ soft caliche 2.9′ MHC 1.4′ sandy caliche

Board Determination

$$\frac{100 \times 6.3' \times 2.33}{27} = \frac{1{,}467.90}{27} = 54.37 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+50	10.09′	4.0′	3.0′ soft caliche 3.0′ MHC 2.0′ sandy caliche

Board Determination

$$\frac{100 \times 8.0' \times 2.33}{27} = \frac{1,864}{27} = 69.04 \text{ cubic yards}$$

Bore log at centerline of 53–7 at station 12+14 shows in part:
0.0′–12.0′—fine sandy loam: easy boring 0.0′–4.8′, moderate boring 4.8′–12.0′; no cementation 0.0′–4.3′, weakly and strongly cemented 4.3′–12.0′; occasional caliche gravels 4.3′–12. ′; calcareous 4.3′–12.0′. (16″auger to 4.8.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
12+50 to 13+50	8.17′	3.0′	2.0′ soft caliche 1.0′ moderately hard caliche 2.9′ sandy caliche

Board Determination

$$\frac{100 \times 5.9' \times 2.33}{27} = \frac{1,374.70}{27} = 50.91 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	8.18′	4.0′	1.0′ soft caliche 2.0′ moderately hard caliche 1.7′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	8.85′	3.5′	1.0′ soft caliche 4.0′ moderately hard caliche 2.4′ sandy caliche

Board Determination

$$\frac{100 \times 7.4' \times 2.33}{27} = \frac{1,724.20}{27} = 63.86 \text{ cubic yards}$$

Bore log on centerline at station 15+88 shows in part:
0.0′–5 0′—fine sandy loam: easy boring, no cementation.
5 0′–11.0′—fine sandy loam: moderate boring, weakly cemented, calcareous.
11.0′–12.0′—caliche: hard boring, strongly cemented.
(Caliche is obviously below depth of trench.) (16″ auger to 5.0′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
16+50 to 17+50	8.40′	4.0′	1.0′ soft caliche 2.9′ moderately hard caliche 1.0′ sandy caliche

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1{,}141.70}{27} = 42.29 \text{ cubic yards}$$

Bureau Classification

17+50 to 18+50	8.34′	5.0′	1 0′ soft caliche 3.8′ moderately hard caliche

Board Determination

$$\frac{100 \times 4.8' \times 2.33}{27} = \frac{1{,}118.40}{27} = 41.42 \text{ cubic yards}$$

Bureau Classification

18+50 to 19+50	7.86′	4.5′	3.9′ soft caliche

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
19+50 to 20+50	7.88′	7.0′	2.9′ soft caliche

Board Determination

$$\frac{100 \times 2.9' \times 2.33}{27} = \frac{675.70}{27} = 25.03 \text{ cubic yards}$$

Bore log at station 20+02, 40′ East shows in part:
0.0′–5.0′—fine sandy loam: easy boring, no cementation.
5.0′—10.0′—fine sandy loam (calcareous): easy boring 5.0′–6.0′, moderate boring 6.0′–10.0′, weakly cemented, 6.0′–10.0′, weakly cemented, numerous caliche gravels ¼ ″–1″.
(16″ auger to 6.0′.)

Bureau Classification

20+50 to 21+50	8.18′	5.5′	3.2′ soft caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

21+50 to 22+50	8.62′	6.0′	3.1′ soft caliche

Board Determination

$$\frac{100 \times 3.1' \times 2.33}{27} = \frac{722.30}{27} = 26.75 \text{ cubic yards}$$

Bureau Classification

22+50 to 23+50	9.0′	5.2′	4.5′ soft caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
23+50 to 24+50	9.42′	5.0′	1.0′ soft caliche 1.0′ moderately hard caliche 2.0′ sand & caliche 0.5′ moderately hard caliche

Board Determination

$$\frac{50 \times 3.5' \times 2.33}{27} = \frac{407.75}{27} = 15.10 \text{ cubic yards}$$

Bureau Classification

24+00 to 24+29.7	9.67′	5.0′	1.0′ soft caliche 1.0′ moderately hard caliche 2.0′ sand & caliche 1.5′ moderately hard caliche

Board Determination

$$\frac{24.297 \times 4.5' \times 2.33}{27} = \frac{254.75}{27} = 9.44 \text{ cubic yards}$$

Line Total=761.09 cubic yards

Bore log at 24+29.7, 40′ east, shows in part:

0.0′–5.0′—fine sandy loam: easy boring, occasional basalt and caliche gravels 1/4″ to 3″.

5.0′–10.0′—sandy loam (calcareous): moderate boring; numerous basalt and caliche gravels 1/4″ to 3″. (16″ auger to 5.0′.)

JB&C Rock Claim (Exh. A)

53–7

Station	Average Depth	Total
1+00 to 8+14	4.3′	2.649 cubic yards
8+14 to 12+14	5.4′	1.864
12+14 to 15+88	6.1′	1.968
15+38 to 20+02	5.0′	2.002
20+02 to 24+29	5.2′	1.916
Total		1,039.9 cubic yards

53–7A

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 1+50	8.40	4.0′	1.0′ soft caliche 3.8′ moderately hard caliche

Board Determination

$$\frac{150 \times 4.3' \times 2.33}{27} = \frac{1,502.85}{27} = 55.66 \text{ cubic yards}$$

Station 0+00 on 53–7A coincides with station 8+14.3 on 53–7. Bore log on centerline of 53–7 at station 8+14 is described *supra*. No caliche other than basalt and caliche gravels was indicated.

Bureau Classification

1+50 to 2+50	8.82′	3.0′	1.5′ soft caliche 4.8′ moderately hard caliche

Board Determination

$$\frac{100 \times 5.55' \times 2.33}{27} = \frac{1,293.15}{27} = 47.89 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 3+50	8.46′	2.5′	2.0′ soft caliche 4.5′ MHC

Board Determination

$$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1,281.50}{27} = 47.46 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	7.61′	3.0′	2.0′ soft caliche 3.1′ MHC

Board Determination

$$\frac{100 \times 4.1' \times 2.33}{27} = \frac{955.30}{27} = 35.38 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8.37′	3.0′	2.0′ soft caliche 2.9′ MHC

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	8.80′	3.0′	3.0′ soft caliche 2.9′ MHC

Board Determination

$$\frac{100 \times 4.4' \times 2.33}{27} = \frac{1,025.20}{27} = 37.97 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	8.51′	4.0′	1.0′ soft caliche 1.0′ MHC 3.0′ sandy caliche

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	7.82′	3.0′	3.3′ soft caliche 1.5′ moderately hard caliche 1.8′ sandy caliche

Board Determination

$$\frac{100 \times 4.95' \times 2.33}{27} = \frac{1,153.35}{27} = 42.72 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8.12′	3.0′	2.0′ soft caliche 2.0′ moderately hard caliche 1.6′ sandy caliche

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1,071.80}{27} = 39.70 \text{ cubic yards}$$

A bore log on centerline of 53–7A at station 9+00 shows in part:
0.0′–5.5′—fine sandy loam: easy boring, no cementation, occasional caliche gravels 1.5′–5.5′.
5.5′–10.0′—caliche: hard boring 5.5′–6.5′, moderate boring 6.5′–10.0′; strongly cemented. (16″ auger to 5.5′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
9+50 to 10+50	8.21′	3.0′	2.0′ soft caliche 2.5′ moderately hard caliche 1.2′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+37.1	8.59′	2.5′	1.0′ soft caliche 3.0′ moderately hard caliche 2.6′ sandy caliche

Board Determination

$$\frac{87.1 \times 5.6' \times 2.33}{27} = \frac{1{,}136.48}{27} = 42.09 \text{ cubic yards}$$

Line Total=457.61

JB&C Rock Claim (Exh. A)

53–7A

Station	Average Depth	Total
0+00 to 11+37	6.2′	608.3 cubic yards

53-7*B*

Bureau Classification

0+00 to 1+50	8.47′	3.0′	2.0′ loose caliche 2.0′ moderately hard caliche 2.0′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{150 \times 5.0' \times 2.33}{27} = \frac{1,747.50}{27} = 64.72 \text{ cubic yards}$$

Station 0+00 53–7B coincides with station 12+14.3 on 53–7. The bore log at station 12+14 on 53–7 has been described, *supra*. The log indicates no caliche other than occasional caliche gravels.

Bureau Classification

1+50 to 2+50	8.96′	3.0′	2.5′ loose caliche 1.5′ MHC 2.5′ sandy caliche

Board Determination

$$\frac{100 \times 5.25' \times 2.33}{27} = \frac{1,223.25}{27} = 45.31 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8.74′	3.0′	2.0′ loose caliche 2.0 MHC 2.2′ sandy caliche

Board Determination

$$\frac{100 \times 5.2' \times 2.33}{27} = \frac{1,211.60}{27} = 44.87 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	7.66′	2.0′	3.0′ loose caliche 2.0′ MHC 1.2′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+50	8.29′	2.0′	2.5′ loose caliche 3.0′ MHC 1.4′ sandy caliche

Board Determination

$$\frac{100 \times 5.65' \times 2.33}{27} = \frac{1{,}316.45}{27} = 48.76 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.09′	2.0′	2.0′ loose caliche 3.0′ MHC 2.6′ sandy caliche

Board Determination

$$\frac{100 \times 6.6' \times 2.33}{27} = \frac{1{,}537.80}{27} = 56.96 \text{ cubic yards}$$

Bureau Classification

6+50 to 7+50	8.81′	2.0′	1.5′ lose caliche 2.5′ MHC 2.3′ sandy caliche

Board Determination

$$\frac{100 \times 5.55' \times 2.33}{27} = \frac{1{,}293.15}{27} = 47.89 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	8.35′	1.5′	1.5′ loose caliche 3.0′ MHC 2.9′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 6.65' \times 2.33}{27} = \frac{1{,}594.45}{27} = 57.39 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8.66′	1.5′	1.5′ loose caliche 3.5′ MHC 2.1′ sandy caliche

Board Determination

$$\frac{100 \times 6.35' \times 2.33}{27} = \frac{1{,}479.55}{27} = 54.80 \text{ cubic yards}$$

A bore log on centerline at station 9+00 shows in part:
0.0′–7.0′—fine sandy loam: easy boring 0.0′–3.0′, moderate boring 3.0′–7.0′, no cementation 0.0′–3.0′, weakly and strongly cemented 3.0′–7.0′; occasional caliche gravels 2.5′–7.0′; calcareous 3.0′–7.0′.
7.0′–10.0′—loamy sand: easy boring; no cementation; occasional coarse sands and caliche particles. (16″auger to 3.0′.)

Bureau Classification

9+50 to 10+50	8.60′	1.5′	3.0′ loose caliche 2.0′ MHC 2.6′ sandy caliche

Board Determination

$$\frac{100 \times 6.1' \times 2.33}{27} = \frac{1{,}421.30}{27} = 52.64 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	8.46′	2.0′	2.0′ loose caliche 3.0′ MHC 2.0′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1,398}{27} = 51.78$ cubic yards
			Bureau Classification
11+50 to 12+50	8.82′	3.0′	2.0′ loose caliche 3.0′ MHC 1.3′ sandy caliche
			Board Determination
			$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1,234.90}{27} = 45.74$ cubic yards
			Bureau Classification
12+50 to 13+50	8.83′	2.5′	2.0′ loose caliche 2.0′ MHC 2.8′ sandy caliche
			Board Determination
			$\frac{100 \times 5.8' \times 2.33}{27} = \frac{1,351.40}{27} = 50.05$ cubic yards
			Bureau Classification
13+50 to 14+25	8. 56′	2. 5′	3.0′ loose caliche 2.0′ MHC 1.6′ sandy caliche
			Board Determination
			$\frac{75 \times 5.1' \times 2.33}{27} = \frac{891.23}{27} = 33.01$ cubic yards

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
14+25 to 14+88	8.37′	2.0′	2.0′ loose caliche 1.5′ MHC 3.4′ sandy caliche

Board Determination

$$\frac{63 \times 5.9' \times 2.33}{27} = \frac{866.06}{27} = 32.08 \text{ cubic yards}$$

Line Total=726.56 cubic yards

JB&C Rock Claim (Exh. A)

53–7B

Station	Average Depth	Total
0+00 to 8+50	4.3′	315.4 cubic yards
8+50 to 14+85	5.7′	312.3
		627.7 cubic yards

53–7C

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 0+50	9.25′	4.0′	1.5′ loose caliche 4.3′ MHC

Board Determination

$$\frac{50 \times 5.05' \times 2.33}{27} = \frac{588.33}{27} = 21.79 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+50 to 1+50	8.3′	3.5′	2.5′ loose caliche 2.9′ MHC

Board Determination

$$\frac{100 \times 4.15' \times 2.33}{27} = \frac{966.95}{27} = 35.81 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	7.75′	4.0′	4.3′ soft caliche

Board Determination

$$\frac{100 \times 4.3' \times 2.33}{27} = \frac{1{,}001.90}{27} = 37.11 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+35	8.09′	6.0′	2.6′ soft caliche 1.0′ MHC

Board Determination

$$\frac{85 \times 2.3' \times 2.33}{27} = \frac{455.52}{27} = 16.87 \text{ cubic yards}$$

53–7C Line Total=111.58 cubic yards

JB&C Rock Claim (Exh. A)
53–7C

Station	Average Depth	Total
0+00 to 1+50	2.6′	33.7 cubic yards
1+50 to 3+35	Normal	

53–7D

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 1+50	8.66′	3.0′	1.5′ loose caliche 2.0′ MHC 2.7′ sandy caliche

Board Determination

$$\frac{150 \times 5.45' \times 2.33}{27} = \frac{1{,}904.78}{27} = 70.55 \text{ cubic yards}$$

Station 0+00 on 53–7D coincides with station 16+143 on 53–7. The bore log at station 15+88 is described in detail *supra*. The only caliche shown was from 11.0′ to 12.0′, which is below trench depth.

Bureau Classification

1+50 to 2+50	8.69′	3.0′	1.0′ loose caliche 2.5′ MHC 2.7′ sandy caliche

Board Determination

$$\frac{100 \times 5.7' \times 2.33}{27} = \frac{1{,}328.10}{27} = 49.19 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8.23′	2.5′	1.5′ loose caliche 2.0′ MHC 2.8′ sandy caliche

Board Determination

$$\frac{100 \times 5.55' \times 2.33}{27} = \frac{1{,}281.50}{27} = 47.46 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	8.43′	2.5′	2.0′ loose caliche 2.0′ MHC 2.8′ sandy caliche

Board Determination

$$\frac{100 \times 5.8' \times 2.33}{27} = \frac{1,351.40}{27} = 50.05 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	8.65′	2.0′	2.0′ loose caliche 4.0′ MHC 1.2′ sandy caliche

Board Determination

$$\frac{100 \times 6.2' \times 2.33}{27} = \frac{1,444.60}{27} = 53.50 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	8.55′	1.5′	2.0′ loose caliche 1.0′ rock 3.0′ MHC 1.6′ sandy caliche

Board Determination

$$\frac{100 \times 6.6' \times 2.33}{27} = \frac{1,537.80}{27} = 56.96 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+25	8.38′	1.5′	2.5′ loose caliche 2.0′ rock 1.9′ MHC 1.0′ sandy caliche

Board Determination

$$\frac{75 \times 6.15' \times 2.33}{27} = \frac{1{,}074.71}{27} = 39.80 \text{ cubic yards}$$

53–7D Line Total=367.51 cubic yards

JB&C Rock Claim (Exh. A)

53–7D

Station	Average Depth	Total
0+00 to 7+90	3.8′	259.1

53–7E

Bureau Classification

0+00 to 0+50	Bureau figure—MHC—5.4

Station 0+00 on 53–7E coincides with station 24+29.7 on 53–7. The bore log at 24+29.7, 40′ East, on 53–7 has been described in detail *supra*. No caliche other than basalt and caliche gravels was indicated.

Bureau Classification

0+50 to 1+50	8.93′	5.5′	1.0′ loose caliche 2.9′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

1+50 to 2+50	8.69′	5.0′	2.5′ loose caliche 1.5′ MHC

Board Determination

$$\frac{100 \times 3.05' \times 2.33}{27} = \frac{710.65}{27} = 26.32 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	8.06′	5.0′	1.5′ loose caliche 2.1′ MHC

Board Determination

$$\frac{100 \times 2.85' \times 2.33}{27} = \frac{664.05}{27} = 24.59 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	8.17′	3.0′	2.0′ loose caliche 1.7′ MHC 2.0′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+50	8.83′	3.0′	2.0′ loose caliche 2.0′ MHC 2.3′ sandy caliche

Board Determination

$$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1{,}234.90}{27} = 45.74 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
5+50 to 6+50	8.93′	2.0′	2.5′ loose caliche 2.0′ MHC 2.9′ sandy caliche

Board Determination

$$\frac{100 \times 6.15' \times 2.33}{27} = \frac{1{,}432.95}{27} = 53.07 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	8.52′	2.5′	3.0′ loose caliche 2.0′ rock 1.5′ sandy caliche

Board Determination

$$\frac{100 \times 5.0' \times 2.33}{27} = \frac{1165}{27} = 43.15 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	8.17′	2.5′	3.0′ loose caliche 1.5′ rock 1.7′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
			$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56$ cubic yards
			Bureau Classification
8+50 to 9+50	8.58′	3.5′	2.0′ loose caliche 1.0′ rock 1.0′ MHC 1.6′ sandy caliche
			Board Determination
			$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1,071.80}{27} = 39.70$ cubic yards
			Bureau Classification
9+50 to 10+00	8.60′	2.5′	1.5′ loose caliche 2.0′ rock 2.0′ MHC 1.1′ loose caliche
			Board Determination
			$\frac{50 \times 5.3' \times 2.33}{27} = \frac{617.45}{27} = 22.87$ cubic yards
			53–7E Line Total=365.90 cubic yards

JB&C Rock Claim (Exh. A)
53–7E

Station	Average Depth	Total
0+00 to 10+00	2.9′	250.3 cubic yards

50B

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 1+50	6.4′	6.0′	0.9′ sand & caliche gravels

Bureau Classification

1+50 to 2+50	7.37′	3.0′	4.0′ silty loam w/gravel veins 0.9′ sand & caliche gravels

Bore log at station 2+00 on centerline shows fine sandy loam to 10.0′, silty loam from 10.0′ to 15.0′, all easy boring, no cementation, with occasional caliche gravels 6.5′ to 10.0′.

(16″ auger to 10.0′.)

Bureau Classification

2+50 to 3+50	10.52′	6.0′	3.0′ silty loam, loam & gravels 2.0′ silt & gravelly sand
3+50 to 4+50	11.09′	6.5′	3.0′ silt & gravels 2.1′ silty gravel sand
4+50 to 5+50	11.33′	7.0′	2.0′ silty loam 2.8′ sand & caliche gravels
5+50 to 6+50	11.35′	7.0′	2.0′ silty loam 2.9′ silty loam & caliche gravels
6+50 to 7+50	11.90′	7.0′	3.0′ silty loam & gravels 2.4′ caliche gravels & silt

Bore log at station 7+35, 100′ left, shows fine sandy loam, loamy sand, sand and silty clay loam, all easy boring to 15.0′, noncemented, with numerous caliche & basalt gravels to 1½″ from 6.3′ to 13.7′.

(16″ auger to 10.0′)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7+50 to 8+50	11.99′	7.0′	3.5′ silty loam & gravels 2.0′ caliche gravels
8+50 to 9+20	11.0′	11.0′	0.5′ caliche gravels

Board Determination

None

50c

0+00 to 1+50	7.45′	4.5′	3.5′ sandy caliche

Board Determination

$$\frac{150 \times 3.5' \times 2.33}{27} = \frac{1,223.25}{27} = 45.31 \text{ cubic yards}$$

Bore log at station 1+100, 67′ left, shows in part:

0.0′–3.5′—sandy loam: easy boring, noncemented, few caliche gravels to 1″ diameter

3.5′–7.6′—loamy sand; easy boring, noncemented, few caliche gravels to 3″ diameter, becoming numerous 5.5′–7.6′

7.6′–10.0′—caliche: moderate boring, strongly cemented (the caliche is below the depth of the trench) (16″ auger to 7.6′.)

Bureau Classification

1+50 to 2+50	8.59′	5.0′	3.9′ sandy caliche

Board Determination

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 3+50	8.73′	2.5′	2.0′ loose caliche 3.7′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	8.96′	2.0′	3.0′ loose caliche 4.5′ sandy caliche

Board Determination

$$\frac{100 \times 5.5' \times 2.33}{27} = \frac{1,281.50}{27} = 47.46 \text{ cubic yards}$$

Bore log on centerline at station 4+50 shows in part:

0.0′–3.3′—very fine sandy loam: easy boring 0.0′–1.5′, moderate boring 1.5′ to 3.3′, no cementation, numerous caliche gravels ½″–3″ diameter 1.5′–3.3′.
3.3′–7.5′—caliche, moderate boring, strongly cemented
7.5′–15.0′—silty clay loam, easy boring, no cementation.
(16″ auger to 3.3′)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+50	9.09′	2.0′	2.0′ loose caliche 3.5′ sandy caliche 2.6′ sandy loam

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
5+50 to 6+50	8.3′	2.0′	3.0′ loose caliche 2.0′ sandy caliche 2.9′ sandy loam

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

6+50 to 7+50	8.43′	1.0′	2.0′ loose caliche 3.9′ sandy caliche 2.0′ sandy loam

Board Determination

$$\frac{100 \times 4.9' \times 2.33}{27} = \frac{1,141.70}{27} = 42.29 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	7.86′	1.0′	2.0′ loose caliche 3.0′ sandy caliche 2.4′ sandy loam

Board Determination

$$\frac{100 \times 4.0' \times 2.33}{27} = \frac{932}{27} = 34.52 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	7.03′	1.5′	2.5′ loose caliche 3.5′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 4.75' \times 2.33}{27} = \frac{1{,}106.75}{27} = 40.99 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+00	6.57′	3.5′	3.0′ loose caliche 1.0′ sandy caliche

Board Determination

$$\frac{50 \times 2.5' \times 2.33}{27} = \frac{291.25}{27} = 10.79 \text{ cubic yards}$$

Bore log at 10+30, 411′ left, shows in part:

0.0′–1.5′—fine sandy loam: easy boring, noncemented
1.5′–9.7′—loamy sand: easy boring 1.5′–3.7′, moderate boring 3.7′–9.7′, noncemented, numerous caliche gravels to 3″ diameter
9.7′–14.7′—weathered basalt, moderate boring. (The above basalt as well as basalt from 14.7′ to 15.0′ is obviously for below depth of trench.) (16″ auger to 9.7′.)

Bureau Classification

10+00 to 10+50	6. 60′	4. 0′	2.0′ loose caliche 3.0′ sandy caliche

Board Determination

$$\frac{50 \times 4.0' \times 2.33}{27} = \frac{466.00}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

10+50 to 11+50	6. 60′	3. 5′	3.6′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+50	7.67′	3.5′	4.7′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

12+50 to 13+50	7.33′	5.0′	2.8′ sandy caliche

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	6.12′	4.0′	2.6′ sandy caliche

Board Determination

$$\frac{100 \times 2.6' \times 2.33}{27} = \frac{605.80}{27} = 22.44 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	5.82′	3.0′	1.0′ loose caliche 2.5′ MHC

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.0' \times 2.33}{27} = \frac{699}{27} = 25.89 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	7.33′	5.0′	2.8′ sandy caliche

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bore log on centerline at station 16+00 shows in part:
0.0′–4.0′—fine sandy loam: easy boring 0.0′–3.0′, moderate boring 3.0′–4.0′, no cementation, occasional caliche gravels 3.0′–4.0′
4.0′–7.0′—caliche: hard boring, strongly cemented
7.0′–15.0′—silty clay loam: easy boring, no cementation.
(16″ auger to 4.0′.)

Bureau Classification

16+50 to 17+20	7.18′	4.0′	3.7′ sandy caliche

Board Determination

$$\frac{70 \times 3.7' \times 2.33}{27} = \frac{603.47}{27} = 22.35 \text{ cubic yards}$$

Bureau Classification

17+20 to 17+70	7.39′	4.5′	3.4′ sandy caliche

Board Determination

$$\frac{50 \times 3.4' \times 2.33}{27} = \frac{396.10}{27} = 14.67 \text{ cubic yards}$$

50C Line Total=587.17

50D

Bureau Classification

0+00 to 1+50	8.08′	7.0′	1.6′ sandy loam & caliche gravels

Bureau Classification

1+50 to 2+50	8.47′	4.0′	2.5′ sandy loam 2.5′ sandy loam & caliche gravels

Bore log on centerline at station 2+00 shows in part:
0.0′–15.0′—fine sandy loam: easy boring, no cementation, occasional caliche gravels ½″ to 3″. (16″ auger to 10.0′.)

Bureau Classification

2+50 to 3+50	9.15′	4.0′	3.5′ sandy loam 2.2′ sandy loam & caliche

Board Determination

$$\frac{100 \times 1.1' \times 2.33}{27} = \frac{256.30}{27} = 9.49 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	8.80′	5.0′	1.5′ sandy loam 2.0′ sandy loam & caliche

Board Determination

$$\frac{100 \times 1.0' \times 2.33}{27} = \frac{233}{27} = 8.63 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
4+50 to 5+50	10.12′	5.0′	2.0′ sandy loam 3.0′ mostly sandy loam
5+50 to 6+50	10.27′	5.0′	2.5′ sandy loam & gravels 3.3′ mostly sandy loam
6+50 to 7+50	10.48′	5.0′	1.5′ sandy loam & gravels 4.5′ mostly loam

Bore log on centerline at 7+50 shows in part:
0.0′–15.0′—fine sandy loam: easy boring, no cementation, occasional caliche gravels ½″–3″ diameter. (16″ auger to 10.0′.)

Bureau Classification

7+50 to 8+50	10.45′	5.5′	1.5′ sandy loam & gravels 4.0′ sandy loam
8+50 to 9+20	10.82′	6.0′	2.0′ sandy loam & gravels 3.3′ sandy loam
9+20 to 9+70	11.23′	6.0′	2.5′ sandy loam & gravels 3.2′ sandy loam

50D Line Total=18.12 cubic yards

50E

Bureau Classification

0+00 to 2+50	No classification indicated

Bureau Classification

2+50 to 3+50	9.17′	5.3′	3.9′ MHC

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	9.47′	4.5′	5.0′ MHC

Board Determination

$$\frac{100 \times 5.0' \times 2.33}{27} = \frac{1,165}{27} = 43.15 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9.29′	4.0′	5.3′ MHC

Board Determination

$$\frac{100 \times 5.3' \times 2.33}{27} = \frac{1234.90}{27} = 45.74 \text{ cubic yards}$$

Bore log on centerline at station 4+80 shows in part:

0.0′–5.0′—fine sandy loam: easy boring, no cementation, numerous caliche gravels 1/2″ to 2″ in diameter.
5.0′–8.5′—caliche: hard boring, strongly cemented.
8.5′–15.0′—silty clay loam: easy boring, no cementation.
(16″ auger to 5.0′.)

Bureau Classification

5+50 to 6+50	9.23′	3.2′	6.0′ soft caliche

Board Determination

$$\frac{100 \times 6.0' \times 2.33}{27} = \frac{1,398}{27} = 51.78 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	8.92′	3.9′	5.0′ caliche sand & gravel
7+50 to 8+50	8.48′	2.8′	5.9′ soft caliche

Board Determination

$$\frac{100 \times 5.9' \times 2.33}{27} = \frac{1{,}374.70}{27} = 50.91 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	8.07′	4.1′	2.7′ soft caliche 2.0′ [soft caliche]

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1{,}095.10}{27} = 40.56 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	8.68′	4.1′	2.5′ soft caliche 2.0′ hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bore log on centerline at station 10+62 shows in part:

0.0′–5.5′—very fine sandy loam: easy boring 0.0′–5.0′, moderate boring 5.0′–5.5′, no cementation, numerous caliche gravels 1/2″ to 2″ in diameter.

5.5′–7.0′—caliche: moderate boring, strongly cemented.

7.0′–15.0′—fine sandy loam: easy boring, no cementation, occasional basalt gravels 1/2″ to 1–1/2″ in diameter.

(16″ auger to 5.5′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
10+50 to 11+50	7.82′	4.1′	2.5′ soft caliche 2.0′ hard caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1{,}048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+50	7.56′	4.4′	1.5′ soft caliche 1.7′ hard caliche

Board Determination

$$\frac{100 \times 3.2' \times 2.33}{27} = \frac{745.60}{27} = 27.61 \text{ cubic yards}$$

Bureau Classification

12+50 to 13+50	7.88′	4.5′	1.5′ soft caliche 1.9′ hard caliche

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	7.44′	4.0′	1.5′ soft caliche 1.9′ hard caliche

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
14+50 to 15+50	7.27′	4.8′	1.0′ soft caliche 1.9′ hard caliche

Board Determination

$$\frac{100 \times 2.9' \times 2.33}{27} = \frac{675.70}{27} = 25.03 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	7.79′	4.7′	1.2′ soft caliche 1.9′ hard caliche

Board Determination

$$\frac{100 \times 3.1' \times 2.33}{27} = \frac{722.30}{27} = 26.75 \text{ cubic yards}$$

Bore log on centerline at station 16+00 shows in part:

0.0′–5.2′—fine sandy loam, easy boring, noncemented, scattered caliche gravels up to 2" in size. (Drilling accomplished with a hand auger shows refusal at 5.2′ on hard material believed to be caliche.)

Bureau Classification

16+50 to 17+50	8.24′	4.6′	1.3′ soft caliche 2.3′ hard caliche

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{838.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
17+50 to 18+20	8.35′	4.5′	1.2′ soft caliche 2.6′ hard caliche

Board Determination

$$\frac{70 \times 3.8' \times 2.33}{27} = \frac{619.78}{27} = 22.95 \text{ cubic yards}$$

50E Line Total = 535.55 cubic yards

50F

Bureau Classification

0+00 to 1+50	10.10′	4.5′	2.0′ sandy loam w/gravels 4.1′ sandy loam, caliche gravel
1+50 to 2+50	9.76′	4.0′	3.0′ sandy loam & gravel 3.3′ sandy loam & caliche gravel

0.0′–15.0′—fine sandy loam: easy boring, no cementation, occasional caliche gravels ½"–2" in diameter.
(16" auger to 10.0′.)

Bureau Classification

2+50 to 3+50	10.45′	4.0′	3.0′ sandy loam & gravels 4.0′ sandy loam, caliche gravels
3+50 to 4+50	10.38′	5.2′	2.5′ sandy loam 2.9′ sandy loam, caliche gravels
5+50 to 6+50	10.83′	6.0′	1.5′ sandy loam 3.8′ sandy loam, caliche gravels
6+50 to 7+20 (EOC)	11.07′	6.0′	2.0′ sandy loam 3.6′ sandy loam & caliche gravels

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
None			

Bore log at station 6+77, 54′ right, shows in part:
0.0′–5.3′—fine sandy loam: easy boring, noncemented.
5.3′–8.1′—loamy sand: easy boring, noncemented, few caliche gravels to 1″ diameter.
8.1′–15.0′—sand: easy boring, weakly cemented peds, scattered caliche gravels to ¼″ diameter.
(16″ auger to 7.0′.)

50G

Bureau Classification

0+00 to 1+50	11.44′	8.0′	1.0′ silty caliche gravels 1.0′ sandy caliche 1.9′ sandy loam

Board Determination

$$\frac{150 \times 1.0' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bore log at 1+63, 100′ left, shows in part:
0.0′–6.5′—very fine sandy loam: easy boring, noncemented.
6.5′–8.7′—loamy sand: moderate boring, noncemented, numerous caliche gravels to 3″ diameter.
8.7′–15.0′—sand: easy boring, noncemented, numerous caliche gravels to ¼″ diameter.
(16″ auger to 8.7′.)

Bureau Classification

1+50 to 2+50	10.89′	6.0′	1.0′ silty caliche gravels 1.5′ sandy caliche 2.9′ sandy loam

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 1.5' \times 2.33}{27} = \frac{349.50}{27} = 12.94 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	10.99′	5.0′	2.0′ silty caliche gravels 4.5′ sandy caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	10.70′	6.0′	1.0′ silty caliche gravels 4.2′ sandy caliche

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	10.74′	5.5′	1.0′ sandy caliche gravels 4.7′ sandy caliche

Board Determination

$$\frac{100 \times 4.7' \times 2.33}{27} = \frac{1,095.10}{27} = 40.56 \text{ cubic yards}$$

Bore log on centerline at station 5+12 shows in part:

0.0′–7.0′—fine sandy loam: easy boring 0.0′–6.0′, moderate boring 6.0′–7.0′, no cementation, few scattered caliche gravels ½″ to 2″ in diameter.

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
7.0′–11.0′—caliche: moderate boring, strongly cemented 11.0′–15.0′—silty clay loam: easy boring, no cementation. (16″ auger to 7.0′)			
Bureau Classification			
5+50 to 6+50	10.63′	3.5′	1.0′ silty caliche gravels 6.6′ sandy caliche
Board Determination			
$\frac{100 \times 6.6' \times 2.33}{27} = \frac{1,537.80}{27} = 56.96$ cubic yards			
Bureau Classification			
6+50 to 7+50	10.13′	3.0′	2.5′ caliche 5.1′ sandy caliche
Board Determination			
$\frac{100 \times 7.6' \times 2.33}{27} = \frac{1,770.80}{27} = 65.59$ cubic yards			
Bureau Classification			
7+50 to 8+50	9.84′	2.0′	3.5′ caliche 5.8′ sandy caliche
Board Determination			
$\frac{100 \times 9.3' \times 2.33}{27} = \frac{2,166.90}{27} = 80.26$ cubic yards			
Bureau Classification			
8+50 to 9+50	9.35′	2.0′	3.0′ MHC 4.9′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 7.9' \times 2.33}{27} = \frac{1,840.70}{27} = 68.17 \text{ cubic yards}$$

Bore log on centerline at station 10+90 shows in part:

0.0′–4.5′—fine sandy loam: easy boring 0.0′–4.0′, moderate boring 4.0′–4.5′, no cementation, scattered caliche gravels ½″ to 2½″ in diameter 4.0′–4.5′.

4.5′–8.5′—caliche: moderate boring, strongly cemented.

8.5′–10.0′—silt loam: easy boring, no cementation.

10.0′–15.0′—silty clay loam: easy boring, no cementation.

(16″ auger to 4.5′.)

Bureau Classification

9+50 to 10+50	9.67′	3.5′	3.5′ MHC 3.2′ sandy caliche

Board Determination

$$\frac{100 \times 6.7' \times 2.33}{27} = \frac{1,561.10}{27} = 57.82 \text{ cubic yards}$$

Bore log at 10+90, 105′ right, shows in part:

0.0′–5.5′—very fine sandy loam: easy boring 0.0′–4.7′, moderate boring 4.7′–5.5′, noncemented.

5.5′–8.8′—caliche: hard boring, indurated.

8.8′–15.0′—silty clay, easy boring, weakly cemented.

(16″ auger to 5.5′.)

Test Pit No. 1 at station 10+00, 80′ left shows in part:

0.0′–4.5′—fine sandy loam, easy digging, no cementation.

4.5′–9.0′—caliche, easy digging, strong cementation.

9.0′–12.0′—silt loam, easy digging, weak cementation. (Above pit blasted with 6 sticks of dynamite in 4 holes drilled to 6′ in depth on 3′ centers.)

Bureau Classification

10+50 to 11+00	10.00′	4.0′	4.0′ MHC 2.5′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{50 \times 6.5' \times 2.33}{27} = \frac{757.25}{27} = 28.05 \text{ cubic yards}$$

Bureau Classification

11+00 to 11+50	7.99′	4.0′	3.3′ soft caliche & caliche sand

Board Determination

$$\frac{50 \times 1.65' \times 2.33}{27} = \frac{192.22}{27} = 7.12 \text{ cubic yards}$$

Bureau Classification

11+50 to 12+50	7.34′	4.6′	2.8′ soft caliche

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

12+50 to 13+50	7.26′	5.4′	1.8′ caliche & caliche sand

Board Determination

$$\frac{100 \times .9' \times 2.33}{27} = \frac{209.70}{27} = 7.77 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	7.30′	4.3′	3.0′ soft caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.0' \times 2.33}{27} = \frac{699}{27} = 25.89 \text{ cubic yards}$$

Bureau Classification

14+50 to 15+50	6.94′	3.4′	3.5′ soft caliche

Board Determination

$$\frac{100 \times 3.5' \times 2.33}{27} = \frac{815.50}{27} = 30.20 \text{ cubic yards}$$

Bureau Classification

15+50 to 16+50	6.99′	3.3′	3.6 [soft caliche]

Board Determination

$$\frac{100 \times 3.6' \times 2.33}{27} = \frac{38.80}{27} = 31.07 \text{ cubic yards}$$

Bureau Classification

16+50 to 17+20	7.40′	3.0′	3.6′ caliche sand & gravel

Board Determination

$$\frac{70 \times 1.8' \times 2.33}{27} = \frac{293.58}{27} = 10.87 \text{ cubic yards}$$

50G Line Total=635.44 cubic yards

Bore log on centerline beyond end of construction at station 18+74 shows in part:

0.0′–4.7′—sandy loam: easy boring 0.0′–4.0′, moderate boring 4.0′–4.7′, weakly cemented, numerous caliche gravels to 3″ diameter, 4.0′–4.7′.

4.7′–6.8′—caliche: hard boring, indurated.

6.8′–13.0′—weathered basalt: moderate boring, sandy 6.8′–13.0′.

(16″ auger to 4.7′.)

50H

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
0+00 to 1+00	10.8′	4.0′	2.0′ soft sandy caliche 5.3′ silty loam

Board Determination

$$\frac{100 \times 2.0' \times 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
1+00 to 1+50	10.63′	6.0′	4.0′ sandy caliche 2.6′ silty clay loam

Board Determination

$$\frac{50 \times 4.0' \times 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
1+50 to 2+50	10.39′	5.0′	5.9′ soft sandy caliche

Board Determination

$$\frac{100 \times 5.9' \times 2.33}{27} = \frac{1{,}374.70}{27} = 50.91 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
2+50 to 3+50	10.12′	6.0′	4.6′ soft sandy caliche

Board Determination

$$\frac{100 \times 4.6' \times 2.33}{27} = \frac{1{,}071.80}{27} = 39.70 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
3+50 to 4+50	9.87′	6.0′	2.0′ gray sandy loam 3.4′ soft sandy caliche

Board Determination

$$\frac{100 \times 3.4' \times 2.33}{27} = \frac{792.20}{27} = 29.34 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9.81′	5.5′	1.6′ gray sandy loam 4.2′ soft sandy caliche

Board Determination

$$\frac{100 \times 4.2' \times 2.33}{27} = \frac{978.60}{27} = 36.24 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	10.03′	6.0′	4.5′ soft sandy caliche

Board Determination

$$\frac{100 \times 4.5' \times 2.33}{27} = \frac{1,048.50}{27} = 38.83 \text{ cubic yards}$$

Bore log on centerline at 6+60 shows in part:

0.0′–15.0′—fine sandy loam: easy boring, no cementation 0.0′–8.0′, strongly cemented 8.0′–10.0′, no cementation 10.0′–15.0′, occasional basalt gravels ½″–1½″ in diameter.
(16″ auger to 8.0′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	10.07′	5.7′	4.4′ caliche sand
7+50 to 8+50	10.09′	4.7′	5.3′ caliche sand & gravel
8+50 to 9+50	10.19′	2.4′	7.8′ caliche sand & gravel
9+50 to 10+50	9.98′	3.0′	7.0′ caliche sand & gravel
10+50 to 11+50		3.8′	balance not shown
11+50 to 12+50	7.39′	4.3′	3.1′caliche & caliche gravel

Board Determination

$$\frac{100 \times 1.55' \times 2.33}{27} = \frac{361.15}{27} = 13.38 \text{ cubic yards}$$

Bore log on centerline at station 11+70 shows in part:

0.0′–4.7′—very fine sandy loam: easy boring 0.0′–4.0′, moderate boring 4.0′–4.7′, no cementation, scattered caliche gravel 1″–3″ in diameter 4′–4.7′.

4.7′–6.5′—caliche: hard boring, strongly cemented.

6.5′–11.0′—silt loam: easy boring, no cementation.

11.0′–15.0′—silty clay loam: easy boring, no cementation.

(16″ auger to 4.7′.)

Bureau Classification

12+50 to 13+50	8.27′	5.7′	2.6′ caliche & gravel

Board Determination

$$\frac{100 \times 1.3' \times 2.33}{27} = \frac{302.90}{27} = 11.22 \text{ cubic yards}$$

Bureau Classification

13+50 to 14+50	7.72′	5.8′	1.9′ caliche & gravel

Board Determination

$$\frac{100 \times .95' \times 2.33}{27} = \frac{221.35}{27} = 8.20 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
14+50 to 15+70 (EOC)		4.9′	4.7′ caliche & sand gravel

Board Determination

$$\frac{120 \times 2.35' \times 2.33}{27} = \frac{657.06}{27} = 24.34 \text{ cubic yards}$$

50H Line Total=286.68 cubic yards

50J

Bureau Classification

0+00 to 1+50	10.57′	8.0′	3.0′ silty loam

Bore log on centerline at 0+03 shows in part:
0.0′–15.0′—very fine sandy loam: easy boring, no cementation, few scattered caliche and basalt gravels ½″–1″ in diameter, caliche gravels 10.0′–15.0′.
(16″ auger to 10.0′.)

Bureau Classification

1+50 to 2+50	10.75′	7.0′	1.0′ silty gravels 3.3′ sandy caliche

Board Determination

$$\frac{100 \times 3.3' \times 2.33}{27} = \frac{768.90}{27} = 28.48 \text{ cubic yards}$$

Bureau Classification

2+50 to 3+50	11.38′	6.0′	2.0′ silty gravels 3.9′ sandy caliche

Board Determination

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation

$$\frac{100 \times 3.9' \times 2.33}{27} = \frac{908.70}{27} = 33.66 \text{ cubic yards}$$

Bureau Classification

3+50 to 4+50	10.26′	8.0′	2.8′ sandy caliche

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

4+50 to 5+50	9.79′	6.0′	1.5′ silty gravels 2.8′ sandy caliche

Board Determination

$$\frac{100 \times 2.8' \times 2.33}{27} = \frac{652.40}{27} = 24.16 \text{ cubic yards}$$

Bureau Classification

5+50 to 6+50	9.31′	7.0′	2.0′ silty loam & gravels 0.8′ sandy loam & caliche

Board Determination

$$\frac{100 \times 0.4' \times 2.33}{27} = \frac{93.20}{27} = 3.45 \text{ cubic yards}$$

Bore log on centerline at station 6+30 shows in part:

0.0′–3.0′—silt loam: easy boring, no cementation.

3.0′–5.0′—very fine sandy loam: easy boring, no cementation.

5.0′–6.5′—silt loam: easy boring no cementation.

6.5′–15.0′—fine sandy loam: easy boring, no cementation 6.5′–10.0′, weakly cemented peds 10.0′–15.0′, few scattered caliche gravels ¼″–1″ in diameter.

(16″ auger to 10′;6′ auger 10′ to 15′.)

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
6+50 to 7+50	9.44′	6.5′	1.5′ silty loam 1.9′ sandy caliche

Board Determination

$$\frac{100 \times 1.9' \times 2.33}{27} = \frac{442.70}{27} = 16.40 \text{ cubic yards}$$

Bureau Classification

7+50 to 8+50	9.56′	6.0′	2.0′ silty gravels 2.0′ MHC basalt & gravel

Board Determination

$$\frac{100 \times 2.0' \times 2.33}{27} = \frac{466}{27} = 17.26 \text{ cubic yards}$$

Bureau Classification

8+50 to 9+50	9.40′	5.4′	1.3′ soft caliche 2.7′ MHC basalt, gravel

Board Determination

$$\frac{100 \times 4.35' \times 2.33}{27} = \frac{1,013.55}{27} = 37.54 \text{ cubic yards}$$

Bureau Classification

9+50 to 10+50	9.30′	5.1′	1.5′ soft caliche 2.8′ MHC & basalt

Board Determination

$$\frac{100 \times 3.55' \times 2.33}{27} = \frac{827.15}{27} = 30.64 \text{ cubic yards}$$

Bureau Classification

Station	Average Trench Depth	Depth Top Soil	Balance of Excavation
10+50 to 11+20 (EOC)	9.43′	3.6′	1.5′ soft [caliche] 3.3′ MHC & basalt —— caliche sand

Board Determination

$$\frac{70 \times 4.8' \times 2.33}{27} = \frac{782.88}{27} = 29.00 \text{ cubic yards}$$

50J Line Total=244.75 cubic yards

Bore log at 11+95, 52′ right, beyond end of construction, shows in part:

0.0′–1.3′—loamy sand: easy boring, noncemented.
1.3′–6.3′—sandy loam: easy boring 1.3′–5.5′, moderate boring 5.5′–6.5′, noncemented 1.2′–3.6′, weakly cemented 3.6′–5.5′, numerous caliche gravels to 3″ diameter, 5.5′–6.3′.
6.3′–10.5′—caliche: hard boring 6.3′–9.3′, moderate boring 9.3′–10.5′, indurated.
10.5′–13.6′—silty clay loam: easy boring, few cemented (weakly) peds.

(16″ auger to 6.3′.)

53–4

Board Determination

The bureau classification shows 190.9 cubic yards of moderately hard caliche on this line which the Board accepts as rock excavation.

53–4 Line Total=190.9 cubic yards

Summary

(All figures are in cubic yards)

Line	Rock Excavated	Rock Reasonably Expected	Excess rock
53	634.43		634.43
53G	775.76		775.76
53H	368.04		368.04
53J	1,004.38		1,004.38
53K	212.28		212.28
53L	1,013.39	471.00	542.39
53M	443.55		443.55
53N	506.33		506.33
53P	368.35		368.35
53–4	190.90		190.90
53–5	261.90		261.90
	5,779.31	471.00	5,308.31
53–7	761.09		761.09
53–7A	457.61		457.61
53–7B	726.56		726.56
53–7C	111.58		111.58
53–7D	367.51		367.51
53–7E	365.90		365.90
	2,790.25		2,790.25
66	2,434.72	1,257.00	1,177.72
66A	730.91	501.00	229.91
66B	215.74	0	215.74
66C	734.78	500.52	234.26
66D	128.14	0	128.14
66E	1,045.29	483.00	562.29
66F	1,666.85	319.00	1,347.85
66G	820.60	435.00	385.60
66H	881.84	870.00	0
66J	713.87	217.00	496.87
66K	1,269.16	331.00	938.16
66K–2	52.33	28.00	24.33
66K–3	233.42	0	233.42
66L	698.39	660.00	0

Line	Rock Excavated	Rock Reasonably Expected	Excess rock
66M	227.81	0	227.81
66N	926.91	436.00	490.91
66P	1,017.16	725.00	292.16
66Q	960.18	764.00	196.18
66R	131.17	94.49	36.68
66S	603.92	227.82	367.10
66T	426.21	159.20	267.01
66–2	0	0	0
66–3	242.06	0	242.06
	16,161.46	8,008.03	8,094.20
50B	0	0	0
50C	587.17	393.00	194.17
50D	18.12	0	18.12
50E	535.55	405.00	130.55
50F	0	0	0
50G	635.44	446.00	189.44
50H	286.68	98.38	188.30
50J	244.75	48.00	196.75
	2,307.71	1,390.38	917.33
System Totals:			
53	5,779.31	471.00	5,308.31
53–7	2,790.25	0	2,790.25
66	16,161.46	8,008.03	8,094.20
50	2,307.71	1,390.38	917.33
	27,038.73	9,869.41	17,110.09

APPENDIX II

Lateral DW279A is 400 feet in length and extends to the southeast from the DW279 at station 46+34.2. A boring was drilled with a 6-inch power auger on centerline of the 279A at station 0.40 on June 18, 1969. Material is shown by the log to be: silt loam 0.0 to 6.5 feet, saturated 2.5 to 6.5 feet, moderate caving; fine sandy loam 6.5 to 11.5 feet, saturated, moderate caving, caliche gravels 9.0 to 11.5 feet, and loamy fine sand 11.5 to 12.0 feet, saturated, severe caving. Water surface after drilling is approximately 9.0 feet below ground surface. Surface elevation is 1,052 and pipe invert is at approximately 1,043.5.

Lateral DW279B is 500 feet in length and extends to the southeast from the DW279 at station 42+09.2. A boring was drilled with a 6-inch power auger on centerlines of the 279B at station 1+00 on June 18, 1969. The log describes material encountered as: silt loam 0.0 to 3.0 feet, wet, no caving; very fine sandy loam 3.0 to 8.0 feet, saturated, severe caving; loamy sand 8.0 to 14.0 feet, saturated, severe caving; and weathered basalt 14.0 to 15.0 feet, hard boring, strongly cemented. There was no water surface after drilling. Surface elevation is 1,060 and pipe invert is approximately 1,051.7.

Lateral DW279C is 550 feet in length and extends to the south from the DW279 at station 42+09.2. A boring was drilled with a 6-inch power auger on centerline of the 279C at station 5+00 on June 18, 1969. Material encountered is described in part: fine sandy loam 0.0 to 6.0 feet, moist 0.0 to 3.0 feet, wet 3.0 to 6.0 feet, slight caving; silt loam 6.0 to 9.5 feet, wet, no caving and sandy loam 9.5 to 12.0 feet, saturated, slight caving. The log states there was no water surface after drilling. Surface elevation at this point is 1,064.4 and pipe invert is approximately 1,055.

Three borings on D87–49 were made on August 19, 1969, at stations 2+50 on centerline, 8+63 75 feet left of centerline, and 12+80 on centerline. The boring at station 2+50 shows a water surface after drilling approximately 2.0 feet below ground surface, while the water surface after drilling on the other two logs is approximately 1.5 feet below ground surface. Each of the above logs shows a refusal due to severe caving above pipe invert.

The boring on centerline of the D87–49 at station 22+40 was drilled with a 6-inch power auger on June 19, 1969, and shows no water surface after drilling. Surface elevation at this point is 1,127.0 and pipe invert is at approximately 1,117.5. The log shows saturated material, loamy sand, and severe caving from 3.5 to 13.0 feet. Caliche and basalt gravels, moderate boring, are indicated from 13.0 to 15.0 feet.

The boring on centerline of the 49 line at station 31+50 was drilled with a hand auger on Aug. 21, 1969. Surface elevation at this point is shown as 1,143.5, but appears to be approximately 1,141.5. Pipe invert is at approximately 1,131.5. The log shows a water surface after drilling approximately 5.5 feet below

ground, saturated material commencing at 2.5 feet, severe caving from 7.0 to 10.0 feet and a refusal at 10.0 feet due to severe caving.

The boring on centerline of the D87–49 at station 38+50 was drilled with a hand auger on Aug. 21, 1969, and the log shows a water surface after drilling approximately 9.0 feet below ground surface and just below pipe invert, which is approximately 8.5 feet below ground surface. Surface elevation at this point is 1,156.4.

The final boring on the centerline of the D87–49 at station 49+58, beyond EOC at 48+50, was drilled with a 6-inch power auger on June 20, 1969. The log shows loamy fine sand, moist, moderate caving from 0.0 to 7.0 feet, scattered caliche gravels from 7.0 to 8.0 feet and hard boring caliche from 8.0 to 12.0 feet. The log shows no water surface after drilling. Surface elevation is 1,167.7 and pipe invert at the nearest point is 1,159.28.

Only two of the 14 bore logs on laterals D87–49A through 49N (there is one bore log on each lateral with the exception of 49H which has two bore logs) show a water surface after drilling. The first of these, drilled with a hand auger on 49H at station 0+50, 10 feet left on Aug. 19, 1969, shows saturated material from 2.5 to 7.5 feet, a water surface after drilling approximately 3.0 feet below ground surface, severe caving from 4.0 to 7.5 feet and a refusal due to severe caving at 7.5 feet. Surface elevation is 1,112 and pipe invert at the nearest point is approximately 1,103.1. The other bore log showing a water surface after drilling, 49N, centerline at station 0+00, was also drilled with a hand auger on Aug. 19, 1969. The log shows saturated material from 3.0 to 7.5 feet, a water surface after drilling approximately 3.0 feet below ground surface and a refusal at 9.0 feet due to severe caving. Surface elevation is 1,131.3 and pipe invert is at 1,122.14.

The borings on laterals 49A through 49F were drilled with a 6-inch power auger on June 18, 1969. These six logs generally show no caving or slight to moderate caving with saturated and severe caving, if any, below pipe invert. An exception to this is the log at centerline, station 7+00 on 49C, which shows severe caving in moist, loamy sand starting at 5.0 feet below ground surface. Surface elevations where the borings were made range from 1,078 to 1,107.7 and pipe invert is from approximately 8.5 to 10.0 feet below ground surface.

Borings on 49H (centerline at station 5+00), 49L (also centerline at station 5+00), and 49M (centerline at station 2+85) were drilled with a 6-inch power auger on June 19, 1969. As previously indicated, these logs show no water surface after drilling. Indeed, the former logs show neither saturation nor severe caving. Surface elevation of the locations where the former logs were made are 1,117.4 (49H) and 1,127.4 (49L), while pipe invert is at approximately 1,108 and 1,119,

respectively. The log at station 2+85 on centerline of 49M, where surface elevation is 1,134.9 and pipe invert is at approximately 1,123.8, shows saturation at 6.0 feet below ground surface and severe caving from 7.0 to 11.0 feet, with no caving 11.0 to 12.0 feet.

The remaining bore logs on the 49 system (station 5+00, centerline on 49J) and (station 3+00, centerline on 49K) were drilled with a hand auger on July 7, 1969. Surface elevation at the location where the former boring was drilled is 1,126.3, while pipe invert is approximately 1,116.5. Surface elevation at the point where the latter log was drilled is 1,128.1 and pipe invert is approximately 1,120. The log on 49J shows saturation 8.5 to 9.0 feet, but no caving and refusal at 9.0 feet due to hard boring. Saturation in the log on 49K is shown from 6.5 to 8.0 feet with slight caving and refusal at 8.0 feet due to hard boring.

The boring on centerline of the 49–2 at station 0+70 was drilled with a 6-inch power auger on June 16, 1969. Water surface after drilling is approximately 4.8 feet below ground surface. The log shows saturation in silt loam 0.0 to 5.0 feet, no caving and saturation in loamy sand, severe caving from 5.0 to 13.0 feet. Strongly cemented basalt gravels, hard boring are shown from 13.0 to 15.0 feet. Surface elevation at this point is 1,046.7 and pipe invert is at approximately 1,038.

A boring on 49–2 at station 4+83.6, 15 feet right, approximately the point where 49–2 turns northward, was drilled with a 6-inch power auger on May 8, 1968. Water surface after drilling is shown at approximately 3.5 feet below ground surface and water surface on July 15, 1968, is shown at approximately 2.0 feet below ground surface. The log shows saturated sandy loam 2.0 to 7.0 feet, no caving and saturated sand, slight caving 7.0 to 10.0 feet, severe caving 10.0 to 14.0 feet. Weathered basalt, hard boring is shown from 14.0 to 14.5 feet. Refusal is indicated at 14.5 feet. Surface elevation is 1,043.1 and pipe invert at the nearest point is approximately 1,038.66.

A boring on 49–2 at station 12+30 40 feet left, was drilled with a 6-inch power auger on Nov. 14, 1969. The log does not show any water surface after drilling. Saturated, fine sandy loam, severe caving is indicated 2.5 to 9.5 feet and saturated silt loam, severe caving is shown 9.5 to 11.0 feet. Saturated sandy loam, severe caving, is shown 11.0 to 14.0 feet. Surface elevation is 1,065 and pipe invert at the nearest point is 1,053.83.

The final boring on 49.2 (station 17+49, 50 feet left) was drilled with a 6-inch power auger Nov. 14, 1969. The log does not indicate any water surface after drilling. The log shows saturated material (fine sandy loam 0.0 to 5.5 feet; very fine sandy loam 5.5 to 8.5 feet and sandy loam 8.5 to 14.0 feet), severe caving from 3.0 to 14.0 feet below ground surface. Surface elevation is 1,084.6 and pipe invert at the nearest point is 1,069.52.

Lateral D87–49–2A is 500 feet in length and extends to the southeast from the 49–2 at station 12+30.2. Water surface after drilling is approximately 7.0 feet below ground surface. A boring was drilled with a 6-inch power auger on centerline at station 4+00 on 49–2A on Nov. 14, 1969. The log shows (loamy sand 0.0 to 9.0 feet, loamy coarse sand 9.0 to 10.5 feet, and silt clay 10.5 to 12.0 feet) saturated material from 5.0 to 10.5 feet and severe caving from 4.5 to 10.5 feet. Surface elevation at this point is 1,069.5 and pipe invert is approximately 1,059.

Lateral 49–2B is 340 feet in length and extends to the southwest from the 49–2 line at station 12+30.2. A boring on centerline of the 49–2B at station 3+00 was drilled with a 6-inch power auger on Nov. 14, 1969. The log states that there was no water surface after drilling. Material encountered is described as very fine sandy loam, moist, slight caving from 0.0 to 7.5 feet and very fine sand, moist, moderate caving from 9.0 to 10.0 feet. Surface elevation at this point is 1,071 and pipe invert is approximately 1,061.25.

Lateral 49–2C is 700 feet in length and extends to the southeast from the 49–2 line at station 17+49.5. A boring was drilled with a 6-inch power auger on centerline of the 49–2C at station 6+00 on June 18, 1969. The log states that there was no water surface after drilling. Material encountered is described as sandy loam 0.0 to 3.0 feet, moist 0.0 to 1.5 feet, wet 1.5 to 3.0 feet, slight caving; silt clay loam 3.0 to 10.5 feet, wet, no caving, no silt loam 10.5 to 12.0 feet, wet, slight caving. Surface elevation at this point is 1,084.7 and pipe invert is approximately 1,076.25.

Lateral 49–2D is 400 feet in length and extends to the southwest from the 49–2 line at station 17+49.5. A boring was drilled with a 6-inch power auger on centerline of the 49–2D at station 3+00 on Nov. 14, 1969. The log states that there was no water surface after drilling. Material encountered is described as very fine sandy loam 0.0 to 7.0 feet, dry, slight caving; silt loam, dry 7.0 to 8.0 feet, moist 8.0 to 9.0 feet, slight caving; and fine sand 9.0 to 10.0 feet, moist, moderate caving. Surface elevation at this point is 1,087.7 and pipe invert is at approximately 1,078.

UNITED STATES STEEL CORPORATION

8 IBMA 156

Decided *September 30, 1977*

Appeal by the United States Steel Corporation to review an initial decision entered May 11, 1977, by Administrative Law Judge John R. Rampton, Jr. (Docket No. DENV 76–85–P), assessing a civil penalty in the amount of $25 for an alleged violation of sec. 103(e) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 813(e) (1970)).

Affirmed.

Lateral D87–49–2A is 500 feet in length and extends to the southeast from the 49–2 at station 12+30.2. Water surface after drilling is approximately 7.0 feet below ground surface. A boring was drilled with a 6-inch power auger on centerline at station 4+00 on 49–2A on Nov. 14, 1969. The log shows (loamy sand 0.0 to 9.0 feet, loamy coarse sand 9.0 to 10.5 feet, and silt clay 10.5 to 12.0 feet) saturated material from 5.0 to 10.5 feet and severe caving from 4.5 to 10.5 feet. Surface elevation at this point is 1,069.5 and pipe invert is approximately 1,059.

Lateral 49–2B is 340 feet in length and extends to the southwest from the 49–2 line at station 12+30.2. A boring on centerline of the 49–2B at station 3+00 was drilled with a 6-inch power auger on Nov. 14, 1969. The log states that there was no water surface after drilling. Material encountered is described as very fine sandy loam, moist, slight caving from 0.0 to 7.5 feet and very fine sand, moist, moderate caving from 9.0 to 10.0 feet. Surface elevation at this point is 1,071 and pipe invert is approximately 1,061.25.

Lateral 49–2C is 700 feet in length and extends to the southeast from the 49–2 line at station 17+49.5. A boring was drilled with a 6-inch power auger on centerline of the 49–2C at station 6+00 on June 18, 1969. The log states that there was no water surface after drilling. Material encountered is described as sandy loam 0.0 to 3.0 feet, moist 0.0 to 1.5 feet, wet 1.5 to 3.0 feet, slight caving; silt clay loam 3.0 to 10.5 feet, wet, no caving, no silt loam 10.5 to 12.0 feet, wet, slight caving. Surface elevation at this point is 1,084.7 and pipe invert is approximately 1,076.25.

Lateral 49–2D is 400 feet in length and extends to the southwest from the 49–2 line at station 17+49.5. A boring was drilled with a 6-inch power auger on centerline of the 49–2D at station 3+00 on Nov. 14, 1969. The log states that there was no water surface after drilling. Material encountered is described as very fine sandy loam 0.0 to 7.0 feet, dry, slight caving; silt loam, dry 7.0 to 8.0 feet, moist 8.0 to 9.0 feet, slight caving; and fine sand 9.0 to 10.0 feet, moist, moderate caving. Surface elevation at this point is 1,087.7 and pipe invert is at approximately 1,078.

UNITED STATES STEEL CORPORATION

8 IBMA 156

Decided *September 30, 1977*

Appeal by the United States Steel Corporation to review an initial decision entered May 11, 1977, by Administrative Law Judge John R. Rampton, Jr. (Docket No. DENV 76–85–P), assessing a civil penalty in the amount of $25 for an alleged violation of sec. 103(e) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 813(e) (1970)).

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Reportable Accidents

The unintentional covering by intentional roof fall of a continuous mining machine during pillar mining constitutes a reportable accident pursuant to sec. 103(e) of the Act, as implemented by 30 CFR 80.1 (b) (10).

APPEARANCES: Billy M. Tennant, Esq., for appellant, United States Steel Corporation; Thomas A. Mascolino, Esq., Assistant Solicitor, and William T. Pendergrass, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

In this proceeding the appellant, United States Steel Corporation, seeks to review the decision of Administrative Law Judge John R. Rampton, Jr., in assessing a civil penalty for a violation of sec. 103 (e) of the Federal Coal Mine Health and Safety Act of 1969 (Act).[1]

On Friday, July 11, 1975, the room and pillar method of mining was being utilized in the 2 East 8 Right section of U.S. Steel's Geneva Mine. By this method, a mining section is developed and pillars are extracted off the rooms of the main entry, thereby creating a pillar line which induces caving in order to relieve pressure from the roof and provide safer mining conditions.

After completion of this process in the aforesaid section of the mine, the hydraulic system failed on a continuous mining machine being trammed from the area, and before additional oil could be obtained to reactivate the system the roof fell covering the machine. Although the caving was an intentional occurrence pursuant to an approved plan, MESA contends that the "accident" required to be reported under sec-103(e) consisted of the covering of the continuous miner by the roof fall, which necessitated considerable recovery work.

Subsequent to the recovery of the machine 5 days later, on Wednesday, July 16, 1975, Mr. J. Freeman, the MESA subdistrict manager, notified the respondent by letter dated July 18, 1975, that its failure to notify MESA of the incident was a violation of 30 CFR 80.11 for which a petition for the assessment of civil penalty was filed on June 8, 1976.

In its answer of July 6, 1976, U.S. Steel denied the violation occurred as alleged and requested that the petition be dismissed stating that the letter from Mr. Freeman notifying it of the violation did not constitute a notice within the meaning of section 104(b) because it failed to allege a violation of any mandatory standard set forth in the Act and did not fix a reasonable time for abatement. On July 13, 1976, MESA filed a response to respondent's answer and a motion to amend its petition to allege a violation of sec. 103(e) of the Act.

[1] 30 U.S.C. §§ 801–960 (1970).

Thereafter, by order dated Sept. 13, 1976, the Administrative Law Judge granted respondent's motion to dismiss the alleged violation of 30 CFR 80.11, and granted MESA's motion to amend its petition. The respondent then filed an answer to the amended petition denying that a violation of sec. 103 (e) occurred as alleged.

The Judge conducted a hearing on the petition in Price, Utah, on Jan. 4, 1977, and on May 11, 1977, issued his decision which concluded that the respondent had violated sec. 103(e) for failing to notify MESA of the occurrence of a reportable accident and assessed a penalty of $25.

Contention of the Parties

On appeal United States Steel argues that the statutory definition of the term "accident" in sec. 3(k) of the Act fails to give the operator notice that he is required to notify the Secretary of any happening other than those enumerated, and it is therefore a denial of administrative due process to assess a penalty for failure to notify the Secretary of an incident which by statutory definition is not a required subject for notification.

MESA contends that the Act has a broad, remedial purpose and should be interpreted in a manner which favors the reporting of accidents. Such a statement, while true, is not solely determinative of the issue. Rather, our decision herein rests on a more specific regulatory provision.

Issue Presented

Whether the appellant's failure to notify MESA of the covering of a continuous mining machine by an intentional roof fall during pillar mining constitutes a violation of sec. 103(e) of the Act, as implemented by Part 80 of 30 CFR.

Discussion

We concur with the Judge as to the results reached in his decision. We believe that he was correct in assessing a penalty under sec. 109 and in concluding that the entrapment of the continuous mining machine constituted a reportable accident within the meaning of sec. 103 (e) of the Act.[2]

As defined by Congress in sec. 3 (k) of the Act, an "accident" includes "a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of any person."

The appellant concedes that the statutory definition of sec. 3(k) by its terms is not all-inclusive, but argues that the Act provides no further guidance as to what Congress intended to be included within the term "accident," and that for the purpose of assessing a civil penalty under sec. 109(a) an operator must have failed to notify the Secretary of an accident within the meaning of sec 3(k).

[2] In pertinent part, sec. 103(e) provides:
"In the event of any accident occurring in a coal mine the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof."

We find no merit in appellant's argument since the term "accident," for reporting purposes has been further defined by the Secretary's regulations. Part 80 of Title 30 CFR promulgated by the Secretary as an exercise of his rulemaking authority under sec. 508 of the Act is specifically applicable. At Subpart A, sec. 80.1(b)(10), the Secretary implemented and interpreted the statutory definition of sec. 3(k) and provided that an "accident" means: "any other event that could have resulted in the death or injury had any person been in the immediate area."

Despite the fact that the covering of a continuous miner is not specifically enumerated in sec. 3(k), it is encompassed under sec. 80.1(b)(10) as an event that could have resulted in death or injury had the caving process begun while efforts were being made to remove the machine from the pillared area.

Recognizing that our interpretation is based on a regulation that is unusually broad and conceivably applies to a multitude of events, we are nevertheless bound by its provisions. We held long ago that the Board, as a delegate of the Secretary, has no authority to determine the validity of regulations promulgated by the Secretary since the power to declare such regulations invalid lies outside the scope of the Board's delegated jurisdiction. We have consistently adhered to that doctrine ever since.[3]

We conclude therefore that 30 CFR 80.1(b)(10) was meant to be read with sec. 103(e), and as such it is deemed that the appellant was on notice that the covering of a continuous miner during pillar mining as a result of a roof fall constituted a reportable accident under the Act.

It is the operator's responsibility to keep apprised of the Secretary's regulations which implement the Act, and it will not be heard to complain that it has been denied administrative due process by the Judge's assessment of a civil penalty for an unreported occurrence which, under the regulations requiring reporting, constitutes a violation.

Accordingly, we affirm the Judge's decision.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Administrative Law Judge IS AFFIRMED and that the United States Steel Corporation pay a civil penalty in the amount of $25 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

[3] See *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973); and *United Mine Workers of America v. Inland Steel Company*, 6 IBMA 71, 83 I.D. 87, 1975–1976 OSHD par. 20,529 (1976).

APPEAL OF ROCKY MOUNTAIN CONSTRUCTION COMPANY*

IBCA-1091-12-75

Decided *August 17, 1977*

Contract No. 14-10-7-971-234, National Park Service.

Sustained in Part.

1. Contracts: Construction and Operation—Actions of Parties—Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Changes and Extras

Interpretation of the parties prior to dispute has great weight and compels conclusion that force account work included placing red dirt fill but not drying and replacing. Drying or replacement of wet borrow was not force account work and was not covered by the changes clause or changed conditions clause.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Performance or Default: Compensable Delays

An order to build a curved wall was a constructive change outside change order #1 which was for a straight wall. Thus, the claim for extra costs for curved construction and for stand-by time caused by the Government delay in staking wall is compensable.

3. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Performance or Default: Inspection—Rules of Practice: Witnesses

The Government failed to show that a rejected wall did not conform to the plans and specifications.

4. Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Changes and Extras—Rules of Practice: Appeals: Burden of Proof

Claimant has the burden of proof of extra work and failed to establish that in placing utility lines the actual work performed differed from contractually required work.

APPEARANCES: Mr. Bruce R. Toole, Attorney at Law, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Montana, for the appellant; Mr. John P. Lange, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE STEELE

INTERIOR BOARD OF CONTRACT APPEALS

INTRODUCTION: These claims arose out of a $746,556.10 contract for the construction of a boat ramp and access road in the Bighorn Canyon National Recreation Area, Montana. The contract consisted of Standard Form 23 (Jan. 1961 Edition), Specifications and Drawings. A hearing on the claims involved in this appeal [1] was

*Not in Chronological Order.

[1] Administrative Judge Spencer T. Nissen was the hearing official. Judge Nissen resigned from the Board on Jan. 14, 1977. The authority of other members of the Board to decide the appeal is well established. *See*, for example, *T. M. Industries*, ASBCA No. 21025 (May 12, 1977), 77-1 BCA par. 12,545.

held in Billings, Montana, on Aug. 16–17, 1976.[2]

The claims, in order of magnitude, are as follows:

(1) $86,520.99 for extra costs by reason of rework necessary when rain and snow wet certain fill or borrow material used to bring the boat ramp excavation up to grade;

(2) $14,654.03 to construct a curved wall in lieu of a straight wall;

(3) $12,895 to demolish, remove and replace parts of the curved wall, curb, gutter and sidewalks;

(4) $2,100 to bury utility lines deeper than required by the contract.

The First Claim—Rework of Wet Borrow Material

Board Decision: Replacement of borrow does not fall within (a) force account work, (b) changes clause nor (c) changed conditions clause and thus the claim is denied.

INTRODUCTION: The instant contract was to do "construction of a concrete boat ramp, parking area, and access road." Special Provision SP–01, appeal file Tab B (hereafter "tab" will refer to tabs in the appeal file). Drawing No. 617–41006 (35 sheets) "are a part of and are supplementary to these Specifications." SP–02, Tab B.

The Government issued an "extra work Order 1" to furnish all materials, equipment and labor and perform all extra work to "(3) Bring the boat ramp to the grade established by the contracting officer by * * * grading, and hauling in imported borrow from a borrow pit designated by the Contracting Officer * * *." Complaint Par. 7 and Exhibits A, B, and C thereto. (As Exhibits to the Complaint, these letters are allegations. The same letters are in the appeal file, however, and thus are also "in evidence.")

The contractor asserts that this order was issued because the true grade was up to 18 inches below that shown on Sheet 24; that to correct this situation, the Government project engineer instructed the contractor to place and compact red dirt fill to correct the sub-grade; and that this was done in February 1970, but thereafter inclement weather caused the red dirt fill to become mud and caused extra work.

THE CONTENTIONS OF THE PARTIES—THE BORROW CLAIM

The contractor appears to base its claim on the changed condition

[2] In Apr. 1977, the appellant moved to introduce into evidence Mr. Kenney's diary for the period Oct. 1, 1970 to Feb. 18, 1971. The Government opposes the motion on the grounds that the record was closed Aug. 17, 1976, and the diary was not produced in response to a Government discovery request dated June 8, 1976, which asked for all diaries in connection with the work performed under the contract. In response to a Board request both parties submitted briefs in support of their respective contentions.

The diary clearly is not newly discovered evidence. Appellant had it within its control and could have offered it at the hearing. Further, it interpreted the Government's discovery request to exclude this diary at appellant's risk. *Cf., K. Square Corporation a/k/a Ultrascan Company,* IBCA–959–3–72 (Nov. 29, 1973), 80 I.D. 769 (1973), 73–2 BCA par. 10,146. As the Board finds no special circumstances to justify admission of this late offered evidence, the appellant's motion is denied.

clause, complaint, Exh. B, p. 1, par. 2. (The clause is General Provision 58, p. 17 of the General Provisions, Tab B.) However, in its Brief, at p. 12, appellant's counsel specifically says Clause 58 is *not* applicable and appears to base its claim on Clause 57—the changes clause. In its reply brief (p. 1) the contractor says "this was force account work and force account work is done under the instruction of the engineer." However, at the trial appellant's counsel said the changes clause did *not* apply (Tr. 10). Thus, appellant's legal theory is not clear.

The Government in its posthearing brief (pp. 4 & 5) concedes that the previous contractor had "over excavated the boat ramp area" and "that the specifications (presumably this is intended to mean the "drawings") showed the slope and elevations for the boat ramp as they should have been excavated." The Government further states "It is for this reason that the Government contracted with Mr. Kenney under force account (Tr. 10) to bring the boat ramp up to the original specified grade."

The Government contends that Kenney (the prime's subcontractor) performed a "pre bid" investigation and "must have been aware of the high and low spots along the ramp."

The Question Presented: Does the drying and rework of borrow placed under the force account constitute (a) force account work, (b) formal or constructive change order work, (c) a changed condition or (d) some other category of work?

Findings of Fact: The wet borrow material claim

The contract was with appellant, the prime contractor, hereafter called Rocky Mt., to build an access road and boat ramp (Tab B). Rocky Mt. subcontracted with Kenney to build the boat ramp (Exhibit 2).

The contract represented that the area of the boat ramp would be prepared (excavated out of rock) down to the grades shown on the contract drawings (Drawing Sheet 24, Notes 1 and 2, Spec. 1–04, Tab B). However, this was not the fact and the true grade was both higher in spots and lower in many areas (Tr. 21), and the lower end of the boat ramp was narrower than shown on the drawings (Tr. 22).

After award of the contract and subcontract, the parties discovered the facts set forth in the preceding paragraph. Thereupon the Government issued and appellant accepted extra work Order #1 which provided that appellant, and Kenney, would remove the high spots and would fill in the low areas with borrow material from borrow areas designated by the Government nearby at the end of the upper parking lot (Tab C, Tr. Brunson (hereafter "Tr. B.—") 50, 51).

The parties agreed that this would be done as "force account" work at a stated labor rate and equipment rental rate (Tab C). Further, they agreed that the parties' representatives would daily

sign-off on documents recording the labor and equipment used to perform this work (Tab C).

Kenney performed this work of getting, carrying and placing this borrow material and bringing the ramp area approximately to grade during the period Dec. 1969–Feb. 1970 (Tr. 213, 214).

Rocky Mt. and Kenney were paid for this work in the total amount of $21,885.74 (Tr. 214, Exhibit 6, Estimates numbered 1, 2, 3, 4, 5, 13, and 14).

This borrow material was in place by Feb. 19, 1970 (Tr. 213). The next work that had to be performed was to place "base course" (crushed stone to a stated specification) to a depth of 3 inches on top of the borrow material and thereafter pour 6 inches of concrete to create the boat ramp (Sheet 25). This was "original contract work" not "forced account work."

Starting Feb. 19, 1970, the weather became cold and rainy and snowy and the borrow material on the boat ramp got damp and occasionally muddy (Tr. 28, 39, 40, 46, 90, 91; Exhibits C, D, E, F; Tr. B. 56, 57, 59 and 61). However, this rain and snow was not unusual for the place or the time of year (Tr. B. 74; *Cf.*, Tr. 55).

Kenney had difficulty because of the wet borrow material and occasionally the base course, men and vehicles sank into the wet borrow material (Tr. 28, 39, 40, 46, 90, 91; Exhibits C–F; Tr. B. 56–59, 61). Nevertheless, Kenney dried out the borrow material sometimes by removing it, letting it dry, and replacing it. The work of laying base course and pouring concrete was finished early in June 1970 (Tab V; Ltr. Feb. 11, 1974; Tr. 28, 40, 50, 51).

The Government project engineer, Kenney and Rocky Mt. were on the work site almost daily (Tr. 28, 39, 49, 89, 90, 91, 237, 240). The Government project engineer knew that Kenney was doing substantial "no-pay" work in drying the wet borrow material and therefore directed him to place about 900–920 tons of "pay item" base course under the sidewalks along the boat ramp; and Rocky Mt. was paid about $2,300 for this work. Rocky Mt. owed Kenney about $7,200 for this work because of the $5.50 difference in price for this work (the prime contract price was $2.50 per ton while the subcontract price was $8 per ton (Tr. B. 70, 71).

Two years later in June 1972, Rocky Mt. and Kenney, for the first time, made claim for the work of drying and replacing the wet borrow material and for inefficiency, delay (lost profits) and added equipment costs allegedly arising out of the wet borrow material situation (June 28, 1972 claim letter, Tab L), all hereafter called "rework."

[1] *Analysis and decision of the wet borrow material claim*

The Board places great weight on the parties' interpretation of their rights and duties under the contract in issue. (*Cf.*, *General Dynamics Corporation* v. *United States*, — Ct.

Cl. —, decided July 8, 1977, slip opinion pp. 7–12; *Cf., Julius Petrofsky, D.B.A. Petrof Trading Company* v. *United States*, 203 Ct. Cl. 347, 361 (1973); *Florida Builders, Inc.*, ASBCA No. 8728 (Sept. 30, 1963), 1963 BCA par. 3886 at 19,290; NASH, *Government Contract Changes*, Fed. Publ. Inc. 1975, pp. 221, 222, 225.

Here, by reason of the special "force account" clause in the project specification and the special force account specification, the parties agreed to daily sign-off on sheets recording the work performed under the force account. They in effect agreed that this work ended in February or March 1970 by their conduct in not listing it as force account work. The Board concludes that extra work Order #1 work was only to dig, carry, place and rough grade the "red dirt" borrow material.

After this work was done the rain and snow came. The weather encountered was not abnormal. The borrow got wet and Kenney "reworked" it.

The Board finds that this rework was not force account work and that, as it did not result from any informal direction by the Government, it was not constructive change order work. The Board further finds that this rework was not attributable to a changed condition because there is no evidence that the conjunction of normal moisture from the heavens and the "red dirt" created a condition that was unusual, unforeseen, abnormal, or contrary to any contractual representation. Appeal of *Welch Construction Co., Inc.*, PSBCA No. 217 (Feb. 11, 1977), 77–1 BCA par. 12,322 and *Monmouth Fund, Inc.*, ASBCA No. 20158 (Dec. 20, 1976), 77–1 BCA par. 12,305; *Cf., NORAIR Engineering Corp.*, ENG BCA No. 3568 (Apr. 30, 1976), 77–1 BCA par. 12,225.

Since appellant (or Kenney) has the burden of proof on this item and has failed to carry that burden this claim is denied.

The Curved Wall Claim

Board decision: Direction to build a curved wall was a constructive change outside of change Order #1. The claim is allowed to the extent of $10,200.

INTRODUCTION: The second claim for $14,654.03 (pp. 16 and 24 of appellant's first posthearing brief) is for building a curved wall rather than a straight wall near the top of the boat ramp.

The Government does not contest entitlement (Government brief, p. 26, par. 4; C.O.'s decision, dated Oct. 24, 1975, Tab A), so the only issue is quantum.

Contentions of the Parties

The contractor (again the subcontractor) says (by inference) that the original contract did not call for this wall (see sheet 24); that change Order #1, dated Feb. 6, 1970, added the work; that the Government did not stake the wall

until June 15, 1970, by which time all the original concrete work had been finished so the contractor had to keep the concrete batch plant and other concrete equipment in the area to do this added work (Appellant's first brief, p. 14); that the subcontractor's total costs for this added work was $22,809.55; that his revenue for the wall was $8,009.33; and that his claim is for the difference, $14,800.22.

The Government says Kenney erroneously included other unrelated work in this claim (Govt. brief, p. 28), that standby costs are improper as that equipment was needed at the site for other contractually required work (Govt. brief, p. 31), that revenues were $12,942, not $8,009.33 and that Kenney is entitled to $12 per foot times 125 percent or $5,835 (of which $4,668 has already been paid Kenney) (C.O.'s Finding, Tab A).

FINDINGS OF FACT ON CURVED WALL CLAIM

The contract did not call for a wall (Sheet 24, Tr. 30). Change Order #1 directed appellant to construct approximately 705 feet of reinforced concrete retaining wall along the boat ramp at an agreed price of $12 per lin. ft. (Tab C). This work was performed before early June 1970, by building a *straight* wall about 425–450 feet long along the boat ramp (Tr. 38; Tab A; Tr. 155). Thereafter, in late May or early June 1970, the Government project engineer directed Kenney to build a curved wall from station 00 about 414 feet northerly from the top of the boat ramp along the eastern side of the parking area at the top of the boat ramp partly according to a sketch (Exh. I) prepared by the Government (Tr. 143, 138, 144). The Government did not stake out this curved wall until June 15 or 16, 1970 (Tr. 144, 155). The Government concedes liability—agreeing that Change Order #1 was only for the *straight* wall—but says that a curved wall only costs 25 percent more than a straight one (Tab A), thus appellant should get 125 percent of the agreed straight wall price of $12 per foot or $15 per foot (Tab A). Appellant says its actual costs were $22,809.55 (Tab V; Feb. 6, 1975), from which should be deducted its actual revenues of $8,009.33 (appellant's first post-hearing brief, p. 14). It includes in its claim standby costs for concrete equipment which it says would have been out of this area and this job but for the constructive change order to build this wall.

[2] *Analysis and Decision of Curved Wall Claim*

The Government concedes liability so the only question is "how much?" This breaks down to two items: (1) direct costs and (2) standby costs.

Appellant's claim methodology has many of the defects of a total cost claim. See *Warren Printing Co., Inc.*, ASBCA No. 18456 (Sept. 10, 1974, 74–2 BCA par. 10,834 at 51,530). It also depends on unclear evidence as to the precise number

of feet of wall built and the specific use of particular equipment. The Government's evidence is also weak, as the author of Exhibit 15 did not testify and his qualifications are unknown. There is evidence, however, of a week or two delay. In these circumstances the Board concludes that it may properly determine the amount of the equitable adjustment by resort to what has been described as jury verdict.

Proceeding on such basis the Board finds that the building of a curved wall instead of a straight wall of approximately 314 feet cost Kenney $5,200 and that stand-by costs should be awarded in the amount of $5,000 (Nash, *Government Contract Changes*, Federal Publications, Inc., 1975, pp. 389, 395, 396. This claim is therefore allowed in the amount of $10,200.

Claim 3—Wall Removal & Replacement Claim

Board Decision: As the Government failed to show that the rejected wall did not meet the requirements of the plans and specifications, the claim is allowed to the extent of $12,000.

INTRODUCTION: The Contentions of the Parties. Appellant claims $12,895.38 for the rejection, removal and partial replacement of the "tangent" wall (from 0+53.8 to elevation 65.9 and parts of the wall from elevation 65.9 to elevation 71.4 on Sheet 24). Appellant also asserts that because the Government personnel were on the site daily and could have objected to and stopped later-rejected work the Government is estopped to later reject the work and deny this claim.

The Government denies liability saying the claim was properly rejected and further that Kenney was paid for removal costs in a subsequent contract.

Findings of Fact—Rejected Wall Claim

This wall was built under a verbal constructive change order and a sketch made and furnished by the Government. See prior section of this opinion.

The Government was unhappy about the wall as soon as it was made in July 1970 (Tr. 248), but did not formally reject the wall in writing until Dec. 17, 1970 (Tab F) and did not give a proper statement of its reasons until Feb. 19, 1971 (Tab H).

A representative of the Government was on the site when the wall was poured (Tr. 162), and in one instance specifically said one questionable section was O.K. (Tr. 166). The joints in the wall curb ramp and sidewalk did not "line up" (Tr. B. 19), but this was due to a joint error by the Government and Kenney in laying out the concrete forms for the boat ramp (Tr. 247).

The Government alleged five reasons for rejecting the wall. These were: (1) joints incorrectly placed, (2) uneven tops of the wall section, (3) varying curb and wall thickness, (4) bowed wall sections and

(5) nonuniformity of finish and color (Tab H). Kenney verbally objected to the rejection in Oct. 1970 (Tr. 252).

The joints were not even because of the 4-foot gap at the top of the boat ramp slabs and because the Government did not tell Kenney where to put the joints as it should have done (Tr. 30, 247, Tr. B. 19, 45, 47, Tr. 162). The unrejected wall tops of the straight wall were comparable to the rejected wall tops of the curved wall (Tr. 165). The varying thickness of the straight and curved walls were quite minor as Kenney was using snap ties for all the supports (Tr. 165). The Government project engineer on the spot verbally agreed the bowed wall section was adequate (Tr. 166).

The texture and finish variations were caused by attempts to alter same (Tr. 167). The work of removal and partial replacement of the curved wall was done in Aug. 1971 to June 1972 (Tab U—Spread Sheet), and Kenney or Rocky Mt. notified the Government of their claim in June 1971 (Tab V, Kenney's Feb. 6, 1975 letter and June 1972 (Tab L)). Kenney incurred costs of approximately $12,895.38 in replacing the wall (Tr. 175, Tab U, Spread Sheet with Kenney's Feb. 6, 1975 letter). The curb portion of the wall was defective and properly rejected (Tr. 165, 166).

[3] *Analysis and Decision of Rejected Wall Claim*

The Government has failed to show that the rejected portions of the wall did not conform with the plans and specifications of the contract or constructive change order. The Government witness rephrased the conclusions stated in the Government's rejection letter but gave no citations to the drawings or specifications supporting those conclusions. Neither did he contradict the testimony of Mr. Kenney which is the basis for the Board's Finding of Fact listed in the preceding section of this decision that the allegedly defective conditions in the curved wall were accepted in the straight wall.

There appears to have been two basic causes of the rejection—uneven joints—and tangent rather than radius design.

The Government is responsible for the adequacy of the design and the drawings (*J. W. Hurst & Sons Awning, Inc.*, ASBCA No. 4167 (Feb. 20, 1959), 59–1 BCA par. 2095; *Bethlehem Steel Corporation*, ASBCA No. 13341 (Nov. 19, 1971), 72–1 BCA par. 9186).

The unevenness of the joints arose out of a mutual misinterpretation of Sheet 24 by the Government project engineer and Kenney when they laid out the location of the forms for the 50-foot concrete slabs of the ramp. Further, the project engineer's sketch of the tangent wall was not sufficiently clear and the Government representative on the site did not indicate that he read the sketch to require joints in specified places and he did not so inform Kenney.

The hint in the evidence that Kenney was paid for wall removal un-

der a later contract is insufficient to establish that as a fact. Kenney admitted at the hearing that the curb was defective. The cost of this element is totally unclear. Thus, on a jury-verdict basis the Board finds for appellant in the amount of $12,000.

Claim 4—Burying the Utility Lines

The Board Decision: The appellant failed to carry its burden of proof and the claim is denied.

INTRODUCTION: This is a claim for $2,100 for burying utility lines deeper than required by the specifications.

Contentions of the Parties

Appellant says Exh. L represents rock not the real surface; also that Mr. Kenney's observations were more accurate than the exhibit (appellant's brief, p. 22). The Government says Kenney need not have buried the lines as deep as he did and his costs are suspect (Government's answer brief, p. 39).

Findings of Fact—Utility Lines Claim

Article 1–21 "Utility conduits," of the construction specifications called for one conduit 18 inches below subgrade and the other two conduits 18 inches below and 12 inches horizontally from the first (Tab B, Addendum 1, p. 3). The location of the planned utility lines is shown on sheet 24 between the top of the boat ramp and the parking lot (Sheet 24, drawings in the appeal file). The lines were dug at approximately the location shown on sheet 24 (Tr. 178).

The lines were dug considerably below 3 feet of the surface of the ground into solid rock in Feb. 1970 (Tr. 178, 179). This was done to the grade set by the Government placed stakes (Tr. 180). The lines were buried 4½ feet below the surface of the rock or subgrade at the center of the parking lot (Tr. 181, 182, 184). At the time the trenches were dug Kenney and the Government did not know precisely where the subgrade would be in the end (Tr. 182).

Sheet 25 shows a typical cut section and graded section of the parking lot at the boat ramp (Sheet 25; Tr. 274). Bidders should have estimated their excavation prices based on finding rock as the subgrade and planned to put the trench down so that it was covered everywhere at least 36 inches below subgrade and so the conduits graded slightly (1 percent minimum) to the east side of the ramp (Tr. 275, Addendum 1 to IFB).

There is no evidence as to what Rocky Mt. or Kenney expected the grade, nature or elevation of the subgrade to be at the location of the conduits when they prepared their bids for this item of work. There is no evidence either that appellant or Kenney was misled or that Kenney was required to excavate deeper than required by the drawings and specifications; nor is there adequate evidence of the basis for the bid or claimed costs.

[4] *Decision of Utility Claim*

Appellant has failed to carry its burden of proof as to how it prepared its bid, how the actual work differed from the contract required work or the work bid upon and how its actual costs were increased. The claim is therefore denied.

Summary of Decision

Item	*Amount Allowed*
Borrow Rework	$0
Curved Wall	10,200
Rejected Wall	12,000
Utility Lines	0
Total	$22,200

GEORGE S. STEELE, JR.,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Administrative Judge.
Chairman.

APPEAL OF AIRCO, INC.

IBCA-1074-8-75

Decided *October 17, 1977*

Contract No. 14-09-0060-3002

1. Rules of Practice: Appeals: Motions

Motion for a protective order to prevent the disclosure of pre-award technical discussions with bidders in a two step 1FB unsupported by affidavits that the information furnished was (a) a trade secret and was (b) furnished in confidence, was denied, but the Government is nevertheless given 45 days to file affidavits by the bidders on these and other issues.

2. Rules of Practice: Appeals: Discovery

The parties are entitled to discover all documents not privileged which are reasonably likely to lead to admissible evidence and do not cause a burden disproportionate to the probable benefit from the requested discovery taking into account the size of the claims involved and their nature as well as the nature of the defenses.

APPEARANCES: Mr. W. Stanfield Johnson, Mr. Joseph M. Oliver, Jr., Attorneys at Law, Jones, Day, Reavis & Pogue, Washington, D.C., for the appellant; Mr. Thomas A. Garrity, Department Counsel, Amarillo, Texas, for the Government.

OPINION BY ADMINISTRATIVE JUDGE STEELE

INTERIOR BOARD OF CONTRACT APPEALS

Table of Contents of Opinion

1. *Introduction.*

The Government in a Motion for Protective Order dated Aug. 3, 1977, has asked for an order stating: (1) that certain enumerated documents (copies furnished to the Board and marked) need not be furnished appellant in discovery and (2) for an order holding that appellant's interrogatories 76, 77 and 78 need not be answered.

2. *Background.*

This is an appeal from the default termination of an approximately $1.7 million contract for the process design and construction of a helium purification plant. The pleadings raise issues including excusable delays (premature default) (*e.g.*, par. 39 Complaint), and impossibility of performance (assumption of the risk of impossibility) (*e.g.*, par. 79(b) Complaint), superior knowledge by the Government (*e.g.*, par. 63 Complaint) (Summary of Prehearing Conference, Oct. 12, 1976, p. 2, par. 3), failure to cooperate (*e.g.*, par. 63 Complaint).

3. *Decision.*

(a) The Government has filed a Motion for a Protective Order (1) as to certain documents and (2) as to interrogatories 76, 77 and 78.

(b) The Motion is denied as to interrogatories 76, 77 and 78.

(c) The claim of attorney-client privilege as to certain documents is denied.

(d) The Motion as to the balance of the documents is denied unless on or before Nov. 28, 1977, the Government files affidavits by the "third parties" that specific portions of specific documents (1) contain information which was proprietary when furnished, (2) the third party expected that the information would be held in confidence (state the basis—in detail—for the expectation together with a statement as to whether the persons furnishing the information made verbal statements or requests that the information was to be treated as "confidential"), (3) the information still is valuable protected "trade secrets" and (4) the present disclosure of the information to appellant would injure the third party in specified ways.

(e) This opinion supersedes the Summary Order dated Oct. 5, 1977.

4. *Government's Contentions.*

The Government says the documents furnished the Board are privileged because they are "material submitted by, or comments about materials submitted by, or comments and reports of informations received from, Appellant's competitors. The deleted material involved negotiations before the contract was awarded to appellant." Further, even if relevant, the information—the Government says—is not material (p. 2 of Government's Motion).

5. *Appellant's Contentions.*

The appellant says that the Government has failed to establish that the material is (a) trade secrets or (b) its disclosure would harm the Government.

6. *Detailed Rulings by the Board—Part I—Documents.*

(a) In this order the Board has grouped the documents into four groups for the purpose of discussion and ruling thereon.

(b) *Group I—Attorney-Client Privilege.*

The documents in this group include the following:

Exhibit 11, Agenda May 29, 1968. (All dates are 1968 unless otherwise indicated.)

Exhibit 16, Apr. 8.

Exhibit 19, June 14.

Discussion. The Exhibit 16, Apr. 8 memorandum is typical of the documents in this group. The *advice* given by counsel is normally privileged; Ingalls, ASBCA No. 17717 (Aug. 16, 1973), 73-2 BCA par. 10,205 at pp. 48,096 and 48,104. However, the fact that a person consulted counsel, or the identity of counsel, is not normally privileged, especially in contract appeals (97 C.J.S. *Witnesses* §§ 283 (d), (e), (f), (g); 8 *Wigmore* (1961 ed.) Sec. 2307, 2313, 2320, 2292). Thus, the objection made by the Government's motion is overruled and the motion, as to this group of documents, is denied.

(c) *Group II—Documents relating to the identity of prospective or actual bidders and relating to discussion or evaluation of technical proposals and/or negotiation of terms and conditions of a contract.*

These documents include the following:

Exh. 11, Feb. 29, 1968; Apr. 1, May 31, May 29.

Exh. 12, Nov. 30, 1967; Dec. 1, 1967; Jan. 24, Mar. 6, Mar. 22 May 16.

Exh. 13, Feb. 29, Apr. 1 (Duplicates Exh. 11, Apr. 1 document, although the claim of privilege is not made as to one paragraph claimed under Exh. 11), Apr. 15, Apr. 25, May 31.

Exh. 19, June 14, July 12, Aug. 2.

Exh. 32, May 9, July 12 (Duplicates July 12 in Exh. 19).

Exh. 36, Apr. 25 (Duplicates Apr. 25 memorandum in Exh. 13).

Exh. 43, July 12 (is a duplicate).

Discussion. The documents in this group range from those such as Exh. 16, Apr. 8, wherein the Government seeks to merely delete the identity of a bidder's name, to the Exh. 12, Jan. 24 document, where the Government seeks to prevent access to a 5-page summary of extensive technical discussions together with some "contractual" negotiations. This document, and others, is listed in more than one group.

There are regulations applicable to the Defense Department (*e.g.*, ASPR 1-329.3c(4)b; ASPR 1-1004, ASPR 3-805.3 (b) & (c); ASPR 4-107), which prohibit "technical transfusion," and "auction techniques" and which very severely limit the *pre-award* distribution of information concerning bidders' proposals and prices, or the disclosure of trade secrets. Department counsel has not cited any similar regulations applicable to the instant contract except that in its Sept. 27, 1977, submission the Government did cite 41 CFR 1-3.103(b). Nevertheless, the Board is not persuaded that any such regulations would be applicable, in the present circumstances of this appeal, to the docu-

ments in this group, because the information contained therein is so general in nature. Thus, the Government's Motion—as to this group—is denied as indicated in par. 3(d) *ante.*

(d) *Group III—Discussions of Processes for helium purification with or without dollars per unit information or horsepower data.*

These documents include the following:

Exh. 11, Apr. 1, May 29.

Exh. 12, Nov. 30, 1967, conf. report; Dec. 1, 1967, conf. report; Jan. 24; Mar. 7, Telecon; Mar. 22, conf. report.

Exh. 13, Apr. 1.

Exh. 32, May 9; Dec. 11, 1967.

Discussion. Exh. 12, Nov. 30, 1967, is a typical document in this group. This is a summary of extensive discussions with a bidder about the units that were part (or to be part) of the instant contract. Apparently, the Government issued the step I request for technical proposals on or about Sept. 25, 1967 (see appeal file, Vol. 2, Tab. 5, Exhibit A, unnumbered page entitled "Technical Proposal G–5017–A, Scope;" see also Complaint, par. 4). The discussions included technical matters such as pounds per square inch, dollars per thousand cubic feet, percentage of recovery and horsepower, etc.

There is no indication that the matters reported were considered trade secrets of a technical process or a financial nature. There is no problem now of technical transfusion since the instant contract was awarded, performed (at least in part) and terminated.

The appellant has alleged impossibility at least as to part of one unit. Thus, even if the documents themselves are not admissible there is a possibility that they will lead appellant to witnesses who may be useful at the hearing. Furthermore, the Board assumes that Mr. Taylor, Mr. Haynes, Mr. Kalman or Mr. Whitney may be a Government witness, and if so, they would probably review these documents as part of their preparation for their testimony and thus make them "available" to appellant under Rule 612 of the Federal Rules of Evidence, 28 U.S.C. FRE. Finally, the Government's claims of privilege in its memorandum are so general and non-specific that they cannot be accepted. All claims of privilege must be specific and the grounds advanced in support of each must be particularized and in detail. Thus, the objection as to these documents is overruled and the Government's Motion—as to these documents—is denied as indicated in par. 3(d) *ante.*

(e) *Group IV—Documents apparently abstracting technical data from technical proposals.*

These documents include the following:

Exh. 13, check list, sheets, abstracting data or processes.

Apr. 15 Memo with 3 sheets.

Exh. 16, check list, 5 sheets abstracting data or processes.

Exh. 27, check list.

Exh. 36, check list—5 sheets.

Discussion. These documents give the Board the most trouble. Exhibit 13's sheets abstracting data or proc-

esses are typical. These appear to be abstracts of the technical proposals submitted during step one of this procurement. It appears likely that the proposals involved were marked with a restrictive notice. Department counsel has not said, however, that this is in fact the case. The problem with the Government's briefs is that they *assume* the critical fact—that the documents contain proprietary technical processes or financial data (trade secrets). The Board will not assume this fact. It is not self-evident. It is not evident from a close examination of the documents themselves. There is no indication that the data were considered "trade secrets" by those who furnished them to the Government. Thus, the Government's objections are overruled. The Government's motion as to these documents is denied as indicated in par. 3(d) *ante*.

7. Part II—*Interrogatories*.

(a) *Interrogatory 76*.

Ruling. The Board denies the Government's motion for a Protective Order. The Government is ordered to answer 76(a) (identifying persons). The Government is ordered to answer 76(b) or to allow appellant to inspect all files which would contain these documents. (The Government may also review the files and claim privilege in detail on specifically identified documents (or portions thereof) or enter into an agreement with appellant reserving the parties' rights to later argue admissibility.) The information sought is possibly relevant to the Government's defense of accord and satisfaction, or to the issue of excusable delay, and to a possible issue of waiver of the original delivery date, if the parties wish to introduce evidence on these issues.

(b) *Interrogatory 77*.

Ruling. The Board denies the Government's motion for a Protective Order. The Government, on p. 6 of its memorandum, misconstrues the Board's *dicta* in its decision dated Apr. 6, 1976. The quote in the Government's brief related to a hypothetical discussion in the opinion of a situation where the contractor failed to appeal a final decision on a specific claim of excusable delay and later appealed a damages assessment which utilized the facts found in the unappealed decision. The Board said in such instance it would not reopen the earlier unappealed findings. That is a different situation from *Fulford;* it is not the situation in this appeal; thus counsel's argument is misplaced or inapplicable. The Government is ordered to answer this interrogatory. This ruling on discovery does not, of course, limit the Government's right to seek, or at the hearing offer, evidence, and in the post-trial briefs to argue the defenses it calls "Accord and Satisfaction" or "Laches" in its "Answer," dated Apr. 29, 1976.

(c) *Interrogatory 78*.

Ruling. The Government's motion for a Protective Order is denied. Note each interrogatory seems to contain three parts: (1) the

numbered question, (2) question "(a)," and (3) question "(b)." The Board's order encompasses all three portions.

In this regard the Board does not understand Department counsel's arguments that questions 76, 77 and 78 require a "guess." The Bureau must merely state the opinions of its employees (and that of any other potential witnesses whose opinion is presently known) as to the work not completed on the units at the dates specified in the questions.

8. *General Guidelines on Discovery.*

(a) There are two alternative methods the Board can use in handling discovery. The first is the normal way which is established by our present rules (43 CFR 4.115 (a)) whereby the Board encourages the parties to engage in voluntary discovery and the Board only deals with discovery when these efforts fail. This is the traditional method followed by most boards and courts. This method has proved to be adequate most of the time.

(b) The second approach—which is advocated in very large complex cases—is for the board or court to control all discovery from the very beginning. The board is willing to proceed in this manner on such cases if application is made to it promptly after the filing of the pleadings.

(c) Since the parties are already many months into their discovery these guidelines may well not be very helpful at this late date. Nevertheless, they are issued for your guidance and the guidance of litigants in future appeals.

(d) Discovery is an important part of litigation. It is necessary that the boards afford the parties sufficient discovery so that the parties have a constitutionally (or contractually) adequate trial (the term as used here includes discovery). It is also important that the Board minimize the cost, and other burdens, of discovery. Thus—when asked—the board will seek to provide adequate discovery balanced against the cost thereof. In this regard much of the cost of attorneys' time can be minimized by the parties if they cooperate in the discovery process.

(e) Where, as in this appeal, excusable delays, and lack of cooperation, are alleged, and the contract was terminated for default, the contractor often has a legitimate desire to review *all* of the Government's files about contract performance (and vice versa). (Counsel should advise his client that such requests are not unreasonable per se and that the burden will be upon the objecting party to establish the existence of a legitimate reason for withholding discovery.) Thus, the moving party may make a relatively minimal showing of good cause to shift the burden of persuasion onto the party who opposes discovery.

(f) Where, as here, a party alleges superior knowledge and impossibility thereby also putting in issue the assumption of the risk of impossibility, see *The Austin Co.* v.

United States, 161 Ct. Cl. 76 (1973), the resisting party's burden is even heavier.

(g) Nevertheless, the board will indeed rule on objections to discovery. It will require that the objections be particularized and in detail. It will require that documents or portions of documents be clearly identified, that the objection be stated specifically and the grounds thereof be set forth in detail. *See Ingalls*, ASBCA No. 17717, 73-2 BCA par. 10,205, for a detailed discussion of the grounds for objections.

(h) Thus, the "first wave" of discovery may well be a motion to produce all or broad classes of documents for inspection. If this discovery is agreed to (or allowed) it will greatly reduce the need for time-consuming interrogatories.

(i) The "second wave" of discovery might well be precise interrogatories aimed at identifying people and the knowledge or opinions they have on precise topics. The board does not look with favor—in general—on interrogatories asking a party to list all documents in its possession or control which relate to topic "A," or topic "B."

(j) Such questions require an inordinate amount of time to answer with less than commensurate benefit. If a party has made full disclosure of its files, and has devised an accurate system of identifying which documents it has produced, there is no reason to allow such an interrogatory. Normally, interrogatories will not be allowed to be used as a substitute for a Bill of Particulars.

(k) It is clear that interrogatories may only be directed to parties (and each corporate or Government agency party must appoint an officer, employee or agent to sign answers to interrogatories on behalf of the party. Such agent should normally not be the trial lawyer—see ABA Canon of Prof. Responsibility ECS-9, 5-10, DR5-101 B; DR5-102, Black's Law Dictionary XLII (4th ed. 1951). Thus, it is technically correct to assert that an interrogatory should not be directed to appellant's employee "Mr. A. J. Jones." Nevertheless, depositions on written interrogatories can be directed—at much greater expense—to such an individual employee of a party. Counsel may often agree to waive this particular objection, of course, and treat the interrogatory as if it was a deposition on written interrogatories.

(l) The "third wave" of discovery can be oral depositions. This board has ruled that such depositions can only be taken of a party's *present* employees (see IBCA cases in Appendix hereto). If a party seeks an order to take a deposition of a person who is not presently an employee of a party he should brief and argue the matter exhaustively as he must ask the board to overrule prior decisions. This limitation on the board's willingness to *order* depositions does not limit the parties' ability to *agree* to depositions of non-employees.

(m) The board in large and complex cases will look favorably upon motions under the discovery and/or prehearing rules to compel the simultaneous production of lists of

expected witnesses, the exchange of exhibits and the exchange of summaries or even verbatim transcripts of expected testimony (all as discovery and not as evidence).

(n) Finally, the Board points out that Rule 103—as to the "appeal file"—(43 CFR 4.103) requires good faith action by the contracting officer and the contractor in filing all documents they believe are relevant to the dispute as then stated. If privilege is asserted at any time, it should be done *in detail.*

(o) Thus, the touchstones of discovery are:

(1) probability that the discovery will lead to admissible evidence (but it is not a ground for objection that a document or other material involved in discovery is not admissible *per se*), and

(2) that the burden is commensurate with the need.

The objections to discovery are (a) privilege—but privilege is not absolute, especially when a competing concern overweighs the reason for the privilege, and (b) burden, *i.e.*, the benefit likely to be derived from the discovery is clearly much less than the burden of compliance.

(p) The board in preparation for this Order digested the opinions which are in the Appendix hereto. They are attached to this Order for your information.

GEORGE S. STEELE, JR.,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Administrative Judge.
Chairman.

251-126—78——2

APPENDIX

Digest of the Selected Discovery Decisions of Boards of Contract Appeals Since 1964. Research method as limiting scope of cases digested

The method used to locate the opinions digested herein was (on Sept. 1, 1977) to run *VITRO*, IBCA-376 (Aug. 6, 1964), 1964 BCA par. 4360, and *INGALLS*, ASBCA No. 17717 (Aug. 6, 1973), 73-2 BCA par. 10,205, through the citator and digest all the relevant discovery cases listed therein.

Table of Contents
Part I—By Agency

1.1 *Commonwealth Electric Co.*, IBCA-1048-1174 (Dec. 18, 1975), 82 I.D. 625, 76-1 BCA par. 11634.

The issue per the pleadings is (a) ambiguous specifications as to whether payment (at the rate for helicopter erection of towers) for all towers is proper or whether this helicopter rate was only for the erection of certain towers.

The request, for all documents relating to the use or potential use of helicopters for erection of transmission line, was allowed.

The request was allowed for engineering estimates and bid estimates where the Government said bidders should have been able to correlate payment provisions with methods of excavation or erection.

The request for "all documents related to the use of helicopters for fire prevention * * *" was denied as the purpose of the specification requirement for a water bucket with helicopters was obvious.

The request for all documents evaluating the contractor's plan of work was denied when the Government said that there were none.

The request for all documents relating to partial or final payment was allowed as there is a dispute over computation, and the documents may explain the Government's decision to allow the helicopter payment rate for one tower.

As to the request for "all documents relating to the contractor's claim * * * consideration of that claim and the contracting officer's final decision" the Board ordered an *in camera* review of all documents which the Government asserted were protected by privilege.

The Board partially allowed a request for all specifications issued by the contracting agency within 5 years which provide for different payments depending on construction method. The Board allowed this only as it related to specifications that had partial mandatory helicopter erection provisions. If this is burdensome the Government can make the files containing these contracts available and allow the appellant to search them.

The request for "all documents relating to environmental considerations * * * in the project" was allowed as the Answer stated that very special environmental considerations were applicable to certain towers.

1.2 *JB&C Co.*, IBCA 1020–2–74 and IBCA–1033–4–74 (Dec. 11, 1974), 75–1 BCA par. 11017.

The Government filed various discovery requests on a total cost claim. The following discovery requests were allowed:

(1) A listing of all equipment used on the differing-site condition claim including make, year, model, size, capacity, mounting and type of power, all accessory equipment, the rated capacity, and whether the equipment was rented (if so list the owner), whether it was hired on an operated basis, the rental charge for each equipment and the base month for computing costs.

(2) All jobs—similar to that in this appeal—performed by appellant for a stated 3-year period, with the location, type of work, name of agency, and specification number. The Board gave these general guidelines:

(a) A party need not produce documents previously furnished.

(b) Motions to produce are distint from interrogatories.

(c) A party need not compile data not readily available to it.

(d) Occasionally a proper response is to make files available for the other party to search.

(e) Generally, contemporaneous photographs, reports and correspondence probably is not protected by a work product or attorney-client privilege.

(f) A conditional response—I will produce the records you seek if you will produce the records I seek—is often reasonable.

1.3 *Carl W. Olson & Sons, Co.*, IBCA–930–9–71 (Apr. 4, 1974), 81 I.D. 157; 74–1 BCA par. 10,564.

In this case the Government objected to the demand for production of certain documents asserting various claims of privilege. The board, after *in camera* inspection, ruled thereon as follows:

(1) Documents prepared after receipt of the claim which evaluated it and apparently were used by the contracting officer in partial allowance of the claim were not "prepared in anticipation of litigation" (FRCP 26(b)(3))—this objection was overruled.

(2) The six "tests" or criteria in *Vitro*, IBCA–376, 1964 BCA par. 4360, are still valid.

(3) The objecting party must specify with particularity the portions of the document which it says are protected by a specific privilege.

(4) The Government must produce:

(a) Six-page memorandum of the project engineer (PE) to the civil engineer transmitting a draft findings of fact of 32 pages (but the draft need not be produced).

(b) Memorandum from regional director to PE on geologic and groundwater conditions involved in claim.

(c) Nine-page memorandum commenting on claim by J. P. Bara.

(d) A handwritten memorandum from Chief Construction Branch to field engineer transmitting four pages of comments by chief inspector commenting on parts of claim.

(e) A memorandum from Chief Materials Branch to the field engineer commenting on one page of the claim.

(5) The Government need not produce the following:

(a) Draft findings.

(b) Memorandum from Project Construction Engineer to Director of Design and Construction with computations in connection with claim.

(c) Draft findings and decision prepared in the Office of the Director of Design and Construction.

These were examined *in camera* and convinced the board that the contracting officer's decision was personal and independent and the documents were protected as mental processes, deliberations, computations and methods by which the contracting officer arrived at his final decision.

1.4 *Carl W. Olson & Sons, Co.*, IBCA–930–9–71 (Oct. 15, 1973), 73–2 BCA par. 10,269.

This is an appeal involving a $1.7 million claim under a contract to

construct concrete lined drains, various concrete and pipe structures and related earthwork.

The board (in the 2d or 3d "wave" of discovery) ruled as follows:

(1) Depositions must be for discovery or evidence but not for both; allowed in this case for discovery only.

(2) The board can order depositions only for Government (or appellant) employees; requests to depose retired former Government employees denied.

(3) Evidentiary discovery will be allowed only on a showing that the deponent will not be available as a witness.

(4) A deposition of an *expected expert witness* will only be allowed on a showing of exceptional circumstances that it is impractical for the moving party otherwise to obtain discovery.

(5) The party requesting the deposition will bear all expenses thereof.

(6) At this late and burdensome stage of discovery (and where the existence of documents has not been established) the Government need only make files available and appellant may search same.

(7) Documents need only be produced once.

(8) A draft letter need not be produced.

1.5 *Iversen Construction Company (AKA ICONCO)*, IBCA–981–1–73 (May 1, 1973); 80 I.D. 299; 73–1 BCA par. 10,019.

In this $90,000 claim the board denied without prejudice appellant's application for oral depositions for discovery saying that voluntary methods should first be exhausted. It also said it did not allow depositions of non-employees, since it had no jurisdiction over them.

1.6 *Carl W. Olson & Sons Co.*, IBCA–930–9–71, Apr. 18, 1973, 73–1 BCA 10,009.

The board said that the application for the depositions of the Government's design team, teamleader and the supervisor of the geologic studies for discovery *and* evidence was defective as the board's rules (43 CFR 4.115) say for discovery *or* for evidence. The Government was ordered to allow depositions for discovery in this $1.7 million claim involving voluminous records.

1.7 *Allison & Haney, Inc.*, IBCA–587–9–66 (Sept. 13, 1968), 68–2 BCA par. 7242.

Correspondence and a memorandum of telecon between Government engineers used by contracting officer in reaching his decisions are ordered produced (and apparently should have been put in the appeal file by the contracting officer) but a draft and two other documents subsequent to the final decision were not discoverable under this request for all documents used by the contracting officer in reaching his decision.

1.8 *Allison & Haney, Inc.*, IBCA–587–9–66 (June 19, 1967), 74 I.D. 178; 67–2 BCA par. 6401.

The Board ruled on numerous discovery requests as follows:

(1) The Government will respond to a motion to admit or deny that the contracting officer consulted others before he issued the final decision.

(2) The Government need not produce policy advice, etc., from others to the contracting officer used in reaching his decision or issuing a "Supplemental Notice" (apparently an amendment to the IFB or Specifications), because the IBCA rule then required the contracting officer to include in the appeal file all of the documents on which the contracting officer relied in making his decision. (Note the present rule 43 CFR 4.103 does NOT contain this language. It does require the contracting officer to file statements of any witnesses on the matter in dispute.)

(3) Orders the Government to answer whether certain specifications are "stock" specifications.

(4) Denies, as over-broad, the request that the Government identify construction projects "of the United States of America" which used certain specifications and limited the request to the Bureau of Reclamation—the contracting agency in this appeal.

(5) Allows *for discovery purposes only* a question as to revisions to the plans and specifications after award of the contract.

(6) Redesignates certain interrogatories as motions to produce the last five construction projects of the Bureau of Reclamation that used these specifications.

1.9 *Winston Brothers Company, Foley Brothers, Inc., Frazier-Davis Construction Company and Hurley Construction Company*, IBCA–625–2–67 (May 22, 1967), 74 I.D. 157; 67–1 BCA par. 6346.

A discovery motion for all minutes, memorandum reports of Government representatives or committees relating to FPR 1–11.401.1 (relating to a contract clause about the allowability of taxes as allowable costs) was denied without prejudice as premature because appellant had failed to show that it had applied under certain regulations to the agencies involved for such documents.

1.10 *William L. Lemesany, d/b/a/ Lemesany Roofing and Insulation Company*, IBCA–533–12–65 (Oct. 31, 1966), 66–2 BCA par. 5917.

Where the IBCA examined report of Division of Investigations (marked "Non-Security—Confidential Not for Public Inspection"), and where it is the policy of the Department of the Interior to keep such investigations secure so as to avoid harrassment of informants and where the persons interviewed in said report had either testified during the appeal or would answer posthearing interrogatories and where the report is hearsay, the Board will not order its production.

1.11 *Vitro Corporation of America*, IBCA-376 (Aug. 6, 1964), 71 I.D. 301; 1964 BCA par. 4360.

Where the contractor apparently in effect wanted all documents relating to a claim/appeal/contract and where the Government was willing to produce all except (i) inter or intra office communications, (ii) opinion deductions or conclusions of engineers, designers or geologists, (iii) personal notes or diaries of individual Government personnel, (iv) supporting calculations as to feasibility of prebid engineer's estimates, the Board said the applicable test under 5 U.S.C. § 488 (1970) is documents "not prejudicial to the interest of the Government," *see also* 43 CFR 2.1–2.20. It also cited with approval the following propositions and cases:

(1) discovery of an official accident report was denied in a Federal Tort claims suit as involving secret material; *U.S.* v. *Reynolds*, 345 U.S. 1 (1953);

(2) discovery of an advisory recommendation to Secretary on policy issues was denied in breach of contract suit; *Kaiser Aluminum Corp.* v. *United States*, 141 Ct. Cl. 38 (1958);

(3) discovery of staff studies of CAB, was denied in *North American Airlines* v. *CAB*, 240 F. 2d 867 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 941.

(4) discovery of an official accident report was denied (Government offered to identify witnesses) as impairing information furnished in confidence, *Machin* v. *Zucker*, 316 F. 2d 336 (1963), but the Court allowed discovery of the "factual findings of the mechanics," 316 F. 2d 340.

The Board said the guidelines for discovery are as follows:

(1) relevancy to appeal;

(2) necessity of the documents for proof of appellant's (moving party) case;

(3) seriousness of damage to public interest caused by disclosure;

(4) factual as opposed to policy content of the document;

(5) existence of confidential relationship which might be impaired by disclosure; and

(6) the normal desirability of full disclosure.

If there is further dispute the Board said it would ask to review the documents *in camera.*

2.1 *Allied Materials & Equipment Co., Inc.*, ASBCA No. 17318 (Sept. 11, 1973), 73–2 BCA par. 10,338.

Here the Government asserted that the work papers of the Defense Contract Audit Agency (DCAA) generated by DCAA auditors when they audited appellant's claim from data in appellant's books and records were privileged as part of the agency's decision making process.

The board examined the papers *in camera* and overruled the general claim of privilege. The Board discusses a prior similar (but much more specific) claim which was sustained as to three papers which were determined by the Board to be irrelevant.

2.2 *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17717 (Aug. 16, 1973), 73–2 BCA par. 10,205.

The ASBCA after giving a lot of background ruled as follows:

(1) A report and evaluation of the claim, which was one basis for the Contracting Officer's final decision, is discoverable except as to portions which are policy advice or attorney-client advice. The Government also must identify the authors of the report.

(2) A fraud investigation need not be produced or its investigators identified at least while the investigation is on-going.

(3) The Government is to state whether Admiral Rickover decided the claim was overstated and, if he has, the Government shall state the basis for that decision and produce documents which comment on the accuracy of the claim except for advisory opinions or legal or policy portions of those documents.

(4) Government audit reports will be produced.

(5) The expected sales portion of appellant's financial plan appears irrelevant and may be excised but board will examine the whole document *in camera.*

(6) The appellant will allow the Government to examine its general ledger but the Government may not now copy same.

3.1 *Blackhawk Heating & Plumbing Co., Inc. & Donovan Construction Co.*, VACAB No. 998 (May 3, 1972), 72-1 BCA par. 9438.

The board ordered the Government to answer apparently relevant interrogatories.

3.2 *The National Construction Co.*, VACAB No. 775 (Jan. 24, 1969), 69-1 BCA par. 7475.

A Government motion to produce documents was denied (where the dispute is over the amount of wages due an employee of appellant's subcontractor) where the record is unclear and the board believes that a speedy trial is more important.

3.3 *Blackhawk Heating & Plumbing Co., Inc. & Donovan Construction Company*, VACAB No. 744 (Sept. 23, 1968), 68-2 BCA par. 7252.

The board at trial admitted a report of an expert (without authentication or testimony of that expert). The Government objected and moved for the production of all field notes and soil samples made or used by the expert. Appellant said those were in the custody of the expert.

The board held that its rule only applied to materials under the control of the parties and denied the Government's motion to produce.

3.4 *Unicon Management Corporation*, VACAB 470 (Aug. 12, 1968), 68-2 BCA par. 7180.

Appellant filed a motion to produce documents. The Government resisted saying some were in the custody and control of an A/E who required money to search for same while as to others the Government had unsigned copies. Appellant alternatively asked for a subpoena under 5 U.S.C. § 304 (1970).

The board ruled as follows:

(1) The motion as to the documents in the control of the A/E was denied as rule 19 applied only to parties.

(2) The motion was allowed as to copies in the Government's control.

(3) The request for a subpoena under 5 U.S.C. § 304 (1970) was denied as the same was an extraordinary, not routine, remedy and appellant had not shown that the A/E refused to furnish documents to appellant.

3.5 *Merritt Chapman & Scott Corp.*, VACAB No. 533 (Aug. 5, 1966), 66–2 BCA par. 5762.

Where appellant seeks engineering documents on specification problem there may be a question of privilege, but the request is denied because appellant has neither shown the documents exist nor sufficiently identified them.

4.1 *General Investment Corp.*, DOT CAB No. 67–9A (Feb. 16, 1968), 68–1 BCA par. 6907.

The Government moved for subpoenas under 5 U.S.C. § 304 (1970). The appellant opposed.

The board allowed the motion saying the information sought appeared relevant.

4.2 *Aries Enterprises, Inc.*, DOT CAB 67–20 (Dec. 13, 1967), 68–1 BCA par. 6761.

Where the appellant asked for an investigation which was conducted in accordance with the Manual for Courts Martial and the contracting officer considered the witness' statements in that report in reaching his decision that appellant was contractually responsible for certain lost equipment and where the DOT CAB rules required the contracting officer to place in the appeal file all witness' statements the contracting officer considered in reaching his final decision, the Government waived any privilege it might have to protect the courts-martial investigation report (as to witness' statements). Further, the Board of Contract Appeals said that the Freedom of Information regulations paralleled the discovery rules.

5.1 *Combustion Associates, Inc.*, GSBCA No. 2366 (Sept. 23, 1968), 68–2 BCA par. 7253.

The board ruled on appellant's motion to produce documents as follows (the $23,000 claim was for mechanical changes to a boiler. There appears to be an argument that chemical conditions caused the condition in the boiler):

(1) As to data about chemical conditions, the board fails to see the relevancy and reserves ruling pending oral argument or hearing of the appeal.

(2) The motion is denied as to certain documents because appellant has failed to establish by deposition or interrogatory that (a) they exist, (b) that they are identified with particularity and (c) that respondent has custody or control over them.

The board did point out the Freedom of Information Act which contains no requirement to show relevancy.

5.2 *Kahoe Supply Company, Inc.*, GSBCA No. 1730 (Jan. 25, 1967), 67–1 BCA par. 6123.

Memoranda from people who worked in the building during the 2 years prior to the janitorial contract in dispute were not relevant and discovery was denied.

Letters that were written deducting sums from other contractors' janitorial contracts in other buildings were confidential, privileged and irrelevant and prior decision denying discovery (66–2 BCA par. 5876) was affirmed.

5.3 *Aberdeen Construction Co.*, GSBCA No. 2165 (Nov. 4, 1966), 66–2 BCA par. 5943.

Where Government counsel asserts that a search has been made and no records found the Board will accept the same as the Government's response to a motion to produce.

Further, the number of other contracts and deficiency notices issued by the Government during a 3-year period is irrelevant so this discovery request is denied.

5.4 *Blount Bros. Construction Co.*, GSBCA No. 1385 (Aug. 10, 1965), 65–2 BCA par. 5043.

The board denies a request for all reports about test borings as the board believed those were not in the Government's custody and it would not allow a general search for evidence.

5.5 *Blount Bros. Corp.*, GSBCA No. 1385 (June 8, 1965), 65–2 BCA par. 4898.

A motion to produce reports, memoranda and documents pertaining to those persons preparing and conducting test borings for the pertinent job site was denied as the moving party must first establish by deposition or interrogatories that the records in fact existed.

5.6 *The Chemithon Corp.*, GSBCA No. 4525 (Mar. 28, 1977), 77–1 BCA 12536.

Gives guidelines on depositions, subpoenas and the Federal Rules of Evidence.

6.1 *Westinghouse Electric Corp.*, AEC BCA 62–2–70 (Apr. 1, 1970), 70–1 BCA par. 8214.

The board said that voluntary discovery should be exhausted before application is made to the board. The board rules are cited as being at 10 CFR 3.207.

7. *Secondary Sources*

(a) Klein, Judicial Admissions before Boards of Contract Appeals, 7 PCLJ 138 (1973); 86 Harv. L.R. 1047 (1973), FOI.

(b) Hart, "The case for Increased Prehearing Discovery in Government Contract Cases," 1970 Proceedings A.B.A. Sec. Ins. N. & C.L. 110 (1970); 9 Procurement Articles 199 (Fed. Pubs. Inc.) (1970).

(c) Kramer, "Contract Appeals Boards and the Subpoena Power: The Curious Background of 5 U.S.C. 304," 7 Proc. Art. 565 (Fed. Pubs. Inc.) (1970); 29 Fed. B.J. 200 (1970).

8. *Evidentiary Rulings*

8.1 Part of a Government memorandum of a conference with appellant about the claim was excluded from evidence. The factual portion of the memorandum made available confirmed the time and place of the meetings, the attendees, the purpose of the meeting, the Government's conclusion from an examination of appellant's records that the overrun involved approximately $46,000, and the conclusion that the meetings produced information substantiating appellant's claim. The author of the memorandum was a witness at trial of *Power City Construction and Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 68-2 BCA par. 7126 at p. 33,016.

8.2 Appellant's witness on the issue of reasonableness of contractor's progress in stringing conductor during instant contract was not allowed to testify as to his progress on the same kind of work on other contracts apparently with the same administration or agency. *Power City Construction and Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 68-2 BCA par. 7126, at 33,017.

ESTATE OF EDWARD LEWIS PITT

6 IBIA 156

Decided *October 17, 1977*

Appeal from an order determining fair-market value of merchantable timber on Tract Nos. 124-4490 (Edward Lewis Pitt) and 124-4491 (Lillian Pitt) as of June 9, 1976.

MODIFIED.

1. Indian Lands: Tribal Rights in Allotted Lands—Indian Probate: Yakima Tribes: Generally—435.0

A statutory option held by the Tribe to take such interests in lands which pass to specific heirs or devisees who are not enrolled members of the Tribe does not vest any rights in said interests until payment by the Tribe of the fair-market value as determined by the Administrative Law Judge, after hearing if demanded, plus unpaid interest.

2. Indian Lands: Tribal Rights in Allotted Lands—Indian Probate: Yakima Tribes: Generally—435.0

Fair-market value date is considered to be the date of hearing to determine value or if no hearing, the date the Judge makes an independent finding and judgment as to the fair-market value of the interest to be taken.

APPEARANCES: Hovis, Cockrill & Roy by Timothy Weaver, Esq., for the Yakima Tribe; MacDonald, Hoague and Bayless, by Robert Free, Esq., for the devisees.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal by the Yakima Tribe from the decision and order of Administrative Law Judge Robert C. Snashall dated Dec. 8, 1976, determining the fair-market value as of June 9, 1976, of merchantable timber on the Yakima Reservation

referred to as Tract Nos. 124–4490 (Edward Lewis Pitt) and 124–4491 (Lillian Pitt) to be $163,238.70 and $142,181.08, respectively.

After a hearing held on June 3, 1975, at Warm Springs, Oregon, Judge Snashall issued an order and decree of distribution dated July 16, 1975, wherein he determined, among other things, that Lewis Edward Pitt died testate on Dec. 30, 1973, leaving his trust property located on the Yakima and Warm Springs Reservations to his children, Charlotte Logsden, Lillian Pitt and Lewis E. Pitt, Jr., with income therefrom to his wife Elizabeth T. Pitt during her lifetime; the rest, residue and remainder, both real and personal to his wife, Elizabeth T. Pitt. The decedent's wife and children were enrolled Warm Springs Indians.

A caveat included in the July 16, 1975, order and decree warned that the devisees' interests in the trust properties on the Yakima Reservation "may be subject to divestiture by Yakima Tribal purchase pursuant to the Yakima Act of Dec. 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607 (1970)); accordingly no distribution shall be made until Dec. 30, 1976."

The Yakima Tribe acting by and through its land committee elected to purchase all of devisees' interests in the trust properties located on the Yakima Reservation as listed by the BIA in its Apr. 15, 1975, inventory and appraisement attached to the July 15, 1975, order approving will.[1] Upon being notified of said election and documents having been filed evidencing, in addition to said election, the appraisement dated Apr. 15, 1975, and transfer of purchase funds to the deposit of this estate, Judge Snashall on Nov. 11, 1975, issued a supplemental order of distribution, ordering that all

[1] ESTATE OF EDWARD LEWIS PITT, YAKIMA ALLOTTEE NO. 124-4490 INVENTORY AND APPRAISEMENT COVERING THE YAKIMA ESTATE DECEASED: DECEMBER 30, 1973

Tract No.	*Description and Acreage*	*Interest*
124-4490 (Original Allotment)	S½NE¼ and Lots 1 & 2 in Sec. 1, T. 7 N., R. 14 E., W.M., WA., cont. 161 a., m/l. Appraised value: $89,000	1/1
124-709 (Minnie Parker)	NW¼ Sec. 15, T. 9 N., R.E., W.M., WA., cont. 160 acres, m/l. Appraised value: $1,875	1/8
124-710 (Chapman Snun-gayah)	SW¼NW¼ and NW¼SW¼ Sec. 16 and E½SE¼ Sec. 17, T. 9 N., R. 16 E., W.M., WA., cont. 160 acres, m/l. Appraised value: $2,730	1/24
124-711 (Martie Snun-gayah)	SE¼ Sec. 18, T. 9 N., R. 16 E., W.M., WA., cont. 160 acres, m/l. Appraised value: $1,250	1/8
124-1569-A (Charlot Edwards)	NE¼NW¼ Sec. 35, T. 11 N., R. 19 E., W.M., WA., cont. 40 acres, m/l. Appraised value: $39,400	1/1
124-1850 (Julia Edwards)	E½SW¼SE¼ Sec. 8, T. 11 N., R. 18 E., W.M., WA., cont. 20 acres, m/l. Appraised value: $1,350	1/8
124-4491 (Lillian Pitt)	Lots 3 & 4 and S½NW¼ Sec. 1, T. 7 N. R. 14 E., W.M., WA., cont. 163 acres, m/l. Appraised value: $34,692	1726/3780

Total Value on Yakima Reservation	$170,297
Yakima Agency IIM Account No. P-166 as of D.O.D	None
Yakima Agency IIM Account No. as of 4-15-75	$1,798.80
Total Value of Yakima Estate	$172,095.80

April 15, 1975. I hereby certify that the foregoing is an accurate inventory according to the records of the Yakima Indian Agency, Toppenish, WA 98948, of the trust real property or interest therein owned by Edward Lewis Pitt, Yakima Allottee No. 124-4490, at the time of his death, Decemer 30, 1973.

The above values are based on appraisals performed by staff appraisers of the Bureau of Indian Affairs.

Realty Officer

right, title and interest of the aforenamed devisees in said trust properties on the Yakima Reservation vest in the United States in trust for the Yakima Tribe. The Judge advised that the order becomes final 60 days from the date of mailing unless within such period an aggrieved party shows cause why said order should not become final. The devisees through counsel on Dec. 29, 1975, protested the appraisal of said trust properties and requested a hearing for the purpose of determining the fair-market value thereof. The devisees contended that the appraisal of said property incorporated in the Nov. 11, 1975, decree and order was substantially below fair-market value.

Judge Snashall on Jan. 26, 1976, issued a modification order reflecting that an error existed in the appraised value of three tracts included in the Apr. 15, 1975, inventory. Incorporated therein was a corrected inventory dated Jan. 6, 1976.[2]

[2] CORRECTED INVENTORY ESTATE OF EDWARD LEWIS PITT, YAKIMA ALLOTTEE NO. 124-4490 INVENTORY AND APPRAISEMENT COVERING THE YAKIMA ESTATE DECEASED: DECEMBER 30, 1973

Tract No.	*Description and Acreage*	*Interest*
124-4490 (Original Allotment)	S½ NE¼ and Lots 1 & 2 in Sec. 1, T. 7 N., R. 14 E., W.M., WA., cont. 161 a., m/l. Appraised value: $89,000	1/1
124-709 (Minnie Parker)	NW¼ Sec. 15, T. 9 N., R. 16 E., W.M., WA, cont. 160 acres, m/l. Appraised value: $3,687.50	1/8
124-710 (Chapman Snungayah)	SW¼ NW¼ and NW¼ SW¼ Sec. 16, and E½ SE¼ Sec. 17, T. 9 N., R. 16 E., W.M., WA, cont. 160 acres, m/l. Appraised value: $1,820.80	1/24
124-711 (Martie Snungayah)	SE¼ Sec. 18, T. 9 N., R. 16 E., W.M. WA., cont. 160 acres, m/l. Appraised value: $1,837.50	1/8

A valuation hearing was held at Toppenish, Washington, on June 8 and 21, 1976, for the purpose of determining the fair-market value of devisees' interest in the trust properties on the Yakima Reservation. The parties stipulated and agreed as to the fair-market value of all of decedent's interest on the Yakima Reservation inherited by the devisees other than the fair-market value of merchantable timber on Tract Nos. 124-4490 and 124-4491.[3]

Tract No.	*Description and Acreage*	*Interest*
124-1569-A (Charlot Edwards)	NE¼ NW¼ Sec. 35, T. 11 N., R. 19 E., W.M., WA., cont. 40 acres, m/l. Appraised value: $39,400	1/1
124-1850 (Julia Edwards)	E½ SW¼ SE¼ Sec. 8, T. 11 N., R. 18 E., W.M., WA., cont. 20 acres, m/l. Appraised value: $1,350	1/8
124-4491 (Lillian Pitt)	Lots 3 & 4 and S½ NW¼ Sec. 1, T. 7 N., R. 14 E., W.M., WA., cont. 163 acres, m/l. Appraised value: $34,692	1726/3780

Total Value on Yakima Reservation..... $171,787.80
Yakima Agency IIM Account. No P-166 as of D.O.D..... None
Yakima Agency IIM Account No. P-166 as of 4/15/75..... $1,798.80
Total Value of Yakima Estate..... $173,586.60

Jan. 6, 1976. I hereby certify that the foregoing is an accurate inventory according to the records of the Yakima Indian Agency, Toppenish, WA 98948, of the trust real property or interests therein owned by Edward Lewis Pitt, Yakima Allottee No. 124-4490, at the time of his death, Dec. 30, 1973.

The above values are based on appraisals performed by staff appraisers of the Bureau of Indian Affairs.

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[3] UNITED STATES DEPARTMENT OF INTERIOR, OFFICE OF HEARINGS AND APPEALS

IN THE MATTER OF THE ESTATE OF EDWARD LEWIS PITT, DECEASED ALLOTTEE 124-4490 OF THE YAKIMA INDIAN AGENCY OF THE STATE OF WASHINGTON

Stipulation of Value Concerning Portions of Deceased's Property

COME NOW Robert Free, on behalf of the heirs of Edward Lewis Pitt, and Tim Weaver,

Upon conclusion of the valuation hearing, Judge Snashall issued what he termed a "Final Order" dated Dec. 9, 1976, wherein he found, among other things, the purchase and taking by the Yakima Indian Tribe on Sept. 3, 1975, of certain trust properties of the above-entitled estate referred to in footnotes 1 and 2, a verification of the Yakima Tribe's deposit into the Dept: Verify makeup from here thru p. 859 estate account of $171,-787.80 less certain allowable credits; that the interested parties entered into a written stipulation as to decedent's interest in the trust properties on the Yakima Reservation, referred to in footnote 3, leaving solely for determination the fair-market value of merchantable timber on Trace Nos. 124–4490 and 124–4491.

Dennis Marlowe, real estate appraiser for the Bureau of Indian Affairs, appraised the merchantable timber as of June 9, 1976, as follows: Tract No. 124–4490 (fair-market value) $139,412.72 and Tract No. 124–4491 (fair-market value) $119,848.72. Alton Cronk, a consulting forester, appraised the merchantable timber on said tracts as of Mar. 3, 1976, as follows: Tract No. 124–4490 (fair-market value) $183,891 and Tract No. 124–4491 (fair-market value) $171,200. Mr. Cronk also appraised the same properties as of June 21, 1976, as follows: Tract No. 124–4490 (fair-market value) $186,347, and Tract No. 124–4491 (fair-market value) $173,528.

Although other appraisals were offered by the interested parties, the Judge found that the appraisals referred to in the previous paragraph were the only ones currently applicable as of the date of hearing.

Judge Snashall found the highest and best use of the property to be forest land for the production

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on behalf of the Yakima Indian Tribe, and stipulate and agree that:

1. The fair market value for Edward Lewis Pitt's interest in Tract No. 124–1569–A (Charlot Edwards) is $39,400.
2. The fair market value of Edward Lewis Pitt's interest in Tract No. 124–1850 (Julia Edwards) is $1,350.
3. The fair market value of Edward Lewis Pitt's interest in Tract No. 124–709 (Minnie Parker) is $6,746.
4. The fair market value of Edward Lewis Pitt's interest in Tract No. 124–710 (Chapman Snungayah) is $3,067.
5. The fair market value of Edward Lewis Pitt's interest in Tract No. 124–711 (Martie Snungayah) is $2,789.
6. The fair market value of the interest of Edward Lewis Pitt in the forest land and young growth trees on Tracts 124–4490 (original allotment) and 124–4491 (Lillian Pitt) is $56 per acre for forest land and $34 per acre for non-forest land.

Having made the above stipulations and agreements, the parties agree that the only material issues of fact remaining to be resolved in an evaluation hearing, are the fair market values of merchantable timber on Tracts 124–4490 and 124–4491.

DATED this 22 day of June 1976.

MACDONALD, HOAGUE & BAYLESS

By _____
ROBERT FREE
Attorneys for Heirs of Edward Lewis Pitt

HOVIS, COCKRILL & ROY

By _____
TIM WEAVER
Attorneys for Yakima Indian Tribe

cc:

Superintendent
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of timber; that there was no conflict as to the estimated timber volumes on Tract Nos. 124–4490 and 124–4491 as of June 9, 1976; that the Western Wood Products Association Ponderosa Pine Index for 1971 was $183.81 and that this Index when adjusted to June 1976 by the adjustment figure of 1.329 (arrived at by taking the average of the Western Wood Products Association Ponderosa Pine figures for March, April and May which were $241.40, $246.28 and $245.27, and dividing it by $183.81) gave a basic selling price for June 1976 of $243.29; that the sales value of by-products (chip value) was $16.51, giving a total net value of the subject Ponderosa Pine of $259.80; that total production costs of said pine were $138.46 as to Tract No. 124–4490 and $141.25 as to Tract No. 124–4491, giving a stumpage value for Tract No. 124–4490 of $124.34 and for Tract No. 124–4491 of $118.55; that Douglas Fir was forty-two percent (42%) and Lodgepole Pine was twenty-five percent (25%) of the Ponderosa Pine value; that the cash market value of the merchantable timber on Tract No. 124–4490 was 1325 MBF of Ponderosa Pine at $121.34 per MBF, 37 MBF of Douglas Fir at $50.96 per MBF and 52 MBF of Lodgepole Pine at $30.34 per MBF, for a total stumpage value of $163,238.70; that the cash market value of the merchantable timber on Tract No. 124–4491 was: 1152 MBF of Ponderosa Pine at $121.34 per MBF and 110 MBF of Lodgepole Pine at $30.34 per MBF for a total stumpage value of $142,121.08; and that devisees' fractionated interest in Tract No. 124–4491 was 1726/3780.

Judge Snashall concluded, among other things, that the use for which the interests in the property in question is taken is a special consideration use in the United States in trust for the Yakima Indian Tribe; and that the just compensation to be paid by the Tribe for the taking of the merchantable timber on Tract No. 124–4490 is $163,238.70 and Tract No. 124–4491 is 1726/3780 of $142,181.08, with interest at eight percent (8%) per annum on the total of said amounts in excess of $171,787.80 from Sept. 3, 1975, until the deficiency is paid into the estate IIM Account.

The Yakima Tribe appealed contending, among other things that:

(1) The Court erred in its apparent ruling that petitioners had satisfied their burden of proof.

(2) The Court erred in determining that the date of valuation should be the date of trial, *i.e.*, June 1976.

(3) The Court erred in applying its formula for determining the fair-market value of merchantable timber on Tract Nos. 124–4490 and 124–4491.

(4) The Court erred in determining the Yakima Tribe was liable for interest in the amount of eight percent (8%) per annum on any excess amounts above $171,787.80 from Sept. 3, 1975, until such deficiency is deposited to the estate's account.

Preliminary to consideration of the merits of the case and the contentions of the Yakima Tribe, after a review of the implementing regulations concerning the Act of Aug. 9, 1946, *as amended* by the Act of Dec. 31, 1970, the Board finds said regulations to be controlling. We further find said regulations as they apply to this matter to be clear and unambiguous.

Pursuant to these regulations when a deceased Indian is shown to have owned a trust estate in and on the Yakima, Warm Springs, or Nez Perce Reservations, the probate proceedings relative to determination of heirs, approval or disapproval of a will and the claim of creditors shall first be concluded as final for the Department. The decision is referred to as the probate decision. 43 CFR 4.301(a).

In the probate decision, a special preliminary finding shall be made showing those interests in land on the reservation which pass to specific heirs or devisees, subject to a statutory option in the Tribe to take at its fair-market value. If an appraisal or a supplemental thereof of the property has been filed, the summary, regardless of the date, shall be attached to the decision for the information of the parties subject to further revisions pursuant to 43 CFR 4.304.

Immediately upon a probate decision becoming final, a notice of finality and an order of distribution of the estate shall be issued at the end of a period of 65 days and mailed by the Judge to the parties in interest including the Tribe. 43 CFR 4.301(b).

The Tribe may then elect within 45 days of the date of mailing the notice, and not thereafter, to take under the statute all or part of the available interests specified in the probate decision. Notice of election shall be filed by the Tribe with the Judge. Copies shall simultaneously be mailed by the Tribe to the affected heirs or devisees and the Tribe shall file a certificate that this has been done. The right to distribution of all unclaimed interests not included in the election to take shall accrue to the heirs or devisees upon the expiration of the 45-day period. *Ibid.*

Upon the expiration of the 45 days allowed to the Tribe, any affected party aggrieved by the findings in the probate decision relative to the appraisal shall file within 20 days a complete statement of all of their reasons for disagreement with such findings and if a hearing is desired the demand shall be made at the same time. Copies of the statement and demand shall be mailed by the filing party to all other affected parties including the Tribe. 43 CFR 4.301(d).

The Judge, upon receipt of a demand for a hearing, may set a time and place and serve notice thereof to all affected parties not less than 20 days in advance of the hearing. At the hearing each party attacking the valuation of the interests shown by the appraisal report shall have the burden of proving his own position. 43 CFR 4.305.

Upon conclusion of the hearing, the Judge shall issue a decision which shall determine all of the issues presented by the objections and the demand for hearing. The decision shall include findings of fact and conclusions in each case with a judgment establishing the fair-market value of the interests to be taken by the Tribe. 43 CFR 4.306.

Nothing shall prevent the parties from entering into binding written stipulations with each other. 43 CFR 4.307.

Where no objection or demand for hearing nor stipulation is timely filed, the Judge shall make an independent finding of and a judgment as to the fair-market value of the interest to be taken. In support thereof the Judge may, with or without a hearing at his sole discretion, require other and further necessary documents or evidence as to value in addition to the appraisal report or any admissions in the stipulation in the record. *Ibid.*

The Judge shall issue a decision, a notice thereof with copy of said decision attached, to all parties in interest. An aggrieved party may appeal to the Board within 60 days of the mailing of the notice and copy of the decision. 43 CFR 4.308(a).

Upon the expiration of 60 days from the date of mailing the notice of decision or the expiration of 2 years following the date of death of the decedent, whichever date shall be later, the pendency of the estate shall terminate. 43 CFR 4.309.

Within 20 days after the decision becomes final the Tribe shall file with the Superintendent a specific list of the interests it elects to take with the names of the heirs or devisees affected, and it shall be conclusively presumed that the Tribe has released all claim to any interest not listed and not paid for as provided in the next paragraph. 43 CFR 4.310(a).

Simultaneously with its election the Tribe shall pay in to the Superintendent not less than 10 percent of the fair-market value of all interests included in its list, said part payment to serve as earnest money and liquidated damages payable to the affected heirs or devisees in the event of a default of full payment by the Tribe. 43 CFR 4.310(b).

The Tribe is obligated to pay the balance of the fair-market value to the Superintendent for the affected parties plus interest on the unpaid balance at a rate of 8 percent per annum within 1 year from the date of filing the election to take. 43 CFR 4.311.

During the pendency of the probate and up to the date of the payment of the earnest money by the Tribe all income received or accrued from the land interest taken by the Tribe shall be credited to the estate account to be distributed to the creditors or to the heirs or devisees. 43 CFR 4.312(a).

Following payment of the earnest money by the Tribe, all income from the interests in land taken by the

Tribe shall be held by the Superintendent for the Tribe pending the payment of the balance of the fair-market value plus interest and upon such payment the income shall be paid over to the Tribe, but upon default by the Tribe, the income shall be credited to the account of the heirs or devisees. The Tribe may elect to default in making full payment as to any or all interest they previously elected to take. 43 CFR 4.312(b).

Upon payment by the Tribe of the full fair-market value as determined for an interest or interests, the Superintendent shall issue his certificate to the Judge that this has been done, and the Judge shall make a finding that the fair-market value as determined in the decision previously entered has been paid by the Tribe and upon such finding the Judge shall issue a decision that the United States holds the title to such interest in trust for the Tribe. 43 CFR 4.313.

In this case, after the probate decision was issued, the Tribe elected on or about July 25, 1975, to purchase all of devisees' interests in the trust properties located on the Yakima Reservation.

On Dec. 29, 1975, the devisees protested the appraisal incorporated in the Nov. 11, 1975, order of distribution, asserting it to be below the fair-market value and at the same time requested a hearing.

A hearing was held on June 8 and 21, 1976, pursuant to section 4.305 of the regulations, wherein among other things, testimony was taken first from Alton Cronk, a consulting forester, for the devisees, and then from Dennis Marlowe, real estate appraiser, Bureau of Indian Affairs. In addition to said testimony, several appraisal reports that were prepared by Messrs. Cronk and Marlowe were submitted and included in the record.

Judge Snashall issued a decision and order entitled "Final Order" on Dec. 8, 1976, wherein among other things, he concluded that as of June 9, 1976, the fair-market value of the merchantable timber on Tract No. 124–4490 to be $163,-238.70 and on Tract No. 124–4491 to be $142,121.08.

We consider it appropriate at this juncture to review the Tribe's contention that the Court erred in its apparent ruling that devisees had satisfied their burden of proof. The record is replete with evidence submitted by the devisees, the preponderance of which clearly establishes that the values set forth in the appraisal report attached to the probate decision of July 16, 1975, were below fair market. Moreover, stipulations entered into by the parties on June 22, 1976, as to fair-market value of land interests included in said appraisal report would further tend to refute the Tribe's contention. We find that the devisees did satisfy their burden of proof regarding the insufficiency of the ap-

praisal report attached to the July 16, 1975, probate decision.

Upon the issuance of Judge Snashall's Dec. 8, 1976 decision, the Tribe had a right to appeal to the Board. Had the Tribe chosen not to appeal, upon the expiration of 60 days from the mailing of the last notice of decision required in 43 CFR 4.308, the Tribe could have exercised its option to take devisees' interest by filing within 20 days after the decision became final, a specific list of interests it elected to take in keeping with 43 CFR 4.310 (a) and simultaneously paying in to the Superintendent not less than 10 percent of the fair-market value of all the interests included in the list pursuant to 43 CFR 4.310(b).

The Tribe elected to exercise its right to appeal and did appeal to this board.

Upon the issuance of the board's decision, which is final for the Secretary, and upon the expiration of 60 days from the mailing of the last notice of decision required by 43 CFR 4.308, the Tribe then will have 20 days within which to exercise its option to take devisees' interests by filing with the Superintendent a specific list of interests it elects to take and simultaneously pay in to the Superintendent 10 percent of the fair-market value of all the interests included, said part payment to serve as earnest money and liquidated damages payable to affected heirs or devisees in the event of a default of full payment by the Tribe. *See* 43 CFR 4.310 (a) and (b).

We find that only a statutory option exists in the Tribe to take upon issuance of the probate decision. We further find that no rights vest in the Tribe until such time as the full fair-market value is paid in to the Superintendent. *See* 43 CFR 4.313.

Consequently, the Judge erred in finding the properties in question were taken on Sept. 3, 1975; that the United States holds the properties as of Nov. 11, 1975, in trust for the Tribe; that all income received or accrued from the land interest accrued to the benefit of the Tribe after Sept. 3, 1975; and that interest on the unpaid balance began to run from Sept. 3, 1975.

We find that title to said trust properties did not vest in the United States in trust for the Yakima Tribe on Nov. 11, 1975, and would not until an election is made by the Tribe at the proper time in keeping with the regulations, and the full market value of said trust properties as determined by the Board herein is paid into the estate's IIM account. The trust properties in question therefore shall remain vested in the United States in trust for the decedent's estate. In addition, all income received or accrued from the land interest since Sept. 3, 1975, shall be credited to the estate account.

We admonish the Superintendent not to make distribution of any of

the Tribal funds transferred to the deposit of the estate or any interest accruing therefrom from the time of deposit since at this point in time said funds and interest therefrom continue to belong to the Tribe.

We turn now to the question of the fair-market value of merchantable timber on Tract Nos. 124–4490 and 124–4491 on June 9, 1976.

As previously stated, testimony was offered by Alton Cronk, a consulting forester, and Dennis Marlowe, real estate appraiser, Bureau of Indian Affairs, who appraised the land and the merchantable timber on said tracts and prepared several appraisal reports that were submitted and made a part of the record.

In arriving at the fair-market value of the merchantable timber on the tracts in question, Alton Cronk used what is referred to as a transaction base comparability appraisal method. In describing this method, Mr. Cronk stated: "I determine or find out what has taken place in the market place by actual sales and the best measure of this in my judgment was Forest Service sales that were sold in a comparable timber in an area adjacent to the Yakima Reservation." He selected basically, two districts on the Snoqualmie National Forest, the Tieton and Naches Districts. The transactions that he selected were what he considered to be open market transactions for a period of Oct. 1, 1975, to Mar. 30, 1976, all of the sales assertedly had a preponderance of Ponderosa Pine on them.

An examination was made of the comparables used by Mr. Cronk, namely, the Devil Rim sale, the T–7 sale, the Flat Salvage sale, the Devil Swamp sale, the Gold Creek sale and the Louie sale, which sales were used by Mr. Cronk to arrive at the fair-market value of merchantable timber on Tract Nos. 124–4490 and 124–4491. Among other things, consideration was given to the acreage of each sale, volume of Ponderosa Pine, and the statistical high bid per MBF. It is noted that the comparable sales bid per MBF that Mr. Cronk used ran from $3 per MBF to $117.43 per MBF. In addition, although Mr. Cronk asserted that he judged by grade, Ponderosa Pine was not graded in the Flat Salvage sale and the Devil's Swamp sale.

The board is constrained to find that the sales used by Mr. Cronk were not realistic comparables applicable to Tract Nos. 124–4490 and 124–4491. Consequently, in arriving at the fair-market value of the merchantable timber on the tracts in question, little or no weight is given by the board to the transaction base comparability appraisal method used by Mr. Cronk as it relates to the comparables used vis-a-vis the tracts in question.

We have equally examined the direct appraisal method used by Dennis Marlowe in arriving at the fair-market value of merchantable

timber on Tract Nos. 124–4490 and 124–4491. After a complete and thorough review of the record we find the direct appraisal method to be more just and equitable than the method used by Mr. Cronk. Consequently, we adopt same in arriving at the fair-market value of merchantable timber on Tract Nos. 124–4490 and 124–4491 as of June 9, 1976. The record clearly sets forth the direct appraisal method. Consequently, we do not find it necessary to repeat it again here.

We, therefore, find that the fair-market values of merchantable timber on Tract Nos. 124–4490 and 124–4491 on June 9, 1976, are as follows:

Tract No. 124–4490

Ponderosa Pine:	
Sales value of lumber	$226.19
Sales value of by-products	14.30
Total Net Value	$240.49
Less Production Cost	138.46
Stumpage value per MBF	$102.03
Douglas Fir:	
Sales value of lumber	$217.53
Sales value of by-products	14.30
Total Net Value	$231.83
Less Production Cost	153.55
Stumpage value per MBF	$78.28
Lodgepole Pine:	
Stumpage value per MBF	$25.51
Ponderosa Pine—1325 MBF @ $102.03	$135,189.75
Douglas Fir—37 MBF @ $78.28	$ 2,896.36
Lodgepole Pine—52 MBF @ $25.51	$ 1,326.52
Total Stumpage Value	$139,412.63

Tract No. 124–4491

Ponderosa Pine:	
Sales value of lumber	$229.56
Sales value of by-products	14.30
Total Net Value	$243.86
Less Production Cost	142.25
Stumpage value per MBF	$101.61
Lodgepole Pine:	
Stumpage value per MBF	$25.40
Ponderosa Pine—1152 MBF @ $101.61	$117,054.72
Lodgepole Pine—110 MBF @ $25.40	$2,794.00
Total Stumpage Value	$119,848.72
A 1726/3780 interest in $119,848.72	$54,724.57

To recapitulate, the Board finds the following:

1) The implementing regulations referred to, *supra*, are controlling in this matter. Moreover, they are clear and unambiguous.

2) The devisees did satisfy their burden of proof regarding the insufficiency of the appraisal report attached to the July 16, 1975, probate decision, the record being replete with testimony and exhibits offered by the devisees which clearly establish the values set forth in the foregoing report to be below fair-market value.

3) The fair-market value is to be determined as of the date of the hearing. See 43 CFR 4.304 and 4.307.

4) That only a statutory option exists in the Tribe to take after a probate decision is issued.

5) No property rights vest in the Tribe until such time as the full fair-market value is paid in to the Superintendent.

6) Title to said trust properties did not vest in the United States in trust for the Yakima Tribe on Nov. 11, 1975, and will not until such time as a proper election is made after this decision becomes final, in keeping with the regulations and full-market value of said trust properties as determined by the Board herein is paid into the estate's IIM account. The trust properties in question therefore shall remain vested in the United States in trust for decedent's estate until the above is complied with.

The Superintendent is again admonished not to make distribution of any of the Tribal funds transferred to the deposit of the estate, or of any interest accruing from the time of deposit until the present, except to the Tribe, since at this point in time said funds and interest continue to belong to the Tribe.

7) The fair-market value as of June 9, 1976, of merchantable timber on Tract No. 124–4490 is $139,412.63.

8) The fair-market value as of June 9, 1976, of a 1726/3780 interest in merchantable timber on Tract No. 124–4491 is $54,724.57.

9) Upon the expiration of 60 days from the mailing of the last notice of decision required by 43 CFR 4.308, the Tribe may within 20 days thereafter file with the Superintendent the specific list of interests it elects to take, and pay in to the Superintendent not less than 10 percent of the fair-market value of the interests included in the list. Interest begins to accrue at the rate of 8 percent on the unpaid balance from the date of such election and deposit. 43 CFR 4.311 and 4.312.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Final Order entered by Administrative Law Judge Robert C. Snashall on Dec. 8, 1976, is hereby MODIFIED in accordance with the findings and dictates set forth above.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

WM. PHILIP HORTON,
Administrative Judge.

ALEXANDER H. WILSON,
Chief Administrative Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1977

APPEAL OF COMMONWEALTH ELECTRIC COMPANY*

IBCA-1048-11-74

Decided *September 30, 1977*

Contract No. 14-03-3217A, Construction of Hanford-Ostrander 500 KV Line No. 1, Schedule IIB, Bonneville Power Administration.

Principal Decision Affirmed On Motion for Reconsideration.

1. Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration—Rules of Practice: Appeals: Statement of Reasons

The Government's motion for reconsideration, which advanced a number of arguments designed to show that the Government's interpretation of the contract was reasonable, provides no reason for overturning the Board's principal decision which applied the rule of *contra proferentem*. The Board, having previously found that appellant's interpretation was reasonable, now affirms its principal decision since the rule requires interpretation against the drafter of a document to resolve an ambiguity even if each party's interpretation is reasonable.

APPEARANCES: Mr. Allen L. Overcash, Woods, Aitken, Smith, Greer, Overcash and Spangler, Attorneys at Law, Lincoln, Nebraska, for appellant; Mr. J. Richard Baxendale, Mr. David E. Lofgren, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This appeal now comes before the Board on the Government's motion for reconsideration of the Board's decision of July 15, 1977, which sustained the appeal.

The work in question under the contract was the erection of 36 steel towers for electric power transmission lines. The contract required helicopter erection of 16 of the towers. For the remaining 20 towers, helicopter erection was neither required nor forbidden. This appeal arose from the Government's refusal to pay for helicopter erection except for the 16 towers specifically required to be erected by helicopter. The Board sustained the appeal, holding that the Government could have limited payment for helicopter erection to the initial 16 towers, but it did not; therefore, when the contractor exercised its option to use helicopter erection for towers in addition to those required, it was entitled to be paid at the contract price for helicopter erection and not at the lower contract price for conventional erection.

In moving for reconsideration, the Government advances a number of arguments under four general headings. The arguments will be discussed in the order presented.

Government's Argument I

In its first argument, the Government asserts that the Board placed too much emphasis on the 34 provisions in the contract which set forth ecological requirements and environmental criteria. The Government correctly points out that more of the provisions apply to the Oregon side of the Columbia River

*Not in Chronological Order.

where the transmission line passes through the Mount Hood National Forest and that only two of the eight governmental offices having jurisdiction over various aspects of the construction are located in the State of Washington. The Government further points out that many of the 34 provisions have been in effect for several years and some date back to 1968. In this connection, the Government asserts that hundreds of miles of transmission lines have been constructed under those limitations using conventional construction methods.

The latter assertion is not based on evidence of record in this appeal and while it may very well be true, it misses the point entirely, as do the arguments which precede it. The question is not whether appellant could have erected the towers outside the mandatory helicopter erection area by conventional means, but whether there were limitations on access. Under Specification 4–405A.2, if the areas outside the mandatory helicopter erection area were areas of limited access, the Government preferred the use of helicopters for construction.

Whether the 34 provisions referred to in the Board's principal decision are emphasized or deemphasized, they cannot be ignored. The knowledge that other contractors successfully complied with similar limitations and used conventional construction methods, under other contracts which may or may not have contained an express Government preference for helicopter erection in areas of limited access, does not diminish appellant's obligation to abide by those limitations in this contract.

The contract provided for construction of 15 towers in the State of Washington and 21 in Oregon, of which 16 were required to be erected by helicopter and 5 were not.[1] It is not necessary to examine each of the 34 contract provisions to determine which limitations apply in Washington, which in Oregon and which apply in both states. The first two specifications cited by the Board in its principal decision give ample evidence of the myriad of limitations that apply to the contractor's access to all construction areas:

> 1–108. *ECOLOGICAL REQUIREMENTS.* Special conservation practices are required to protect the soil, vegetation, farm lands, forests, wild life, and fish. Air and water pollution, dust abatement, erosion and esthetics will be critically watched by Government Agencies, local land owners, the general public, and the press. The Tanner Creek Drainage is a source of water for the Bonneville Fish Hatchery.
>
> 1–109. *ENVIRONMENTAL CRITERIA.* The Contractor shall comply with all applicable anti-pollution laws and regulations in the prevention, control, and abatement of all forms of pollution. (Refer to Clause 12 of the GENERAL PROVISIONS. Standard Form 23–A.) Offices having jurisdiction are: * * *

(There follows a list of two offices in Washington and six in Oregon.)

In the face of these two provisions alone, without reference to the remaining 32 contract provisions cited by the Board, the Government cannot seriously contend that the con-

[1] Government Exhibit No. 11; Appeal File Item 1.

tractor's access to the construction areas was unlimited. There is substantial evidence to support the Board's conclusion that the contract contained many provisions directing appellant to restrict its construction operations. Accordingly, the Board rejects the argument that its conclusion was in error.

Government's Argument II

Under this argument, the Government quotes extensively from the transcript of its cross-examination of the Northwest Division manager of Commonwealth Electric Company, who participated in the preparation of the bid on this project. In the quoted testimony (Tr. 34, line 7, through Tr. 36, line 8) the Government elicited the information that the tower sites on the Washington side were accessible from the ground, that Commonwealth did take a small crane to each site to erect the tower leg extensions, and that with not very much additional road construction it could have moved a 60-ton crane to each site and erected the towers completely from the ground.

The Government argues that the quoted testimony refutes appellant's contention that the Washington side was an area of limited access. However, the testimony selected by the Government relates only to access and not whether that access was limited. Had the Government quoted further from its cross-examination of appellant's division manager, a more instructive colloquy on his views on limited access at the Washington tower sites would have been revealed (Tr. 38, line 19, through Tr. 40, line 8):

Q. Now, in—you may not be the man to be asking these questions of, but in your complaint, or in Commonwealth's complaint and in the claim, quite a bit is made of the environmental strictures or restrictions that were applicable to the job, okay, that, in essence, caused you to elect the helicopter erection mode on the project?

A. Yes, it had a bearing on us, sure.

Q. Okay.

A. I mean, it's a—the whole area is, in general—(interrupted)

Q. Well, now, this is where I want to be somewhat specific here. I don't think there's any agreement—or disagreement among the parties that—in terms of construction on the Oregon side where helicopter erection was required, that the restrictions were indeed quite strict. But in terms of terrain and ecological strictures on the Washington side, is it now your testimony, and that of Commonwealth's, that the ecological requirements and the terrain did not require helicopter erection?

A. Did not require it, no.

Q. And did not demand it in terms—you're a professional, you've had experience on jobs of this type, and I'm putting this question to you directly—did the conventional—had you utilized conventional erection techniques on the Washington side, how much longer or shorter would it have taken you to complete the project?

A. Well, we analyzed that very carefully, and like I testified earlier, the congestion per tower site—because it had to be done in a relatively short time, this—or it would have taken if we—had we elected to use a crane in order to do it, it would have either been—several ways. We would have either been—we would have had to delay the assembly in the erection to start behind the founda-

tions, or clear a larger area around the tower site so that we would have adequate room to both assemble and excavate foundations at the same time. And just after evaluating it all in—there was some restrictions on routing of a stream and some lakes that were named in the contract we had to be careful of. So there was some ecological restrictions up there, too.

Q. This is on the Washington side?
A. Yes.

Specification 4.403 of the contract lists three lakes and three creeks located in Washington, together with specific restrictions which are applicable. As indicated in connection with the discussion of Argument I, above, the general ecological requirements and environmental criteria apply to both Washington and Oregon to limit access to the tower sites and to limit construction activity.

The Government cites testimony of the area engineer for Bonneville Power to the effect that ground access was available to the tower sites on the Washington side and that conventional erection would not have had an adverse ecological impact on the area (Tr. 101–103). On cross-examination, the area engineer conceded that construction limitations in Specification 5–101.D.2 on page 32 of the contract applied to the entire line and were not applicable solely in Oregon (Tr. 108).

The Government's second argument, that there was no limitation on access to the tower sites in Washington, is contrary to the evidence of record. The Board rejects such argument as a basis for reconsideration.

Government's Argument III

The third argument begins with the Government stating that it has reviewed the contracting officer's decision to ascertain the basis for the following statement from the Board's principal decision: "Indeed, the contracting officer concedes in his final decision that appellant had the option to use the helicopter method for the remaining steel towers after the initial 16, and that a preference for such use was stated in Specification 4–405."

The Government professes its inability to find the source of the statement except in the paragraph beginning at the bottom of p. 6 of the findings of fact and decision where the contracting officer was paraphrasing appellant's arguments and attempting to refute them. We direct the Government's attention to p. 3, where the contracting officer makes the following finding of fact:

For the remainder of the tower erection work the use of the helicopter method was optional with the contractor, although a preference therefor was stated by BPA in the contract specifications as follows:

4–405. *HELICOPTER.* A. *General.* 1. All helicopter operations shall conform to Federal Aviation Regulation No. 133.

2. This specification designates certain areas where helicopters shall be used for removal and erection of steel towers. In other areas of limited or prohibited ground access the use of helicopters for logging, line removal, and construction is the preferred method.

The Board's principal decision rested on interpretation of the contract strictly against the drafter to

resolve an ambiguity—the familiar rule of *contra proferentem*.[2] In connection with the discussion of the question, the Board pointed out that the Government failed to limit payment for helicopter erection as it did for removal of existing steel towers and for tower foundation excavation. The Government now contends that while this comparison may appear tantalizing on its face it loses its validity when examined. The required helicopter erection was spelled out in the contract while the required hand or clamshell excavation depended on a determination at each tower site based on ground conditions discovered as work progressed.

The point of the comparison was not to enter into a detailed analysis of the means by which the Government limited payment for premium priced construction in other parts of the contract, but merely to show that it had included such limitation in the contract and could have done so with respect to helicopter erection of the towers if it had so intended. The application of the rule of *contra proferentem* in this instance is not dependent upon the presence of other limitations in the contract, but rather on the absence of any limitation on payment for helicopter erection of towers.

The Government next argues that Section 4–405 which encouraged helicopter erection of the towers in areas of limited access, should not apply to the entire line since it appears as part of Chapter 4, SPECIAL AREAS. The Government concedes that the Mount Hood National Forest on the Oregon side of the Columbia River is a special area but apparently does not believe that the Washington tower sites are in special areas. The Board observes that Chapter 4, Section 4–403 *Special Requirements*, Subsection B, specifically mentions the State of Washington and Subsection C lists specific areas designated by stations in Washington where special requirements are imposed. The Government's argument is contrary to the express provisions of the contract.

In a parting argument respecting Section 4–405A.2, the Government asserts that it was established at the hearing that the preference for helicopter erection has no relevance to tower erection performed outside of the mandatory helicopter erection area. No transcript references were provided to show where such fact was established.

The language used by the Government in drafting Section 4–405 requires no elaborate interpretation. The use of helicopters for erection of the steel towers is not the preferred method in the areas where designated; it is the only method. It is in *other* areas of limited access that the Government preferred the use of helicopters. The reason for the Government's preference is not a matter for conjecture. Compliance with the lengthy list of ecological requirements and environ-

[2] See *Tecon Corporation, et al.* v. *United States*, 188 Ct. Cl. 15 (1969) for a discussion of the rule of *contra proferentem*.

mental criteria could be achieved far more easily if the helicopter method were used instead of the conventional method of tower erection. The Government's difficulties with the interpretation of this contract arose not from the provisions it placed in the contract but from those it failed to include. Although the Government clearly expressed its preference for the use of helicopters, it completely failed to mention that it intended to pay for helicopter erection only for those towers specifically designated for such erection.

The Government contends that appellant could have deduced the Government's intentions if it had paid attention to the significant relationship between the estimated weight of tower steel to be erected by the helicopter method and the estimated weight of the remainder of the work. This statement of the Government's position was first made by the contracting officer in his findings of fact and decision. There is no evidence that the Government considered the relationship to be significant during the formation of the contract. When the invitation for bids was issued on January 22, 1973, there were 15 towers designated for helicopter erection with an estimated weight of 768,000 pounds. On Feb. 12, 1973, the invitation was amended by Addendum No. 2 which added one tower to those designated for helicopter erection. It is noteworthy that the Government did not increase its estimate of the number of pounds of steel under Item 36 for helicopter erection nor did it decrease its estimate under Item 35 for conventional tower erection. The relationship which now is characterized as significant was not of sufficient significance to bring to the attention of prospective bidders.

The Board rejects the arguments advanced under general heading III as a basis for reconsideration.

Government's Argument IV

In its fourth argument, the Government contends that it is crucial to the outcome of the appeal that the area engineer for the Bonneville Power Administration, when he learned that appellant intended to erect the towers in Washington by helicopter, told appellant's project superintendent that "there's no payment for helicopter erection in Washington" (Tr. 105). Later testimony by the area engineer, however, indicated that he did not have full authority as the contracting officer's representative (Tr. 109).

The Board attaches little significance to the superintendent's response that he would continue with the helicopter erection anyway (Tr. 107) since there is nothing in the record to indicate that the superintendent made the decision on helicopter erection in the first instance nor is there any evidence that he could have changed the decision as a result of his conversation with the area engineer.

The Government next argues that appellant should have submitted its construction plan to the contracting officer for approval be-

fore beginning construction. The purpose of such argument is not fully articulated. The Government had no objection to helicopter erection of the towers. Its objection was to paying the contract price for such erection except for the 16 towers required to be erected by helicopter.

It is also argued that appellant submitted its bid on the basis of the less expensive conventional method of tower erection (citing Tr. 41) and should therefore be limited to the contract price for such work. At Tr. 42, however, appellant's division manager testified that the price per pound for helicopter erection was the same whether they erected some or all of the towers by helicopter and that he believed he had the option to utilize that method.

The Government's final argument is that appellant accepted payment at the lower unit price for conventional erection and did not make a claim for the higher unit price for helicopter erection until several months later. The Government asserts that appellant's actions show that it acquiesced in the interpretation placed on the contract by the Government. Without giving this defense its proper name, the Government is attempting to apply the doctrine of laches against appellant for its failure to make an immediate claim for the higher unit price. The doctrine of laches is not available as a defense.

Another board of contract appeals recently applied the doctrine of laches, at the Government's behest, to deny partial recovery to an appellant after finding appellant's interpretation of the contract was reasonable under the rule of *contra proferentem*. The Court of Claims, however, reversed the board. *H & M Moving, Inc.* v. *United States*, 204 Ct. Cl. 696 (1974). At p. 719, the Court stated:

> * * * What the board did not seem to realize is what the court stated in *Kaiser Alum. & Chem. Corp.* v. *United States*, 181 Ct. Cl. 902, 906-07, 388 F. 2d 317, 319 (1967):
>
> "* * * this court has not accepted the defense of laches as applying to contract actions against the Government; that defense has been confined to personnel suits for unlawful removal, suspension, or demotion from a federal position, and the court has given special reasons for its application to that area. [Citations omitted.] So far as the court is aware, no case in this court has applied the doctrine as a defense to a contract action. * * *."
>
> We find, then, that the board was in error as a matter of law in denying recovery to plaintiff for travel time claimed prior to May 12, 1970. Having correctly found, as a matter of law, that the language of the contract was ambiguous and subject to more than one reasonable interpretation, the board then found as a matter of fact, which binds us, that plaintiff's interpretation thereof was reasonable. That should have ended the matter, but then the board erroneously applied the doctrine of laches, an equitable remedy not available in construing contract terms, to bar recovery. It is the *contra proferentem* rule which governs this case and entitles plaintiff to recover on its entire claim. * * *

In the present case, the Government has striven vigorously to convince the Board that its interpretation of the payment provisions of

the contract is reasonable. As indicated above, some of the arguments find no support in the record and others are directly contradicted by the record. Even if it were otherwise and the Board could agree that the Government's interpretation is reasonable, such showing is not enough to allow the Government to prevail so long as appellant's interpretation is also reasonable.

Conclusion

The Board's principal decision of July 15, 1977, is hereby affirmed.

G. HERBERT PACKWOOD,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.
Chairman.

KARL S. VASILOFF,
Administrative Judge.

GEORGE S. STEELE, JR.,
Administrative Judge.

ADMINISTRATIVE JUDGE LYNCH CONCURRING:

I concur in the decision rendered in this case but note an exception rather than a dissent only because the Government's Motion for Reconsideration has failed to question the Board's findings in the original decision that the contractor was entitled to the allowance of interest on the authority of *G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1, *reh. denied*, 160 Ct. Cl. 58, *cert. denied*, 375 U.S. 954 (1963), *reh. denied*, 376 U.S. 929, 377 U.S. 1010 (1964). Since I did not participate in the decision in which that judgment was reached, I take this occasion to note (i) that I regard the decision as an unwarranted extension of the so-called *Christian* doctrine and (ii) that I have serious reservations as to whether the *Christian* decision itself would warrant the carte blanche application in the instant case where the clause in question was not referenced several times in the contract as was the case in *Christian* and, (iii) that, whether the *Christian* decision is sound law or not, I question the propriety of the Board's reliance on *Christian* for the authority to reform a contract, and thereby add a clause which neither party contemplated at the inception of the contract. Should application of the *Christian* doctrine again come before this Board during my tenure, I will undertake to fully set forth the rationale for this position.

RUSSELL C. LYNCH,
Administrative Judge.

ALLEN R. PROUSE*

32 IBLA 311

Decided *September 30, 1977*

Appeal from decision of the Idaho Falls District Office, Bureau of Land Management, renewing grazing lease and rejecting a conflicting application. (I-3-77-1(15))

*Not in Chronological Order.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally—Grazing Leases: Generally—Grazing Leases: Renewal

Under sec. 402(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1977), the holder of an expiring grazing lease receives first priority for the new lease if the requirements of sec. 402(c) are met. Therefore, a conflicting applicant is properly denied the lease where the renewal applicant meets those requirements.

APPEARANCES: Allen R. Prouse, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Allen R. Prouse appeals from the Mar. 10, 1977, decision of the Idaho Falls District Office, Bureau of Land Management (BLM), awarding sec. 15 grazing lease I–3–77–1 (15) to the Eastern Idaho Grazing Association (Eastern Idaho) and rejecting his application for a lease of the same lands.[1] The conflict area consists of approximately 380 acres in secs. 4, 5 and 8, T. 4 S., R. 39 E., B.M. Both applicants own or control land contiguous to the federal public land as required for preference to receive a lease under sec. 15 of the Taylor Grazing Act, *as amended*, 43 U.S.C. § 315m (1970).

The conflict area is bounded on the east by the Blackfoot River. Across the river lie more public lands. These lands plus the conflict area have been leased to Eastern Idaho since 1957. Their preference lands lie east of this area. Appellant's preference lands bound the conflict area on the west and south and are separated from the area by a fence.

In its decision, the BLM District Office found that Blackfoot River would not provide a practical natural barrier if appellant were awarded the lease. Additional fencing would be needed to prevent cattle from crossing the river. No allegations have been made of unsound range management practices, or of violations, by Eastern Idaho while the lands were leased to it. The District Office renewed Eastern Idaho's lease and rejected appellant's application based upon application of existing regulations, including 43 CFR 4121.2–1(d)(2), which provides for consideration of historical use, proper range management and use of water for livestock, proper use of the preference lands, topography, public ingress and egress across preference lands to the public lands under application, and other land use requirements. The decision also relied on sec. 402(c) of the Federal Land Policy and Management Act of

[1] We note that the District Office did not name Eastern Idaho specifically as an adverse party in its decision. Therefore, appellant was not required to serve Eastern Idaho with appeal documents and to file proof of service with the Board as required by 43 CFR 4.413, although it does appear that appellant sent a copy of its Statement of Reasons to Eastern Idaho. In the future, the District Office should clearly identify adverse parties in its decisions.

1976, 43 U.S.C.A. § 1752(c) (West Supp. 1977), which gives the holder of an expiring grazing lease first priority for receipt of a new lease on the same lands.

In his Statement of Reasons, appellant argues that his range management practices were ignored by the District Office. He asserts that better use of the range would result if the lease were awarded to him. Finally, he argues that the priority right under 43 U.S.C.A. § 1752(c) (West Supp. 1977) creates a monopoly of range use "at the expense of the taxpayer."

[1] In the past, the Board has upheld the renewal of grazing leases and the rejection of conflicting applications where BLM determined that the conflicting applicant had not demonstrated the award was improper under regulatory criteria. In those cases, BLM held, and the Board affirmed, that, all else being equal, the historical use of the renewal applicant was the determinative factor for awarding the lease to him under 43 CFR 4121.2–1(d)(2). *E.g.*, *Wesley Leininger*, 28 IBLA 93 (1976); *Doyr Cornelison*, 24 IBLA 155 (1976). However, sec. 402(c) of the Federal Land Policy and Management Act, 43 U.S.C.A. § 1752(c) (West Supp. 1977), enacted on Oct. 21, 1976, provides the following:

> So long as (1) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to sec. 1712 of this title or sec. 1604 of Title 16, (2) *the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned*, and (3) the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease, *the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease.* [Italics supplied.]

Even if there were some question whether the factors other than historical use listed in 43 CFR 4121.2–1(d)(2) weighed more in appellant's favor than in Eastern Idaho's, Eastern Idaho would be entitled to renewal of its lease as long as it was in good standing under the old lease. Although appellant argues this creates a monopoly, Congress clearly stated its intentions in House Report No. 94–1163, 1976 U.S. Code Cong. & Ad. News 6175, 6186–87, concerning the provision which became sec. 402(c):

> * * * The general principle embodied in the section is that existing grazing operations will be continued so long as the following prevails: The authorized user remains qualified under the law and regulations and accepts and observes the terms and conditions of his lease or permit; and the lands remain in Federal ownership and available for grazing in the discretion of the Secretary concerned.
>
> * * * * * * *
>
> Subsection (c) specifies that, upon expiration of a lease or permit, existing users would have a right of first refusal for any new lease or permit, provided that grazing will be continued by the Secretary concerned and they are in good standing and accept the terms and conditions of the new lease or permit.

There is no suggestion in the case record that Eastern Idaho was not "in compliance with the rules and regulations issued and the terms and conditions in the * * * lease," nor has appellant alleged such non-

compliance. Accordingly, we affirm the decision of the BLM District Office.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

PHIL BAKER v. THE NORTH AMERICAN COAL COMPANY*

8 IBMA 164

Decided *September 30, 1977*

Appeal by The North American Coal Company from an initial decision by Administrative Law Judge Fauver in Docket No. VINC 74-872 granting relief based upon an application for review of an alleged discriminatory discharge under sec. 110(b) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Discrimination: Filing Period

The 30-day period in sec. 110(b)(2) of the Act for the filing of an application for review of alleged discriminatory conduct is a statute of limitations and is therefore an affirmative defense which is waived if not timely raised. 30 U.S.C. § 820(b)(2)(1970).

2. Federal Coal Mine Health and Safety Act of 1969: Discrimination: Intention

Any miner seeking relief from alleged discriminatory conduct in retaliation for a safety complaint who has not directly reported to the Secretary or his authorized representative must show that it was his intention to contact the federal authorities before the protection of the Act is invoked.

3. Federal Coal Mine Health and Safety Act of 1969: Discrimination: Scope of Review

A finding that an operator violated mandatory safety standards is irrelevant in a proceeding brought by a miner pursuant to sec. 110(b)(1) of the Act. 30 U.S.C. § 820(b)(1)(1970).

APPEARANCES: Charles E. De Bord II, Esq., and John W. Cooper, Esq., for appellee Phil Baker; Timothy M. Biddle, Esq., and W. Scott Ferguson, Esq., for appellant The North American Coal Company; Philip G. Sunderland, Esq., for Joseph D. Christian as amicus curiae.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

The North American Coal Company (North American) is appealing from a decision by Administra-

*Not in Chronological Order.

tive Law Judge Fauver on Mar. 17, 1975, which concluded that North American violated section 110(b)(1) of the Federal Coal Mine Health and Safety Act (the Act) by discriminating against Mr. Phil Baker on May 21 and May 23, 1974.

At the outset, the Board essentially agrees that all relevant facts with respect to the actual events of May 21 and May 23, 1974, as found by the Judge are supported by the record. On May 21, 1974, Mr. Kaldor, a section mechanic, was notified that the small roller chain powering the tramming gear on the extensible belt tailpiece had come off its sprockets.[1] He removed the guard which covered the chains, replaced the chain, and reinstalled the guard. Work resumed, but a short time later the small tram chain again became displaced. Kaldor was summoned, replaced the chain again, but advised the section crew that he was going to observe its operation without replacing the guard and that he wanted Baker, the continuous miner operator, to operate the miner while he tested the chain. The section foreman, Mr. McNear, had earlier that day refused to allow Kaldor to do so for safety reasons.

Baker advised Kaldor that he would not operate the miner while the chain was unguarded as he believed such operation to be unsafe and he feared injury. Following this refusal, Baker and Kaldor left the face area to discuss the matter with McNear who ordered Baker to operate the machine while the chain was being observed without the guard. Baker refused, expressed his opinion about the danger presented, and finally asked to speak to a union safety committeeman. McNear refused his request for a safety committeeman, and threatened that if Baker did not run the machine, the shift foreman would be called to remove him from the mine which would cause Baker to lose wages for the remainder of the day. A heated argument ensued with Baker reiterating his desire to talk to the safety committeeman a number of times, and McNear refusing to comply. Following McNear's repeated refusals, Baker picked up the telephone pager and requested the dispatcher to call the safety committeeman, whereupon McNear ripped the communications wires loose, thereby severing the phone connection. An argument followed concerning McNear's action, and he instructed Kaldor to repair the connection which was accomplished within a minute and one-half of the disruption. Kaldor was then permitted to call the safety committeeman. Both Kaldor and Baker spoke to the committeeman and, pursuant to instructions given by him, Baker agreed to return to his machine and operate it while the tram chain was being run without a guard.

Shortly after returning to the face and commencing operation of the miner, Baker and Kaldor again examined the malfunctioning of the

[1] The extensible belt tailpiece operates on caterpillar treads and is placed immediately behind the continuous mining machine. It provides a conveyor bridge between the conveyor belt on the continuous miner and the conveyor belt which carries newly cut coal out of the mine.

tram chain, readjusted bolts on the oil motor, and reinstalled the guard. Mining operations then continued without further incident during the shift.

McNear later discussed the day's incidents with the mine superintendent, Mr. Kochan, and both agreed that Baker should not be disciplined over the events of that day. Baker spoke further with the safety committeeman, at the conclusion of the shift, and related all that had transpired. It appears that Baker had not mentioned to him, in the earlier telephone conversation, that McNear had disrupted communication by telephone.

A safety grievance against McNear was issued by the Union Safety Committee to North American on May 22, 1974. The grievance charged that there was a dispute about calling the safety committee with reference to the tram chain, and that the communication wires had been torn out to prevent Baker from calling the committeeman. It was alleged that McNear had violated mining laws of the State of Ohio and contractual rights of the United Mine Workers of America. The safety committee recommended that McNear be suspended for a 5-day period.

On that same day, May 22, 1974, the mine was idled by a work stoppage, apparently owing to the McNear dispute. Several meetings were held between the union and management. Another meeting was held the following day where the events of May 21, 1974, were fully discussed along with the issue of whether McNear should be suspended. At the conclusion of this meeting management refused to discipline McNear in the face of the union's persistent demand to do so. Shortly after this meeting on May 23, 1974, management summoned Baker and notified him that he was being suspended for 5 days, subject to discharge at the conclusion of 5 days. The charge apparently recited against Baker was insubordination for refusing to give the telephone to McNear on May 21, 1974.[2]

Management informed the union that the charges against Baker would be withdrawn if the union withdrew its safety grievance against McNear. The union and Baker agreed to do so because they feared that Baker might risk losing his job if they did not agree.

An application for review was filed on June 21, 1974, by Phil Baker and District 6 of the United Mine Workers of America against North American, pursuant to section 110(b)(1) of the Act.[3] A hearing took place in Arlington, Vir-

[2] The suspension notice was later torn up by management and so was not available at the hearing.

[3] Sec. 110(b)(1) provides:

"No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

ginia, on Oct. 29, 30, and 31, and Nov. 19 and 20, 1974.

In his decision of Mar. 17, 1975, the Judge found that North American had violated section 110(b)(1) by discriminating against Baker. It was initially found that Baker had a good faith fear of operating the continuous miner with the small tram chain unguarded (Dec. 9). The Judge credited the testimony of applicants' expert witnesses with respect to the safety risks involved in McNear's order to Baker on May 21 (Dec. 8–9). Pursuant to the court's holding in *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F. 2d 772 (D.C. Cir. 1974), the Judge examined the procedure in effect at the mine for miners to follow in reporting safety violations or dangers. A complaint would initially be lodged with a foreman, and then with the union safety committee if unresolved. The record was unclear as to when and under what circumstances the safety committee would report a safety complaint to the Mining Enforcement and Safety Administration (MESA) (Dec. 14). However, the Judge believed that the latter fact should not affect the Act's coverage as the potential of a miner's complaint reaching the federal authorities is always present (Dec. 15).

After finding the facts to exist as set forth in detail above, the Judge concluded that:

> The specific acts of discrimination found herein consist of (1) a threat, on May 21, 1974, to have Baker disciplined (*i.e.*, removal from the mine, loss of wages and possible discharge) for raising a safety complaint; (2) refusal, on May 21, 1974, to call a safety committeeman upon Baker's request in connection with such safety complaint; (3) a suspension of Baker, with threat of discharge, on May 23, 1974, because of safety complaints he was pressing against his foreman through his union, beginning with Baker's safety complaints on May 21; and (4) coercion of him and his union to withdraw such safety complaints on May 23, 1974. Although the threat on May 21 was not carried out, and the suspension and threat on May 23 were withdrawn by Respondent on that date, all of the discriminatory acts against Baker will operate as precedents in Respondent's mine if they are not officially declared to be contrary to law. Such precedents would continue to have a chilling effect on the exercise of the right of Baker and other miners to complain of safety violations or dangerous conditions in their employment.
>
> (Dec. 17).

North American was required to post the decision at its mine for 60 days, and ordered to compensate Baker for all costs and expenses incurred by him for the institution and prosecution of the proceeding. The Judge additionally found that North American was in violation of three mandatory safety regulations (Dec. 13).

A timely notice of appeal was filed with the Board by North American. On Apr. 14, 1975, North American filed a motion to defer briefing on the ground that a case involving similar issues, *Munsey* v. *Morton*, 507 F. 2d 1202 (D.C. Cir. 1974), had been remanded to the Board on Dec. 17, 1974, for further consideration. As the Board's conclusions of law on remand in the

Munsey case (*Glen Munsey, et al.* v. *Smitty Baker Coal Co., Inc.*, 8 IBMA 43, 84 I.D. 336 (1977) might influence the disposition of its appeal, North American requested that its brief be due 20 days after issuance of the Board's decision in *Munsey*. It was represented that counsel for appellees had no objection to the granting of this motion. The motion was granted by order dated Apr. 17, 1975.

On July 17, 1975, the *Munsey* case, IBMA 72-21, 8 IBMA 43, 84 I.D. 336 (1977), was referred by the Board to the Chief Administrative Law Judge for assignment for a further hearing and a recommended decision.

Appellees filed a motion to schedule briefing on Mar. 18, 1977, citing in support thereof the unexpectedly lengthy period of time that had elapsed since deferral of briefing was ordered and during which the *Munsey* case had been pending before the Administrative Law Judge for further fact-finding. In denying this motion, by order dated Apr. 7, 1977, the Board stated that the recommended decision was issued on June 25, 1976. The filing of exceptions and supporting briefs was completed on Dec. 17, 1976, and the case was under active consideration. The Board highlighted the uncontradicted identity of issues between the present appeal and *Munsey*, and the lack of any assertion of prejudice by appellees.

On June 30, 1977, the Board's decision in *Munsey* was issued, 8 IBMA 43, and the parties were immediately notified and provided with a copy thereof.

Based on a representation that appellees had no objection, North American was permitted to file its brief late on July 25, 1977. Appellees were similarly granted an extension of time within which to file their brief on appeal. Appellees' brief was filed on Sept. 1, 1977. A thorough brief on the nature of the 30-day filing period was filed by Joseph D. Christian as amicus curiae.

At the outset, North American argues on appeal that Secretarial review of the incident which occurred on May 21, 1974, is jurisdictionally barred as the application for review was filed 31 days after this event. It is contended that the incident on May 21 was found to be a separate discriminatory act, and therefore the Judge erred in viewing it as having "carried over" to May 23.

North American then contends that McNear's inchoate threat to Baker and his refusal to call the safety committeeman at Baker's behest did not amount to discriminatory conduct. Although tempers flared, North American points out that the procedures for resolving safety disputes were ultimately followed. Additionally, the focus during the meetings on May 22 and 23 was the union grievance against McNear. Management, it is argued, displayed no illegal motivation, but rather issued the suspension notice to Baker for his insubordinate acts.

It is contended that the Judge misinterpreted the court's decision in *Phillips*, *supra*, in holding that the procedures in effect at the mine for resolving safety disputes served as an automatic link to the federal authorities. North American states that there is no evidence that Baker or anyone else notified or intended to notify the Secretary's representative of his safety complaint, but rather chose to employ the union contractual procedures for resolving such complaints. In the absence of either notification, or an intent to notify federal authorities, North American contends that the protection of sec. 110(b) is not triggered.

Finally, it is argued that the Judge was without jurisdiction to find that North American had violated mandatory safety regulations.

On appeal, Baker asserts that he exercised his right to refuse to work under conditions that he believed in good faith were dangerous, and that he was disciplined for exercising such right. Additional discriminatory conduct allegedly arose out of his reporting a dangerous condition to his foreman, and attemping to report to the safety committeeman.

Baker highlights that, under the interpretation of sec. 110(b) set forth in *Phillips*, *supra*, it is unnecessary for a miner to formally notify federal authorities before he is protected. Rather, it is argued, mere notice to the foreman or a safety committeeman is sufficient to automatically bring sec. 110(b) into play. Baker contends that because he insisted that his safety rights be protected, he was suspended from his job. Under duress and coercion the grievance against McNear was withdrawn in order to avoid Baker's suspension. The instant case is distinguished from the situation presented the Board in *Munsey*, *supra*, as here there is no evidence that Baker's complaint was either frivolous or made in bad faith.

Because the suspension notification to Baker on May 23 dates back to the events which transpired on May 21, Baker argues that his application was properly found by the Judge to have been timely filed. Additionally, Baker cites an analogous provision in the Occupational Health and Safety Act, under which exceptions to the 30-day filing period have long been recognized.

Issues Presented

1. Whether the Application for Review as to the events of May 21, 1974, was jurisdictionally barred as it was filed more than 30 days thereafter.

2. Whether the Judge erred in finding that applicant Baker engaged in protected activity under sec. 110(b)(1) of the Act and was discriminated against by North American because of such activity.

3. Whether the Judge erred in finding that North American violated several mandatory safety regulations.

Discussion

A.

At the outset it is necessary to determine whether the Board is

without jurisdiction to review the allegedly discriminatory acts of May 21, 1974, because the application for review was filed 31 days after that date. In arguing that such review by the Board is jurisdictionally barred, North American highlights the language of sec. 110 (b) (2) which provides in pertinent part that:

> Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) of this subsection may, within thirty days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent.

The Judge apparently agreed that an application for review late-filed under sec. 110(b) (2) would preclude administrative review of the incident, but found that in the instant case the 30-day period did not begin to run until May 23, 1974, as the events on that day dated back to, and were interwoven with, the acts of May 21, 1974 (Dec. 17).

[1] The Board is of the opinion that the 30-day filing period in sec. 110(b) (2) is not a limit on jurisdiction but is, rather, a statute of limitations. As a statute of limitations it may, of course, be extended in appropriate circumstances. *See, e.g., Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 927 (5th Cir. 1975).

In so holding, the Board has examined relevant legislative history as we believe and have held in the past, that Congressional intent is controlling on this issue. *Consolidation Coal Co., Inc.*, 1 IBMA 131, 136, 79 I.D. 413 (1972), 1971–1973 OSHD par. 15, 377 (1971); *NLRB* v. *Local 264, Laborers' International Union of North America*, 529 F. 2d 778, 785 (8th Cir. 1976); *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 426–427 (1965).

The Court in *Phillips*, *supra*, recognized that in construing safety or remedial legislation liberal construction should be employed in order to effectuate the prime purpose of that legislation. *Id.* at 782. The prime purpose of sec. 110(b) is apparent from statements made by Senator Kennedy when he introduced this provision.

> [T]he rationale for [my] amendment is clear. For safety's sake, we want to encourage the reporting of suspected violations of health and safety regulations.
>
> * * * * * * *
>
> But miners will not speak up if they fear retaliation. This amendment should deter such retaliation, and, therefore, encourage miners to bring dangers and suspected violations to public attention. 115 Cong. Rec. 27948 (1969).

In so encouraging the reporting of violations by miners and providing protection from retaliatory conduct for such reporting Congress was clearly intent upon affording miners an enforceable remedy. If this prohibition against discrimination is unenforceable owing to a late-filed application for review occasioned by extenuating circumstances, we believe that Con-

gressional intent is thwarted. Neither the express wording of sec. 110(b) nor legislative history supports such a narrow interpretation.

Additionally, at the time sec. 110 (b) was introduced it was stated that miners who attempt to assist in enforcing the Act would now be afforded the same protection against retaliation as Congress had provided under other federal statutes. 115 Cong. Rec. 27948 (1969). A similar provision in the National Labor Relations Act, 29 U.S.C. § 158 (a)(4)(1970) was expressly referred to as analogous by Senator Kennedy. In interpreting sec. 110 (b) the courts have recognized this parallel with the NLRA. *Phillips*, *supra* at 782; *Munsey*, *supra* at 1210.

Under the NLRA an employee who believes that he has been discharged or discriminated against may file an unlawful labor practice charge pursuant to 29 U.S.C. § 160 (b)(1970), which provides in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

In spite of the mandatory language in this section (unlike the permissive language in sec. 110(b)) prohibiting the issuance of a complaint where a charge has been filed and served more than 6 months after the allegedly unfair labor practice, this filing period has been held to be a statute of limitations and not a prerequisite to the Board's jurisdiction. *See, e.g., NLRB* v. *Local 264, Laborers' International Union of North America*, *supra* at 785; *Shumate* v. *NLRB*, 452 F. 2d 717, 720 (4th Cir. 1971); *A. H. Belo Corp. (WFAA-TV)* v. *NLRB*, 411 F. 2d 959, 966–967 (5th Cir. 1969); *NLRB* v. *A. E. Nettleton Co.*, 241 F. 2d 130, 133 (2d Cir. 1957).

In view of the foregoing, the Board holds that the 30-day filing period in sec. 110(b)(2) is a statute of limitations and therefore, the well-established extensions and tollings applicable to statutes of limitations will be applied, in extenuating circumstances, to applications filed under this section.

In the present case, the application for review was filed on June 21, 1974, and specifically highlighted events of May 21, 1974, in support of the allegations of discriminatory conduct. Following the granting of an extension of time within which to answer, North American filed its Answer on July 22, 1974, specifically setting forth four defenses to Baker's allegations and requesting

a public hearing on the application. It is well-settled that the expiration of a filing period prescribed by a statute of limitations is an affirmative defense which is waived if not timely raised. The Federal Rules require that this defense be raised in the first responsive pleading, and so, in order to preserve the defense, North American is required to raise it in its Answer. *See, e.g., Strauss* v. *Douglas Aircraft Co.*, 404 F. 2d 1152, 1155 (2d Cir. 1968); *Grabner* v. *Willys Motors, Inc.*, 282 F. 2d 644 (9th Cir. 1960); Fed. R. Civ. P. 8 (c), 12(b). Herein North American apparently first challenged the application on the ground that it was late-filed at the hearing (Tr. 5), and later in its posthearing brief on Feb. 3, 1975.[4] Because this contention is based upon sec. 110(b)(2) which has been found to be a statute of limitations, the Board concludes that it is an affirmative defense, untimely raised by North American and, therefore, waived.

In reaching the merits of applicant's allegations of discriminatory conduct the Board adopts the factual determinations made by Administrative Law Judge Fauver with respect to the actual events of May 21, 22 and 23, 1974, as being amply supported by the record. The Board expresses no opinion as to whether North American's acts were correctly found to be discriminatory as we believe that the protection of sec. 110(b) was not invoked by Baker. We, therefore, find it necessary to reverse the determination made below as a matter of law.

In the absence of a direct notification by Baker or the union to MESA, pursuant to the mandate laid down by the court in *Phillips*, *supra*, the Judge examined the procedures in effect at the mine for lodging safety complaints. With respect to notification of the federal authorities, it was then concluded that:

> Whether, and to what extent, this channel of communications is used to transmit safety complaints to the federal authorities should not affect the Act's coverage of a miner who utilizes the channel by making a safety complaint to his foreman in compliance with local mine procedure. The potential of his complaint reaching the federal authorities is always there; indeed if a safety complaint is not resolved at the miner/foreman level neither the foreman nor the miner can predict its ultimate destination. (Dec. 15).

[2] We believe that in so holding the Judge misinterpreted the *Phillips* decision. The Board is of the

[4] In its posthearing brief, North American cited cases wherein, it was argued, the Board held that the 30-day limit for the filing of applications under sec. 105(a) was a jurisdictional prerequisite. (*Consolidation Coal Co., Inc.*, 1 IBMA 131, 79 I.D. 413 (1972); *Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149 (1970)). Therefore, North American contended, the same must be found with respect to section 110(b)(2). The nature of the filing period under section 105 is not squarely raised herein and so the Board's holdings with respect thereto need not be examined. It is sufficient to point out that North American's conclusory statement with respect to the relationship between those two provisions fails to address the obvious distinctions. Additionally, the clear Congressional intent with respect to sec. 110(b), as discussed above, controls the nature of the time limit therein and the weight to be afforded this legislative history mitigates against affording persuasive weight to what North American assumes to be an analogous provision.

opinion that in order to engage in protected activity within the purview of sec. 110(b), although formal notification to MESA need not be made, the miner must at least intend to notify MESA of the alleged safety violation.

The court in *Phillips* was obviously concerned about the precarious position of a miner, attempting to assist in enforcing the Act by lodging a safety complaint, prior to his formal notification to a representative of the Secretary. In that case, the miner notified his foreman of an alleged safety violation, refused to work under such alleged unsafe condition, and was immediately fired. The court held that, under the procedures in effect at that mine to invoke the Act, notification to a foreman was the first prescribed step. 500 F. 2d at 781. In affording protection to the miner, under section 110(b) from the time the foreman was notified, the court expressed its primary concern if the Act's protection was not so extended:

> [T]o endorse this limited concept of the Safety Act's scope would be to put a premium on the company firing first, before the employee has a chance to institute a proceeding with the Secretary's representative. To hold that *only* a discharge after a formal proceeding has been instituted is protected, but that a discharge after the miner has taken the first step in the complaint procedure by complaining to his foreman is *not* protected, would be to invite all employers to gut the Safety Act by quick discharges of complaining employees. [Italics in original.]

Id. at 781, n. 32.

The desire to afford protection to miners who *intend* to notify the federal authorities, but who are thwarted in doing so by preemptory retaliatory action by an employer, is implicit in the court's rationale.

The same court, when presented with an opportunity to apply its decision in *Phillips*, made it apparent that it was not the court's intention to automatically afford the Act's protection to a miner who lodges a safety complaint with his foreman. In *Munsey, supra*, it was recognized that when a miner made a report to his union safety coordinator concerning a safety matter it was often relayed to a federal mine inspector. 507 F. 2d at 1207, n. 33. Yet rather than concluding that the *potential* of such a complaint reaching MESA invoked the protection of sec. 110(b) as the Judge herein did, the court remanded the case to the Board to determine whether the miners' complaint to company personnel under the facts therein could be equated to notification to MESA. *Id.* at 1209.

Upon remand the Board referred the case for a recommended decision and specifically asked the Administrative Law Judge to find whether or not the miners therein *intended* to notify MESA of the alleged safety violation. Memorandum and Order, Appeal No. IBMA 72-21, July 7, 1975.

Administrative Law Judge Stewart, in his recommended decision issued on June 25, 1976, similarly recognized the necessity for the threshold showing of intent to notify the federal authorities:

> [I]t is obvious that a report to a foreman under any circumstances that might exist is not equatable to a report to the

Secretary. If all such reports were so equatable it would not have been necessary for the Court of Appeals to remand this case for findings concerning the practicalities as to the procedures implementing the statute actually in effect at the No. 1 mine.

Rec. Dec. Docket No. NORT 71-96, p. 18-19.

We agree. If the decision in *Phillips*, *supra*, is to be expanded to afford protection to a miner who raises a safety complaint with his foreman on the grounds that there is always a potential that such complaint will reach the federal authorities, then it is for the courts to do so. The Board is unable to support such a liberal construction of sec. 110(b) based on either its express wording or its purpose. To hold otherwise would embroil the Secretary in the litigation of countless private labor disputes which may have originated from the lodging of a complaint concerning safety. Such was not the intent of Congress in enacting sec. 110(b).

In introducing this section, Senator Kennedy stated:

My proposed amendment would make it unlawful for any person to discharge or otherwise discriminate against a miner for bringing suspected violations of this act *to the attention of authorities.* [Italics supplied.]

115 Cong. Rec. 27948 (1969).

Senator Kennedy highlighted Congress' desire to encourage the reporting of suspected violations of health and safety regulations as evidenced by the provision which permits a representative of the miners to call for an immediate inspection by MESA whenever it is believed that a violation exists.[5] It was felt that this provision would be ineffective if a miner feared retaliation upon his report of such a violation to the federal authorities under sec. 103(g). Sec. 110(b) was therefore enacted in order that miners might be protected against such discriminatory conduct and be encouraged to lodge reports of suspected violations with the Secretary or his authorized representative. This express Congressional purpose is in no way served by affording the protection of section 110(b) to a miner who has no intention of reporting a violation to MESA, but rather elects to pursue the remedy provided him under a union contract. The dispute remains purely private and outside the realm of protected activity under the Act.

In view of the foregoing, we must determine whether, in the instant appeal, Baker's actions can be categorized as protected activity and therefore within the purview of sec.

[5] Sec. 103(g) provides:

"Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title."

110(b). In his brief on appeal, Baker does not address himself to the question of intent but states that "notification is complete upon notification to a foreman and/or a safety committeeman," citing the decisions in *Phillips*, *supra*, and *Munsey*, *supra* (Br. 23). As discussed above, such reliance on these decisions is misplaced as neither court held that a miner need not at least intend to notify the federal authorities.

The Judge made no express finding with respect to Baker's intent as he deemed such intention irrelevant (Dec. 15). It is incumbent on the Board therefore to review the extensive record in order to make a finding with respect to the issue of intent.

It appears from the record that at least one federal inspector was present in the mine daily and that Baker was aware of how to contact an inspector if he so desired (Tr. 311, 34). There was a telephone "hotline" number prominently posted for the benefit of the miners, by which MESA could be contacted at any time with respect to a suspected violation (Tr. 547, 646). There is no evidence that Baker *intended* to either directly contact the inspector in the mine, or communicate with MESA by phone. Similarly, there is no evidence that Baker intended his safety committeeman to contact MESA in his behalf. Indeed he returned to work upon being told to do so by his committeeman. On the following day the committeeman answered the inquiry of a MESA inspector concerning the gathering of union officials without in any way inviting his participation (Tr. 311–312).

The Board finds that at all relevant times, Baker and the union viewed the controversy as a private labor dispute. The grievance filed on May 22, 1974, charged that the foreman had violated the mining laws of the State of Ohio and contractual rights of the United Mine Workers of America owing to his actions of the previous day. No reference was made with respect to rights Baker asserted under the Act. We believe that Baker opted to pursue a private remedy when he decided that an unsafe condition existed, and that he cannot now seek to be protected by the Act merely because the dispute arose from a suspected safety violation.

C.

Finally, North American assigns as error the Judge's finding that its actions constituted violations of 30 CFR 75.1722(a), 75.1725(a), and 75.1600–2(e). The Board agrees that the Judge erred in making this determination.

[3] The authority of an Administrative Law Judge is clearly delineated in 43 CFR 4.582 and does not include the authority to find an operator in violation of a mandatory standard in the absence of a charge by MESA that a violation has occurred. *See Zeigler Coal Com-*

pany, 2 IBMA 216, 224, 80 I.D. 626, 1973–1974 OSHD par. 16,608 (1973). Additionally, any findings with respect to the violation of safety standards is irrelevant in a proceeding under sec. 110(b)(1).

In conclusion, because Baker has failed to meet his prima facie burden that he was engaged in protected activity, within the purview of sec. 110(b), the Board denies his claim for relief based upon the alleged discriminatory conduct on May 21 and May 23, 1974.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS REVERSED, and that the Application for Review based upon alleged violations on May 21 and May 23, 1974, IS DENIED.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

DAVID TORBETT,
Alternate Administrative Judge.

ADMINISTRATIVE JUDGE SCHELLENBERG DISSENTING IN PART:

I concur with the ultimate disposition of this case and the conclusions of the majority except with respect to the discussion concerning the 30-day filing period of sec. 110(b)(2) and the conclusion that it is a statute of limitations.

In view of the ultimate decision, I do not believe it was necessary to reach the issue but having done so I believe it has been erroneously decided.

The statutory language being here construed appears in sec. 110(b)(2) of the Act as follows: "Any miner * * * who believes that he has been discharged * * * in violation of paragraph (1) of this subsection *may, within thirty days* after such violation occurs, *apply to the Secretary for a review* of such alleged discharge * * * ." (Italics added.)

Substantially identical language is used in sec. 105(a)(1) of the Act with respect to review of withdrawal orders as follows: "An operator * * * *may apply to the Secretary for review of the order within thirty days* of receipt thereof or within thirty days of its modification or termination." (Italics added.)

This Board in *Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149 (1970), and in *Consolidation Coal Co.*, 1 IBMA 131, 79 I.D. 413 (1972) has held that the 30-day filing period of sec. 105(a) was a limitation on the Secretary's review jurisdiction. We have consistently adhered to this interpretation. I am unable to find in this case any logical basis for departing from this interpretation and treating differently the substantially identical limitation period contained in sec. 110(b)(2).

Each of the aforementioned statutory provisions has been translated into the regulations at 43 CFR 4.561 and 43 CFR 4.530(c), respectively, as follows:

43 CFR 4.561 When to file.

An application to review a discharge or act of discrimination *shall be filed within 30 days after* such discharge * * * occurs. [Italics added.]

43 CFR 4.530 Initiation of Proceeding.

(c) *Time for filing.* An application for review *shall be filed within 30 days of receipt by the applicant of the order or notice sought to be reviewed* * * *. [Italics added.]

Additionally, the regulations further specify in 43 CFR 4.561 a filing time for actions brought under sec. 110(a) of the Act which has no statutory counterpart, as follows: "An application for compensation *shall be filed within 45 days after the date of issuance of the withdrawal order which gives rise to the claim.*" (Italics added.)

It is highly significant to me that the majority, while citing vague and inconclusive legislative history, National Labor Relations Act provisions and court cases relative thereto, fails to even mention, let alone attempt to distinguish the most recent pronouncement of the U.S. Circuit Court of Appeals for the Seventh Circuit interpreting and construing a limitations period contained in the very same section of the Secretary's regulations and relating to the very same section of the Coal Mine Health and Safety Act of 1969.

The 45-day filing time limitation of 43 CFR 4.561 was challenged in *UMWA* v. *Kleppe and Inland Steel Company*, U.S. Court of Appeals for the Seventh Circuit, No. 76-1377, decided Sept. 13, 1977. In its decision that Court discussed the nature of the regulation involved and stated as follows:

We believe the petitioner has wholly mischaracterized the nature of the regulation challenged, which provides only that an "application for compensation shall be filed within 45 days after the date of the withdrawal order which gives rise to the claim." 43 CFR 4.561. That regulation is not a "statute of limitations" designed to protect mine operators from stale claims, but simply a condition precedent to invocation of the agency's administrative jurisdiction analagous to other procedural rules setting time limits for the filing of pleadings, Fed. R. Civ. P. 12 (a), and the taking of appeals from a final judgment, Fed. R. App. P. 4, or an administrative order, 43 CFR 4.600.

Later in the decision the Court in discussing "the reasonableness of 45 day limitations period" states as follows:

The 45 day period prescribed by the Secretary for the filing of compensation claims does seem on its face to be an unusually short one. On the other hand, prompt adjudication of compensation claims is not an unreasonable goal for the Secretary to seek in view of the strong federal policy favoring relatively rapid resolution of labor disputes (citation omitted). Moreover, *the other limitations periods prescribed in the Act by Congress itself are also very short.* Miners who claim to have been discharged in retaliation for attempting to obtain compliance with the health and safety standards set by this Act, for example, *must file their petitions for reinstatement with the agency within 30 days of the allegedly illegal discharges*, 30 U.S.C. § 110(b), and operators who contest the validity of the withdrawal orders out of which the miner's compensation claims arise must do so within 30 days of the orders' issuance. 30 U.S.C. § 815(a). [Italics added.]

In my opinion that case is dispositive of the question and I respectfully dissent.

HOWARD J. SCHELLENBERG, JR.
Administrative Judge.

APPEAL OF WILLIAM THOMAS WOOLARD

2 ANCAB 150

Decided *November 3, 1977*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management rejecting William Thomas Woolard's application for a primary place of residence under § 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974, as amended, 89 Stat. 1145 (1976)) for lands described in sec. 29 and 32, T. 27 S., R. 22 E., Kateel River Meridian.

Decision reversing Bureau of Land Management Decision #F–19746 and remanding for further disposition.

1. Alaska Native Claims Settlement Act: Withdrawals: Generally

The withdrawal of lands pursuant to § 11(a)(1) of ANCSA took place on Dec. 18, 1971, the date of passage of ANCSA.

2. Alaska Native Claims Settlement Act: Withdrawals: Termination

Under § 22(h)(1) of ANCSA, the withdrawal of lands pursuant to § 11(a)(1) terminated as of Dec. 18, 1975, a date four years after the date of enactment of the Act, unless the lands were selected by a Native Corporation under § 12 of ANCSA.

3. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Primary Place of Residence: Generally

When a Village Corporation selects withdrawn lands in one section, but excepts from selection a smaller tract of withdrawn land within the section, no determination can be made as to whether a § 11 withdrawal terminated on the tract of land excepted from selection until such time as a decision is rendered by the Bureau of Land Management on the validity of the exception from selection.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Generally

The Alaska Native Claims Appeal Board and the Bureau of Land Management are bound by the rules and regulations enacted by the Department of the Interior.

5. Alaska Native Claims Settlement Act: Land Selections: Generally—Alaska Native Claims Settlement Act: Primary Place of Residence: Generally

As of Dec. 18, 1975, lands withdrawn under § 11(a)(1) or § 11(a)(3) and not selected under §§ 12 or 19 of the Act, became lands outside the areas withdrawn by § 11 and became available for selection as a primary place of residence under § 14(h)(5).

6. Alaska Native Claims Settlement Act: Administrative Procedure: Applications: Primary Place of Residence

Under § 14(h)(5) of ANCSA and 43 CFR Part 2653, an applicant who desired to file an application for the conveyance of a primary place of residence was required to do so by Dec. 18, 1973, regardless of the status of the land at the date of filing.

7. Alaska Native Claims Settlement Act: Administrative Procedure: Applications: Primary Place of Residence

Neither the Act nor regulations permit an applicant for a primary place of residence

to refile an application for a primary place of residence once a § 11 withdrawal terminates and the land becomes available for selection as a primary place of residence.

8. Alaska Native Claims Settlement Act: Land Selections: Generally—Alaska Native Claims Settlement Act: Primary Place of Residence: Generally

An applicant who filed an application for a primary place of residence within the time limits set forth by § 14(h)(5) and 43 CFR 2653.8 on land which was withdrawn by § 11(a)(1) or § 11(a)(3) as of the date of filing, shall not have his application rejected pursuant to 43 CFR 2091.1 as a premature filing when Departmental regulations specifically permit the selection of formerly withdrawn land after Dec. 18, 1975 but do not permit a primary place of residence applicant to refile his application.

9. Alaska Native Claims Settlement Act: Generally

The Alaska Native Claims Appeal Board, in its discretion, will not rule on issues raised on appeal which were not the grounds cited by the Bureau of Land Management for rejection of applicant's application and which are not dispositive of the issue on appeal.

APPEARANCES: John W. Burke, Esq., Office of the Regional Solicitor, on behalf of the State Director, Bureau of Land Management; Richard Brown, Attorney for appellant from Alaska Legal Services Corporation, Anchorage, Alaska.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

On Dec. 17, 1973, appellant filed a primary place of residence application with the Alaska State Office, Bureau of Land Management which was number F–19746. The application was filed pursuant to § 14(h)(5) of ANCSA and implementing regulations in 43 CFR Subpart 2653 which provides that the Secretary may convey to a Native applicant the surface estate to his primary place of residence. On Dec. 18, 1973, Doyon Limited, the Regional Native Corporation affected, filed its written concurrence with Mr. Woolard's application.

On Apr. 13, 1976, the Alaska State Office, Bureau of Land Management rejected the application of appellant for the reason that the lands sought were within the § 11(a)(1) withdrawal areas of the Don Lee Corporation (the Village Corporation for the Native Village of Nikolai). The Decision stated that on Nov. 19, 1974, Don Lee Corporation selected all lands embraced in the township in which appellant's primary place of residence was located.

On May 12, 1976, Richard Brown, Attorney, Alaska Legal Services Corporation, Anchorage, Alaska, filed a Notice of Appeal with this Board on behalf of appellant, said appeal having been numbered ANCAB #PR 76–1. In the appellant's Statement of Reasons for Appeal, the following additional factual information is alleged. First, appellant's application for a primary place of residence fell within two sections of land—Secs. 29 and 32 of T. 27 S., R. 22 E., Kateel River Meridian. The lands in both of these sections were withdrawn pursuant to § 11(a)(1) of

ANCSA for selection by Don Lee Corporation. On Nov. 19, 1974, Don Lee Corporation selected lands within Section 32 of T. 27 S., R. 22 E., Kateel River Meridian. Don Lee Corporation did not select any lands lying within Section 29 of the same township and range.

As to the lands in Section 29, appellant claims that the withdrawal of these lands under § 11(a) terminated pursuant to § 22(h)(1) of ANCSA because these lands were not selected by a Native Corporation within four years of the date of enactment of ANCSA. These lands not having been selected by Don Lee Corporation and the withdrawal having terminated, appellant claims that he has the right to select them for his primary place of residence.

Appellant also contends that as to those lands in his application lying within Section 32, T. 27 S., R. 22 E., his application should be held in abeyance until it is determined that Don Lee Corporation will actually receive the lands.

Appellant further states that all of the lands in his application have been withdrawn by the Secretary under § 17(d)(1) of ANCSA and have been recommended by the Secretary to Congress for inclusion in a National Forest. Although his application wasn't rejected for these reasons, he contends that the BLM may reject the application as being in conflict with the § 17(d)(1) withdrawal.

On July 9, 1976, the Bureau of Land Management, through the Office of the Regional Solicitor, answered appellant's claim and alleged that since all of the lands in appellant's application had once been withdrawn under § 11 of the Act, they were therefore excluded from selection as a primary place of residence under § 14 of the Act. They further alleged that since the lands were not available at the date of filing the application by appellant, the application cannot now be approved.

The Bureau of Land Management agrees with appellant that Don Lee Corporation did not select the lands within Section 29, T. 27 S., R. 22 E. It further states that Don Lee Corporation excepted from selection, those lands in appellant's application which were within Section 32 of T. 27 S., R. 22 E. The Bureau of Land Management claims, however, that this exception from selection was invalid since a Village Corporation must select all available land within a section and cites for this proposition § 12((a)(2) of ANCSA and regulation 43 CFR 2651.3(c). Thus, BLM contends that even if appellant can select lands within an area formerly withdrawn by § 11 of ANCSA, appellant's application must be rejected as to the lands lying in Section 32, T. 27 S., R. 22 E., because these lands should have been selected by Don Lee Corporation.

The first issue to be decided is whether an applicant for a primary place of residence may select land which has been formerly withdrawn pursuant to § 11(a)(1) or § 11(a)

(3) of ANCSA, but which was not selected by a Native Corporation. The answer to this question is yes.

Sec. 14 of ANCSA, as it relates to appellant's primary place of residence states as follows:

* * * * * * *

(h) The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 11 and 16, and follows:

* * * * * * *

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

* * * * * * *

The regulations which have been enacted to implement § 14(h)(5) and which pertain to those areas which can be selected for § 14(h)(5) purposes state as follows:

43 CFR 2653.3 Lands available for selection.

(a) Selection may be made for existing cemetery sites or historical places, Native groups, corporations formed by the Natives residing in Sitka, Kenai, Juneau, and Kodiak, and for primary places of residence, from any unappropriated and unreserved lands which the Secretary may withdraw for these purposes: *Provided,* That National Wildlife Refuge System lands and National Forest lands may be made available as provided by sec. 14(h)(7) of the Act and the regulations in this subpart. Selections for these purposes may also be made from any unappropriated and unreserved lands which the Secretary may withdraw from lands formerly withdrawn and not selected under sec. 16 of the Act and *after December 18, 1975, from lands formerly withdrawn under sec. 11(a)(1) or 11(a)(3) and not selected under sec. 12 or 19 of the Act.* (Italics added.)

* * * * * * *

Neither party to this appeal disputes the fact that the lands selected by appellant for his primary place of residence were withdrawn pursuant to § 11(a)(1) of ANCSA for the selection of Don Lee Corporation. The parties dispute the significance of the termination of the § 11 withdrawal as it relates to the ability of appellant to select such land as his primary place of residence.

The termination of § 11 withdrawals is governed by § 22(h)(1) of ANCSA which provides as follows:

All withdrawals made under this Act, except as otherwise provided in this subsection, shall terminate within four years of the date of enactment of this Act: *Provided,* That any lands selected by Village or Regional Corporations or by a Native group under section 12 shall remain withdrawn until conveyed pursuant to sec. 14.

[1, 2] The withdrawal of lands pursuant to § 11(a)(1) of ANCSA took place on Dec. 18, 1971, the date of passage of ANCSA. Under § 22(h)(1), the withdrawal of lands pursuant to § 11(a)(1) of ANCSA terminated as of Dec. 18, 1975, a date four years after the date of enactment of the Act, unless the lands were selected by a Native Corporation.

The lands in Section 29, T. 27 S., R. 22 E., Kateel River Meridian, were withdrawn pursuant to § 11

(a)(1) of ANCSA on Dec. 18, 1971. These lands were not selected by Don Lee Corporation and there is no evidence in the file that indicates any other corporation selected these lands under ANCSA. Pursuant to § 22(h)(1), the withdrawal of Sec. 29 under § 11(a)(1) of ANCSA terminated as of Dec. 18, 1975.

[3] The lands in Section 32, T. 27 S., R. 22 E., Kateel River Meridian, were also withdrawn on Dec. 18, 1971, under § 11(a)(1) of ANCSA. These lands were selected by Don Lee Corporation on Nov. 19, 1974. As pointed out by the Bureau of Land Management, however, Don Lee Corporation excepted from selection, those lands in Section 32 which were included in appellant's application for a primary place of residence. This exception from selection has been questioned by the Bureau of Land Management. As of this date, there is no evidence that the Bureau of Land Management has made a decision as to the propriety of the selection application of Don Lee Corporation and the exception from selection contained therein. Until such time as a decision is issued by the Bureau of Land Management on Don Lee Corporation's selection application, no determination can be made on the question of whether the § 11 withdrawal also terminated on the lands in appellant's application lying within Section 32, T. 27 S., R. 22 E., Kateel River Meridian.

Appellant argues that § 14(h) of ANCSA and the implementing regulations do not prohibit selection of land for primary places of residence within terminated § 11 withdrawal areas. He states:

* * * * * * *

ANCSA sec. 14(h) indicates that the conveyances permitted by the subsection may only take place on land *"located outside the areas withdrawn by Section 11 and 16"* (Italics added). An 11(a)(1) withdrawal which, like the withdrawal of Section 29, has been terminated due to a village corporation's failure to select cannot be considered as falling within the definition of the phrase "withdrawn by Section 11" and, thus, cannot be viewed as coming within the exclusionary clause found in Sec. 14(h) and quoted with italics above. * * *

(Appellant's Reply Brief, page 3.)

* * * * * * *

The Bureau of Land Management argues to the contrary and states:

* * * * * * *

* * * The land was withdrawn by sec. 11 and thereby was excluded by section 14 which did not make any provision for primary place of residence applicants who applied for land which was withdrawn by section 11, but not selected by a village.

(Answer of Bureau of Land Management of July 7, 1976, page 2.)

* * * * * * *

[4, 5] The Secretary of the Interior has enacted regulations specifying the type of lands which can be selected for primary places of residence pursuant to § 14(h)(5) of ANCSA and has addressed this particular issue. 43 CFR 2653.3(a), which has been previously quoted, sets out in the proviso that after

Dec. 18, 1975, lands which were formerly withdrawn under § 11(a)(1) or § 11(a)(3), and which were not selected pursuant to § 12 or § 19, are available for selection as a primary place of residence. This Board and the Bureau of Land Management are bound by the rules and regulations enacted by the Department of the Interior. (*United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954)). The Board therefore finds that as of December 18, 1975, lands withdrawn under § 11(a)(1) or § 11(a)(3) of the Act, but not selected pursuant to § 12 or § 19 of the Act, became lands outside the areas withdrawn by § 11 and became available for selection as a primary place of residence under § 14(h)(5).

The Bureau of Land Management contends that even if selections of formerly withdrawn lands is proper, any application for a primary place of residence must be rejected if the lands were not available at the date of filing the selection application. Cited for this proposition is 43 CFR 2091.1 which states in part:

> * * * applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:
> (a) Withdrawal or reservation of lands; * * *
> * * * * * * *

This regulation was not enacted pursuant to ANCSA and does not specifically refer to ANCSA or any provisions thereof.

[6, 7] Under § 14(h)(5) of ANCSA and 43 CFR 2653.8, an applicant who desired to file an application for the conveyance of a primary place of residence was required to do so by Dec. 18, 1973, regardless of the status of the land on the date of filing. 43 CFR 2653.3(a) further provides that after Dec. 18, 1975, land that was withdrawn under § 11(a)(1) or § 11(a)(3) but not selected under § 12 or § 19 became available for selection for purposes of primary places of residence. Neither the Act nor implementing regulations permit an applicant to refile his application for a primary place of residence once a § 11 withdrawal terminates and the land becomes available for selection.

Appellant filed his application for a primary place of residence as required by Departmental regulations and within the time limits set forth therein. Although the land embraced in his application was withdrawn at the date of filing his application, 43 CFR 2653.3(a) specifically provides that if the land was withdrawn under § 11(a)(1) or § 11(a)(3) of ANCSA and not selected pursuant to § 12 or § 19, on Dec. 18, 1975, the lands became selectable for applicants such as appellant.

[8] In order to give effect to Departmental regulations enacted to implement selection of primary places of residence under ANCSA, this Board must reject the contentions of the Bureau of Land Management. This Board finds that an applicant who files for a primary place of residence within the time limits set forth by § 14(h)(5) and

43 CFR 2653.8, on land which is withdrawn under § 11(a)(1) or § 11(a)(3) at the time of filing, shall not have his application rejected under 43 CFR 2091.1 as a premature filing when Departmental regulations specifically permit the selection of formerly withdrawn land after Dec. 18, 1975, and do not permit a primary place of residence applicant to refile his application.

Appellant has further alleged that the land in his application has been withdrawn under Public Land Order No. 5184 (37 FR 5588, Mar. 16, 1972) pursuant to § 17(d)(1) of ANCSA for study and review by the Secretary for purposes of classification and reclassification. He also asserts that the Secretary recommended to Congress that these lands be included in a proposed National Forest. He further contends that if this Board reverses the previous decision of the Bureau of Land Management, the Bureau of Land Management will reject his application under 43 CFR 2653.3(c) which states:

> A withdrawal made pursuant to sec. 17(d)(1) of the Act which is not part of the Secretary's recommendation to Congress of Dec. 18, 1973, on the four national systems shall not preclude a withdrawal pursuant to sec. 14(h) of the Act.

[9] Due to the fact that appellant's application was not rejected on the grounds that the land was withdrawn under § 17(d)(1) of ANCSA and recommended to Congress for inclusion in a National Forest, this Board finds that such contention is not dispositive of this appeal and in its discretion declines to rule on this issue.

However, the Board notes that Public Land Order No. 5184 which was enacted pursuant to § 17(d)(1) of ANCSA withdrew lands "for study and review by the Secretary of the Interior for classification or reclassification of any lands not conveyed pursuant to section 14 of ANCSA." If the Secretary did classify and recommend the lands in appellant's application to Congress for inclusion in a National Forest, as is alleged by appellant, it appears that such classification would be subject to the provision allowing for conveyances under § 14(h).

Furthermore, even if, as alleged by appellant, these lands are put into a National Forest by Congress, as recommended by the Secretary, § 14(h)(7) of ANCSA permits the Secretary to convey lands in National Forests for purposes of primary places of residence.

This Board Orders that the Decision of the Anchorage Office of the Bureau of Land Management on the Primary Place of Residence of William Thomas Woolard, # F-19746, and dated Apr. 13, 1976, be reversed and remanded for an adjudication as follows:

1. That the Anchorage Office of the Bureau of Land Management adjudicate the land in appellant's application for a primary place of residence, which lies within Section 29, T. 27 S., R. 22 E., Kateel River Meridian, in accordance with 43 CFR 2653.3(a) as being on lands formerly withdrawn under § 11(a)(1) or § 11(a)(3) and not selected under § 12 or § 19 of the Act.

2. That any adjudication on that portion of land in appellant's application lying within Section 32, T. 27 S., R. 22 E., Kateel River Meridian be held in abeyance pending an adjudication of the selection application of Don Lee Corporation. Upon an adjudication of Don Lee Corporation's selection application, as it relates to the exception from selection of that land in appellant's application lying within Section 32, T. 27 S., R. 22 E., Kateel River Meridian, the Anchorage Office of the Bureau of Land Management shall adjudicate, in accordance with 43 CFR 2653.3(a), the question of whether or not the land in appellant's application lying within Section 32 is available for selection as a primary place of residence as being land formerly withdrawn under §11(a)(1) or §11(a)(3) and not selected under §12 or §19 of the Act.

3. That prior to any adjudication of appellant's application, the Bureau of Land Management receive a field study from the Bureau of Indian Affairs as requested by the Bureau of Land Management on June 3, 1974, and make a determination as to whether appellant has met all qualifications for receiving a conveyance for a primary place of residence.

This represents a unanimous decision of the Board.

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

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF ROCKY MOUNTAIN CONSTRUCTION COMPANY

IBCA-1091-12-75

Decided *November 4, 1977*

Contract No. 14-10-7-971-234, National Park Service

Motion for Reconsideration Granted.

1. Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Contract Clauses—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Performance or Default: Waiver and Estoppel—Rules of Practice: Appeals: Reconsideration

Upon reconsideration, the Board finds that where the Government issues an "Extra Work Order" under a "force account" provision for minor extra work not provided for in other pay items, at agreed on rates, the contractor is entitled to be paid for inefficiency, re-work costs and delay costs when moisture causes borrow material placed under the extra work order, to become muddy. However, the appellant's failure to give prompt notice of the claim under the force account provision caused the Government to order added pay item work, thus the claim must be reduced by the amount of added pay item payment.

APPEARANCES: Mr. Bruce R. Toole, Attorney at Law, Crowley, Haughey, Hanson, Toole and Dietrich, Billings, Montana, for the appellant; Mr. John P. Lange, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE STEELE

INTERIOR BOARD OF CONTRACT APPEALS

Decision. Upon reconsideration, the Board reverses its prior decision

on the "red dirt borrow" claim and allows the "late" claim for work under "force account" provisions of the contract to the extent of $54,200.

The appellant, on Sept. 16, 1977, filed a motion for reconsideration of the board's decision of the "red dirt borrow re-work" portion of the decision dated Aug. 17, 1977.

The appellant and the Government have filed briefs on the motion.

Appellant's contentions. In support of its motion, the appellant had advanced a number of contentions, among which are: (i) the Board did not consider that the boat ramp was not at the grade shown on the plans; (ii) after award the Government issued an extra work order to bring the ramp up to grade by hauling imported borrow; (iii) the contractor (subcontractor) had no way of knowing what the borrow material would be or his costs of hauling it; (iv) part of the work of bringing the ramp up to grade was done (as it was supposed to be done) under the force-account provisions of the contract but the Government ran out of force account funds and the balance of the work was done without reimbursement; and (v) the problem of placing the aggregate (a pay item) and concrete (a pay item) on top of the red dirt fill (a force-account item) was that the red dirt was unsuitable fill when it got wet—as it did—and caused a lot of unanticipated work in drying the red dirt fill, replacing it, regrading it and then placing the aggregate and concrete.

The contractor takes exception to the Board's statement that the work involved was "original contract work" not "force account work."

The appellant says that the Differing Site Conditions Clause might afford relief, but says that the changes clause is more likely to be applicable. As to notice, the appellant says that the notice was given before final payment and that was sufficient in the circumstance of this case when the rework was a consequence of a written extra work order.

We are persuaded by appellant's brief that the Board should carefully re-examine the facts and the law of this portion of its Aug. decision on the appeal.

The Government's Contentions. The Government says that the Government project engineer and the contractor were on the site at the appropriate time, that the weather was not unusual for the time and place, that the parties complied with the force-account provisions and agreed on the men and equipment used to place the borrow material and that the contractor made no protest or contemporaneous claim when the force-account funds were exhausted. The Government therefore concludes that the Board was correct in its ruling that this conduct of the parties should be given great weight when interpreting their rights and duties under the force account (or other) provisions of the contract. The Government also says that a motion for recon-

sideration that just repeats prior arguments should be denied.

Discussion Analysis and Decision

A. *The Facts*

In this contract and subcontract, the contractor agreed to do what the Board calls "no-pay work" and "pay work." Pay work on the subcontract would be the 14 items listed in the subcontract and the 15th item, the force-account work. No-pay work would be the other work necessary to do the pay item work.

The appellant correctly points out that neither the prime nor the subcontractor could "bid" on the force account work because it was not handled that way but was imposed upon the contractor under Specification FA–1.

Thus, the parties and the Board are faced with the following factual situations: (1) award of the contract, (2) issuance of extra work order #1 to bring the ramp to grade under the force account clause, (3) bringing the ramp to grade under the force account, (4) rain and rework of the borrow in the ramp area, (5) placement of aggregate and concrete, and (6) filing of a claim for the cost of No. 4 above.

The Board in its original decision characterized (5) above as original contract work. It was item 8 and the $8 per ton base course work of the subcontract (Government Exhibit 2).

The decision for the Board is whether (4) *supra*, is part of (2) (the extra work order #1) or whether it is (a) changed condition work, or (b) change order work or (c) no-pay work.

The appellant seems to say that factually it was part of the force account extra work order work. However, the Board is faced with the parties' contrary interpretation of the force account specification which requires daily signoff (Tab B, FA–1, par. 3). The parties signed off daily on approximately $21,000 blasting and hauling of fill (Exhibit 6), but they did *not* continue this practice as to the work for which appellant here makes claim. Appellant did not file a protest or a notice of claim or a claim until 2 years later. In the meantime, in reliance on the absence of protest or notice of claim, and as an aid to the subcontractor to partially pay him for this apparently no-pay work,[1] the Government directed the subcontractor to place 900–920 tons of pay items worth $2,300 to the prime and $7,200 to the subcontractor.

Nevertheless, the question remains, is the appellant entitled under the contract to payment for this item 4, *supra*, work?

B. *Differing Site Conditions*

Was the red dirt borrow a misrepresentation under par. (1) of this clause (the Differing Site Condition clause)?

Neither the plans nor the extra work order contained an express

[1] 2 Tr. 251–2 reads as follows:

"Q. Why did you allow Mr. Kenney to place that gravel under the sidewalks if it was his responsibility under the contract to put that material in there without being paid for it?

"A. Well, that was compensation for the extra work he was doing with the replacing of the borrow and I thought Mr. Kenney had accepted this * * *." *See also* 2 Tr. 257.

representation with respect to this "*ad hoc*" borrow pit. Appellant cites *Morrison-Knudsen Co.* v. *United States*, 184 Ct. Cl. 661 (1968), as applicable, but that was a case where the court held that representations of borrow pits *on the plans* were erroneous and affected the bidders' cost estimates. The Board holds that par. (1) (misrepresentation) does not afford relief in the instant appeal.

Was the red dirt, as affected by the moisture in late February through early June, an unusual condition under par. (2) of the clause?

The appellant has detailed many of the problems with the "red dirt." The Government has tried to minimize them. The issue for decision nevertheless is whether these conditions were "unknown physical conditions at the site, of any [*sic*] unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract [extra work order]." However, a preliminary issue is whether the Differing Site Condition clause is applicable to extra work orders at all. This whole clause was presumably inserted in IFB type contracts to reduce contract prices by reducing contingencies in bids because bidders would get paid if the events set out in the clause occurred. Here, where the force-account work is really "time and materials" work, no need is perceived for resorting to the Differing Site Conditions clause. The Board, after reconsideration, concludes that in the circumstances of this case this clause—or at least par. (2)—is not applicable to this extra work order situation because appellant had no opportunity to "bid on" the extra work. So much of our prior decision as is contrary hereto is overruled.

C. *Changes clause*

Was this work done pursuant to a formal or constructive change order under the Changes clause?[2] *Morrison-Knudsen*, *supra*, may be applicable here except for the absence of evidence of express Government order to "rework" the red dirt fill and the absence of written notice required by clause (b) of the Changes clause.

There is no evidence that the Government representative on the site ordered or directed or required appellant to remove, dry, or replace the wet borrow material. Rather, it appears that appellant (or really Kenney, the subcontractor), did this work because it was necessary in order to place not only the red dirt fill properly, but to place the aggregate (base course) and concrete.

Thus, the Board concludes that this work was not either formal or constructive change order work but was *part of* the work required by extra work order #1.

The Board finds that the parties' failure to continue to "sign off" as

[2] There were two changes clauses in the contract. Clause 57 is the normal post 1968 clause. Clause 34 is a clause that relates only to the pricing of changes. Specification FA–1, Force Account Work, in par. 4 said "Payment for this item shall be in accordance with subparagraphs (a) (1) and (a) (2) of Clause 34 'Changes' in the General Provisions." (Tab B.)

to men and equipment used on this "rework" was caused by the exhaustion of force-account funds (1 Tr. 85), and that in the circumstances present, the appellant's failure to protest, make claim, or demand daily sign off represented ambiguous conduct rather than the type of conduct required to clearly establish the parties' rights under the force-account clause, as we held in our earlier decision.

D. *Force-Account Work—Extra Work Order #1*

If the Board is correct in its conclusion that the "rework" was part of extra work order #1, the next question is what is the effect of the apparently "late" filing of this force-account claim?

Most claims are made under the Differing Site Conditions clause or the Changes clause, and each clause has its own notice provisions. However, the force-account specification has no express notice provision. The clause provides for a daily sign off. This was not done for this rework. So the question remains, what effect does this have on the claim? If there is a reasonable doubt as to amount, as to whether certain men or equipment performed force-account work, it would appear to be clear that the claim—to that extent—must fail. But that is a quantum matter. Is this a late claim, and, if so, what follows from this conclusion?

When a contractor fails to give reasonably prompt notice of a claim, it unquestionably runs the risk specified in particular clauses for the filing or giving notice of claims thereunder. It also runs the risk, however, of misleading the other contracting party to its detriment. Here the force account clause provides for payment under par. (a) of Changes clause number 34. This clause provides for payment by a negotiated lump sum or rate or by actual costs plus 15 percent (par. (a)(2), see footnote 2). The appellant is entitled to such payment and the Board will calculate it in the next part of this opinion.

Nevertheless, because the claim was not filed promptly, or notice thereof promptly given, the Government directed "pay item" work and made payment thereof to the extent of $2,300 (see footnote 1). Thus, the award made in the next section of this opinion will be reduced by $2,300 as a partial estoppel arising from appellant's failure to give reasonably prompt notice of this claim under the force-account clause.

The Board's present conclusion is that the claim is one under the force account (or extra work order #1), it is not a changes claim; it is not a changed condition claim. Thus, the notice provisions of the Changes clause and the Differing Site Conditions clause do not govern this claim.

Should the Board infer a notice provision in the force-account specification? We note that the Government drafted the provision; that for the most part it assumed that there would be a daily sign off; and that this would give notice of claims. Yet, Changes clause 34(a)(2), which was incorporated by reference, contemplates a situation where there was no prior agreement

on costs. So the whole scheme is written not just for cases involving agreement on the cost of the force-account work done, but also for cases where there is no such agreement. Since no express notice provision governing force-account work was written into the contract by the Government, the Board finds that the only requirement for notice is that the appellant must file its claim under the contract within a reasonable time.

It is clear that the Government has a right to put notice provisions in its contract clauses and that it frequently does so. The Board will not here write-in such a requirement in the force-account provisions except as provided above in our estoppel discussion.

E. *Cost of Red Dirt Borrow Rework*

The next-to-last issue is quantum. Clause 34(a)(2)—in effect—says "actual cost plus 15 percent." Standby and delay costs are "actual" costs. (Clause 34(a)(1) says use agreed-upon prices.)

A party is not limited to its evidence submitted to the contracting officer as appeals are de novo. Nevertheless, the Board will examine the amount claimed each time it is claimed. A contractor need not prove its case with mathematical precision. In the absence of such proof, it is entitled to a fair approximation of its increased costs.

Additional Findings of Fact on Quantum

Appellant, if it had not had to work with the wet red dirt borrow material, would have laid the aggregate and poured the concrete in 21 working days (1 Tr. 61).

Appellant's added costs because of the wet red dirt borrow material were approximately as follows:

Labor:		
(base pay)	$10,261.43	(Ex. G)
(additives)	3,386.36	(Ex. G)
Total	$13,647.79	(Ex. G)

However, during this period appellant earned and was apparently paid $7,860.65 as agreed force account work. Exhibit 6, $20,946.17 (est. #5) − $13,085.52 (est. #3) = $7,860.65.

On this evidence, as a jury verdict because the amounts paid under the force account may not completely coincide with the claim period, the Board finds that the appellant's (Kenney's) added labor cost due to the wet borrow material was $6,500.

The added equipment cost of appellant (Kenney) is not precisely clear because Kenney had to rely on memory. He did not testify as to the rates he *actually paid* but instead, in Tab V, used the force account rates. In Exhibit H however, he sought to use 1970 rates. These factors seem to account for most of the difference between the February 6, 1975 claim of $65,446.26, and the January 12, 1977 claim of $86,520.99 (p. 24, appellant's brief).

The standard for payment is (a) agreed prices (clause 34(a)(1)) or (b) "actual necessary cost" (Clause 34(a)(2)). Extra work order #1, provided the rates would be as stated therein (p. 2, 3). Thus the 1970 rates, Exhibit H, are not applicable.

The Board finds that the appellant is entitled to equipment costs as follows: $65,446.26 − $13,647.70 = $51,798.56 (gross).

However, this amount erroneously includes standby at $31/day/truck for 23 days when the two cement truck were *not on the site or on standby.* (There is no evidence appellant (Kenney) incurred this cost.) Twenty-three days × 2 trucks = 46 truck days. Forty-six × $31/day (not $29.40) = $1,426.

$51,798.56
−1,426.00
$50,372.56

The Board's findings and conclusions as to added force account costs are as follows on the basis of a jury verdict:

Labor	$6,500	
Equipment	$50,000	
	$56,500	
minus	$2,300	for added "pay work"
	$54,200	

cf. Hawaiian Airmotive, A Division of Pastushin Industries, Inc., ASBCA Nos. 7892, 8749 (June 30, 1965), 65–2 BCA par. 4946; *Eggers & Higgins* v. *United States*, 185 Ct. Cl. 765 (1968), *Rixon Electronics, Inc.* v. *United States*, 536 F.2d 1345, 1352 (1976); *Lockheed Shipbuilding & Construction Co.*, ASBCA No. 18460 (May 13, 1975), 75–1 BCA par. 11,246, pp. 53, 554–7.

The appeal on this claim item is sustained to the extent of $54,200 and is otherwise denied.

F. *Interest*

Appellant in its Motion for Reconsideration dated September 14, 1977, asks for interest.

In *Commonwealth Electric Co.*, IBCA–1048–11–74 (July 15, 1977), 84 I.D. 407, 77–2 BCA par. 12,649, this Board held that the notice of July 28, 1972, in 37 FR 15, 152, inserting clause 41 CFR 1–1.322 Payment of Interest on Contractor's Claims, was incorporated by operation of law into Commonwealth Electric Company's contract.

The instant contract dated Oct. 24, 1969, ante-dates the *Federal Register* notice by almost three years. Thus, *Commonwealth Electric Co.*, *supra*, is not applicable to the instant appeal. That *Federal Register* notice says the clause shall *not* be incorporated into contracts executed prior to Sept. 21, 1972.

Appellant has not introduced evidence that it incurred added financing costs such as those allowed in *Bell* v. *United States*, 186 Ct. Cl. 189 (1968); nor has it shown that it used its own capital per *New York Shipbuilding, A Division of Merritt-Chapman & Scott*, ASBCA No. 15443 (December 21, 1972), 73–1 BCA par. 9852; *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17717 (Aug. 16, 1973), 73–2 BCA par. 10,205; and *Fischbach and Moore International Corp.*, ASBCA No. 18146 (Dec. 13, 1976), 77–1 BCA par. 12,300; *Baifield Industries, Division of A–T–O, Inc.*, ASBCA Nos. 13418, 13555, 17241 (Dec. 30, 1976), 77–1 BCA par. 12,308 (and such "interest" seems not to have been claimed in construction contracts, presumably because it is included in standby rates, etc.). Thus, appellant's "petition" for interest assumes some other

plenary or discretionary power in this Board to award interest. The appellant has not cited any clause in this contract or any other authority, authorizing the contracting officer or the Board to grant such relief. We are not aware of any. The claim for interest is therefore denied.

GEORGE S. STEELE, JR.,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Administrative Judge.
Chairman.

KARL S. VASILOFF,
Administrative Judge.

TAX STATUS OF THE PRODUCTION OF OIL AND GAS FROM LEASES OF THE FORT PECK TRIBAL LANDS UNDER THE 1938 MINERAL LEASING ACT

Indian Lands: Leases and Permits: Generally—Indian Lands: Leases and Permits: Oil and Gas

Oil and gas produced from leases of Fort Peck tribal lands cannot be taxed by the State of Montana.

Indian Lands: Leases and Permits: Generally—Indian Lands: Taxation

The taxation proviso contained in 25 U.S.C. § 398 (1970) does not apply to leases entered into under the 1938 Mineral Leasing Act (25 U.S.C. §§ 396a–396f (1970)). States cannot tax the production of oil and gas from such leases.

Mineral Leasing Act: Generally

Oil and gas leases of Indian lands entered into under the 1938 Mineral Leasing Act (25 U.S.C. §§ 396a–396f (1970)), are not subject to the taxation proviso contained in 25 U.S.C. § 398 (1970). The 1924 Act's (25 U.S.C. § 398 (1970)) taxation proviso applies to leases entered into under the 1891 Mineral Leasing Act (25 U.S.C. 397 (1970)).

Fort Peck tribal lands are not "bought and paid for" under 25 U.S.C. § 397 (1970).

Overruled Opinions:

1. 58 I.D. 535 (1943) (This opinion is *superseded* to the extent that it is *inconsistent* with M–36896).
2. M–36345, May 4, 1956, "State Production taxes on Tribal Royalties From Leases Other Than Oil and Gas."
3. M–36318, Oct. 13, 1955 "Oil and Gas Privilege and License Tax, Fort Peck Reservation, Under Laws of Montana."
4. Oct. 27, 1966, Opinion of Assistant Secretary on applicability of Montana tax to oil and gas leases of Fort Peck lands.
5. Dec. 2, 1966, Opinion of Deputy Assistant Secretary *affirming* October 27, 1966 opinion of Assistant Secretary.

M–36896 *November 7, 1977*

OPINION BY SOLICITOR KRULITZ

OFFICE OF THE SOLICITOR

To: ASSISTANT SECRETARY FOR INDIAN AFFAIRS

FROM: SOLICITOR

SUBJECT: THE TAX STATUS OF THE PRODUCTION OF OIL AND GAS FROM FORT PECK TRIBAL LANDS

You have requested our opinion on whether or not the State of Montana has authority to apply its production tax to oil and gas produced from mineral leasing of tribal lands of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. Production taxes have been levied by the State under the purported authority of the Act of May 29, 1924, 43 Stat. 244 (25 U.S.C. § 398 (1970)), and are being paid by the lessees prior to paying royalties to the Tribes. *See* Revised Codes of Montana, §§ 84–7006, 84–5401, 84–6205, 84–2202, 60–145. In 1966, the tax was determined applicable to oil and gas production from Fort Peck tribal lands by the Assistant Secretary and the Deputy Assistant Secretary, relying on legal advice from this office. See Attachments No. 1 and 2 hereto. After careful reconsideration, we have concluded that that earlier determination is erroneous as a matter of law. Specifically, we hold that production of oil and gas on Fort Peck tribal lands—or lands of other tribes—from leases made under the Indian Mineral Leasing Act, May 11, 1938 (52 Stat. 347; 25 U.S.C. §§ 396a–396f (1970)) are not taxable by the state.[1]

The Assistant Secretary's 1966 determination relied heavily on the Supreme Court's decision in *British-American Oil Co.* v. *Board of Equalization*, 299 U.S. 159 (1936). In *British-American*, a non-Indian mineral lessee on the Blackfeet Reservation sued to enjoin collection of state gross production and net proceeds taxes on its oil and gas revenues.[2] The Court held taxation of the non-Indian lessee was authorized by a 1924 statute (43 Stat. 244), 25 U.S.C. § 398 (1970).[3] This 1924 statute permits state taxation of the production of oil and gas and other minerals from lands leased under the earlier 1891 Indian mineral leasing statute, 25 U.S.C. § 397 (1970). Sec. 397 reads:

Where lands are occupied by Indians who have *bought and paid for* the same, and which lands are not needed for farming or agricultural purposes, and are not

[1] At the present time there are 82 active leases at Fort Peck, eight of which are producing oil, all of which were authorized under the 1938 Act. Prior to a lease being given, a sale is conducted under departmental regulations. A notice of advertisement of the sale is made which cites the 1938 Act and the regulations published thereunder (25 CFR Part 171) as the authority for the leasing of tribal lands. Leases are then awarded to the bidder who offers the highest "money bonus on a tract basis."

[2] The Tribe's interest was not argued before the Supreme Court.

[3] This statute provides:

"Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under sec. 397 of this title may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. (Italics added.)

The Court in *British-American* opined that the Blackfeet lease was authorized by sec. 397; hence, taxation was authorized by the 1924 statute. The Court relied upon "uniform administrative practice" and "judicial decision" construing the "bought and paid for" language in sec. 397 "as not confined to lands acquired by Indians through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights." 299 U.S. at 164.

We conclude that *British-American* is inapposite to production under the Fort Peck leases for a number of reasons. First, the question of whether sec. 397 authorized the lease was not the subject of any dispute between the parties. The State agued that the statute applied; otherwise, the 1924 Act authorizing taxation could not have been relied upon. The lessee agreed that the statute applied; otherwise since there would be no other applicable Indian mineral leasing authority, its underlying lease would have been void. *See* 25 U.S.C. § 177 (1970). The Court's statements that the statute authorized the lease thus arose in this context. Moreover, the lease in issue in *British-American* specifically "recites that it was given in accordance with § 3 of the Act of Feb. 28, 1891, * * * as amended by [the] Act of May 29, 1924 * * *." The relationship of the 1938 Act to sec. 398 was not (nor could it have been) an issue. The decision is not, then, authority for holding tribal royalties taxable, particularly when the lease is made under the 1938 Act, and not under the earlier 1891 statute.

It is understandable that, since it was for many years the only general mineral leasing authority covering tribal lands, the 1891 statute would have been broadly construed by the Court's dicta in 1936 and by the few administrative decisions of the Department preceding *British-American*.[4] However, in 1938, shortly after the decision, Congress enacted a new general and comprehensive Indian mineral leasing statute. 25 U.S.C. §§ 396a–396f (1970). The 1938 Act contains no explicit provision similar to that in the 1924

[4] The two earliest Departmental decisions are expressions by the Assistant Attorneys General dated Jan. 11, 1892, and Nov. 17, 1897. The 1892 letter states that by using the "bought and paid for" language:

"* * * Congress was legislating with reference to those Indians who have, *under treaty or otherwise*, become possessors or owners of certain specific tracts or bodies of lands, by purchase, or exchange or surrender of other property, in contradistinction to those Indians who are occupying reservations *created by executive order or legislative enactment*." * * * (Italics added.)

Strawberry Valley Cattle Co. v. *Chipman*, 13 Utah 454, 45 P. 348, 351 (1896).

Act authorizing the imposition of state taxes.

The failure to clearly state the relationships among the statutes creates an ambiguity with respect to whether the 1924 taxing authority was meant to be repealed by sec. 7 of the 1938 Act as inconsistent with the later Act. Since the 1938 Act made no provision for taxation, even though it was intended to be a comprehensive scheme for mineral leasing of tribal land, that Act could reasonably be construed, given the rules for interpretation of statutes passed for the benefit of Indians (discussed *infra*), as having repealed the earlier taxing proviso. However, I do not believe such a conclusion is necessary here. Even if the 1924 taxing authority was not repealed as to leases entered into pursuant to the 1891 Act, it is far from clear that the 1938 Act intended to carry forward and incorporate the taxing authority into the general leasing scheme provided therein, resulting in a situation where leases entered into pursuant to the later Act would be subject to the earlier taxing authority. In fact, the clear intent of the 1938 Act was to *replace* the earlier leasing statutes, not to complement or incorporate them. The 1938 statute, as noted, does not itself authorize state taxation, nor does it refer to the 1924 proviso. The failure of the 1938 Act to either clearly repeal or clearly adopt the earlier Act at most creates an ambiguity which necessarily calls into play the appropriate rules of statutory construction.

The 1897 decision (25 L.D. 408), involved the validity of a lease on the Uintah Reservation. It sets forth in some detail the history of that reservation, emphasizing the process by which tribes ceded other lands and agreed to move onto the reservation. *Id.* at 410–11. The opinion concludes that where tribal lands elsewhere are surrendered in return for the creation of a reservation, the reservation lands are "bought and paid for" within the meaning of the 1891 Act.

The general rules for the construction of Indian statutes, particularly those in which a tax question is present, were recently summarized by the Supreme Court in *Bryan* v. *Itasca County, Minnesota*, 426 U.S. 373–392 (1976):

> * * * [I]n construing this "admittedly ambiguous" statute, *Board of Com'rs* v. *Seber*, 318 U.S., at 713, we must be guided by that "eminently sound and vital canon," *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). See *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Antoine* v. *Washington*, 420 U.S. 194, 199–200 (1975). This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S., at 174; *Squire* v. *Capoeman*, 351 U.S. 1, 6–7 (1956); *Carpenter* v. *Shaw*, 280 U.S. 363, 366–367 (1930). "This is so because * * * Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." *Oklahoma Tax Comm'n.* v. *United States*, 319

U.S. 598, 613-614 (1943) (Murphy, J., dissenting).

In *Bryan*, the Supreme Court held that sec. 4(a) of Public Law 280 (codified at 28 U.S.C. § 1360 (1970)), because it is not a clear grant of power to the states to tax, did not terminate the traditional Indian immunity from state taxation. 426 U.S. at 393.[5]

If the 1938 Act incorporated the 1924 taxing proviso, it must have done so by implication,[6] for there is no express provision. Yet in *Bryan*, the Supreme Court declined to find a similar implied grant of taxing power in Public Law 280. Observing that Congress had enacted several termination statutes which were "cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation," the Court concluded that "if Congress in enacting Public Law 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so." 426 U.S. at 389-390. With respect to the 1938 leasing Act, the situation is exactly the same. Had Congress intended to include state taxing authority, it would have done so expressly. The fact that it had earlier done so, for leases issued under the 1891 Act, is clear evidence that it knew how to grant such authority to the states, had it so intended.

The 1938 Act was proposed by the Department. The Secretary's transmittal letter states that "* * * [o]ne of the purposes of the legislation now proposed, * * * is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes."[7] Prior to the 1938 Act, "the law governing leases on tribal land [was] in a patchwork

[5] In *Choate* v. *Trapp*, 224 U.S. 665 (1912), the Supreme Court considered whether a statutory exemption of allotted reservation lands from state taxation was repealed by implication by a second statute which removed certain restrictions on alienation imposed by the first statute. The state officials who were parties to the case relied upon the general principle that tax exemptions should be narrowly construed. After conceding the general applicability of that doctrine, the Court held that as to:

"* * * the Government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, * * *." 224 U.S. at 675.

Accord, McClanahan v. *Arizona State Tax Commission, supra.*

[6] An interpretation of the 1938 Act as incorporating the 1924 tax proviso would be especially repugnant in the case of those reservations and those minerals for which leasing authority was first created by the 1938 Act, and for which, therefore, no taxing authority previously existed, since as to these, a tax immunity would be terminated by implication. *See,* the transmittal letter of the Assistant Secretary of the Interior in H. Rep. 1872, 75th Cong., 1st Sess., 1938, describing the confused situation with respect to existing leasing authority and demonstrating that, in certain instances, no authority existed at all.

[7] Letter of June 17, 1937, from Acting Secretary Charles West to the Speaker of the House of Representatives, H. Rep. No. 1872, 75th Cong., 2d Sess., also quoted in F. S. Cohen, *Handbook of Federal Indian Law,* p. 328, n. 468 (G.P.O. 1940 Ed.).

state." [8] The 1938 legislation was intended as a "comprehensive law covering mineral leases on unallotted land. * * *" [9] The Act authorized leasing of all "unallotted lands within any Indian reservation * * * by authority of the tribal council or other authorized spokesmen for such Indians." 25 U.S.C. § 396a (1970). The comprehensive procedures in the Act provide for public auctions of oil and gas leases, the rejection of all bids and readvertisement if it is in the interests of the Indians (25 U.S.C. § 396b (1970)), and impose bonding requirements on lessees of tribal land (25 U.S.C. § 396c (1970)). The 1938 Act refers to the Indian Reorganization Act (48 Stat. 987) which permits Indian tribes organized and incorporated under secs. 16 and 17 of the IRA to lease lands for mining purposes in accordance with the provisions of any tribal constitution and charter. *See* 25 U.S.C. §§ 476, 477 (1970).

It is clear that states cannot tax trust property, reservation Indians, or Indian tribes unless Congress has consented; [10] and it is likewise well-established that statutes diminishing Indian tax exemptions are strictly construed.[11] Accordingly, we attach considerable significance to the fact that Congress did not provide in the 1938 Act that tribal royalties received under that statute were to be subject to state taxation. We conclude accordingly that royalties received from leases executed under authority of the 1938 statute are not subject to the proviso in 25 U.S.C. § 398 (1970). Only if a lease is entered into under the 1891 statute would the proviso consenting to taxation be applicable. The Bureau should administer its leases accordingly.

This interpretation of the 1891 Act, the 1924 amendment and the 1938 Act is consistent with present Congressional policy on Indians. Both the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit recently have stated that when interpreting Indian statutes you must take into consideration the present Congressional

[8] Cohen, *supra*, Ftn. 4 at p. 328.

The law prior to 1938 was described in the Secretary's transmittal letter proposing the legislation as follows:

"Under sec. 26 of the Act of June 30, 1919 (41 Stat. 31), as amended, leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of sec. 3 of the Act of Feb. 28, 1891 (26 Stat. 795), as amended May 29, 1924 (43 Stat. 244), leases for oil, gas and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Sec. 16 of the Indian Reorganization Act, approved June 18, 1934 (48 Stat. 984), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under sec. 17 of that act Indian tribes to which charters of incorporation issued are empowered to lease their lands for periods of not more than ten years. There is at present no law under which Executive order lands may be leased for mining, outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under secs. 16 and 17 of the Indian Reorganization Act. * * *"

[9] *Ibid.*

[10] *Bryan* v. *Itasca County, supra; Confederated Salish and Kootenai Tribes* v. *Moe*, 48 LEd2d 96 (1976); *McClanahan* v. *Arizona State Tax Commission, supra; Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973); *British-American Co.* v. *Board, supra*, at p. 16.

[11] See *Choate* v. *Trapp, supra*, at Ftn. 5.

policy on Indians. *Bryan*, *supra*, at p. 15, ftn 14; *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). That Congressional policy is one of "fostering Indian autonomy, reservation self-government and economic self-development." *Santa Rosa*, *supra*. Our reading of the 1938 Act is not only consistent with and an implementation of this policy, but is also consistent with Congress' Indian policy when the 1938 Act was enacted into law. *See* Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–478 (1970). As Felix Cohen stated in his *Handbook of Federal Indian Law*, *supra*, p. 126, the Indian Reorganization Act,

> * * * by affording statutory recognition of * * * [tribal] powers of local self-government and administrative assistance in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various state agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves. (Footnote omitted.)

Our conclusion may to some extent depart from earlier decisions of the office. Solicitor Harper held that the 1924 Act authorized New Mexico and Montana to levy various taxes on mineral royalties received by the Blackfeet and Ute Mountain Tribes, relying almost entirely on *British-American*, *supra*. 58 I.D. 535 (1943). Although that opinion postdates the 1938 statute, the leases in question had been "executed pursuant to * * * the Act of Feb. 28, 1891." 58 I.D. at 536. Under the circumstances, Solicitor Harper had no occasion to consider the impact of the 1938 Act on his conclusion. While we do not believe our decision directly conflicts with Solicitor Harper's—since on the facts before him, *British-American*, clearly controls—this opinion would supersede that one as to leases executed under the 1938 Act. In 1956, Associate Solicitor Flannery issued an opinion which held, among other things, that the 1938 Act did not affect the taxing power of the State of New Mexico under the 1924 Act. Memorandum, May 4, 1956, M–36345, entitled "State Production Taxes on Tribal Royalties From Leases Other Than Oil and Gas." One year earlier, Associate Solicitor Flannery concluded that the Fort Peck Tribes' royalties may be taxed under the 1924 Act. Memorandum, Oct. 13, 1955, M–36310, entitled "Oil and Gas Privilege and License Tax, Fort Peck Reservation, Under Laws of Montana." These decisions by Associate Solicitor Flannery are hereby reversed.

While our reading of the 1938 Act disposes of the question, we also conclude that the 1891 statute—25 U.S.C. § 397 (1970)—does not in any event cover tribal lands at Fort Peck. Those lands are not, in our view, "bought and paid for" within the meaning of that section. The

dicta in *British-American* did not limit the interpretation of the "bought and paid for" clause in the 1891 statute "to lands acquired by Indians through the payment of a consideration in money" but also found it to include "lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights." [12] Whether or not the Blackfeet lands were "bought and paid for" in *British-American* was *dictum* since the parties had stipulated to the applicability of the 1924 Act. The petitioner did not "question that the reservation as existing and occupied by the tribe in recent years comes within the terms of the proviso in the Act of 1891 as lands which the Indians have bought and paid for." The history of the Blackfeet Reservation shows that the Tribe's original territory, described in an 1855 treaty,[13] was set apart for them as a reservation by subsequent executive orders and Acts of Congress.[14] On May 1, 1888 (25 Stat. 113), Congress ratified agreements between the United States and the Assiniboine, Sioux, Gros Ventre and Blackfeet Tribes in which the four tribes ceded the 1874 Act reservation to the United States except for three smaller reservations retained by the Tribes. The three reservations are Blackfeet, Fort Peck and Fort Belknap. Each of the Tribes, by various agreements as ratified by the 1888 Act, disclaimed any interest in the reservations set aside for other tribes (*e.g.*, the Blackfeet Tribe disclaimed any interest in the Fort Peck and Fort Belknap Reservations, which between 1874 and 1888 had been the common property of all four tribes). By another agreement ratified on June 10, 1896 (29 Stat. 321, 353), part of the separate Blackfeet Reservation was ceded to the United States, and the remainder was set apart as the Tribe's future home. The present Blackfeet Reservation was created as a result of the 1896 agreement, in which the Tribe ceded to the United States part of the separate reservation created for it in 1888, while retaining the remaining land as its reservation. The Court focused on this transaction in *British-American.*

There are a number of distinctions between Blackfeet and Fort

[12] The only other judicial decision construing the statute holds that the statute is satisfied "either by the payment of money, or exchange or surrender of the possession of other property." *Strawberry Valley Cattle Co.* v. *Chipman, supra.* In *Strawberry,* the Supreme Court of Utah held that the lands of the Uintah and White River Utes "were bought and paid for" (they surrendered the possession of other property). The Cherokee Indians are an example of another tribe which "bought and paid for" lands when they surrendered their lands east of the Mississippi to settle on lands west of Arkansas.

[13] The Blackfeet Reservation was established pursuant to the treaty of Oct. 17, 1855, 11 Stat. 657. This treaty agrees to a particular territory as Blackfeet country (Art. 4), permits other tribes to have common hunting rights in that territory (Art. 3), agrees to passage of United States settlers through the territory, and to the establishment of roads, telegraph lines and military posts (Arts. 7 and 8).

[14] "Under executive orders of 1873 and 1874, an Act of Congress of Apr. 15, 1874, c. 96, 18 Stat. 28, and executive orders of 1875 and 1880, the Blackfeet and certain of the other Indians associated with them came to occupy a large part of this original territory as a reservation specially set apart for them." *British-American,* at p. 162.

Peck. The 1855 Treaty recognized Blackfeet title to aboriginal lands. Under later agreements and statutes, like the one in 1896, the Blackfeet retained some of their aboriginal lands but ceded other parts of these lands to the United States. By contrast, the Fort Peck Reservation was created by a grant of lands to the Tribes from the United States. It was initially set aside by executive order,[15] confirmed by statute,[16] creating a single reservation of about 20 million acres for the "Gros Ventre, Piegan, Blood, Blackfeet, River Crow and other Indians." [17] The present reservation was separated from two other reservations—Blackfeet and Fort Belknap—by the Act of May 1, 1888, *supra* (which followed agreements with the Tribes that had interests in the larger reservation). But title had vested in the Tribes by virtue of eariler grants and not as a process of their surrender and cession of other lands. That is, as applied to the Fort Peck Tribes, their reservation was not created out of lands reserved for them in return for their cession or surrender of other lands; the Assiniboine and Sioux Tribes did not buy these lands, they already owned them.[18]

Our review of prior interpretations of this "bought and paid for" provision has convinced us that its construction has not been altogether consistent. The requirement of an exchange, surrender and cession in *British-American* is not invariantly followed. For example, an 1892 letter by the Assistant Attorney General shortly after the 1891 Act [19] distinguishes treaty reservations from those established by "executive order or legislative enactment." Similarly, the Acting Secretary's 1937 letter transmitting the comprehensive mineral leasing proposal that became the 1938 Act states that the 1891 statute pertains only to "treaty reservations." [20] Of course, if "bought and paid for" is so read, Fort Peck is also excluded, for it is not a treaty reservation.

From our research, however, we have been unable to discover a pre-

[15] Executive Order of July 5, 1873, 1 Kapp. 855.

[16] Act of Apr. 15, 1874, 18 Stat. 28.

[17] "Other Indians" included the Assiniboine and Sioux Tribes. *United States* v. *Assiniboine Tribes of Indians*, 192 Ct. Cl. 679, 688–90, 428 F.2d 1324, 1328–30 (1970).

[18] Notably, Congress in 1922 enacted a special authority for leasing unallotted surplus lands at Fort Peck. 25 U.S.C. § 400 (1970).

[19] *Supra*, Ftn. 3.

[20] The 1891 Act has historically been held inapplicable to executive order Indian reservations by the Department. 25 L.D. 408 (1897); 49 L.D. 139, 142 (1922). The reason for this, in part, was doubt as to whether these lands were public lands (in which case the United States would be entitled to lease revenues) or Indian trust lands (in which case the tribes would be entitled to the revenues). In 1919, Congress authorized some mineral leasing excluding oil and gas on executive order reservations in certain states, 25 U.S.C. § 399 (1970), and enacted the Mineral Leasing Act for public lands the following year. Attorney General Harlan Fiske Stone determined that executive order Indian reservation lands could not be leased as public lands, 34 Op. A.G. 171 (1924), and Congress by a 1927 Act provided for oil and gas leasing on all executive order reservations. 25 U.S.C. § 398a (1970). It was not until the 1938 Act that mineral leases for other than oil and gas could be made on executive order reservations outside the states covered by the 1919 Act.

cise or consistent reading of "bought and paid for." However, the Supreme Court in *British-American*, *supra*, might have reasonably construed that clause to mean those lands actually purchased by Indians in a commercial setting. *See* Footnote 12, *supra*. The language is not a recognized term of art in Indian law. It was inserted into the Act in 1891 by the Conference Committee.[21] Prior to the proviso's insertion, the bill would have covered all "Indian lands not needed for allotment, and not suitable for agriculture or farming, and [which would] not sell to the advantage of the Indians." Accordingly, some constriction must have been intended, but the Conference Report provides no edification of the Committee's intent. Nor is it apparent why Congress wished to distinguish for leasing purposes lands that had been "bought and paid for" from other unallotted tribal lands. Since virtually all present Indian mineral leasing is under the 1938 Act, it is unnecessary for this office to reconcile these somewhat conflicting readings of the "bought and paid for" language, or to determine on a reservation-by-reservation basis whether particular lands were "bought and paid for."

It is, accordingly, my conclusion that the State of Montana is without authority to apply its production tax to oil and gas produced from mineral leasing of tribal lands on the Fort Peck Reservation.

LEO KRULITZ.

[21] 21 Cong. Globe 3118 (1891).

Oct. 27, 1966

Dear Mr. Sonosky:

On Mar. 16, 1965, you filed an appeal as attorney for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana from a decision by the Deputy Commissioner of Indian Affairs, dated Feb. 25, 1965, affirming the applicability of the Montana tax on oil and gas production to oil and gas produced from leased Fort Peck tribal lands and authorizing tribal oil and gas lessees to pay directly to the State of Montana future taxes due on tribal royalty interests.

Your appeal is based on two assertions: first, that the Congress did not authorize State taxation of the tribal lands in question, and second, that the Montana tax violates both the Enabling Act under which Montana was admitted into the Union and the Montana Constitution, both of which provide that, "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *."

More specifically, you first contend that Congress has not authorized State taxation here since the Act of May 29, 1924 (43 Stat. 244; 25 U.S.C. § 398 [1970]), authorizes taxes only on lands leasable under sec. 3 of the Act of Feb. 28, 1891 (26 Stat. 795; 25 U.S.C. § 397 [1970]). "Lands leasable under the 1891 Act are lands occupied by Indians who have bought and paid for the same." You claim that the lands of Fort Peck Reservation are not within the scope of the 1891 Act since they are not "bought and paid for."

The Fort Peck Reservation was created by an agreement ratified by Congress May 1, 1888 (25 Stat. 113). This agreement created the Fort Peck, Fort Belknap, and Blackfeet Reservations in return for which the Indians ceded to the United States much of the land within an earlier reservation. The applicability of the Act of May 29, 1924 (43 Stat. 224; 25 U.S.C. § 398 [1970]), to the Blackfeet Reservation was considered in *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U.S. 159

November 7, 1977

(1936). In that case, the Court recognized that the Blackfeet Reservation fell within the term of lands "bought and paid for" by the Indians, stating at p. 164:

"* * * by uniform administrative practice and by judicial decision this part of the proviso has been construed as not confined to lands acquired through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights, and citing 25 L.D. 408 and *Strawberry Valley Cattle Co.* v. *Chipman*, 13 Utah 454, 45 Pac. 348 (1896)."

The Fort Peck tribal oil and gas leases were approved under the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. § 396 a–f) [1970]). This act is silent concerning taxation of the royalty interest but there is nothing inconsistent with the broad measure of the 1924 Act permitting State taxation. Sec. 7 of the 1938 Act repeals only those acts inconsistent with the 1938 Act. In an unpublished Opinion of the Solicitor, M–36310 (Oct. 13, 1955), it was decided that the Montana tax was assessable against royalties accruing from oil production on Fort Peck Reservation tribal land. After thorough consideration in the Solicitor's Office, nothing in this appeal has been found which indicates error in the 1955 opinion.

Finally, we come to the contention that Montana's tax violates the Enabling Act of Feb. 22, 1889 (25 Stat. 676), and Ordinance No. 1, Constitution of the State of Montana, both of which provide that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." The Montana Supreme Court, in *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 101 Mont. 293, 54 P.2d 129, *affirmed*, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1937), considered this issue, which was raised by the Blackfeet Tribe, and held that neither the Enabling Act nor the Montana Constitution prevented the imposition of the royalty interest tax. As recently as 1961 the Supreme Court had occasion in *Kake Village* v. *Egan*, 369 U.S. 60 [1962], to examine similar disclaimer language in Alaska's Enabling Act. There the Court quite clearly indicated that such disclaimers by the States are of proprietary rather than of governmental interests. We, therefore, cannot agree that Montana is prohibited either by its Enabling Act or constitution from taxing the tribal royalty interest.

For the reasons stated, we concur in the decision of the Deputy Commissioner and, accordingly, dismiss the Tribes' appeal.

Sincerely yours,

HARRY R. ANDERSON,
Acting Secretary of the Interior.

Dec. 2, 1966

Dear Mr. Sonosky:

Your letter of Nov. 4, 1966 to the Secretary of the Interior petitions for reconsideration of the decision of Oct. 27, 1966, rendered by the Assistant Secretary which affirmed a decision dated Feb. 25, 1965 of the Deputy Commissioner of Indian Affairs, which held applicable to oil and gas produced from the tribal lands on the Fort Peck Indian Reservation the Montana production tax and authorized lessees to pay such taxes directly to the State. You assert, as you did in your original appeal, that the Fort Peck Reservation is not land "occupied by Indians who bought and paid for the same" within the meaning of the Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 397 and

that, therefore, oil and gas produced from these lands is not subject to state taxation under the Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398 [1970].

The Fort Peck Reservation was established by an agreement approved by the Act of May 1, 1888 (25 Stat. 113, 1 Kappler 261). That agreement created separate Fort Peck, Fort Belknap, and Blackfeet Reservation from a much larger area which had been reserved in 1874 for certain tribes in common. The Act of May 1, 1888, created three separate and distinct reservations and set them apart respectively for 1) a band of the Assiniboine Tribe and the Sioux Tribe (Fort Peck), 2) another band of the Assiniboine Tribe and the Gros Ventre Tribe (Fort Belknap) and, 3) the Blackfeet Nation (Blackfeet). While it is true that the tribes did receive monetary considerations for the cessions and reliquishments which they made under this agreement, we are convinced that the agreement cannot be construed as meaning that these considerations were exclusive. In *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159 (1936), the Court characterized the agreement as entailing "various considerations moving from the Blackfeet to the United States and the reverse, and from the Blackfeet to their associates and the reverse." *Op. cit.* p. 162. In this respect, the situation of the Fort Peck Indians is in no wise different from that of the Blackfeet. We are convinced that the setting apart and the confirmation of separate reservations for the exclusive use of particular tribes must be regarded as partial consideration for what each surrendered.

But even if it could be said that the reservations established by the agreement and Act of 1888 were in no part *quid pro quos* for what the Indians gave-up, still it is probable that the lands of their respective reservations would be considered "bought and paid for" within the meaning of the Act of 1891. In 10 Op. A.A.G. 122, cited in 25 L.D. 408, 412 [1897], the Assistant Attorney General observes:

"It has been repeatedly ruled that Indians who are in possession of lands that have been given to them by the United States, for permanent occupancy, where Congress has recognized the right and title of the Indians to such lands, hold said lands as purchasers having paid for the same, in the sense in which the words 'have paid for the same' are used in the Act of 1891."

In this view, the words "bought and paid for" are merely intended to distinguish lands in which Indians have a compensable property right under the Constitution from those, such as unconfirmed executive order reservations, in which they do not. Cf. *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1948); *Healing* v. *Jones*, 174 F. Supp. 211, 216; 210 F. Supp. 125, 138 (1962)

Your next contention is that the case of *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159 (1936), does not support the holding of the Assistant Secretary because *British-American* conceded that the Blackfeet Reservation had been "bought and paid for" as, you assert, it was required to do to sustain the validity of its lease.

It appears from the opinion that British-American was not relying upon the Act of 1891 as authority for issuance of the lease under which it claimed but, on the contrary, was contending that its lease should be deemed to have been granted under special acts relating to the Blackfeet Tribe. In any event, the Court states that the reason for the concession was doubtless that the petitioner recognized that by uniform administrative practice and by judicial decision the "bought and paid for" provision of the 1891 Act had been construed as not confined to lands acquired by Indians by the payment of monetary consideration, but equally to lands reserved for Indians in return for a cession or surrender by them of possessions or rights. We think it clear that the Court gave explicit ap-

proval to the application of the "bought and paid for" provision of the 1891 Act to the Blackfeet Indian Reservation which, as noted, was established under the 1888 Act in the same manner as the Fort Peck Reservation.

Finally, you contend that the question whether the State tax is compatible with the State constitution was not addressed in the *British-American* case. You submit that the Blackfeet Tribe was not involved in that litigation and that the issue could not have been authoritatively disposed in its absence. While it does not appear that the Tribe participated in case in the Supreme Court of the United States, there can be no doubt that it participated below. The State Supreme Court's opinion, 54 P. 2d 129 [1936], states that the Blackfeet Tribe filed a complaint in intervention (*Ibid.* at p. 129), and contains the following:

"It is urged most strenuously by counsel on behalf of the tribe that the taxing of royalties, if permitted to stand, is in violation of the treaties and agreements between the Indians and the United States, and also in violation of our State Constitution." (*Ibid.* at p. 133.)

It is obvious from a reading of the opinion that the issue of State power was raised in the case by the Blackfeet Tribe and was not developed, as suggested by your letter, solely as an issued between the State and British-American.

Your arguments have not persuaded us that the conclusion reached in the decision of Oct. 27, 1966—that the land in question was "bought and paid for" within the meaning of the Act of Feb. 28, 1891 (26 Stat. 795, 25 U.S.C. § 397 [1970])—is erroneous. The petition for reconsideration is hereby denied.

Sincerely yours,

ROBERT E. VAUGHAN,
Deputy Assistant Secretary
of the Interior.

APPEAL OF CSP, INC.

IBCA-1137-12-76

Decided *November 10, 1977*

Contract No. 14-08-0001-15808, Geological Survey.

Appeal denied.

1. Contracts: Disputes and Remedies: Burden of Proof—Evidence: Burden of Proof—Rules of Practice: Evidence

The Government has the burden of proof that the contractor failed to deliver the goods. The contractor has the burden of proof that its failure was excusable. Where the only evidence of excusability was a letter from the contractor saying that it was delayed by delays in procurement of components and unexpectedly slower rates of system checkout and software debugging, the contractor has not carried its burden of proof of excusability and the appeal is denied.

APPEARANCES: Mr. Samuel Ochlis, Executive Vice President, CSP, Inc., Burlington, Massachusetts, for the appellant; Mr. John S. McMunn, Department Counsel, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE STEELE

INTERIOR BOARD OF CONTRACT APPEALS

1. *Decision.* The Appeal is Denied.

2. *Detailed findings of fact and conclusions of law.*

(a) On Apr. 9, 1976, the U.S. Geological Survey, hereafter referred to as "the Government," and

CSP, Inc. entered into a firm fixed price negotiated contract for $40,406. CSP, Inc. (hereafter referred to as CSP, appellant, or the contractor) agreed to deliver seven pieces of equipment which would be made up as a single piece of equipment called a "high speed floating point array processor" (hereafter called "the processor"). This equipment is more fully described in the Government's RFP 249W of Feb. 11, 1976, and CSP's proposal dated Mar. 5, 1976. Delivery was to be made within 120 days after date of "award" (*i.e.*, approximately Aug. 9, 1976).

(b) The processor was to be incorporated into the Marine Integrated Data and Acquisition and Processing System on board the research vessel *S. P. Lee* (Tab 2, contract file Contract 14–08–0001–15808).

(c) On June 8, 1976, in response to a written delivery status report request CSP indicated that delivery would be on time (Tab 28).

(d) On July 9, 1976, the Government advised the contractor by letter that time was of the essence.

(e) On July 19, 1976, the Government was advised that the contractor had 30 systems to deliver ahead of the one required by this contract and that the contractor would not meet the required delivery schedule.

(f) On Aug. 9, 1976, the Government sent a 10-day show cause letter to appellant.

(g) On Aug. 16, 1976, CSP replied that it had experienced delays in procurement and experienced slower rates of system checkout and software debugging than it expected, and it anticipated shipment of the processor the week of Oct. 11, 1976.

(h) The Government issued a default termination letter on Aug. 23, 1976, for failure to deliver on time (and it returned CSP's software package).

(i) On Nov. 22, 1976, the Government notified CSP that it was assessing it $4,666 in excess costs.

(j) On Dec. 8, 1976, CSP appealed.

(k) The reprocurement order was issued Aug. 24, 1976.

(l) Reprocured equipment was delivered on Sept. 30, 1976, and accepted Oct. 5, 1976.

(m) The reprocurement contractor was Floating Point Systems, Inc. (hereafter called "Floating Point") which had been the next lowest offeror on this solicitation at $56,539.25 (abstract of "bids").

(n) The Government has paid Floating Point Systems, Inc. $45,072 (Exhibit A to Answer).

3. *Discussion of the law.*

(a) The Government has the burden of proof to establish: (1) failure of the contractor to meet the delivery schedule, (2) reasonably prompt placement of repurchase contract, (3) similarity of equipment, and (4) payments actually made under reprocurement contract.

(b) The appellant has the burden of proof to establish: (1) justifiable excuse for failure to deliver on time, and (2) failure of the Gov-

ernment to reprocure at a reasonable price.

4. *Ultimate findings and conclusions.*

(a) The Government has sustained its burden of proof on the elements listed in par. 3(a) above.

(b) We conclude from a comparison of Floating Point's proposal "Quote No. 1043/WRW, Mar. 11, 1976" with the reprocurement Purchase Order 62676, that the reprocured equipment was similar (*see*, technical evaluation of Long to Beasley dated Mar. 23, 1976).

(c) The appellant has failed to sustain its burden of proof on the elements listed in par. 3(b) above.

(d) The appellant is obligated to the Government in the amount of $4,666 ($45,072 minus $40,406).

(e) The appeal is denied.

GEORGE S. STEELE,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Administrative Judge.
Chairman.

MID-CONTINENT COAL AND COKE COMPANY

8 IBMA 204

Decided *November 10, 1977*

Appeal by the Mining Enforcement and Safety Administration to review an initial decision entered June 7, 1977, by Administrative Law Judge Michael L. Morehouse (Docket Nos. DENV 76X-140-P and DENV 76-89-P), vacating two sec. 104(b) notices of violation in a civil penalty proceeding brought pursuant to sec. 109(a) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 819 (1970)).

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Evidence: Prima Facie Case

The mere showing by MESA that a methane monitor was not set to indicate a true reading does not in itself prove a prima facie violation under 30 CFR 75.313 in that the terms "operative" and "properly maintained" refer to the functional properties of the monitor and not its calibration which is encompassed within the term "frequently tested."

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Methane Accumulations

Neither the Act nor the regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation. *Mid-Continent Coal and Coke Company*, 1 IBMA 250, 79 I.D. 736 (1972).

3. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Sufficiency

It is improper to cite a general regulation governing ventilation plans where the alleged violation is based solely on an excessive accumulation of methane gas.

APPEARANCES: Thomas A. Mascolino, Esq., Assistant Solicitor, and Harold J. Baer, Jr., Esq., Trial Attorney; for appellant, Mining Enforcement and Safety Administration; Edward Mulhall, Jr., Esq., for appellee, Mid-Continent Coal and Coke Company.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On Dec. 13, 1976, a hearing was held at Glenwood Springs, Colorado, at which time the Mining Enforcement and Safety Administration (MESA) sought the assessment of civil penalties against respondent, Mid-Continent Coal and Coke Company for 11 violations of health or safety standards at its Dutch Creek No. 1 and 2 Mines at Redstone, Pitkin County, Colorado. Four original cases were initiated under 43 CFR 4.540 and were consolidated for hearing and decision.

After an analysis of the six statutory criteria of section 109(a) the Administrative Law Judge in his decision of June 7, 1977, ordered the respondent to pay a combined penalty of $495.40 for 7 of the 11 alleged violations. Of the four remaining violations, two were dismissed pursuant to motion by MESA, and two, Notice No. 2 LV, issued on Aug. 15, 1975, in Docket No. DENV 76X140–P; and Notice No. 2 FES, issued on July 21, 1975, in Docket No. DENV 76–89–P were vacated by the Judge's decision. On June 29, 1977, MESA filed with the Board its Notice of Appeal, and presently urges us to reverse the Judge's decision with respect to these latter two vacated notices.

The first of the vacated notices under review is Notice No. 2 LV in Docket No. DENV 76X140–P, which alleged the following condition in violation of 30 CFR 75.313 (sec. 303(l) of the Act)[1]: "[T]he methane monitor on a 12 CM continuous mining machine, in slopes, was not set to indicate a true reading of the mine atmosphere in the face area."

The record discloses that after repairs were completed on the continuous miner's trailing cable at a point 300 feet from the face the machine was energized which in turn energized the methane monitor. Inspector Louis Villegos, a duly authorized representative of MESA examined the machine and found that the monitor was not indicating a true methane reading. He permitted the machine to be trammed toward the face so the methane monitor could warm up during the tramming period, and upon a reexamination of the monitor at the face he discovered that it was still not indicating a true reading, whereupon he issued the notice in question. The inspector testified that the monitor indicated a low reading, but since he lost his notes he could not remember what the reading was (Tr. 12).

[1] 30 CFR 75.313 provides in pertinent part: "When installed on any such equipment, such monitor shall be kept operative and properly maintained and frequently tested as prescribed by the Secretary. * * * to give a warning automatically when the concentration of methane * * * which shall not be more than 1.0 volume per centum of methane. * * * [and] to deenergize automatically equipment * * * when the concentration of methane reaches * * * 2.0 volume per centum of methane."

The respondent's mine manager testified that immediately after the monitor was energized the mine mechanic tested it and reported a high reading of 0.5 percent methane, in a 0.0 percent methane atmosphere, whereupon the machine was trammed toward the face and the monitor properly adjusted.

The Administrative Law Judge concluded that the adjustment made by the respondent constituted a normal procedure within the mine, and the only evidence relating to the methane readings was the 0.5 reading made by respondent's mechanic. The Judge determined that the monitor was set to indicate a true reading of the mine atmosphere prior to the start of actual mining and he therefore vacated the notice.

On appeal, MESA contends that to accept the Judge's interpretation of 30 CFR 75.313 is to conclude that all the regulations demand is that a regular maintenance schedule as required by 30 CFR 75.313–1 be followed, and the effect of such rationale would be to render 30 CFR 75.313 meaningless, thus making the statutory mandate of sec. 303(1) of the Act subordinate to the schedule and record-keeping requirements of 30 CFR 75.313–1.

The second notice under review, Notice No. 2 FES, in Docket No. DENV 76–89–P, cited a violation of 30 CFR 75.301 (sec. 303(b) of the Act)[2] and alleged that "methane in excess of 5.0% was detected in the left side of the face area of No. 4 entry of the 2 North section. Mining was in progress at this place."

Prior to issuing the notice of violation, the inspector observed miners in the process of loading a shuttle car in the face area of the No. 4 entry of the 2 North section of respondent's mine. After the loading was completed the inspector took a methane reading on the high side of the face, which revealed the presence of methane in excess of 5 percent. He then issued the notice for what he felt was an insufficient current of air to dilute the accumulation of methane at the face.

The Administrative Law Judge concluded that the ventilating current of air was sufficient to dilute and render harmless the excessive methane accumulation at the face, and noted that the inspector failed to require an increase in the quantity and velocity of air as allowed by 30 CFR 75.301. Additionally, he deemed it significant that the respondent was cited under a general regulation governing ventilation plans, rather than one of the specific regulations dealing with methane accumulation, and thereby vacated the notice.

[2] 30 CFR 75.301 provides in pertinent part: "All active workings shall be ventilated by a current of air * * * and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious and harmful gases, and dust, and smoke and explosive fumes. * * * The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners."

In its brief, MESA argues that the mere fact that a 5 percent accumulation was present demonstrates the error of the Judge's ruling that the ventilating current was sufficient to dilute and render harmless the methane liberated during the regular course of mining. It submits that it is only necessary to show a harmful accumulation of noxious or poisonous gases, and not a violation of the ventilation plan in order to sustain a violation of 30 CFR 75.301 or sec. 303(b) of the Act.

Issue on Appeal

Whether the two notices of violation in Docket Nos. DENV 76X 140–P and DENV 76–89–P were properly vacated.

Discussion

Notice No. 2 LV, Docket No. DENV 76X140–P

Considering the Judge's decision, the transcript of the hearing, and the briefs of the parties, the Board is of the opinion that MESA's argument is nonpersuasive and therefore cannot prevail. The Administrative Law Judge found that pursuant to normal procedure in the mine the methane monitor was adjusted periodically and was properly calibrated prior to the start of actual mining. In light of these undisputed findings of fact we reach the same conclusion as did the Judge.

In a proceeding for the assessment of civil penalties, it is incumbent upon MESA to bear the burden of presenting such evidence as is necessary to establish the fact of violation, which in law will suffice for proof until contradicated or overcome by evidence presented by the operator. In the instant case MESA has failed to meet this burden and prove a prima facie violation of 30 CFR 75.313 by showing that the methane monitor was inoperative or not "properly maintained."

[1] We are not prone to engage in a play on words, but contrary to MESA's interpretation of 30 CFR 75.313 we conclude that the terms "operative" and "properly maintained" were meant to refer to the functional properties of the monitor and not its calibration, which we interpret as being encompassed in the term "frequently tested." The frequency of testing issue was not raised by MESA and therefore is not here considered.

Accordingly, the Judge's decision vacating the notice of violation in this docket is affirmed.

Notice No. 2 FES, Docket No. DENV 76–89–P

With respect to the issue of whether the Administrative Law Judge erred in dismissing the notice of violation in Docket No. DENV 76–89–P, we conclude that he did not. Consistent with our decision is the position of the respondent who argues that the notice under review should be dismissed on two theories. First, it submits that methane accumulation is not per se a violation of the Act, and second, the notice was improperly issued under

30 CFR 75.301 and therefore cannot be sustained.

[2] As to the respondent's first argument, we find that the instant case is controlled by the Board's earlier decision in *Mid-Continent Coal and Coke Company*, 1 IBMA 250, 79 I.D. 736 (1972) in which we stated: "Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation."

We perceive no necessity to alter the application of the legal principle of our earlier decision based on the facts of the instant case. We so hold despite MESA's contrary contention that the notice under review cited a potentially explosive accumulation of 5 percent methane, and is therefore not "nearly identical" to the earlier decision in which only a 1.2 percent methane concentration was found. Such an argument is viewed as an erroneous attempt to circumvent the Board's earlier rationale. By employing the phrase "in excess of 1.0 volume per centum" the Board's decision encompassed a 5 percent accumulation as not a per se violation.[3]

The Board is of the opinion that it would be patently inconsistent administration to hold that an excessive methane accumulation constitutes a violation under 30 CFR 75.301 when the provisions of 30 CFR 75.308 provide for specific actions to be taken when such an excessive accumulation is discovered. As we stated in our earlier *Mid-Continent* decision it is the failure to act upon becoming aware of the presence of an excessive methane accumulation that constitutes the violation, and not the excess as such.

The regulations contemplate that even with an approved ventilation plan which is purportedly sufficient to "dilute and render harmless explosive, noxious, and harmful gases" excessive accumulations of gas may still be detected from time to time in which event changes or adjustments are to be made. Also, presumably when the changes become so frequent as to become the rule rather than the exception, a new plan must be adopted and more air coursed through the area of the mine affected.

[3] Clearly the respondent cannot be properly cited for excessive methane accumulation under a section designed primarily for the establishment of a ventilation plan when such was already in existence at the mine, and as stated by MESA in its brief the notice was issued *solely* because of a 5 percent methane accumulation at the face.[4] It is also deemed significant that in this instance MESA failed to exercise

[3] Although we so conclude, we are in no sense condoning the presence of such an explosive accumulation. We readily recognize the inherent dangers associated with the presence of 5.0 percent methane, which is sufficient to justify the issuance of a withdrawal order under sec. 104(a) as constituting an "imminent danger" (see *Eastern Associated Coal Corp.*, 3 IBMA 60, 81 I.D. 153, 1973–1974 OSHD par. 17,550 (1974); and *Pittsburgh Coal Co.*, 2 IBMA 277, 80 I.D. 656, 1973–1974 OSHD par. 16,776 (1973)). Contrary to MESA's contention, our decision would not deprive it of enforcement responsibility under the Act, in that it is free to cite the operator under section 104(a) or other specific regulations relating to methane.

[4] Appellant's Brief, p. 3.

any of its other enforcement powers provided by the Act and the regulations.[5]

We have consistently held that we do not presume to dictate to MESA how to enforce the provisions of the Act. Our function is to determine only the correctness of its past enforcement actions. In the instant case for MESA to cite the respondent under an inappropriate standard warrants a dismissal of the notice.

Therefore, the decision of the Administrative Law Judge dismissing the notice of violation in this docket is affirmed.

In sum, the Board concludes that the Judge gave full and fair consideration to all relevant testimony and evidence and that the findings, conclusions and resulting order vacating the notices at issue herein are supported by the record.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

[5] These regulations include 30 CFR 75.307 (methane examinations); 30 CFR 75.307-1 (examinations at the face); 30 CFR 75.308 (accumulations at the face); and 30 CFR 75.308-2 (tests for methane).

APPEAL OF CHESTON COMPANY*

IBCA-1093-1-76

Decided *November 19, 1976*

Contract No. 14-06-D-7029, Solicitation No. DS-6822, Governors for Hydraulic Turbines, Grand Coulee Dam, Third Powerplant, Columbia Basin Project, Washington, Bureau of Reclamation.

DISMISSED.

1. Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Suspension of Work—Rules of Practice: Appeals: Dismissal

A contractor's claim for additional costs attributed to the Government's delay in requesting contemplated installation services under a contract calling for the furnishing of governors for hydraulic turbines is dismissed for want of jurisdiction where the Board finds that the claim asserted is not redressable under the Changes clause of Standard Form 32 (Supply Contract) or under the special Suspension of Deliveries (or Services) clause which reserves to the Government the right to suspend services and preserves the contractor's right to make claim therefor but fails to provide that any costs attributable to such suspension shall be recoverable by way of an adjustment to the contract price.

APPEARANCES: Mr. Richard M. Hill, President, Cheston Company, Rancocas, New Jersey, for the appellant; Mr. John P. Lange, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The principal question raised by this appeal is whether the contrac-

*Not in Chronological Order.

tor's claim for costs attributed to the Government's delay in ordering installation services contemplated by the contract represents a claim arising under the contract over which the Board has jurisdiction. For the reasons hereinafter stated, we conclude that the claim presented is not subject to our jurisdiction.

Findings of Fact

The instant contract was awarded to the appellant's predecessor in interest [1] in the amount of $537,728 on July 23, 1970. The contract called for the furnishing of three electro hydraulic-type governors for regulating the speed of three hydraulic turbines for the Third Powerplant, at the Grand Coulee Dam in Washington. According to the terms of the contract the governors for units 19, 20, and 21 were initially scheduled to be shipped on or before Jan. 12 and July 11, 1973, and Jan. 7, 1974, respectively. Time extensions for excusable delays resulted in the time for shipment of governors for units 19, 20, and 21 being extended to May 25 and August 16, 1973, and January 13, 1974, respectively (Exh. 3).[2]

The contract authorized the Government to require the contractor to furnish an erecting engineer to supervise the installation of the governors in question. Based upon the solicitation showing that the services of an erecting engineer would be required for 100 calendar days, the contractor submitted a bid price for supplying such services of $100 per calendar day. In addition to the General Provisions contained in Standard Form 32 (June 1964 Edition), the Contract (Exh. 1) included a Special Condition reading in pertinent part as follows:

A–6 Suspension of Deliveries (or Services)—The Government may at any time suspend, in whole or in part, delivery of materials or performance of service to be supplied by the contractor hereunder but such right of suspension shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension * * *.

By letter dated Apr. 10, 1975 (Exh. 5), the contracting officer notified the contractor that the services of an erection engineer would be required at Coulee Dam, Washington, beginning May 1, 1975, to supervise the installation of the turbine governors and that payment for such services would be made at the rates indicated in the bidding schedule of the contract. In its response of Apr. 16, 1975 (Exh. 6), the contractor advised that an erection engineer would report to Coulee Dam on the date specified after which it stated:

We respectfully invite your attention to the contrast in rates for Erecting Enginers between that of the subject contract, viz., $100 per day, versus Bureau of Reclamation Contract DS 6999 which

[1] Baldwin-Lima-Hamilton Corporation. Throughout the opinion appellant's predecessor in interest and the party prosecuting this appeal (the Cheston Company) will be referred to as either the contractor or appellant.

[2] Finding of Fact of Apr. 4, 1973. All references to exhibits are to those contained in the appeal file.

is $159 per day, and Bureau Contract DS 7023 which is $168 per day.

The wide variation between the rates for Grand Coulee vs. Mt. Elbert and Teton is a reflection of two conditions, the unforeseeable inflation of the national economy and the equally unforeseeable extended time between Grand Coulee contract inception and equipment erection.

We * * * request that our contract be modified to increase the daily rate for the services of our erecting engineer from $100 per day to the more equitable rate of $168 per day.

* * * * * * *

Throughout the ensuing correspondence the contractor has maintained that it is entitled to be paid for all erection engineering services furnished at the rate of $168 per day. The position initially taken by the Government was that the contractor's request for additional compensation for such services appeared not to be meritorious.[3] Following further discussion and the submission of additional information by the contractor, the contracting officer forwarded a proposed amendment to the contract under which erecting engineering services would be paid for on two different bases (Exh. 10). For the first 120 days of such services (the solicitation's estimate of 100 days plus a 20 percent variation), the contractor would receive a lump-sum payment of $1,998 to compensate it for the fact that the erecting engineer's services had been furnished beginning May 1, 1975, rather than within a reasonable period after the three governors were scheduled for shipment in early 1974. For the estimated additional 250 days the services of an erecting engineer would be required, the contractor would be paid at the rate of $168.26 per calendar day.

The contractor rejected the amendment to the contract as proposed, however, on the ground that the lump-sum figure of $1,998 failed to give the proper effect to the data it had submitted (Exh. 11). When the proposed amendment was returned unsigned, the contracting officer consulted the Regional Solicitor's office which confirmed that he had authority to direct that the services of an erecting engineer be furnished beyond the contract estimated amount and a normal overrun (*i.e.*, in excess of 120 days) and to provide the contractor with an equitable adjustment therefor under the "Changes" clause. The Solicitor's office also advised, however, that the contracting officer was without authority to equitably adjust the contract to pay any increased costs sustained by the contractor in furnishing the services of an erecting engineer for the first 120 days he was required to be at the job site for installation (*i.e.*, the difference between the cost of furnishing such services when scheduled in early or mid-1974, and when

[3] The contracting officer's letter to the contractor of July 28, 1975 (Exhibit 7), concludes with the following statement: "Therefore, in view of the fact that the contract specifically prohibits the Government from paying your increased costs during the contract period and you have not substantiated any increased costs for a period from early or mid-1974 to May 1975, your request for additional compensation for the increased costs for erecting engineer services appears to be without merit."

actually furnished commencing May 1, 1975). The legal advice so received is reflected in the contracting officer's decision of Dec. 5, 1975 (Exh. 12), which also states:

> In addition, paragraph B–19, which covers adjustments for changes in cost, specifically prohibits me from paying the increased costs that you have incurred from July 23, 1970, to early or mid-1974, when you could have reasonably anticipated furnishing the services of the erecting engineer at the rate specified in the bidding schedule at the time you submitted your bid.

In the course of rejecting a proposal made in the appellant's letter of Dec. 16, 1975 (Exh. 13),[4] the contracting officer stated:

> Your claim for increased cost for services of your erecting engineer has again been reviewed. We cannot agree that there is any entitlement for increased costs during the contract period.[5] We do agree that you encountered unforeseen additional costs during the period of Government delay[6] and we feel that additional compensation should be made. However, in accordance with Weardco Construction Corporation 64 ID 376 and Comptroller General Decision B–154572 dated Apr. 11, 1965, this claim is not within my authority to determine. (Exh. 14.)

Since neither party requested a hearing, the Board entered an Order Settling Record on Apr. 13, 1976. The Order provided that either party might supplement the record with additional documents or exhibits and file briefs by May 17, 1976. Only the Government has filed a brief.

Decision

[1] In the findings from which the instant appeal was taken, the contracting officer found that he was without authority to increase the rate payable for the services of an erecting engineer for the first 120 calendar days such services would be required for the installation of governors on turbines but that for any number of days erecting engineer services were required beyond the first 120 days (100 days as estimated in the contract plus 20 days for a normal overrun), the Government would pay $168.26 per day. Appellant seeks payment of $168.26 per day for the first 120 days as well as for any period thereafter.

[4] The penultimate paragraph of the letter reads: "Specifically, the contract as originally written was structured on the premise that the services of the erecting engineer would be required on or about early spring of 1974, while in actual fact, this time frame was delayed through no fault of the Cheston Company, until May 1, 1975. What we propose is a simple contract change incorporating the actual time frame in which the service work is being accomplished and a rate change commensurate with the time frame."

[5] As shown by note 4, *supra*, the appellant contemplated that the services of an erecting engineer would be required "on or about early spring of 1974." Prior to that time the rate for the services of erecting engineers had increased materially over the $100 rate per calendar day for such services reflected in the bid on the instant contract. In the contracting officer's letter to the contractor of July 28, 1975, the following statement is made: "* * * our staff has reviewed Solicitation No. DS–6999 offered June 15, 1973, and Solicitation No. DS–7023 offered Oct. 31, 1973, and found that you had bid $159 and $168 per calendar day, respectively, for the services of the erecting engineers * * *" (Exhibit 7).

The amounts shown by the Government to have been bid by the contractor on these solicitations correspond to the figures used by the contractor in its letter of Apr. 16, 1975 (Exh. 6) as shown by the portion of the letter quoted in the text, *supra*.

[6] The erecting engineer was to supervise the installation of the governors and the starting and operating of the equipment until the field tests were completed but the three governors were to be installed by another contractor. Although the record does not disclose the reason for the delay in ordering the service of the erecting engineer, we have assumed that the installation contractor was not ready for the erecting engineer until May 1, 1975.

The Government's brief asserts that the contracting officer is without authority to "pay for delay" under either the standard "Changes" clause [7] or the "Suspension of Deliveries (or Services)" clause quoted above. In support of its position respecting the latter clause, the Government cites our decisions in *R. A. Heintz Construction Co.*, IBCA–403 (June 30, 1966), 73 I.D. 196, 66–1 BCA par. 5663 and in *Weardco Construction Corporation*, IBCA–48 (Sept. 30, 1957), 64 I.D. 376, 57–2 BCA par. 1440. The clauses construed in *Heintz* and in *Weardco* were, insofar as pertinent to the instant appeal, substantially similar to the clause quoted above.

Concerning its authority to provide an equitable adjustment under the terms of the clause involved in *Weardco*, the Board stated:

> * * * [T]he "suspension of work" clause contained in this contract does not grant to the contracting officer, either expressly or by necessary implication, the authority to make an equitable adjustment in the contract price in order to compensate a contractor for expenses incurred because of a suspension of work directed or required by the Government. The reference in that clause to "actual, reasonable, and necessary expenses due to delays, caused by such suspension" appears to be for the purpose of saving to the contractor the right, which a reservation of suspension authority by the Government would otherwise cause him to lose, of recovering *through court proceedings* such damages as he may have sustained by reason of a suspension order, and not to be for the purpose of creating a basis for the administrative assessment of those damages. It contains no provision comparable to the affirmative authorization for the making of an equitable adjustment by the contracting officer which appears in some of the other forms of "suspension of work" clauses used by Government agencies. (Italics supplied.)
>
> (64 I.D. 376, 383, 57–2 BCA at 4842 (1957)).

Although the Government has cited *Heintz* and *Weardco* as dispositive of the question presented, we are mindful of the fact that almost a score of years has elapsed since the *Weardco* decision was rendered and that during that period many important decisions relating to board jurisdiction have been issued by the Supreme Court, the Court of Claims and the various boards. In our view the question of whether or not the Board has jurisdiction over the claim involved in the instant appeal can best be determined by having recourse to criteria set forth in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), and applied in

[7] After quoting the portion of the standard "Changes" clause outlining the scope of coverage, the Government brief states: "There is no authority set forth in this clause which would permit the Contracting Officer to 'pay for delay.'" *See Cosmos Engineers, Inc.*, IBCA–979–12–72 (Mar. 28, 1973), 73–1 BCA par. 9972.

The present appeal is similar to Cosmos in that this case also involved postponement of the contemplated installation dates without any change in the order or sequence in which the work was to be performed.

Also noteworthy is the fact that the changes clause interpreted in *Cosmos* and with which we are here concerned is identical to the Changes clause construed in *Weldfab, Inc.*, IBCA–268 (Aug. 11, 1961), 68 I.D. 241, 61–2 BCA par. 3121, in which the Board found that delay costs incurred prior to the issuance of the order which put an end to the delay were not covered by the Changes clause.

We, therefore, conclude that the contractor's claim for cost attributed to the Government's delay in ordering contemplated engineering services is not a claim remediable under the "Changes" clause.

various factual situations in later cases.

Perhaps most helpful in resolving the issue before us are the following remarks in *Utah:*

> When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract. See *Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 757, 345 F. 2d 833 (1965). * * * For ease of reference we will therefore use the term "breach of contract claims" to refer to contract claims that are not redressable under specific contract adjustment provisions.
>
> (384 U.S. 404–405, footnote 6.)

The emphasis in *Utah* upon the contract making provision for equitable adjustment and claims being redressable under specific contract adjustment provisions as distinguished from what would otherwise be claims for breach of contract has been underscored by the Court of Claims in a number of subsequent decisions. The year after the *Utah* decision was rendered, a question arose concerning the nature of board jurisdiction in the case of the *Len Company and Associates* v. *United States*, 181 Ct. Cl. 29 (1967).[8] Citing *Utah*, the Court of Claims stated at 36:

> * * * To the extent that complete relief is available under a specific provision—i.e., the claim is both cognizable under and adjustable by the terms of the contract—such as the currently standard "Changes", "Changed Conditions", or "Inspection" clauses, the controversy arises under the contract and is subject to initial administrative resolution as provided in the normal "Disputes" article. But if a fair reading of the particular contract shows that the specific dispute has not been committed to agency decision, the claims are then for a "pure" breach of contract and are considered *de novo* in this court. (Footnote omitted.)[9]

Later cases citing *Len*[10] include

[8] Prior to the *Len* decision, the Board had applied the Utah guidelines in resolving the jurisdictional questions squarely raised in *American Cement Corporation*, IBCA–496–5–65 and IBCA–578–7–66 (Sept. 21, 1966), 73 I.D. 266, 66–2 BCA par. 5849, *affirmed on reconsideration*, 74 I.D. 15, 66–2 BCA par. 6065. In that case the Board stated: "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. * * * (73 I.D. 271, 66–2 BCA at 27,153.)

[9] Later in the opinion the Court stated: "* * * Although arising as a result of the operation of that article, the claims are not made adjustable under or by it. The Supreme Court, this court, and the Armed Services Board have said on many occasions that disputes cannot 'arise under' the contract and need not be presented to an administrative tribunal unless some substantive contract provision authorizes the granting of a specific type of relief. (footnote omitted)" (181 Ct. Cl. 51.)

[10] *Marden Corporation* v. *United States*, 194 Ct. Cl. 799 (1971) is one of such cases. In *Marden* the Court of Claims found that the Permits and Responsibilities clause included in the General Provisions of Standard Form 23–A was not a contract adjustment provision under the test enunciated in *Utah*. The absence of jurisdiction in the Armed Services Board, however, appears to have been predicated primarily upon the Court's finding that the work performed by the contractor following the collapse of a portion of an airplane hangar prior to completion and acceptance constituted a cardinal change and was therefore not redressable under the standard "Changes" clause. Thus in distinguishing its prior holding in *L. W. Foster Sportswear Co.* v. *United States*, 186 Ct. Cl. 499 (1969), the Court stated: "We adhere to the view stated in Foster. Where a plaintiff, in a Government contract case, states a claim which is fully redressable under the contract, the plaintiff cannot be permitted to maintain a separate claim for breach which is merely a recharacterization of the claim which is redressbale under the contract. To allow a plaintiff to maintain such a claim would amount to subversion of the Utah decision. We would be inclined to view the present case as indistinguishable from Foster if it were not for the fact that, in our opinion, plaintiff's claim, when characterized as a change (as in Count I), is not redressable under the Changes clause because it alleges a cardinal change." (194 Ct. Cl. 808.)

Bird & Sons, Inc. v. *United States*, 190 Ct. Cl. 426, 432 (1970) ("It is settled law that the Disputes clause applies only 'to the extent complete relief is available under a specific contract adjustment provision,' *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 402 (1966) [Emphasis added]; that is, some 'other * * * [clause] of the contract calling for equitable adjustment of the * * * price or extensions of time upon the occurrence of certain events.' *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 506 (1967) [Emphasis added]. * * *"); and *Sanders Associates, Inc.* v. *United States*, 191 Ct. Cl. 157, 168 (1970) ("* * * [I]t is sufficient to say that the payments clause in question is not the type of 'specific contract adjustment provision' contemplated by the Court in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 402 (1966) * * * We do not feel that the payments clause in this case was cast in terms of contract price adjustment, as specified in Utah, such that the parties intended liability to be a matter for administrative disposition under the disputes clause. (Footnote omitted) * * *.")

Board decisions in which the jurisdictional questions presented have been resolved on the basis of applying the test enunciated in *Utah*—as foreshadowed in earlier or elaborated upon in later Court of Claims cases—include *E. H. Marhoefer, Jr. Co.*, DOT CAB Nos. 70–17, *et al.* (Feb. 27, 1970), 70–1 BCA par. 8177; *JCM Corporation*, DOT CAB No. 70–6 (Nov. 13, 1970), 70–2 BCA par. 8586; *Bovay Engineers, Inc.*, AGBCA No. 303 (Mar. 31, 1971), 71–1 BCA par. 8798; *Historical Services, Inc.*, DOT CAB No. 71–8 (June 1, 1971), 71–1 BCA par. 8903; *F. W. Brown Company*, DOT CAB No. 71–11 (June 21, 1971), 71–2 BCA par. 8939 at 41,561 ("The law is now well established that the jurisdiction of contract appeals boards is limited to claims under specific contract clauses authorizing the particular relief sought, *i.e.*, claims under substantive contract adjustment provisions, separate and apart from the Disputes clause itself * * *."); *Potomac Electric Power Co.*, GSBCA No. 3448 (Apr. 17, 1972), 72–1 BCA par. 9414 at 43,724 ("* * * * This dispute is not one that arises 'under this agreement' according to the standards set forth by the Supreme Court in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966). There the Supreme Court agreed with the Court of Claims that the above-quoted Disputes clause requirement is met when the relief sought is available under a specific contract adjustment provision."); *Southern Pipe and Supply Co.*, NASA BCA No. 570–7 (June 28, 1973), 73–2 BCA par. 10,118.

The Armed Services Board has frequently cited and construed *Utah* in deciding cases involving its jurisdiction.[11] Before *Utah*[12] the

[11] See *Luzon Stevedoring Corporation*, ASBCA No. 15606 (Sept. 30, 1971), 71–2 BCA par. 9104, at 42,196 ("Appellant's prime con-

ASBCA had resolved jurisdictional questions somewhat differently depending upon whether the disputed items involved claims asserted by the contractor or by the Government. After *Utah* the same line of demarcation was maintained.[13] Following the Court of Claims decisions in the *Len* and *Bird* cases, *supra*, however, the rationale for the ASBCA position with respect to the two types of claims was articulated with much greater specificity. *See J. J. Fritch, General Contractor, Inc.*, ASBCA Nos. 13445, 13672 (Feb. 10, 1970), 70–1 BCA par. 8123 and particularly *Harrington & Richardson, Inc.*, ASBCA No. 9839 (May 30, 1972), 72–2 BCA par. 9507 at 44,295:

> In *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, * * * the Supreme Court was concerned with a board's jurisdiction over breach of contract claims for delay damages by a contractor against the Government and it rested its decision on a history of the treatment given to unliquidated damage claims by the boards and the courts over a period of more than a quarter of a century. Not one of the thirty published decisions cited in *Utah* to trace that history involved the reverse situation of a breach of contract claim by the Government against a contractor. Early Court of Claims decisions had pointed to the Comptroller General's unwillingness to be bound by administrative decisions on unliquidated damage claims for breach of contract against the Government. See *Anthony Miller, Inc.* v. *United States*, 111 Ct. Cl. 252, 330 * * *.
>
> * * * * *
>
> To the same effect see *Continental Illinois Bank et al.* v. *United States*, 126 Ct. Cl. 631, 640 * * * cited by the Supreme Court in Utah, supra:
>
> "The departments are authorized to spend money only for the purposes for which it is appropriated by Congress. Funds are not appropriated to pay damages for breaches of contracts."

The soundness of this rationale may well be questioned[14] but it represents a part of the history on which the Supreme Court relied.

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tention is that the Disputes articles of its contracts provide in themselves an adequate and sufficient jurisdictional basis for the Board's resolution of the merits of this appeal. We have consistently held that we will assume jurisdiction only over claims 'cognizable under the contract,' that is, claims under contract provisions which may fairly be said to authorize substantive relief. *J. J. Fritch, General Contractor, Inc.*, ASBCA Nos. 13445, 13672, 70–1 BCA par. 8123; *Lenoir Wood Finishing Co.*, ASBCA No. 7950, 1964 BCA par. 4111. This principle has been recognized by the Supreme Court in *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 * * *.")

[12] See the extensive discussion of the ASBCA position in *McGraw-Edison Co.*, IBCA–699–2–68 (Oct. 28, 1968), 75 I.D. 350, 354–356, 68–2 BCA par. 7335, at 34,111–34,113.

Retention of jurisdiction over the Government's claim for common law damages in *McGraw-Edison*, at least for the purpose of completing the administrative record, was predicated upon the fact that there were common questions of fact involved in the Government's claim and the claims asserted by the contractor of excusable delay and practical impossibility over which the Board unquestionably had jurisdiction.

[13] For example, see *Eaton Corporation*, ASBCA Nos. 17713, 18378 (June 5, 1974), 74–2 BCA par. 10,697 at 50,884 ("The cases cited by appellant in challenging the Board's jurisdiction, including the leading case of *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 * * * all involved claims by contractors against the Government. As this Board has pointed out previously, the rationale of the *Utah* decision is not present in the situation of claims by the Government against contractors * * *").

[14] The rationale does not appear to have been adhered to in *Cannon Construction Co.* v. *United States*, 162 Ct. Cl. 94 (1963) in which it was held that the contracting officer had authority to settle the contractor's damage claim for Government delays. See discussion of *Cannon* in *Utah, supra*, at footnote 11 and our view of *Cannon* as reflected in *James Knox dba Jak Enterprises*, IBCA–684–11–67 (Feb. 13, 1968), 68–1 BCA par. 6854 and in *Pirate's Cove Marina*, IBCA–1018–2–74 (Feb. 25, 1975), 83 I.D. 445, 75–1 BCA par. 11.109.

But such a factor is not present in the reverse situation of claims by the Government against contractors,[15] whether denominated as equitable adjustment or breach claims. In such cases, for which the *Utah* decision is not a precedent, the jurisdictional issue is whether the appeal involves a dispute on a question of fact arising under the contract. * * *

While the Armed Services Board has stated that "it should be clear from the discussion in the *Fritch* appeal that [the] Board does not share the artificially narrow view of its jurisdiction that was articulated in the Len decision," [16] it is clear from reading the Board's decision on reconsideration in *Fritch* [17] that the basis for retaining jurisdiction over the claims asserted by the contractor in that case is entirely compatible with the holding in the *Len* case.

Notwithstanding the emphasis in *Utah* and *Len* upon a specific contract adjustment provision in conjunction with the Disputes clause as the sources from which board jurisdiction is derived, there are well recognized exceptions to the requirement that the contract contain a substantive contract provision specifically authorizing the relief sought. The same day the *Len* case was decided, the Court of Claims handed down its decision in *Schlesinger* v. *United States*, 181 Ct. Cl. 21 (1967), in which, after referring to the Changes and Changed Con-

[15] Later, on the same page, the Board states: "This does not mean that the Board has jurisdiction over all claims against contractors or that the existence of a contract clause related to the subject matter of a dispute is irrelevant. But it does mean that, where a dispute plainly involves questions of fact arising under the contract, such as those involving specification conformance, inspection procedures or similar performance problems, a separate contract provision that expressly provides for an equitable price or other contractual adjustment is not necessarily essential. The contractor may obtain the administrative relief of a decision that the Government's claim is either partially or entirely invalid, with the force of the Wunderlich Act behind the Board's factual findings. Obviously the force of the findings is no less should the decision be unfavorable to the contractor."

[16] *Delcher Brothers Storage Co.*, ASBCA No. 15193 (Nov. 10, 1970), 70–2 BCA par. 8583 at 39,876. *Cf. F. W. Brown Co.*, DOT CAB No. 71–11 (June 21, 1971), 71–2 BCA 8939 at 41,561 ("This Board recognizes that its jurisdiction is limited and depends upon the terms of the parties' contract. We have declined jurisdiction over various claims where the contract failed to provide an adjustment clause for the type of relief sought (Citations omitted). If this view of board jurisdiction seems too narrow or restrictive, the ready solution is for the drafters of contract language to fashion additional contract adjustment provisions for any and all matters which they wish to make redressable under the Disputes clause procedure. *See Len Company and Associates* v. *United States*, 181 Ct. Cl. at pp. 52–53, and *United States* v. *Utah Construction and Mining Co.*, [*supra*] 384 U.S., at pp. 412–413, 415–417.").

[17] *J. J. Fritch General Contractor, Inc.*, ASBCA No. 13672 (July 14, 1970, 70–2 BCA 8422 at 39,192 ("* * * [T]he Board has been authorized by the Secretaries to decide Capehart claims which are, quite simply, breach of contract claims. It should also be apparent that the *Len* case is not authority for a contrary conclusion. * * * Insofar as the case is directly relevant to the Secretarial memoranda, it merely contains a brief discussion of the Navy memorandum. It expresses the view that the memorandum had no intention of requiring administrative relief for breach of contract claims or of converting breach claims into claims 'arising under' the contract subject to the Disputes process. While we are concerned primarily with the Air Force and Defense memoranda at this time, we would agree with the Court's view, as thus expressed. Quite clearly we would not agree with the further dictum, if it was so intended, that claims not cognizable under the peculiar Capehart changes article may not be decided under special Secretarial authority. We think the Court merely meant that, unless claims have been made cognizable under the contract so as to call for the application of the Wunderlich Act, then the Court may not be ousted from a de novo trial." (Footnotes omitted.)

ditions clauses as examples of standard adjustment clauses, the Court states at 26–27:

> * * * Admittedly, neither of these clauses points with unerring certainty to the scope of their coverage, and disputes, such as plaintiff's (dealing with the taking of erroneous discounts), might arguably be viewed as pure breach claims. Nevertheless, we directed plaintiff to seek out administrative relief because the matter of claim denomination is a subject that is better settled in the light of accepted administrative practices than through the reflections of abstract analysis. * * * [W]e reaffirm our rejection of plaintiff's "breach" argument by again pointing to the teachings of settled administrative practice. * * *

The "teachings of settled administrative practice" is no doubt the basis for recognition of board jurisdiction in a host of constructive change cases not involving simply a formalization of an oral directive to the contractor to proceed in a way not required by the contract (see, for example, *Gulf & Western Precision Engineering Co.* v. *United States*, Ct. Cl. No. 335–70, slip opinion, at 9–13 (Oct. 20, 1976); *Aerodex, Inc.* v. *United States*, 189 Ct. Cl. 344 (1969); and *Red Circle Corporation* v. *United States*, 185 Ct. Cl. 1 (1968)), as well as in cases involving board determinations of excess cost assessed under defaulted contracts (*see Nager Electric Co.* v. *United States*, 184 Ct. Cl. 390, 397 at footnote 6 in which the Court of Claims stated that all issues bearing on a termination for default including interference with plaintiff's performance and the reasonableness of the excess costs claimed by the Government were "grist for the administrative mill").

Based upon the foregoing analysis and under the authorities cited, we conclude that the contract contains no substantive contract provision authorizing an equitable adjustment in the contract price for the claim here asserted. In dismissing the claim presented in *Weardco* on the ground that the contract's suspension of work clause contained "no provision comparable to the affirmative authorization for the making of an equitable adjustment by the contracting officer which appears in some of the other forms of 'suspension of work' clauses used by Government agencies" (64 I.D. 383, 57–2 BCA par. 1440 at 4842), the Board appears to have anticipated the jurisdictional test established in *Utah*, *supra*, and underscored in *Len*, *supra*, that "disputes cannot 'arise under' the contract * * * unless some substantive contract provision authorizes the granting of a specific type of relief." (181 Ct. Cl. 51.)

The "Suspension of Deliveries (or Services)" clause included in the instant contract is not an "adjustment provision" as defined in *Utah*, *Len* and later cases.[18] The holdings in *Weardco* and *Heintz*, *supra*, negate resort to settled administrative practice as a basis for taking jurisdiction. We, therefore, dismiss the claim presented as one

[18] *Marden* v. *United States*, note 10, *supra*, at 807 ("* * * We remain of the opinion that an adjustment provision is one which 'authorizes the granting of a specific type of relief * * *'").

not "arising under" the contract and one therefore for which we are not authorized to provide relief.[19]

Conclusion

The appeal is dismissed.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

I CONCUR:

SPENCER T. NISSEN,
Administrative Judge.

I dissent for reasons stated in separate opinion.

KARL S. VASILOFF,
Administrative Judge.

DISSENTING OPINION BY JUDGE VASILOFF:

I dissent from the opinion of the majority.

The Government's position is that no increase can be granted for the first 120 days (100 days as provided in the contract plus 20 days for a normal overrun) but for any number of days beyond that first 120 days the Government would pay $168.26 per day. Appellant seeks payment of $168.26 per day for the first 120 days as well as for the period beyond the first 120 days.

That appellant encountered additional cost due to the Government delay in not requiring the services of an erection engineer until May 1, 1975, is conceded by the Government. Indeed, the Government has stated to appellant that "We do agree that you encountered unforeseen additional costs during the period of Government delay and we feel that additional compensation should be made" (Ex. 14).

There is no dispute that both appellant and the Government anticipated the utilization of the services of an erection engineer during the early part of 1974. Appellant knew the services of the erecting engineer would only be needed after the three governors were delivered. Since the last governor was scheduled to be delivered in Jan. 1974, the erecting engineer's services would be needed shortly thereafter. It would be reasonable, therefore, for appellant to anticipate that the Government would request the services of the erecting engineer in the early part of 1974. The Government in its proposed Modification No. 6 admits that the delay is approximately 14 months (Jan. 1974 to May 1975) (Ex. 10).

[19] Since we are dismissing the claim for lack of jurisdiction, we express no opinions on the merits thereof. We note, however, that the contracting officer has acknowledged that the appellant encountered unforeseen additional costs during the period of Government delay and has expressed the opinion that additional compensation should be made. With respect to the portion of the claim considered to be meritorious, the attention of the contracting officer is invited to Comptroller General Decision B-155343 dated Dec. 22, 1964, in which the following statements appear:

"* * * [I]t is well established that the United States can be required to compensate a contractor for damages which he has actually sustained as a result of a breach of the contract by the Government, limited to the actual costs incurred in excess of the costs which reasonably would have been incurred but for the breach. We do not concur in the view sometimes expressed that we are without jurisdiction to consider claims for damages resulting from breach of contract * * *. [O]ur Office will settle claims where there is no doubt regarding the liability of the Government and the amount of damage can be determined with reasonable certainty." (44 C.G. 353, at 357-358).

All requests made by appellant for time extensions were granted by the Government, and all extensions were found to be excusable. Even with the extensions the governor for unit 21 was delayed 1 week, the governor for unit 20 was delayed over 1 month and the governor for unit 19 was delayed just over 2 months. There is no showing by the Government that even had all three governors been delivered as required by the original schedule that the services of the erecting engineer would have been utilized in the early part of 1974 as anticipated. Another contractor was to actually install the three governors supplied by appellant (Ex. 1). Although the record does not disclose the reason for the delay in the need for the erection engineer, I may draw the conclusion that the installation contractor was not ready for him until May 1, 1975 (Ex. 4).

The Government relies upon the authority of the holdings in Comp. Gen. Dec. B–154572 (Apr. 14, 1965), and *Weardco Construction Corp.*, IBCA–48 (Sept. 30, 1957), 64 I.D. 376, 57–2 BCA par. 1440.

The factual situation before the Comptroller General in Comp. Gen. Dec. B–154572 involved the construction and completion of equipment installation in the Hoover Powerplant. The Government was to furnish some of the equipment to be installed. Due to the absence of any express covenant to make the equipment available at a particular date, the Comptroller General held that the delay in delivery of the equipment would not make the Government liable for any damages. But in regard to the other portion of the claim, a delay involving a change order issued to a supplier by the Government, the Comptroller General ruled that the contracting officer had authority to pay excess costs incurred due to delays in delivery of Government-furnished equipment. One of the possible courses of action the contracting officer could have taken, said the Comptroller General, was to issue a suspension of work order. Comp. Gen. Dec. B–154572 does not support the Government's position.

The *Weardco* decision involved a construction contract wherein the contractor alleged that due to the delay of the delivery of Government-furnished material work had to be stopped. The contractor sought an equitable adjustment on the ground that additional costs were incurred because of the delay. The contracting officer found that the failure to deliver the material delayed the contractor for a period of 30 days and granted an extension of 30 days as an excusable delay. The contracting officer found that the claim did not fall within the suspension of work clause, the changed conditions clause, or the changes clause of the contract.

The suspension of work clause in *Weardco* reads as follows at 382:

"The Government may at any time suspend the whole or any part of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable,

and necessary expenses due to delays, caused by such suspension, it being understood that expenses will not be allowed for such suspensions when ordered by the Government on account of weather conditions."

This Board in *Weardco* found that the Government did not stop the work by any order or request. Nor did the record show that a stoppage of the work would have been for the convenience of the Government. Nor did the contractor actually stop work, but continued to work until it had to stop because of failure of delivery of the material. Nor did the record show if the Government was responsible for the delay of delivery of the material. The Board did comment, as dictum, that the above-quoted suspension of work clause:

> * * * contained in this contract does not grant to the contracting officer, either expressly or by necessary implication, the authority to make an equitable adjustment in the contract price in order to compensate a contractor for expenses incurred because of a suspension of work directed or required by the Government. The reference in that clause to "actual, reasonable, and necessary expenses due to delays, caused by such suspension" appears to be for the purpose of saving to the contractor the right, which a reservation of suspension authority by the Government would otherwise cause him to lose, of recovering *through court proceedings* such damages as he may have sustained by reason of a suspension order, and not to be for the purpose of creating a basis for the administrative assessment of those damages. It contains no provision comparable to the affirmative authorization for the making of an equitable adjustment by the contracting officer which appears in some of the other forms of "suspension of work" clauses used by Government agencies. (Italics supplied.)

(64 I.D. at 383, 57-2 BCA at 4842.)

Since *Weardco*, this Board has continued to cite this dictum as authority in *Adler Construction Company*, IBCA-156 (Jan. 4, 1960), 60-1 BCA par. 2513; *Utah Construction Co.*, IBCA-133 and IBCA-140 (June 10, 1960), 67 I.D. 248, 60-1 BCA par. 2649; *J. A. Jones Construction Co.*, IBCA-233 (June 17, 1960), 60-1 BCA par. 2659; *Bay Construction, Inc.*, IBCA-77 (Nov. 30, 1960), 61-1 BCA par. 2876; *Kenneth Holt*, IBCA-279 (May 26, 1961), 68 I.D. 148, 61-1 BCA par. 3060; *Commonwealth Electric Co.*, IBCA-347 (Mar. 12, 1964), 71 I.D. 106, 1964 BCA par. 4136; *Montgomery-Macri Co.*, IBCA-59 and IBCA-72 (June 30, 1964), 71 I.D. 253, 1964 BCA par. 4292; *Electrical Builders, Inc.*, IBCA-406 (Aug. 12, 1964), 1964 BCA par. 4377; *Concrete Construction Corp.*, IBCA-432-3-64 (Nov. 10, 1964), 71 I.D. 420, 65-1 BCA par. 4520; *Craftsmen Construction Co., Inc.*, IBCA-360 and IBCA-361 (Mar. 25, 1965), 72 I.D. 134, 65-1 BCA par. 4739; *R. A. Heintz Construction Co.*, IBCA-403 (June 30, 1966), 73 I.D. 196, 66-1 BCA par. 5663; *Orndorff Construction Company, Inc.*, IBCA-372 (Oct. 25, 1967), 74 I.D. 305, 67-2 BCA par. 6665; and *Allison and Haney, Inc.*, IBCA 642-5-67 (Feb. 7, 1968), 68-1 BCA par. 6842. These cases are all construction cases.

The suspension of work clause in this contract appears in A-6 of the

Special Conditions and reads as follows:

> The Government may at any time suspend, in whole or in part, delivery of materials or performance of service to be supplied by the contractor hereunder but such right of suspension shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension: *Provided,* That if this solicitation provides that all or part of the funds for payment of earnings under the contract are contingent upon future appropriations, expenses will not be allowed for such suspension when ordered or authorized by the Government on account of the failure of Congress to make the necessary appropriations for expenditures under this contract.

While the *Weardco* suspension of work clause involved a construction contract, the suspension of work clause in this instance involves a supply contract and the language is tailored for supplies and services. Even in the *Weardco* suspension of work clause, a plain reading of the language would appear to authorize a contracting officer to make an equitable adjustment due to Government caused delay. I believe that the Board in *Weardco* was unduly influenced by the reasoning in *United States* v. *Rice*, 317 U.S. 61 (1942). The Supreme Court has recognized since the *Rice* case that boards of contract appeals have broadened their interpretation of contract clauses to provide an administrative settlement of claims. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 418 (1966).

The Armed Services Board of Contract Appeals has said in *S. Patti Construction Co.*, ASBCA No. 8423 (Apr. 30, 1964), 1964 BCA par. 4225 at 20,503:

> A predecessor to this board early decided that the Suspension of Work article is not limited in application to those instances where the contracting officer actually orders the work stopped, but also affords relief where he should have done so or constructively did so. * * * We have consistently followed this principle. * * * Thus generally in situations where the courts hold that Government—caused delays to the contractor's work constitute a breach of contract, we hold that relief is also available under the Suspension of Work article. This is held to apply, for example, where the Government fails in a duty to make timely delivery of the work site or of materials to be used in the work. * * *

Most recently the Court of Claims in *C. H. Leavell & Co.* v. *United States*, 208 Ct. Cl. 776, 802, 530 F. 2d 878 (1976), has had an opportunity to interpret a suspension of work

> * * * For example, in *John A. Johnson & Sons* v. *United States*, 180 Ct. Cl. 969 (1967) the court concluded:
>
> "*But the plaintiff's right to a price adjustment under the suspension of work clause does not depend on a breach of the contract by the defendant.* The issue is whether the defendant, for its own advantage and convenience in administering the project, has taken action which delayed the plaintiff's access to its worksites for an unreasonable length of time and thereby caused the plaintiff additional expense not due to the plaintiff's fault or negligence. *If it has, the suspension of work clause directs that the contracting officer shall make an equitable adjustment in the contract price.*" [Italics supplied.]

clause in a construction contract. In contrasting a breach of contract action with an equitable adjustment the Court said:

180 Ct. Cl. at 990

This Board has not hesitated to take jurisdiction of an appeal even in the absence of specific language authorizing the action taken by the contracting officer. In *Farber & Pickett Contractors, Inc.*, IBCA-591-9-66 (Mar. 15, 1967), 74 I.D. 70, 67-1 BCA par. 6190, this Board upheld the right of the contracting officer to deduct from the contract payment a set-off pursuant to applicable state law under provisions in the contract making the contractor responsible for preserving public and private property adjacent to the worksite and also to comply with applicable state laws. In a supply contract, *McGraw-Edison Company*, IBCA-669-2-68 (Oct. 28, 1968), 75 I.D. 350, 68-2 BCA par. 7335, this Board held it could hear an appeal involving the Government's action for common-law damages to determine the question of jurisdiction. The Government had withheld money due the contractor for the alleged failure of the contractor to deliver autotransformers on schedule.

To fragment a claim arising out of the same contract does not serve to provide an expeditious administrative settlement of disputes. The dictum in *Weardco* should no longer control the settlement of disputes.

The language in the suspension of work clause in this contract is clear and broad enough to authorize the contracting officer to make an equitable adjustment in regard to the first 120 days of the service needed by the Government for the erecting engineer.

The dictum in *Weardco* was not necessary to reach a decision in that case. I believe the dictum in *Weardco* was in error and little purpose is served in continuing to follow such a gratuitous statement without evaluating the rationale for its validity. I believe the language in the suspension of work clause in this contract is clear that it provides for an equitable adjustment and resort to another clause is not necessary. Even adopting the majority reasoning the suspension of work clause in this contract meets the test set forth in *Utah*. I would, therefore, hold that the Board does have jurisdiction to hear this appeal and would sustain the appeal and allow appellant to recover the sum of $168.26 per day for the first 120 days for the services of the erecting engineer.

KARL S. VASILOFF,
Administrative Judge.

ADMINISTRATIVE APPEAL OF WHATCOM COUNTY PARK BOARD (APPELLANT) v. AREA DIRECTOR, PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS (RESPONDENT), LUMMI INDIAN TRIBE (INTERVENOR)

6 IBIA 196

Decided *November 28, 1977*

Appeal from a decision of the Area Director, Portland Area Office, Bureau

of Indian Affairs, terminating a right-of-way over tidelands of the Lummi Indian Tribe.

Dismissed.

1. Indian Lands: Rights-of-Way

It was not error for the administrative law judge to interpret ambiguous provisions of the subject right-of-way as if they were agreed to in an easement by contract through consideration of the intentions of the parties. If the easement was created by Federal grant, intentions of the parties could still be examined to resolve ambiguous language.

2. Indian Lands: Rights-of-Way

The intention of the parties was that appellant would consummate a lease of tribal tidelands as a condition to receiving the grant of a right-of-way over the tidelands.

3. Indian Lands: Rights-of-Way

Appellant was required to complete a lease of tribal tidelands before it could subject them to public use. The foremost condition of the right-of-way grant was that the public not have access to tribal tidelands before a shellfish protection plan could be incorporated in a lease of the tidelands.

4. Indian Lands: Rights-of-Way

There was an unauthorized opening of the right-of-way by appellant before completion of a tidelands lease agreement.

5. Indian Lands: Rights-of-Way

Appellant was required to make improvement on the right-of-way before it could be opened to the public. The Bureau of Indian Affairs was entitled to cancel the right-of-way grant in accordance with 25 CFR 161.20(a) when appellant violated this condition.

APPEARANCES: Chester T. Lackey, Esq., Bellingham, Washington, for appellant; Arthur Biggs, Esq., Regional Solicitor's Office, Department of the Interior, for respondent; Daniel A. Raas, Esq., Bellingham, Washington, for the Lummi Indian Tribe.

OPINION BY ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal by the Whatcom County Park Board (appellant), from a decision of the Portland Area Director, Bureau of Indian Affairs (respondent), upholding an action of the Superintendent, Western Washington Agency, Bureau of Indian Affairs, which terminated appellant's right-of-way over tidelands of the Lummi Indian Tribe (Intervenor). Appellant alleges that the termination is unlawful and inequitable.

PROCEDURAL BACKGROUND

This appeal, filed with the Commissioner of Indian Affairs on Sept. 16, 1976, was referred to the Board for decision on Nov. 9, 1976, by the Acting Deputy Commissioner of Indian Affairs in accordance with 25 CFR 2.19(a)(2).[1] By order dated Nov. 12, 1976, the Board re-

[1] That sec. provides in part:
"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:
* * * * * * *
"(2) Refer the appeal to the Board of Indian Appeals for decision."

ferred this case to the Hearings Division, Office of Hearings and Appeals, for a fact-finding hearing by an administrative law judge and issuance of a recommended decision, pursuant to 43 CFR 4.361.

A hearing was held on Jan. 11 to 13, 1977, in Bellingham, Washington, by Chief Administrative Law Judge L. K. Luoma. Judge Luoma issued a recommended decision on Sept. 16, 1977, in which he concluded that appellant's right-of-way was rightfully terminated. The parties were allowed 30 days within which to file exceptions to the recommended decision.

Parts of Judge Luoma's recommended decision have been adopted by the Board, as later set forth. The recommended decision is therefore attached as an appendix to this opinion, p. 952.

The Secretary of the Interior, in the exercise of his supervisory authority, has expressly reserved the privilege of reviewing the Board's decision in this case upon request by any interested party. Decisions of the Board are otherwise final for the Department. 43 CFR 4.1(2) and 4.21(c).[2] Accordingly, the parties are advised that they may request a review of this decision by the Secretary.

Explanation of the Right-of-Way

There is general agreement as to the facts below.

Portage Island, also known as Point Francis, consists of approximately 1,000 acres of naturally occurring land. It is situated in Bellingham Bay, State of Washington, and lies entirely within the boundaries of the Lummi Indian Reservation. The island is connected to the Lummi Peninsula by a strip of tidelands known as the "portage."[3] Access to and from Portage Island is possible at low tide by crossing the portage on foot or by vehicle. At high tide, the waters of Bellingham Bay flow across the portage. The subject right-of-way consists of an easement across the portage which was obtained by appellant through the consent of the Lummi Indian Tribe and subsequent approval by the Bureau of Indian Affairs (BIA) in behalf of the Secretary of the Interior.

At one time Portage Island was entirely allotted to individual Indians pursuant to the Treaty of Point Elliott, 12 Stat. 927, II Kappler 669 (1855), and the Treaty with the Omahas, 10 Stat. 1043, II Kappler 611 (1854). However, the individual allotments of land did not include the tidelands surrounding the island or the portage. It has been long recognized that these tidelands are held in trust by the United States for the use and benefit of the Lummi Indian Tribe.[4] *United*

[2] Pursuant to 43 CFR 4.5, the regulations of the Office of Hearings and Appeals may not be construed to deprive the Secretary of any power conferred upon him by law. Enclosed with the parties' copies of this decision are two communications from the Office of the Secretary which set forth the additional opportunity for review of this case.

[3] Portage is a word coined by seamen. It is defined in Webster's as the route followed in transferring boats or goods overland from one body of water to another.

[4] The Lummi Indian Tribe is the political successor to certain bands and tribes of American Indians who signed the Treaty of Point Elliott, *supra*. The Lummi Indian Reservation, which the tribe governs, was enlarged to its present size by the Executive Order of Nov. 22, 1873. I. Kappler 917.

States v. *Boynton*, 53 F. 2d 297 (9th Cir. 1931); *United States* v. *Stotts*, 49 F. 2d 619 (W.D. Wash., 1930).

Through the years various Indian allottees or their heirs obtained unrestricted fee patents to their parcels of land on Portage Island. Eventually some of these interests were purchased by non-Indians. By 1966 only about 50 percent of Portage Island remained in Indian ownership.

During 1965 and 1966 several of the non-Indian owners of land on Portage Island developed plans to subdivide their land for sale to other non-Indians. The Lummi Tribe and the Whatcom County Park Board were concerned about the possible individual development of Portage Island through such subdivisions. These two parties were also concerned about county proposals to link Portage Island with another island by bridge.

From the tribe's standpoint, development of Portage Island posed a threat to the traditional way of life of the Lummi people. As the ancestral home of many Lummi Indian families, the island and its tidelands have remained of cultural and historical importance to the Lummi Tribe. Also, from treaty times until today, the beaches and tidelands of Portage Island have been used by tribal members for food gathering.

Since its inception in 1965, the Park Board has regarded Portage Island as a prime location for a county park. In addition to its potential for salt-water oriented activities, such as boating and swimming, the island is known for its scenic qualities. Among other sites, it is situated in view of the Cascade Mountains.

As a result of their respective interests in Portage Island, the Lummi Tribe and the Park Board began negotiations in 1965 with respect to a proposed park on the island. The tribe at this time was poor, as were many of the tribal members. Along with other considerations, therefore, the tribe was encouraged that development of a park on Portage Island would produce income for the tribe and employment opportunities for the Lummi people. The primary source of tribal income was expected to result from the leasing of the Lummi tidelands around Portage Island. Other income was possible through management of concessions at the park.

All parties recognized that conversion of Portage Island into a marine park facility hinged on three developments. First, it was necessary that the Park Board acquire ownership of either all of the land on the island (as maintained in this case by the tribe and the BIA), or as much of the island as possible. Second, the tidelands surrounding the island would have to be leased from the Lummi Tribe in order to satisfy the recreational demands of the public. And third, access to the island would have to be

guaranteed by acquisition of a right-of-way across the portage which is beneficially owned by the tribe.

In the beginning it was envisioned that the Park Board would simultaneously acquire the necessary right-of-way across the portage as well as a lease of the tidelands around the island. In 1966, however, the Park Board learned that its sources of funding for acquiring lands on Portage Island, including the Bureau of Outdoor Recreation of the Department of the Interior, would not make funds available unless the Park Board could show that it had a legal right-of-way to the island. Accordingly, the Park Board requested the Lummi Business Council, which is the governing body of the Lummi Indian Tribe, to consent to the granting of a right-of-way across the portage without awaiting consummation of a general tidelands lease.

On July 29, 1966, the Lummi Business Council passed a resolution which consented to a road right-of-way over the portage. Certain conditions were attached to the tribe's consent.[5] The precise nature of these conditions and whether or not there was a failure by the Park Board to fulfill one or more of them form the basis of this appeal.[6]

Review of Recommended Decision and Exceptions

The recommended decision identifies the issues and sub-issues in this case as follows:

The first issue is whether Appellant fulfilled the conditions contained in the 1966 Tribal Resolution.

A) The first sub-issue is a determination of the applicable law governing interpretation of the 1966 Resolution.

B) The second sub-issue is whether Appellant was required to acquire all land on Portage Island.

C) The third sub-issue is whether the right-of-way grant necessitated that a tidelands lease agreement be completed.

[5] The conditions as worded on the face of the Resolution are as follows:

"WHEREAS, it is the desire of the Lummi Business Council that this right-of-way be granted contingent upon the area known as 'Point Francis' or 'Portage Island' being acquired for governmental recreational park purposes, only, and limited exclusively to governmental recreational park purposes, and

"WHEREAS, the Lummi Business Council also desires that the granting of this right of way shall be subject to access without charge to members of the Lummi Indian Tribe and the right for Lummi Tribal members or legal agents to have access to Lummi Tribal tidelands across the easement and Portage Island for tideland shell fish culture or tideland development, and in the event that for any reason the area known as 'Point Francis' or 'Portage Island' shall cease to be a County park, said right of way with improvements shall automatically revert to the Lummi Indian Tribe, and the granting of this right of way shall be subject to the County to limit the use of this road so as to not allow third parties access to Point Francis other than those cited above, violation of which shall cause automatic reversion of easement and improvements to the Lummi Tribe, and

"WHEREAS, prior to opening the easement to public access, negotiations for the use of tidelands will be undertaken, between the parties hereto, in good faith,

"Now, THEREFORE, BE IT RESOLVED that the Lummi Business Council hereby consents to the granting of this right of way, subject to the provisions mentioned above * * *."

[6] For purposes of this administrative appeal, the validity of the original grant of the right-of-way and the authority of the BIA to terminate such rights-of-way are not at issue (Tr. 7, 8). The BIA's post-hearing brief nevertheless provides a detailed explanation of the steps followed in processing the subject right-of-way request and the regulatory requirements in force at the time (Brief of Area Director, at 8–12).

D) The fourth sub-issue is whether the newspaper article of May 14, 1970, constituted a breach of the right-of-way grant.

E) The fifth sub-issue is whether Appellant was required to make improvements across the right-of-way.

The second issue is whether the right-of-way should have been terminated under 25 CFR 161.20.

A) The first sub-issue is a determination of the purpose for which the right-of-way was granted.

B) The second sub-issue is what constituted the reasonable time within which improvements were to be constructed.

C) The third sub-issue is whether a termination of the right-of-way is equitable.

We will follow the above format in reviewing the recommended decision.

I. Were the Conditions Fulfilled

A. *Determination of Applicable Law*

Judge Luoma concluded that Federal contract law is applicable to the subject controversy (Recommended Decision 5, 8). The Lummi Tribe takes exception to this conclusion. The tribe submits that the subject right-of-way represents a Federal grant of an interest in land and that the terms and conditions of the right-of-way can be no more nor less than what was federally imposed (Intervenor's Exceptions, at 2–3).[7]

[7] The BIA did not file exceptions to the recommended decision but it advanced the same argument as the tribe in its post-trial brief (*See* Brief of Area Director, at 16–20.)

It is not disputed that the Tribal Resolution of July 29, 1966, consenting to the subject right-of-way, is the source document of whatever conditions were attached to the approval of the easement. However, it is also agreed—and Judge Luoma so found—that several of the conditions recited in the Resolution are ambiguously worded (Recommended Decision, 5).

By holding that the grant of the right-of-way in question constituted a complete contract, Judge Luoma resolved ambiguities found in the Tribal Resolution by examining the intentions of the parties. As a result, some of the conditions of the right-of-way were interpreted in a manner contrary to the alleged intentions of the tribe and the BIA.

Technically, the tribe and the BIA may be correct that the subject right-of-way was acquired by grant and not by contract.[8] Nevertheless, the rules of construction are the same for easements by grant and easements by contract. 25 Am. Jur. 2d, *Easements and Licenses*, §§ 22–23. Accordingly, if the language of an easement is uncertain or ambiguous in any respect, regardless of whether the easement arose by grant

[8] Rights-of-way granted under authority of 25 CFR 161 are considered to be in the nature of easements. *See* 25 CFR 161.18 (1976) and 25 CFR 161.19 (1966). The usual practice is that easements are acquired by grant, although they may arise by contract. 25 Am. Jur. 2d, *Easements and Licenses*, § 17; Thompson on Real Property, Vol. 2, § 331. Whereas the term "grant" is repeatedly cited in 25 CFR Part 161, the term "contract" does not appear.

or contract, "all the surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court, to the end that the intention of the parties may be ascertained and given effect." *Fox* v. *Miller*, 150 F. 320 (9th Cir. 1906).

We know of no authority which says that intentions of the parties may not be considered in resolving ambiguous Federal grants or contracts, or more specifically that ambiguous provisions in a right-of-way across Indian land shall be interpreted only in accordance with the intentions of the Indians.

As a Federal grant in an interest in land, however, it is clear that the subject right-of-way would not evoke the common-law rule of construction advanced by appellant, viz., that an ambiguously worded easement will be construed favorably to the grantee.[9] That rule is reversed when Federal grants are involved so that doubtful expressions in such grants are to be construed favorably to the government. *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112 (1957); *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960); *Caldwell* v. *United States*, 250 U.S. 14 (1919).[10]

It is noted that the recommended decision does not make reference to rules of construction favoring either party. Such reliance is generally regarded as a device of last resort and inappropriate when the intentions of the parties are otherwise ascertainable.

[1] In summary, we hold that it was not error for the Administrative Law Judge to interpret ambiguous provisions of the subject right-of-way as if they were agreed to in an easement by contract through consideration of the intentions of the parties. If the easement was created by Federal grant, intentions of the parties could still be examined to resolve ambiguous lanugage. Further, the recommended decision does not suggest that doubtful expressions in the right-of-way provisions were unlawfully construed in favor of the grantee in contradiction of the canons of construction concerning Federal grants. Whatever favorable interpretations were received by ap-

[9] Brief of appellant filed June 2, 1977, at 11.

[10] In furtherance of this rule, the tribe and the BIA suggest that Federal law requires ambiguities contained in rights-of-way over Indian land to be construed favorably to the Indians (Brief of Area Director, at 20; Post-Hearing Memorandum of Lummi Indian Tribe, at 9; Intervenor's Exceptions to Recommended Decision, at 3). None of the cases cited by the parties makes this point. The only right-of-way case referred to is *Bennett County, South Dakota* v. *United States*, 394 F.2d (8th Cir. 1968), but the chief issues there were whether certain Indian treaties amounted to recognition of Indian title and whether the Highway Act of 1866 specifically granted easements for highway purposes over the land in question. The *Bennett County* case simply reenforced the fundamental principle enunciated in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), that ambiguities in Federal treaties or statutes dealing with Indians be resolved in their favor.

The Whatcom County case does not involve interpretation of Federal treaties or statutes but of a Federally approved right-of-way over Indian land. The task of resolving ambiguities in this grant is more akin to resolving ambiguities in a Federally approved lease of Indian land. With respect to the latter, it has been held that proper interpretation is dependent on the intentions of the parties. *United States* v. *Lewiston Lime Company*, 466 F.2d 1358 (9th Cir. 1972).

pellant appear to have resulted from the Judge's evaluation of the evidence.

B. *Acquisition of Land Requirement*

A major issue at the hearing was whether the grant of the subject right-of-way require appellant to purchase all land on Portage Island. The tribe and the BIA argued that this was a condition of the grant. The Park Board, which has acquired substantially all of the land there, but not all of the land, disagreed.

Judge Luoma found that there was no 100 percent acquisition requirement. None of the parties filed an exception to this finding. The Board adopts Judge Luoma's recommended findings on this sub-issue and they are incorporated by reference to pages 6–7 of the recommended decision.

C. *Lease of Tidelands Requirement*

[2] The third sub-issue, as framed by the Administrative Law Judge, is whether the 1966 Resolution necessitated that a tidelands lease agreement be completed. Judge Luoma found that it did not. The Board disagrees.

We think it is clear that the parties knew that at some time a tidelands lease agreement had to be completed. The issue which consumed a major portion of the hearing was whether or not such an agreement had to be completed before appellant could open the right-of-way to public access.

Other findings of the Administrative Law Judge support the conclusion that a tidelands lease agreement was required. These are:

> * * * Development of the island would serve Appellant as an excellent park facility and would serve the Tribe by providing jobs for tribal members as well as income from lease of tidelands surrounding Portage Island (Tr. 19, 351).
>
> At p. 4.
>
> When Appellant initiated negotiations with the Tribe, both parties intended that a right-of-way providing access to Portage Island, and a lease of the tribal tidelands surrounding the island, would be concluded simultaneously. However, the Tribe gave its consent to the grant of a right-of-way before a lease of the tidelands was agreed upon (Tr. 351).
>
> The Tribe waived its right to monetary compensation for Appellant's use of a 200-foot wide right-of-way because the tidelands over which the right-of-way passed were considered to be part of the tidelands *to be leased by Appellant at a later date* (Tr. 347, 351–52). [Italics added.]
>
> At pp. 4–5.
>
> * * * [N]o monetary benefit accrued to the Tribe under the right-of-way grant, but rather was deferred and was to be included in the tidelands lease.
>
> At pp. 7–8.

The testimony from Park Board officials consistently indicated that unless they could obtain a lease of the tidelands around Portage Island, it was not reasonable to plan a marine park there (Tr. 128, 170, 183–185).

Nor, in appellant's opinion, was there a likelihood that State and

Federal agencies would fund a marine park project without availability of the tidelands (Tr. 171). Accordingly, in appellant's application for funding from the Department's Bureau of Outdoor Recreation, it was represented that Portage Island Park would provide the following recreational uses, among others: swimming, water skiing, skin and scuba diving, saltwater fishing, and boating (Exh. W–3, Tr. 177).

Members of the Lummi Business Council testified that a tidelands lease agreement was a definite condition of the right-of-way grant and that such a lease had to be completed before the island could be opened to the public (Tr. 213, 236, 263, 293, 295, 300). The tribe's paramount concern was that public use of the park and tidelands would endanger the shellfish culture unless a lease agreement existed which guaranteed effective protection (Tr. 207, 227, 297).

While income from a tidelands lease may have been a secondary consideration to the Lummi Indians (Tr. 213), the BIA's approval of the right-of-way was influenced considerably by the economic advancements which a lease of the tidelands would mean to a very poor tribe (Tr. 337). In addition, the Park Board realized that the only "direct dollar recompense" which the tribe stood to gain from appellant in the right-of-way arrangement was through lease of its tidelands (Tr. 109, 110).

The tribe submits in its exceptions to the recommended decision that Judge Luoma's finding that a completed lease agreement was not a condition of the subject easement "leads ineluctably to the conclusion that the right-of-way is granted without consideration" (Intervenor's Exceptions, at 3). Under 25 U.S.C. § 325 (1970), no grant of a right-of-way over Indian land may be made without the payment of just compensation. Since the parties have stipulated to the validity of the subject easement (Tr. 8), it is not necessary to decide whether the right-of-way was supported by just compensation.[11] However, we agree that it is of interpretative value to contemplate the tribe's incentive to consent to the subject right-of-way in the absence of a tidelands lease guarantee, as well as the motives of the BIA which granted the easement in its fiduciary capacity.

The recommended decision observes that no material or essential terms of a tidelands lease were specified in the 1966 Resolution, and that to be enforceable, an agreement to make a future contract must include such specificity (Recommended Decision, 8). Assuming *arguendo* that this general rule of contracts is applicable when a future lease requirement is imposed as a condition to an easement grant, it is arguable that most of the material terms of the

[11] The BIA's theory of compensation was stated in its letter of Mar. 8, 1976, to the Park Board as follows:

"Since no monetary compensation was paid to the Lummi Tribe for this easement, the grant was approved based upon the consideration that the terms and conditions * * * contained in the resolution of the Lummi Business Council * * * would be faithfully performed."

contemplated lease were preordained in this case, including, *e.g.*, the names of the parties, a description of the premises, length of the term (co-extensive by necessity with the term of the easement), and amount of rental (by law, Indian land cannot be leased for less than fair annual rental, except as otherwise provided at 25 CFR 131.5(c)).

However, because the parties have stipulated to the validity of the subject right-of-way, our present task is simply to ascertain the conditions attached thereto. From the evidence previously detailed, we hold that one condition was the consummation of a lease of Lummi tidelands around Portage Island.

As previously stated, the Board believes the issue formed by the record is not whether a tidelands lease was required, but when it was required.

[3] The evidence is susceptible to only one logical conclusion. A lease of the tidelands was mandatory before the appellant could subject the tidelands to public use.

Notwithstanding that the 1966 Resolution conveys at one point that upon commencement of good faith negotiations for the use of the tidelands, the right-of-way may be opened to the public,[12] it is completely inconsistent with the understanding of any of the parties that the tidelands would be exposed to public traffic before a tidelands protection plan could be finalized in a completed lease agreement.

Park Board officials acknowledged at the hearing that a major concern of the Lummi Indian Tribe and the Board itself, was development of a shellfish protection plan (Tr. 64, 65, 93, 155). Prior to the hearing, a legal spokesman for the Park Board stated to the BIA in response to alleged violations of the right-of-way grant: "Contrary to the impression I gain from your letter, there has been no official opening of the park to the public. As a matter of fact, the park cannot be opened until this problem over the lease of the tidelands has been resolved." [13]

While various Lummi officials disagreed on some points at the hearing, the issue of tidelands protection evoked united, oratorical replies. According to the tribe, the clearest and most important of all conditions attached to the right-of-way grant was that the public not have access to Lummi tidelands before shellfish protection could be organized by agreement with the appellant. *See* Tr. 203, 204, 207, 208, 212, 213, 219, 220, 221, 222, 227, 236, 237, 293, 296, 297, 502.

The Administrative Law Judge, who questioned at the hearing why such a vital element of the right-of-way grant was not clearly spelled out in the 1966 Resolution (Tr. 236, 237), ultimately found that "the protection of the tidelands is an

[12] *See* fn. 5, last "WHEREAS" clause.

[13] Exh. 20, p. 2.

essential part of the right-of-way grant" (Recommended Decision, 8).[14]

We hold that tidelands protection was the foremost condition of the right-of-way grant and that it was therefore understood that Lummi tidelands would not be subjected to public use before a plan for such protection was negotiated in a lease.

D. *Was the Easement Opened*

The fourth sub-issue under the matter of condition fulfillment involves the allegation that there was an unauthorized opening of Portage Island to the public.

On May 14, 1970, an article appeared in the Bellingham Herald newspaper under the headline "Park Campground Set For Summer Season." (Exh. 11.) In this article Appellant's Director, Mr. Kenneth Hertz, was quoted as saying that Portage Island is 1,000 acres of undeveloped land, accessible by a hike or by boat, but that the park's development plans had not yet been determined by the county. The article also stated:

> The county has a 200-foot easement on Indian tidelands at the sand spit so that the public can get to the island.
>
> Persons can hike across the spit at low tide of plus 3.5 feet or less. During the summer, persons can walk across about 80 percent of the time, but Hertz advised persons going to the island to bring their tide table books.

The only admonition reported in the article was that campers should bring litter bags and be cautious with fires.

Mr. Hertz testified that he believed he had authority to advise the public that they could go to Portage Island. He stated that the newspaper article was prompted by inquiries he was receiving as to whether the island was available for public use (Tr. 77).

Subsequent to tribal objection over the foregoing article, the Park Board Director sent news releases to the Herald for clarification that visitors to the island should first seek permission from the Lummi Tribe (Tr. 56; Exh. 39, pp. 15–16).

On June 12, 1970, the Park Board Director wrote a letter of apology to the Chairman of the Lummi Business Council (Exh. W–3). The opening paragraph states: "Please let me take this opportunity to express to you and the Lummi Tribal Council my most sincere apologies for any problems created due to the increased public use of Portage Island tidelands."

That the May 14, 1970 article in fact resulted in public use of the tidelands was proved. Kenneth Cooper, a Lummi policeman, testified that after the Herald article was published, people began coming

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[14] Initially, the parties were not bothered by the seeming vagueness of the 1966 Resolution. Forrest Kinley, a 20-year member of the Lummi Business Council, explained to Judge Luoma that the Resolution was created between "neighbors * * * people just like ourselves * * * interested in a project" (Tr. 237; *see also* Tr. 501–502).

Council for Appellant has stated:

"The initial dealing between the Parks Department and the tribe was cooperative. It is apparent that consent was not granted in an adversarial setting. The very imprecision of the 1966 Resolution supports this conclusion. As a result, no hard enforceable agreement was worked out, and both parties assumed that the present attitudes would prevail. Therefore, the language of the resolution should be viewed in that context" (Brief of Appellant filed June 2, 1977, at 12).

to the island and the tidelands (Tr. 431, 432). Some who came went clam digging and removed oysters from the tribal shellfish beds (Tr. 433). Tribal council members also testified to the public use of Lummi tidelands after the Herald article was published (Tr. 256, 257, 274, 275).

The Park Board does not deny that it promoted public access to Portage Island in 1970 (Tr. 77–78, 82, 84). While appellant denies that there was an official opening of the park, its position in this appeal has been that because good faith negotiations for a lease of the tidelands had been commenced, any opening of the easement to the public was nevertheless justified. The Administrative Law Judge so held. (Recommended Decision, 9.)

We have already ruled, however, that the appellant was not at liberty to open the easement to public access until such time as a tidelands lease had been completed. This condition stemmed from the obvious detriment which public access would present to the tribe's shellfish culture.

[4] We further rule that it is clear that there was an unauthorized opening of the subject right-of-way in May 1970. Whether or not such opening was "official" is irrelevant in finding a violation of the condition.[15]

The record shows that subsequent to the opening, appellant took no steps to patrol Portage Island and made only token attempts to preserve tribal interest in the tidelands (Recommended Decision, 9).[16] As previously detailed, the fears of the tribe associated with premature public admission were in some degree realized.

E. *Construction of Improvements*

The fifth sub-issue is whether appellant was required to make improvements across the right-of-way. Judge Luoma found that at the time the Lummi Business Council gave its consent for the right-of-way, all the parties contemplated that improvements would be constructed (Recommended Decision, 10).

Appellant does not deny that improvements to the right-of-way were contemplated, but contests the subsequent findings of the administrative law judge regarding the scope and timing of improvement construction (Appellant's Brief on Exceptions, at 3–5).

We hold that appellant was required to make improvements on

[15] The 1966 Resolution does not contain the word "official" in its reference to opening of the easement. *See* fn. 5, last "WHEREAS" clause. That "unofficial" openings were also prohibited is obvious. Indeed, more harm would seem foreseeable from a premature unofficial opening than from a premature official opening for which preparation might be expected.

[16] The recommended decision points out that the 1966 Resolution does not specifically require either party to protect tribal tidelands and that appellant was not regarded by the tribe as having the sole duty of protection (Recommended Decision, 8).

the right-of-way and Judge Luoma's findings to this effect are incorporated by reference to page 10 of the recommended decision.

II. Should the Easement Have Been Terminated

The Board incorporates the procedural history of the easement termination recited in the recommended decision by reference to pages 10–11 therein.

A. *Purpose of the Right-of-Way Grant*

The Board adopts Judge Luoma's finding that although appellant may have requested the subject right-of-way to assure funding agencies that access existed to Portage Island, the conditions contained in the 1966 Resolution were an inalienable part of the grant. The grant, therefore, is terminable if any condition attached to the grant is unfulfilled (Recommended Decision, 11).

B. *Time for Construction of Improvements*

We have previously affirmed the finding that appellant was obligated to make improvements across the right-of-way as a condition of the 1966 Resolution. The next question is when were such improvements to be made.

Judge Luoma found that commencing in at least 1969, the issue of nonuse of the right-of-way had been raised and that because appellant has to this date not constructed improvements across the easement, there has been a breach of a condition of the grant (Recommended Decision, 12).[17]

Appellant takes strong exception to the finding that the issue of nonuse was raised in 1969 (Appellant's Brief on Exceptions, at 5–8). We agree that such finding is not supported by the evidence cited in the recommended decision (*i.e.*, Tr. 49), nor does it comport with the record as a whole. Rather, it appears that nonuse was first alleged on Apr. 9, 1971, when the Acting Superintendent of BIA's Western Washington Agency issued a notice of violation to the appellant in which the requirements of 25 CFR 161.20 were quoted (Exh. 15).[18]

Appellant submits that the nonuse theory for termination is unjustified regardless of the date that it may have first been raised. Appellant contends first, that it was understood by the parties that no improvements would be made to the right-of-way until the nature of such construction was agreed to by

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[17] The nonuse issue derives from application of 25 CFR 161.20 which provides that a right-of-way shall be terminable for "(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted."

In 1966, the regulations merely stated that rights-of-way were terminable for nonuse, omitting reference to any period of time. 25 CFR 161.19 (1966).

[18] The issue was later addressed in the tribe's resolution of Nov. 4, 1975 (Exh. 36) and the BIA's "show cause" letter to the Park Board dated Mar. 8, 1976 (Exh. 37). The BIA sent a letter to the appellant in 1969 which advised that failure to comply with the conditions contained in the Tribal Resolution of July 29, 1966, could result in revocation of the easement. However, this letter did not make reference to federal regulations or the question of nonuse (Exh. 8).

the Lummi Business Council, and second, that the prospects for such agreement were frustrated by the actions of an uncooperative tribe (Appellant's Brief on Exceptions, at 4).

The testimony indeed shows that the tribe expected to be consulted on the nature of any easement improvement and that no improvements were to be made until after appellant acquired the uplands of the island and negotiated a lease of the tidelands (Tr. 269–270).[19]

[5] The BIA official who drafted the 1966 Resolution for the tribe testified that the intent of the easement grant was that an improvement to the right-of-way would be completed before the easement could be opened (Tr. 346,347). The Board holds that this interpretation is consistent with all other conditions of the right-of-way, and particularly the matter of shellfish protection.

Because the appellant opened the right-of-way to the public before improvements were constructed, we hold that the BIA was entitled to cancel the easement pursuant to 25 CFR 161.20(a).[20]

C. *Was Termination Equitable*

Judge Luoma concluded that the Department should uphold termination of the right-of-way notwithstanding that the Park Board has expended money and effort to purchase property on Portage Island and that the BIA did not act promptly to preserve the trust *res* (Recommended Decision, 12). We concur and incorporate by reference his findings and conclusions in this regard.

The following additional opinions are furnished.

While there is ample support for appellant's claim that the Lummi Indian Tribe unilaterally decided in 1972 that it did not want to go ahead with plans for a park on Portage Island, the record is convincing that this change of attitude occurred only after the appellant breached important conditions of the right-of-way grant. The relationship between events was made plain (Tr. 208, 209).

Further, although the Park Board has invested substantial funds towards acquisition of land on Portage Island, it possesses a valuable piece of real estate and may yet achieve some tidelands rights.

[19] Appellant took this position in its brief on exceptions: "It is equally undisputed * * * that Appellant and the tribe contemplated that the improvements were not to be constructed until after uplands had been acquired and the tidelands leased." (At p. 7.) The foregoing statement is also noteworthy because it conveys appellant's understanding that a tidelands lease had to be completed.

[20] This section provides that a right-of-way is terminable for: "(a) Failure to comply with any term or condition of the grant or the applicable regulations." The foregoing provision was quoted to appellant in the BIA's Apr. 9, 1971 notice of violation (Exh. 15) and its subsequent notice dated Mar. 8, 1976 (Exh. 37).

Finally, when the equities are weighed it cannot be overlooked that the Lummi Indian Tribe, which has long been poor, never derived a dollar from an unsuccessful easement plan.

There remains the common interest of both sides that Portage Island be perpetuated as a wilderness area. But for the right-of-way which was granted, it would likely not be so now. The Board is hopeful that a natural park can yet be established on Portage Island to the satisfaction of the Lummi Indians and all residents of Whatcom County.

SUMMARY

The issue in this appeal has been whether the termination of appellant's right-of-way should be upheld. The Board holds that it should on the basis that conditions of the right-of-way grant, which were primarily imposed to protect the shellfish culture of the Lummi Indian Tribe, were violated by appellant in two ways: (1) appellant opened the right-of-way to public use before completion of a tidelands lease agreement; and (2) appellant opened the right-of-way to public use before construction of improvements on the right-of-way.

ORDER

The appeal is dismissed.

Because the Secretary has reserved the right to review this decision upon request by any interested party, the above Order will not be made effective for a period of sixty (60) days from the date of this decision in order to allow sufficient time for the submission of review requests to the Secretary. A timely request for review shall stay the effectiveness of this decision.

WM. PHILIP HORTON,
Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Chief Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

RECOMMENDED DECISION

BACKGROUND

On Sept. 16, 1976, the Whatcom County Park Board (appellant) appealed a decision of the Portland Area Director, Bureau of Indian Affairs (Respondent) which terminated a right-of-way over the tidelands of the Lummi Indian Tribe. On Nov. 9, 1976, the Acting Deputy Commissioner of Indian Affairs referred this appeal to the Interior Board of Indian Appeals in accordance with 25 CFR 2.19 (a) (2).[1] By order dated Nov. 12, 1976, the Interior board of Indian Appeals, pursuant to 43 CFR 4.1,[2] referred this matter

[1] That section provides, in part:
"(a) Within 30 days after all time for pleadings (including extension granted) has expired the Commissioner of Indian Affairs shall:
* * * * * * *
"(2) Refer the appeal to the Board of Indian Appeals for decision."

[2] That section provides, in part:
"The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing,

to the Chief Administrative Law Judge for a fact-finding hearing de novo. A hearing was held on Jan. 11 to 13, 1977, in Bellingham, Washington. At the hearing, the Lummi Indian Tribe was permitted to join the proceeding as an intervenor.

Portage Island and the tidelands that surround it are part of the Lummi Indian Reservation (Tr. 15). In 1966, appellant entered into negotiations with the Lummi Tribe for the creation of a park on Portage Island. The park would be reached by a right-of-way across tribal tidelands. The park, as first envisioned, was to include the land on Portage Island as well as a recreational lease of the tidelands which surround the island.

For purposes of this administrative appeal, the validity of the original grant of the right-of-way and respondent's authority to terminate such rights-of-way are not at issue (Tr. 7, 8).[2]

considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary. Principal components of the Office include (a) a Hearings Division comprised of administrative law judges who are authorized to conduct hearings in cases required by law to be conducted pursuant to 5 U.S.C. sec. 554 [1970], * * * and hearings in other cases arising under statutes and regulations of the Department, * * *.

"(2) *Board of Indian Appeals.* The Board decides finally for the Department appeals to the head of the Department pertaining to (i) administrative actions of officials of the Bureau of Indian Affairs, issued under Chapter I of Title 25 of the Code of Federal Regulations, in cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant, * * *." (Footnote omitted.)

[2] 25 CFR 161.5, Application for right-of-way, provides, in part:

"Written application * * * for a right-of-way shall be filed with the Secretary. The application shall cite the statute or statutes under which it is filed and the width and length of the desired right-of-way, and shall be accompanied by satisfactory evidence of the good faith and financial responsibility of the applicant. * * * Except as otherwise provided in this section, the application shall be accompanied by a duly executed stipulation * * * expressly agreeing to the following:

"(a) To construct and maintain the right-of-way in a workmanlike manner.

"(b) To pay promptly all damages and compensation * * * determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting, construction and maintenance of the right-of-way.

"(c) To indemnify the landowners * * * for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, * * *.

"(d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the right-of-way was granted.

"(e) To clear and keep clear the lands within the right-of-way to the extent compatible with the purpose of the right-of-way * * *.

* * * * * * *

"(h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work * * *.

* * * * * * *

"(k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted."

ISSUES

The first issue is whether appellant fulfilled the conditions contained in the 1966 Tribal Resolution.

A) The first sub-issue is a determination of the applicable law governing interpretation of the 1966 Resolution.

B) The second sub-issue is whether appellant was required to acquire all land on Portage Island.

C) The third sub-issue is whether the right-of-way grant necessitated that a tidelands lease agreement be completed.

D) The fourth sub-issue is whether the newspaper article of May 14, 1970, constituted a breach of the right-of-way grant.

E) The fifth sub-issue is whether Appellant was required to make improvements across the right-of-way.

The second issue is whether the right-of-way should have been terminated under 25 CFR 161.20.[4]

A) The first sub-issue is a determination of the purpose for which the right-of-way was granted.

B) The second sub-issue is what constituted the reasonable time within which improvements were to be constructed.

C) The third sub-issue is whether a termination of the right-of-way is equitable.

Discussion, Findings and Conclusions

Portage Island consists of approximately 1,000 acres and is connected to the mainland by a strip of tidelands known as the "portage." At low tide, the portage is crossable by foot or vehicle. At high tide, the waters of Bellingham Bay flow across the portage. The subject right-of-way crosses the portage (Tr. 21).

Years before this controversy, Portage Island had been entirely allotted to individual Indians, however, these allotments of land did not include the tidelands which surround the island (Tr. 20–22). The tidelands are held in trust by the United States for the use and benefit of the Lummi Indian Tribe, *United States* v. *Boynton*, 53 F.2d 297 (9th Cir. 1931).

In 1965, appellant, a municipal corporation organized under the laws of the State of Washington, was created to set up and administer a system of county parks. Accordingly, appellant designated certain areas in Whatcom County which were appropriate for use as water-front parks. Portage Island was a high priority in this designation (Tr. 11, 12). Development of the island would serve appellant as an excellent park facility and would serve the Tribe by providing jobs for tribal members as well as income from lease of tidelands surrounding Portage Island (Tr. 19, 351).

When appellant initiated negotiations with the Tribe, both parties intended that a right-of-way providing access to Portage Island, and a lease of the tribal tidelands surrounding the island, would be concluded simultaneously. However, the Tribe gave its consent to the grant of a right-of-way before a lease of the tidelands was agreed upon (Tr. 351). The Tribe waived its right to monetary compensation for appellant's use of a 200-foot wide right-of-way because the tidelands over which the right-of-way passed were considered to be part of the tidelands to be leased by appellant at a later date (Tr. 347, 351–52).

On July 29, 1966, the Lummi Business Council enacted a resolution which gave consent to the right-of-way (Exh. 1). The Lummi Business Council is the governing body of the Lummi Tribe.

In 1966 and 1967, intense negotiations were held concerning lease of the tidelands. In 1968 and 1969, negotiations were less frequent (Tr. 11–13). Notwithstanding the lack of progress in negotiating a tideland lease, appellant acquired property on Portage Island. Acquisition of the property did not include any tideland interest because of the tideland's trust status. To date, appellant has acquired all but two interests in land on Portage Island (Tr. 11).

All lands in question are located in Whatcom County. Acquisition of land by appellant on Portage Island does not affect reservation boundaries (Tr. 13–16).

The first issue is whether the conditions contained in the 1966 Tribal Reso-

[4] That section provides, in part:

"All rights-of-way granted under the regulations in this part shall be terminable in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with § 161.5(j), for any of the following causes:

"(a) Failure to comply with any term or condition of the grant or the applicable regulations;

"(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;

"(c) An abandonment of the right-of-way.

"If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way. * * *"

lution, which gave consent for the right-of-way, were fulfilled.

The Resolution which granted the right-of-way across the Portage, contains a number of conditions which are limitations upon the grant of the right-of-way. Several of these conditions are ambiguously worded. This necessitates interpretation of the language used there.

The first sub-issue is a determination of the applicable law governing interpretation of the 1966 Resolution.

The Tribe contends that the rules of statutory construction must be applied to ascertain intent where the 1966 Tribal Resolution is ambiguous. The basis of this contention is that an Indian Tribe is analogous to any other local government, and that a resolution of the Tribal Business Council has the force of law upon the Lummi Indian Reservation.

I find that Federal contract law is applicable to the subject controversy. On Aug. 14, 1967, appellant's application for the right-of-way, which included the 1966 Resolution, was recorded. Although the grant of the right-of-way constituted a grant of an interest in land, the 1966 Resolution was a contract whereby the Tribe gave its consent to the right-of-way in return for the fulfillment of certain conditions by appellant. A resolution of the Business Council has the force of law upon the Tribe, however, the 1966 Resolution was written as a result of, and was directed to, negotiations which took place between the Tribe and appellant. In 1966, both the Tribe and appellant were working toward a common goal, *i.e.*, the development of a park on Portage Island. The 1966 Resolution was written, adopted and agreed to in an atmosphere of cooperation. Both parties assumed that cooperation would prevail and the language of the resolution must be viewed in that context (Tr. 377). *Administrative Appeal of Brown County, Wisconsin*, IBIA 74-32-A (June 27, 1974).

The second sub-issue is whether appellant was required to purchase all land on Portage Island.

Prior to 1966, three types of land ownership existed on Portage Island; *i.e.*, land held in fee by Indians, land held in fee by non-Indians, and land held by the Government in trust for Indians (Tr. 33). The land now owned by appellant is owned in fee (Tr. 13, 239).

During 1965 and 1966, several non-Indian owners of fee land on the island planned to subdivide their land for sale to other non-Indians. Both the Tribe and appellant wanted to prevent individual development of the island through such subdivisions (Tr. 33–34, 62, 169, 174, 264, 228).

Although appellant did not acquire all of the land on Portage Island, appellant has acquired the ownership of substantially all land there (Tr. 11). The land which is not owned by appellant consists of two relatively small tracts (Tr. 58). These tracts are owned by members of the Lummi Tribe. One tract is owned in fee, the other is held in trust by the U.S. Government for individual Indians (Tr. 260, 261, 307, 308, 317).

On June 8, 1971, a cotenant of the tract held in trust conveyed a 1/2,000 interest to the Tribe as a gift (Exh. L–3, Tr. 25, 308). This was done to prevent appellant from acquiring that interest through condemnation proceedings (Tr. 320–23). Land held in trust for Indians is conveyed through mechanisms set up by respondent, but neither the Tribe nor respondent induced or encouraged the making of this gift deed to the Tribe (Tr. 261, 311–312).

Federal law allows the condemnation of lands held in trust for individual Indians (25 U.S.C. § 257 (1970)), but there is no provision of Federal law which allows the condemnation of lands held in trust for an Indian tribe, *United States v. 10.69 Acres, etc. Yakima City*, 425 F. 2d 317 (9th Cir. 1970).

That provision of the tribal resolution which deals with the acquisition of land on Portage Island states that the right-of-way is granted contingent upon the area known as "Portage Island" being acquired for governmental park purposes only.

Appellant contends that there was no 100 percent acquisition requirement and if there were such a requirement, respondent's action in approving transfer of an interest in land to the Tribe was a breach of the requirement (Tr. 89, 112).

Respondent contends that the subject language required appellant to purchase the entire island and develop the land for public use (Tr. 342, 338, 339).

I find that there was no 100 percent acquisition requirement contained in the Tribal resolution. The 1966 Resolution did not state that all land must be acquired, the resolution only stated that Portage Island would be used only for park purposes. The most logical way of preserving Portage Island solely for governmental park purposes is the acquisition of 100 percent of the island by appellant. However, it does not follow that a 100 percent fee acquisition of the island is the only method available. Situations are conceivable whereby appellant could assure use of the island solely for governmental park purposes without total acquisition of the land there. An example of such a situation would be the use of strict scenic easements.

Appellant had initiated condemnation proceedings against land which it could not buy outright, including the two plots discussed above (Tr. 67, 68, 317). Until the mid 1970's, appellant continued to negotiate for these areas (Tr. 51). In effect, appellant, by its acquisitions and continued negotiations for acquisition, was assuring that Portage Island would be used for park purposes only.

Appellant's contention that respondent should not have allowed the conveyance of an interest to the Tribe because such was inconsistent with a 100 percent acquisition requirement is not valid. Respondent has a fiduciary duty to both individual Indians and to the tribe. Each duty is independent from the other (Tr. 478, 479). I have found that there was no 100 percent requirement. This finding is based upon the wording of the document and the situation which existed when the resolution was drafted. That the Tribe may have gained a 1/2,000 interest in land on Portage Island is not inconsistent with Portage Island's status as a park. Similarly, that the appellant has not acquired all land on the island does not necessarily threaten the park status of the island. To date, appellant has acquired substantially all of the 1,000-acre island and, therefore, has substantially complied with its duty to prevent the land on Portage Island from being used for other than park purposes.

The third sub-issue is whether the 1966 Resolution necessitated that a tidelands lease agreement be completed.

Since the Tribe agreed to grant immediate access to the park by means of a right-of-way and since no monetary benefit accrued to the Tribe under the right-of-way grant, but rather was deferred and was to be included in the tidelands lease, the Tribe contends that a reasonable time limit was implied for conclusion of the tideland lease (Tr. 347, 351, 420) and that the right-of-way could not be opened for public use until such a lease had been completed (Tr. 263, 293, 295, 300).

The grant of the right-of-way constituted a complete contract. To be enforceable, an agreement to make a future contract must specify all material and essential terms with none left to be agreed upon as the result of future negotiations. The 1966 Resolution merely anticipated that a tidelands lease would be negotiated at some future time. No material and essential terms of that lease were specified. I find, therefore, that the 1966 Resolution did not necessitate that a tidelands lease be completed.

The fourth sub-issue is whether the newspaper article of May 14, 1970, constituted a breach of the right-of-way grant.

The 1966 Resolution states that prior to opening the right-of-way to public access, negotiations for the use of the tidelands will be undertaken, between the parties, in good faith.

Appellant commenced negotiations to obtain a lease of the tribal tidelands surrounding Portage Island in 1966. From 1966 to 1969, there were meetings between appellant and the Tribe to negotiate mutually agreeable terms and conditions. These meetings produced several proposed leases (Exhs. W–1, B–2 through B–7). The last draft of a proposed lease was prepared and received in 1969 (Exh. B–7).

As late as Dec. 8, 1971, appellant made a new offer with respect to the amount of rent to be paid (Exh. 23; Tr. 53). However, the recreational use of the tidelands was never leased to appellant.

Appellant recognized that any lease would require a balance between use of the tidelands for recreational purposes and their use for aquaculture (Tr. 137, 143). Notwithstanding, appellant did not prepare plans to advise the Tribe as to how many people were expected to use the park, what activities were to be offered, what improvements were to be made nor where they were to be located (Tr. 289).

The Tribal Resolution of 1966 does not specifically require either party to protect tribal tidelands, however, the protection of the tidelands is an essential part of the right-of-way grant. All parties intended that tribal interests in the tidelands would not be damaged by the development of the park. The Tribe, however, concedes that charging appellant with the sole duty of providing tidelands protection is unreasonable and contrary to the intent of the 1966 resolution (Tr. 78, 84–87, 115, 203).

In a newspaper article of May 14, 1970, appellant's Director was quoted as saying that Portage Island is 1,000 acres of undeveloped land, accessible by a hike or by boat, but that the park's development plans had not been determined. The article further stated that appellant had a 200-foot wide right-of-way across the tidelands so that the public could get to the island (Exh. 11). Later, appellant qualified the article by adding that the public must obtain permission from the Tribe to use the tidelands (Tr. 55, 56).

Appellant has no park police and took no steps to patrol Portage Island. Although non-Indian use of the island increased after the newspaper article of May 14, 1970, appellant made only token attempts to preserve tribal interest in the tidelands (Tr. 432). Appellant did not provide financial assistance to the Tribe for tideland protection.

On May 26, 1970, the Lummi Council adopted a resolution to revoke the right-of-way because appellant had failed to comply with Tribal conditions. The resolution stated that the May 14 article constituted an opening of the right-of-way to public use and as such was a cause for revocation (Exh. 12).

Appellant contends that it had undertaken negotiations in good faith as evidenced by the many negotiation sessions since the drafting of the 1966 Resolution.

Respondent contends that appellant's lack of planning for development of the park and tidelands did not constitute negotiating in good faith because it evidenced appellant's failure to recognize the genuine concerns of the Tribe and to make reasonable attempts to resolve those concerns (Tr. 99).

I find that the newspaper article of May 14, 1970, did not constitute a breach of the right-of-way. On its face, the meaning of the disputed condition is clear: upon commencement of good faith negotiations, the right-of-way may be opened to the public.

All the parties agree that, at least until May 1970, the negotiations were reasonable and fair. Good faith negotiations, therefore, had been undertaken and ap-

pellant had a right, absent other considerations, to open the right-of-way to public access.

That appellant may have failed to recognize the genuine concerns of the Tribe in the lease negotiations alone is not evidence of bad faith in those negotiations. However, appellant initiated the whole concept of a park on Portage Island (Tr. 37, 38). Appellant, therefore, should have been more responsive to the Tribe when the Tribe requested proposed plans and provisions for protection of aquaculture on the tidelands.

The fifth sub-issue is whether appellant was required to make improvements across the right-of-way.

The 1966 Resolution provided that if for any reason the area known as "Portage Island" shall cease to be a county park, the right-of-way with improvements shall automatically revert to the Tribe.

Appellant contends that this provision merely envisioned that negotiations would be held to determine what type of improvements would be made.

Respondent contends that the 1966 Resolution obligated appellant to make improvements across the right-of-way (Tr. 345–46).

The right-of-way was to be improved by the construction of a causeway (Tr. 260, 345–46). In its application to acquire funds, appellant indicated that the cost of constructing a causeway would be a major development cost (Exh. W–2). Thus, at the time the Business Council gave its consent for the right-of-way, all the parties contemplated that improvements would be constructed (Tr. 175, 176). I find, therefore, that appellant was required to make such improvements upon the right-of-way.

The second issue is whether the right-of-way should have been terminated under 25 CFR 161.20.

In 1970, the Lummi Business Council concluded that appellant had violated several conditions of the right-of-way grant. On May 26, 1970, the Council enacted a resolution to revoke the right-of-way (Exh. 12). On Apr. 9, 1971, respondent notified appellant by letter that appellant had 30 days to show cause why the right-of-way should not be terminated for failure to comply with the conditions set forth in the 1966 Tribal Resolution (Exh. 15).

In response, appellant offered to purchase land on Portage Island from two of the remaining owners (Exhs. 16 and 17). Appellant also suggested a time and place for renewing negotiations for the lease of the tidelands surrounding Portage Island (Exh. 18).

Respondent, however, did not terminate the right-of-way upon the expiration of the 30-day period. A notice of intent to terminate was not given until approximately 5 years later. During this 5-year gap, appellant continued efforts to lease the tribal tidelands (Exh. 23–32).

On Nov. 4, 1975, the Lummi Business Council enacted a resolution which requested that respondent declare the right-of-way null and void. This resolution stated that appellant had failed to use the right-of-way for the purpose for which it was granted (Exh. 36). On Mar. 8, 1976, respondent informed appellant that the right-of-way would be terminated unless the conditions of the 1966 Resolution were complied with within 30 days (Exh. 37). After a review of the situation, respondent had concluded that the conditions upon which the Tribe had consented to the right-of-way had not been fulfilled (Tr. 405).

The first sub-issue is a determination of the purpose for which the right-of-way was granted.

Appellant began its purchases of land on Portage Island using locally generated money. Later, appellant realized that additional funds were available from Federal and State agencies if ap-

pellant could show access from the mainland to Portage Island (Tr. 498). Therefore, appellant asked the Tribe to immediately grant a right-of-way to assure the funding agencies that access existed to the island.

Since the right-of-way was granted to satisfy funding agencies that access existed to Portage Island, appellant contends that there was no breach because the right-of-way was used, throughout, for the purpose for which it was granted (Tr. 16–17).

As the beneficial owner of the tidelands surrounding Portage Island, however, the Tribe, through its governing body, could withhold or give consent for a right-of-way. The Tribe could attach such terms and conditions to its consent as it deemed necessary or appropriate. Appellant recognized that the Tribe's consent was granted subject to the terms and conditions imposed by the Tribe's 1966 Resolution (Tr. 19, 153). Further, 25 CFR 161.20(a) provides that failure to comply with any term or condition of a grant is cause for termination of the right-of-way.

In effect, although appellant may have requested the right-of-way merely to get outside money, the conditions contained in the 1966 Resolution were an inalienable part of the grant. The grant, therefore, is terminable if any condition attached to the grant is unfulfilled.

Earlier, I found that appellant was obligated to make improvements across the right-of-way as a condition of the 1966 Resolution. The second sub-issue is when were those improvements to be constructed.

Proposed lease agreements were drawn up by respondent in 1967 and in 1969. Neither of these lease proposals were agreed to by the parties, however, after the second lease proposal in 1969 respondent and the Tribe began to raise the issue of abandonment or non-use of the right-of-way (Tr. 49).

The 1966 Tribal Resolution provides no time limits for construction of improvements, however, 25 CFR 161.20(b) states that a grant of a right-of-way may be terminated if it has not been used for a consecutive 2-year period for the purpose for which it was granted. Although the subject right-of-way was a means by which appellant got Federal money for construction of a park on Portage Island, the construction of improvements there was an equally important use for which the right-of-way was granted (Tr. 17–19).

Since the issue of non-use was first raised by respondent and the Tribe in 1969, I find that the 2-year time period began to run, at very latest, at that time. To date, appellant has not constructed improvements across the right-of-way. This constitutes a breach of a condition of the right-of-way grant. The grant was, therefore, properly terminated.

The third sub-issue is whether a termination of the right-of-way is equitable.

Eight years elapsed between the first order to show cause issued by respondent and respondent's termination of the right-of-way (Tr. 451–484). Appellant expended money and effort to purchase property on Portage Island both before and during this 8-year gap (Tr. 19–20). Appellant contends that, because of lack of diligence, respondent should not be allowed to terminate the right-of-way.

I find that the Tribe is entitled to termination of the right-of-way notwithstanding that respondent was extremely slow to act. The fact that respondent let so much time pass between its show cause letter and its termination of the right-of-way is not cause to invalidate the termination.

Since respondent holds the subject tidelands, including the area over which

the right-of-way passes, in trust for the Lummi Tribe, respondent has a fiduciary duty to the Tribe. Respondent, therefore, is held to the highest standard of care when dealing with the trust property, *Seminole Nation* v. *United States*, 316 U.S. 286, (1942); *Rockbridge* v. *Lincoln*, 449 F.2d 567 (9th Cir., 1971); *Coomes* v. *Adkinson*, 414 F. Supp. 975 (D.S.D., 1976). Respondent's duty is to act to preserve and protect the trust *res* whenever reasonable and proper, *Sessions, Inc.* v. *Morton*, 348 F. Supp. 694 (C.D. Calif. 1972). *Aff'd.* 491 F.2d 854 (9th Cir., 1974).

Notwithstanding that respondent did not act promptly to preserve and protect the trust *res*, *i.e.*, the Tribal tidelands, that slowness to act should not be imputed to the Tribe. Since a condition of the grant of the right-of-way was not fulfilled, the grant failed and the Tribe is entitled to termination of the right-of-way.

The proposed findings of fact and conclusions of law submitted by the parties have been considered and, except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial.

ORDER

The appeal is dismissed.

L. K. LUOMA,
Chief Administrative Law Judge.

EVERETT L. PRITT

8 IBMA 216

Decided *November 30, 1977*

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Edmund M. Sweeney dismissing a civil penalty proceeding under sec. 109(c) (30 U.S.C. § 819(c) (1970)) of the Federal Coal Mine Health and Safety Act of 1969 in Docket No. MORG 76-56-P.

Reversed and remanded.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Elements of Proof

Although the fact of violation of a mandatory health or safety standard by a corporate coal mine operator is a necessary element of proof, such proof is not legally required to be established in a separate or consolidated proceeding against such operator as a condition precedent to instituting a proceeding against an agent of such operator under sec. 109(c) of the Act. 30 U.S.C. § 819(c) (1970).

APPEARANCES: J. Philip Smith, Esq., for appellant Mining Enforcement and Safety Administration. Everett L. Pritt did not participate in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On Nov. 13, 1975, a fatal roof fall accident occurred in the No. 41 Mine of Bethlehem Mines Corporation (Bethlehem) which resulted in the death of miner Harry L. Henderson. An investigation of the accident was conducted by the Min-

ing Enforcement and Safety Administration (MESA) and a report of the investigation was compiled by Richard J. Vasicek, Federal coal mine inspector. The report states that on the 8 a.m. to 4 p.m. shift of Nov. 13, 1975, the roof control plan was not being complied with and that the accident was caused by improper pillar extraction. On Nov. 14, pursuant to sec. 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 (the Act), Notice of Violation No. 1 ALC/RJV was issued to Charles Wolfe, mine foreman. It described the following condition or practice:

> The sequence of pillar extraction that is described in Drawing No. 7 of the approved roof control plan was not being followed. Nos. 3 and 4 primary splits were connected before the fender of No. 3 primary split was extracted which resulted in a fatal roof fall accident on 11-13-75 in the 5 south section. It was determined by tape measurements that the continuous mining machine operator had operated such machine inby roof supports in the primary splits, 10 and 6 feet respectively. Temporary roof supports were not installed as required by the approved roof control plan in that three temporary roof supports were reportedly installed in No. 3 primary split and no roof supports were installed in the final mining of the No. 4 primary split.

On Mar. 4, 1976, MESA filed a petition for assessment of civil penalty against Everett L. Pritt (Pritt) pursuant to sec. 109(c) of the Act. 30 U.S.C. § 819(c) (1970). The petition alleged that Pritt, as acting section foreman at the mine, "knowingly authorized, ordered, or carried out" the above violation as an agent of Bethlehem, the corporate operator of the mine. The petition also alleged that Bethlehem carried out the violation described in the above notice. There is no indication in the record that a copy of the petition was served on Bethlehem, nor does the record indicate whether there has been a petition for assessment of civil penalty against Bethlehem. Sec. 109(c) of the Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsec. (a) of this sec. or sec. 110(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsecs. (a) and (b) of this section.

On Apr. 9, 1976, Pritt filed an answer requesting a hearing and denying that he knowingly authorized, ordered, or carried out the violation, as an agent or otherwise.

A hearing was held in Charleston, West Virginia, on May 18, 1976. Pritt appeared *pro se*.

The Judge issued his initial decision on July 9, 1976. He determined

that liability for the assessment of a civil penalty against an individual under sec. 109(c) is contingent upon a previous *finding* of a violation committed by the corporate operator. He concluded that since Bethlehem was not a party in this proceeding, it could not be found liable in absentia for a civil penalty therein. For these reasons the Judge reached no conclusion as to the liability, if any, of Pritt and therefore dismissed the proceeding.

Contentions on Appeal

MESA concedes that when an operator's agent is charged with knowingly authorizing, ordering, or carrying out a violation, it must be shown that the operator violated the mandatory standard in question. MESA argues however that it proved the violation charged against Bethlehem *and* against Pritt in the instant proceeding. Citing salient portions of the testimony, MESA states that "the actions and admissions of agent Pritt were in effect the actions and admissions of Bethlehem," as to the fact of violation by the operator, "*for the purposes of section 109(c)*" (MESA Br. 9). (Italics in original.) MESA requests the Board to remand the case for findings as to the individual liability of Pritt. No briefs were filed with the Board by Pritt.

Issue

Whether sec. 109(c) requires proof of a previous quasi-judicial finding of a violation by the corporate operator as an element of proof that an agent knowingly authorized, ordered or carried out such a violation when the sec. 109(c) proceeding has not been joined with a proceeding against the operator pursuant to sec. 109(a).

Discussion

Sec. 109(c) provides for the assessment of a civil penalty against an officer or agent of a corporate operator, if that person knowingly authorized or carried out a violation by the corporation. This section provides that such an individual "shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this sec." [1] In his decision the Judge concluded that:

> Under the provisions of sec. 109(c) of the Act, it is a legal condition precedent that a corporate operator be shown to have violated a particular health or safety standard before a person as its agent can become subject to a civil penalty action thereunder for knowingly authorizing, ordering, or carrying out the said violation.
>
> (Dec. 11).

It was held, therefore, that since MESA failed to show that Bethlehem was previously found to have violated the safety standard in question, and because Bethlehem was not

[1] Sec. 109(a) provides for penalties of up to $10,000 against an operator for each separate violation, and sec. 109(b) allows for fines or imprisonment upon the willful violation of mandatory standards.

joined in the present action (Dec. 8), a necessary condition precedent to the institution of a proceeding under sec. 109(c) was not met. We disagree.

There is nothing in either the language or the legislative history of sec. 109(c) which would lead to a determination that the civil liability of an agent thereunder is dependent upon a previous or contemporaneous administrative determination of the civil liability of the corporate owner under sec. 109(a). Neither is the Judge's conclusion compelled by any due process rights of either Pritt or his employer.

Sec. 109(c) begins with the words: "Whenever a corporate operator violates a mandatory health or safety standard * * *." Such clause, phrased as it is in the present tense, establishes merely an element of a prima facie case under sec. 109(c). There is no ambiguity in this language or warrant in the legislative history to justify the interpretation placed on this section by the Judge. MESA, in assessing the liability of an agent pursuant to sec. 109(c), must establish that the corporate operator similarly violated the standard at issue, but such may be established in the sec. 109(c) proceeding, in the absence of the operator as a party.[2]

In a proceeding in the posture of the present case, any findings favorable to MESA are, of course, binding *only* as to the agent and would be excluded as irrelevant in any subsequent proceeding brought against the corporate operator. In fact a penalty might well be assessed against an individual agent pursuant to sec. 109(c), with the corporate operator found not liable for that same violation in a subsequent sec. 109(a) proceeding. This result is inescapable as the liability of the agent under sec. 109(c) is not derivative in nature; rather he is liable by virtue of his individual acts of omission or commission. Additionally, we can easily conceive of a situation where, for whatever reason, a corporate operator elects not to contest a notice of violation, and, in effect admits the fact of violation by electing to pay the assessed penalty. In such instance, it would be highly prejudicial to permit evidence of the operator's admission against an agent in the 109(c) proceeding who wishes to contest the existence of the violation.[3]

Similarly, the criminal liability of an agent can be determined without a prior or contemporaneous determination of the operator's guilt under sec. 109(b). By way of

[2] In previous cases other administrative law judges have so proceeded in sec. 109(c) cases. *See, e.g., MESA* v. *Daniel Hensler*, Docket No. VINC 75-374-P (Mar. 31, 1976); *MESA* v. *Ronald Corl*, Docket No. PITT 75-445-P (Apr. 23, 1976).

[3] This analysis comports with the express legislative intent that the agent, under sec. 109(c), should not bear the brunt of a corporate violation. Legislative History of the Federal Coal Mine Health and Safety Act of 1969, P.L. No. 91-173, Part 1 at 1191 (1975).

an analogy, it is not uncommon that an accessory is found guilty in a criminal proceeding separate and prior to that brought against the principal. *See* 21 Am. Jur. 2d, *Criminal Law*, § 127.

The Board is concerned, as the Judge may well have been, about a multiplicity of proceedings when it would be fairer and simpler to join related sec. 109 (a) and (c) proceedings. A case such as the present one certainly encourages the waste of scarce adjudicative resources and tax dollars. However, we are unable to perceive any *legal* basis for enforcing such a joinder policy under sec. 109(c) in the absence of any direct regulatory support therefor. Due process demands that MESA prove each element of its prima facie case under sec. 109(c) and that the agent be afforded the opportunity of fully contesting each such element, including the operator's liability.

Because it was determined that MESA failed to establish what the Judge found to be a condition precedent in any proceeding against Pritt, no findings were made with respect to whether Bethlehem had violated the standard in question and whether Pritt was liable, under sec. 109(c), for this same violation. Therefore, having held that MESA can proceed against an agent in the absence of the corporate operator, and without first proceeding against such operator under sec. 109 (a), this case must be remanded in order that the above-cited findings may be made pursuant to sec. 109(c).

ORDER

WHEREFORE, pursuant to authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS REVERSED and that the case IS REMANDED for appropriate further proceedings on the merits.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

DAVID TORBETT,
Alternate Administrative Judge.

ADMINISTRATIVE JUDGE SCHELLENBERG DISSENTING:

The legislative purpose of sec. 109(c) was not to establish a separate and distinct penalty proceeding against agents, officers and directors of corporate operators but rather to extend assessment of penalty provisions and advance the cause of safety. In piercing the corporate veil Congress intended to make such persons conscious of their individual responsibilities and aware that as individuals they could not hide behind the corporate status and "knowingly" authorize, order, or carry out health and safety violations with impunity secure in the knowledge that any penalties as-

sessed would be paid out of corporate funds.

The operative part of sec. 109(c) is the opening phrase "Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act * * *" which, in my opinion, sets out a condition precedent to any charge against an agent, officer or director.

If there is no violation by a corporate operator, there can be no charge against an agent for knowingly authorizing, ordering, or carrying out such violation.

With this in mind, I find myself unable to agree with any interpretation of sec. 109(c) which would permit a finding of liability against an agent for knowingly authorizing, ordering, or carrying out a violation and also permit a subsequent finding of no liability against a corporate operator, a situation which the majority concedes to be a distinct possibility. Either a violation occurs or it does not. I find no support for the assessment of penalty against an agent for what later may prove to be a nonviolation of a corporate operator. Such interpretation, in my opinion, does violence to the conscious concern and intention of the Congress that an agent should not bear the brunt of corporate violations (*See* Legislative History of the Federal Coal Mine Health and Safety Act of 1969, P.L. No. 91-173, Part 1 at 1191 (1975)).

Furthermore, I have trouble accepting the concept of a finding of liability against an absent corporate operator *solely* for the purpose of sec. 109(c). The liability of a corporate operator for penalty arises out of sec. 109(a). The liability of an agent arises out of sec. 109(c) for knowingly authorizing, ordering or carrying out such corporate violation. Therefore, the liability of the agent necessarily must be dependent upon a finding of corporate operator liability, which liability, in my opinion, cannot be established *either* solely for purposes of sec. 109(c) *or* in the absence of the corporate operator.

If the concept of establishing corporate liability in the absence of the operator and *solely* for 109(c) purposes is accepted, it should be applicable whether the 109(c) proceeding against an agent is held before or after a 109(a) proceeding against a corporate operator. However, in the situation where a corporate operator is held not liable in a prior 109(a) proceeding, I cannot conceive of any circumstances where a proceeding could or would be brought against an agent since the 109(a) finding would be forever dispositive of the question of violation by the corporate operator. In other words, the condition precedent would be unfulfilled. I conclude, therefore, that since such concept cannot be applied equally in related circumstances, it is unreasonable and unacceptable.

For the foregoing reasons, I respectfully dissent and would affirm the Judge's decision which I consider to be a more reasonable and workable interpretation of sec. 109 (c) consistent with the purposes of the Act and intent of Congress.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

APPEAL OF BRILES WING & HELICOPTER, INC.

IBCA-1158-7-77

Decided *December 2, 1977*

Contract No. 81-0018 (Geological Survey), Office of Aircraft Services.

Government Motion To Dismiss Denied.

1. Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Notice of Appeal—Rules of Practice: Appeals: Statement of Reasons

A Government motion to dismiss an appeal is denied where the ground for the motion is that the contractor failed to raise its allegations before the contracting officer prior to filing its appeal but the board finds that the contracting officer did have an opportunity to pass upon the principal allegations of the contractor prior to rendering his decision.

APPEARANCES: Messrs. Richard S. Cohen, Richard T. Williams, Attorneys at Law, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, California, for the appellant; Ms. Joyce Wolfe, Department Counsel, Anchorage, Alaska, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal for lack of jurisdiction on the ground that the contractor "failed to raise its allegations before the Contracting Officer prior to filing this appeal." The Government motion is accompanied by a memorandum citing cases relied upon and by affidavits from the Chief, Branch of Contracting, Office of Aircraft Services, Alaska Region, and from the Chief, Division of Technical Services, Alaska Region.

Appellant has filed a Memorandum of Points and Authorities in Opposition To Motion To Dismiss Appeal, together with affidavits from appellant's Director of Marketing and from the General Manager of Tundra Copters, a wholly owned subsidiary of the appellant-corporation.

For the purposes of this motion, it is unnecessary to resolve all of the manifest differences in the position of the parties with respect to what allegations were presented to the contracting officer prior to the time the contract was terminated for default. This is because the appeal file itself discloses that in at least one instance the contracting officer was apprised of the contractor's position that the Government was responsible for the difficulties experienced in performing the contract before the contracting officer rendered his final decision.

It is clear that the termination for default was effected by a telegram dated May 26, 1977 (Appeal File Exh. 24), in which the contracting officer found that as of the close of business on May 26, 1977, the contractor had failed to furnish pilot and mechanic data required by

the contract and that such failure was not excusable. In such telegram the contractor was also advised that it would be liable for any excess costs incurred by the Government in reprocuring the required services. More than a week before the termination for default, the contractor had sent a telegram, marked for the attention of the contracting officer, from which the following is quoted:

> 2. Have found upon investigation of your statement that "Tundras complete inability to plan and execute pilot requirement," was directly attributable to the U.S. Geological Survey Branch unreasonably restrictive, closed-union, discriminatory approach concerning pilots requirements.
>
> Cannot comprehend how new pilots are qualified when existing pilots retire.
>
> 3. We have spared neither time nor money in an attempt to find pilots with suitable requirements as follows:
>
> * * * * *
>
> 3. Contacted personnel agencies that specialize in pilot placement.
>
> 4. Made telephone inquiries to other operators in Alaska and Calif. for avail pilots that met requirements.
>
> 5. Contacted O.A.S. Boise for names of pilots known to meet restrictive standards.

(Appeal File Exh. 17).

The position outlined in the contractor's telegram of May 18, 1977, from which we have quoted above was elaborated upon considerably and expanded somewhat in the notice of appeal but the appellant's basic position has remained the same, as is illustrated by the following passage from the Notice of Appeal, at p. 2:

> 3. * * * [T]he Government engaged in arbitrary and capricious agency action; its termination of the Contract for failure to supply qualified pilots is a direct result of this early capricious Government action and is itself arbitrary, capricious and unlawful.

We note that Clause 3 "Default" of the Contract enumerates excusable causes of delay and that the causes so enumerated include "(c) * * * acts of the Government in either its sovereign or contractual capacity * * *." (Appeal File, Exh. 9, General Provisions, Service Contracts, OAS–17 (Rev. 12–75.))

Decision

The case before us involves an appeal by a contractor from a termination for default of its contract in which the contracting officer had found the contractor's delay in furnishing data required by the contract was not exclusable and where the record shows that both before and after the termination for default the contractor has charged that the delays experienced in performing the contract were attributable to the Government's own actions. The contractor also contests the assessment of excess costs in the amount of $52,035. There is no doubt concerning the authority to this Board to determine the propriety of a termination for default and the amount of excess costs, if any, properly assessable against the defaulted contractor. See *K Square Corporation, A/K/A Ultrascan Company*, IBCA–959–3–72 (Nov. 29, 1973), 80 I.D. 769, 73–2 BCA par. 10,363, and cases cited therein.

[1] We find that the contracting officer did have an opportunity to pass upon the principal allegations of the contractor prior to rendering

his decision. The fact that the Notice of Appeal may have elaborated upon the contractor's basic position in certain respects does not deprive us of jurisdiction over the appeal where, as here, the central issue remains the same (*i.e.*, the extent to which the appellant's delay in performing the contract is attributable to Government action).

It has long been held that proceedings before boards of contract appeals are *de novo*. See *Monroe Garment Company, Inc.* v. *United States*, 203 Ct. Cl. 324 (1973); *S.W. Electronics & Manufacturing Corp.*, ASBCA Nos. 20698 and 20860 (June 23, 1977), 77-2 BCA par. 12,631; *Bendix Field Engineering*, ASBCA No. 10124 (Nov. 8, 1966), 66-2 BCA par. 5959; and *Eastern Maintenance Company*, IBCA-275 (Nov. 29, 1962), 69 I.D. 215, 1962 BCA par. 3583. Generally speaking boards of contract appeals have been loath to dismiss an appeal on a technical ground, if it is possible to make findings on the merits of the real controversy between the parties. See, for example, *Webb Manufacturing Company*, GSBCA No. 4063 (Oct. 3, 1974), 74-2 BCA par. 10,881.

Accordingly, the Government's motion to dismiss the instant appeal as beyond the purview of our jurisdiction is denied.

WILLIAM F. MCGRAW,
Administrative Judge Chairman.

I CONCUR:

GEORGE S. STEELE, JR.,
Administrative Judge.

APPEAL OF HARRY CLATERBOS CO. JV

IBCA-1153-5-77

Decided *December 6, 1977*

Contract No. 14-16-0001-5795, Fish and Wildlife Service.

Motion To Dismiss Granted.

1. Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Timely Filing

An appeal is dismissed as untimely when it was not filed within 30 days of the date on which the contracting officer's final decision was received by a person who was not employed by the appellant but who was authorized to receive his mail during the 6 weeks the appellant was away on vacation. While the appellant denied that such person was authorized to sign a return receipt for certified mail, the Board noted that no question of authority to sign for certified mail had been raised in the contractor's letter requesting an extension in the time for filing the appeal and that no such question was raised until the Government's motion to dismiss the instant appeal was filed.

2. Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Extensions of Time—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Timely Filing—Rules of Practice: Supervisory Authority of the Secretary

A motion to dismiss an appeal is granted when the appellant had failed to file an appeal within 30 days of the date on which the contracting officer's final decision was received. Respecting the contractor's argument that the 30-day time limit should be waived, the Board noted

that the right to extend the time for filing a notice of appeal had been specifically excepted from the grant of authority to the Board as set forth in the regulations governing board proceedings.

APPEARANCES: Mr. John H. Bright, Attorney at Law, Keller, Rohrback, Waldo & Hiscock, Seattle, Washington, for the appellant; Ms. Jean P. Lowman, Department Counsel, Portland, Oregon, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal under the captioned contract on the ground that the appeal was untimely and that the Board is therefore without jurisdiction in the matter. In opposition to the motion, the appellant asserts that the appeal was timely filed but that, even if it were not, the late filing should be waived since the delay in taking the appeal did not prejudice the Government in any way.

Findings of Fact

1. Contract No. 14–16–0001–5795 was entered into between Harry Claterbos Co. JV, and the Government under date of Apr. 30, 1975, in the amount of $831,915. The contract called for the furnishing of all labor, equipment, and supplies required to construct approximately 0.89 miles of access road to the proposed Makah National Fish Hatchery (Phase A), and for the construction of earthwork, drainage, seeding, and other related work at the Hatchery (Phase B), which was located near Neah Bay, Washington. Prepared on standard forms for construction contracts, the contract included the General Provisions of Standard Form 23–A (Oct. 1969 Edition), Labor Standard Provisions, General Conditions, Special Conditions, and separate Technical Specifications for Phase A and for Phase B (Exhibits 1 and 2).[1]

2. The notice to proceed with the work was given to the contractor by letter from the contracting officer dated May 9, 1975, which specified that the work was to commence within 10 calendar days after date of receipt of the notice to proceed and to be completed within 500 calendar days after date of receipt thereof.

3. By Change Orders 1, 2, 3, and 4, the contract amount was increased by $65,943 to $897,858 [2] and the time for completion of the contract work was extended to Oct. 11, 1976 (Exhibits 4, 5, 6 and 10).

4. The bid which resulted in the award of the instant contract was submitted by a partnership under the name of Harry Claterbos Co. JV, Route 1, Box 984, Astoria, Oregon 97103. In addition to Harry Claterbos, Jr., the partners as described in the bid, were Wayne Construction, Inc.—D. W. Arntzen, President, and Claterbos, Inc., Harry Claterbos III, President.

The letterhead of Harry Claterbos Co. JV shows the address of the company to be Route 1, Box 984,

[1] All references to exhibits are to those contained in the appeal file.

[2] The revised contract amount stated in Change Order Nos. 3 and 4 are understated by $20, apparently as a result of misreading the revised contract amount shown in Change Order No. 2.

Astoria, Oregon 97103. The address for Claterbos, Inc., is also listed thereon as Route 1, Box 984, Astoria, Oregon 97103. The letterhead shows the address of Wayne Construction, Inc., to be at 3810 Stone Way N., Seattle, Washington 98103.

5. All Change Orders (Finding 3),[3] and all correspondence from the Government to the Contractor were sent to Harry Claterbos Company JV, or to Harry Claterbos, Route 1, Box 984, Astoria, Oregon 97103.[4] The contracting officer's decision from which the appeal was taken was directed to the same address and this is the address shown in the notice of appeal (Exhibits 13 and 17). There is nothing in the record before us indicating the contractor ever requested a different address be used than the one set forth in the contract.

6. In its claim letter of Sept. 17, 1976, the contractor stated:

> (Item 1) Excavation, (Item 4) Borrow for structural engineered fill, and (Item 6) compaction for structural engineered fill over ran 14,335 cy or 55 percent.
>
> We respectfully request that we be paid $124,857.85 for this overrun. 14,335 cy × $8.71 (aggregate of bid items 1, 4, and 6).
>
> Support data for this request will be forwarded within a few days.
>
> We request a 20-day extension of time.

(Exhibit 7).

7. By a letter to the contracting officer under date of Oct. 13, 1976, the contractor forwarded additional information in support of the claim consisting of a copy of two pages from a notebook of the Government's field engineer showing that the contractor had used 40,335 cy of engineered fill material from July 25, 1975, to Sept. 11, 1975. The amount so used was stated to be a net figure reflecting an allowance of 28½ percent for compaction. Noting that the additional work had been performed without additional mobilizing and during the course of the contractor's regular work, the letter proposed a unit cost of 80 percent of the contractor's original proposal resulting in a revised claim of $99,914.95. The letter concluded by requesting a change order be prepared allowing the contractor the claimed amount and providing for a 30-day extension of time (Exhibit 8).

8. The contracting officer's letter of Jan. 31, 1977, denying the claim was addressed to Mr. Harry Claterbos, Jr., Harry Claterbos Co., Route 1, Box 984, Astoria, Oregon 97103, and concluded as follows:

> This decision is made in accordance with the Disputes Clause, Standard Form 23–A, and shall be final and conclusive as provided therein; unless, within 30 days from the date of receipt of this decision, a written notice of appeal (in triplicate) addressed to the Secretary of the Interior is mailed or otherwise furnished to the Contracting Officer. The Notice of Appeal, which is to be signed by you as Contractor or by an attorney acting in your behalf, and which may be in a letter

[3] Change Order No. 3, dated June 30, 1976, was addressed to Harry Claterbos Co., Route 1, Box 894, Astoria, Oregon 97103. The apparent transposition of figures in the box number appears not to have seriously interfered with delivery for the change order was sent by Certified Mail, Return Receipt Requested (Certified No. 014692), and was receipted for by Barbara Claterbos on July 9, 1976 (Exhibit 6).

[4] The abbreviations for the words "company," "route" and "Oregon" were frequently used.

form, should indicate that an appeal is intended, should refer to this decision, and should identify the contract by number. The Notice of Appeal may include a statement of the reasons why the decision is considered to be the erroneous[5] The Interior Board of Contract Appeals is the authorized representative of the Secretary of the Interior for hearing and determining such disputes * * *.

This letter is my final decision concerning the responsibility of the Contractor to excavate, fill and compact the area outlined in bid items 2, 4 and 6 on the Makah National Fish Hatchery site under Contract No. 14-16-0001-5795.

Immediately below the signature line of the contracting officer, the following handwritten notation appears: "Attachment to Letter: Rules, Interior Board of Contract Appeals." (Exhibit 13.)

9. The contracting officer's decision (Finding 8), was sent by Certified Mail, Return Receipt Requested (Certified No. 824375). The receipt form is signed by one Margaret M. Roman on the line immediately above the words "SIGNATURE OF ADDRESSEE's AGENT, IF ANY" but no date appears under the caption "DATE DELIVERED." On the side of the card on which the return address "Division of Contracting & General Services, U.S. Fish & Wildlife Service" appears, however, there is a postmark of February 2.[6]

10. In a letter dated March 8, 1977, the contractor requested an extension of time for the taking of an appeal, stating:

> In reference to your letter dated Jan. 31, 1977.
>
> We have arrived home on Mar. 5, 1977, from a 6 week vacation. Your letter had been waiting for us at that time.
>
> We do request an additional 20 days extention [*sic*] in which to prepare an answer to the Contracting Officer [*sic*] decision.

(Exhibit 14).

11. The contracting officer responded by letter dated Mar. 11, 1977,[7] in which he stated: "A request for an extension of time for appeal has to be made before the 30 days expires, before a contracting officer may consider a request for an extension of time. Therefore, I

[5] The quoted language appears to have been included in accordance with the requirements of FPR Sec. 1-1.318-1 (contracting officer's decision under a Disputes Clause), which also provides:

"(b) A copy of each contracting officer's decision shall be furnished to the contractor by certified mail, return receipt requested, or by any other method which provides evidence of the date of receipt of the decision by the contractor."

[6] In an affidavit which accompanied the Government's motion to dismiss the appeal, the contracting officer states:

"The return receipt shows receipt by the Contractor's agent, but it does not bear the date of such receipt * * *. The address side of the return receipt, whereby the same was addressed for return to me, bears a postmark showing the date Feb. 2, 1977 * * *." (Affidavit of Richard D. Mundinger, dated May 25, 1977).

[7] The letter was accompanied by a copy of an opinion from the Office of the Regional Solicitor. Among the cases cited therein was the case of *Refer Construction Company*, IBCA-209 (Oct. 20, 1960), 67 I.D. 457, 461, 60-2 BCA par. 2831, at 14,689, in which the Board stated:

* * * * *

"It is correct that the Board 'has no authority to waive this limitation or otherwise extend the 30-day period,' particularly in view of the precise language of 43 CFR 4.16:

'The Board may grant extensions of time except with respect to the filing of the notice of appeal.'

"However, before the appeal time has elapsed, contracting officers may validly extend the appeal period in the same manner as they have the power to enter into contracts, modify, and terminate them * * *."

cannot grant an extension of time" (Exhibit 16).

12. In support of its opposition to the granting of the Government's motion to dismiss, the appellant submitted an affidavit, the entire contents of which is quoted below:

I Harry Claterbos, being first duly sworn on oath, state as follows:

On Mar. 5, 1977, I arrived home from a six week vacation and found a letter dated Jan. 31, 1977, from Mr. Richard D. Mundinger, Contracting Officer, denying our claims for reimbursement for 14,335 cubic yards of excavation, structural engineered fill and compaction of the structural engineered fill. Said letter also provided that the denial would be final unless I appealed within thirty days from the date of receipt of the decsion [*sic*].

I immediately wrote a letter to Mr. Mundinger requesting an additional twenty days extension in which to prepare an appeal. I in turn was advised that since my request for an extension of time had not been made within the appeal period of thirty days, that I could not get an extension.

Subsequently I discussed the matter with my attorney and belatedly filed the instant appeal.[8]

The individual who signed the receipt for certified mail is one Margaret Roman who had previously been requested by myself to transfer my mail from my mail box to my home. She had never been authorized to receive certified mail and certainly was not my agent for any other purpose than to deliver my mail unopened from my mail box to my home in order to prevent my mail box from overflowing during my absence.

The refusal on the part of the Contracting Officer to allow me an extension of time in order to file an appeal, which refusal was based upon the assertion that requests for extension can only be granted when made within the appeal period proper, misled me into believing that there was no method by which I could have this matter reviewed.

Contentions of the Parties

In the brief filed in support of the motion to dismiss the appeal, the Government quotes from the Disputes Clause included in the contract to show that the decision of the contracting officer becomes "final and conclusive" unless, within 30 days from the date of receipt thereof, "the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved."[9] Thereafter, the Govern-

[8] The Notice of Appeal, dated May 4, 1977, stated:

"The contracting officer's decision was contrary to the rules, terms and General Provisions governing this contract No. 14–16–0001–5795. Said decision was further erroneous because of incorrect interpretation and definition of contract terms and language as applied to the Notice of Claim" (Exhibit 17).

[9] "6. Disputes:

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily

(Continued)

ment asserts that the decision of the contracting officer from which the instant appeal was taken was made on Jan. 31, 1977, and was mailed to the contractor on that date by certified mail, return receipt requested; that the return receipt shows the decision was receipted for by the contractor's agent not later than Feb. 2, 1977; that computed in the usual manner from the Feb. 2, 1977 date, the time for taking an appeal expired on Mar. 4, 1977; that it was not until Mar. 8, 1977, or 4 days after the 30-day period for taking an appeal had expired that the contractor requested a 20-day extension of time for taking an appeal; that the contracting officer advised the contractor that a request for an extension of time to file an appeal must be made prior to the expiration of the 30-day period; and that since the appeal was not timely filed, the Board has no jurisdiction in the matter.

Opposing the Government's motion to dismiss the appeal, appellant's counsel takes exception to what he describes as "the government's characterization of the recipient of said decision as appellant's agent." Elaborating upon this position the brief states:

> The individual who signed the certified mail receipt was, as the appellant's affidavit shows, neither authorized nor appointed to in any manner deal with certified mail.
>
> * * * * *
>
> * * * In this case the individual who receipted the certified mail did so for the purely protective purpose of getting the mail out of the mail box and into the appellant's house where it would not be destroyed in his absence.[10] Certainly appellant's neighbor would not be a person authorized to receive service on behalf of the appellant if original process were involved [11] and it seems extraordinarily unjust to bind the appellant to the decision of a delivery man for the United States post office whose decision to deliver a piece of certified mail into the hands of a person who may or may not be qualified to receive it is now operating to deprive appellant of his rights in this matter.
>
> * * * * *
>
> It is almost inconceivable that any reasonable person could agree that the law requires appellant to be deprived of his rights for his failure to be at home at the proper time or on the proper day that the government chose to render its decision * * *.[12]

(Continued)

to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

"(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law." (General Provisions, Standard Form 23–A, Oct. 1969 Ed.)."

[10] Addressing this argument the Department counsel states:

"This could not be the case. Certified mail, return receipt requested, is not left in the mail box. If no one is available to sign the receipt, it is retained by the post office for a time and then returned to sender" (Memorandum to Board dated July 1, 1977).

[11] The Department counsel comments:

"[W]hether Margaret Roman would be authorized to receive service of summons and complaint is not relevant. Those are not the requirements of the contract" (Memorandum, note 10, *supra*). This view of the matter is supported by the decided cases. See, for example, *Maney Aircraft Parts, Inc.*, ASBCA No. 14363 (Nov. 2, 1973), 73–2 BCA par. 10326, at 48,767.

[12] Government counsel examines the question from a different vantage point, stating:

The second position advanced by the appellant in opposition to the motion to dismiss is grounded on the premise that the Board has authority to waive the 30-day notice requirement for taking an appeal. In appellant's brief the argument is stated in the following terms:

> The government's brief continues to assert the position that the rights of the government vest after the thirty day appeal period has passed when, in fact, the well known case of *Mancy Aircraft Parts, Inc.* v. *U.S.*, 17 CCF par. 81,070 (1972), long ago disposed of this matter when it established that Boards of Contract Appeals have power, in proper circumstances, to waive or extend the appeal period specified in the usual disputes of laws [*sic*]. *See also Monroe M. Tapper* v. *U.S.*, 17 CCF par. 81,288 (1972). In this case, there is a substantial hardship worked upon the appellant for failing to be at his mail box at the time that the government's decision was delivered. Moreover, no conceivable prejudice could flow to the government as a consequence of allowing this appeal on the merits.[13]

"[T]his is not true. In the exercise of ordinary care and diligence, the Contractor could and should have handled his affairs so that timely action would have been taken on this matter" (Memorandum, note 10, *supra*).

The question of diligence has arisen in a number of cases involving the timeliness of an action taken by a contractor. A recent case in which such question was addressed is *Fred Schwartz*, ASBCA No. 20724 (May 11, 1976), 76–1 BCA par. 11,916 where the Board stated:

"[I]f the notices did not, in fact, come to appellant's personal attention until after the cure dates had passed, the fault must lie in the failure of appellant and his business concern to exercise due diligence. Respondent cannot be blamed for appellant's carelessness in handling its mail and appellant may not be permitted to benefit, at the other party's expense, from its own lack of diligence" (76–1 BCA at 57,121).

[13] The Government flatly contests this assessment, asserting:

"[T]his is patently not true. The Government cannot be required to go behind every return receipt signed for a contractor in the space provided for "Signature of Addressee Agent" to learn whether there is only one person who may receive mail for a firm, and, if so, whether the person signing was specifically authorized by that individual to receive certified mail. The resultant burden would be highly prejudicial both to the Government and to its Contractors" (Memorandum, note 10, *supra*).

In any event, it is clear that the mere absence of any showing of prejudice to the Government is not necessarily dispositive of the matter. This is evident from the language employed by the Court of Claims in its decision in the case of *Monroe M. Tapper and Associates* v. *United States*, 198 Ct. Cl. 72, 77 (1972) ("Plaintiff's position is that a waiver must be accorded, and the appeal period enlarged, unless the Government can show prejudice from such enlargement. We cannot accept that as the sole and exclusive criterion * * *"). *See also Maney Aircraft Parts, Inc.* v. *United States*, 202 Ct. Cl. 54, 61 (1973) ("Prejudice to the government is a factor to be considered, but the lack of such prejudice does not automatically entitle the plaintiff to a waiver. Furthermore, carelessness or neglect on the part of the contractor is relevant, though not necessarily conclusive * * *").

Timeliness of the Appeal

A. *Discussion*

Prior to considering the questions raised by the instant appeal, there would appear to be some value in outlining the general principles in this area as reflected in the decided cases. At the outset we note that a motion to dismiss an appeal as untimely generally raises questions as to (1) the date upon which the contractor received the contracting officer's final decision; (2) the date on which the contractor mailed [14] or otherwise furnished

[14] Where timeliness of an appeal is in issue and the mails have been used to effect delivery, the contractor has the burden of proving by a preponderance of the evidence that the appeal was properly and timely mailed. *Astro Industries, Inc.*, ASBCA No. 19082 (Oct. 22, 1974), 74–2 BCA par. 10,921. Showing an appeal to have been properly mailed entails proving that the envelope containing the notice of appeal was properly addressed and carried

(Continued)

to the contracting officer the notice of appeal, and (3) the method of computing the 30-day period.[15] *Pyramid Van & Storage Company of Monterey*, ASBCA No. 14,257 (Oct. 14, 1969), 69-2 BCA par. 7952.

It is clear that in ordinary circumstances the decision of the contracting officer is required to be mailed to the contractor at the address shown in the contract. *Vinnell Corp. of California*, ASBCA No. 3382 *et al.* (Nov. 8, 1957), 57-2 BCA par. 1517; *Chicago Garment Co., Inc.*, ASBCA No. 4657 (July 16, 1959), 59-2 BCA par. 2278. Where the contractor properly requests the Government to use a different address, however, the decision should be sent to such address and, in the event it is not, the appeal period commences to run when the decision is received at the designated address. *General Motors Corp., Ternstedt Division*, ASBCA Nos. 2830, 2831 (Aug. 15, 1956), 56-2 BCA par. 1041.

It is also clear that the time for taking an appeal starts to run when the contractor receives the contracting officer's final decision and that the Government has the burden of proving when the contractor receives the decision. It accomplishes this in most instances by producing a return receipt. McBride & Wachtel, Government Contracts, Sec. 6.90[2]. In cases where the time of receipt of the contracting officer's decision or a board decision[16] is in issue, the question presented frequently turns on the effect to be given to the rebuttable presumption that a letter properly mailed and posted reached its destination and was received by the party to whom it was addressed. *See Sancolmar Industries, Inc.*, ASBCA No. 16879 (Dec. 12, 1972), 73-1 BCA par. 9812, where an appeal was dismissed as untimely on the basis of applying this presumption. The presumption may be invoked, however, only if the decision is sent to the contractor's correct address. That address will be the address shown in the contract unless prior to the issu-

(Continued)
sufficient postage. In most instances the postmark is used to establish the time of mailing. There are cases, however, where appellants have succeeded in establishing (i) that a notice of appeal was mailed earlier than the time indicated by a postmark (*e.g., Allied Contractors, Inc.*, ASBCA No. 5254 (Mar. 12, 1959), 59-1 BCA par. 2143) or (ii) that a notice of appeal was properly and timely mailed even though the Government denied having received it. *Astro Industries, supra.*

[15] The 30 days allowed for taking an appeal is governed by the time that elapses between the date when the contracting officer's decision is received by the contractor and the date when the notice of appeal is mailed to the contracting officer. *Wiscombe Painting Company*, IBCA-78 (Oct. 26, 1956), 56-2 BCA par. 1106. In computing the 30 days allowed by the "Disputes" clause, the several boards have uniformly followed the general rule of excluding the date on which the appellant received the contracting officer's decision and including the day on which the appellant mailed or delivered his appeal. *Guye Construction Co.*, ASBCA No. 4756 (Jan. 7, 1959), 59-1 BCA par. 2060; *Edisto Construction Co.*, IBCA-409 (Feb. 28, 1964), 71 I.D. 68, 1964 BCA par. 4120. When the 30th day falls on a Sunday or a day that is established as a public holiday by Federal law, the time for appealing does not expire until the end of the next succeeding day which is neither a Sunday nor a Federal holiday. *Bushman Construction Company*, IBCA-193 (Apr. 23, 1959), 66 I.D. 156, 59-1 BCA Par. 2148. Our rules have been modified to also include Saturdays or other nonbusiness days (43 CFR 4.22(e)).

[16] *See Vap-Air Division, Vapor Corporation*, ASBCA No. 14411 (Dec. 17, 1971), 72-1 BCA par. 9240 (Government's motion for reconsideration denied as untimely).

ance of the decision the contractor has requested that a different address be used. In the comparatively early case of *Chicago Garment Co., Inc.*, ASBCA No. 4657 (July 16, 1959), on reconsideration, 59–2 BCA par. 2278, the Government urged that the appeal be dismissed as untimely, citing as authority the rule stated in 31 C.J.S., Evidence, Section 135a, as follows: "There is a strong presumption that mail matter properly addressed, stamped and mailed was received by the addressee. * * * As to registered mail, there is a presumption that it was delivered, and that the person who signed the receipt therefor had authority so to do * * *" (59–2 BCA at 10,205).

While in *Chicago Garment*, the Government's motion to dismiss the appeal as untimely was denied, on the dual grounds that the decision was sent to the wrong address [17] and that the person who receipted for it was without authority to do so, contractors have rarely succeeded in overcoming the effect of the presumption in cases where the evidence shows that the decision was sent to the contractor's proper address. In many instances, such dismissals have involved attempts by corporate contractors to deny that receipt by a clerical employee was receipt by the corporation for the purpose of commencing the 30-day appeal period contemplated by the "Disputes" clause. *See*, for example, *L & V Machine and Tool Works, Inc.*, ASBCA No. 15243 (Aug. 12, 1971), 71–2 BCA par. 9035 in which addressing this question the Board stated:

> [T]he Disputes Clause provides that the appeal period shall begin to run upon receipt of the contracting officer's final decision. It does not specify that only a particular class of persons shall be authorized to accept the communication containing the decision. All that is required is that the contractor receive a copy of the decision. It is well known that a corporation can only act through its agents and employees. The receipt of mail is an ordinary business function commonly and uniformly entrusted to clerical personnel. We know of no case, and none has been brought to our attention by appellant, which requires that the clerk who receipts for the mail of a corporation be an officer of the corporation or a person authorized to bind the corporation contractually. We are satisfied from the record that the contracting officer's final decision was delivered to appellant on 17 Apr. 1970.

Unincorporated concerns have not been any more successful in overcoming the effect of the presumption where the mail has been delivered to the contractor's proper address. Illustrative is the recent case of *Fred Schwartz*, ASBCA No. 20724 (May 11, 1976), 76–1 BCA par. 11,916 in which the Armed Services Board stated:

> Addressing the issue of the validity of the Notices of Default in the terms posed

[17] With respect to this ground, the Board stated:

"[T]he presumption of the authority of the person signing for the letter does not apply unless the letter was properly addressed, and the Government is not entitled to the benefit of this presumption unless it is first established that the letter was 'properly addressed' to appellant * * *. The contract did not show Traverse City as appellant's mailing address, and at no time did appellant request the Government to use that address" (59–2 BCA at 10,206).

by appellant, the essential dispositive fact is appellant's receipt of the Notices. Appellant's assertion that the Notices did not come to his personal attention until after the cure dates had expired, even if true, does not dispose of the matter. In accordance with generally observed principles of commercial law, codified in the statutes of nearly every state, including the State of California where appellant conducts its business, appellant received each Notice when it was duly delivered at the place of business through which the contract was made. Uniform Commercial Code, Sec. 1-201(26)(b).[18]

Our findings that the Notices of Default * * * were duly delivered to appellant's place of business through which the contracts were made on 5 June 1975 and 9 June 1975, respectively, are reinforced by the signing of the return receipts therefor by an employee of appellant who had actual authority to receive mail on appellant's behalf. It is not a prerequisite to the effectiveness of a notification sent to an unincorporated business concern that the notification be received only by an official of the concern authorized to bind the company contractually. *Ban Electronics*, ASBCA No. 16616, 73-2 BCA par. 10,045 (76-1 BCA at 57121).

See also M. D. Willner, DOT CAB No. 73-9 (Dec. 6, 1974), 75-1 BCA par. 11,011 (appeal dismissed as untimely where not filed within 30 days of the date when the contracting officer's final decision was received for the contractor by his wife).

B. Decision

The principal question presented for our decision is the date upon which the appellant received the contracting officer's final decision. It is clear that under the Disputes clause (note 9, *supra*), the contracting officer is required to mail or otherwise furnish a copy of his decision to the contractor. For the most part, the facts having a bearing on the manner in which this obligation was discharged are undisputed. In this case the contracting officer (i) issued a final decision; (ii) stated that his decision was being rendered in accordance with the Disputes clause; (iii) gave notice to the contractor that the decision would become final and conclusive unless within 30 days from the date of receipt thereof a written notice of appeal addressed to the Secretary of the Interior was mailed or otherwise furnished to the contracting officer; (iv) instructed the contractor as to the contents of any notice of appeal and as to the person authorized to sign such notice; (v) informed the contractor that the Interior Board of Contract Appeals was the authorized representative of the Secretary of the Interior for the purpose of hearing and determining contract disputes; (vi) furnished the contractor with a copy of the rules of the Interior Board of Contract Appeals; and (vii) sent a copy of the final decision to the contractor at the address shown in the contract by certified mail, return receipt requested (see note 5, *supra*).

The appellant denies, however, that the individual who signed the receipt for certified mail which accompanied the contracting officer's final decision had any authority to do so. In the affidavit quoted in the

[18] Oregon has adopted the Uniform Commercial Code including the subsection cited without any variation. *See Anderson Uniform Commercial Code*, Sec. 1-201:2 Local Statutory Citations and Variations.

text above, the denial is couched in the following terms:

> The individual who signed the receipt for certified mail is one Margaret Roman who had previously been requested by myself to transfer my mail from my mail box to my home. She had never been authorized to received certified mail and certainly was not my agent for any other purpose than to deliver my mail unopened from my mail box to my home in order to prevent my mail box from overflowing during my absence.

Neither in the above-quoted language nor elsewhere in the record is there an indication that Margaret Roman was given any instructions at all with respect to how she should handle mail addressed to the contractor and sent certified, return receipt requested. The record clearly shows, however, that in the ordinary course of administering the contract prior to the issuance of the findings, the contracting officer frequently transmitted documents to the contractor by certified mail, return receipt requested (Exhibit Nos. 4, 5, 6, and 10). One of the documents so transmitted was Change Order No. 2 involving an increase to the contract price of $363 (Exhibit No. 5), as contrasted with the amount involved in the revised claim for which a change order was requested in the amount of $99,914.95 (Finding 7). We note that some 3½ months elapsed between the time the contractor completed its claim presentation on October 13, 1976 (Finding 7), and the contracting officer issued his final decision on Jan. 31, 1977. (Finding 8.)

That Margaret Roman regarded signing for certified mail addressed to the contractor as within the ambit of the authority conferred upon her is evident from the fact that she signed her name on the return receipt card immediately above the words "SIGNATURE OF ADDRESSEE'S AGENT, IF ANY." (Finding 9.) It is considered significant that no question was raised concerning Margaret Roman's authority to sign for certified mail in the contractor's letter of Mar. 8. 1977, requesting a 20-day time extension for taking an appeal (Finding 10). In fact, no such question was raised until the Government filed its motion to dismiss the instant appeal.

[1] As we have previously noted with citation to authorities, the presumption is that mail properly addressed and bearing the necessary postage is received by the addressee and that the person signing for such mail has the authority to do so. Where, as here, the presumption is applicable, the burden is on the appellant to show that the recipient was not authorized to receive the mail and to sign the receipt. No such showing has been made in this case. We, therefore, find that the contractor received the contracting officer's decision within the meaning of the Disputes clause when Margaret Roman received and receipted for such decision on or before Feb. 2, 1977, and thereby started the running of the 30-day appeal period.

In accordance with the general rule, the 30-day period for taking

an appeal commenced to run on Feb. 3, 1977, and expired on Mar. 4, 1977. Irrespective of whether Mar. 8, 1977 (the date of the request to extend the time for taking an appeal), or May 4, 1977 (the date of the notice of appeal), is considered to be the date the appeal was taken, there was no timely filing.

Waiver of the 30-day time limit for taking an appeal

A. *Discussion*

The question of whether a board of contract appeals has authority to waive the 30-day time limit for taking an appeal depends upon (1) the construction to be placed upon the language contained in the standard Disputes clause and (2) the terms of the delegation of authority from the head of a department or agency to a particular board of contract appeals. Prior to the Court of Claims' decision in *Maney Aircraft Parts, Inc.* v. *United States*, 197 Ct. Cl. 159 (1972), the various boards of contract appeals were uniform in holding that the filing of an appeal within 30 days from the date of receipt of a contracting officer's final decision was a prerequisite to the board having jurisdiction over an appeal. In dismissing an appeal for lack of jurisdiction in the case of *Maitland Brothers*, ASBCA No. 6607 (Feb. 25, 1966), 66-1 BCA par. 5416, the Armed Services Board of Contract Appeals stated:

> [F]or more than twenty years this Board and its predecessor Board have consistently held that it does not have jurisdiction to consider and decide an appeal unless there has been a timely appeal from the contracting officer's decision. See General Motors Corporation, WDBCA No. 9, 1CCF 100, decided 9 April 1943, where the Board dismissed an untimely appeal as beyond its jurisdiction, saying: "When an appeal is not taken in time, neither this Board nor its president as representative of the Secretary of War has power to act thereon." This rule has been consistently followed to the present time * * * (66-1 BCA at 25,429).

Following the Court of Claims' decisions in *Maney Aircraft Parts, Inc., supra*, and in *Monroe M. Tapper and Associates* v. *United States*, 198 Ct. Cl. 72 (1972), most boards of contract appeals that have had occasion to consider the question have accepted the Court of Claims' view that the 30-day time limitation is not jurisdictional and that, subject to good cause being shown, a board of contract appeals may exercise its discretion and waive the requirement of the Disputes clause that a contractor file his appeal within 30 days after he receives the final decision of the contracting officer. *See*, for example, *West Coast Dredging, Inc.*, ENG BCA No. 3254 (Apr. 28, 1972), 72-1 BCA par. 9461; *SWH Company*, DOT CAB No. 72-29 (June 29, 1972), 72-2 BCA par. 9570; *Conncor, Inc.*, GSBCA No. 4654 (Dec. 7, 1976), 77-1 BCA par. 12,255.[19] *Cf. Central Reforestation*, AGBCA No. 76-179 (Feb. 25, 1977), 77-1 BCA par. 12369 (no

[19] The General Services Board took exception to the Court of Claims ruling in *Maney, supra*, in *Grunley-Walsh Construction Co., Inc.*, GSBCA No. 3132 (Sept. 26, 1972), *on reconsideration*, 72-2 BCA 9687. In *Conncor, Inc., text supra*, however, the General Services Board noted that since the Court of Claims had specifically set forth its position to that Board in *Grunley-Walsh Construction*

authority to consider waiver question where regulation expressly prohibits extending the time for taking an appeal).

The Court of Claims' decision in *Maney*, *supra*, has not been accepted as dispositive of the question by the Armed Services Board of Contract Appeals, however, as is clear from its subsequent decision in *Maney Aircraft Parts, Inc.*, ASBCA No. 14363 (Apr. 28, 1972), 72–1 BCA par. 9449, where the following statement appears: "[I]n this instance, the Board must respectfully decline to follow the Court of Claims' suggestion concerning its discretion to waive the requirement of appeal within thirty days of receipt of the contracting officer's final decision" (72–1 BCA at 43,887).

Thereafter, acting pursuant to the authority contained in Public Law 92–415, 86 Stat. 652, *amending* 28 U.S.C. § 1491, the Court of Claims remanded the case to the Armed Services Board and directed it to exercise its discretion and determine whether the 30-day time limit requirement should be waived (*see Maney Aircraft Parts, Inc.* v. *United States*, 202 Ct. Cl. 54 (1973)). While in *Maney Aircraft Parts, Inc.*, ASBCA No. 14363 (Nov. 2, 1973), 73–2 BCA par. 10,326, the Board did comply with the Court's directive, it made clear that it had not altered its views with respect to the underlying questions, as is evidenced by the following statement from the opinion.

> At the outset, we reiterate that we are considering this case again in its present posture solely because of the Court's remand order and pursuant to its instructions. As such, we do not regard ourselves as acting under our Charter or the language of the contract's Disputes clause as written or properly interpreted. Our actions here in these circumstances should not be interpreted as any modification of the views we expressed the last time this case was before us. Maney Aircraft Parts, Inc., 72–1 BCA par. 9449.[20]

(73–2 BCA at 48,765.)

Based upon such consideration, the Board determined that the appellant had "not shown good cause or justifiable excuse under all the facts and circumstances of the case for failing to file its appeal within the 30-day time limit." (73–2 BCA at 48,768.) This ruling was sustained by the Court of Claims in Order No. 191–70, dated Dec. 13, 1974, by which the Government's motion for summary judgment was allowed and the plaintiff's petition was dismissed (*see* 205 Ct. Cl. 881).

The terms of our delegation of authority are set forth in 43 CFR, Part 4. With respect to the question presented, the following provisions therefrom are of particular importance:

* * * * *

(f) Extensions of time. (1) The time for filing or serving any document may

(Continued)
Co., Inc. v. *United States*, 206 Ct. Cl. 887 (1975), the Board now considers the matter of waiver, citing *R & O Industries, Inc.*, GSBCA No. 4582 *et al.* (July 30, 1976), 76–2 BCA par. 12,026 and *R. C. Hedreen Company*, GSBCA No. 4259 (Apr. 15, 1975), 75–1 BCA par. 11,202.

[20] This same position has been enunciated by the Board in subsequent decisions where the question of the timeliness of an appeal has been in issue. *E.g.*, see *Henry Products Company, Inc.*, ASBCA No. 18299 *et al.* (Jan. 28, 1974), 74–1 BCA par. 10,457.

be extended by the Appeals Board or other officer before whom the proceeding is pending, *except for the time for filing a notice of appeal* and except where such extension is contrary to law or regulation. (43 CFR Sec. 4.22 Documents) [Italics added.]

* * * * *

(b) [W]here it has authority to extend time limitations, the Board may extend them in appropriate circumstances, on good cause shown * * * (43 CFR Sec. 4.100 Guidelines).

B. *Decision*

[2] Since the above-quoted regulations are considered to be determinative of the question presented, we need not undetake to determine whether the language of the Disputes clause itself precludes the Board from exercising jurisdiction over an appeal not filed within 30 days from the date and contractor receives the contracting officer's final decision. While the Board of Contract Appeals has been authorized to decide finally for the Department appeals to the Secretary of the Interior from findings of fact or decisions by contracting officers of the Department (43 CFR 4.1), the right to extend the time for filing a notice of appeal has been specifically excepted from the grant of authority to the Board. We, therefore, find that we are without authority to extend the 30-day time limit requirement of the Disputes clause for taking an appeal from a contracting officer's final decision.

Conclusion

The Government's motion to dismiss the instant appeal for lack of jurisdiction is granted and the appeal is dismissed.

WILLIAM F. MCGRAW,
Chief Administrative Judge
Chairman.

WE CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

RUSSELL C. LYNCH,
Administrative Judge.

APPEAL OF EKLUTNA, INC.

2 ANCAB 214

Decided *December 19, 1977*

Pursuant to regulations contained in 43 CFR Part 4, Subpart B, 4.21(c), on Dec. 7, 1977, the Bureau of Land Management (hereinafter BLM), through the Office of the Regional Solicitor, Anchorage Region, filed a Petition for Reconsideration of this Board's "Decision Reversing Bureau of Land Management Decision #AA-6661-B" issued Sept. 28, 1976.

Decision affirming Bureau of Land Management's Decision of Aug. 1, 1974 and reversing this Board's Decision dated Sept. 28, 1976.

Granting Petition for Reconsideration and Decision on Reconsideration.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Reconsideration

Where regulations provide that a party may promptly request the reconsideration of a decision but provides no time limit for the filing of such a request, a request for reconsideration filed within a reasonable time under the circumstances of the appeal will be considered timely.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Reconsideration

A Petition for Reconsideration will be granted when in its discretion, the Alaska Native Claims Appeal Board finds that extraordinary circumstances do exist that had not been considered by the Board in rendering its decision.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

A regulation enacted to implement the sale of isolated tracts pursuant to 43 U.S.C. § 1171 (1970), which defined the term "cornering" for purposes of that Act and which was not enacted pursuant to ANCSA, is not binding upon this Board in interpreting the meaning of the phrase "cornering" pursuant to § 11(a) of ANCSA.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

This Board will not reverse an administrative determination of the Bureau of Land Management that is a reasonable, consistently applied interpretation of the law, and on which many Village Corporations relied in making their land selections under ANCSA, even though it is not the only reasonable interpretation of the statute.

5. Alaska Native Claims Settlement Act: Survey: Generally—Alaska Native Claims Settlement Act: Survey: Standard Parallel—Alaska Native Claims Settlement Act: Withdrawals: Cornering

The Alaska Native Claims Appeal Board, in reversing a previous decision, finds that townships, which by legal description have a common corner, but are not in actual physical contact due to the location of a "standard parallel" or "correction" line, such townships shall be considered as not cornering for purposes of § 11(a) of ANCSA.

254-916—78——2

APPEARANCES: Saul R. Friedman, Esq., Rice, Hoppner, Blair & Hedland, Edward G. Burton, Esq. and John W. Sedwick, Esq., Burr, Pease & Kurtz, Inc., for Eklutna, Inc.; John W. Burke, Esq. and Joyce B. Wolfe, Esq., Office of the Regional Solicitor, on behalf of Bureau of Land Management; James Vollintine, Esq., John R. Snodgrass, Esq. and James D. Linxwiler, Esq., for Cook Inlet Region, Inc., and James N. Reeves, Esq., Assistant Attorney General, for the State of Alaska.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, *as amended*, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), and implementing regulations in 43 CFR Part 4, Subpart A, 4.1(5), and Subpart B, 4.21(c), and Subpart J, Part 2650, hereby makes the following findings, conclusions and decision on the Bureau of Land Management's Petition for Reconsideration.

43 CFR Part 4, Subpart B, 4.21 (c) provides as follows:

Finality of decision. No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regula-

tions relating to the particular type of proceeding concerned, and must state with particularity the error claimed. The filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Director or an Appeals Board. A request for reconsideration need not be filed to exhaust administrative remedies.

The Bureau of Land Management filed this Petition for Reconsideration some 39 days following this Board's Decision of Sept. 28, 1976. Eklutna, Inc., alleges that the Bureau of Land Management failed to file this Petition in a timely fashion as required by 43 CFR 4.21 (c). This regulation requires that "Requests for reconsideration must be filed promptly, * * *." No time limitations for filing such motions are set forth in the regulation.

[1] This Board finds that the Petition for Reconsideration was filed within a reasonable time under the circumstances and will be considered timely filed in accordance with 43 CFR 4.21(c).

In its Petition for Reconsideration, the Bureau of Land Management claims specifically that this Board's Decision of September 28, 1976 is contrary to Departmental regulation; that this Board's Decision is contrary to the intent of Congress; and that this Board is bound to follow the reasonable, consistently applied Departmental interpretation of the meaning of the word "cornering" as it is used in §11 of ANCSA.

The Bureau of Land Management further contends that the Board's Decision redefines the term "cornering" as it was used by appellant in implementing ANCSA, and that this will result in a loss of land entitlement for many villages and several regions under ANCSA.

At no time prior to the submittal of the Petition for Reconsideration did the Regional Solicitor's Office, Attorneys for the Bureau of Land Management, argue that the interpretation of the term "cornering" by the Bureau of Land Management had been a reasonable consistently applied administrative interpretation. No evidence was submitted to this Board showing that this interpretation was a reasonable interpretation in light of ANCSA and its method of identifying withdrawn land, nor was any evidence submitted showing any consistency in application of the definition of the term. The Board assumes that the Regional Solicitor was not then aware of the full implications of the appeal.

[2] In light of these allegations of Petitioner and the memorandum submitted by them in support of their Petition for Reconsideration, this Board finds that extraordinary circumstances do exist that were not considered by the Board in rendering its Decision of Sept. 28, 1976 and sufficient reason appears for this Board to grant the Petition for Reconsideration. This Board therefore grants the Petition for Reconsideration. The parties having briefed the issues presented on reconsideration, the Board renders the following decision:

The issues presented in the original appeal concerned the definition of the term "cornering" as used by the Bureau of Land Management to identify withdrawals made under § 11(a)(1) of ANCSA. This sec. provides that lands were withdrawn for selection by a village corporation in two concentric tiers surrounding the township or townships in which a village corporation was located. The lands in the first tier were described as being those lands which were contiguous to or cornering on the township that encloses all or part of a Native village. The second tier of withdrawn lands were those lands which were contiguous to or cornering on the lands withdrawn in the first tier.

Thus, in the case of a village located entirely within one township and having one "core" township, 25 townships would be withdrawn for selection by a village. This would be comprised of the core township, the first tier townships which consist of four townships which are contiguous to and four townships which corner on the core township, and the second tier townships which consist of four townships which corner on and twelve townships which are contiguous to the first tier townships. This is shown in Diagram A as follows:

DIAGRAM A:

C/2				C/2
	C		C	
		X		
	C		C	
C/2				C/2

X = Core Township

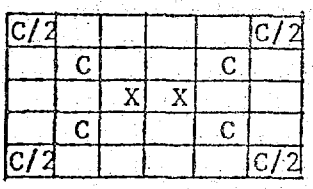
C = Cornering Township, 1st Tier

C/2 = Cornering Township, 2nd Tier

☐ = Contiguous Township

In the case of a village located in two townships, and thus having a "double core," 30 townships would be withdrawn: two "core" townships, eight cornering townships, and 20 contiguous townships as follows:

DIAGRAM B:



XX = Double Core Townships

C = Cornering Township, 1st Tier

C/2 = Cornering Township, 2nd Tier

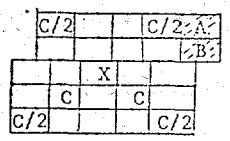
☐ = Contiguous Townships

In both cases the basis pattern of two concentric tiers is maintained.

This pattern of withdrawal of two concentric tiers of townships as represented by Diagrams "A" and "B" is disturbed, in practice, by the existence of "standard parallel" or "correction" lines. A correction line under the public land survey system is necessary to compensate for the convergence of meridians toward the pole. As the meridians converge, the area between two meridians from one baseline north to the next baseline is reduced. Thus, to reestablish the correct measurement of township boundaries, a correction line is established every four townships in the public land survey system.

The effect of offset lines on the withdrawal pattern is as follows:

DIAGRAM C:



---- STANDARD PARALLEL (Correction Line)

X = Core Township

C = Cornering Township, 1st Tier

C/2 = Cornering Township, 2nd Tier

☐ = Contiguous Townships

A, B = Townships not included in withdrawal due to fact that they do not corner and are not contiguous with the core township nor a township that corners on or is contiguous with the core township.

(The definition of cornering used for this Diagram is "actual physical touching").

The Bureau of Land Management claims that cornering means actual physical touching of the corners of townships. Without the correction offset, Township "B" of Diagram C would have been contiguous to a township cornering on the core township, and Township "A" would have cornered on a cornering township. Under the petitioner's definition of cornering, due to the correction offsets, Township "A" and "B" no longer corner on or are contiguous to the core township or with those townships which corner on or are contiguous to the core township. Township "B," rather, is contiguous to a township which in turn is contiguous to a township which is in the first tier. Township "A" corners on a township which is contiguous to a township in the first tier. Both Township "A" and "B" would thus be located outside of the withdrawal area.

Eklutna contends that actual physical cornering was not necessary in instances where a village withdrawal was affected by a correction line. Eklutna contends that where two townships would corner by legal description, and would have physically cornered but for the existence of a correction line, the respective townships should be deemed to corner for the purpose of being withdrawn and available for selection of the Village Corporation. Under this approach, both Township "A" and "B" of Diagram C would be within the withdrawal area.

In a Decision of Sept. 28, 1976, this Board held that where townships, which by legal description have a common corner, but are not in actual physical contact due solely to the location of a "standard parallel" or "correction" line, the requirements of § 11 that the townships corner will be satisfied.

In light of the contentions made by the Bureau of Land Management that their administrative interpretation of the definition of the term "cornering" should be upheld as it relates to the identification of withdrawn lands to be made available for village selection, this Board on Feb. 18, 1977, issued an Order requesting certain information from the Bureau of Land Management. This Order included a request for a statement of facts and authorities supporting the administrative determination of those lands identified by the Bureau of Land Management as being withdrawn pursuant to § 11 of ANCSA, information demonstrating consistency of application of this determination, and maps and information made available to Eklutna and other villages indicating which lands were withdrawn pursuant to § 11(a)(1) of ANCSA and made available for village selection.

On Mar. 9, 1977, the Bureau of Land Management, in complying with this Board's Order of Feb. 18, 1977, submitted various information including an "Affidavit of Ann Ivanoff," an employee of the Adjudication Office of the Bureau of Land Management, maps of several villages identifying land withdrawn pursuant to § 11(a)(1) of ANCSA and other information concerning

the method used for identifying § 11 (a) (1) withdrawn lands.

The first point of error alleged by the Bureau of Land Management is that this Board's Decision was contrary to the definition of cornering as established by Departmental regulation. The Bureau of Land Management asserts in its Memorandum in Support of its Petition for Reconsideration that regulations in Chap. 2 of Title 43 CFR 2710.0–5(d) contain the definition of cornering which was used by the Bureau of Land Management and applied to all villages under ANCSA in identifying those lands withdrawn by § 11(a)(1) of the Act. This regulation which was promulgated by the Department of the Interior to implement provisions for sale of isolated tracts in 43 U.S.C. § 1171 (1970) contains the following definition of cornering:

> The term "isolated or disconnected tract" means a tract of one or more contiguous legal subdivisions completely surrounded by lands held in non-Federal ownership or so effectively separated from other federally-owned lands by some permanent withdrawal or reservation as to make its use with such lands impracticable. A tract is considered isolated if the contiguous lands are all patented, even though there are other public lands cornering upon the tract. *The term "cornering" refers to lands having a common survey corner but not a common boundary.*
>
> (43 CFR 2710.0–5(d)) (Italics added.)

[3] This regulation was not enacted pursuant to ANCSA and there is no indication that this regulation was to be used in identifying lands withdrawn under ANCSA. This Board therefore finds that it was not ruling contrary to Departmental regulations when it held that for purposes of identification of withdrawal areas pursuant to § 11(a)(1) of ANCSA, that the term "cornering" could be defined to include those townships which cornered by legal description, even though such townships might not physically touch due to the existence of correction lines.

The question remains, however, that if the Bureau of Land Management did define cornering to mean those townships physically touching and cornering, was this definition a reasonable, consistently applied interpretation that this Board should have found controlling?

When the meaning of the language of a statute is not free from doubt, courts have regarded as controlling a reasonable, consistently applied administrative interpretation of the statute [*Ehlert* v. *United States*, 402 U.S. 99, 105 (1971)].

In upholding the Secretary of the Interior's interpretation of Executive Orders and Public Land Orders, the Court in *Udall* v. *Tallman*, 380 U.S. 1 (1965) stated as follows:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings," [citations omitted]. Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the

men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* at 16.

In the present case, employees of the Bureau of Land Management made an administrative interpretation of the meaning of the word "cornering." The affidavit filed with this Board by Ann Ivanoff, an employee of the Bureau of Land Management, substantiates the fact that they did consider the term "cornering" to mean "touching." Paragraph 3 of this affidavit states as follows:

I do not recall receiving any written instructions or guidelines defining "cornering" and "contiguous" in section 11(a)(1). I, and the other examiners involved, did not consider there to be any ambiguity in those terms. We considered those terms to mean physically touching. We recognized that because of the township offset most villages would have an irregular withdrawal pattern.

It appears from this document that the Bureau of Land Management examiners found no ambiguity in the term "cornering" and assumed that the term meant actual touching rather than cornering by legal description. It also appears that they arrived at this definition without the aid of 43 CFR 2710.0–5(d) or any other Departmental regulation.

Other documentation submitted by the Bureau of Land Management shows that the Executive Director of the Federal-State Land Use Planning Commission believed that cornering was limited to those circumstances where the corners of townships physically touched. In a map attached to a memorandum prepared by the Executive Director of the Federal-State Land Use Planning Commission, townships which might corner from the standpoint of their legal description are shown not to corner, when by virtue of a correction line, the corners of the townships do not physically touch. Although it does not appear that the Bureau of Land Management relied on this memo and map, such evidence does show that a further agency which deals with land conveyancing problems under ANCSA came to the same conclusion on the meaning of the term "cornering" as did the Bureau of Land Management.

In view of the fact that a regulation interpreting cornering in respect to other public land laws defined cornering as lands having a common survey corner and the fact that the Bureau of Land Management and the Federal-State Land Use Planning Commission have interpreted cornering to mean those townships which physically touch, this Board does not believe that the Bureau of Land Management's interpretation of the meaning of cornering is unreasonable.

It is also asserted, without contradiction, in the affidavit and other information submitted to this Board that the Bureau of Land Management consistently used this definition of cornering in identifying those lands withdrawn under § 11(a)(1) for all villages under ANCSA. Maps submitted for the

Villages of Koliganek and Lime Village show that the Bureau of Land Management identified these withdrawals in a pattern whereby townships which do not physically touch due to a correction offset are deemed not to corner. Information submitted on several other villages also evidence this fact. There is no showing that the Bureau of Land Management identified cornering townships in any other manner involving other situations where village withdrawals were affected by a correction line.

Information contained in the Bureau of Land Management's Memorandum in Support of its Petition for Reconsideration also shows that at least 18 villages, and possibly more, made their selections based on this determination of the Bureau of Land Management. It is asserted, without contradiction, that at least 18 villages, if not all villages except Eklutna, have relied upon this determination made by the Bureau of Land Management.

[4] Even though this Board does not believe that the interpretation of cornering as determined by the Bureau of Land Management was the only reasonable interpretation of the word cornering, this Board does believe that it was a reasonable interpretation of § 11(a)(1) of ANCSA. Since it has been applied consistently with reliance thereon by the village corporations in making their land selections under ANCSA, this Board will not disturb the procedures followed by the Bureau of Land Management in identifying the § 11(a)(1) withdrawal areas under ANCSA.

[5] For the above reasons this Board, upon reconsideration, reverses its Decision of Sept. 28, 1976, and finds that townships, which by legal description have a common corner, but are not in actual physical contact due to the location of a "standard parallel" or "correction" line, such townships shall be considered as not cornering for purposes of § 11(a) of ANCSA. The Decision of the Bureau of Land Management of Aug. 1, 1974, which rejected the selection application of Eklutna, Inc., in T. 17 N., R. 3 E., Seward Meridian, Alaska, is hereby affirmed.

This represents a unanimous decision of the Board.

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

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

ALASKA PLACER COMPANY

33 IBLA 187

Decided *December 21, 1977*

Appeal from the decision of the Alaska State Office of the Bureau of Land Management holding for rejection appellant's mineral patent application F-13922.

Reversed.

Villages of Koliganek and Lime Village show that the Bureau of Land Management identified these withdrawals in a pattern whereby townships which do not physically touch due to a correction offset are deemed not to corner. Information submitted on several other villages also evidence this fact. There is no showing that the Bureau of Land Management identified cornering townships in any other manner involving other situations where village withdrawals were affected by a correction line.

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Board Member.

ALASKA PLACER COMPANY

33 IBLA 187

Decided *December 21, 1977*

Appeal from the decision of the Alaska State Office of the Bureau of Land Management holding for rejection appellant's mineral patent application F-13922.

Reversed.

1. Administrative Procedure: Adjudication—Administrative Procedure: Decisions

Where a decision calls upon an applicant to supply certain documents and make certain showings in support of its mineral patent application or face rejection of the application, and on appeal it is established that all of the documents and evidence called for had already been furnished by the applicant and incorporated in the case record, where they were apparently overlooked by those who examined the application, the decision will be reversed.

2. Conveyances: Generally—Mining Claims: Generally—Mining Claims: Possessory Right—Mining Claims: Special Acts

Where a corporation allegedly acquired a group of unpatented mining claims, but the instruments of conveyance and the abstract of title are subject to various objections by the Government's title examiner, which the corporation finds are difficult or impossible to cure, the corporation nonetheless may receive a patent to the claims pursuant to the Act of July 9, 1870 (R.S. § 2332; 30 U.S.C. § 38 (1970)), by demonstrating its qualifications under that Act.

3. Mining Claims: Possessory Right—Mining Claims: Special Acts

Where it becomes necessary for a corporate applicant for mineral patent under R.S. § 2332, 30 U.S.C. § 38 (1970) to demonstrate that it and its predecessors have held and worked the subject mining claims for a specific term of years, the applicant may tack the predecessor's period of possession to its own if there was a privity of interest between them which was demonstrated by any agreement, conveyance or understanding, the purpose of which was to transfer the right and possession of the previous adverse claimant to the successor, and this is accompanied by actual delivery of possession.

4. Mining Claims: Possessory Right—Mining Claims: Special Acts

An applicant for a mineral patent under 30 U.S.C. § 38 (1970) may be credited with actual possession and working of the claims for the period when the claims were occupied and worked by the claimant's lessee who recognized the title asserted by the claimant.

5. Mining Claims: Possessory Right—Mining Claims: Special Acts

An applicant for a mineral patent under 30 U.S.C. § 38 (1970) may be credited with actual possession and working of the claims for the period when the claims were occupied and worked by others under a conditional contract of sale with the claimant, as well as the period after the claimant lawfully declared the contract forfeited but the putative purchasers continued to hold and work the claims, contending the continued validity of the sales contract, during the course of the claimant's litigation to eject them, which ultimately was successful.

APPEARANCES: Risher M. Thornton, Esq., Anchorage, Alaska, for the appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

On May 12, 1971, Alaska Placer Company (Alaska Placer) filed its application for patent for nine placer mining claims embracing a total of 172.167 acres in the Port Clearance Mining District near

Nome, Alaska.[1] The claims were included in what was known as the Cape Creek Group, which was the subject of Mineral Survey No. 2199, completed on Dec. 12, 1957, and approved and certified May 15, 1957. The claims at issue were located at various times from 1935 to 1952, and are allegedly based upon discovery of valuable deposits of tin, consisting of cassiterite pebbles and sand. Alaska Placer asserts title to the claims through a deed dated Mar. 1, 1965. However, when the abstract of title was examined by the Assistant Regional Solicitor, Anchorage, in Nov. 1971, he found that the instruments of conveyance by and to the several predecessors in interest were so irregular and deficient that he could not confirm that record title to the unpatented claims was reposed in Alaska Placer Company. Accordingly, in his opinion dated Nov. 9, 1971, he described the specific title objections he had identified and the curative material which Alaska Placer would have to provide to overcome them. Upon being apprised of these objections and the nature of the required curative material, Alaska Placer determined that to procure the curative instruments would be extremely difficult, if not impossible. It therefore made an election to pursue its application for patent under the Act of July 9, 1870, R.S. § 2332, 30 U.S.C. § 38 (1970). This statute requires that a mineral patent applicant provide evidence of having possessed and worked the claims for the period of time equal to that prescribed by the statute of limitations for mining claims in the State or Territory where the claims are sited. In Alaska the statutory period is 10 years. *Alaska Stat.* § 09.10.030.

The processing of the application proceeded on that basis, and Alaska Placer supplemented the record with additional materials calculated to demonstrate its entitlement under 30 U.S.C. § 38 (1970). In Mar. 1977, these were referred to the Office of the Regional Solicitor, together with the case file, with a request for an opinion as to whether the record was legally sufficient to show possessory title.

In an opinion dated Mar. 25, 1977, the attorney to whom the matter was referred found that the application was still deficient in a number of respects and specified a number of requirements which Alaska Placer must meet in order to cure the alleged deficiencies.

[1] The major portion of this 1977 title opinion was incorporated verbatim in the text of the decision by the Alaska State Office of the Bureau of Land Management, from which this appeal is taken. The decision, dated Apr. 15, 1977, held that Alaska Placer has not satisfied the requirements to obtain mineral patent, and it allowed the company 60 days in which to file submissions in support of seven enumerated requirements, failing in which Alaska Placer's patent application

[1] Following the BLM report of mineral examination Alaska Placer withdrew the Valley claim, comprising 34.514 acres, from the application for patent. Therefore, we are here concerned with an application for only eight claims embracing 137.653 acres.

would be rejected without further notice.

In its appeal from that decision Alaska Placer maintains that it has already met each of the seven specified requirements. We will examine each of them in a sequence of our own choosing.

First, the Regional Solicitor's 1977 title opinion and the decision states, "a certificate of incorporation must be filed to satisfy the citizenship criterion. 43 CFR section 3862.2–1." In response appellant says: "The decision is in error in requiring the filing of a certificate of incorporation as to ALASKA PLACER COMPANY. A certificate of incorporation and a certificate of good standing from the State of Alaska were filed with the original patent application, and are contained in the BLM files."

A perusal of the case record reveals that appellant is correct. Not only are the certificates contained in the record, but also a certified copy of the articles of incorporation. The Bureau's receipt stamp shows that these documents were filed on May 12, 1971. The certificates bear the seal of the Department of Commerce, State of Alaska, and are signed by the Commissioner, and appear otherwise to be in good order. Accordingly, the decision is reversed as to this issue.

Next, the title opinion and the decision state: "The Company must establish that discovery of a valuable mineral occurred at the mining site. 43 CFR 3863.1–3. *United States* v. *Springer*, 491 F.2d 239, 242 (9th Cir. 1974); *United States* v. *Haskins*, 505 F.2d 246 (9th Cir. 1974). The agency determines whether a discovery was made."

In its statement of reasons for appeal Alaska Placer responds: "The decision is in error in denying that a valuable discovery has occurred. Discovery has already been allowed on all claims included in the original application except for the valley [*sic*] claim, as to which the company withdrew the application on June 27, 1974, at the request of the Bureau."

Appellant is correct. The case file contains the report of mineral examination dated Jan. 11, 1973, performed jointly by the BLM's Minerals Specialist for the State of Alaska and a BLM mining engineer. It concludes that a discovery of a valuable mineral has been made on eight of the nine claims, but finds no discovery on the "Valley" claim. After a "technical review" and a "management review" the report was approved as supplemented on Feb. 2, 1973. The report recommends that the other eight claims "be clear-listed for patent, all else being regular." The Anchorage office of BLM advised Alaska Placer of these findings and informed the company that contest proceedings would be initiated against the Valley claim, whereupon the company withdrew the Valley claim from the application on June 27, 1974. It thus appears that "the agency" *has* determined that a discovery has been made on each of the eight claims remaining in the application and

that appellant is under no obligation to make any further showing in this regard. Accordingly, the decision is reversed as to this issue.[2]

The title opinion and the decision then state: "A statement showing proof of improvements must be filed."

Alaska Placer responds as follows:

> The decision is in error in finding that proof of improvements have not been filed. This proof has been included in the original patent application, and apparently has satisfied a field examination by the Bureau of Land Management. (See letter dated April 30, 1974, attached as "Exhibit A".) In addition to that reflected in the original filing, the possession affidavit of R. Kirk Dunbar, dated April 4, 1977, reflects an additional expenditure in excess of $625,000.00 on the claims since 1974, and subsequent to the BLM examination.

Again, appellant is correct. The file is replete with evidence of the improvements to such a degree that anyone who carefully reviewed the record would be familiar with the place on a subsequent first visit. The report of the U.S. Mineral Surveyor describes in great detail the improvements as they existed in 1957. At that time he valued the expenditures at nearly $200,000 exclusive of the eight buildings which he described but did not appraise.[3] Appellant's patent application, which is notarized, devotes pages 9 through 16 to a description of the improvements on each of the claims. The BLM report of mineral examination verified the expenditure of the requisite amount, stating: "The statutory requirement of $500 development work on each claim has more than been met with the drilling, road work and buildings constructed." The affidavit of R. Kirk Dunbar, President of Alaska Placer, dated Feb. 4, 1977, does indeed describe expenditures of an additional $625,000 on the eight claims during the period from 1974 through Sept. 1976. In addition, the case file contains maps showing the location of improvements and aerial and on-the-ground color photographs of the improvements. We find that there has been ample demonstration and verification of the required statutory expenditures. Accordingly, the decision is reversed as to this issue.

Next, the title opinion and the decision state:

> [T]he Company must file affidavits that the annual assessment work has been performed. In *Oliver* v. *Burg*, 154 Ore. 1, 58 P.2d 245, 250 (1936) the court concluded that 30 U.S.C. section 38—"does not relieve the applicant of the necessity of showing performance of the necessary assessment work in addition to possession for the statutory period."

[2] This is the second such mineral examination performed by BLM. The earlier examination was performed in 1959 in response to a previous patent application by Alaska Placer's predecessors in interest. The report of that examination, which is contained in the case file, declared that discovery of a valuable mineral deposit had been made on all nine claims originally listed in this application, including the Valley claim. Thus, BLM has *twice* verified the discoveries on the subject claims.

[3] There were 15 claims in this group at the time, and these values refer to the improvements on the entire group, rather than exclusively to the eight claims at issue here.

Failure to file affidavits is evidence that the assessment work has not been performed.

* * * * *

The Company has filed only one affidavit of annual work filed in 1970. Additional proof of substantial compliance or evidence of resumption of work prior to a government contest proceeding must be presented to satisfy the assessment requirement.

To which the appellant has responded:

The decision is in error in finding that the Applicant has not satisfied the assessment requirement. Assessment work affidavits have been filed annually each year since the claims were located in 1935 as to five claims, 1947 as to two claims, and 1952 as to one of the claims. Copies of these affidavits were included in the abstract filed with the application for patent.

Yet again appellant is correct, and the title opinion and the decision are wrong. The affidavits of assessment work are included in the abstract of title, together with the Notices of Intention to Hold Mining Claims authorized by joint resolution of Congress in lieu of the performance of assessment work during and following World War II. These proofs of labor and notices of intention to hold comprise 35 pages in the abstract and could hardly be missed by anyone examining it. In addition, there is a second bound file of duplicates in the case record. All proofs and notices show recording data in the Nome (or Cape Nome) Recording District. Therefore, the decision is reversed as to this issue.

[2] The remaining issues relate to the general question of whether Alaska Placer has adequately demonstrated that it has "held and worked" the claims for a period of 10 years so as to qualify for patent under 30 U.S.C. § 38 (1970). The title opinion and the decision below hold that it has not shown that it has done so, and require certain additional proof. Alaska Placer argues that its showing, properly interpreted, is sufficient. The resolution of this question will require some analysis of the background.

The eight claims involved in this appeal were part of a group of 15 claims ostensibly acquired in 1957 by a partnership comprised of Ralph Lomen and H. G. Gabrielson. The claim of the partnership was based upon various transfers from diverse predecessors extending back to the original locators. In 1962 Gabrielson died and his interest in the partnership passed to his widow, Pauline Gabrielson. In 1963 Mrs. Gabrielson gave her son-in-law, Kirk Dunbar, a special power of attorney with respect to the claims. Subsequently, Ralph Lomen did the same. (Dunbar was also the manager of Lomen and Gabrielson's mining operations in the Nome area.) On Mar. 1, 1965, Pauline Gabrielson and Ralph Lomen conveyed all of the assets of the partnership, including the subject mining claims, to Alaska Placer Company. At the time of this conveyance to Alaska Placer, all of the outstanding stock of Alaska Placer Company was owned by Ralph Lomen and Pauline Gabrielson.

In 1960, prior to H. G. Gabrielson's death, the partners had executed a lease of the claims to Richard E. Lee. Under the terms of this agreement Lee was to work the claims and mine every year, but as of 1964 Lee had only stripped some of the overburden, and had not taken any ore out.

Alaska Placer having taken over the interest held by the partnership, Lee was notified that the company was dissatisfied with his failure to produce. A meeting ensued between Ralph Lomen and Kirk Dunbar with Richard Lee, and a new agreement was reached. Lee and his wife, Phyllis, contracted to purchase the claims for $400,000 by paying $2,500 cash, $5,000 from smelter receipts for the coming 1965 production, and the balance in annual installments equal to 15 percent of the annual net mineral production of tin concentrates. The Lees were to work the claims to their full capacity during the season when mining was feasible, operating two 10-hour shifts per day and delivering 1,200 tons of ore per day to the washing plant for concentration. It was provided that Alaska Placer had the option to forfeit the Lees' interest in the property if they failed to perform.

During the 1965 mining season the Lees delivered only 3,500 tons to the washing plant, whereupon Alaska Placer gave them notice of the forfeiture of their interest on Oct. 5, 1965. The Lees refused to vacate and a lawsuit ensued which was ultimately decided by the Supreme Court of the State of Alaska by its decision of June 4, 1969. *Alaska Placer Co.* v. *Lee*, 455 P.2d 218 (Sup. Ct. Alas. 1969). The Court held that Alaska Placer had properly exercised its right to terminate the agreement and that "[the Lees'] failure to vacate the mining claims after forfeiture of their interest made them trespassers," and it enjoined the Lees from continuing to occupy and mine the claims.

According to affidavits submitted to BLM by Alaska Placer in support of its patent application, when the Lees were evicted in 1969 Alaska Placer began working the claims for its own account. In 1974 Alaska Placer leased the claims to Len Grothe and C. T. Pearson. According to an affidavit by R. Kirk Dunbar, now president of Alaska Placer, these lessees expended in excess of $200,000 on these claims in 1974, in excess of $250,000 in 1975, and $175,000 during 1976 up to the month of September.

[3] The 1977 title opinion from the Regional Solicitor's Office and the BLM decision from which this appeal is taken hold that Alaska Placer may not be given credit for holding and working the claims for the statutory 10-year period for the following reasons:

1. The possession and development of the claims by Lomen and Gabrielson from 1957–65 cannot be tacked to the period of possession of Alaska Placer because although under 30 U.S.C. § 38 (1970) the possession of the claims by applicants' grantors may be counted, the instrument of conveyance from Ralph Lomen and Pauline Gabrielson merely conveyed "all of the

business and assets of Lomen and Gabrielson" to Alaska Placer. The 1971 title opinion concluded that this was inadequate to serve as a deed to the claims.

2. Dunbar's affidavit "does not indicate precisely whether the Lees were successors in interest whose holding and working the claims can be tacked by the Company * * * . Also, the litigation that arose in 1966 precludes the Company from tacking the Lees' possession of the claim from 1966 to 1969, since the Lees were adverse claimants during that period."

3. Dunbar also states that:

> Beginning (in) 1966 ALASKA PLACER COMPANY performed all necessary assessment work and in 1969 *once again* went into actual possession of the claims, and operated them for its own account during the years 1965 through 1973. (Italics added.)

This statement could be interpreted to mean that the Company resumed possession in 1969, yet "operated" the claims from 1965 to 1973. What is needed is a clear statement, evidentially supported, that the company held and worked the claim continuously from 1965 to 1973. Evidence is needed also to substantiate that Grothe and Pearson were lessees and that they worked the claim from 1973 to 1976.

In its brief on appeal with respect to item 1, *supra*, Alaska Placer asserts that the Lomen and Gabrielson possession *can* be tacked to the possession of Alaska Placer, noting that the "Agreement of Sale and Assignment" from Lomen and Gabrielson was a sale of all of the assets of the partnership, which included the subject mining claims, as well as a specific assignment to Alaska Placer of the lease of those claims which the partnership had given to Richard Lee. While appellant still asserts that this instrument was sufficient to pass good title to the claims, notwithstanding the Solicitor's title opinion, it points out quite effectively that it is not necessary that the predecessor pass good title in order to tack the predecessor's period of adverse possession to the successor's, citing the majority rule relating to tacking and privity as stated in 3 Am. Jur. 2d, *Adverse Possession* § 60:

> * * * It is generally held that the privity necessary to support the tacking of successive possessions of property may be based upon any connecting relationship which will prevent a break in the adverse possession and refer the several possessions to the original entry. The continuity of the original adverse possession may be effected by any conveyance or understanding the purpose of which is to transfer to another the rights and the possession of the adverse claimant, when accompanied by an acutal delivery of the possession. * * * [Citing a number of cases from many different states.] [Footnotes omitted.]

Inasmuch as Lomen and Gabrielson owned all of the stock of Alaska Placer at the time they assigned all of the assets and business of the partnership to Alaska Placer, and since at that time Kirk Dunbar was not only the vice president of Alaska Placer, but also the general manager of Lomen and Gabrielson and attorney-in-fact for each of the partners, it is clear that there was

a connecting relationship and a privity of interest between the partnership and the company. Therefore, the continuity of the adverse possession of the partnership was not broken by reason of any legal-technical deficiency in the conveyance to Alaska Placer, since "*any* conveyance or understanding," the purpose of which was to transfer possession of these claims, would be sufficient to preserve the continuity of possession under these circumstances. It cannot be doubted that it was the intention of the partners to transfer and assign the claims to Alaska Placer, along with the mining lease held by Richard Lee at that time. For example, paragraph No. 3 of the instrument states:

> 3. The First Party [the partnership] hereby assigns to the Second Party [Alaska Placer] all of its rights and liabilities under that certain * * * sublease entered into on April 6, 1960 by and between Lomen & Gabrielson and Richard E. Lee, of Nome, Alaska, and the Second Party hereby accepts all rights and liabilities under the said lease and sublease.

Paragraph No. 6 states:

> 6. It is understood that the rights and liabilities of the First and Second Parties under the said leases are of nominal value only at the present time but may increase in value due to future workings of the mining claims represented thereby. Any increase in value of said mining claims and leases will accrue to the First Party by virtue of the stock ownership of the Second Party.

Obviously, if Lomen and Gabrielson intended to realize the benefit of any increase in the value of the claims through the enhanced value of their stock in Alaska Placer, they must have contemplated that Alaska Placer would be the owner of the claims. Otherwise, the increase in the value of the claims would have accrued to them directly, as the owners.

The Court of Appeals for the Ninth Circuit, in construing the Alaska adverse possession statute, has applied the majority rule concerning privity and continuity of possession. In *Ringstad* v. *Grannis*, 171 F.2d 170 (9th Cir. 1948), the Court held that "adverse possession may be by different occupants where privity exists between them," adding that if successive possessions are connected by any agreement or understanding which has for its object the transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact, it is sufficient to constitute a continuous possession.

We are of the opinion that there was the requisite privity, agreement and intent between the partnership and Alaska Placer to bring Alaska Placer within the purview of this rule.

[4] We must now consider whether the actual physical occupation of the land by Richard Lee and his wife was in fact the occupancy and possession of the partnership and Alaska Placer, respectively, or whether the holding by the Lees interrupted the continuity of possession under the statute.

Richard Lee first took possession of the claims in 1960 pursuant to a mining lease issued by the partnership, and Lee remained in possession under authority of that lease until March 25, 1965, when Richard

and Phyllis Lee contracted to purchase the claims from Alaska Placer. Thus, Lee was in possession under the permission granted by the lease, and could not have been holding adversely against his lessors. "It is elementary that adverse possession cannot be permissive. Conversely, permissive possession is not adverse." 3 Am. Jur. 2d *Adverse Possession* § 36. Yet the question remains, where the lessor is asserting title under 30 U.S.C. § 38 (1970), based upon a statute of limitations, can the lessor be credited with actual possession of the claims during the time they were being occupied and worked by his lessee? We find in the affirmative.

> Actual possession of land consists of exercising acts of dominion over it, making the ordinary use of it, and taking the ordinary profits it is capable of producing in its present state. Pedis possessio is not indispensable to the necessary possession * * *. The possession need not be by the claimant personally, but may be effected through another on his behalf.
>
> * * * * *
>
> Accordingly, the requirement of actual possession may be met through possession on behalf of the adverse claimant by an agent, licensee, relative or tenant. If the possession is by tenant of the claimant it is in law the claimant's possession and he may avail himself of its benefits. The nature of the required possession is not altered when it is supplied through a tenant, however. In such case, the tenant is the means by which the necessary open, hostile, notorious, continuous, exclusive possession under a claim of right is achieved; in common parlance, the tenant flies the landlord's flag.
>
> 3 Am. Jur. 2d *Adverse Possession* §§ 13, 15 (1962) [Footnotes omitted]. *See also* 2 C.J.S. *Adverse Possession*, §§ 46, 47 (1972).

Actual possession by a tenant of the adverse claimant will inure to the latter's benefit and ripen into title in his favor. *Combs* v. *Ezell*, 232 Ky. 602, 24 S.W.2d 301 (Ct. of App., Ky., 1930).

Therefore, Richard Lee's occupation and working of the claims under the lease constituted possession of the claims, at first by the partnership and, subsequently, by Alaska Placer. Since we have held that the possession of Lomen and Gabrielson can be tacked to that of Alaska Placer, we are brought to a recognition of qualifying possession for the period from 1957, when the partnership first took possession, to Mar. 1965, when the mining lease was supplanted by the conditional contract of sale by Alaska Placer to Richard and Phyllis Lee. Because a possession from 1957 to 1965 does not satisfy the Alaska 10-year statute, we must now determine whether the Lee's possession thereafter also can be regarded as the possession of Alaska Placer.

[5] During the Lees' operation of the claims during the 1965 mining season, Alaska Placer had its own representative on the ground in the person of Kimball Dunbar, Kirk Dunbar's son. It was apparently his function to observe and report on the progress of the work and the extent of the Lees' compliance with their contract obligations to Alaska Placer. About the end of that mining season, on October 5, 1965, Alaska Placer notified the Lees that

it was invoking the forfeiture clause in the contract. However, the Lees failed to vacate the premises, and in March 1966 Alaska Placer brought an action in the state court to enjoin them from the claims. This litigation was finally concluded by the decision of the Supreme Court of the State of Alaska on June 4, 1969. *Alaska Placer Co.* v. *Lee*, *supra*. While the litigation was in progress the Lees remained in possession of the claims, asserting that they had a right thereto by reason of their contract with Alaska Placer, which they maintained had not been breached. During this period the Lees continued to work the claims and produced and sold a considerable quantity of ore.[4] In 1969, however, the Alaska Supreme Court held that the Lees had breached their contract in 1965, that Alaska Placer had properly invoked the forfeiture clause, and that "[the Lees'] failure to vacate the mining claims after forfeiture of their interest made them trespassers." *Id.*, at 455 P. 2d 229.

There followed litigation initiated by Alaska Placer to recover damages from the Lees for the proceeds from the smelter runs of ore mined and shipped by the Lees while they were resisting Alaska Placer's efforts to eject them. *Alaska Placer Co.* v. *Lee*, 502 P.2d 128 (Sup. Ct., Alas., 1972), and *Alaska Placer Co.* v. *Lee*, 553 P.2d 54 (Sup. Ct., Alas., 1976). Neither of these latter decisions concerned the title to the claims. Rather, they concerned the nature and character of the Lees' trespass on the claims and the consequent measure of damages to be applied.

The Mar. 1977 title opinion by the Regional Solicitor's Office and the decision from which this appeal is taken expressed certain misgivings about this litigation, stating: "[T]he decision in *each* of these suits and their effect on (1) The Company's ability to establish possession for the statutory period, and (2) The Lees' status as possible adverse claimants must be included in the narration of facts presented by the applicant."

As noted above, only the 1969 decision by the Supreme Court of Alaska was concerned with the question of the title and possessory rights to the claims, and it held in favor of Alaska Placer and declared the Lees to be trespassers. The two subsequent decisions had nothing whatever to do with the title or possessory interests.

With regard to "the Lees' status as possible adverse claimants," both the title opinion and the decision failed to take note of the fact that the Lees had on March 1, 1973, filed a formal protest against this patent application. By decision of the Alaska State Office dated May 30, 1975, the Lees' protest was dismissed, the State Office holding, in part, that "the parties of protest [the Lees] have failed to provide sufficient evidence to establish an adverse title or interest in the mining claims described." The Lees ap-

[4] The Supreme Court found that the proceeds from the claims were:
"1966—$75,943.39
1967—80,245.91
1968—105,620.17"
553 P. 2d at 62, N. 27.

pealed to this Board from that State Office decision, and on Oct. 30, 1975, their appeal was dismissed. *Richard E. and Phyllis Lee*, 22 IBLA 284 (1975). Therefore, the Lees' status as possible adverse claimants *has already been administratively adjudicated, as reflected by the case record.*

During the entire period of the Lees' possession and working of these claims they were asserting their right to be there on the basis of either the mining lease or the conditional sales contract. That is, they were there by virtue of their recognition of Alaska Placers' asserted paramount legal title. They were mining the claims not only for their own account, but also for the account of Alaska Placer. At no time prior to the filing of their 1973 protest did they assert a claim of title or interest independent from or exclusive of the title asserted by Alaska Placer. Their sole dispute with Alaska Placer was whether they had breached their conditional sales contract to the extent that Alaska Placer could properly declare their interest forfeited. The fact that Alaska Placer had entered into the conditional sales contract did not divest Alaska Placer of the title it was asserting. The contract only served to invest the Lees with a certain equity, which was subsequently vitiated by their failure of performance and forfeiture. In fact, the execution of the contract to sell to the Lees actually strengthened Alaska Placer's claim to an adverse possession of the claims, viz; "Also, adverse possession may be evidenced by such acts as *conveying*, leasing, mortgaging, or paying the insurance or taxes on the property; * * *" 5 Thompson on Real Property, *Adverse Possession*, § 2544. [Italics added.]

Upon default by the Lees, Alaska Placer acted promptly and diligently to assert its claims of title and to evict them, as noted by the Alaska Supreme Court in its 1969 opinion, *supra*. The Lees at all times material to this discussion recognized the title asserted by Alaska Placer and claimed their interest under that title. A substantial portion of the value of the ore mined by them was awarded by the court to Alaska Placer. In light of this, the occupancy and working of the claims by the Lees under the conditional contract of sale cannot be distinguished in any meaningful or material aspect from their working of the claims under the mining lease. Therefore, for the purposes of 30 U.S.C. § 38 (1970), we hold that the occupancy and working of the claims by the Lees from 1960 to 1969 was in law the possession of Alaska Placer, and it may avail itself of the benefit of such possession.

R. Kirk Dunbar filed in the Alaska State Office his affidavit dated February 4, 1977, wherein he states that in 1969 (after the Lees were enjoined from occupying the claims) Alaska Placer went into actual possession of the claims and operated them for its own account through 1973, when Alaska Placer granted a mining lease to Grothe

and Pearson, who worked the claims from 1973 through 1976.

The title opinion and the decision appealed from require the submission of more evidence to substantiate these statements. We fail to see the necessity for this. The statements are the sworn, notarized declarations of the president of the applicant company, and there is nothing at all in the record to suggest that they are untrue. If BLM has reason to doubt the veracity of the affidavit, it has a duty to require further evidence, but lacking any such reason it is pointless to demand further evidence of facts already verified. Moreover, the affidavit of R. Kirk Dunbar was corroborated by the affidavit of Guy Rivers, president of Rivers C. & M. Co., a construction and mining firm. In this affidavit Rivers describes his familiarity with the claims since the 1950's, states that he knew both Ralph Lomen and H. G. Gabrielson, as well as R. Kirk Dunbar, and states that he has read Dunbar's affidavit and that the matters set forth therein are true and correct. Absent any reason for doubt, this submission would be adequate to satisfy the requirement for corroborative proof imposed by 43 CFR 3862.3–3.

We have held that the possession of Lomen and Gabrielson can be tacked to that of Alaska Placer under the privity rule, *supra*, and that the occupancy and working of the claims by the Lees in recognition of the title asserted by the partnership and the company was in law the possession of those who were asserting the title. We conclude, therefore, that Alaska Placer can be credited with occupancy and working of the claims from 1957 through 1976.

The only remaining question concerns Alaska Placer's compliance with 43 CFR 3862.3–2, which requires a court certificate that no suit or other action involving possession of the claims is pending, etc. The attorney employed by Alaska Placer to assist in the filing of this application has submitted an affidavit of his own. In it he describes his efforts to procure the required certificate. He states that because "[t]he State of Alaska does not have any particular court which has jurisdiction of mining cases within the judicial district embracing the claims, the Clerk of the Alaska Trial Courts, situated in Nome, Alaska, refuses to make a certificate in accordance with Bureau of Land Management Regulation No. 3862–3.2." In substitution of such certificate, he then offers his own affidavit to the effect that no such actions are pending.

This poses something of a dilemma. This Board has no authority to compel the Court or any officer or employee thereof to execute a certificate in the face of such a refusal. On the other hand, the Department should not be obliged to waive its regulation simply to accommodate the personal recalcitrance of an individual who is beyond Departmental control. Accordingly, we must insist that either 1) the certificate be obtained and submitted, or 2) that the Clerk or superior officer of the Court having jurisdiction of civil actions in the area of the subject claims indicate in writing that the execution of such a cer-

tificate is refused, whereupon the certificate of some attorney in private practice, or officer of a title abstract company, or title insurance company, approved by the BLM, will be received in substitution thereof. If no written refusal to execute the certificate can be obtained, Alaska Placer will be left with no alternative but to seek to procure such certificate through an appropriate legal process such as *mandamus* or *quo warranto*.

When this final requirement is met we perceive no bar to the issuance of the patent applied for.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the case is remanded to the Alaska State Office, BLM, for further action consistent with this opinion.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

UNITED STATES STEEL CORPORATION

8 IBMA 230

Decided *December 21, 1977*

Appeal by the United States Steel Corporation from a decision of Chief Administrative Law Judge L. K. Luoma in Docket No. BARB 76-345-P, dated July 23, 1976, assessing a $100 civil penalty pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Regulations: Generally

An operator's failure to notify MESA immediately of a gas ignition, in accordance with 30 CFR 80.11, constitutes a violation of sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)).

APPEARANCES: Billy M. Tennant, Esq., for appellant, United States Steel Corporation; Robert J. Phares, Esq., Acting Assistant Solicitor, and Jonathan Strong, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural and Factual Background

On Oct. 29, 1974, at approximately 12:30 p.m., a methane gas ignition occurred at the United States Steel Corporation's (U.S. Steel) Concord No. 1 Mine. This ignition was extinguished within 1½ to 2 minutes and caused no injuries. The section foreman examined the room where the ignition had occurred and found no evidence of smoke or

fire. A check for methane produced a maximum reading of .04.

The fact that this ignition occurred was not reported to the U.S. Steel surface personnel until the section foreman came out of the mine at 4:33 p.m. U.S. Steel then attempted to contact the Mining Enforcement and Safety Administration (MESA), but it was unable to do so immediately as the MESA office had earlier closed at 4:30 p.m. Contact was eventually made at 5:45 p.m. and a MESA inspector arrived at the mine around 8 p.m. The inspector thereupon issued an order under sec. 103(f) of the Act (30 U.S.C. § 813(f) (1970)) which had the effect of closing the section of the mine where the ignition occurred. However, he did not go into the mine itself as the eyewitnesses had ended their shift and were unavailable.

On Nov. 6, 1974, MESA sent a letter to U.S. Steel in which it cited a violation of 30 CFR 80.11 for the latter's failing to report the ignition promptly, using the fastest available means of communication. Thereafter, MESA filed a petition for a civil penalty assessment. It amended this petition to reflect the fact that U.S. Steel was sent a "Letter of Violation," rather than being served with a notice of violation. In a subsequent amendment, MESA struck the word "Standard," from the Order of Assessment thereby conforming its pleading to the agreement of counsel for both parties that 30 CFR 80.11 is not a health or safety standard.

Following a hearing on this petition in Docket No. BARB 76-71-P, Chief Administrative Law Judge Luoma found that U.S. Steel had violated 30 CFR 80.11 in failing to report the ignition immediately to MESA, even though the means to do so were available. The Chief Judge further found an "inextricable relationship" between this regulation and sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)). Nevertheles, in his decision dated Apr. 28, 1976, Chief Judge Luoma held that a civil penalty could not be assessed pursuant to sec. 109 of the Act (30 U.S.C. § 819 (1970)), as the petition alleged neither a violation of a health or safety standard, nor of "any other provision" of the Act. The Chief Judge therefore dismissed the petition without prejudice.

Following the dismissal, MESA again petitioned for a civil penalty assessment, this time alleging a violation of secs. 103(e) (30 U.S.C. § 813(e) (1970)) and 111 (30 U.S.C. § 821 (1970)) of the Act. Notions for summary decision were filed subsequently by both MESA and U.S. Steel.

In his decision, in Docket No. BARB 76-345-P, dated July 23, 1976, Chief Judge Luoma adopted his findings from the prior proceeding (Docket No. BARB 76-71-P) and held that U.S. Steel's failure to notify MESA immediately of the ignition in accordance with 30 CFR 80.11 resulted in a violation of sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)). Accordingly, a civil penalty in the amount of $100 was assessed. It is from the finding of this sec. 103(e) violation that U.S. Steel appeals.

Contentions of the Parties

U.S. Steel contends that the Chief Judge's conclusion that 30 CFR 80.11 is proper and necessary to carry out the meaning and intent of sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)) requires a strained interpretation of the statutory language that is not justified. It argues that the notification and preservation of evidence aspects of sec. 103(e) are separate and distinct and have no particular relationship to one another. U.S. Steel further argues that it is the notification portion of sec. 103(e) which serves as the statutory basis for 30 CFR 80.11, while it is the preservation of evidence portion which provides the statutory basis for 30 CFR 80.12. It contends, therefore, that if, as the Chief Judge felt, the meaning and intent of the preservation of evidence portion of sec. 103(e) justifies regulatory language connoting "immediacy," such regulatory language should be contained in 30 CFR 80.12, rather than in section 80.11.

U.S. Steel also argues that, in promulgating 30 CFR 80.11, the Secretary of the Interior exceeded his statutory authority under sec. 508 of the Act (30 U.S.C. § 957 (1970)), which allows him to adopt regulations "to carry out" the provisions of such Act. Finally, U.S. Steel contends that a penalty cannot be assessed for a violation of a reporting regulation which is not a safety standard.

MESA takes the position that the notification and preservation of evidence requirements of sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)) were intended to be read together, so as to insure a prompt and thorough investigation of the accident. MESA also contends that the additional requirement of "immediacy" is to be inferred from the language, construction, and purpose of sec. 103(e). It argues that, if the Secretary (of the Interior) is not notified quickly of the accident, testimonial evidence and, in many cases physical evidence as well, fades or disappears altogether, thereby frustrating the remedial purpose of the Act.

MESA further argues that, as 30 CFR 80.11 was intended to implement section 103(e) of the Act (30 U.S.C. § 813(e) (1970)), a failure to find that a violation of this regulation likewise violated the Act would render such regulation unenforceable.

Issue on Appeal

Whether an operator's failure to notify MESA immediately of a gas ignition, in accordance with 30 CFR 80.11, constitutes a violation of section 103(e) of the Act (30 U.S.C. § 813(e) (1970)).

Discussion

[1] Section 103(e) of the Act (30 U.S.C. § 813(e) (1970)) requires that, in the event of a coal mine accident, the operator: (1) notify the Secretary (of the Interior), and (2) take the appropriate measures to prevent the destruction of any evidence which would assist in in-

vestigating the cause of such accident.[1] We hold that the sec. 103(e) requirements were intended to complement one another, that read together, they form but a single statutory obligation. Thus, were an operator to comply with one requirement, but not the other, a violation of sec. 103(e) would result.

We further hold that there is an inference of immediacy in sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)) for, in a practical sense, should the Secretary receive other than expeditious notice, this statutory provision for preservation of evidence would be of progressively diminished value. Drawing upon this inference, the Secretary promulgated 30 CFR 80.11,[2] which requires that, in certain instances, the operator is to notify MESA immediately of the accident by way of the fastest available means of communication. In promulgating this regulation the then Acting Secretary noted:

> The regulations * * * are being promulgated * * * because they will provide the Bureau with immediate notification when needed and enable the Bureau to utilize its investigative resources most effectively to achieve the purpose of the Act.

35 FR 19999 (Dec. 31, 1970).

The Board finds inescapable the conclusion that 30 CFR 80.11 was intended to implement sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)). Furthermore, we find that, in those instances enumerated in section 80.11, the element of immediacy is to be construed as an integral part of the notification and preservation of evidence obligation of sec. 103(e).

We, therefore, hold that in not reporting the gas ignition immediately to MESA, U.S. Steel failed to comply with 30 CFR 80.11 and that this failure constituted a violation of sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)). We further hold that as a result of this violation, a civil penalty was properly assessed pursuant to sec. 109 of the Act (30 U.S.C. § 819 (1970)). Accordingly, the Chief Judge's decision, as well as the $100 civil penalty assessment, should be affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the

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[1] Sec. 103(e) of the Act (30 U.S.C. § 813(e) (1970)) reads in pertinent part:

"In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof." * * *

[2] 30 CFR 80.11 in pertinent part provides:

"§ 80.11 Notification by operator.

"The operator of a coal mine shall, using the fastest available means of communication, immediately notify the District or Subdistrict Coal Mine Safety Office of the Mining Enforcement and Safety Administration of the District in which the mine is located of the occurrence of any of the following accidents:

"(a) A fatal injury;

"(b) A serious nonfatal injury that the operator or a medical officer believes could result in the death of the injured person;

"(c) A death occurring on mine property;

"(d) A mine fire not extinguished within 30 minutes;

"(e) A mine explosion;

"(f) An ignition of gas or dust or combination thereof."

Chief Administrative Law Judge IS AFFIRMED and that the United States Steel Corporation pay a civil penalty in the amount of $100 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

APPEAL OF TERRY E. KRIZE AND J. BURGLIN

2 ANCAB 247

Decided *December 28, 1977*

Reconsideration of dismissal of appeal from the Decision of the Alaska State Director, Bureau of Land Management, #F-8201, rejecting the offer of appellants, under provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 226 (1970), for a noncompetitive oil and gas lease, based on a conflict with an interim conveyance issued Nov. 29, 1976, to the Arctic Slope Regional Corporation under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. II, 1972).

Appeal on reconsideration dismissed December 28, 1977.

1. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

Where the Secretary, pursuant to regulations in 43 CFR 4.5, takes original jurisdiction of a case and renders a final decision, the Board is bound by his findings, conclusions, and statements of Departmental policy.

2. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where, pursuant to Departmental regulations, a party must claim a property interest in land affected by a decision in order to have standing to appeal such a decision, and the Secretary has found as a matter of law that a noncompetitive oil and gas lease offeror has no property interest in his offer, the Board finds that offerors for noncompetitive oil and gas leases do not have standing under 43 CFR 4.902 to appeal a BLM decision to issue conveyance to a Native Corporation under ANCSA.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Oil and Gas Leases: Noncompetitive Leases

The Secretary's policy against appealing the rejection of oil and gas lease offers to the Interior Board of Land Appeals separately from an appeal of the decision to issue conveyance, confers on the Alaska Native Claims Appeal Board exclusive jurisdiction over decisions rejecting noncompetitive oil and gas lease offers because of conflicts with land selections by Native Corporations under ANCSA.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal

Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Conveyances: Generally

Where interim conveyance has been issued for the lands embraced by oil and gas lease offers, the Department no longer has jurisdiction over the lands and has no authority to convey any interests in the lands, including mineral leases.

5. Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims Settlement Act: Conveyances: Generally

Sec. 22(i) of ANCSA, 43 U.S.C. § 1621 (i) (1970), does not authorize the issuance of mineral leases on lands to be conveyed under ANCSA.

6. Alaska Native Claims Settlement Act: Administrative Procedure: Decisions—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

Where Departmental policy is to expedite conveyances under ANSCA by rejecting noncompetitive oil and gas leases which conflict with conveyances under ANCSA, and the Secretary has announced that oil and gas leases will not be issued as a consequence of administrative appeals, the Board interprets this policy as a mandate to affirm a BLM decision rejecting a noncompetitive oil and gas lease offer because of conflict with a conveyance under ANCSA.

7. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Conveyances: Generally

The Board vacates its previous ruling that BLM's rejection of a noncompetitive oil and gas lease offer, because of conflict with an ANCSA conveyance, constitutes final agency action from which no appeal will lie.

8. Alaska Native Claims Settlement Act: Administrative Procedure: Decisions—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Statement of Reasons—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The Board will accept appeals from decisions rejecting noncompetitive oil and gas lease offers based on conflicts with interim conveyances under ANCSA, but will dismiss such appeals after elapse of the thirty-day period in which statements of reasons and standing may be filed.

9. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

All challenges to the validity of ANCSA are beyond the jurisdiction of an administrative adjudicative body organized to decide appeals under that statute.

APPEARANCES: Stephen C. Ellis, Esq., Reed, McClure, Moceri & Thonn, P.S., for appellants; John M. Allen, Esq., Regional Solicitor, for the Bureau of Land Management; and Kevin F. Kelly, Esq., Wickwire, Lewis, Goldmark, Dystel and Schorr, for Arctic Slope Regional Corporation.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

The Board, on Aug. 5, 1977, dismissed the above appeal from a Bureau of Land Management Decision rejecting a noncompetitive oil and gas lease offer because of a conflict with an interim conveyance to Arctic Slope Regional Corporation pursuant to ANCSA. The basis for the Board's dismissal was a decision issued by the Secretary in the case of *Arctic Slope/Western, Arctic Slope/Eastern (Central)*, ANCAB # RLS 76-11(A)-(MM), ANCAB # RLS 76-12(A)-(O). Appellants

have requested reconsideration of the dismissal.

The Board, on Sept. 2, 1977, granted appellants' request for reconsideration and directed the parties to file briefs on the following issues:

1. Whether an offeror for a noncompetitive oil and gas lease, whose offer is rejected because of the conflict with a conveyance to a Native Corporation under ANCSA, can have standing under the Secretary's ruling in *Arctic Slope/Western*, to appeal such rejection to this Board.

2. Whether having issued interim conveyance of the disputed lands the Department may now assert jurisdiction over such lands for purposes of lease issuance in view of Interior Board of Land Appeals (IBLA) decisions cited in Decision #F–8201 and in view of the Board's ruling in *Appeal of Eklutna, Inc.*, 1 ANCAB 305 (#VLS 75–1) 84 I.D. 105 (1977), that when an interim conveyance has been issued pursuant to the Alaska Native Claims Settlement Act, the Secretary of the Interior and this Board lose all authority and jurisdiction over those interests in land which have been conveyed.

Appellants' request for reconsideration was based, in general, on the fact that the Board summarily dismissed its appeal, in reliance on interpretation of Secretarial policy expressed in *Arctic Slope/Western*, before the elapse of the thirty-day period allowed the appellant in which to file Statement of Reasons and Standing. Appellants timely filed their Statement of Reasons and Standing in connection with their request for reconsideration.

Appellants assert the following reasons for appeal:

The Alaska Native Claims Settlement Act violates the terms of the public trust imposed upon the Federal government by common law, which requires that natural resources must be reserved for all the public and developed according to the most democratic means possible.

Appellants argue that the Constitutional power of Congress to deal with the public lands is limited, for Congress must administer the public lands as a public trust. Appellants contend that transfer of certain public lands in Alaska into private hands violates the public trust doctrine and renders the transfer void.

The characterization of the public trust as charitable or private yields no difference in the duties owed by the trustee to the beneficiaries. Appellants contend that transfer of the disputed lands to Arcitic Slope Regional Corporation breaches certain enumerated trust duties, and that Congressional action in passing the Alaska Native Claims Settlement Act was therefore arbitrary and contrary to law.

Appellants argue that the transfer of public lands to the Arctic Slope Regional Corporation is not for a public purpose as contemplated by the Fifth Amendment; the sole beneficiary of the transfer being Arctic Slope Regional Corporation, and without compensating benefits for the United States and the public, the transfer violates the standard of care demanded of the United States as trustee.

Appellants assert that the right of public to development of the public land and resources in the best interests of all citizens is protected

by the Ninth Amendment to the United States Constitution. Appellants further attack the constitutionality of § 10 of ANCSA which imposes a one-year statute of limitations on any civil action to contest the authority of Congress to enact the Act, designates the State of Alaska as the only party who may file such an action, and vests exclusive jurisdiction in the United States District Court for the District of Alaska. Appellants assert that this section of ANCSA also violates the First Amendment right to petition government for the redress of grievances.

Finally, appellants allege that the transfers of land violate the National Environmental Policy Act of 1969, Jan. 1, 1970 (83 Stat. 852) in that no environmental impact statement or negative declaration of impact has been filed. Appellants contend that the transfer of 38 million acres of Federal land into private ownership constitutes "major Federal action" significantly affecting the quality of human environment.

Responding to the Board's Order on reconsideration, the appellants allege standing as beneficiaries of a public trust challenging a breach of fiduciary obligations by the trustee.

Appellants argue that Departmental regulations in 43 CFR 4.902 and 43 CFR 4.1(5), on standing to appeal and duties of the Board, conflict with the mandate of the National Environmental Policy Act, *supra*, that all Federal agencies shall prepare environmental impact statements for major Federal actions which significantly affect the quality of the human environment.

Appellants respond to the second issue on reconsideration (whether the Department retains any jurisdiction over the disputed lands after issuance of interim conveyance for such lands to Arctic Slope Regional Corporation, pursuant to the Board's Decision in *Appeal of Eklutna, Inc., supra*, by asserting that because the Department retains authority to survey boundaries of Native selections after issuance of interim conveyances, the Department retains jurisdiction over such lands.

Arctic Slope challenges appellants' standing because regulations in 43 CFR 4.902 require a claim of property interest and a noncompetitive oil and gas lease offer is at most a hope, or expectation, rather than a claim. Arctic Slope rejects appellants' public trust theory on the grounds that beneficiaries of such a trust are not identifiable.

As to jurisdiction over lands on which interim conveyance has issued, Arctic Slope would uphold the Board's conclusion in *Appeal of Eklutna, Inc., supra*, that an interim conveyance of land is substantively the same as a patent and transfers legal ownership of land so that, upon issuance of interim conveyance to Arctic Slope Regional Corporation, the Department of the Interior lost all jurisdiction to control the land, including the power to issue mineral leases to the appellants.

Arctic Slope denies the Board's jurisdiction over appellants' challenge to the legality of ANCSA, be-

cause this claim is subject to the limitations in § 10, and the Board, as an administrative agency organized to adjudicate claims under ANCSA, cannot consider a constitutional challenge to the Act.

The Bureau of Land Management, on reconsideration, agrees that the appeal was subject to dismissal because appellants had no property interest in the disputed land and therefore no standing to appeal, and because the Department had no jurisdiction over the disputed lands since interim conveyance had already been issued to Arctic Slope Regional Corporation.

The Bureau of Land Management requests however, that the Board vacate that portion of its Decision reading as follows:

> The Board further finds that where BLM, in accord with Secretarial policy quoted herein, rejects a noncompetitive oil and gas lease offer because of conflict with a conveyance under ANCSA, such rejection by BLM constitutes final agency action from which no appeal will lie by the offeror to the Board or to the Interior Board of Land Appeals.

The Regional Solicitor points out that BLM has no authority to act finally for the Department except where such a delegation has been explicitly made; all decisions of BLM made under Chapter II, Title 43 CFR are subject to the provisions of 43 CFR Part 1840, referencing appeals procedures of 43 CFR Part 4; these rules grant ANCAB appellate jurisdiction over "matters relating to land selection" under ANCSA and grant to the Interior Board of Land Appeals appellate jurisdiction over decisions "relating to the use and disposition of public lands and their resources." These two grants of jurisdictional authority, which are binding on BLM, are intended to cover all BLM decisions under ANCSA.

Finally, the Regional Solicitor argues that ANCAB lacks jurisdiction to decide whether the Interior Board of Land Appeals has jurisdiction over an appeal. When the Secretary stated in *Arctic Slope/Western, supra*, that Secretarial action in the matter would "obviate the confusion and delay" of transfers of jurisdiction, he contemplated only the fact that ANCAB and IBLA have been defining their respective jurisdictions and that the Secretary in taking personal jurisdiction of an appeal could eliminate such delay.

DISCUSSION

On reconsideration, the Board makes the following findings and conclusions:

Binding effect of Secretarial decision

[1] The Board reaffirms its ruling that where the Secretary, pursuant to regulations in 43 CFR 4.5, takes original jurisdiction of a case and renders a final decision, the Board is bound by his findings, conclusions, and statements of Departmental policy in such decision.

Standing

Standing before the Board is governed by regulations in 43 CFR

4.902 which provide in pertinent part:

> Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, * * * may appeal as provided in this subpart. * * *

In *Arctic Slope/Western*, the Secretary accepted as controlling a body of case law holding that a noncompetitive oil and gas lease offeror has no right to a lease, and no property interest in his offer. (*Arctic Slope/Western*, *supra* at 5)

[2] Where, under Departmental regulations, a party must claim a property interest in land affected by a decision in order to have standing to appeal such a decision, and the Secretary has found as a matter of law that a noncompetitive oil and gas lease offeror has no property interest in his offer, the Board finds that appellants, as offerors for noncompetitive oil and gas leases, do not have standing under 43 CFR 4.902 to appeal to ANCAB a decision to issue conveyance to a Native Corporation under ANCSA.

The Secretary in *Arctic Slope/Western*, responded to an argument that his failure to lease to appellants violated a public trust responsibility, holding:

* * * * *

> * * * The Department is authorized to administer the public domain; its duties in this regard derive from Congressional exercise of its authority under the Property Clause of the Constitution, *not any fiduciary-trust responsibilities.* * * * (Italics added.)

* * * * *

Thus it appears the Secretary would reject the argument of appellants in the present appeal that they have standing as beneficiaries of a public trust.

The present appeal is not from a decision to issue conveyance, but from a decision to reject appellants' offers based on a conflict with a previously issued interim conveyance.

Pursuant to 43 CFR 4.1(3), the Interior Board of Land Appeals (IBLA) decides appeals "* * * from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources * * *." A right of appeal is extended by 43 CFR 4.410 to "* * * any party * * * adversely affected by a decision of an officer of the Bureau of Land Management * * *."

Thus, a party unable to assert a property interest for standing before ANCAB might still be found by IBLA to be "adversely affected" so as to have standing before that Board.

However, in *Arctic Slope/Western*, *supra*, after finding that offerors for noncompetitive oil and gas lease offers lacked standing to appeal to ANCAB a decision to convey, the Secretary stated:

* * * * *

> This decision will avoid attempts to invoke the jurisdiction of the Interior Board of Land Appeals by appealing the rejection of the oil and gas lease offers separately from the appeal of the decisions to issue conveyance. The Board of Land Appeals has such appeal authority in the regular oil and gas lease offer case, 43 CFR 4.1(3). Since August 6, 1975, however, appeals in "matters" relating to land selection arising under [ANCSA]" lie with ANCAB. 43 CFR 4.1(5), 40 F.R. 33172 (1975). This Order will obviate the confusion and delay of multiple appeals,

determinations of jurisdiction under this regulation, and case transfers under 43 CFR 4.901(c).

* * * * *

[3] The Secretary's policy against appealing the rejection of oil and gas lease offers to the Interior Board of Land Appeals separately from an appeal of the decision to issue conveyance, and against multiple appeals, determinations of jurisdiction, and case transfers, confers on the Alaska Native Claims Appeal Board exclusive jurisdiction over decisions rejecting noncompetitive oil and gas lease offers because of conflicts with land selections by Native Corporations under ANCSA, as well as jurisdiction over decisions to issue conveyances under ANCSA.

[4] The second issue raised by the Board on reconsideration, involves Departmental jurisdiction over lands for purposes of lease issuance in view of the Board's ruling in *Appeal of Eklutna, Inc., supra*, and is dispositive. The Board ruled that interim conveyance and patent, pursuant to 43 CFR 2650.0–5(h) and (i), are documents of equal significance in granting title under ANCSA, and that when an interim conveyance has been issued, the Secretary and this Board lose all authority and jurisdiction over those interests conveyed. The Board here reaffirms this ruling. Because interim conveyance has been issued for the lands embraced by appellants' oil and gas lease offers, the Department no longer has jurisdiction over the lands and has no authority to convey any interests in the lands, including mineral leases.

[5] Even if the Department retained jurisdiction over the lands, lease issuance would still be barred by the Secretary's conclusion, in *Arctic Slope/Western*, that sec. 22 (i) of ANCSA, 43 U.S.C. § 1621(i) (1970), does not authorize the issuance of mineral lease on lands to be conveyed under ANCSA. (*Arctic Slope/Western, supra*, 10.) Further, even if ANCSA did not preclude lease issuance, the Secretary in the same decision established Departmental policy contrary to mineral leasing, stating:

* * * * *

* * * Issuance of leases on the pending offers would frustrate Congressional policy by denying Alaska Native corporations the full benefit of the resources in the lands which Congress intended to be conveyed to them. (*Arctic Slope/Western, supra*, 11.)

* * * * *

Additional grounds exist for denying the present appeal. The Secretary announced in *Arctic Slope/Western*:

* * * * *

* * * It is the policy of the Department of the Interior to expedite conveyances under ANCSA by rejecting pending noncompetitive oil and gas lease offers which conflict in whole or in part with conveyances under ANCSA * * *. (*Arctic Slope/Western, supra*, 10.)

* * * * *

In accordance with this policy, the Secretary stated, oil and gas leases will not be issued as a consequence of administrative appeals and appeals requesting lease issuance were rejected.

[6] Where Departmental policy is to expedite conveyances under ANCSA by rejecting noncompetitive oil and gas leases which conflict in whole or in part with conveyances under ANCSA, and the Secretary has announced that oil and gas leases will not be issued as a consequence of administrative appeals, the Board interprets this policy as a mandate to affirm a BLM decision rejecting a noncompetitive oil and gas lease offer because of conflict with a conveyance under ANCSA.

[7] On reconsideration, the Board vacates its previous ruling that BLM's rejection of a noncompetitive oil and gas lease offer, because of conflict with an ANCSA conveyance, constitutes final agency action from which no appeal will lie. As pointed out by the Regional Solicitor, the Bureau of Land Management has no authority to act finally for the Department except where such authority has been specifically delegated to it, and all decisions of the Bureau are subject to appeal either to ANCAB or to IBLA. Therefore, unless specifically delegated such authority, the Bureau of Land Management cannot act finally for the Department without administrative review.

[8] At the same time, the Board sees no reason to compel individuals to pursue a burdensome appeal process when no substantive appeal is, in fact, possible. Therefore, in recognition of the fact that the Bureau of Land Management decisions are not administratively final, the Board will accept appeals from decisions rejecting noncompetitive oil and gas lease offers based on conflicts with interim conveyances under ANSCA. However, the Board will dismiss such appeals after elapse of the thirty-day period in which Statements of Standing and Reasons for appeal may be filed, unless the parties allege factual circumstances which distinguish the appeal from *Arctic Slope/Western*.

[9] The Board further rules that all challenges to the validity of ANCSA are beyond its jurisdiction as an administrative adjudicative body organized to decide appeals under the Act.

With regard to appellants' contention that ANCSA violates the National Environmental Policy Act, *supra*, the Board also direct appellants' attention to initial regulations on Alaska Native Selections, published in the *Federal Register*, May 30, 1973, which was prefaced by the following finding:

> It is hereby determined that the publication of this rule making is not a major Federal action significantly affecting the quality of the human environment and that no detailed statement pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(c)) is required. This conclusion has been reached on the basis that all actions authorized by these regulations which could significantly affect the quality of the human environment have either been directed by Congress or the action can be taken only after the exercise of discretion by the Secretary. In the latter instance an environmental impact statement will be prepared when appropriate prior to the exercise of discretion.

In accordance with the above findings and conclusions, the Board on reconsideration hereby dismisses this appeal.

This represents a unanimous decision of the Board.

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

ABIGAIL F. DUNNING,
Board Member.
LAWRENCE MATSON,
Board Member.

APPEAL OF DONALD WATSON

2 ANCAB 258

Decided *December 29, 1977*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management #AA-8595, dated June 3, 1976, rejecting a primary place of residence selection of Donald Watson, under § 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976), dismissed Dec. 29, 1977.

Decision affirming Bureau of Land Management decision #AA-8595.

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

In order to establish a primary place of residence pursuant to § 14(h)(5) of ANCSA, a dwelling must be constructed upon the land applied for as a primary place of residence.

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

The fact that an applicant has a dwelling in the vicinity or adjacent to land sought as a primary place of residence is not sufficient to meet the criteria necessary to establish a primary place of residence.

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

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, Dec. 18, 1971 (85 Stat. 688), 43 U.S.C. §§ 1601–1624 (Supp. II, 1972), and the implementing regulations in 43 CFR Part 2650 *as amended*, 41 FR 14734 (Apr. 7, 1976), and the regulations in 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions, and decision affirming the decision of the State Director, Bureau of Land Management #AA-8595 (hereinafter the State Director).

On Dec. 14, 1973, Donald Watson filed an application for a primary place of residence under § 14(h)(5) of the Alaska Native Claims Settlement Act (85 Stat. 705) which provides as follows:

The Secretary may convey to a Native, upon application within two years from the date of enactment of this Act, the surface estate in not to exceed 160 acres

of land occupied by the Native as a primary place of residence on Aug. 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporations;

The lands described in Donald Watson's application included certain lands in Sec. 6, T. 3 N., R. 6 W., Seward Meridian and Secs. 31 and 32, T. 4 N., R. 6 W., Seward Meridian and specifically excluded the patented land in U.S. Survey 3141.

Appellant stated in his application that he had occupied these lands as a primary place of residence each year from May 1970 to the present time.

On Mar. 12, 1974, the Bureau of Land Management issued a notice to Mr. Watson that additional evidence was required before his application could be processed further. This notice stated that the Departmental regulations required that there must be a dwelling on the tract of land applied for and furthermore, casual or occasional use was not considered sufficient occupancy to make the tract of land applied for a primary place of residence. Mr. Watson was allowed 30 days from receipt of the notice to submit any additional evidence of improvements present on the land for which he applied and any other additional evidence in support of his claim. On Mar. 28, 1974, Mr. Watson sent to the Bureau of Land Management a response to the notice for additional evidence and stated as follows:

Improvements on the above property to qualify as a primary place of residence include, a 2 bedroom house, an outhouse a large garden, have also cleared brush and deadfall from the area.

On May 6, 1974, James B. Monnie, the Refuge Manager of Kenai National Moose Range prepared a statement concerning the applications for primary place of residence of Mr. Donald Watson and three other applicants. Mr. Monnie stated that on Apr. 26, 1974, an aerial survey was made of the tract of land applied for by Mr. Donald Watson. No dwellings or other structures were located on this tract. A small house and several other structures and a garden were found to be located on tract USS 3141, a fee title tract, and a dilapidated old cabin was found to exist on a tract of land applied for as a primary place of residence by Mr. Watson's son, Donald A. Watson. Mr. Monnie further stated that on May 2, 1974, he personally spent five hours examining the area for houses and other developments and/or other occupancy of the tracts of land applied for as primary places of residence. No house as described by appellant was located on the tract of land sought by appellant as a primary place of residence.

In summary, Mr. Monnie stated as follows:

Donald Watson—AA8595—No building or garden located on this described tract of land. The description appears to be of his fee title property located on USS Tract 3141.

On June 27, 1975, Alan Backford and Gary Rasmussen, Realty Specialists for the Bureau of Indian Affairs, conducted an investigation of lands applied for as primary

places of residence by Donald Watson, Russell Watson, Teresa (Watson) Neitz and Donald A. Watson. In making a report on this investigation, Mr. Rasmussen stated that an extensive search for evidence of use and occupancy was conducted on the ground with Donald Watson serving as a guide. He stated that Donald Watson owned five acres of fee title property located in U.S. Survey 3141. Brass caps were found to be located at corners one and three of U.S. Survey 3141. All usable improvements found in the area were located within U.S. Survey 3141 and consisted of a two bedroom cabin of recent construction, smokehouse, outhouse, and garden. On the lands applied for by Donald A. Watson, son of appellant, was located a small dilapidated old cabin. No other improvements were located on any of the four parcels. In summary, this report stated as follows:

> Evidence of use and occupancy is limited to trapping on each of the four parcels. All usable improvements are located on a five acre parcel of fee land owned by Donald Watson. The applications of Donald Watson and Donald A. Watson are in conflict with Native Allotment application AA-8235 of Benjamin P. Lindgren, Sr.

On June 3, 1976, the application of Donald Watson was rejected by the Bureau of Land Management as not meeting the statutory or regulatory requirements necessary for establishing a primary place of residence. One of the grounds for rejection of appellant's application was that no dwelling had been constructed upon the land for which appellant had applied.

Appellant timely filed his Notice of Appeal and Brief in Support of Appeal. No request was made for a hearing pursuant to 43 CFR 4.911 (c) on any matters in this appeal.

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

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

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

> (a) *Periods of occupancy.* Casual or occasional use will not be considered as occupancy sufficient to make the tract applied for a primary place of residence.
>
> (b) *Improvements constructed on the land.* (1) Must have a dwelling.
>
> (2) May include associated structures such as food cellars, drying racks, caches etc.
>
> (c) *Evidence of occupancy.* Must have evidence of permanent or seasonal occupancy for substantial periods of time.

[1] In order to establish a primary place of residence, one of the requirements which must be met is that there must be a dwelling constructed upon the land (43 CFR § 2653.8-2(b)(1)).

Appellant contends that he has met all the criteria set forth in the Act and regulations for establishing a primary place of residence.

Although he does not specifically controvert the finding of the Bureau of Land Management that all improvements were located on land owned by appellant, he does make two assertions regarding improvements which are required to be on the land applied for. First, he states that during the BIA field investigation, a small trapper's cabin was found on the land selected by "Donald Watson." (Appellant's Brief in Support of Appeal, p. 3.) Secondly, in summarizing the time he spent "at the location," he states that a home was built in 1970, and that a smokehouse and garden were also maintained at the location. (Appellant's Brief in Support of Appeal, pp. 3–4.) This latter assertion was also made by appellant in a letter to the Bureau of Land Management on Mar. 28, 1974, when appellant stated that a two bedroom house, outhouse and garden were on the property.

The field examination of the primary place of residence of appellant, which was conducted by the Bureau of Indian Affairs in the presence of appellant, found no improvements to be constructed upon the land which appellant seeks to have conveyed as his primary place of residence. Regarding the "trapper's cabin" found on Donald Watson's selected land, the field examination found a small dilapidated cabin on the land for which Donald A. Watson, the son of appellant, has applied as a primary place of residence. This land was not included in the primary place of residence application of appellant.

Regarding appellant's claim that a house, smokehouse and other improvements were at the location, the field report of the Bureau of Indian Affairs confirmed the fact that there was a house, smokehouse, and garden in the vicinity of the land sought by appellant. This report stated, however, that these improvements were located within U.S. Survey 3141, a tract of land owned by appellant and which was excluded from his primary place of residence application. Appellant did not specifically controvert this finding in his brief. In summarizing time spent "at the location" he stated that a home had been constructed there. There was no specific assertion that this home was on the land for which he applied rather than being located on the land lying within U.S. Survey 3141.

[2] The fact that appellant owns land on which he has constructed a house and other improvements and which is in the vicinity or adjacent to the land he claims as a primary place of residence is not sufficient to meet the criteria necessary to establish a primary place of residence. The regulations in 43 CFR 2653.8–2 (b) (1) specifically require that a dwelling must be constructed on the land.

Appellant has also asserted that the regulation's allowance in 43 CFR 2653.8–2 (b) (2), of associated structures, such as food cellars, drying racks and caches, to compromise evidence of improvements con-

structed on the land can be used to "substitute or bolster a finding of a dwelling place." Since appellant has not asserted that any structures exist on the land other than those which were found in the field examination to be located on land owned by appellant and on land which was not included in appellant's application, this Board need not rule on this issue.

The Bureau of Land Management having rejected appellant's application for, among other reasons, not having a dwelling constructed upon the land for which appellant sought to have conveyed as a primary place of residence and appellant having not shown that a dwelling or any other structures were constructed on such land, the Decision of the Bureau of Land Management is hereby affirmed.

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

This represents a unanimous decision of the Board.

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

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF SCONA, INC.*

IBCA-1094-1-76

Decided *December 28, 1977*

Contract No. H50C14208649, Specifications No. H53-090-1000-4-4, Bureau of Indian Affairs.

Motions for reconsideration and for new hearing granted.

1. Rules of Practice: Appeals: Answers—Rules of Practice: Appeals: Hearings—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration

Motion for quantum hearing will be allowed when the Government admitted liability on certain claims in the Answer and the first hearing was limited to entitlement.

2. Contracts: Disputes and Remedies: Appeals—Rules of Practice: Appeals: Effect of—Rules of Practice: Appeals: Notice of Appeal

Notice of appeal of all issues in a contracting officer's decision puts all the issues contained therein "at issue" before the IBCA until the parties state the issues then in dispute in the complaint and Answer.

3. Rules of Practice: Appeals: Hearings—Rules of Practice: Appeals: Reconsideration

Request that hearing of a substantial complex appeal be limited to "entitlement," will not be construed to be a waiver of right to hearing on "quantum" absent a clear record that the request was so intended.

4. Contracts: Disputes and Remedies: Appeals—Rules of Practice: Appeals: Reconsideration

*Not in Chronological Order.

The findings and determinations of the contracting officer which have been appealed become some evidence to be considered and weighed by the Board together with all the other evidence in the record when the appeal is decided by the Board.

5. Rules of Practice: Appeals: Hearings—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration—Rules of Practice: Evidence

Motion for reconsideration is granted where original ruling that hearing will be limited to entitlement may have contributed to lack of evidence at the hearing and where issues included complex question of concurrent fault and damages.

APPEARANCES: Alva A. Harris, Attorney at Law, Shelley, Idaho, for appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE STEELE

INTERIOR BOARD OF CONTRACT APPEALS

Summary of Decision

The Board allows the motion for reconsideration and for a new hearing and vacates its May 6, 1977, decision (77-1 BCA par. 12,518). The transcript of that hearing will be stricken and will be treated as tantamount to discovery depositions. The Complaint and Answer are stricken and the appellant has 30 days to file a new Complaint. The Government will have 30 days thereafter to file a new Answer. The issues on appeal are all those in the contracting officer's decision repudiated in the notice of appeal unless the parties hereafter narrow those issues.

Background

The appellant was awarded a contract to do certain construction work. Before the work was completed the Government terminated the contract for default (without issuing a final contracting officer's decision) and the work was completed by others. The appellant filed various claims. The contracting officer denied some claims and allowed others resulting in a finding that the appellant was entitled to $77,437.08 and a 102 calendar day time extension. The appellant *pro se* filed a timely appeal. The parties did some discovery and the case was set for a prehearing conference and for hearing of the appeal. At the prehearing conference it was decided that the hearing would be limited to entitlement (Tr. 5). The parties presented evidence at the hearing and the Board decided the appeal by a decision dated May 6, 1977.

Appellant's Motions

There are three matters presently before this Board. These are:

(1) Request for a hearing on quantum ("Request for Hearing, Appellant's Objection to Monetary Amounts Awarded by Decision of Contracting Officer, dated Dec. 2, 1975,") filed on Aug. 19, 1977.

(2) Motion for a new trial or further trial, made by a document dated June 15, 1977.

(3) Motion for reconsideration of the Board's decision dated May 6,

1977, made by the "Motion for Reconsideration of Decision Decided May 6, 1977, and For Rehearing" dated June 15, 1977.

Decision on Motion for Quantum Hearing

[1] The contract's "Disputes" clause says in part: "In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal * * *."

The contracting officer admitted in his final decision that the Government was liable on the embankment claim (contracting officer's decision, pp. 64–65), and he calculated an equitable adjustment of $77,437.08 for all of the claims, including this one. The appellant appealed from this final decision, and thus the issues of entitlement/liability and quantum/amount were "at issue" and to be tried at the hearing and thereafter decided by the Board. However, when the Board at the prehearing conference ruled that only *entitlement* would be tried, there was no need to (and it would have been improper to) present quantum evidence at the hearing.

The appellant now asks for a hearing and decision on the quantum issues with respect to claims on which the contracting officer admitted entitlement and found quantum in a specified amount.

Since in our view the appellant has a right to such a hearing, this motion is allowed.

As indicated in the transcript, the request to limit the hearing to entitlement was not intended to be a waiver of the right to a hearing on quantum. We will find such a waiver only on a clear and unambiguous record. In *COAC, Inc.*, IBCA–1004–9–73 (December 6, 1974), 81 I.D. 700 74–2 BCA par. 10,982 at p. 52,260, cited by Administrative Judge Packwood, in his dissenting opinion, neither party requested a hearing so the appeal was decided on the record without a hearing. The Board on reconsideration (Feb. 19, 1975, 75–1 BCA par. 11,104) clearly pointed to sec. 4.109 of the rules (43 CFR 4.109) as to the timing for the filing of demands for a hearing and pointed to the facts in that case indicating that appellant had failed to demand a hearing even after receipt of notice that it had such right until after it received the Board's Dec. 6, 1974, decision of the appeal. In *COAC* there was a clear waiver of the right to a hearing on entitlement and on quantum. Consequently, there is no inconsistency between the present decision and *COAC, Inc.*

[2, 3] Because the Board lacks unanimity in this opinion we elaborate on the majority's view of (a) how issues are "framed" in an appeal (b) the distinction between entitlement/liability and quantum/amount, and (c) the weight given to the contracting officer's findings.

If we disregard breach of contract claims then the contracting officer and the Board can provide relief to contractor claimants only as

provided in a contract clause (also disregarding the Christian doctrine. (*G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1, *rehearing denied*, 160 Ct. Cl. 58, *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929, 377 U.S. 1010 (1964)). Thus, the relief generally available is that provided by provisions such as the "Changes" clause, or the "Differing Site Conditions" clause, or the "Termination For Default—Damages For Delay—Time Extensions" clause. These clauses—when a dispute arises—refer to the procedure set out in the "Disputes" clause under which the contracting officer first decides the dispute and the contractor, if he wishes to carry all or part of the dispute to the Board, then files a notice of appeal. If the contractor appeals "all issues" in the contracting officer's decision, he contests all questions so decided and the contracting officer's decision is not presumed to be correct. In such circumstances the principal effect of the decision is to define the issues in dispute and to serve as an evidentiary admission by the Government. Absent an appeal, the contracting officer's decision is "binding" on the parties; when there is a timely appeal, the contracting officer's decision is not binding on either the parties or the Board. The conclusion follows that either the contractor or the Government or both can take partially or completely different "positions" in the course of the appeal, than they did during the dispute before the contracting officer. This is one consequence of the phrase that proceedings before the Board are de novo. *Cf. Bendix Field Engineering Corporation*, ASBCA No. 10124 (Nov. 8, 1966), 66-2 BCA par. 5959, especially at p. 27,570 where the Board said as follows:

> [T]he Government's reply brief contains a point titled "The Contracting Officer's Decision is Presumed Correct." We do not believe that extended discussion is necessary to demonstrate that no such presumption exists, and that appeals under the Disputes procedures have long been recognized as providing de novo consideration of the dispute.

Support for the views expressed in *Bendix Field Engineering*, *supra*, may be found in cases decided almost a quarter of a century before. *See*, for example, *Fox Sport Emblem Corporation*, BCA No. 87 (Mar. 4, 1943), in which the War Department Board of Contract Appeals held that the taking of the appeal, "which confers jurisdiction on the Board to consider the case, opens up the entire case * * *." While findings of fact favorable to a contractor may be treated as evidentiary admissions by the Government (*see*, for example, *Roy L. Matchett*, IBCA-826-2-70 (Feb. 26, 1971), 71-1 BCA par. 8722), the finding is not binding upon the Board, *Fox Sport Emblem Corporation*, *supra*. *See also*, *Eastern Maintenance Company*, IBCA-275 (November 29, 1962), 69 I.D. 215, 218-19, 1962 BCA par. 3583, at 18,119, where the Board stated:

> Here, the contracting officer found that as a part of the equitable adjustment due appellant as a result of Change Order No. 1, the reduction in the contract price re-

sulting from the elimination of one raceway should be $58,294.66 rather than $70,000.00 as stated in Change Order No. 1. It follows that, although appellant did not appeal from that finding, the Board nevertheless has jurisdiction to consider the equitable adjustment because of possible errors, which, if left unnoticed, would defeat the ends of justice.

The de novo nature of the jurisdiction of boards of contract appeals has been reaffirmed in many cases over the intervening years and recently in *S. W. Electronics & Manufacturing Corp.*, ASBCA Nos. 20698 and 20860 (June 23, 1977), 77-2 BCA par. 12,631. The Court of Claims is of the same view. See *Monroe Garment Company, Inc.* v. *United States*, 203 Ct. Cl. 324 (1973), in which the Court stated at 345:

> Plaintiff argues defendant is bound by the finding of the contracting officer at the Apr. 14, 1969, meeting that the 80-shirt inspection was legally insufficient as a basis for warranty invocation. Any determination as to the required size of the sample involves interpretation of the provisions of the shirt specification and of the sampling standard. Such interpretation involves a question of law, and neither the views of the contracting officer nor the views of the board would be final. With regard to questions of fact, findings by the contracting officer are not necessarily binding upon the board. The board proceeding is de novo, and the board may base its decision on a prepondence of the evidence in its entire record. The board is not limited to evidence before the contracting officer. [Citations omitted]. Conclusions reached by the Government representatives at the April 14, 1969, meeting, expressed in an internal Government record, are not determinative of the adequacy or inadequacy of the size of the sample under the requirements of the contract. The validity of invocation of the provisions of the Supply Warranty clause in this case rests upon the inspection that was accomplished in May 1969.

The question of the effect to be given to a contracting officer's findings has been raised by the appellant in the "Motion for Reconsideration of Decision Decided May 6, 1977, and for Rehearing" dated June 15, 1977, as is evidenced by the following quotes therefrom:

> F. The decision leaves many questions unanswered, such as: (1) What effect has decision on Contracting Officer's entitlement award and his unilateral and arbitrary calculation of award amount? (2) Is appellant bound by Contracint [*sic*] Officer's determination of amount awarded? Appellant thought he was appealing from those calculations and for further entitlement.

Subsequently, in a document filed with the Board on Aug. 19, 1977, and entitled "Request for Hearing, Appellant's Objection to Monetary Amounts Awarded by Decision of Contracting Officer Dated December 2, 1975," the appellant's counsel requested a "hearing on that portion of appellant's appeal objecting to the monetary amounts awarded appellant for work charges acknowledged by contracting officer as found on pages 46 through 65 of that certain Findings of Fact and Decision by the Contracting Officer, No. 1, dated Dec. 8, 1975."

Under the cases cited above, it appears to be clear that the appellant is not bound by the contracting officer's determination of the amount awarded where, as here, a timely ap-

peal was taken from the contracting officer's findings and the contractor's request to limit the hearing to the question of entitlement was approved by the Board member before whom the case was tried.

Thus the issues in dispute *in the appeal* are, in the first instance, determined by examination of the contracting officer's decision and the notice of appeal. These in turn rely in part on the issues defined in the claim letters.

The parties may refine or redefine these issues in their Complaint and Answer. After discovery they may do so again by amending their pleadings or by filing prehearing briefs. At trial they may again redefine the issues by the evidence they adduce (*see* 43 CFR 4.108(b)). Further since the appeal file is "in evidence" those documents may also raise issues. Their next chance to define the issues is in the posthearing briefs and the final opportunity during the appeal is on the motion for reconsideration. (Note, however, that the parties normally only have one opportunity to present testimony.)

In the instant appeal the issues were restated in the Complaint and the Answer. The Government in its Answer *chose* to conform its position in the appeal to the positions taken by the contracting officer in his decision. This it did by specifically incorporating the contracting officer's decision into the Answer. Government counsel has this authority. *See General Dynamics* v. *United States*, 214, 558 F.2d 985 Ct. Cl 607, July 8, 1977. *Cf. DeFoe Shipbuilding Company*, ASBCA No. 17095 (Mar. 11, 1974), 74-1 BCA 10,537.

Up until the prehearing conference "the issues" were all those issues in the contracting officer's decision which were challenged by the notice of appeal. (The Contractor appealed "all the findings of fact and conclusions of law set forth in the contracting officer's decision dated Dec. 8, 1975." Last page of notice of appeal dated Jan. 8, 1976.) However, when it was decided at the prehearing conference (Tr. 5) to limit the hearing (and thus the decision) to "entitlement," all "quantum" issues were removed from that hearing and the decision thereof. Moreover, the Government's admissions of liability in its Answer made it unnecessary for appellant to introduce any evidence on entitlement on those claims which the Government admitted it was liable for. This, for example, included the embankment claim. Because the hearing was limited to entitlement/liability appellant was not obligated (nor was the Government) to introduce any evidence of the extra cost allegedly caused by the misrepresentation of the size of the embankment.

Thus we come to discuss the distinction between liability/entitlement and amount/quantum.

The distinction at common law was between "liability" and "damages." *Cf. Black's Law Dictionary* (3d ed.), "liability" and "damages;" *Words and Phrases* (1961 ed.), "liable." Courts and boards may order separate trials for particular issues (often liability and

damages). 88 C.J.S. *Trial* § 9(a), p. 33; *cf.* §§ 9 (b) and (e); FRCP 42(b). In civil suits if the defendant fails to file an answer the issue of liability may be taken as admitted and the only issue then to be tried is damages. C.J.S. *Damages* § 163 *et seq. Cf.* FRCP 37(b)(ii). A party may claim a jury trial as to some issues only. FRCP 38(c). In an automobile personal injury case the liability witnesses are the vehicle operators and the accident observers, while the damages witnesses are the plaintiff, the doctors and the auto mechanics. Generally speaking, in a Government contract appeal the liability/entitlement witnesses are the engineers who testify as to what they say the specifications mean, as contrasted with the quantum witnesses represented by change order estimators and pricing and audit personnel. Delay and liquidated damages issues complicate the distinction between entitlement and quantum but the witnesses who testify as to the causes and extent of delay cover both issues. Cause is "liability," extent is "quantum," and "cost" is quantum; but when there are complex issues of cause and effect the parties and the Board may have a difficult time sorting them out especially if the hearing is not a full one but is limited to "entitlement" issues only. This complexity is one reason why the Board is ruling as it does in this opinion. Where, as here, a substantial complex appeal involving appealed admissions of liability and findings of quantum by the contracting officer, as well as clearly contested issues of entitlement and amount, came on for a hearing on all issues, the request by appellant that the hearing be limited to entitlement (said request being allowed by the trial judge), will not be construed as a waiver of the right to a hearing on contested quantum issues. Such a waiver will only be found on clear convincing evidence that such waiver was intended or upon clear evidence that a reasonable man would so construe the actions or conduct of the party.

[4] The final matter is the proper weight to be given the contracting officer's decision. In general, the contracting officer's decision is one of the factors that the Board must weigh in reaching a decision. In *Southwest Welding & Mfg. Co.* v. *United States*, 188 Ct. Cl. 925, 954 (1969), the Court stated:

> At other points, the first Board decision refers to "defects which the Contracting Officer has classified as cracks," and to "the reasonableness of the Contracting Officer's decision." In the "factual" portion of this opinion, it is recited that "the action of the Contracting Officer in ordering the replacement of all questionable welds cannot be found to be arbitrary or capricious."
>
> The "Disputes" article under which these Board decisions were rendered, does not countenance a rubber-stamping of the contracting officer's decision. Under the "Disputes" article, his decision enjoys no presumptive validity whatever. It is vacated by the appeal to the Chief of Engineers, or a Board representing him. The latter then owes the contractor a de novo hearing and a de novo decision based on the applicable law, the contract terms, and a preponderance of the evidence. [Citations omitted.] The Board cannot abdicate that responsibility by

applying Wunderlich Act-type tests to the contracting officer's decision. Those tests are reserved for a court engaged in any subsequent judicial review of a Board decision.

Compare J. D. Hedin Constr. Co., Inc. v. *United States*, 171 Ct. Cl. 70 at 83, 84 (1965).

Decision on Motion for a New Trial or a Further Trial

The appellant has also moved for a new trial, or a further hearing, and stated numerous arguments in support thereof. The Board will not discuss most of the grounds assigned because the basis for the decision reached makes such consideration unnecessary. The Board specifically notes, however, one of the grounds assigned which was stated as follows: "The hearing examiner refused to let counsel for the bondsmen, who was present, have any say or take any part in the proceedings." This allegation is not supported by affidavit. It is subscribed to by Mr. Darrell M. Anderson (appellant's president) and Mr. Alva A. Harris, who until recently, represented the bondsmen. The evidence in the transcript (1 Tr. 4, 5) is as follows:

[THE COURT:] At this time, I want to ask the parties to enter their appearances. For the Appellants, Mr. Anderson?

MR. ANDERSON: Mr. Darrell M. Anderson.

THE COURT: You are the president of Scona, Inc.?

MR. ANDERSON: Yes, sir, I am.

THE COURT: You're not represented by counsel today?

MR. ANDERSON: No, your honor.

THE COURT: You are going to represent yourself?

MR. ANDERSON: Yes, I am.

THE COURT: Mr. Harris, would you like to introduce yourself?

MR. HARRIS: I am Alva A. Harris, Attorney at Law, representing the former bondsmen of Scona, Inc. I will not be participating actively in this hearing.

THE COURT: You are merely here as an observer, then?

MR. HARRIS: Yes.

Thus the Board finds the allegation in the motion is not only not supported by the evidence in the record but is flatly contradicted by such evidence.

One of the critical issues in the appeal is the proper interpretation of the contract as it relates to the method set out therein for doing the construction work "in the channel." Mr. Anderson, the appellant's president, testified as to his opinion on this point. The only contrary testimony was by Government witness Wiebe in his answers to leading questions (3 Tr. 29).

The appellant asserts that several witnesses were not available at the hearing for various reasons but that they would now be available and testify at a rehearing.

While it is doubtful that this situation meets the criteria enunciated in *South Portland Engineering Co.*, IBCA-771-4-69 (Jan. 29, 1970), 70-1 BCA par. 8092 (*Cf. Southland Manufacturing Corp.*, ASBCA No. 10519 (Oct. 22, 1969), 69-2 BCA par. 7968, p. 37,030) for granting a motion for reconsideration, it is not necessary for us to determine this question, where, as here, no hearing on quantum has been accorded to the appellant and where there are complex questions of concurrent fault and damages which

can only be properly resolved on a record encompassing both entitlement and quantum.

Judges Packwood and Vasiloff point out that appellant's document filed Aug. 19, 1977, did not meet the 30 day requirement in a motion for reconsideration (43 CFR 4.125). Nevertheless it is our view that paragraphs F(1) and (2) of appellant's motion dated June 15, 1977, are sufficient to open the issue on reconsideration. Those paragraphs—quoted earlier in this opinion—question the Board's decision and its relationship to the contracting officer's allegedly arbitrary calculation of amount. This is sufficient to raise the issue on a motion for reconsideration. Compare *United Microwave Company, Inc.*, ASBCA Nos. 9420, 9629 (Nov. 29, 1965), 65-2 BCA par. 5244 at p. 24,698.

The motion for a rehearing is allowed. The parties may have a new hearing as if the first hearing had never occurred. The appeal has been reassigned (at Judge Vasiloff's request) to a different hearing officer who will have the opportunity to hear all the testimony to be presented, and to observe the demeanor of the witnesses. The transcript of the hearing is stricken from evidence. It is nevertheless available to the parties as if it were discovery depositions.

The exhibits introduced at trial are also stricken from evidence. If any party wishes to reintroduce them, this will have to be done at the next hearing. New copies of such exhibits will not be required, only a new offer, authentication, etc.

[5] *Decision on Motion for Reconsideration*

Because of the Board's rulings on the two motions just decided the motion for reconsideration is allowed and the Board's decision dated May 6, 1977, is vacated.

The Board is allowing this motion because the Board's ratification of appellant's request to limit the hearing and decision to entitlement may have contributed to a failure to present evidence at the hearing. *J & B Construction Company, Inc.*, IBCA-667-9-67 and IBCA-767-3-69 (Apr. 17, 1970); 70-1 BCA par. 8240 at p. 38,300.

Thus the motion for reconsideration is granted and upon reconsideration the decision of May 6, 1977, is vacated. *Cf. Richey Construction Company*, IBCA-187 (June 18, 1963), 70 I.D. 222, 1963 BCA par. 3788.

Finally, because appellant is now represented by counsel and the Government may wish to reconsider its position on all the issues, the Complaint and Answer are stricken.

Appellant is to file a new Complaint within 30 days of receipt of this opinion. Thereafter the Government will have 30 days from receipt of the new Complaint to file a new Answer.

Thereafter the parties may have such further discovery as they agree to, or as the Board orders. If the issues defined by the new pleadings then seem inadequate to the parties or to the Board, we will consider

issuing any necessary prehearing orders, to clarify the situation and avoid substantial surprise and prejudice at the hearing.

GEORGE S. STEELE,
Administrative Judge.

WE CONCUR:

RUSSELL C. LYNCH,
Administrative Judge.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

ADMINISTRATIVE JUDGE VASILOFF DISSENTING:

I dissent and would deny the motions filed with this Board by the appellant.

Appellant filed a document with the Board dated June 15, 1977, received June 20, 1977 entitled "Motion for Reconsideration of Decision Decided May 6, 1977 And For Rehearing." In the same document, Mr. Alva A. Harris, attorney at law, entered his appearance as counsel for Scona, Inc. The document is signed by Mr. Darrell M. Anderson, President, Scona, Inc., and by Mr. Alva A. Harris. On June 20, 1977, the Board also received a letter from Mr. Anderson which corrected five errors in the motion described above. On July 11, 1977, Mr. Harris telephoned the chief administrative judge of the Board to request the Board's consent to file a brief in support of the motion filed by appellant. The request was granted by the Board and the parties were notified that the brief of appellant would be due by Aug. 10, 1977. The brief was received by the Board on Aug. 15, 1977, but it has been considered.

On Aug. 19, 1977, the Board received a document signed by Messrs. Anderson and Harris entitled "Request for Hearing, Appellant's Objection to Monetary Amounts Awarded By Decision Of Contracting Officer Dated Dec. 2, 1975." In this document appellant requests a "hearing on that portion of appellant's appeal objecting to the monetary amounts awarded appellant" by the contracting officer in the final decision.

In opposing appellant's motions, Government counsel points out that the several volumes of documents which were submitted to the contracting officer by Mr. Anderson were included in the appeal file; that depositions were taken by Mr. Anderson; that appellant was allowed to present its case in any manner it saw fit; and that Mr. Anderson exercised his right to cross-examine Government witnesses.

Appellant's motion filed with the Board on June 20, 1977, in the main, simply advances contentions made at the hearing and reiterates arguments made in its posthearing briefs. It does not allege newly discovered evidence. The grounds upon which appellant relies may be stated as follows:

1. Appellant's general superintendent is now available to testify but due to sickness was not available during the hearing.

2. Five different persons are now available to testify since "At time of hearing they had filed suit against Scona, Inc., and had refused to testify. Scona, Inc., has subsequently earned enough to settle said suits and obtain testimony."

3. Appellant was not represented by legal counsel and Mr. Anderson did not understand the nature of the proceedings. Moreover, it is alleged that "the hearing examiner refused to let counsel for the bondsman, who was present, have any say or take any part in the proceedings."

4. The hearing was limited to the issue of entitlement.

These contentions will be considered herein seriatim.

In regard to appellant's contention that his general superintendent, Mr. Ray Everett, was ill and unavailable during the hearing, the record shows that Mr. Anderson was fully cognizant of the Board's rules concerning the utilization of depositions for use as evidence or for the purpose of discovery. On Mar. 11, 1976, prior to the hearing in this appeal, Mr. Anderson wrote to the Board to request that he be allowed to take depositions of six Government employees citing the appropriate Board rule authorizing such procedures. The record indicates that the depositions were taken since the court reporter wrote to the Board on Feb. 15, 1977, requesting information about payment for his services in taking the depositions. The record shows the failure of appellant to request that the hearing be postponed until such time that Mr. Everett would be available. It should be noted, also, that appellant made no request at the hearing to keep the record open in order to permit the taking of Mr. Everett's deposition for the purpose of refuting the evidence received which reflected adversely upon Mr. Everett's competence.

Appellant's motion alleges that Mr. Everett was unable to testify at the hearing due to illness but that he is now well enough to testify. No details have been provided, however, as to when the illness occurred or the date by which Mr. Everett had recovered sufficiently to be available as a witness. The motion is not accompanied by a physician's certificate setting out the prior or present state of Mr. Everett's health; nor has the Board been furnished an affidavit from Mr. Everett concerning the matters. There is nothing in the information provided by appellant to indicate that the testimony of Mr. Everett could not have been obtained prior to the time the record was closed if the appellant had exercised due diligence.

The Board found that: "[a]ppellant's superintendent [Mr. Everett] was not qualified to oversee the

work and to ensure the specifications were followed." (77–1 BCA at 60,705). Earlier in the opinion, the Board had cited the testimony of the Government's chief inspector, Mr. Crawford, concerning the lack of qualifications of Mr. Everett (77–1 BCA at 60,702). The extremely damaging nature of that testimony is illustrated by the following colloquy between Government counsel and the chief inspector for the Government, Mr. Crawford, upon direct examination.

Q. What is your appraisal of Mr. Everett as a construction superintendent in respect to this job?

A. As a construction superintendent in respect to this job, I would have to rate Mr. Everett extremely low. I can relate to you a couple of instances as to why I say this * * *. We were up about, oh, I don't know, four feet or so with the fill, and nothing had been done towards construction of these road embankments, and so I went to Ray, I said, "Ray, as a suggestion, don't you think it would be a good idea to bring your road embankment up along with your fill rather than to try and tie them into it somehow after the fill is completed?" He looked at me and he said, "Oh, yea, whatever you want to do. Go ahead. That's fine with me. I don't care what you do." And I said, "Hey, Ray, look, this is not my job. It's yours. All I'm here for is to see that it is done correctly. You have got to take hold and do the job." Then later on, at a later date, oh, somewhere about halfway through the fill, Ray came to me one day and he said, "Would you tell me what this is supposed to look like when it's done?" I said, "What do you mean, what is it supposed to look like when it's done?" He says, "Well, I don't know what it's supposed to look like when it's finished." I said, "Ray, do you have a set of the specs with drawings in them?" He said, "Oh, yeah, I got a set, but they don't mean anything to me." And I said, "Well, Ray, I don't know how to explain it to you any better than it is drawn in those drawings," but this was typical of Ray's supervision. He spent very little time out on the fill.

(3 Tr. 72–74).

Upon direct examination, Mr. Anderson gave the following appraisal of Mr. Crawford:

MR. ANDERSON: Of '74. At which time, and I would like to make this comment: Earl Crawford, who was the inspector, you know, he was a good inspector, you know, he done things as far as I'm concerned, he was straightforward, there was nothing wrong with Earl's approach. He was very helpful. He was the type of person you like to have around, you know, that you're working with, you have got to be cooperative * * *.

(2 Tr. 12).

With respect to the second ground urged by appellant, the Board found that appellant's employees, suppliers and subcontractors would not perform because they were either underpaid, not paid, or paid with checks returned by the bank marked "insufficient funds." In the brief filed by counsel for appellant, he states that a subcontractor was successful in a Miller Act suit against Scona, Inc. The fact that, according to the motion, five different persons of three different firms would not testify in appellant's favor during the trial because they were suing appellant for nonpayment of money owed for

work performed on this contract confirms the finding of the initial decision that appellant failed to pay its subcontractors.

Appellant notes that it was not represented by legal counsel. While this statement is correct it does not constitute a basis to support a motion for reconsideration. The fact that appellant chose to proceed *pro se* was a matter wholly within its own discretion. There is no provision in the Board's rules that requires contractors to be represented by legal counsel. Nor is there anything in the Board's rules which mandates the application of different or more lenient rules to contractors who elect to proceed *pro se*.

Appellant's representative at the hearing, Mr. Anderson, its president, demonstrated, for a layman, an astonishing competence and knowledge of legal procedures and an ability to utilize legal skills. He submitted a prehearing brief of 28 pages containing extensive citations to judicial and contract appeal board precedents. His performance during the hearing was capable and he cross-examined Government witnesses extensively. Following the hearing, Mr. Anderson submitted a 34 page brief with appropriate references to the transcript and hearing exhibits together with citations to legal authorities. Finally, Mr. Anderson filed a 21 page reply brief in which he again demonstrated competence far beyond that ordinarily possessed by laymen.

Appellent alleges that "the hearing examiner refused to let counsel for the bondsman, who was present, have any say or take any part in the proceedings." The referenced counsel for the bondsman is Mr. Alva A. Harris. He now represents appellant in its motion for reconsideration. The record shows that the appeal was filed and docketed with this Board on January 26, 1976. Both Mr. Anderson and Mr. Harris signed the appeal notice. By letter dated Feb. 27, 1976, Mr. Harris informed the Board that he represented only the two individual bondsmen on the contract involved in this appeal. On Mar. 10, 1976, Mr. Anderson notified the Board by letter that "Mr. Harris does not represent Scona, Inc., nor has Mr. Harris ever had an interest in Scona, Inc. Mr. Harris does represent the two bondsmen, Mr. Darrel Cook and Mr. Thomas Christensen." The fact that Mr. Harris was not counsel for appellant prior to its pending motion is demonstrated not only by the foregoing but by the hearing transcript which is quoted by the majority above (1 Tr. 4, 5). At no time during the three day hearing did Mr. Harris either request or attempt to participate in the hearing. Nor did Mr. Anderson make a request that Mr. Harris participate. As the transcript shows, Mr. Harris attended the hearing merely as an observer.

Appellant's fourth ground in support of its motion is predicated on the fact that the hearing was limited to the issue of entitlement. However, this was done pursuant to appellant's request and over the objection of Government counsel. Appellant has not revealed its reason(s) for demanding that the hearing be limited solely to entitlement but it may have been due to the fact, as stated in its complaint, that appellant had not performed an audit of its own costs. Be that as it may, the fact remains that appellant was not denied an opportunity to try the issue of quantum, as intimated by appellant. The hearing was restricted to entitlement solely because appellant itself wanted it that way.

In its motion, appellant alleges that "it had come prepared to discuss the equity and justice of the contracting officer's earlier [final] decision of entitlement and equitable adjustment; he did not understand this was foreclosed by the hearing officer's statement that he would only consider *further* entitlement." (Italics supplied.) There is not a shred of evidence to support the allegation that the hearing officer stated he would only consider further entitlement and the allegation is simply untrue. As noted, the hearing was limited to entitlement because appellant requested that that be done. Appellant had the burden of demonstrating that the amount found due by the contracting officer in his final decision was incorrect. That is all appellant was required to do. It did not have to demonstrate, as the majority appears to think, that entitlement to a specific number of dollars had to be proved in order to prevail. During the hearing, appellant did not limit its evidence on entitlement solely to matters beyond what the contracting officer found to be due but attacked what the contracting officer found was due. Appellant simply failed to prove that it was entitled to anything more than what the contracting officer found to be due. This failure was not due to any restrictions placed upon appellant's opportunity to present whatever evidence it wished.

Appellant has requested a hearing on "that portion of appellant's appeal objecting to the monetary amounts awarded appellant" by the contracting officer in his final decision. The request which was received by the Board on Aug. 19, 1977, comes more than two months beyond the requisite notice requirement of 30 days specified in the Board's rules. Moreover, compounding the error, although appellant has only asked for a hearing on that portion of entitlement found to be due by the contracting officer, the majority opinion allows the appellant to wipe the slate clean and start all over again on all issues previously tried, briefed, considered, and decided. Such a decision is unprecedented and will surely lead to con-

fusion and turmoil. I see nothing in the facts of this case, in equity, or in established legal precedent for granting appellant "two bites at the apple."

KARL S. VASILOFF,
Administrative Judge.

I concur in the dissenting opinion of Administrative Judge Vasiloff.

G. HERBERT PACKWOOD,
Administrative Judge.

ADMINISTRATIVE JUDGE PACKWOOD DISSENTING:

I dissent for the reasons stated by Administrative Judge Vasiloff and for the reasons which follow.

The majority cites that portion of the disputes clause which states that "the contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal." Then, by a leap in logic which I am not prepared to follow, it translates the requirement for an opportunity to be heard into a requirement that a hearing must be held on both entitlement and quantum. In the recent past, the Board recognized the distinction between the opportunity to be heard and the necessity for a hearing, holding that an appellant who failed to request a hearing, and who received an adverse decision on the record, was not entitled to reopen the record to receive a hearing, *COAC, Inc.*, IBCA–1004–9–73 (Feb. 19, 1975), 75–1 BCA par. 11,104. In the present appeal, Scona requested a hearing but also requested that it be limited to entitlement. With respect to quantum, therefore, Scona was in the same position it would have been in if it had requested no hearing at all. Under the precedent of *COAC*, there is no issue of quantum which requires a hearing and Scona is entitled only to have the issue of quantum decided on the record.

The questions asked by appellant about the quantum calculations of the contracting officer and the offer of further testimony which was omitted raise no issue which could form a proper basis for reconsideration of the Board's principal decision under precedent heretofore followed by this Board. *In South Portland Engineering Company*, IBCA–771–4–69 (Jan. 29, 1970), 70–1 BCA par. 8092, the Board held:

> [T]he rulings on the admissibility of evidence made by the hearing official also were neither misleading nor unclear. If appellant did not comprehend their scope, it should have requested further explanation at the time of the hearing. The function of a motion for reconsideration is not to correct procedural errors or omissions by a party in the presentation of its case. KEY, INC. & JONES-ROBERTSON, INC., IBCA–690–12–67 (Jan. 10, 1969), 69–1 BCA par. 7447.
>
> Upon reconsideration the Board can properly consider significant newly-discovered evidence or evidence not readily available prior to the time the principal decision was rendered. We have no such situation here. To the contrary, by the appellant's own admission, it is seeking

reconsideration in order to introduce evidence which was readily available at the time of the hearing. * * *

* * * * *

The present appeal falls squarely within the above holding. If appellant did not comprehend the consequences of a favorable ruling on his request to limit the hearing to entitlement, he should have inquired at the time of the hearing. The evidence appellant now seeks to offer at a new hearing, by his own statements, is evidence which was readily available at the time of the hearing. The Board should not allow a new hearing to correct procedural errors and omissions on the part of Scona unless it is prepared to overrule the decision in *Key* and *South Portland*, *supra*, and to turn its back on the precedent previously followed in determining the merit of a motion for reconsideration.

Finally, the statement that the Board is allowing this motion because of the Board's ratification of appellant's request to limit the hearing to entitlement is a statement that will come back to haunt the Board. It raises the spectre of every future appellant having an option to try his appeal *pro se* and then, in the event of an adverse decision, being able to demand a new hearing because the Board permitted such *pro se* representation.

G. HERBERT PACKWOOD,
Administrative Judge.

I concur in the dissenting opinion of Administrative Judge Packwood.

KARL S. VASILOFF,
Administrative Judge.

INDEX-DIGEST

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